Student number:

China's Approach to International Law and the Belt and Road Initiative

Perspectives From International Investment Law

Submitted in fulfilment of the requirements for the Degree of LLM by Research

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Abstract

This dissertation examines China's approach to international law. In order to do so, it compares the country's stance on international dispute resolution in past and present times. After a first historical chapter outlining China's changeable relationship with international adjudication, the thesis subsequently focuses on contemporary developments. The emphasis here is on international instruments and mechanisms that China uses to protect investments within the Belt and Road Initiative.

This dissertation combines doctrinal analysis with concrete case studies and applies deductive as well as inductive methods. The study of the legal dimension of the initiative leads to the basic assumption that two coexisting regulatory complexes provide investment protection within the initiative. Accordingly, as a first complex, the dissertation analyses China's design of investment protection treaties and China's stance in the reform debate on the future of investment arbitration. As an outcome, the analysis claims that even though the first complex does not relate specifically to the Belt and Road Initiative, this complex nevertheless has inextricable links to China's approach in the initiative's context. Soft law documents, which China has concluded with both state and non-state actors, and informal mechanisms of dispute resolution form the second regulatory complex. The study investigates their functions for investment protection in the Belt and Road Initiative.

In an overall view of the two regulatory complexes, this dissertation finds that China uses strictly legal and rather political methods for investment protection. In the synopsis of this result with the findings obtained from the historical part, the study concludes that China follows a realist approach to international law.

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List of Abbreviations

ASEAN	Association of Southeast Asian Nations
BAC	Beijing Arbitration Commission
BIT(s)	Bilateral investment treaty (-ies)
BRI	Belt and Road Initiative
CAO	China Aviation Oil
CAOHC	China Aviation Oil Holding Company
CAOSC	China Aviation Oil Supply Corporation
CCPIT	China Council for the Promotion of International Trade
CIETAC	Economic and Trade Arbitration Commission
CMPort	China Merchant Port Holdings
CPC	Communist Party of China
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
ECT	Energy Charta Treaty
EU	European Union
EximBank	Export-Import Bank of China
FDI	Foreign direct investment
FTA(s)	Free Trade Agreement(s)
GATT	General Agreement on Tariffs and Trade
HKIAC	Hong Kong International Arbitration Centre
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention / Washington Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ISDS	Investor-state dispute settlement
ITLOS	International Tribunal for the Law of the Sea
MFN	Most-Favored-Nation clause
MoU	Memorandum of Understanding / Memoranda of Understanding
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PPP	Public-private partnership
PRC	People's Republic of China
RCA	Radio Corporation of America
RCEP	Regional Comprehensive Economic Partnership Agreement
SCIA	Shenzhen Court of International Arbitration
SCO	Shanghai Cooperation Organisation
SOE(s)	State-owned enterprise(s)

TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UN SC Res	UN Security Council Resolutions
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	UN Convention on the Law of the Sea
UNECE	United Nations Economic Commission for Europe
UNIDO	United Nations Industrial Development Organization
US / USA	United States of America
USD	US-Dollar
WTO	World Trade Organisation
WTO DSB	WTO Dispute Settlement Body

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Author’s Declaration

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Place, Date and Signature:

Berlin, 16 January 2022

1 Introduction

'China is, simultaneously, in different policy areas, a cooperation partner with whom the EU has closely aligned objectives, a negotiating partner with whom the EU needs to find a balance of interests, an economic competitor in the pursuit of technological leadership, and a systemic rival promoting alternative models of governance.'[1] It is not only the European Union (EU) that has been rethinking its relationship with China in recent years. Few issues in international relations capture the attention of stakeholders as much as China's understanding of and objectives for a rules-based international order in a multipolar world.[2] For an international lawyer, it is particularly relevant how China approaches international norms and institutions.

My central thesis in this dissertation is that China follows a realist approach to international law.

According to this normative approach, the law is essentially a multidisciplinary decision-making process and should be analysed in a policy-oriented manner. That means that the formal distinction between law and non-law loses importance as determining factor in international relations.[3]

1.1 The Scope of This Thesis

To develop my argument, I will look at past and present developments. Against the background of China's past encounter with modern international law beginning in the 19th century, it will become clear why it is appropriate to focus on international adjudication to determine China's

[1] European Commission, 'EU-China Strategic Outlook' (2019) 1 <https://ec.europa.eu/info/publications/eu-china-strategic-outlook-commission-contribution-european-council-21-22-march-2019_en> accessed 12 January 2022.

[2] See only Robert D Williams, 'International Law with Chinese Characteristics: Beijing and the "Rules-Based" Global Order' (2020) <https://www.brookings.edu/wp-content/uploads/2020/10/FP_20201012_international_law_china_williams.pdf> accessed 12 January 2022.

[3] Roscoe Pound, *Law and Morals* (University of North Carolina Press 1924) 87–88; 113–114; 124-125: Pound sees law as a living instrument that 'will not be content with a legal science that refuses to look beyond or behind formal legal precepts and so misses more than half of what goes to make up the law.' He also argues for a comprehensive approach as '[a]ll the social science must be co-workers.'; New Haven became an influential school from the early 1960s on, see as of its prominent figures Myres Smith McDougal, *Studies in World Public Order* (Yale Univ Press 1960); for a summary of further schools of the 'movement' Steven R Ratner, 'Legal Realism School', *Max Planck Encyclopedia of Public International Law* (2007) paras. 3; 15.

stance on international law. As will be seen, international adjudication has proven to be a key indicator for a changeable Chinese understanding of international law.

In present times, China's realist take becomes visible in the country's legal approach to investment protection in the Belt and Road Initiative (BRI). I argue that the launch of this initiative coincided with the beginning of a new era. This era is characterised by a China which has gained enough experience with the international order that it is confident enough to actively shape it and use it in a sophisticated manner for its objectives. Therefore, the BRI could be a step towards a more Chinese international legal order.

My dissertation puts this initiative in the spotlight because it is *the* cornerstone of China's foreign economic policy.[4] With this, the analysis will lay the focus on investment protection because the BRI should essentially be understood as an outbound investment programme,[5] and the study will concentrate on the resolution of investment disputes because there are 'good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors'.[6]

1.2 The BRI as a Challenge for Legal Scholarship and the Limits of This Thesis

Admittingly, despite its omnipresence in politics and the media, it is not easy to define the BRI succinctly. Its ambit has evolved continuously in terms of the participating states and their nature of participation ever since China's paramount leader *Xi Jinping* announced the initiative under the English name 'One Belt and One Road'[7] in 2013. After all, it is fair to say that the

[4] James Crawford, 'China and the Development of an International Dispute Resolution Mechanism for the Belt and Road Construction' in Jinyuan Su, Sheng Zhang and Wenhua Shan (eds), *China and International Dispute Resolution in the Context of the 'Belt and Road Initiative'* (Cambridge University Press 2021) 15.

[5] In 2016 a draft of a 'blue book' was published and after revision re-published in 2020 by the International Academy of the Belt and Road (IABR) a state-affiliated research institution concerning the BRI. The authors identify three types of disputes arising under BRI: commercial disputes, international trade disputes and investment disputes. By pointing to some deficiencies of existing dispute settlement means, they sketch rules for a mechanism designed to meet the requirements of BRI. Disputes outside the economic or financial realm are not mentioned: Guiguo Wang, Yuk Lun Lee and Feng Li, *Dispute Resolution Mechanism for the Belt and Road Initiative* (Springer Singapore 2020) 3; 8–9; 17–63.

[6] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, para. 54; see also *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No. ARB/10/1, para. 4.2.14.

[7] The official English translation of the initiative's Chinese name 一带一路 (*yidai yilu* = One Belt, One Road) was later changed to 'Belt and Road Initiative'; see this document of the National Development and Reform Commission, *Decision on the English Translation of 'Belt and Road Initiative'* (2015), in Chinese <https://web.archive.org/web/20190511191431/http://www.ndrc.gov.cn/gzdt/201509/t20150921_751695.html> accessed 12 January 2022. With this, China reacted to criticism that the initiative was aimed at creating a new Chinese global order, see for example then-US Defense Secretary James Mattis: 'I think in a globalized world, there are many belts and many roads, and no one nation should put itself into a position of dictating One Belt, One Road' <https://reconasia.csis.org/many-belts-and-many-roads/> accessed 12 January 2022.

BRI's emphasis remains on the investment by Chinese state-owned enterprises (SOEs) in infrastructure projects in Central Asia, Africa, and Europe.[8]

Using international law as a yardstick to measure the BRI raises a whole range of theoretical questions because – even though I speak of a 'legal architecture of the BRI' – the BRI is primarily an economic and political initiative. Its legal aspects, by contrast, appear to be 'underdeveloped',[9] which does not mean that law has no role to play in the BRI. On the international level, none of the official documents explicitly concretises how the BRI docks on to the existing multilateral frameworks or which corpus of international law rules guide the BRI's implementation.[10] The lack of comprehensive 'sources of BRI-law' is why the BRI's impact has been assessed mainly from the point of view of economics or international relations and less from an international law's perspective.[11] The legal discussion on BRI-related aspects tends to be twofold: authors either analyse the status quo of the law in different BRI states or look at the international treaties between them.[12] This dissertation adds another angle to the debate. It analyses the steps that China takes to improve the protection of its investments and puts it in a broader context. My study is original as it brings together major development lines with contemporary, rather technical issues of the global investment protection regime. It shows how, at first glance, only distantly related topics are interrelated, as they are used in the Chinese approach to international law.

On its analytical path, this dissertation encounters some fundamental theoretical issues and contested notions of international law. These include the role of history in international law, the distinction between hard and soft law or the discourse on the notion of the rule of law. Moreover, 'a dispute' or 'an investment' are fundamental categories of international investment law that have been the subject of decades of debate. Due to space limits, I cannot

[8] Ammar A. Malik and others, 'Banking on the Belt and Road: Insights from a New Global Dataset of 13,427 Chinese Development Projects' (2021) AidData at William & Mary 21.

[9] Crawford (n 8) 13; Simon Chesterman, 'Can International Law Survive a Rising China?' (2020) NUS Law Working Paper 2020/018 9–10.

[10] Jianfu Chen, 'Tension and Rivalry: The "Belt and Road" Initiative, Global Governance, and International Law' (2020) 8 The Chinese Journal of Comparative Law 177, 191.

[11] Giuseppe Martinico and Xueyan Wu, 'The Belt and Road Initiative: A Legal Analysis—An Introduction' in Giuseppe Martinico and Xueyan Wu (eds), *A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road?* (Springer International Publishing 2020) 1–2; Huaxia Lai and Gabriel M Lentner, 'Paving the Silk Road BIT by BIT: An Analysis of Investment Protection for Chinese Infrastructure / Projects under the Belt and Road Initiative' in Julien Chaisse and Jędrzej Górski (eds), *The Belt and Road Initiative - Law, Economics, and Politics* (Brill Nijhoff 2018) 250.

[12] Lutz-Christian Wolff, 'Legal Responses to China's "Belt and Road" Initiative: Necessary, Possible or Pointless Exercise?' (2019) 29 Transnational Law and Contemporary Problems 249, 266.

claim to be exhaustive on all these issues. As with this dissertation, I am making another point, namely showing China's distinctive approach to international law, my study will deal with fundamental theoretical issues and contested notions of international law in more detail only where research integrity demands that I lay bare my preconception.

1.3 The Methodology and Structure of This Thesis

This dissertation combines doctrinal analysis with concrete case studies and applies deductive as well as inductive methods. It begins with a historical perspective in chapter 2. My view through the lenses of history will not be confined to China's stance on investment dispute resolution but rather look broadly at international adjudication. This is because China has had a changeable view on international courts and tribunals. From this view, further conclusions can be drawn about China's general attitude towards international law. Just as there is no coherent international dispute resolution system, there more generally neither exists a consistent and overarching international legal order.[13] Nevertheless, an interaction between the different types of international dispute resolution mechanisms occurs while different judicial bodies may complement and contradict each other.[14] China's experience within the World Trade Organisation's (WTO) dispute settlement mechanism underlines this idea. As I shall explain, China's 'WTO experience' serves as a recurring pattern of explanation for China's attitude towards investor-state dispute settlement (ISDS) today.

Chapter 3 zooms in on the BRI's practical implementation (section 3.1) and its legal dimension (section 3.2). This chapter shall add to the understanding of the BRI's general normative structure. One of its main characteristics is the dual-track normative system: BRI-specific soft law texts on the first track combined with existing (mostly hard law) norms that are only BRI-related.

With this understanding in mind, in chapter 4 I will depart on a more in-depth analysis of China's undertakings to protect investments within the BRI. This chapter mirrors the BRI's dual-track normative system: In section 4.1, the dissertation will show that China on the second normative track continues to rely on treaties and formalised ISDS. Bilateral investment treaties (BITs) also play a decisive role in the BRI era. Furthermore, China is an engaged participant

[13] Joost Pauwelyn, 'Fragmentation of International Law', *Max Planck Encyclopedia of Public International Law* (2006) paras. 41-42.

[14] John G Merrills, 'The Mosaic of International Dispute Settlement Procedures: Complementary or Contradictory?' (2007) 54 Netherlands International Law Review 361, 393.

in the ISDS reform process and is building new ISDS institutions, which may become more important for ISDS in the future. The connection between these aspects and the BRI is not obvious at first glance. The link is only clear when understanding them as part of the BRI's dual-track normative system. One must bear in mind that the second normative track is only BRI-*related*. On the other hand, section 4.2 shows a more politicised Chinese approach. China uses the BRI-*specific* soft law texts of the first normative track as a steering tool for bilateral negotiations to protect its investments.

Finally, chapter 5 will put my findings regarding past and present developments in an overarching context. It shall resolve the seeming inconsistency of the two normative tracks of the BRI by referring to China's understanding of the notion of the rule of law (section 5.1). Ultimately, it will guide my train of thought to the overall conclusion: China follows a realist approach that goes far beyond international investment law (section 5.2).

2 A Bird's Eye View on China's Historical Encounter With International Law

This chapter will outline the background against which China uses different legal tools to implement the BRI. The following sections focus on China's involvement in different fora of international dispute settlement. I will explain where the BRI is docking on in this development, and my study will draw conclusions that support the analysis in the ensuing chapters.

2.1 How to Talk About History and Where to Begin?

A chronological look at *the* Chinese approach to international law has to balance between the fault lines of political instrumentalisation of history and the criticism against a linear depiction of the past.[15] There is some merit on both sides.

A political perspective to history considers that a collective memory conveys a 'collective identity' to a given society, whereas in reality, only individuals carry on memories.[16] Therefore, one can expect from a chronological look at history to understand to what extent a country's stance on international law may be socially and culturally determined.[17] In China's case, one finds historical references in many official documents that follow such a politicised narrative of historical continuity.[18] Through its centralist governmental system, China tends to pursue

[15] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) 2; see in general Dieter Teichert, 'Zeitalter' in Jürgen Mittelstraß (ed), *Enzyklopädie Philosophie und Wissenschaftstheorie: Th–Z* (2nd edn, JB Metzler 2018).

[16] Jan Assmann, 'Collective Memory and Cultural Identity' (1995) New German Critique 125, 128.

[17] Jan Assmann, *Religion und Kulturelles Gedächtnis: Zehn Studien* (3rd edn, Beck 2007) 19.

[18] See the Chinese position on the South China Sea Arbitration (emphasis added): 'The issue of the South China Sea involves a number of States and is compounded by *complex historical background* and sensitive political factors. Its final resolution demands patience and political wisdom from all parties concerned. China always maintains that the parties concerned shall seek proper ways and means of settlement through consultations and negotiations on the basis of *respect for historical facts* and international law.', Chinese Society of International Law, 'The Tribunal's Award in the "South China Sea Arbitration" Initiated by the Philippines Is Null and Void', re-published in 15 Chinese Journal of International Law (2016), 431, 455, para. 92; in the context of the BRI: 'symbolizing communication and cooperation between the East and the West, the Silk Road Spirit is a *historic and cultural heritage* shared by all countries around the world. In the 21st century, a new era marked by the theme of peace, development, cooperation and mutual benefit, it is all the more important for us to carry on the Silk Road Spirit in face of the weak recovery of the global economy, and complex international and regional situations.', National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization, *Vision and Actions on jointly building the Silk Road Economic Belt and Twenty-first Century Maritime Silk Road* (2015), <http://www.chinese-embassy.org.uk/eng/zywl/t1251719.htm> accessed 12 January 2022..

goals on a long-term basis more than governments in Western countries.[19] Consequently, in China's case, a country's historical and cultural context indeed forms a 'pertinent element in the study of the reality of international law'[20].

By contrast, critics of such a procedure rightly consider that looking back in time always provokes the epistemological question of what one can know about the past.[21] This critical perspective reveals that every depiction has a circular tendency since it concludes aspects it has established itself by selecting (often implicitly) *which* past is relevant for the present investigation.[22]

My historical perspective takes up the increasing orientation of international legal scholarship towards history.[23] Arguments in international law follow a genealogical logic by looking at events, concepts, or persons.[24] In that sense, it is in *Orford's* words the 'anachronistic' task for international lawyers to 'make the meaning move across time'.[25]

I argue that China's investment protection within the BRI is embedded in the broader context of China's encounter with international law. This pre-BRI context should be divided into three periods: (1) the time before the People's Republic of China (PRC), (2) the era of *Mao Zedong*, and (3) the period following *Deng Xiaoping's* 'Reform and Opening'[26] until 2013.

In 2013, China's paramount leader *Xi Jinping* announced the launch of the BRI. One may see it as arbitrary to set 2013 as the pivot point between past and present in this analysis. I do concede that before 2013, there were similar initiatives, narratives, or ideas of connecting the economies in Central and East Asia through a comprehensive political initiative.[27] Opposed to

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[19] Luuk van Middelaar, 'Macht Unter Mächten' *Die Zeit* (22 April 2021) 9.

[20] Hanqin Xue, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law* (BRILL 2012) 17 with reference to Schachter, 'International Law in Theory and Practice : General Course in Public International Law', Recueil des cours , Vol. 178, 1982, 22–23.

[21] Bardo Fassbender and Anne Peters, 'Introduction: Towards A Global History Of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 15; Constantin Fasolt, 'The Limits Of History In Brief' (2005) 6 Historically Speaking 5, 5.

[22] Fassbender and Peters (n 21) 14.

[23] See for example Martii Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View Keynote Paper' (2013) 27 Temple International & Comparative Law Journal 215, 215–216; Emmanuelle Tourme Jouannet and Anne Peters, 'The Journal of the History of International Law: A Forum for New Research' (2014) 16 Journal of the History of International Law 1, 1–2.

[24] Naming these as objects of historical research Fassbender and Peters (n 21) 11.

[25] Anne Orford, 'On International Legal Method' (2013) 1 London Review of International Law 166, 172.

[26] For a similar periodisation Xue (n 20) 18; Thoralf Klein, *Geschichte Chinas: Von 1800 bis zur Gegenwart* (2nd edn, Schöningh 2009) 22–30 gives an overview of the different concepts in the description of modern Chinese history.

[27] Peter Frankopan, *Die Neuen Seidenstraßen - Gegenwart und Zukunft unserer Welt* (3rd edn, Rowohlt 2020) 100 who points out that US-American diplomats talked about a Silk Road Initiative in the context of the Iraq

my vision, one may furthermore underline that China had already invested heavily in infrastructure in the context of its 'Going Abroad' strategy launched in 1998.[28]

Nevertheless, strong arguments favour my choice: *Xi Jinping's* take-over in 2012/2013 has marked a profound turning point in Chinese politics.[29] A lesson learnt from the last roughly 200 years is that China's stance on the international legal order has been indivisibly linked to its economic and political leadership, as I shall demonstrate in the next sections.[30] Moreover, the enormous financial resources already spent in BRI projects differentiate the BRI from similar endeavours.[31] Many projects have been approved, are active or completed,[32] which, for instance, stands in stark contrast to the American 'New Silk Road Initiative' (2011) that mainly remained without substance.[33] It may well be that the BRI is a continuation of China's 'Going Abroad' strategy adopted over a decade before. However, empirical studies show that China since 2013 has doubled down on outward investment and has considerably changed its investment structure.[34] At last, the BRI's launch coincided with a fresh debate on China's changing stance on international adjudication[35] that gained new momentum due to the

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invasion; see also the statement of US scholar Frederick Starr, 'A Partnership for Central Asia Foreign Affairs', Foreign Affairs, July/August 2005 <https://www.foreignaffairs.com/articles/asia/2005-07-01/partnership-central-asia> accessed 12 January 2022; Richard Boucher, 'US Policy in Central Asia: Balancing Priorities (Part II)', Statement to the House International Relations Subcommittee on the Middle East and Central Asia, 26 April 2006 <http://commdocs.house.gov/committees/intlrel/hfa27230.000/hfa27230_0f.htm> accessed 12 January 2022; Hillary Clinton 2011 in Chenai, July 20 2011: State Department, Remarks on India and the United States: A Vision for the 21st Century <https://2009-2017.state.gov/secretary/20092013clinton/rm/2011/07/168840.htm> accessed 12 January 2022.

[28] Frankopan (n 27) 102; Ammar A. Malik and others (n 8) 36.

[29] See for example this interview with China expert Carl Minzner: Shannon Tiezzi, 'Carl Minzner on China's Post-Reform Era' <https://thediplomat.com/2018/04/carl-minzner-on-chinas-post-reform-era/> accessed 12 January 2022; Kenji Kawase and Nikki Sun, 'Chinese State Tightens Grip 40 Years after Deng's Reforms' <https://asia.nikkei.com/Spotlight/The-Big-Story/Chinese-state-tightens-grip-40-years-after-Deng-s-reforms> accessed 12 January 2022.

[30] Jacques deLisle, 'China's Approach to International Law: A Historical Perspective' (2000) 94 Proceedings of the annual meeting - American Society of International Law 267, 274; Grewe observed this regarding the international legal order in the first half of the 20th century Wilhelm G Grewe, *The Epochs of International Law* (Michael Byers tr, De Gruyter 2013) 6.

[31] I will specify how I understand 'BRI projects' in section 3.1.

[32] See for an overview Ammar A. Malik and others (n 8) 137–150.

