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ARTICLE

Characterization (and Registration) of a "BRI Dispute"

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Abstract

This article explores the terms "BRI dispute" and "BRI jurisprudence". It undertakes a practical and theoretical analysis that considers whether "BRI disputes" have distinct and visible characteristics and are capable of being identified in a legal sense. This is important since practitioners – arbitration centres and law firms – use the term broadly and without specific criteria. By exploring the customary usage and the approach of legal scholars to the term, presenting examples of "BRI disputes" and examining their unique features, and constructing a theoretical approach (utilizing the concepts of *ratione materiae*, *ratione loci, ratione temporis*, and *ratione personae*; and considering the jurisprudence of the ICSID), this article moves from a broad to a narrow analysis to develop both a definition and a system of registration of "BRI disputes" for use by academics, practitioners, and policymakers.

Keywords: BRI; Belt and Road; Dispute Settlement; ICSID; China

I. Customary usage of the terms "BRI disputes" and "BRI jurisprudence"

It is not the purpose of this article to consider (again) the history and development[1] of China's Belt and Road Initiative (BRI) nor to comprehensively describe the strengths and weaknesses (particularly conceptually) of the BRI.[2] Instead, this article focuses on understanding and deciphering the term "BRI disputes". In Part I, I begin this process by describing the significant customary usage of the term. For instance, the term "BRI

[1] Chinese President XI Jinping announced the "Belt" and the "Road" during public speeches in Kazakhstan and Indonesia in September and October 2013, see The State Council of the People's Republic of China, "Chronology of China's Belt and Road Initiative" *Xinhua News Agency* (28 May 2015), online: ENGLISH.GOV.CN http://english.www.gov.cn/news/top_news/2015/04/20/content_281475092566326.htm. For an introduction to the background and framework of the BRI, see Jiangyu WANG, "Dispute Settlement in the Belt and Road Initiative: Progress, Issues, and Future Research Agenda" (2020) 8(1) The Chinese Journal of Comparative Law 4 at 5–7; and Lutz-Christian WOLFF, "Legal Responses to China's 'Belt and Road' Initiative: Necessary, Possible, or Pointless Exercise?" (2020) 29(2) Transnational Law and Contemporary Problems 250 at 250–3.

[2] For a comprehensive description of the conceptual weaknesses of the BRI, see Lingliang ZENG, "Conceptual Analysis of China's Belt and Road Initiative: A Road towards a Regional Community of Common Destiny" (2016) 15 (3) Chinese Journal of International Law 517. See also Heng WANG, "China's Approach to the Belt and Road Initiative: Scope, Character, and Sustainability" (2019) 22(1) Journal of International Economic Law 29 and Julien CHAISSE and Jamieson KIRKWOOD, "Adjudicating Disputes Along China's New Silk Road: Towards Unity, Diversity, or Fragmentation of International Law?" (2021) 68(2) Netherlands International Law Review 219.

disputes" is already accepted and promoted by many prominent legal organizations – for example, the International Chamber of Commerce and the Hong Kong International Arbitration Centre – and there are also many law firms which do not hesitate to speak about "BRI disputes"; for example, Clifford Chance, Norton Rose Fulbright, etc.[3] Furthermore, academic papers[4] and newspapers frequently reference "BRI Disputes".[5] Therefore, it is clear that the term "BRI disputes" has become part of the common legal parlance of professionals working in related fields.

Other examples include eBRAM (Electronic Business Related Arbitration and Mediation), an online dispute resolution tool established in 2017 to (amongst others) settle disputes in major BRI infrastructure projects)[6] and the Singapore International Arbitration Centre, which has been actively promoting itself as an appropriate body to resolve BRI-related disputes by, for example, regularly holding seminars dedicated to the BRI and partnering with relevant organizations in pursuit of improving its BRI-specific services (such as the Joint Seminar and Memorandum of Association with the China International Economic and Trade Arbitration Commission, entitled "Effective Resolution of BRI Disputes").[7]

[3] See International Chamber of Commerce (ICC), "Belt and Road Commission", online: ICC https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/belt-and-road-commission/ (states that the "ICC created the Belt and Road Commission to drive the development of ICC's existing procedures and infrastructure to support Belt and Road disputes"); Hong Kong International Arbitration Centre (HKIAC), "Why HKIAC for Belt and Road Disputes?", online: HKIAC https://www.hkiac.org/Belt-and-Road/why-hkiac-belt-and-road-disputes (states the reasons to choose HKIAC for "BRI disputes"); Clifford Chance, "Briefings: Belt and Road: Dispute Resolution from a Chinese Perspective" (18 October 2018), online: Clifford Chance https://www.cliffordchance.com/briefings/2018/06/belt_and_road_disputeresolutionfromachines.html (discusses the resolution of "BRI disputes"); King and Wood Mallesons, "BELT AND ROAD PRACTICAL GUIDE: HOW TO RESOLVE DISPUTES ON THE BELT AND ROAD" (14 November 2019), online: King and Wood Mallesons https://www.kwm.com/hk/en/insights/latest-thinking/how-to-resolve-disputes-on-the-belt-and-road.html (provides a full report on managing "BRI disputes"); Alfred WU, "Publication: Belt and Road Initiative Disputes – Bumps in the Road?" *Norton Rose Fulbright* (October 2018), online: Norton Rose Fulbright https://www.nortonrosefulbright.com/en/knowledge/publications/7b9bd0cc/belt-and-road-initiative-disputes---bumps-in-the-road.