[33] Frankopan (n 27) 101–102; another sign of its relevance are competing programmes established by the European Union and the G7 as a response to the BRI. See European Commission, 'Joint Communication: The Global Gateway' <https://ec.europa.eu/info/sites/default/files/joint_communication_global_gateway.pdf> accessed 12 January 2022; Group of Seven (G7), 'G7 Leaders' Communiqué: Our Shared Agenda for Global Action to Build Back Better' <https://www.consilium.europa.eu/media/50361/carbis-bay-g7-summit-communique.pdf> accessed 12 January 2022.

[34] Ammar A. Malik and others (n 8) 23–24; UNCTAD estimates that the BRI's transportation network could lead to a 5 per cent increase in total FDI flows to the countries involved. UNCTAD, World Investment Report 2019 (United Nations 2019) <https://unctad.org/webflyer/world-investment-report-2019> accessed 12 January 2022 45–47.

[35] Manjiao Chi and Xi Wang, 'The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications Special Issue: Dawn of an Asian Century in International Investment Law' (2015) 16 Journal of World Investment &

beginning of the South China Sea Arbitration between China and the Philippines in 2013-2014.[36]

2.2 International Adjudication as an Indicator for China's Understanding of International law

2.2.1 The Time Before the PRC

2.2.1.1 Qing Dynasty – China's Encounter With Modern International Law

When Chinese officials refer to an earlier Golden Age and China's status as a world power, they most likely allude to the Qing Dynasty during the 18th century (which began around 1644). Economic prosperity coincided with internal as well as external stability on the territory that was then China.[37] In 1770, China's territory had its greatest ever geographical expansion.[38] However, the Western understanding of a nation-state was foreign to this country, which considered itself rather as a cultural entity.[39]

In the aftermath of the two Opium Wars (after 1842), China concluded a series of treaties, mostly with European nations.[40] Those treaties were later summarised under the term 'uneven

Trade 869, 898; Norah Gallagher, 'China's BIT's and Arbitration Practice: Progress and Problems' in Wenhua Shan and Jinyuan Su (eds), *China and International Investment Law: Twenty Years of ICSID Membership* (BRILL 2014) 214; Dapo Akande, 'Is China Changing Its View of International Tribunals?' (*EJIL: Talk!*, 4 October 2010) <https://www.ejiltalk.org/is-china-changing-its-view-of-international-tribunals/> accessed 12 January 2022; Harriet Moynihan, 'China's Evolving Approach to International Dispute Settlement' (2017) Chatham House <https://www.chathamhouse.org/2017/03/chinas-evolving-approach-international-dispute-settlement> accessed 12 January 2022.

[36] *The Republic of Philippines v The People's Republic of China*, PCA Case No. 2013-19, <https://pca-cpa.org/en/cases/7/> accessed 12 January 2022.

[37] In Chinese histography, several such Golden Ages are described under the term 盛世 (*shengshi)*, see to the Golden Age during the early Qing dynasty Qizhi Zhang, *An Introduction to Chinese History and Culture* (Springer 2015) 61–74.

[38] Klein (n 26) 34.

[39] Tieya Wang, *International Law in China: Historical and Contemporary Perspectives*, Vol. 221 (1990) 219; for a critical opinion on the culturalism-nationalism dichotomy in Chinese history Hayden White, 'The Question of Narrative in Contemporary Historical Theory' (1984) 20 History and Theory 1; the fact that China also today officially recognises 56 ethnic minorities and even within the majoritarian Han-Chinese multiple different dialects exist, shows that the concept of a rather homogenic nation is hardly compatible with China then and today, see: 'Ethnic groups in China' <http://english.www.gov.cn/archive/china_abc/2014/08/27/content_281474983873388.htm> accessed 12 January 2022*; Sun Yatsen*, the first president of the Republic of China after the decline of the Qing dynasty, opted for a new form of nationalism in which the idea of a Chinese nation was focused on territory rather than the predominant Han culture, Phil CW Chan, 'China's Approaches to International Law since the Opium War' (2014) 27 Leiden Journal of International Law 859, 872.

[40] The first of the 'uneven' treaties was concluded with Great Britain under threat of assault on 29 August 1842.

treaties' and have since symbolised a 'century of humiliation'.[41] The 'uneven treaties' subjected business and diplomacy to (Western) legal norms and thereby served as a basis for executing an imperialistic order in China.[42] These treaties, inter alia, established a non-reciprocal extraterritoriality regime that included immunity in local jurisdiction for nationals of the foreign treaty power. Moreover, they allowed the presence of foreign troops and the administration of bureaucratic services, as well as the lending of certain territories.[43]

China reacted to the legal straitjacket of the West with substantial legal reforms and made efforts to become familiar with the modern international system.[44] It should be emphasised that at an early stage, the Chinese also had reassuring experiences in their use of modern international law to settle conflicts. In 1864, for instance, the government body in charge of foreign policy during the late Qing dynasty (*zongliyamen*) used international norms to protest against Prussia's capture of a Danish ship in the Tianjin harbour. In response, the Prussians released the ship.[45] China also signed a few 'equal' treaties at the beginning of the 20th century.[46]

Seen from this angle, it is not as surprising as one could think[47] that the Qing dynasty, before its internal decline, became more active on the international stage. China participated in the

[41] Alison Adcock Kaufman, 'The "Century of Humiliation," Then and Now: Chinese Perceptions of the International Order' (2010) 25 Pacific Focus 1, 2; Anne Peters 'Treaties, Unequal', *Max Planck Encyclopedia of Public International Law* (2018) para. 58; Shin Kawashima, 'China' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 459 who also points out that it was not necessarily seen as 'unequal' from the then-Qing's point of view.

[42] Klein (n 26) 293.

[43] Other than e.g. many African nations, China was never completely colonised. Historians talk, however, of an 'informal imperialism'; communist doctrine referred to China during this era as 'semi-coloni' (*banzhimindi*), see deLisle (n 30) 270–271.

[44] China invested great efforts to use international law to counter the imposed treaty regime and to find its 'rightful place in the family of nations', James Li, 'The Impact of International Law on the Transformation of China's Perception of the World: A Lesson from History' (2012) 27 Maryland Journal of International Law 128, 152; an important step in this was the translation of Henry Wheaton's Elements of International Law (1836) into Chinese by William Martin and the newly founded 总理衙门 (*zongliyamen*) published it as *wangguofa* in 1865, Kawashima (n 41) 460; deLisle (n 30) 271.

[45] Wang, *International Law in China: Historical and Contemporary Perspectives* (n 39) 234 who quotes from the memorial of the *zongliyamen* to the Court, 30 August 1864 (in Chinese), in Beginning and End of the Management of Barbarian Affairs, Tongzhi Period, Vol. XXVII, 26: 'We, your ministers, find that although this book [referring to the *wangguofa*] on foreign laws and regulations is not basically in complete agreement with the Chinese systems, it nevertheless contains sporadic passages which are useful.'; see also Kawashima (n 43) 462.

[46] Wang, *International Law in China: Historical and Contemporary Perspectives* (n 39) 249.

[47] Cai points to voices that argue that the external force together with the influence of traditional Confucius thinking led to a general Chinese reluctance to any form of international adjudication, though he does not seem to fully agree with this himself Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (Oxford University Press) 267.

Hague Peace Conferences (1899 and 1907)[48] and signed the Convention for the Pacific Settlement of International Disputes. It thereby became a founding member of the Permanent Court of International Arbitration (PCA), the first global effort to establish a system of international adjudication.[49] In addition to that, the Chinese emperor signed a convention on arbitration with the United States in 1908.[50] Similar agreements were concluded with Brazil and the Netherlands in 1909 and 1915.[51] Finally, China made an agreement with the US that was part of a series named the 'Bryan Treaties', which served as an extension of the arbitration agreements and focused on the method of inquiry to settle disputes peacefully.[52]

2.2.1.2 The Republican Years – Increased Efforts to Overcome the 'Uneven Treaties'

During the Republican time (1912-1949), the external relations were characterised by China's search for the relinquishment of the 'uneven treaties'.[53] As Western powers refused to give back occupied territories,[54] China increased its diplomatic and legal efforts to counter foreign interferences. Two examples suggest that China, as a result of this, appeared as an active player in an increasingly formalised international dispute settlement landscape.

China's response to Japan's occupation of Manchuria – then part of China – concerned a state-to-state dispute. China invoked the Covenant of the League of Nations to argue that Japan's

[48] In China, the so-called Boxer rebellion developed into a violent international crisis during that time. The Boxer rebellion ended in 1901 with a victory of the foreign powers alliance and the Boxer Protocol of 7 September 1901 that imposed foreign troops stationing agreements and high reparations on China Betsy Baker, 'Hague Peace Conferences (1899 and 1907)', *Max Planck Encyclopedia of Public International Law* (2009) para. 9; the protocol is available at <https://en.wikisource.org/wiki/Boxer_Protocol> accessed 12 January 2022.

[49] Julian Ku, 'China and the Future of International Adjudication China' (2012) 27 Maryland Journal of International Law 154, 158.

[50] *Arbitration Convention between the United States and China* (1909) 3 The American Journal of International Law 221 <http://www.jstor.org/stable/2212449> accessed 12 January 2022.

[51] Wang, *International Law in China: Historical and Contemporary Perspectives* (n 39) 249.

[52] Hans-Jürgen Schlochauer, 'Bryan Treaties (1913-14)', *Max Planck Encyclopedia of Public International Law* (2007) paras. 1, 7: the Bryan treaties gave an 'impetus to the use of commissions of inquiry in situations where other methods of settling or deciding disputes had failed' that can now be found in the UN Charter in Art. 33 und 36; the original text of the Treaty between China and the United States for the Advancement of Peace (signed 15 September 1914, ratifications exchanged 22 October 1915) is available in (1916) 10 American Journal for International Law Supplement 268.

[53] Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study*, Vol. 1 (Princeton University Press 1974) 12; Wang, *International Law in China: Historical and Contemporary Perspectives* (n 39) 250.

[54] The German Empire ceded territory to Japan, which sparked the May Fourth student movement that pressured the government to refuse its signature, see Margaret MacMillan, *Peacemakers: The Paris Peace Conference of 1919 and Its Attempt to End War* (John Murray 2003) 322–345.

actions were unlawful. In view of the internal turmoil in China, Japan denied China's quality of a state and thus objected to the Chinese position. The League of Nations agreed with China and adopted the *Stimson Doctrine*, according to which 'recognition of a territory that came into being as a state through the threat or use of force would thenceforth be unlawful'.[55] Eventually, this was of little help to the Chinese demands as Japan withdrew from the League of Nations.[56]

The second example concerned a private-to-state dispute. The Radio Corporation of America (RCA), a private company, claimed in 1935 that China had breached a contract, which granted the exclusive operation of radio communications between the United States and China. The reason for this claim was that China had signed a similar concession agreement with another company. The parties went to arbitral proceedings before the Administrative Council of the PCA under Article 47 of the Convention for the Pacific Settlement of International Disputes.[57] The tribunal decided in favour of China by denying a breach of contract. Until today, the case remains the only known instance of recourse to these services under Article 47.[58]

China's efforts further included the participation in other relevant dispute resolution fora: it accepted the jurisdiction of the Permanent Court of International Justice (PCIJ) and was also a founding member of the International Court of Justice (ICJ) in 1945.[59] The Republic of China became a party of the General Agreement on Tariffs and Trade (GATT) and accepted its dispute settlement mechanism until 1950.

In sum, the prosperous beginning of the Qing Dynasty era found a distressful and traumatising end with the encounter with Western powers that went along with internal struggles.[60] To the Chinese, international law appeared predominantly as a tool of suppression. It proved to be mostly ineffective as a means of defence against foreign intervention.[61] The peaceful settlement

[55] A commission lead by Lord Bulwer Lytton approved the Chinese position in a report to the League of Nations, however could only impose moral sanctions, Klein (n 26) 328–329.
[56] Phil C. W. Chan 'China's Approaches to International Law since the Opium War' (2014) 27 Leiden Journal of International Law 859, 872.
[57] *Radio Corporation of America v China*, PCA Administrative Council 13 April 1935, Reports of International Arbitral Awards, Vol. III, 1621–1636 <https://legal.un.org/riaa/cases/vol_III/1621-1636.pdf> accessed 12 January 2022.
[58] Cesare PR Romano, Karen J Alter and Yuval Shany, 'Mapping International Adjudicative Bodies, the Issues, and Players' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 11.
[59] Ku (n 49).
[60] Xue (n 20) 14.
[61] ibid.

of disputes during the 19th century relied on diplomatic means such as negotiations. Judicial methods only developed after the Peace Conference at the transition to the 20th century. The Chinese governments embraced the new methods and took an active role. They were motivated to overcome the imperialistic order but ultimately failed to do so through legal efforts. From a historical perspective, this period can be understood as the cause of a Chinese distrust of the international legal order and the origin of a pragmatic understanding of international law. At the same time, the period shows that China's encounter with international law focused to a considerable extent on treaties and international dispute settlement.

2.2.2 The PRC – *Mao*'s Withdrawal From The International Scene (1949-1976)

Two treaties of 1943 ushered in the end of the formal imperialist order in China. China agreed with the United States and the United Kingdom to end the extraterritorial system in China.[62] A new era began with the PRC, which was founded in 1949.[63] From its early days, the PRC – apart from some exceptions[64] – widely disregarded an international legal order.

On the one hand, the new Communist government's ideology was incompatible with international law as it cemented the principles of imperialism and capitalism from the Communist leadership's point of view. On the other hand, the PRC was not a recognised member of the UN Security Council, the most important organ of the UN. While the Republic of China (Taiwan) participated in the ICJ and the GATT dispute settlement mechanism[65], the

[62] See *Treaty Between the Republic of China and the United States for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters*, 11 January 1943, United Nations Treaty Series, Vol. 10 II <https://treaties.un.org/doc/Publication/UNTS/Volume%2010/v10.pdf> 262–268; *Treaty Between the United Kingdom and India and the Republic of China for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters*, 11 January 1943, League of Nations Treaty Series Vol. 205, <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20205/v205.pdf> 69–76 all cited websites accessed 12 January 2022.

[63] Article 55 of the Common Programme of the Chinese People's Political Consultative Conference of 29 September 1949 provided that '[T]he Central People's Government of the People's Republic of China must study the treaties and agreements concluded by the Kuomintang government with foreign governments and, depending on their contents, recognize, annul, revise or reconclude them.' Wang, *International Law in China: Historical and Contemporary Perspectives* (n 39) 248, 262.

[64] The PRC before the 1966 Cultural Revolution ratified the four 1949 Geneva Red Cross Conventions, the 1930 international convention on Landline and the 1929 Warsaw Convention on international Cariage by Air, Hungdah Chiu, 'Chinese Attitudes Toward International Law in the Post-Mao Era, 1978-1987' (1987) 21 The International Lawyer 1127, 1153.

[65] From which it withdrew in 1950, see Ku (n 49) 159. The Republic of China submitted statements in ICJ's first two advisory proceedings, however, did not participate in the oral proceedings; see *Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Rep. 1948, 57; *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, ICJ Rep. 1949, 174.

PRC stressed that only negotiations could settle international disputes.[66] During large parts of the Cold War era, the PRC cut its own path[67] and sought relations with other so-called 'newly independent States' such as India.[68] With the admission of these states to the UN, the PRC took the 'Chinese seat' within the UN.[69]

Immediately after that, the government of the PRC withdrew its commitment to the compulsory jurisdiction of the ICJ given by the Taiwanese government. In a letter to the ICJ from 1972, the PRC stated that it 'does not recognise the statement made by the defunct Chinese Government on 26 October 1946.'[70] Between 1971 and 1984, China did not appoint a judge to the ICJ. These measures were the beginning of a revision process concerning all international commitments concluded by the Republic of China.[71] For example, China was also reluctant to

[66] Ku (n 49) 155–156.

[67] See to this ambiguous relationship with the Soviet Union deLisle (n 30) 272–273 who summarises the political shift 'from alliance with Moscow, to self-appointed champion of post-colonial nations, to world wellspring of revolutionary values, to partial rapprochement with the West' to which Chinese commentators 'crafted compatible positions on the nature and status of international law and the content of doctrines.'

[68] In 1954, China and India first formulated the *Five Principles of Peaceful Coexistence*, see *Agreement Between the Republic of India and the People's Republic of China on Trade and Intercourse Between Tibet Region of China and India*, 29 April 1954, Indian Treaty Series 5, <http://www.commonlii.org/in/other/treaties/INTSer/1954/5.html> accessed 12 January 2022; this document still today is considered to be the basis for Chinese foreign policy. It includes mutual respect for sovereignty and territorial integrity; mutual non-aggression; mutual non-interference in internal affairs; equality and mutual benefit; peaceful coexistence Dirk Schmidt, 'Außen- Und Sicherheitspolitik' (2018) 337 Informationen zur politischen Bildung - Volksrepublik China 32, 32 <https://www.bpb.de/shop/zeitschriften/informationen-zur-politischen-bildung/275591/china> accessed 12 January 2022; the term newly-independent states, in general, is used to describe those states that were under colonial rule and are therefore economically not as developed as fully industrialised nations. A further categorisation according to the date of independence or other factors does not seem to be useful, see Andrew D Sens, 'The Newly Independent States, The United Nations, and Some Thoughts on the Nature of the Development Process' (1968) 30 The Journal of Politics 114, 116–117.

[69] *Restoration of the Lawful Rights of the People's Republic of China in the United Nations*, UN General Assembly Resolution, A/RES/2758 (XXVI), adopted on 25 October 1971 Government of the Republic of China 'from the place which they unlawfully occupy at the United Nations and in all organizations related to it', para. 3.

[70] UN General Assembly, *Report of the International Court of Justice 1 August 1972–31 July 1973*, Official Records, Supplement No. 5 (A/9005) <https://digitallibrary.un.org/record/724386#record-files-collapse-header> accessed 12 January 2022.

[71] On 29 September 1972, the Minister for Foreign Affairs of the PRC stated to the UN Secretary General: 'With regard to the multilateral treaties signed, ratified or acceded to by the defunct Chinese government before the establishment of the government of the PRC, my government will examine their contents before making a decision in the light of the circumstances as to whether or not they should be recognized. As from October 1, 1949, the day of the founding of the PRC, the Chiang Kai-shek clique has no right at all to represent China. Its signature and ratification of, or accession to, any multilateral treaties by usurping the name of `China' are all illegal and null and void.', see Multilateral Treaties Deposited with the Secretary-General, UNTC, <https://treaties.un.org/Pages/HistoricalInfo.aspx?clang=_en#China> accessed 12 January 2022; see also Chiu (n 64) 1151; Junwu Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (BRILL 2009) 117.

the compulsory jurisdiction of the International Tribunal for the Law of the Sea.[72] Domestically, the PRC stripped down large parts of its legal system and officially distanced itself from the notion of law altogether during the Cultural Revolution (1966 to 1976).[73]

To conclude, China's external actions were primarily motivated by internal ideological struggles and reforms. From an active member within the international community before 1949, the PRC remained hostile towards the international order during large parts of *Mao*'s reign. The Cold War and decolonisation contexts profoundly influenced its position. During this time, China developed ties with African states that are still of value in today's environment of the BRI. Moreover, though China tended to the Soviet socialist bloc, it kept its own agenda. Regarding international dispute settlement, the PRC opposed legal mechanisms and focused on diplomatic means. Political leadership also influences the external state practice in other states. However, this period illustrates that in the case of China, the influence of political leaders on China's attitude towards international law can hardly be overestimated.

2.2.3 The PRC After Mao – 'Reform and Opening'

2.2.3.1 Rapprochement With the International Scene

After Mao died in 1976, *Deng Xiaoping* became China's paramount leader and initiated the policy of 'Reform and Opening'. This meant a profound re-orientation in China's external relations. As China adopted dozens of international treaties, international law became a tool for economic and political modernisation.[74] However, qualified international lawyers and research resources were rare.[75] For this reason by itself, China could only gradually adjust its

[72] Third United Nations Conference on the Law of the Sea Official Records, Vol. V (1976), A/CONF.62/SR.60, <https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_5/a_conf62_sr60.pdf> accessed 12 January 2022, paras. 24, 26-28.

[73] E.g. law schools as well as the Ministry of Justice were closed, lawyers were sent to work as farmers in the countryside Orde F Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press 2016) 163–164; see further Cai (n 47) 26.

[74] Chiu (n 64) 1153–1154 who provides an extensive list of the conventions concluded by the PRC between 1977–1986.

[75] For example, in a book review regarding Zhou Gengsheng's treatise on international law from 1981, Chiu wrote: 'Because the publication date is 17 years after the manuscript was completed, a substantial part of the book is out of date and some terms or statements are not even consistent with the PRC's current policy. ... [I]t is not clear whether the author, in 1964, sensed the deterioration in Sino-Soviet relations; he still exaggerated the Soviet contribution to certain principles of international law in a few references.' Hungdah Chiu, 'Book Review: International Law by Zhou Gengsheng; International Law by Wang Tieya and Wei Min; Selected Materials on

approach to international law. The adjustment process took place in the context of accelerating globalisation and increasing 'proliferation' of international courts.[76] China's changing economic and political interests caused a careful reconsideration of international adjudication in various international fora.

Following around 20 years of absence, *Ni Zhengyu* became the first judge nominated by the PRC to the ICJ in 1984.[77] The PRC never accepted the compulsory jurisdiction of the ICJ[78] but abolished its policy of 'blind reservations' to the jurisdiction of the ICJ. In the 1990s, the PRC went even further by stating that it would principally refrain from reservations to the ICJ's jurisdiction in international economic, trade, and technical treaties.[79] In 1993, China declared that it would resume all activities in the PCA and that it was committed to the Hague Conventions.[80] Most recently, in 2009, it became apparent that China's attitude towards the ICJ had slowly changed. That year, the government of the PRC, for the first time, submitted statements to the ICJ in the Advisory Opinion on Kosovo's declaration of independence.[81] On this occasion, China emphasised its standpoint on sovereignty, territorial integrity and the principle of self-determination in international law while citing its own Five Principles of Peaceful Coexistence (signed with India and Myanmar in 1954) next to UN documents such as the UN Charter, the Friendly Relations Declaration (1970), and ICJ cases.[82]

International Law by Wang Tieya and Tian Ruxuan' (1983) 77 The American Journal of International Law 977, 977.

[76] Chiu (n 64) 1137–1138 pointing at the inclusion of ever more subject matters in international law; Cai (n 47) 317–318 who speaks of 'an enhanced judicialization of international law'; see also pointing to ICJ's increasingly 'busy docket', Ku (n 49) 155. In 2012, the ICJ said it had more than doubled its work rate compared to 1990 <https://www.icj-cij.org/public/files/press-releases/2/17102.pdf> accessed 12 January 2022.

[77] Yan Ling, 'In Memoriam: Ni Zhengyu In Memoriam' (2004) 3 Chinese Journal of International Law 693, 695.

[78] See for an overview <https://www.icj-cij.org/en/declarations> accessed 12 January 2022.

[79] Jinwu Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (BRILL 2009) 119.

[80] ibid 118.

[81] *Written Statement of the People's Republic of China to the International Court of Justice on the Issue of Kosovo*, 16 April 2009 <https://www.icj-cij.org/public/files/case-related/141/15611.pdf> accessed 12 January 2022; see also the *Oral Statement of the People's Republic of China to the International Court of Justice on the Issue of Kosovo*, 7 December 2009 <https://www.icj-cij.org/public/files/case-related/141/141-20091207-ORA-01-00-BI.pdf> accessed 12 January 2022 by Judge Xue Hanqin, paras. 28-37; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Rep. 2010, 403.

[82] In its written statement, the Chinese governments cites the *Island of Palmas Case* of the PCA as well as the ICJ cases *Corfu Channel* and *Military and Paramilitary Activities in and against Nicaragua*, Written Statement of the People's Republic of China to the International Court of Justice on the Issue of Kosovo (no 81) 3-7; see also the Oral Statement of the People's Republic of China to the International Court of Justice on the Issue of Kosovo (no 81), paras. 12-18; to the principle of self-determination paras. 19-26.

China also participated in the International Criminal Tribunal for the former Yugoslavia (ICTY) by voting in favour of the UN Security Council Resolutions (UN SC Res) 808 and 827 that established this judicial body. However, China stressed that this vote should not reflect precedence for future Chinese legal views. The PRC was especially concerned about the absence of an international treaty to set up the tribunal. It nominated judges to the ICTY but in its 1997 amicus curiae brief also underlined the limits of international adjudication.[83]
To emphasise its critical standpoint,[84] China abstained in the vote on UN SC Res 955 that approved the establishment of the International Criminal Tribunal for Rwanda (ICTR). Due to concerns about the impartiality of the future International Criminal Court (ICC), expanding jurisdiction, and broadening the substance of international crimes,[85] the PRC never signed the Rome Statute.[86]

In 1996, China joined the UN Convention on the Law of the Sea (UNCLOS). UNCLOS includes different methods for dispute resolution on issues, including the control over territorial seas, sea beds, and economic zones. While the procedures mostly rely on consent, the states can also limit the compulsory jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS). The PRC made a declaration under article 298 UNCLOS that limits jurisdiction to the minimum possible.[87]

In total, international judicial fora became more numerous with the fall of the Iron Curtain. This trend overlapped with an essential phase of Chinese realignment in international law, which is why China's adopted approach was particularly evident in international fora. A recurring pattern of China's participation in the fora presented so far was that China limited binding dispute resolution methods to a large extent. As the next section shows, this did not apply for trade and investment disputes.

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[83] *Prosecutor v Blaškić*, ICTY Case No. IT-95-14, AR108bis, A 1470-A 1465.
[84] Bing Bing Jia, 'The Legacy of the ICTY and ICTR in China Symposium on the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Broadening the Debate' (2016) 110 American Journal of International Law Unbound 245, 247 who holds that the limiting of the impact of the ICTY as precedence for future cases was 'at least' one interest guiding the Chinese decision.
[85] ibid 248.
[86] Rome Statute of the International Criminal Court, 17 July 1998, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280025774> accessed 12 January 2022.
[87] Declarations and Reservations to UNCLOS available at <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 12 January 2022.

2.2.3.2 Docking on the Belt and Road Initiative – 'Going Abroad'

I have spared China's role in international trade and investment from the historical depiction so far. These two fields are central to understanding the BRI's legal dimension, so I shall dedicate a separate part to them.

2.2.3.2.1 China's Experience in the WTO

China's experience in the WTO dispute resolution mechanism has proven to be one of the most influential for China's stance on ISDS. After lengthy negotiations, China became a member of the WTO in 2001 and gained hereby better access to the international trade market. As a compulsory condition for the accession, China had to accept the jurisdiction of the WTO Dispute Settlement Body (DSB). In the first years of China's WTO membership, China was mostly respondent in procedures of the DSB. Oher states were wary and had the impression that China lag behind in compliance with WTO rules.[88] Furthermore, China was 'late WTO participant'[89] who lacked experience in the WTO DSB but also generally in international adjudication.[90] An early Chinese success was the *US-Steel Safeguards case* which the WTO DSB panel decided in 2003. The Appellate Body upheld the decision to a large extent.[91] Following this, it took several years until China acted more frequently as complainant in WTO cases by 2007.[92] The WTO DSB experienced several 'Chinese years' and China was able to

[88] Liyu Han and Henry Gao, 'China's Experience in Utilizing the WTO Dispute Settlement Mechanism' in Gregory C Shaffer and Ricardo Meléndez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press 2010) 154–157 with an extensive description of all cases in which China was a respondent up to 2010.

[89] Congyan Cai, 'International Law in Chinese Courts during the Rise of China' (2016) 110 American Journal of International Law 269, 288.

[90] Jie Song, 'Evaluating the Effectiveness of China's Participation in International Legal Matters: Lessons from China's Practice in the International Law Commission and the International Court of Justice' (2017) 15 China: An International Journal 144 quoting a Chinese representative who participated in the negotiations for the United Nations Convention on the Assignment of Receivables in 1999 and who said of himself that he 'could only grasp the bare minimal knowledge of the content discussed by the representatives of the other delegations'; Cai (n 47) 288 quoting Yang Guohua, a senior legal official involved in the US Steel Safeguards case: 'I realized that the tables of the people from all the other eight members were covered with documents and materials, while only a few pieces of papers, including the name of different delegations, were in front of my Chinese colleagues.'; see also Liyu Han and Henry Gao 'China's Experience in Utilizing the WTO Dispute Settlement Mechanism' in Gregory C Shaffer and Ricardo Meléndez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press 2010) 167–168.

[91] *People's Republic of China v United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO DS Case No. DS252, Appellate Body report, 10 December 2003.

[92] *Peoples Republic of China v United States – Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, WTO DS Case No. DS368, to which an award was never issued.

win more cases. In 2009, China was involved in half of the annual WTO cases.[93] Until 2013 China filed nine more applications.[94]

Throughout this period (2001-2013) China generated enormous trade surpluses. Simultaneously, it had become unprecedentedly successful in attracting foreign direct investment (FDI). By 2004, China had already accumulated 609 billion US-Dollar (USD) in foreign exchange reserves.[95] With its increasing foreign exchange reserves, the Chinese government gradually shifted its investment emphasis. This shift came about as part of the 'Going Abroad' policy that promoted Chinese investments in other countries through different measures by the Chinese government. It was initiated by the Communist Party of China's (CPC) Central Committee in 1998 but was only effectively implemented after China acceded to the WTO.[96] By 2009, China had turned into one of the ten most important FDI-exporting countries.[97] This change also influenced China's investment treaty practice.

2.2.3.2.2 China's BITs and International Investment Law

In simplified terms, international investment law developed as a response to the concerns of Western investors that feared expropriation in the 'newly independent states'.[98] Western states,

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[93] Manjiao Chi, 'China's Participation in WTO Dispute Settlement Over the Past Decade: Experiences and Impacts' (2012) 15 Journal of International Economic Law 29, 32.

[94] *People's Republic of China v United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO DS Case No. DS379, Appellate Body report 11 March 2011; *People's Republic of China v United States – Certain Measures Affecting Imports of Poultry from China*, WTO DS Case No. DS392, Panel report 29 September 2010; *People's Republic of China v United States – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WTO DS Case No. DS397, Appellate Body report 15 July 2011; *People's Republic of China v United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WTO DS Case No. DS399, Appelate Body report, 5 September 2011; *People's Republic of China v United States — Anti-Dumping Measures on Certain Footwear from China*, WTO DS Case No. DS405, Panel report, 28 October 2011; *People's Republic of China v United States — Anti-Dumping Measures on Shrimp and Diamond Sawblades from China*, WTO DS Case No. DS422, Panel report, 8 June 2012; *People's Republic of China v United States — Countervailing Duty Measures on Certain Products from China*, WTO DS Case No. DS437, Appellate Body report, 18 December 2014: *People's Republic of China v United States — Countervailing and Anti-dumping Measures on Certain Products from China*, WTO DS Case No. DS449, Appelate Body report, 7 July 2014*; People's Republic of China v United States — Certain Measures Affecting the Renewable Energy Generation Sector*, WTO DS Case No. DS452.

[95] Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford University Press 2009) para. 1.24.

[96] See State Council, *Note on the Implementation of the 'Going Abroad Policy'* 走出去战略 (*zouchuqu zhanlue*), available in Chinese only <http://www.gov.cn/node_11140/2006-03/15/content_227686.htm> accessed 12 January 2022.

[97] Gallagher and Shan (n 95) para. 1.26.

[98] Muthucumaraswamy Sornarajah, 'The Past, Present and Future of the International Law on Foreign Investment' in Wenhua Shan and Jinyuan Su (eds), *China and International Investment Law: Twenty Years of ICSID*

newly independent and Latin American states disagreed about the norms that should apply.[99] Without any international agreements, legal remedies were only available through diplomatic protection of the home state, which was rarely effective. The introduction of BITs could mitigate these issues.[100] States conclude BITs to stimulate investment flows and set international law standards.[101] BITs establish terms and conditions for, inter alia, ensuring fair and equitable treatment or protection from appropriation for foreign investors. The vast majority of them also contains dispute settlement provisions.[102] Standardised procedural rules for ISDS were promulgated by the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

After introducing the policy of 'Reform and Opening', China's economic rise depended on inbound FDI before it would eventually become also a strong outbound FDI player. China signed its first BIT with Sweden[103] in 1982. Article 6 of the China-Sweden BIT (1982) included a state-to-state arbitration provision if a conflict could not be settled through negotiations. In a declaration attached to the treaty, the two states agreed that a binding investor-state mechanism would be amended when China became a member of the ICSID Convention.

The fact that China accepted this instrument is remarkable if one bears in mind that the notion of private property was against the Communist ideology.[104] It was a sign of a new pragmatic view on the international order after its staunch rejection during the *Mao* era. In 1993, China officially characterised its economy as a (Socialist) market economy.[105] The same year, the

Membership (BRILL 2014) 24–26 sees the origin of investment protection law in the relationships between the United States and Latin American countries, that became independent earlier than African and Asian states; Muthucumaraswamy Sornarajah, 'Chinese Investment Treaties in the Belt and Road Initiative Area' (2020) 8 The Chinese Journal of Comparative Law 55, 57–61 with a critical view on this development.

[99] Andreas von Arnauld, *Völkerrecht* (4th edn, C F Müller) paras. 591-592; 983; see only *Charter of Economic Rights and Duties of States*, UN General Assembly Resolution A/RES/29/3281, that was passed without the votes of industrialised states.

[100] The first BIT was concluded between Germany and Pakistan in 1959.

[101] Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 635; Gallagher and Shan (n 95) para. 1.98.

[102] See more extensively in the next chapter.

[103] For the full text <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/782/download> accessed 12 January 2022.

[104] Sornarajah, 'The Past, Present and Future of the International Law on Foreign Investment' (n 98) 28.

[105] National People's Congress, *Amendment to the Constitution of the People's Republic of China* (1993) <https://www.cecc.gov/resources/legal-provisions/1993-amendment-to-the-constitution-of-the-peoples-republic-of-china> accessed 12 January 2022: 'The state has put into practice a socialist market economy. The State

PRC signed the ICSID Convention but stressed that it would only submit the compensation resulting from expropriation and nationalisation to the jurisdiction of ICSID tribunals.[106] Subsequently, China signed dozens of BITs with other countries. By 2006, it had become the country with the second most BITs after Germany.[107]

Until the decade 2000-2010, one seldomly found (publicly available) ISDS awards.[108] This was the case regardless of the parties involved and therefore not necessarily a Chinese particularity. The more specific reasons for the absence of (publicly available) cases with Chinese participation in the 1990s lay mainly in China's focus on inbound FDI. Accordingly, Chinese BITs of the first two generations included only narrow investor-state clauses that by far did not cover all substantive obligations under the respective BIT.[109] There was at first only a gradual change when the Chinese outbound FDI increased. China was conscious of its strong bargaining power. During this time, China's economic weight permitted China to evade binding dispute procedures through negotiations.[110] As China's outbound FDI increased on a larger scale, the PRC began widening ISDS clauses in BITs to include more subject matters in arbitration procedures.[111]

In 2007, *Tza Yap Shum* became the first Chinese national to file an application for (publicly known) arbitral proceedings to the ICSID. He claimed successfully that the Republic of Peru

strengthens formulating economic laws, improves macro adjustment and control and forbids according to law any units or individuals from interfering with the social economic order.'

[106] Jingzhou Tao and Mariana Zhong, 'The Changing Rules of International Dispute Resolution in China's Belt and Road Initiative' in Wenxian Zhang, Ilan Alon and Christoph Lattemann (eds), *China's Belt and Road Initiative, Changing the Rules of Globalization* (Palgrave Macmillan 2018) 317, see anon.

[107] Monika CE Heymann, 'International Law and the Settlement of Investment Disputes Relating To China' (2008) 11 Journal of International Economic Law 507, 513.

[108] Daniel Ikenson, 'A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement' (2014) Free Trade Bulletin 2 <https://www.cato.org/sites/cato.org/files/pubs/pdf/ftb57.pdf> accessed 12 January 2022. One may speculate that this could also partly due to the fact that awards were not made available to the public. Asian states still today are underrepresented in institutions like the ICSID, the WTO and are the least likely to participate in third-party adjudication Simon Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures' (2016) 27 European Journal of International Law 945, 946; 961–962.

[109] Jane Willems, 'Investment Disputes under China's BITs: Jurisdiction with Chinese Characteristics?' in Julien Chaisse (ed), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (Oxford University Press 2019) 445; see also Heymann (n 107) 524.

[110] Gallagher (n 35) 183 who refers to the first ever ICSID claim filed against China, *Ekran Berhad v People's Republic of China*, ICSID Case No. ARB/11/15, which was suspended upon the parties' request and no substantial legal documents were ever published, as well as the settlement reached with the involvement of the Chinese and French government between Danone and Wahaha over disputed breaches of their joint venture agreement, see <http://www.chinadaily.com.cn/business/2009-10/05/content_8764096.htm> accessed 12 January 2022.

[111] Gallagher (n 35) 182; Chi and Wang (n 35) 874.

had breached the BIT between China and Peru.[112] At the brink of the BRI's announcement, there were other noteworthy developments in Chinese international investment policy: new case law was produced, as two other Chinese companies filed (at the end unsuccessful) claims against states in 2010 and 2012.[113] Just like China's experience in the WTO, these early cases have had a lasting impact on China's stance on ISDS, as will be seen in chapters 3 and 4. Furthermore, Chinese actors appeared on the bench. In 2011, *An Chen* and *Teresa Cheng* were the first Chinese arbitrators appointed to ICSID tribunals.[114] Simultaneously, China concluded new investment treaties with neighbouring countries and their clauses approximated modern international standards.[115] Finally, the PRC started negotiations for investment treaties with the US (2008/2009)[116] and the EU (2012)[117], hinting at new developments in the Chinese handling of investment protection.[118] Chapter 4 will investigate further to what extent China adopted its treaty practice to the demands of the BRI.

Contrasting its sceptical approach to binding dispute settlement in most international courts and tribunals, China embraced judicial means of dispute settlement in international trade and investment law. Especially the field of ISDS shows how China's stance evolved from reticence

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112 *Tza Yap Shum v Republic of Peru*, ICSID Case No. ARB/07/6, available in Spanish <https://www.italaw.com/sites/default/files/case-documents/ita0881.pdf> accessed 12 January 2022. The tribunal dismissed a request of annulment by the Republic Peru in 2015 <https://www.italaw.com/sites/default/files/case-documents/italaw4371.pdf> accessed 12 January 2022.

113 *China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong, International Industrial Co. Ltd. v Mongolia*, PCA Case No. 2010-20 <https://www.italaw.com/sites/default/files/case-documents/italaw11026_0.pdf> accessed 12 January 2022; Hong Kong based *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 <https://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf> accessed 12 January 2022.

114 *Bernhard von Pezold and others v Zimbabwe*, ICSID Case No. ARB/10/15 <https://www.italaw.com/cases/1472> accessed 12 January 2022; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe*, ICSID Case No. ARB/10/25, <https://www.italaw.com/cases/1470> accessed 12 January 2022; see also Gallagher (n 35) 200.

115 Heymann (n 107) 524–525; Matthew Levine, 'Towards a Fourth Generation of Chinese Treaty Practice, Substantive Changes, Balancing Mechanisms, and Selective Adaption' in Julien Chaisse (ed), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (Oxford University Press 2019) 209–211; Gallagher (n 35) 187–188.

116 *US-China Joint Statement*, 17 November 2009 <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/us-china-joint-statement> accessed 12 January 2022.

117 *Joint Press Communiqué of the 14th EU-China Summit*, 14 February 2012, 2 <https://eeas.europa.eu/archives/docs/china/summit/summit_docs/120214_joint_statement_14th_eu_china_summit_en.pdf> accessed 12 January 2022.

118 On 30 December 2020, the People's Republic of China and the European Union reached a political agreement for the conclusion of an investment treaty in the near future, see the Press Release of the European Commission <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2115> accessed 12 January 2022.

– when it exclusively emphasised inbound FDI – to acceptance of broader third-party jurisdiction – when Chinese investment policy also included outbound FDI.

Interim Conclusion

This chapter has identified three elements that have historically shaped the Chinese understanding of international law. The first two are *scepticism* and *pragmatism* that China developed already in the 19th and the first half of the 20th century. During the 'century of humiliation', China engaged with the international legal order but hardly reached its goal of gaining full sovereignty through international rules. The third element this chapter has identified is the *crucial role of the political and ideological leadership*. It could be observed with the foundation of the PRC and with the launch of 'Reform and Opening'. A look at China's participation in international adjudication after 'Reform and Opening' combined the three elements as the PRC cautiously became familiar with international adjudication but actively participated in fora only where it served Chinese interests.

With the beginning of 'Reform and Opening' China adopted a less ideological and more pragmatic approach to international law compared to the early years of the PRC.[119] With its growing economic and political power, China increased its bargaining power outside of formalised legal fora. At the same time, one can identify an adaptive treaty-making policy and openness towards investment arbitration. The long absence from the international stage during the early PRC years has meant that Chinese actors have often seen a need to catch up in terms of experience and resources for international dispute resolution.

During the years right before the launch of the BRI, Chinese officials and academia have worked on improving their legal capacities. Law professors increasingly advised government institutions and private companies urged the Chinese government to take legal action in their respective sector against foreign restrictions.[120] In this respect, the PRC's role during the BRI differs from its role during the beginning of 'Reform and Opening' in terms of its economic wealth and its ability to use international norms in its favour. The improved legal capacities together with China's reassuring 'WTO experience' and a further increase of the Chinese

[119] Pan identifies three perspectives among Chinese scholars on how to revive China: nativism, anti-traditionalism, pragmatism Pan (n 79) 110–113; also deLisle (n 30) 273 speaks of a realist approach.
[120] Chi (n 93) 33.

outbound FDI during the BRI era may lead to the expectation that the PRC continues to focus on binding dispute settlement for investment protection. However, the following chapters will reveal that the developments within the BRI are more nuanced.

3 International Law as a Yardstick for the BRI

This chapter will outline the legal framework of the BRI. It will lay the groundwork for observing China's complex efforts to protect investments within the BRI in the following chapter 4. Referring to recent data, I shall briefly sketch how the BRI is put in place in section 3.1. After that, section 3.2 shall appreciate the international rules that concern the protection of investments within the BRI. As already mentioned in the introduction, the legal design of the BRI follows a dual-track normative system. This juxtaposition of soft and hard mechanisms will be the key to understanding my analysis in chapter 4.

3.1 The BRI in Practice

The BRI is like an umbrella for countless infrastructure projects. BRI projects involve a range of different state and non-state actors. Every project is unique, but more public information is available on how BRI projects are generally structured. The projects are financed through loans and public aid. A difference between the pre-BRI and the current period is that the ratio of loan contracts to foreign aid has increased substantially by more than 40 per cent.[121] These infrastructure projects are particularly interesting for the development of international investment law. Although a uniform approach to BRI infrastructure projects does not exist, a specific pattern can still be observed.[122]

As a first step, China and the BRI host country agree on a broad frame of the envisaged investment (soft law).[123] In a second step, a Chinese contractor and the host country conclude a commercial project contract while, simultaneously, a Chinese financier and the host country make a loan agreement.[124]

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[121] Ammar A. Malik and others (n 8) 12–13, 24.

[122] Jelena M Andrić and others, 'The Conceptual Model of Belt and Road Infrastructure Projects' in Fenjie Long and others (eds), *Proceedings of the 23rd International Symposium on Advancement of Construction Management and Real Estate* (Springer 2021) 327–328; Wolff (n 12), 289–290; see for a case study on a Chinese-Laotian railroad project World Bank, 'From Landlocked to Land-Linked : Unlocking the Potential of Lao-China Rail Connectivity : Main Report' (2020) 20 <https://documents1.worldbank.org/curated/en/648271591174002567/pdf/Main-Report.pdf> accessed 12 January 2022.

[123] See for instance Memorandum of Understanding between the PRC and the Democratic Republic of the Congo on BRI cooperation <https://eng.yidaiyilu.gov.cn/qwyw/rdxw/160558.htm> accessed 12 January 2022.

[124] With an overview of different Chinese creditors of BRI projects Anna Gelpern and others, 'How China Lends: A Rare Look into 100 Debt Contracts with Foreign Governments' (AidData 2021) 12

The BRI projects often follow the public-private partnership (PPP) model.[125] While PPP can have varied meanings,[126] in the context of BRI infrastructure projects, it means that the private sector provides infrastructure assets as well as services and takes over certain risks from the government.[127] In theory, the private investor generates financial profits in return. The Chinese party of the BRI's secondary agreements (investor and financier) is often under the direct or indirect control of the government. Chinese SOEs are the dominant investors in BRI projects and have been the largest investors in landlocked developing countries in recent years, many of which are located within the ambit of BRI.[128] SOEs are companies in which the state exercises ownership in various ways depending on the corporate form.[129] While their activities are mainly oriented towards economic purposes[130], there is an assumption that SOEs within the BRI pursue strategic political goals. The reason for this assumption is that the profitability of a not insignificant number of BRI projects in developing countries is doubtful and entails high risks.[131] At this point, these remarks are sufficient for the purpose of understanding the BRI's general project structure. I will come back to the BRI's 'element of risk' in section 4.1.3.

What has already become clear is that this project structure challenges Chinese investment protection within the BRI through formalised judicial means of ISDS. The 'multi-bilateral'

<https://www.aiddata.org/publications/how-china-lends> accessed 12 January 2022; Analysing a project in Laos Ammar A. Malik and others (n 8) 48.

125 Vicky Ma and others, 'Belt and Road: How Can PPPs Help?' (*Clifford Chance*) 6 <https://www.cliffordchance.com/content/cliffordchance/briefings/2019/06/belt_and_road_howcanpppshelp.html> accessed 12 January 2022; Ammar A. Malik and others (n 8).

126 Kenneth W Abbott, 'Public Private Partnership', *Max Planck Encyclopedia of Public International Law* (2008) para. 1 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1084?prd=MPIL> accessed 12 January 2022.

127 OECD, 'Public-Private Partnership' <https://stats.oecd.org/glossary/detail.asp?ID=7315> accessed 12 January 2022.

128 Michele Ruta and others, 'Belt and Road Economics: Opportunities and Risks of Transport Corridors' (2019) 6 <https://www.worldbank.org/en/topic/regional-integration/publication/belt-and-road-economics-opportunities-and-risks-of-transport-corridors>; Heng Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges' (2021) 20 World Trade Review 282, 287; Laura Zhou, 'Chinese Private Investment in Belt and Road Projects May Be Losing Steam' *South China Morning Post* (1 November 2018) <https://www.scmp.com/news/china/diplomacy/article/2173467/chinese-private-investment-belt-and-road-projects-may-be-losing>; UNCTAD, World Investment Report 2020 (United Nations 2020) <https://unctad.org/webflyer/world-investment-report-2020> all cited websites accessed 12 January 2022, 78; Ping Xiong and Roman Tomasic, 'Soft Law, State-Owned Enterprises and Dispute Resolution on PRC's Belt and Road - towards an Emerging Legal Order China Law' (2019) 49 Hong Kong Law Journal 1025, 1028.

129 For example, through a majority of voting shares or an equivalent degree of control OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (2015) 14.

130 ibid.

131 Julien Chaisse and Mitsuo Matsushita, 'China's "Belt And Road" Initiative: Mapping the World Trade Normative and Strategic Implications' (2018) 52 Journal of world trade 163, 181; Wolff (n 12) 287–288; see for data on an increase in suspended and cancelled Chinese development projects within the BRI Ammar A. Malik and others (n 8) 72–76; however, the orientation on policy goals is a common issue in SOEs' corporate governance not only in the case of China, see OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (n 134) 11–12; Xiong and Tomasic (n 128) 1030.

approach also hints at alternative ways to secure Chinese assets abroad. Before analysing this more in-depth, I shall now clarify the general legal approach of the BRI.

3.2 The Legal Architecture of the BRI – An Attempt at Systematisation

As mentioned in the introduction, the scope of the BRI has been redefined multiple times. In 2015, the China Development Bank announced that it had started to finance around one thousand projects in 49 countries.[132] Today, the official BRI portal website lists 119 participating countries.[133] Areas include energy, infrastructure, traffic projects, as well as international cooperation in cyberspace, outer space, and, most recently, global health care.[134] Thus, it is challenging to capture the BRI's legal structure in a systematic picture. *Wang Heng* has aptly categorised the legal dimension of the BRI in an institutional scheme and a dual-track normative system.[135] I will adopt this categorisation to discern the legal aspects of the BRI.

3.2.1 The BRI's Institutional Scheme

China builds the BRI on international as well as domestic institutions and mechanisms. First, pre-existing institutions[136] coordinate projects and policies. Within these fora, China presents

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[132] Frankopan (n 27) 103.

[133] International Cooperation Profiles <https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10076&cur_page=5> accessed 12 January 2022.

[134] See on the so-called 'Digital Silk Road' Frankopan (n 27) 105–106; 129; on the so-called 'Health Silk Road' Moritz Rudolf, 'China's Health Diplomacy during Covid-19 - The Belt and Road Initiative in Action' (*SWP Comment 2021/C 09*, January 2021) <https://www.swp-berlin.org/10.18449/2021A05/> accessed 12 January 2022; see on the 'Polar Silk Road' Jane Nakano, 'China Launches the Polar Silk Road' (*Center for Strategic & International Studies*, 2 February 2018) <https://www.csis.org/analysis/china-launches-polar-silk-road> accessed 12 January 2022.

[135] Heng Wang, 'China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability' (2019) 22 Journal of International Economic Law 29, 29 et seq.

[136] In respect of financial institutions see the Chinese President's speech at Boao Forum for Asia 28 March 2015: 'We will promote [...] a platform for exchanges and cooperation among Asian financial institutions, and advance complementary and coordinated development between the Asian Infrastructure Investment Bank and such multilateral financial institutions as the Asian Development Bank and the World Bank.' <https://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpcxbayzlt2015nnh/t1250690.shtml>; for the agricultural sector: Ministry of Agriculture of the People's Republic of China, *Vision and Action on Jointly Promoting Agricultural Cooperation on the Belt and Road*, May 2017 <https://eng.yidaiyilu.gov.cn/zchj/qwfb/34829.htm>; for international mechanisms in general Office of the Leading Group for Promoting the Belt and Road Initiative, *The Belt and Road Initiative Progress, Contributions and Prospects*, 22 April 2019 <https://eng.yidaiyilu.gov.cn/zchj/qwfb/86739.htm>: 'Upholding the principles of consultation on an equal footing, openness, and inclusiveness, they aim to promote mutually beneficial cooperation among B&R countries on the basis of existing international mechanisms. Applying the principles of mutual respect and mutual trust, China actively engages in substantive coordination and cooperation on the Belt and Road Initiative with other participating countries, fully utilizing existing multilateral cooperation mechanisms such as: G20, APEC, World

the BRI as a tool for tackling international issues and underlines its wish for equal power distribution.[137] Secondly, China sets up new international institutions related to the BRI, mainly in finance, such as the Silk Road Fund, the Asian Infrastructure Investment Bank, or the China-ASEAN justice forum.[138] Thirdly, several domestic institutions relate to the BRI. For example, the Central Commission on Comprehensively Deeping Reform issued a document that includes principles to establish mechanisms for commercial disputes within the BRI.[139] The Supreme People's Court's interpretation concretised these principles and established the China International Commercial Court, an organ of the Supreme Court of China, and set up two tribunals in Shenzhen (for the 21st century Maritime Route) and Xi'an (for the economic Belt).[140]

3.2.2 The BRI's Dual-Track Normative System

Normative rules within the BRI follow a dual-track system.

One track consists of BRI-*specific* documents. As mentioned above, most BRI projects begin with a soft law text that coordinates investments on a bilateral level. These are the only international rules that *exclusively* serve the implementation of the BRI. I will not treat the specificities of these soft law texts in this section, as I shall look at them more closely in section 4.2.

Economic forum [...]' <https://eng.yidaiyilu.gov.cn/zchj/qwfb/86739.htm> all cited websites accessed 12 January 2022.

[137] Foreign Minister Wang Yi in a press conference on 08 March 2015: 'If I may use a musical metaphor, it is not China's solo, but a symphony performed by all relevant countries.' <https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1243662.shtml> accessed 12 January 2022.

[138] See the *Nanning Declaration at the 2nd China-ASEAN Justice Forum*, 09 June 2017 <http://cicc.court.gov.cn/html/1/219/208/209/800.html> accessed 12 January 2022; Office of the Leading Group for the Belt and Road Initiative (n 137) 31–32.

[139] The General Office of the CPC Central Committee and the General Office of the State Council, *Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions*, 27 June 2018 <http://cicc.court.gov.cn/html/1/219/208/210/819.html> accessed 12 January 2022.

[140] Supreme People's Court, *Provisions on Several Issues Concerning the Establishment of the International Commercial Courts*, 25 June 2018, 2 China Law Connect 83 <https://cgc.law.stanford.edu/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts/> accessed 12 January 2022; see also Jiangyu Wang, 'Dispute Settlement in the Belt and Road Initiative: Progress, Issues, and Future Research Agenda' (2020) 8 The Chinese Journal of Comparative Law 4, 15; Julien Chaisse and Jędrzej Górski, 'Introduction' in Julien Chaisse and Jędrzej Górski (eds), *The Belt and Road Initiative - Law, Economics, and Politics* (Brill Nijhoff 2018) 1–2; see an overview on its composition and function: A Brief Introduction of China International Commercial Court <http://cicc.court.gov.cn/html/1/219/193/195/index.html> accessed 12 January 2022.

Hard law rules form the second track, which is only BRI-*related*. That means international investment rules governing the BRI stem from different legal regimes that were not exclusively designed to serve the BRI. China has concluded BITs of different generations with the majority of BRI states.[141] This tool, which I will examine more extensively in section 4.1.1, is only one component of a web of other agreements that contain investment provisions. Furthermore, China is a party of 19 Free Trade Agreements (FTAs) with investment provisions. It actively promotes further negotiations.[142]

This effort is not least due to the diverse content of the provisions of treaties with countries taking part in the BRI. For instance, chapter 10 of the Regional Comprehensive Economic Partnership Agreement (RCEP) of November 2020 deals with the guarantees given to investors inside the Free Trade Zone. Article 19.5 of the RCEP includes rules for the choice of forum for both trade and investment disputes.[143] Similarly, the FTA between China and Peru includes investment protection clauses in Chapter 10 and the FTA with Pakistan in Chapter IX[144]. By contrast, the China-Korea FTA only includes a declaration in Annex 11-C that both parties intend to set up a preferential arrangement for investment facilitation.[145]

WTO law also relates to investment protection within the BRI. On the one hand, the WTO norms and the WTO Dispute Settlement Understanding are state-centric. Foreign investors have no standing to submit a 'claim' and instead enforce a state's obligations under the WTO regime indirectly.[146] Furthermore, the WTO regime does not offer a comprehensive multilateral agreement on foreign investment. On the other hand, WTO law covers investment-related provisions in several agreements.[147] In the Uruguay Round, the member states established the Trade-Related Investment Measures Agreement while 'recognizing that certain investment measures can have trade-restrictive and distorting effects'.[148] With the introduction of the

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[141] Wei Shen, 'The Belt and Road Initiative, Expropriation and Investor Protection under BITs' in Yun Zhao (ed), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press 2018) 136–141; Crawford (n 8) 15–16.

[142] Website of the Chinese Ministry of Commerce <http://fta.mofcom.gov.cn/index.shtml> accessed 12 January 2022.

[143] See for the full text <https://rcepsec.org/legal-text/> accessed 12 January 2022.

[144] See for the full text <http://fta.mofcom.gov.cn/pakistan/xieyi/fta_xieyi_en.pdf> accessed 12 January 2022.

[145] See for the full text <http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf> accessed 12 January 2022.

[146] Heymann (n 107) 522.

[147] Kavaljit Singh, *Multilateral Investment Agreement in the WTO - Multilateral Investment Agreement in the WTO* (Asia-Pacific Research Network 2003) 23–26 <https://www.wto.org/english/forums_e/ngo_e/multi_invest_agree_july03_e.pdf> accessed 12 January 2022; Levine (n 120) 206.

[148] For an overview WTO, Agreement on Trade-Related Investment Measures (TRIMs) <https://www.wto.org/english/tratop_e/invest_e/trims_e.htm> accessed 12 January 2022.

General Agreement on Trade in Services, investment was included indirectly in WTO law since one of the modes of trade in services is commercial presence.[149] Additionally, the Intellectual Property Rights Agreement contains rules on liberalising investment policies as it incorporates the protection of intangible assets in intellectual property.[150] Finally, parties occasionally invoke WTO norms in ISDS proceedings.[151]

Interim Conclusion

BRI-*specific* rules only exist in the form of soft law. Rules *related* to investment protection within the BRI are dispersed over different regimes.

Some have tried to illustrate the BRI's legal approach by contrasting it to a Free Trade Zone.[152] Before the conclusion of an FTA, like the North American Free Trade Agreement (NAFTA), member states agree on the norms article by article so that the institutions, the scope of the provisions, the participants as well as the dispute settlement mechanisms are set before the Free Trade Zone is formally established. In contrast to that – the idea goes – the BRI involves various members, institutions, mechanisms, and norms from different regulatory systems. Therefore, none of the aspects of a 'classical' Free Trade Zone is clearly defined within the BRI.

The findings of this chapter reveal that this comparison of the BRI with a Free Trade Zone is poor. An FTA *is* law and is *meant to* create an overarching legal framework, while the BRI is not law and does not aim to bind participants with a clear set of legal rules.[153] China will most likely not use the institutional scheme and the normative system as a stepping stone to establish a multilateral arrangement in the long run.[154] The PRC deliberately follows a 'trial-and-error' method and focuses on individual projects. This design makes it challenging to keep track of

[149] Singh (n 149) 24.

[150] ibid 25.

[151] For a critical view on the invocation of WTO norms in investor-state arbitration Jürgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents' (2009) 20 European Journal of International Law 749.

[152] Several authors adduce this example Jingxia Shi, 'The Belt and Road Initiative and International Law: An International Public Goods Perspective' in Yun Zhao (ed), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press 2018) 25; with reference to the dispute settlement rules under the BRI Ernst-Ulrich Petersmann, 'International Settlement of Trade and Investment Disputes Over Chinese "Silk Road Projects" Inside the European Union' in Giuseppe Martinico and Xueyan Wu (eds), *A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road?* (Palgrave Macmillan 2020) 55.

[153] Crawford (n 8) 14–15.

[154] Chen, 'Tension and Rivalry: The "Belt and Road" Initiative, Global Governance, and International Law' (n 10) 194.

the different rules in force within the BRI. In that respect, the historical reference to the Silk Road may be appropriate. The dispersed normative framework seems like an endeavour to include all kinds of different legal regimes that must be looked at 'in a holistic view'.[155] For international investment law, the analysis must concentrate on the interplay of different processes that are only connected at second glance.

[155] Frankopan (n 27) 105–106.

4 China's Methods to Protect Investments Within the BRI

Concentrating on the interplay of different processes is the task of this chapter. It will demonstrate that China's investment protection within the BRI has two sides: reliance on treaty practice as well as formal ISDS procedures (section 4.1) and a tendency to politicise investment protection (section 4.2). By doing so, I take up the dual-track normative system of the BRI but do not follow the chronology of the BRI project model (section 3.2). The implementation of investment projects begins with soft law texts (first track) and only once investments are made, the related rules (second track) apply. Nevertheless, to an international lawyer it seems more intuitive to start with the 'hard' instruments and mechanisms. They are still familiar from the historical chapter and more susceptible to legal categorisation. Moreover, the examinations of the second normative track leads to the reasons why China relies on the less legally binding features of the first normative track to protect investments within the BRI.

4.1 China's Commitment to Treaties and Formalised Legal Procedures

Under section 4.1.1, I will look at the fragmented treaty regime of the BRI and China's efforts to adjust it accordingly. In the following section 4.1.2, I shall analyse China's role in the reform process of ISDS. These are two decisive steps to improve investment protection based on binding third-party dispute settlement. However, neither is apt to provide legal protection for all investments in the specific environment of the BRI (see under section 4.1.3).

4.1.1 China's International Agreements on Investment Protection

As mentioned earlier, China's success in attracting foreign investment has been linked to its extensive network of bilateral and multilateral investment treaties (sections 2.2.2 and 2.2.3).[156] Ever since the policy of 'Reform and Opening' was introduced, investment treaties have been one legal pillar to support investment inflows; reform in domestic legislation is the second pillar.[157] China would have to conclude new or update old BITs with BRI countries if it wanted this first pillar to fully sustain its function within the BRI fully. China would need to address

[156] Gallagher and Shan (n 95) para. 1.54; Shen Wei, *Decoding Chinese Bilateral Investment Treaties* (Cambridge University Press 2021) 1.
[157] Gallagher and Shan (n 95) para. 1.98.

substantial and procedural concerns such as narrow dispute settlement clauses, and it would need to ensure the protection of investments by SOEs through BITs (4.1.1.1).[158] However, it looks like China is not so keen to improve investment protection within the BRI through a comprehensive update of its BIT network (4.1.1.2).

4.1.1.1 Fragmentation of the BRI's Treaty Regime

A challenge for investment protection lies in the BRI's fragmented legal structure. I have shortly summarised the different generations of Chinese BITs in chapter 2. Many of the BITs China has concluded with BRI countries only contain narrow dispute settlement clauses.[159] In those instances, they stem from a period of a Chinese emphasis on attracting FDI and thus do not consider China's interest in protecting its investors abroad.[160] Void of an overarching legal structure, every BRI investment project follows a different set of rules.

The BIT between China and Poland, for example, dates back to 1988 and offers legal remedy for investors only regarding the amount of compensation for expropriation.[161] Even the so-called 'second generation' BITs from approximately 1990 to 1997 do not uniformly contain an unconditional reference to ISDS.[162] A notable change can only be perceived in the so-called 'third generation' BITs. An example of this generation is the China-Iran BIT of 2000. It contains an arbitration clause without the limitation to the amount of compensation for expropriation.[163] More recent BITs have adopted various modalities on ISDS which cannot be

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[158] Ma and others (n 125) 5; Yuwen Li and Cheng Bian, 'China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options' (2020) 67 Netherlands International Law Review 503, 527–528; Lai and Lentner (n 11) 283; M Hodgson and A Bryan, 'Bumps in The Road: Identifying Gaps in China's Belt and Road Treaty Network' (2017) 14 Transnational Dispute Management 11; Donovan Ferguson, James McKenzie and Felicity Ng, 'A Practical Guide to Chinese Investor Protections along the Belt and Road' <https://www.kwm.com/en//knowledge/insights/a-practical-guide-to-chinese-investor-protections-along-the-belt-and-road-20180412> accessed 12 January 2022.

[159] See section 4.1.1.2.

[160] Chi and Wang (n 35) 873–874.

[161] Article 10 of the China-Poland BIT (1988) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/770/download> accessed 12 January 2022.

[162] Lai and Lentner (n 11) 260; see only the narrow clauses in Article 8 para. 3 in the China-Mongolia BIT (1991) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/760/download> accessed 12 January 2022 or Article 8 para. 2 of the China-Saudia Arabia BIT (1996) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3361/download> accessed 12 January 2022.

[163] For example, Article 12 of the China-Iran BIT (2000) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/744/download> accessed 12 January 2022; see chapter IX of the China-Pakistan FTA (2006) also contain more extensive ISDS clauses <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2738/download> accessed 12 January 2022.

regarded as a coherent 'fourth generation'. Arbitrators look at every BIT in its own political, economic, and temporal context and interpret it on a 'treaty by treaty basis'.[164] This diverse and partly outdated structure of BITs does not guarantee adequate investor protection.[165]

The case *Ping An v Belgium* (2015) gave further reasons to doubt that investment protection within the BRI can be guaranteed through BITs.[166] Ping An made its claims under substantive provisions of the China-Belgium BIT of 1986. The dispute settlement clause in the BIT of 1986 was limited to the amount of compensation for appropriation; however, China and Belgium had concluded a revised BIT (2009) which contained a wider dispute settlement clause. Ping An wanted to combine substantive provisions from the 1986 treaty with the wider dispute settlement clauses of the 2009 treaty, which the ICSID tribunal rejected. According to the tribunal, an investor cannot invoke a broader dispute settlement clause of possible future treaties unless the language of the new treaty explicitly includes disputes that have arisen before its conclusion. In its view, the treaty's wording did not allow Ping An to invoke the 2009 clause in connection with substantive claims from an earlier treaty.[167]

4.1.1.2 Adjustment of the BRI's Treaty Regime

China has, in fact, made efforts to adjust its treaties, but these efforts by far do not concern treaties with all BRI countries. Since 2013, China has concluded international agreements on investment, namely FTAs that contain investment protection clauses such as the RCEP (2020) with, inter alia, the states of the Association of Southeast Asian Nations (ASEAN), the FTA with Georgia (2017) or the FTA with the Republic of Korea (2015). Multilateral instruments such as the Energy Charta Treaty (ECT) are complementary tools.[168] However, China has not

[164] Lai and Lentner (n 11) 260; who refer to J Romesh Weeramantry, 'Investor–State Dispute Settlement Provisions in China's Investment Treaties' (2012) 27 ICSID Review - Foreign Investment Law Journal 192, 192–193; see also for a nuanced approach Sornarajah, 'Chinese Investment Treaties in the Belt and Road Initiative Area' (n 98) 78.

[165] Lai and Lentner (n 11) 282.

[166] *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v The Government of Belgium*, ICSID Case no. ARB/12/29.

[167] See for a summary of the tribunal's argumentation Claire Wilson, 'Protecting Chinese Investment Under the Investor–State Dispute Settlement Regime: A Review in Light of Ping An v Belgium', *China's International Investment Strategy* (Oxford University Press 2019) 473–474; with a critical comment to the tribunal's view Qing Ren, 'Ping An v Belgium 1: Temporal Jurisdiction of Successive BITs' (2016) 31 ICSID Review - Foreign Investment Law Journal 129, 132–137.

[168] Anatole Boute, 'Energy Dispute Resolution along the Belt and Road: Should China Accede to the Energy Charter Treaty?' in Wenhua Shan, Sheng Zhang and Jinyuan Su (eds), *China and International Dispute Resolution*

updated its BIT network substantially in recent years. Since 2013, China has only concluded one new BIT with Tanzania (2013) and renewed one BIT with Turkey (2015).[169] Other negotiations are ongoing but unlikely to materialise in new legal substance soon.

In December 2020, the EU and the PRC agreed on the general terms for an investment treaty,[170] but the European Parliament halted the ratification out of political scepticism.[171] In September 2021, China requested to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a trade agreement among, inter alia, Australia, Canada and BRI countries like Singapore and Vietnam. The CPTPP entails rules on investment protection.[172] A few days after the PRC's submission, Taiwan also applied to join this FTA, which added to the political tensions over the contested question of Taiwan's independence.[173] Many multilateral trade agreements such as CPTPP have a geo-political dimension which can pose challenges to the accession process.[174] Looking at this last point and at the lengthy domestic procedure for the ratification of international treaties in China,[175] it appears that China may simply not have been able to further adjust its international agreements to the BRI at such short notice.

At the same time, *Chaisse* and *Kirkwood* argue that the narrow ISDS clauses in the BRI's BIT structure could be mitigated through the current set of norms. They bring forward the argument that the Most-Favored-Nation clause (MFN) could open broader access to ISDS in the BRI's

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in the Context of the 'Belt and Road Initiative' (Cambridge University Press 2021) 204; Hodgson and Bryan (n 160) 10 et seq.

169 See for the full text China-Tanzania BIT (2013) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5488/download>;
China-Turkey BIT (2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6085/download> all cited websites accessed 12 January 2022.

170 EU-China Comprehensive Agreement on Investment (2020) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237> accessed 12 January 2022.

171 Members of the European Parliament refuse any agreement with China as a reaction to sanctions in place against certain European individuals and entities <https://www.europarl.europa.eu/news/en/press-room/20210517IPR04123/meps-refuse-any-agreement-with-china-whilst-sanctions-are-in-place> accessed 12 January 2022.

172 Bloomberg, 'China Formally Applies to Join Asian Trade Deal Trump Abandoned' *Bloomberg.com* (16 September 2021) <https://www.bloomberg.com/news/articles/2021-09-16/china-formally-applies-to-join-asian-trade-deal-u-s-abandoned> accessed 12 January 2022.

173 Reuters, 'Taiwan Applies to Join Pacific Trade Pact Week after China' *Reuters* (22 September 2021) <https://www.reuters.com/world/asia-pacific/taiwan-applies-join-pacific-trade-pact-cptpp-official-news-agency-2021-09-22/> accessed 12 January 2022.

174 Carla Freeman, 'How Will China's Bid to Join a Trans-Pacific Trade Pact Affect Regional Stability?' (*United States Institute of Peace*, 7 October 2021) <https://www.usip.org/publications/2021/10/how-will-chinas-bid-join-trans-pacific-trade-pact-affect-regional-stability> accessed 12 January 2022.

175 Gallagher and Shan (n 95) paras. 1.63 and 1.64; Yuwen Li and Cheng Bian 'China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options' (2020) 67 Netherlands International Law Review 503, 528.

fragmented BIT structure. Many BITs contain such a MFN clause according to which the parties owe each other the most favourable treatment among all the guarantees that one party has granted to other states. *Chaisse* and *Kirkwood* refer to the *Maffezini v Spain* case, in which the ICSID tribunal decided that the MFN could expand the scope of dispute settlement provisions.[176] If MFNs in Chinese BITs were interpreted as to also applying to procedural provisions – namely wider access to ISDS – a revision of BITs with narrow ISDS provisions could be obsolete. In that way, wider investor protection could be 'multilateralised to an invisible overarching BRI investment treaty'.[177]

What looks like a pragmatic solution turns out to be yet another factor of uncertainty. *Chaisse* and *Kirkwood* themselves concede that other tribunals have contested the arguments of the *Maffezini case*.[178] A lot also depends on the exact wording of the MFN that is not uniform in Chinese BITs. Given the controversy over such an application,[179] a convergence of investor-friendly rules on decisive procedural questions through MFN remains incalculable.

4.1.2 China as a Systematic Reformer of ISDS

Adjusting treaties is one move to improve investment protection; another is to reform the current dispute settlement regime. The rules and institutions of the current ISDS system are dispersed. Some 2,800 BITs exist today, of which many include ISDS clauses.[180] ISDS takes place on the base of different procedural rules and in various institutions. The most important institution to administer international investment cases is the ICSID.[181] The ICSID rules together with UNCITRAL rules have emerged as convergence points so that ISDS procedures share common features. However, according to present ICSID and UNCITRAL rules, the

[176] See *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7.

[177] Julien Chaisse and Jamieson Kirkwood, 'Chinese Puzzle: Anatomy of the (Invisble) Belt and Road Investment Treaty' (2020) 23 Journal of International Economic Law 245, 247–248.

[178] August Reinisch, 'Maffezini v Spain Case', *Max Planck Encyclopedia of Public International Law* (2007) para. 13; Chaisse and Kirkwood (n 179) 261–262.

[179] Different from the *Maffezini* case the tribunal in *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, para. 118 argued that since the MFN of the Italy-Jordan BIT did not include a provision to envisage 'all rights or all matters covered by the agreement' it did not apply to dispute settlement clauses; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, para. 223 ruled that dispute settlement should not be seen as envisaged by an MFN clause unless there was 'no doubt that the Contracting Parties intended to incorporate them'.

[180] See for the number <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 12 January 2022.

[181] See <https://icsid.worldbank.org/About/ICSID> accessed 12 January 2022, others are for instance the London Court of International Arbitration, the International Chamber of Commerce, the Hong Kong International Arbitration Centre.

arbitral tribunals decide autonomously and so far widely without a correcting authority. The launch of the BRI coincides with an environment of reform of the ISDS system.[182] The analysis of the ongoing reform process reveals that China actively participates in that process. It embraces the present system while also seizing the moment to shape its future.

4.1.2.1 The Origins of the Reform Debate

With an increasing caseload for investment tribunals in the 1990s and early 2000s, critical views on the ISDS system gained support.[183] There are multiple reasons for this criticism, including an alleged bias for investor interests, a lack of transparency of the process, and conflicts of interest among the arbitrators. There was also a growing awareness in civil societies of the profound consequences of ISDS awards. Political groups have since criticised that some investors' claims touched upon the states' sovereign 'right to regulate' sensitive matters.[184] Other points of criticism are the tremendous costs and the long duration of the procedures. A paradigmatic example from Germany is the ongoing public debate after the Swedish energy supplier Vattenfall sued the Federal Republic of Germany before two ICSID tribunals in 2009[185] for Hamburg's environmental regulations, and in 2012[186] for the accelerated nuclear phase-out after the Fukushima nuclear accident. The criticism against ISDS has also affected the negotiation process of FTAs such as the Transatlantic Trade and Investment Partnership (TTIP).[187]

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[182] See only Malcolm Langford, Michele Potestà, Gabrielle Kaufmann-Kohler and Daniel Behn, 'Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions – An Introduction', (2020) 21 Journal of World Investment & Trade 167–187.

[183] See for instance Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Publlic International Law through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521; José E Alvarez, *The Public International Law Regime Governing International Investment* (BRILL 2011) 75–93; Ming Du and Wei Shen, 'The Future of Investor-State Dispute Settlement: Exploring China's Changing Attitude' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 2500.

[184] According to the critics, ISDS does this indirectly as it has a 'chilling effect'.

[185] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*, ICSID Case No. ARB/09/6, concluded by the tribunal's award embodying the parties' settlement agreement <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/09/6> accessed 12 January 2022.

[186] *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12, concluded by Discontinuance Order of 9 November 2021. Germany and Vattenfall concluded a public-law agreement that contains, inter alia, a provision on the question of the bearing of costs for the nuclear phase-out <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/12> accessed 12 January 2022.

[187] See only Joseph Weiler, 'European Hypocrisy: TTIP and ISDS' (*EJIL: Talk!*, 21 January 2015) <https://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/> accessed 12 January 2022.

Different levels addressed these concerns. Already in 2006, the ICSID amended its Regulations and Rules. The amendment broadened the public access to documents and hearings of ICSID tribunals.[188] The UNCITRAL followed in 2013 with comparable 'Rules on Transparency in Treaty-based Investor-State Arbitration'.[189] In 2014, 23 states signed the UN Mauritius Convention, which increased transparency in ISDS procedures.[190] At the same time, some states reconsidered their international investment policy. Bolivia, Ecuador, and Venezuela withdrew from the ICSID Convention in 2007–2012 to 'emphatically reject the legal, media and diplomatic pressure of some multinationals that [...] resist the sovereign rulings of countries, making threats and initiating suits in international arbitration'.[191] Other states, such as the United States, revised their model-BIT to '[...] continue to provide strong investor protections and preserve the government's ability to regulate in the public interest'.[192] The EU altered its treaty practice by introducing new mechanisms. For example, in its Comprehensive Economic and Trade Agreement (CETA) with Canada and its BIT with Vietnam, the parties included provisions on the establishment of a permanent investment tribunal with an appellate body.[193]

A new amendment process of the ICSID Regulations and Rules began in October 2016. The amendment is aimed at making the process more time and cost-effective.[194]

At last, in 2017, the UNCITRAL Working Group III has three tasks to reform ISDS: identify and collect concerns regarding ISDS, consider whether reform is desirable to address these

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[188] See Meg Kinnear, 'ICSID and the Evolution of ISDS' in Jinyuan Su, Sheng Zhang and Wenhua Shan (eds), *China and International Dispute Resolution in the Context of the 'Belt and Road Initiative'* (Cambridge University Press 2021) 108–111.

[189] See for the full text <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf> accessed 12 January 2022.

[190] *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, 10 December 2014 <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&clang=_en> accessed 12 January 2022; so far only 9 states have ratified the Convention.

[191] Quotation by Evo Morales, then-president of Bolivia, taken from Damon Vis-Dunbar, Luke Eric Peterson and Fernando Cabrera Diaz, Investment Treaty News, 9 May 2007 referring to the Washington Post at <http://www.iisd.org/itn/wp-content/uploads/2010/10/itn_may9_2007.pdf>, <https://icsid.worldbank.org/news-and-events/news-releases/denunciation-icsid-convention> background knowledge and statistics see here <https://www.bilaterals.org/?icsid-and-latin-america-criticisms&lang=fr> all cited websites accessed 12 January 2022.

[192] United States Concludes Review of Model Bilateral Investment Treaty, Office of the United States Trade Representative, April 2012 <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2012/april/united-states-concludes-review-model-bilateral-inves> accessed 12 January 2022.

[193] See Chapter 8 Section F, Article 8.27 of EU-Canada, Comprehensive Economic and Trade Agreement (2014) <https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 12 January 2022; see Articles 3.38 and 3.39 of the EU-Vietnam Investment Agreement (2019) <https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157394.pdf> accessed 12 January 2022 that needs yet to be ratified.

[194] Kinnear (n 185) 111–112.

concerns, and, if reform is deemed desirable, develop proposed solutions.[195] The mandate of this ongoing process is broad but limited to procedural issues.[196] The Working Group III discussed several proposals to tackle the criticism mentioned above in its sessions.[197] The proposals include the establishment of an appellate mechanism, a multilateral investment court or a court with an appellate mechanism. They also include drafting a code of conduct for arbitrators, regulating third-party funding and questions of increased state control of treaty interpretation, and alternative dispute resolution methods.[198] Many of the ideas are not new, and the reform discussion takes not only place within the UNCITRAL. The ICSID also gathered proposals to amend its rules that partly overlap with those of the UNCITRAL Working Group III.[199]

4.1.2.2 The Background for the Chinese Position in the Reform Process

As mentioned before, Chinese interests in ISDS procedures tend to grow ever since its outbound FDI increased by high numbers. Even with new BITs that widen the jurisdiction of arbitral tribunals, issues would persist regarding their diverging interpretations of similar BIT clauses. This criticism of inconsistency, incoherence, and unpredictability in arbitral proceedings plays a significant role in China's current engagement in reforming the ISDS system.[200] I will use two examples to demonstrate how this came to be. The examples touch upon the thorny issues I mentioned earlier, namely the standing of SOEs in ISDS and the scope of narrow ISDS clauses in China's first generations' BITs.

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[195] See <https://digitallibrary.un.org/record/1305987#record-files-collapse-header> accessed 12 January 2022.

[196] There was even only fragile consensus on a reform of procedural rules. The state community could not agree on common substantive issues that could have been included in the Working Group. Giorgetti and others observe, however, that 'some proposed procedural reforms will perforce have substantive implications' Chiara Giorgetti and others, 'Reforming International Investment Arbitration: An Introduction' (2019) 18 The Law and Practice of International Courts and Tribunals 303, 306.

[197] For a summary of the different reform proposals see UNCTAD, 'Reform Package for the International Investment Regime' (2018) 47–59 <https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition-> accessed 12 January 2022.

[198] For an overview see Giorgetti and others (n 198) 308 and; Julian Arato, Chester Brown and Federico Ortino, 'Parsing and Managing Inconsistency in Investor-State Dispute Settlement' (2020) 21 The Journal of World Investment & Trade 336, 370.

[199] See ICSID, Proposals of Amendment of the ICSID Rules <https://icsid.worldbank.org/sites/default/files/publications/WP%205-Volume1-ENG-FINAL.pdf> accessed 12 January 2022 1; Kinnear (n 185) 112.

[200] See UNCITRAL Working Group III <https://undocs.org/en/A/CN.9/WG.III/WP.149> accessed 12 January 2022.

4.1.2.2.1 Standing of SOEs in ISDS

SOEs play a substantial role in the BRI's implementation. The debate on whether SOEs enjoy standing in ISDS procedures has so far not reached a consensus.[201] Rarely any of China's BITs addresses this question explicitly.[202] SOEs are not a new issue in international investment law. Nonetheless, the BRI contributes to a trend of increased SOE investment and puts the question to what extent international investment treaties should regulate their activities into the limelight.[203] The standing of SOEs in ISDS procedures is uncertain because SOEs often pursue strategical and not only commercial objectives (section 3.1). Art. 25 paragraph 1 of the ICSID Convention determines that '[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State [...]'. If the state is the owner of an enterprise that legally has a private law form, it is questionable whether it should be considered a 'national' or not rather as a 'Contracting State'. Attributing the activities of SOEs to the state of China would mean that SOEs would have no possibility to assert their rights in international investment arbitration tribunals. This attribution argument has been raised against Chinese SOEs in two cases before arbitral tribunals.

In *China Heilongjiang International Economic & Technical Cooperative Corp and Others v Mongolia*, the tribunal found that 'the fact that the Chinese State directly or indirectly owns [the SOEs] has no relevance for their qualification as investors' under the China-Mongolia BIT (1991).[204] In the case of *Beijing Urban Construction Group Co., Ltd. v Yemen*, the tribunal referred to Article 5 of the International Law Commission's Draft Articles on State

[201] Xinquan Tu, Na Sun and Zhen Dai, 'Issues on SOEs in BITs: The (Complex) Case of the Sino–US BIT Negotiations' in Julien Chaisse (ed), *China's International Investment Strategy* (Oxford University Press 2019) 195; Chaisse and Matsushita (n 131) 173; Claudia Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties' (2011) 10 Chinese Journal of International Law 531, 533–537; Julien Chaisse and Dini Sejko, 'Investor-State Arbitration Distorted' in Leïla Choukroune (ed), *Judging the State in International Trade and Investment Law: Sovereignty Modern, the Law and the Economics* (Springer 2016) 81 who see a gradual adjustment to the emergence of SOEs in the investment sphere.

[202] Norah Gallagher, 'Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy' (2016) 31 ICSID Review - Foreign Investment Law Journal 88, 99.

[203] Lu Wang and Norah Gallagher, 'Introduction to the Special Focus Issue on State-Owned Enterprises' (2016) 31 ICSID Review - Foreign Investment Law Journal 1, 1.

[204] *China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong, International Industrial Co. Ltd. v Mongolia*, Award, PCA Case No. 2010-20, para. 417.

Responsibility and decided similarly.[205] In *Tulip Real Estate and Development Netherlands B.V. v Turkey* (2014), the tribunal found 'that there is no basis under international law to conclude that ownership of a corporate entity by the State triggers the presumption of statehood. [...] [W]hilst state ownership may, in certain circumstances, be a factor relevant to the question of attribution, it does not convert a separate corporate entity into an "organ" of the State.'[206]

The fact that tribunals have not considered the activities of Chinese SOEs to be directly attributable to the state does not resolve all doubts for future cases. It remains possible that future tribunals will qualify investors from China as state agents or find that they perform state functions.[207] Given the importance of SOEs in BRI investments, a reliance on the case-to-case logic of arbitral tribunals with only minimal error-correction mechanisms hampers investment protection in many instances.

That is why recent investment treaties negotiated by China include a definition of 'investor' that applies explicitly to SOEs. Article 1 para. 2 of the China-Uzbekistan BIT (2011) is one example.[208] Article 1 para. 2 of the China-Tanzania BIT (2013) defines an investor as 'a national or an enterprise of one Contracting Party who is investing or has invested in the territory of the other Contracting Party'. For an enterprise it is 'irrespective of whether it is owned or controlled by a private person or the government'.[209] The ASEAN-China FTA (2009) defines a juridical person of a Party as 'any legal entity duly constituted or otherwise organised under the applicable law of a Party, whether for profit or otherwise, and whether privately-owned or governmentally-owned'.[210] There is also consensus that SOEs can file claims under the ECT, but this does not set a precedent for other arbitration rules such as the one of the

[205] *Beijing Urban Construction Group Co., Ltd. v Republic of Yemen*, Decision on Jurisdiction, ICSID Case No. ARB/14/30, paras. 31-41 applying also the Broches test according to which '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'.

[206] *Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey*, ICSID Case No. ARB/11/28, para. 289.

[207] Anran Zhang, 'Letter to the Journal The Standing of Chinese State-Owned Enterprises in Investor-State Arbitration: The First Two Cases' (2018) 17 Chinese Journal of International Law 1147, 1153; Lu Wang and Norah Gallagher 'Introduction to the Special Focus Issue on State-Owned Enterprises' (2016) 31 ICSID Review - Foreign Investment Law Journal 1, 2.

[208] See for the full text <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3357/download> accessed 12 January 2022.

[209] See for the full text <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5488/download> accessed 12 January 2022.

[210] See Article 1 (f) ASEAN-China FTA <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2596/download> accessed 12 January 2022.

ICSID.[211] Furthermore, this reflects China's motive for promoting a second instance with higher authority in arbitration procedures which could mitigate the imponderability of SOEs' standing in ISDS.

4.1.2.2.2 Scope of Narrow ISDS Clauses in China's Early BITs

The Chinese conviction about the necessity of a revision mechanism in ISDS also goes back to another experience in ISDS case law with Chinese involvement. In particular, there has been one contradiction between different tribunals on the scope of narrow ISDS clauses in China's first generations' BITs which added to China's discomfort with the present one-tier system.[212] As mentioned before, Chinese BITs of the first generations limit ISDS tribunals' jurisdiction to disputes regarding the quantum of compensation in the event of expropriation. Many of them contain clauses that grant jurisdiction to disputes 'involving the amount of compensation for expropriation'.[213]

Different ISDS tribunals and the Court of Appeal of Singapore read these words broadly, meaning that the word 'involving' does not limit the jurisdiction to the amount for expropriation but leaves an interpretative margin to include also the question of liability for the expropriation.[214]

On the contrary, the PCA tribunal in *China Heilongjiang International Economic & Technical Cooperative Corp. and Others v Mongolia* denied its jurisdiction in a comparable case. It

[211] Gallagher (n 204) 99–100.

[212] Du and Shen (n 185) 2494–2497; on this nexus between China's position in the Working Group III and its experience in ISDS Li and Bian (n 177) 527.

[213] See for instance Article 8 of the China-Peru BIT (1994) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/767/download>; Article 9 of China-Egypt BIT (1994) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/730/download>; Article 9 of China-Uruguay BIT (1993) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/794/download> or Article 9 of Azerbaijan-China BIT (1994) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5092/download> all cited websites accessed 12 January 2022.

[214] *Tza Yap Shum v Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, available only in Spanish <https://www.italaw.com/sites/default/files/case-documents/ita0881.pdf> paras. 150-161; *Sanum Investments Limited v Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, Decision on Jurisdiction <https://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf>, paras. 329-342; Court of Appeal of the Republic of Singapore, SGCA 57, Civil Appeals No. 139 and 167 of 2015, <https://www.italaw.com/sites/default/files/case-documents/italaw7600.pdf>, paras. 126-151; *Beijing Urban Construction Group Co., Ltd. v Republic of Yemen*, Decision on Jurisdiction, ICSID Case No. ARB/14/30, 31 May 2017 <https://www.italaw.com/cases/5904> paras. 54-109, all cited websites accessed 12 January 2022.

referred to a narrow understanding to this type of ISDS clause.[215] Given that in this example most tribunals decided in China's favour, an appeal mechanism could provide for more legal clarity as well as consistency and could be another tool to support Chinese interests.

4.1.2.3 The Chinese Reform Efforts

Keeping these two examples in mind, I shall now look at China's reform efforts in ISDS. This section will underline the general tendency that China embraces the present system. At the same time, it contains such reform efforts, which are likely to overly reduce China's space for finding alternative ways of dispute resolution. To make my point, I will limit myself to two aspects of particular interest, namely the introduction of an appellate body and the institutional side of ISDS. While the first aspect is part of the multilateral debate within the UNCITRAL Working Group III, the second is a move China develops mainly outside of multilateral consultations.

4.1.2.3.1 The UNCITRAL Working Group III and the Debate on an Appellate Mechanism

The majority of China's BITs subject investment disputes at least partly to the regulatory regime of the ISDS procedures of ICSID or UNCITRAL rules.[216] China, therefore, has a vested interest in playing a role in the reform efforts of the ISDS system. In its submissions to the UNCITRAL Working Group III (see already section 4.1.2.1), China identifies the lack of an error-correcting mechanism and the lack of stability and predictability as two of the main challenges to the current system of international investment arbitration.[217]

By tendency, China belongs to the group of states that *Roberts* classified as 'systemic reformers' of the ISDS system. These are states that 'see merit in retaining investors' ability to

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[215] *Heilongjiang International Economic & Technical Cooperative Corp., Beijing, Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong, International Industrial Co. Ltd. v Mongolia*, Award, PCA Case No. 2010-20 < https://www.italaw.com/cases/279> accessed 12 January 2022, paras. 439-454.

[216] Yuwei Liu, 'selecting an Investor-State Arbitration Mechanism for Disputes Arising under China's Belt and Road Initiative Projects Comments' (2020) 34 Emory International Law Review 639, 639.

[217] This is consistent with submissions of other states, see, for instance, Submission to the UNCITRAL Working Group III of Morocco on appellate mechanism <https://undocs.org/en/A/CN.9/WG.III/WP.195>, 3 or Submission to the UNCITRAL Working Group III of Russia on the appointment of arbitrators <https://undocs.org/en/A/CN.9/WG.III/WP.188> 3, all cited websites accessed 12 January 2022.

file claims directly on the international level but view investor-state arbitration as a seriously flawed system for dealing with such claims'.[218] This characteristic differentiates the Chinese view from the so-called 'paradigm shifters', which opt for fundamental reform of international investment law like South Africa. Paradigm shifters question the very purpose of the international investment regime. They demand that the system should aim towards other goals than pure economic growth and see, for instance, sustainable development as its primary objective.

Additionally, in the view of South Africa, '[a]ny discussion on ISDS has to be located in a wider context and reform dialogue – to include reform of the terms of the underlying treaties, because reforming ISDS is in itself not sufficient to solve the current problems the regime faces'.[219] South Africa proposes a broader agenda that includes also reforming substantive standards.[220] Brazil, another 'paradigm shifter', proposes 'an alternative system based on dispute prevention', as according to their consultations with Brazilian multinational companies, 'investors were more interested in the improvement of the institutional framework for investment with foreign governments than in after-the-fact remedies that would provoke long and expensive litigation'.[221]

China has got a different take because of its reassuring experience with the international order in the last decades. It is highly integrated into the global market and has no interest in turning the system upside down.[222] This Chinese position finds an implicit basis in China's UNCITRAL Working Group III submission. It does not mention issues typical for paradigm shifters, namely pro-investor bias, the limitation of a state's regulatory autonomy and chilling effects on a host state's social regulations.[223] Therefore, China does not 'push for retrenchment, abstention from further participation, and reversion to the old BIT model'[224] but opts for a

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[218] Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 American Journal of International Law 410, 410.

[219] Submission to the UNCITRAL Working Group III of South Africa <https://undocs.org/en/A/CN.9/WG.III/WP.176> accessed 12 January 2022, paras. 14; 18-19.

[220] Anthea Roberts and St John Taylor, 'UNCITRAL and ISDS Reforms: Agenda-Widening and Paradigm-Shifting' (*EJIL: Talk!*, 20 September 2019) <https://www.ejiltalk.org/uncitral-and-isds-reforms-agenda-widening-and-paradigm-shifting/> all cited websites accessed 12 January 2022.

[221] Submission to the UNCITRAL Working Group III of Brazil <https://undocs.org/en/A/CN.9/WG.III/WP.171> accessed 12 January 2022, para. 2.

[222] Yunling Zhang, 'How China Ends West's Domination' (*The Diplomat*) <https://thediplomat.com/2012/01/how-china-ends-wests-domination/> accessed 12 January 2022.

[223] Du and Shen (n 185) 2504.

[224] Thomas Stephan Eder, *China and International Adjudication: Caution, Identity Shifts, and the Ambition to Lead* (Nomos 2021) 450.

reform based on the current structures. Chinese scholarly writing suggests that an active role could foster the Chinese influence on ISDS and shape its future.[225]

One can observe this effort also in other fields of Chinese international policy initiatives. t the eighth Leaders' Summit of the Group of 20, held in Saint Petersburg in 2013, President *Xi* called for 'exploring ways to improve global investment norms and guide the rational flow of global development capital'[226]. The intent of streamlining international investment policy remains high on China's agenda. Under the Chinese presidency of the G 20, the leaders of the twenty biggest global economies agreed on 'Guiding Principles for Global Investment Policymaking'.[227] China worked closely with international organisations and other stakeholders that praised 'China's dynamic leadership'[228] in the G 20's newly established Trade & Investment Working Group.

As mentioned before, one of the main proposals in the reform process is establishing a new international institution to deal with appeals in investment disputes. This proposal mainly aims at inconsistencies between different arbitral tribunals in their interpretation of arbitral awards. While some go as far as to consider the establishment of a permanent multilateral investment court,[229] others like China only opt for the creation of an appeal mechanism.
The proposal of an appeal mechanism is not new. Around 25 international investment agreements worldwide already contain provisions regarding an appeal instance in ISDS.[230] Among those is the Australia-China FTA of 2015, which in its Article 9.23 stipulates: 'Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered [...] in arbitrations commenced after any such appellate mechanism is established. Any such

[225] ibid.
[226] See for this quotation Submission to the UNCITRAL Working Group III of China <https://undocs.org/en/A/CN.9/WG.III/WP.177> accessed 12 January 2022, 2.
[227] Group of 20, Guiding Principles for Global Investment Policymaking <https://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf> accessed 12 January 2022.
[228] Ana Novik, 'G20 Serves an Appetiser to a Potential Investment Policy Feast' (*OECD Insights Blog*, 13 July 2016) <http://oecdinsights.org/2016/07/13/g20-serves-an-appetiser-to-a-potential-investment-policy-feast/> accessed 12 January 2022.
[229] See the Submission to the UNCITRAL Working Group III of the European Union, 12 December 2017, <https://undocs.org/en/A/CN.9/WG.III/WP.159> accessed 12 January 2022, para. 9; further European Union Parliament Brief of 28 January 2020 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf> accessed 12 January 2022.
[230] Li and Bian (n 177) 530–531.

appellate mechanism would hear appeals on questions of law.'[231] The wording of China's UNCITRAL submission portrays an appellate body as a 'means to enhance the legitimacy of ISDS' and as a promoter of the 'application of the rule of law to the settlement of disputes between investors and States'.[232] This hope ostensibly stems from China's experience in the WTO dispute settlement:[233] 'The practical experience of the World Trade Organization dispute settlement mechanism reflects the relatively high efficiency of its appeal mechanism as well as its moderate operating costs.'[234]

However, coming back to *Roberts'* classification, China is not a pure 'systematic reformer'. Unlike the EU that could rather fall into this category, China does not seek a conformist international system. At first glimpse, the EU's, and China's submissions to the UNCITRAL Working Group III follow similar argumentations about the public international law nature of international investment law and permanent bodies. In spite of that, do they arrive at different conclusions. The EU finds that ISDS is best regulated by a multilateral investment court. By By referring to, inter alia, the European Court of Human Rights, the Inter-American Commission on Human Rights or the WTO, the EU places a prospective international investment court in a row with progressive institutions of global juridification and constitutionalisation.[235]

China, too, underlines the importance of a multilateral approach since 'many problems tend not to lend themselves to resolution through bilateral investment agreements between the member states.'[236] On the other hand, China rejects an overarching system built on the premise of a form of international constitutionalism.[237] A multilateral investment court would render the flexible approach of China's investment strategy within the BRI difficult. Therefore, China, like other states, such as Russia, insists on the right of the parties to appoint arbitrators.[238]

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[231] See for the full text <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3453/download> accessed 12 January 2022.

[232] Submission of China (no 226) 4; see for a comparison with other submissions <https://undocs.org/A/CN.9/WG.III/WP.185> accessed 12 January 2022, para. 8.

[233] Gallagher (n 204) 95.

[234] Submission of China (no 226) 4.

[235] Submission of the European Union (no 229) para. 9.

[236] Submission of China (no 226) 4; see for a comparison with other submissions <https://undocs.org/A/CN.9/WG.III/WP.185> accessed 12 January 2022, para. 45.

[237] Shen Wei, *Decoding Chinese Bilateral Investment Treaties* (Cambridge University Press 2021) 332; see on the debate of constitutionalism in international investment law Alvarez (n 185) 448 et seq.

[238] This is one aspect for scepticism towards permanent mechanisms in Chinese scholarship see Eder (n 226) 457; see the Submission of Russia (no 217) 4; also in WTO the parties have (limited) selection rights

China favours compulsory pre-arbitration consultations[239] and supports the extension of alternative dispute resolution methods. It considers that they offer a high degree of flexibility as well as autonomy to the disputing parties and thus safeguard harmony between the parties.[240] The tendency to extend alternative dispute resolution methods should not hastily be labelled as a Chinese peculiarity to avoid confrontational methods of dispute resolution, for instance as a feature of China's Confucian legal tradition.[241] As a recent ICSID study showed, many states have included mediation clauses in their investment treaties.[242] During the last decade, there was a notable increase in mediation as a means of dispute resolution.[243] Nevertheless, the fact that China is advocating the establishment of a more effective investment conciliation mechanism in the UNCITRAL Working Group III[244] is consistent with the legal approach of the BRI, which leaves room to shape bilateral relations flexibly and autonomously.[245]

4.1.2.3.2 New Chinese ISDS institutions

Next to these procedural technicalities, the second aspect of China's involvement in reforming the ISDS system concerns the institutional level outside of the UNCITRAL process. As seen in chapter 3, institutions play a vital role in implementing the BRI. Prominent among those is the Asian Infrastructure Investment Bank, but China also lays the foundations for new institutions that deal with investment disputes while it also makes efforts to play a more prominent role in long-established institutions like the ICSID. The latter can be seen in facilities cooperation agreements between the ICSID and Chinese institutions like the Economic and Trade Arbitration Commission (CIETAC), the Hong Kong International Arbitration Centre (HKIAC) or the Shenzhen Court of International Arbitration (SCIA), which enables the ICSID

<https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p2_e.htm> accessed 12 January 2022.

239 See for a comparison with other submissions <https://undocs.org/en/A/CN.9/WG.III/WP.190> accessed 12 January 2022, para. 7.

240 Submission of China (no 226) 5; see for a comparison with other submissions <https://undocs.org/en/A/CN.9/WG.III/WP.190> accessed 12 January 2022, para. 38.

241 In that sense, however, Du and Shen (n 185) 2506.

242 ICSID, 'Overview of Investment Treaty Clauses on Mediation' (2021) 1–2 <https://icsid.worldbank.org/resources/publications/overview-investment-treaty-clauses-mediation> accessed 12 January 2022.

243 ibid 2.

244 Submission of China (no 226) 5.

245 See also this report on the UNCITRAL Working Group III inter-sessional meeting on ISDS reform with the theme of the use of mediation in ISDS in November 2021, co-organised by the PRC and the UNCITRAL <https://uncitral.un.org/sites/uncitral.un.org/files/wg_iii_intersessional_report_mediation_rev.pdf> accessed 12 January 2022.

to offer hearings in China and the Chinese institutions to use resources of ICSID.[246] Another example for the latter are the comments of the China Council for the Promotion of International Trade (CCPIT) in the ongoing amendment process of ICSID's procedural rules. The CCPIT is China's national foreign trade and investment promotion agency. It proposed the extension of the ICSID's official languages to all official UN languages, including Chinese.[247] According to Regulation 34 of ICSID's Administrative and Financial Regulations, only English, French, and Spanish are the official procedural languages. Strengthening the Chinese language in ISDS is also one key motivation for establishing new Chinese institutions.

In the last five years, three Chinese institutions have notably revised their arbitration rules to extend their jurisdiction to investor-state disputes. The first was the SCIA in 2016, followed by CIETAC in 2017 and the Beijing Arbitration Commission (BAC) in 2019. No publicly available ISDS procedure has taken place in these venues, but their influence is likely to grow in the future.[248] Even though some of these Chinese institutions are experienced in commercial arbitration, their challenge is the competition by long-time ISDS practice in institutions like the ICSID.[249] Additionally, none of the Chinese BITs refers investment disputes to CIETAC, BAC, or SCIA but limits the ISDS mechanism to well-established institutions or procedural rules like those under ICSID or UNCITRAL. Only according to Article 12 of the China-Uzbekistan BIT (2011), 'the disputing investor [...] may, by his choice, submit the claim to [the ICSID, ... or] *any other arbitration institutions or ad-hoc arbitral tribunals* agreed by the disputing parties'.[250] CIETAC's, SCIA's, or BAC's future role will ultimately depend on the international support for China's institutions. However, China relies on their competence. The institutions mentioned above have participated in ISDS-related processes, including the BIT

[246] Kinnear (n 185) 108.

[247] The main arguments are the ICSID's strong connection to the UN and China's desire to enable all of its lawyers to learn more about international investment law, see Compendium of Member State and Public Comments on Working Paper # 1 of 3 August 2018 <https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf> accessed 12 January 2022, 72.

[248] Sceptical of the impartiality and high-level adjudicative quality of the institutions Li and Bian (n 177) 528–529; more optimistic that Chinese investors might choose CIETAC to resolve investment disputes connected to BRI projects Yuwei Liu 'selecting an Investor-State Arbitration Mechanism for Disputes Arising under China's Belt and Road Initiative Projects Comments' (2020) 34 Emory International Law Review 639 639.

[249] Manjiao Chi, 'The ISDS Adventure of Chinese Arbitration Institutions: Towards a Dead End or a Bright Future?' (2021) Asia Pacific Law Review 1, 6.

[250] Emphasis added, China-Uzbekistan BIT (2011) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3357/download> accessed 12 January 2022.

negotiations between China and the US and between China and the EU. Recently CIETAC and the BAC have obtained the observer status in the UNCITRAL Working Group III.[251]

4.1.3 'Chinese Exceptionalism' – the BRI's Element of Risk

China's adjusted treaty practice and its systematic reform efforts have shown a substantial Chinese engagement oriented towards investment protection through legal methods of ISDS. Nonetheless, these steps are incomplete in view of an essential aspect of China's investments in many BRI countries. The following considerations show that China's reform efforts towards treaties and formal dispute resolution do not satisfy investment protection needs along the BRI. These findings will then lead to section 4.2, where I shall analyse the alternative tools China has at hand to secure investments.

BRI investments are often characterised as containing an 'element of high risk'.[252] The BRI addresses especially low- and least-developed countries, a circumstance that affects the security of invested assets (see already section 3.1). Even considering only the 65 'original' BRI states, their jurisdictions are diverse in terms of their legal traditions and their degrees of legal sophistication.[253] The latter undoubtedly is tricky to measure. One tool is the rule of law index by the *World Justice Project*. It quantifies the score of a country according to specific criteria. Given the contention of the notion of the rule of law,[254] the numbers should be considered with caution.[255] However, the World Justice Project score evaluates criteria such as

[251] Manjiao Chi 'The ISDS Adventure of Chinese Arbitration Institutions: Towards a Dead End or a Bright Future?' (2021) Asia Pacific Law Review 1, 2–3.

[252] Crawford (n 8) 13; Tower names civil or ethnic intra-state conflicts, territorial disputes and geo-political conflicts Jason G Tower, 'Conflict Dynamics and the Belt and Road Initiativ - Ignoring Conflict on the "Road to Peace"' (Brot für die Welt 2020) Study Analysis 97 26 <https://www.brot-fuer-die-welt.de/fileadmin/mediapool/blogs/Kruckow_Caroline/Analyse97-en-v08-Web.pdf> accessed 12 January 2022; this issue is also raised in several official Chinese documents such as Government of Pakistan and People's Republic of China, *National Development & Reform Commission, Long Term Plan China-Pakistan Economic Corridor (2017-2030)* <http://cpec.gov.pk/brain/public/uploads/documents/CPEC-LTP.pdf> accessed 12 January 2022, 7; see in the context of the current COVID-19 pandemic the statement of the high official of China's foreign ministry Wang Xiaolong: 'About 20 percent of the projects have been seriously affected.' <https://www.aljazeera.com/economy/2020/6/19/how-coronavirus-has-affected-chinas-belt-and-road-plans> accessed 12 January 2022; see also China's position on the Kazakhstan unrest <https://eurasianet.org/what-does-china-make-of-the-kazakhstan-unrest> accessed 12 January 2022.

[253] Tao and Zhong (n 106) 308 who refer to the fact that a majority are civil law countries, some others are common law countries, a small number of countries are influenced by the Islamic legal tradition and the rest are mixed or hybrid law countries.

[254] See further below in section 5.1.

[255] The WJP itself is aware of this World Justice Project, 'Rule of Law Index 2020' 9 <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020> accessed 12 January 2022.

'order and security' and 'regulatory enforcement' that give hints regarding the enforceability of awards by ISDS tribunals in these countries.[256] Several BRI countries occupy low rankings in the index, for instance, Afghanistan (No. 122), Myanmar (No. 114) and Pakistan (No. 120).[257] International investment rules at their current status cannot provide a complete remedy. Even if BITs between China and these states may exist, the political situation in many BRI countries puts the effectiveness of arbitral awards in question.

China's status as a member state of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) does not remedy the situation. According to the New York Convention, any foreign award rendered in another member state is enforceable under the provisions of the Convention and the relevant national law.[258] However, apart from the remaining issue of political instability, China's commitment to the New York Convention is also limited. It has ratified the Convention only under the reservation that it 'will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the PRC'.[259] Other BRI countries such as Indonesia or Iran have ratified the convention under similar reservations.
The ICSID Convention also contains provisions on the enforcement of arbitral awards, but ICSID procedures are not the only arbitration category, especially under the so-called 'second generation' BITs. While the ICSID Convention offers enforcement procedures with clear obligations (see chapter IV, section 6 of the Convention), other mechanisms fall short on this aspect. Overall, enforcement of arbitral awards cannot be guaranteed in all BRI countries.

Despite elements of high risk, BRI investments continue. The tendency of a seeming lack of risk aversion in Chinese investments has been dubbed 'Chinese exceptionalism'. According to this, Chinese firms do not avoid disruptive factors such as weak institutions and ineffective legal enforcement mechanisms because Chinese policy banks provide loan-financed investments that compensate for investment costs.[260] While this claim is debatable,[261] indeed,

[256] ibid 10.
[257] ibid 6–7; arguing similarly Li and Bian (n 177) 525–526.
[258] Tao and Zhong (n 106) 310.
[259] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958 <https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf> accessed 12 January 2022.
[260] Canfei He, Xiuzhen Xie and Shengjun Zhu, 'Going Global: Understanding China's Outward Foreign Direct Investment from Motivational and Institutional Perspectives' (2015) 27 Post-Communist Economies 448, 468.
[261] See this sociological study by Camba who argues major Chinese firms tended to invest in countries whose leaders they perceive as strong. Camba found through interviews with Chinese decision-makers that their perception of a host country leader's strength arises from a range of subjective and relational factors. Thus, the

wider dispute settlement clauses in China's investment treaties and more predictable ISDS awards seem not to overcome the fact that there are weak institutional and legal structures in many BRI countries.

From the BRI's point of view, all these aspects make it plausible that China's wish to rely on investment treaties and its engagement in developing the future ISDS system is limited. A too strong commitment to treaties and formalised investor legal procedures of investment protection could undermine the BRI's political and regulatory flexibility.[262] In addition to that, a lesson learnt from chapter 2 is that China's investment protection policy is oriented towards its status as an investment importer and/or exporter. China is the country with the highest FDI outflows nowadays, but it should not be forgotten that China also continues to be the country with the second-highest FDI inflows.[263]

4.2 China's Commitment to Flexible Politicised Procedures to Protect Investments

This section shows how China closes the investment protection gap on a bilateral level based on soft law. I will first analyse the function of soft law within the BRI abstractly (sections 4.2.1 to 4.2.3) and then illustrate my point concretely through two short case studies (section 4.2.4). The inclusion of ISDS provisions in BITs and the growing importance of ISDS depoliticised investment disputes as concession treaties between investor and host-state became unnecessary.[264] Although China is not reluctant to safeguard its investment flows through hard law rules, it follows an ambiguous path in the legal conception of the BRI. This path leads to an increased potential of politicisation in investment protection. As I will conclude further below, this orientation to legal and political means is not inconsistent as China follows a realist approach to international law.

path taken by Chinese firms ccould not be fully explained by 'objective' measurable indicators such as policy bank financing or natural endowments. Alvin Camba, 'How Chinese Firms Approach Investment Risk: Strong Leaders, Cancellation, and Pushback' (2021) Review of International Political Economy 3–4.

[262] Wei (n 239) 11 and 332; to this characteristic of binding constraints on the state Alvarez (n 185) 450–452.

[263] UNCTAD, *World Investment Report 2021* (United Nations 2021) <https://unctad.org/webflyer/world-investment-report-2021> accessed 12 January 2022, 534.

[264] Gallagher and Shan (n 95) para. 8.02.

4.2.1 What is Soft Law?

The normative nature and definition of soft law have been debated for a long time. *Lord McNair* first used the term to describe 'instruments with extra-legal binding effect'.[265] The international literature defines it, for instance, as 'any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behaviour'[266]. This broad definition indicates that according to different features, a variety of texts can be considered soft law without a uniform answer to the legal and practical consequences these texts may have.[267] Soft law can be differentiated from hard law insofar as soft law does not qualify as a source of international law according to Article 38 (1) of the ICJ Statute. Nevertheless, it can produce significant legal effects.[268]

Chapter 3 has already provided insights into soft law's role within the BRI's legal architecture. 'BRI soft law' aims at coordination rather than developing concrete rules.[269] In the initial stage of a BRI project, China intensifies its ties with a host country mostly on a bi- or plurilateral level by concluding 'primary agreements'[270]. While the language of these texts may vary as to the degree of the commitment,[271] what seems more important than the legal status of these documents are the political implications and considerations which can influence a state's behaviour.[272] The BRI's primary agreements constitute soft law because they include declarations of intent or the affirmation of promises and principles that amount to an understanding among the involved parties of expected behaviour. Such an understanding

[265] Daniel Thürer, 'Soft Law', *Max Planck Encyclopedia of Public International Law* (2009) para. 5; referring to Arnold Duncan McNair, *The Law of Treaties* (Clarendon Press 1961); others deny the paternity of Lord McNair e.g., Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 European Journal of International Law 1075, 1081.

[266] Wang (n 135) 41.

[267] Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 The American Journal of International Law 581, 582 warns of the inconsistencies of this notion and dismisses the term soft law altogether. His demarcation is oriented towards the dichotomy between contracts (binding rules) and pledges (non-binding rules).

[268] Thürer (n 265) para. 37.

[269] Wang (n 128) 292.

[270] ibid.

[271] Paragraph IV of China-Italy Memorandum of Understanding (2017) <https://www.governo.it/sites/governo.it/files/Memorandum_Italia-Cina_EN.pdf> accessed 12 January clarifies that it 'does not constitute an international agreement which may lead to rights and obligations under international law' and 'is to be understood and performed as a legal or financial obligation or commitment of the parties'; Wang (n 128) 290 points out, however, that a small number of primary agreements develop new plurilateral mechanisms that reflect a higher degree of obligation.

[272] The fact that law is not the only effort to influence states' conduct may seem obvious, yet any legal analysis must take this into account Raustiala (n 269) 590.

happens by agreeing on enhanced policy coordination in a general manner, by emphasising specific issues (e.g. currency) or providing guidance on how to settle disputes (e.g. mediation recognition of civil judgments).[273]

4.2.2 The Different Forms of Soft Law Within the BRI

Soft law within the BRI can take on several different forms. They include joint statements, memoranda of arrangements, declarations, letters of intent, protocols and other agreements and documents.[274] Through those, China engages with different parties such as governments, local and federal levels, international organisations, and private actors. Soft law instruments cover a variety of subject matters ranging from joint transportation infrastructure development, joint set-up of industrial parks or the collaboration in regional initiatives for trade and investment promotion.[275]

Furthermore, not only the Chinese state creates soft law with other actors. Chinese institutions also use soft law norms. One example is the Export-Import Bank of China (EximBank) that issued a 'White Paper on Green Finance and Social Responsibility' in 2019.[276] Another example are the Asian Infrastructure Investment Bank's policies that it has adopted since its foundation in 2015. These policies include, for instance, the 'Environmental and Social Framework' with, inter alia, a 'project-level Grievance Redress Mechanism' and 'Environmental and Social Standards'.[277] The soft law rules constitute another tool for regulating governance and settling disputes involving Chinese SOEs.[278] A further aspect of little interest to this dissertation but major importance for the global economy is that China's immense activities abroad enable it to establish 'global defaults', for instance ultra-high voltage standards in power grids.[279]

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[273] Wang (n 128) 288.

[274] See for a list of the different instruments Wang (n 135) 40.

[275] See for an overview of the MoUs <https://www.beltroad-initiative.com/memorundum-of-understanding-belt-and-road-initiative/> accessed 12 January 2022.

[276] Export-Import Bank of China, *White Paper on Green Finance and Social Responsibility* (2019) <http://english.eximbank.gov.cn/News/WhitePOGF/202001/P020200115362817337502.pdf> accessed 12 January 2022.

[277] Environment Framework, Asian Infrastructure Investment Bank <https://www.aiib.org/en/policies-strategies/_download/environment-framework/AIIB-Revised-Environmental-and-Social-Framework-ESF-May-2021-final.pdf> accessed 12 January 2022.

[278] Xiong and Tomasic (n 128) 1051.

[279] OECD, 'The Belt and Road Initiative in the Global Trade, Investment and Finance Landscape' (OECD 2018) 27 <https://www.oecd-ilibrary.org/finance-and-investment/oecd-business-and-finance-outlook-2018/the-belt-

4.2.3 How Soft Law Works Within the BRI

The features of BRI's soft law are aspirational language and a coordination purpose. However, even compared to other soft law outside the BRI's realm, they remain blurry regarding their legal content.[280] This blurriness should not make insensitive to differences. Regarding the specificity of terms, the agreements differ, which expresses the state of cooperation between China and the respective party. Memoranda of Understanding (MoU) contain more detailed provisions, which is why they are considered as the 'highest-level agreement' in the BRI.
On the other hand, cooperation agreements include merely a shared intent and use more general language.[281] One can infer that China prioritises 'breadth of the BRI as much as depth'.[282] Through this differentiation, China can include many states in the initiative and widen its scope as well as international recognition. It keeps China flexible to gradually distinguish between the different stages of the bilateral relationship to BRI countries.

4.2.3.1 Coordination

Soft law agreements serve a coordinating function in the sense that they set standards that could help facilitate interstate deliberations like early bilateral BITs of capital-exporting countries did.[283] These agreements create a network of agreements with China and mainly concern issues of the BRI. In that way, China gains a central position which *Wang* summarises under the term 'hub-and-spoke network'.[284] BRI's soft law agreements do not differ from soft law elsewhere as their function can also be to create emergent hard law, i.e. soft law that aims to negotiate a treaty or transform into hard law provisions through recognition of customary international law and eventually form an overarching agreement.[285] This use of soft law is intertwined with the institutional organisation of the BRI as it does not aim at creating an overarching institution

and-road-initiative-in-the-global-trade-investment-and-finance-landscape_bus_fin_out-2018-6-en> accessed 12 January 2022.
[280] Wang (n 128) 289.
[281] Jack Nolan and Wendy Leutert, 'signing up or Standing aside: Disaggregating Participation in China's Belt and Road Initiative' (*Brookings*, 12 October 2020) <https://www.brookings.edu/articles/signing-up-or-standing-aside-disaggregating-participation-in-chinas-belt-and-road-initiative/> accessed 12 January 2022.
[282] ibid.
[283] Lauge N Skovgaard Poulsen, 'Beyond Credible Commitments: (Investment) Treaties as Focal Points' (2020) 64 International Studies Quarterly 26, 32.
[284] Wang (n 128) 294–295.
[285] Wang (n 128) 293; see to this function of soft law 'as part of a process of hardening rules' Xiong and Tomasic (n 128) 1036.

based on a binding treaty. Instead, the way in which China uses soft law influences existing mechanisms.[286] The field of cyber security is an example that illustrates how this process could looks like in practice.

The Shanghai Cooperation Organisation (SCO) had published principles (soft law) on cyber security in 2009.[287] After a failed initiative in 2011, some SCO member states, including China, managed to gain the support of a majority in the UN's General Assembly in 2019 to set up an ad-hoc working group to draft an international convention on cybercrime.[288] This convention includes some of the principles of the 2009 document of the SCO.[289]

4.2.3.2 Gaining Support and Trust for the BRI in the International Community

Moreover, China actively engages with UN commissions and agencies to promote its BRI project model on a larger scale. In 2016, its MoU with the United Nations Development Programme (UNDP) became the first agreement which the PRC signed with an international organisation. Further agreements followed with the United Nations Economic Commission for Europe (UNECE) and the United Nations Industrial Development Organization (UNIDO).[290] In their joint report of 2017, the UNDP and the China Center for International Economic Exchange examined modalities to include standards for social and environmental sustainability into BRI projects.[291]

Through this process, China and its BRI partners can develop new soft law rules. *Xiong and Tomasic* argue that China engages in these processes to gain support and trust for the BRI.

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[286] Giuseppe Martinico, 'Comparative Law Reflections on the Use of Soft Law in the Belt and Road Initiative' in Giuseppe Martinico and Xueyan Wu (eds), *A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road?* (Springer International Publishing 2020) 141.

[287] *Agreement between the Governments of State Members of the Shanghai Cooperation Organization on Cooperation in the Field of Ensuring the International Information Security*, 16 June 2009 <https://cis-legislation.com/document.fwx?rgn=28340> accessed 12 January 2022.

[288] *Countering the use of information and communications technologies for criminal purposes*, UN General Assembly Resolution, A/RES/74/247, 27 December 2019 <https://undocs.org/A/Res/74/247> accessed 12 January 2022; see further on the process proceeding in 2022 UN Office on Drugs and Crime 'Ad hoc committee established by General Assembly Resolution 74/247' <https://www.unodc.org/unodc/en/cybercrime/ad_hoc_committee/home> accessed 12 January 2022.

[289] See for this example Roza Nurgozhayeva, 'Rule-Making, Rule-Taking or Rule-Rejecting under the Belt and Road Initiative: A Central Asian Perspective' (2020) 8 The Chinese Journal of Comparative Law 250, 255 et seq.

[290] For an overview of the different types of soft law texts and involved parties Wang (n 135) 41–42; see also this list of soft law texts on the official BRI portal website <https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10059> accessed 12 January 2022.

[291] UNDP and China Center for International Economic Exchanges, 'The Belt and Road Initiative: A new means to transformative global governance towards sustainable development', 2017 <https://www.undp.org/content/dam/china/docs/Publications/UNDP-CH-GGR%202017.pdf> accessed 12 January 2022.

They assume that these ties through political agreements could be 'utilised in future dispute resolution wherever there are gaps in applying more formal rules to resolve disputes'[292].Two examples show how China gains acceptance for its BRI investment model.

According to Article 1 of the MoU between the UNECE and the National Development and Reform Commission of China '[t]he parties agree that the promotion of the PPP model in the countries along the Belt and Road is beneficial to infrastructure development and the delivery of efficient public services and is in line with the United Nations 2030 Agenda for Sustainable Development and with the goals and objective of the Belt and Road initiative'.[293]
Another example stems from the Joint Communiqué of the Leaders Roundtable of the Belt and Road Forum for International Cooperation of May 2017. The leaders of several BRI countries highlighted 'concrete actions, in accordance with our national laws and regulations and international obligations where applicable, such as [m]aximizing synergies in infrastructure planning and development [..] by aiming at harmonizing rules and technological standards when necessary [...] by promoting public-private partnership in areas that create more jobs and generate greater efficiency'.[294] China cements its PPP model, which is typical for BRI investment schemes.[295] In the long term, this PPP model offers a platform for further standardisation of procurement models, funding structures or dispute resolution mechanisms between BRI countries.[296]

A third and last example shows how soft law agreements legitimises the claims of Chinese banks and investors within the BRI. Finance ministers of several BRI countries have agreed on the Guiding Principles on Financing the Development of the BRI. The Guiding Principles advocate 'fair, equitable, open and efficient legal systems, as well as mutual-beneficial and investor-friendly taxation regimes. [They] support the settlement of debt and investment

[292] Xiong and Tomasic (n 128) 1045.
[293] China-UNECE/UNIDO, Memorandum of Understanding (2017) <https://eng.yidaiyilu.gov.cn/wcm.files/upload/CMSydylyw/201706/201706090618045.pdf> accessed 12 January 2022.
[294] Joint Communique of the Leaders Roundtable of the Belt and Road Forum for International Cooperation 16 May 2017, para. 15 lit. e) <https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1462012.shtml> accessed 12 January 2022.
[295] See under section 3.1.
[296] Ma and others (n 125) 7.

disputes in a fair, lawful and reasonable way to effectively protect creditors and investors' legitimate rights and interests.'[297]

4.2.3.3 Structuring of Informal Negotiations

The BRI's state-centric project approach, paired with its legal structure, leads to a politicisation of investment disputes. China's BRI prioritises state-framed channels of communication and state-centric models of development. In a way, this stands in contrast to the western liberal market approach.[298] BRI investments are carried out by investors who are one way or the other connected to the state, and that is because the BRI has a geopolitical dimension. While SOEs are certainly no distinct feature of China's investment efforts, their exercise of ownership rights can still be seen as an extension of the executive power.[299]

One of the visible features of this is that several chief executive officers of large SOEs are ministerial officials of the state by virtue of their office.[300] If a dispute arises between a Chinese SOE and a host state, the fragmented legal structure may hinder formalised means of ISDS from settling the dispute. In these circumstances, the parties may use the fall-back option of alternative dispute resolution methods where soft law rules come into play. They offer coordinative guidance and can structure negotiations according to principles laid out in soft law texts. A look at concrete secondary project agreements of BRI projects confirms this practical function.

A recent study of 100 lending contracts along the BRI showed that cancellation, acceleration, and stabilisation clauses in Chinese contracts allow the lender – Chinese banks and SOEs – to impact the debtors' domestic and foreign policies. While these may not be enforceable in court, they influence debt renegotiations.[301] These clauses are part of the broader Chinese investment programme – they link different parts of the programme, i.e. financial, trade, and construction contracts.[302] The contracts differ from traditional commercial contracts as the governments directly or indirectly support dispute settlement.[303] The BRI's commercial contracts structure

[297] *Guiding Principles on Financing the Development of the Belt and Road*, Chinese Ministry of Finance, 16 May 2017 <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13757.htm> accessed 12 January 2022.
[298] Xiong and Tomasic (n 128) 1035–1036.
[299] OECD, *State-Owned Enterprises in the Development Process* (2015) 138.
[300] ibid.
[301] Gelpern and others (n 124) 2.
[302] ibid 45.
[303] Wang (n 128) 287.

makes it 'almost inevitable that many disputes will first be submitted to informal government-to-government discussions'.[304] Since China has not made extensive efforts to update its BIT structure,[305] it applies similarly to ISDS that China must resolve to diplomatic channels in many cases.[306]

To conclude, China uses the coordination strands, which are woven through its 'primary agreements', to secure investment abroad. Primary agreements encourage an approach to investment protection through political channels as this statement by China's Vice Foreign Minister *Le Yucheng* illustrates. Regarding security concerns about BRI projects, he said: '[W]e [primarily] look to the government of host countries to provide for the security of BRI projects. The BRI cooperation agreements we have signed with various countries include provisions that the host countries will take up the security responsibility.'[307] The following case studies shall further illustrate my findings.

4.2.4 Case Studies

This section provides concrete examples of the mechanisms analysed in the previous sections 4.2.1 to 4.2.3. The two short case studies highlight the complementarity between soft law and formal ISDS. The publicly available material on BRI projects is scarce, and still today, large parts of the debate depend on anecdotal evidence.[308] Even though some of the already cited studies[309] give more insights into BRI projects, BRI projects are generally criticised for their lack of transparency.[310]

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[304] Patrick M Norton, 'China's Belt and Road Initiative: Challenges for Arbitration in Asia' (2018) 13 University of Pennsylvania Asian Law Review 72, 86.

[305] See under section 4.1.1.2.

[306] ibid 101; for a similar account Li and Bian (n 177) 525–526.

[307] Jamil Anderlini, 'Transcript of Vice Foreign Minister Le Yucheng's Exclusive Interview with the Financial Times' *Financial Times* (12 September 2018) <https://www.chinadaily.com.cn/a/201809/26/WS5bab2f67a310c4cc775e8304.html> accessed 12 January 2022.

[308] Gelpern and others (n 124) 4; Wolff (n 12) 289.

[309] Ammar A. Malik and others (n 8); Gelpern and others (n 124); Samantha Custer and others, 'silk Road Diplomacy: Deconstructing Beijing's Toolkit to Influence South and Central Asia' (2019) AidData Policy at William & Mary.

[310] World Bank, 'Belt and Road Economics: Opportunities and Risks of Transport Corridors' (World Bank 2019) 82; 85 <https://www.worldbank.org/en/topic/regional-integration/publication/belt-and-road-economics-opportunities-and-risks-of-transport-corridors> accessed 12 January 2022; Martinico (n 288) 135; Gelpern and others (n 129) 2; 6–7; Wang (n 135) 52.

The first case from Sri Lanka shows how bilateral negotiations can bridge gaps in law enforcement mechanisms with debt contracts as leverage. There have been multiple such debt renegotiations regarding Chinese investments in infrastructure abroad. In this instance, bilateral political engagement can compensate where no comprehensive legal framework exists.
Interestingly, the second case demonstrates that even *if* a comprehensive legal framework exists, conflicts revolving around Chinese investments may still be mitigated through political means. The case of the investment of a Chinese SOE in Singapore reveals clues about the BRI's reality, even though it pre-dates the BRI. Despite the significant turns that China's 'Going Abroad' strategy has undergone with the launch of the BRI,[311] there is an underlying structure to this example that the BRI is also built on, namely the participation of Chinese SOEs in outward investment activities.

4.2.4.1 Sri Lanka

The first example concerns the Hambantota Port, which Sri Lanka lent for 99 years to a Chinese SOE to write off certain Sri Lankan debts. I will not address the political and highly controversial question whether this is an emblematic case for China's alleged 'debt trap diplomacy'[312]. Moreover, the case provides illustrative material on how China deals with investment risks within the BRI, notably outdated or non-existent BITs and an unstable political as well as economic environment. China's BIT with Sri Lanka dates to the first BIT generation, containing only a narrow dispute settlement clause.[313] The Sri Lankan government focused on infrastructure projects to support the reconstruction after the Civil War (which ended in 2009) during the last decade. China became an essential partner in this endeavour as it could direct investments through its SOEs efficiently, which accelerated the development

[311] See under 1.2.

[312] Yogita Limaye, 'sri Lanka: A Country Trapped in Debt' *BBC News* (25 May 2017) <https://www.bbc.com/news/business-40044113>; see on these allegations Kinling Lo, 'sri Lanka Wants Its "Debt Trap" Port Back – but Will China Listen?' (*South China Morning Post*, 7 December 2019) <https://www.scmp.com/news/china/diplomacy/article/3040982/sri-lanka-wants-its-debt-trap-hambantota-port-back-will-china>; denying the 'debt trap' Maria Adele Carrai, 'Questioning the Debt-Trap Diplomacy Rhetoric Surrounding Hambantota Port' (*Georgetown Journal of International Affairs*, 5 June 2021) <https://gjia.georgetown.edu/2021/06/05/questioning-the-debt-trap-diplomacy-rhetoric-surrounding-hambantota-port/> all cited websites accessed 12 January 2022; Custer and others (n 311) 26 with a balanced assessment.

[313] See Article 13 section 3 of the China-Sri Lanka BIT (1986) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/781/download> accessed 12 January 2022, which limits ISDS to 'disputes involving the amount or compensation resulting from expropriation'.

process and gave it a comparative advantage over other investors.[314] China did not only help to construct the Hambantota port but also other infrastructure, including parts of an airport or a skyscraper.

Two Chinese SOEs built the Hambantota Port, while 85 per cent of the financial resources came from the Chinese state-owned Exim Bank. When Sri Lanka failed to pay its debts – which not only resulted from contracts with China[315] – the Sri Lankan government agreed with the Chinese SOE China Merchant Port Holdings (CMPort) to lend the 15,000 acres area of the Hambantota to CMPort for 99 years in exchange for a debt cut.[316] Such asset seizures are rare occurrences,[317] but debt renegotiations have become a feature of quite some BRI investments.[318] Despite its economic weight, China does not necessarily prevail in all of these negotiations.[319]

The case demonstrates the importance of state-to-state mechanisms in the Chinese investment protection strategy and its politicisation.[320] The politicisation comes from the BRI's project structure and legal architecture. It addresses concerns with judicial forms of investment dispute settlement, such as the inconsistent arbitral outcomes in the cases *Tza Yap Shum v Peru* and *China Heilongjiang International Economic & Technical Cooperative Corp. and Others v Mongolia* (see above section 4.1.2.2).

[314] Custer and others (n 311) 26.

[315] Carrai (n 314).

[316] Maria Adele Carrai, 'China's Malleable Sovereignty along the Belt and Road Initiative: The Case of the 99-Year Chinese Lease of Hambantota Port Around the World on One Belt, One Road: Foreign Capital Competition, Human Rights, and Development in the Twenty-First Century' (2019) 51 New York University Journal of International Law and Politics 1061, 1065.

[317] However, a probe of the Ugandan parliament in autumn 2021 concluded that China had imposed onerous conditions on loans to the country, including potential forfeiture of the only Ugandan international airport in case of default, sparking public outrage. China and the Ugandan government have denied this, see Elias Biryabarema, 'China Rejects Allegations It May Grab Ugandan Airport If Country Defaults on Loan' *Reuters* (29 November 2021) <https://www.reuters.com/markets/rates-bonds/china-rejects-allegations-it-may-grab-ugandan-airport-if-country-defaults-loan-2021-11-29/>; see also The Citizen, 'Uganda Says Entebbe Airport Has Not Been Surrendered to China' (30 November 2021) <https://www.thecitizen.co.tz/tanzania/news/uganda-says-entebbe-airport-has-not-been-surrendered-to-china-3636724> all cited websites accessed 12 January 2022.

[318] Logan Wright, Allen Feng and Agatha Kratz, 'New Data on the "Debt Trap" Question' (*Rhodium Group*) <https://rhg.com/research/new-data-on-the-debt-trap-question/> accessed 12 January 2022.

[319] Many of the cases reviewed by Rhodium showed outcomes in the favor of the borrower especially so when countries had alternative financing sources. The research lab reviewed 40 cases of China's external debt renegotiations ibid.

[320] Li and Bian (n 177) 527.

4.2.4.2 Singapore

The BRI comprises various jurisdictions and different formal investment protection regimes.[321] Without wanting to challenge their relevance, my point with this second case is to show that even *if* a legal framework exists, alternative means of dispute settlement may well be preferable to China and its partners within the BRI.

China Aviation Oil (CAO) was initially founded in Singapore in 1993 as a joint venture between two Chinese and one Singaporean company.[322] In 1995, CAO became an overseas subsidiary company of one of the Chinese firms, the China Aviation Oil Supply Corporation (CAOSC). In 2001, CAO was listed on the Singapore Stock Exchange and was engaged in jet fuel procurement as well as international oil-related investments. CAOSC sold 25 per cent of CAO's shares to the public, while CAOSC sold the remaining 75 per cent of shares to the China Aviation Oil Holding Company (CAOHC). CAOHC was a company whose shares were held by Chinese SOEs in the aviation industry.

In 2003, CAO diversified from oil trading into derivatives. Shortly after CAO experienced losses of hundreds of millions of USD while it still reported profits.[323] Since CAOHC controlled CAO as a parent company, it was informed about CAO's financial losses before any other shareholder or future investor. In October 2004, CAOHC sold 15 per cent of its shares in CAO, which generated some 200 million USD. CAOHC did so to rescue CAO as CAOHC used this money to grant CAO a loan to meet liabilities. Nevertheless, by the end of November 2004, CAO was forced to file for bankruptcy in Singapore.

The Singaporean authorities started investigations into CAOHC's sale for insider trading and securities fraud. The CAO case, among other things, triggered enforcement actions by Singaporean authorities and regulators. However, these were eventually dropped as the

[321] See for an analysis of selected countries along the BRI with overall 17 domestic investment laws and 648 international investment treaties Priyanka Kher and Trang Tran, 'Investment Protection Along the Belt and Road' (World Bank 2019) Working Paper <https://openknowledge.worldbank.org/handle/10986/31247> accessed 12 January 2022.

[322] The following depiction of the events is largely based on the detailed summary of the case in Curtis J Milhaupt and Katharina Pistor, 'The China Aviation Oil Episode: Law and Development in China and Singapore', *Law and Capitalism* (University of Chicago Press 2008) 125–128.

[323] Yuen Teen Mak, Luh Luh Lan and Azrudi Bin Buang, 'Implementation and Enforcement of Rules in Singapore and the Case of China Aviation Oil' (OECD 2007) 100 <http://www.oecd.ilibrary.org/governance/enforcement-of-corporate-governance-in-asia_9789264035607-en> accessed 12 January 2022.

CAOHC agreed on a settlement with the Monetary Authority of Singapore and criminal charges were only issued against a few individuals.[324]

The case shows that although formal rules and civil courts were available to solve the conflict, Singaporean and Chinese governmental authorities dealt with the case. Such a settlement could only be reached because there were closed-door negotiations between governmental entities from Singapore and China.[325] Therefore, the resolution of the conflict rested on negotiations between governmental actors. *Milhaupt and Pistor* conclude that 'investor protection was achieved not principally by enforcement of corporate and securities laws but through political mechanisms'.[326] The preference for political mechanisms is rooted in the legal cultures of China and Singapore. Nonetheless, the political solution of the conflict was also related to the Chinese state's involvement in the investment activities through SOEs.

Interim Conclusion

China's legal approach to protect investments within the BRI is twofold. First, China uses existing regulatory regimes due to the absence of an independent legal framework for the BRI. Thus, processes not directly concerned with the BRI impact the initiative's legal conception. Looking at these processes, it becomes clear that China continues to develop hard law mechanisms through investment treaties. Furthermore, China supports binding methods of investment dispute resolution. Chinese parties nowadays appear before tribunals in numerous third-party ISDS procedures. The first publicly available arbitral awards in cases with Chinese participation gave no reason for China to oppose the system.[327] China's objective to shape the

[324] Xiong and Tomasic (n 128) 1054.

[325] ibid 1055.

[326] Milhaupt and Pistor (n 324) 145.

[327] **Cases with China as respondent**: *Hela Schwarz GmbH v People's Republic of China*, ICSID Case No. ARB/17/19; *Jason Yu Song v China*, PCA Case No. 2019-39; *Marco Trading Co., Ltd. v China*, ICSID Case No. ARB/20/22; *Ekran Berhad v People's Republic of China*, ICSID Case No. ARB/11/15; *Ansung Housing Co, Ltd. v People's Republic of China*, ICSID Case No. ARB/14/25. **Cases with Chinese investors as claimants**: *Tza Yap Shum v Republic of Peru*, ICSID Case No. ARB/07/6; *Ping An Life Insurance Company of China v Kingdom of Belgium*, ICSID Case No. ARB/12/29; *Sanum Investments Limited v Laos*, PCA Case No. 2013-13; *Beijing Urban Construction Group Co. Ltd. v Republic of Yemen*, ICSID Case No. ARB/14/30; *China Heilongjiang International Economic & Technical Cooperative Corp. and others v Mongolia*, PCA Case No. 2010-20; *Philip Morris Asia Limited v The Commonwealth of Australia*, PCA Case No. 2012-12; *Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20; *Wuxi T. Hertz Technologies Co. Ltd. And Jetion Solar Co. Ltd.* v *Greece* (UNCITRAL); *Standard Chartered Bank (Limited) Hong Kong v United Republic of Tanzania*, ICSID Case No. ARB/15/41; *Sanum Investments Limited v Lao People's Democratic Republic*, ICSID Case No. ADHOC/17/1; *Fengzhen Min v Republic of Korea*, ICISID Case No. ARB/20/26.

future direction is evident in several respects. It actively participates in international efforts to reform the current system and it adds new institutions to the international institutional landscape. From China's point of view, the current system seems well suited for the BRI. Its frayed structure leaves room for individual specificities by following a case-by-case logic in the absence of a central institution. If the reform process strengthens alternative dispute resolution mechanisms, this will not be detrimental to the legal conception of the BRI either, as China and its investors have considerable bargaining power.

Second, China fills the gaps that the existing regulatory regimes leave with politicised methods based on coordinating soft law. Section 4.2 has shown that the Western tendency of focusing on hard law and formalised ISDS mechanisms is incomplete if one seeks to understand China's take on ISDS. Soft law rules act as a silken thread between BRI states and China. They pull ISDS into the political sphere and reveal, as I argue, a distinctive Chinese perspective on international law.

5 Lessons for China's Stance on International Law – the BRI and the Rule of Law

This final chapter brings the interim findings to a head and places them in a broader context. In section 5.1, I will explore the meaning of the concept of the rule of law, which is a crucial determinant in implementing the BRI according to Chinese sources. In the light of this exploration, the final section 5.2 shall explain how I interpret my findings from the previous chapters.

5.1 The Rule of Law as Guiding Principle of the BRI

5.1.1 A Highly Contested Notion

The principle of the rule of law is generally accepted in international law. It is cited in numerous international documents and judgments of international courts.[328] One of the most prominent examples is the Friendly Relations Resolution of the UN General Assembly (1970), which outlined principles of international law in accordance with the UN Charter. In its preamble, the states opt for the 'promotion of the rule of law among nations'.[329] Moreover, in international investment law, ISDS is often portrayed as a decisive tool for establishing the rule of law.[330] However, less consensus exists on the content of the principle. Various equivalences like *État de Droit* in the French, *Rechtsstaatlichkeit* in the German and *Fazhi* in the Chinese legal tradition respectively allude to a distinct national context.[331] It is not only this national context that shapes differences in meaning.[332] The various strands of international law endow the concept with further nuances. In the field of international investment law, the meaning of the

[328] See for instance *Prosecutor v Tadić*, ICTY Case No. IT-94-1, Appeals Chamber Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 42-47.
[329] *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations*, UN General Assembly Resolution A/RES/25/2625.
[330] Eder (n 226) 521; see Submission of China (no 226) 2–4: 'The present reform proposal should remedy the main shortcomings of the current mechanism for settling investment disputes and promote the process of building the rule of law into the field of international investment'; critical towards this 'mantra' in international investment law Christian Tams, 'International Arbitration: Heating Up or Under Pressure?' (*EJIL: Talk!*, 11 March 2014) <https://www.ejiltalk.org/international-arbitration-heating-up-or-under-pressure/> accessed 12 January 2022.
[331] See for a collection of reports on different national understandings of rule of law <https://wikis.fu-berlin.de/display/SBprojectrol/Country+Reports> accessed 12 January 2022.
[332] James Gerard Devaney, 'selecting Investment Arbitrators: Reconciling Party Autonomy and the International Rule of Law' (2019) KFG Working Paper Series 10.

rule of law depends on one's answer to whether investment arbitration is rather of public or private nature.[333]

Broadly speaking, while many requirements remain contested,[334] formal elements of the rule of law allow broader support due to their apparent 'neutrality'.[335] Thus, elements like clarity, consistency and predictability of laws, the impartiality of the judiciary, or the absence of arbitrary power form the essence of the rule of law.[336]

5.1.2 The BRI as a 'Rule of Law initiative'?

In October 2014, the Central Committee of the CPC stressed that 'it is imperative to have the rule of law play a greater role in leading and standardizing our practices in order to help our Party to do better in conducting coordinated planning on both the international and domestic scenes [...].'[337] Several official BRI-specific documents emphasise that cooperation within the initiative should be based on the rule of law.[338] In 2015, the Chinese Supreme People's Court issued opinions on judicial services within the BRI, according to which 'the rule of law is an important safeguard for the BRI, in which the role of the judiciary is indispensable'.[339]

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[333] Stephan Schill, 'The Public Law Paradigm in International Investment Law' (*EJIL: Talk!*, 3 December 2013) <https://www.ejiltalk.org/the-public-law-paradigm-in-international-investment-law/> accessed 12 January 2022 who claims that arbitrators who stress the private nature of ISDS tend to emphasis faithfulness to party consent and autonomy as the essential parts of rule of law while public international lawyers focus more on rule of law as limiting the exercise of public authority.

[334] Cai (n 47) 271; Henrik Andersen, 'Rule of Law Gaps and the Chinese Belt and Road Initiative: Legal Certainty for International Businesses?' in Giuseppe Martinico and Xueyan Wu (eds), *A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road?* (Springer International Publishing 2020) 104 et seq.

[335] Velimir Zivkovic, 'International Rule of Law Through International Investment Law - Strengths, Challenges and Opportunities' (2018) KFG Working Paper Series 10–11; James Crawford, 'International Law and the Rule of Law' (2003) 24 Adelaide Law Review 3, 4.

[336] See for example on the guarantees of judicial independence in the European Union, *Repubblika v Il-Prim Ministru*, Judgment of the Court (Grand Chamber) of 20 April 2021, C-896/19, ECLI:EU:C:2021:311, paras. 54-65.

[337] *Communiqué of the Fourth Plenary Session of the 18th Central Committee of the CPC*, 23 October 2014 <http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm> accessed 12 January 2022.

[338] Statement of the Co-Chairs of the Forum on the Belt and Road Legal Cooperation <http://aoc.ouc.edu.cn/26/72/c9828a206450/page.psp> para. 4 et seq.; Joint Communiqué of the Leaders Roundtable of the Belt and Road Forum for International Cooperation 2017/05/16, para. 14 <https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1462012.shtml> all cited websites accessed 12 January 2022.

[339] *Several Opinions on the Provision of Judicial Services and Safeguard for Building the Belt and Road by the People's Courts* (关于人民法院为"一带一路"建设提供司法服务和保障的若干意见), Supreme People's Court, Fa Fa (2015) 9 Hao, 16 June 2015) available in Chinese only <http://gongbao.court.gov.cn/Details/b10a1d30141bc4a4c7886b00d759c3.html> accessed 12 January 2022.

When looking at some of the rule of law requirements mentioned above, i.e. predictability, some find that the BRI lacks elements of the rule of law since an overarching BRI framework or a uniform set of principles applicable to all participant states is missing.[340] China, on the other hand, states that one of its motivations for the launch of the BRI was the perceived 'crisis of multilateralism', which made it wary of tying itself down to an overarching legal framework.[341] This crisis refers, among other things, to trade wars with the US and the arduous reform process of the WTO DSB.[342] Since 2019, the Appellate Body has been paralysed because of the American veto to the appointment of new members.[343]
Therefore, the Chinese government envisions rather 'forging a global FTA network' than a single overarching FTA comprising all BRI countries.[344] It underlines that it wants to 'take full advantage of the existing bilateral and multilateral cooperation mechanisms'[345] in implementing its scheme and thereby expresses its intention to flexibly operate the BRI through international legal frameworks instead of replacing them.[346]

After all, the rule of law within the BRI appears rather as a functional than a sharply contoured concept. It serves as a legitimising narrative for the initiative, which is, admittingly, not an uncommon use of the notion in international documents. The exact meaning of the rule of law is rarely spelt out.[347] The PRC's insistence that the rule of law guides the BRI and my preceding

[340] Chen, 'Tension and Rivalry: The "Belt and Road" Initiative, Global Governance, and International Law' (n 10), 190–191.
[341] Office of the Leading Group for the Belt and Road Initiative (n 137) 29–30; Jingxia Shi, 'The Belt and Road Initiative and International Law: An International Public Goods Perspective' in Yun Zhao (ed), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press 2018) 26.
[342] Marianne Schneider-Petsinger, 'The Path Forward on WTO Reform' (*Chatham House*, 7 May 2019) <https://www.chathamhouse.org/2019/05/path-forward-wto-reform>; the latest Conference of Ministers (MC12) where states wanted to tackle important issues was postponed due to the pandemic Michael Johnson, 'The WTO Ministerial Conference Victim of the New Omicron Variant' *BBC Edition* (27 November 2021) <https://bbc-edition.com/money/the-wto-ministerial-conference-victim-of-the-new-omicron-variant/> all cited websites accessed 12 January 2022.
[343] Tom Miles, 'U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms' *Reuters* (27 August 2018) <https://www.reuters.com/article/uk-usa-trade-wto-idUKKCN1LC19G> accessed 12 January 2022.
[344] State Council, *Opinions on Speeding Up the Implementation of Free Trade Zones Strategy* (2015) <http://english.www.gov.cn/policies/latest_releases/2015/12/17/content_281475255618346.htm> accessed 12 January 2022; Jiaxiang Hu and Jie (Jeanne) Huang, 'Dispute Resolution Mechanisms and Organizations in the Implementation of "One Belt, One Road" Initiative: Whence and Whither' (2018) 52 Journal of World Trade 815, 816.
[345] National Development and Reform Commission and others (no 18).
[346] Crawford (n 8) 15.
[347] See to this function for the international legal order in general Zivkovic (n 338) 15.

analysis of investment protection within the initiative together provide insights into the Chinese understanding of international law.

5.2 The BRI's Rule of Law Approach and China's Realist Approach to International Law

5.2.1 Different Reads of the Findings

From the historical sketch in chapter 2, it became clear that China's view on law and legal concepts has been ambivalent since the late Qing period. It was marked by cultural tension and a desire for international recognition. *Li Chen*, therefore, remarked that China's legal approach appeared 'too foreign to the Chinese and too Chinese to foreigners'.[348] I have already implied that chapters 3 and 4 could be understood as revealing an inconsistent Chinese approach to investment protection within the BRI. Within the BRI's legal framework, the PRC is apt to protect its investments through genuinely legal instruments and those that lie at the transition between law and politics. Therefore, seeing China's approach as inconsistent is only accurate under the premise of a sharp separation between law and politics. I argue that my findings offer a different read.

According to my understanding, China's use of different forms of normativity in the BRI, be it hard or soft law rules, indicates that China is guided by Legal Realism. Such a claim, of course, must face counter-arguments. Legal scholarship struggles to apply the sophisticated and cross-cutting inquiry that some realists demand to gain insights.[349] Interpreting China's approach as guided by Legal Realism bears the risk of ignoring the considerable impacts that the many international regulatory systems have on China's state practice. In my dissertation, this became clear when looking at China's treaty practice and its engagement in the ISDS reform process. However, Legal Realism is a theory that can adequately explain the legal

[348] Li Chen, 'Traditionalising Chinese Law: Symbolic Epistemic Violence in the Discourse of Legal Reform and Modernity in Late Qing China' in Michael Ng and Yun Zhao (eds), *Chinese Legal Reform and the Global Legal Order: Adoption and Adaptation* (Cambridge University Press 2017) 210.

[349] Anne Peters, 'There Is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law' in Jost Delbrück, Andreas Zimmermann and Rainer Hofmann (eds), *German yearbook of international law* (44th edn, Duncker & Humblot 2002) 32.

dimension of BRI since it has developed as a 'manifestation of American power politics' (*Peters*)[350] and China is poised to become a new superpower.

5.2.2 China's Approach to International Law in the Light of its Understanding of the Rule of Law

The Chinese understanding of the rule of law is informed by a specific Chinese cultural and theoretical context.[351] Official documents opt for a combination of 'the rule of law with the rule of virtue'[352]. This dichotomous standpoint alludes to a debate in Chinese legal theory among specific streams of Confucianism in which virtue is superior to law and a legalistic tradition that gives law precedence over all other norms.[353] From the CPC's point of view, law does not limit political power but correlates with it as the 'socialist rule of law must uphold the Party's leadership, while the Party's leadership must rely upon socialist rule of law'.[354]
The rule of law to the Chinese is not an underlying principle of governance but merely an abstract political objective. In the words of the Central Committee of the CPC, 'the political elite as well as the people should devote themselves to the great endeavour of comprehensively advancing the law-based governance of China, press ahead with a pioneering spirit, work in a pragmatic fashion, and strive to build China into a rule of law country'.[355]

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[350] ibid 31–32 to whom Legal Realism 'appears to be an ideal legal theory for a superpower'; Cai (n 47) 39 who disagrees in China's case insofar as to him international law 'may also impose more hurdles on China than it did to old great powers in history. In a word, a safe judgment is that international law is more relevant to the rise of China than it was to old great powers.'; in turn with a critical review on this 'party line book' Chesterman (n 9) 5; 9–12; Xiong and Tomasic (n 128) 1055 who see soft law as a type of 'functional equivalent' to more formal legal rules; Martinico (n 288) 134 who does not see the necessity for a clear choice between hard law and soft law within the BRI.

[351] Cai (n 47) 60–61 who expects that 'China cannot fully embrace Western legal conception' of the rule of law.

[352] Communiqué of the Fourth Plenary Session (no 337).

[353] In the Analects the following words are attributed to Confucius translated by James Legge: 'If the people be led by laws 法 (*fa*), and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue 礼 (*li*), and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.' <https://china.usc.edu/confucius-analects-2>; see to this traditional tension between Confucianism and Legalism Simon Chesterman, 'Rule of Law', *Max Planck Encyclopedia of Public International Law* (2007) para. 10; Zhiqiong June Wang and Jianfu Chen, *Dispute Resolution in the People's Republic of China: The Evolving Institutions and Mechanisms* (Brill Nijhoff 2019) 24; Article 5 of the revised Chinese constitution of 2018 reads: 'The People's Republic of China shall practice law-based governance and build a socialist state under the rule of law[...]'
<http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml> all cited websites accessed 12 January 2022.

[354] Communiqué of the Fourth Plenary Session (no 337).

[355] ibid.

Chinese officials see law as a means to control and coordinate the economy and society.[356] The CPC's Central Committee explicitly spelt out this control function in its 'Rule by Law Decision' (2014).[357] From this perspective, the protective function of law, which is essential for investment protection, appears as a marginal feature. The minor role of the protective function is exemplified by the fact that Chinese citizens cannot directly invoke constitutional guarantees in a legal dispute even though the constitution entails many fundamental rights. On 24 July 2001, the SPC promulgated a judicial interpretation in a civil law case (*Qi Yuling v Chen and others*). It directly evoked the constitution to recognise the constitutional right of a Chinese citizen to education, name, identity, and reputation.[358] The interpretation marked the first time that the Supreme Court of the PRC cited Article 46 of the PRC Constitution as the basis for the right of education.[359] On 18 December 2008, however, the Court abolished the Reply to the *Qi Yuling v Chen and others* case because it was 'no longer applicable'.[360]

If China's claim is to be regarded as fulfilled and the initiative is to be understood as a rule of law project, one must take note of the specific Chinese understanding of the rule of law, namely as a policy objective and not as a principle to guarantee the constraints of political actions through predictable and systematic rules. The result of looking at the BRI's legal conception that way is not the inconsistency of hard and soft law rules but rather their coexistence. The Chinese Supreme People's Court considers the rule of law as an 'important safeguard for the BRI' while at the same time China wants to foster '[t]he development of the BRI mainly [...] through policy communication and objectives coordination' and understands it as a 'pluralistic and open process of cooperation which can be highly flexible, and does not seek conformity'.[361]

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[356] Milhaupt and Pistor (n 324) 144.

[357] Central Committee of CCP, Decision on Major Issues Concerning Comprehensively Enhancing to Rule State by Law, 23 October 2014, unofficial English translation <https://www.chinalawtranslate.com/en/fourth-plenum-decision/> accessed 12 January 2022; Cai (n 47) 60.

[358] *Official Reply of the Supreme People's Court on Whether the Civil Liabilities Shall Be Borne for the Infringement upon a Citizen's Basic Right of Receiving Education* (expired) (最高人民法院关于以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利是否应承担民事责任的批复 (失效] 法宝引证码), Case No. CLI.3.36302(EN) <http://www.lawinfochina.com/display.aspx?lib=law&id=1954&CGid=> accessed 12 January 2022.

[359] Some even compared the case to the US Supreme Court Decision *Marbury v Madison*, 5 US (1 Cranch) 137 (1803), a landmark case that established the principle of judicial review in the United States. On this Robert J Morris, 'China's Marbury: Qi Yuling v. Chen Xiaoqi - The Once and Future Trial of Both Education & Constitutionalization' (2010) 2 Tsinghua China Law Review 273, 291–312.

[360] To my knowledge there is no English version available. See, however, Zhiwei Tong, 'A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling's Case Symposium on Constitutional Review in China' (2009) 43 Suffolk University Law Review 669, 669.

[361] National Development and Reform Commission and others (no 18).

The juxtaposition of these two statements shows once again that China pragmatically chooses whether it binds itself by international norms or merely creates a negotiating framework through general documents depending on the country and the Chinese political objectives. From the Chinese perspective, law guides the relationship in both cases. This focus on law as a tool for pragmatic decision-making is typical for proponents of Legal Realism. However, *Shaffer* points out rightly that 'to address how law works, one of course has to have a conception of what one is studying'.[362] In this section, I have found that the Chinese understanding of the rule of law is based on a specific understanding of law. This Chinese understanding has a profound impact on China's normative approach to investment protection within the BRI.

Concluding Remarks

China's historical encounter with international law has been a root of Chinese scepticism regarding a deeper integration in an international order. In the last two decades, China has impressively proven how it is able to use international norms to forge ahead in its economic development. Securing these economic achievements is the political aim of the BRI. Many international rules foster the BRI on a case-to-case basis and with flexible policy arrangements. China stays engaged with formal rules, ISDS in established institutions and China builds its own institutions. Simultaneously, China seeks to stay out of institutionalised dispute settlement and prefers bilateral solutions in other instances. China has developed a realist approach to international law, which is rooted in its status as a major economic power as well as Chinese history and culture. While European legal scholarship tends to seek a sharp distinction between law and politics, some go as far as 'to view hard law as theory and customary or soft law as practice' in China's case.[363] This dissertation suggests that according to China's approach law and politics merge fluidly.

In the era of the BRI, China adapts international norms and uses international regulatory regimes with sophistication. My analysis has shown that one must adopt a holistic view to grasp the legal dimension of the BRI. The few genuinely legal studies on the BRI need to be

[362] Gregory Shaffer, 'The New Legal Realist Approach to International Law' (2015) 28 Leiden Journal of International Law 189, 191–192.
[363] Larry A DiMatteo, 'Rule of Law in China: The Confrontation of Formal Law with Cultural Norms' (2018) 51 Cornell International Law Journal 391, 441.

supplemented through further research because China has become an inescapable factor on the international stage as a cooperation partner, a negotiating partner, an economic competitor and a systemic rival.

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***Note**: Chinese surnames — such as 'Cai' or 'Wang' — precede given names in Mandarin, but this order is often reversed in English publications. This dissertation follows the English practice for bibliographical references. The first listed name of an author is the given name. Apart from that, I follow the Chinese order (e.g. 'Xi Jinping' or 'Deng Xiaoping').*

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