[4] See, for example, Bernardo CARTONI, "The 'Belt and Road Initiative' and the Tools to Solve 'BRI-Related' Disputes", International Arbitration and the Jurisdiction of Arbitral Tribunals, Conference Paper – Madrid, 17 December 2019, online: SSRN https://ssrn.com/abstract=3512963 (which considers BRI dispute resolution, including the role of arbitral institutions in "BRI-related" disputes, mediation in the Chinese culture, and the Chinese International Capital Corporation (CICC) and its rules); Weixia GU, "The Dynamics of International Dispute Resolution Business in the Belt and Road", University of Hong Kong, Faculty of Law, Research Paper No. 2019/122 (Proceedings of the American Society of International Law Annual Meeting, Vol. 113, Washington, 2019), online: SSRN https://ssrn.com/abstract=3519778 (considers BRI dispute resolution, which has triggered a proliferation of "adjudication business". From the perspectives of BRI investors and disputants, three major means of dispute resolution are on offer and the institutions involved).

[5] See, for example, Bruce LOVE, "China Belt and Road Disputes Set to Fuel Mediation's Global Rise" *Financial Times* (14 August 2019), online: Financial Times https://www.ft.com/content/71288fe2-9e6f-11e9-9c06-a4640c9feebb; MAO Weihua and CAO Yin, "Urumqi Mediation Room Resolves BRI Disputes" *China Daily* (20 September 2019), online: China Daily https://www.chinadaily.com.cn/a/201909/20/WS5d842ff9a310cf3e3556c8da.html (an example of "BRI disputes" being discussed in newspapers).

[6] See Herbert Smith FREEHILLS, "The Role of Mediation in the Resolution of Belt and Road Disputes" (11 October 2017), online: Asia Disputes Notes https://hsfnotes.com/asiadisputes/2017/10/11/the-role-of-mediation-in-the-resolution-of-belt-and-road-disputes/ (discusses eBRAM). See also DEACONS, "eBRAM: Changing the way we do ADR" (25 April 2019), online: Legal Updates https://www.deacons.com/2019/04/25/ebram-changing-the-way-we-do-adr/

[7] See Singapore International Arbitration Centre (SIAC), "SIAC Signs Memorandum of Understanding with the China International Economic and Trade Arbitration Commission" (12 October 2018), online: SIAC https://siac.org.sg/wp-content/uploads/2023/04/Press-Release-SIAC-Signs-MOU-with-the-China-International-Economic-and-Trade-Arbitration-Commission.pdf).

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Examples from mainland China and internationally include the Wuhan Arbitration Commission, the "One Belt One Road Arbitration Court",[8] the "One Belt One Road Arbitration Initiative" (a collaboration between the Kuala Lumpur Regional Centre for Arbitration, the Cairo Regional Centre for International Commercial Arbitration, and the Beijing Arbitration Commission), and the establishment of a Belt and Road subcommittee by the International Bar Association.[9]

The term "BRI jurisprudence", the philosophy of law applied within the BRI, has also recently emerged.[10] Although the term "BRI jurisprudence" is contested, an argument can be made that the term is developing.[11] The idea of developing "BRI jurisprudence" is the anticipation that, over time, a critical mass of BRI-related discussion and practices (from a legal point of view), BRI-related tribunal decisions, and/or BRI-related dispute settlement procedures will develop.

However, it is understandable that there has been an absence of established dispute settlement practices in the ten or so years since the BRI was first officially announced in 2013 for two principal reasons. First, as Chiann Bao explains, "BRI disputes have only recently begun to surface in the last few years (which is consistent with the expected three-to-five-year gestation period of disputes for complex infrastructure projects)".[12]

Second, the nature of BRI-related dispute cases means that very few have become public, and these have not been the subject of adjudication in any tribunal. These factors also explain why we cannot (yet) see a system of BRI precedents.[13] Therefore, it is likely that "BRI jurisprudence" will start to become more noticeable over time. Additionally, a system of BRI precedents might yet emerge.[14]

Additionally, Chinese judicial practice has facilitated the identification of the terms "BRI disputes" and "BRI jurisprudence" in the following ways. First, the Supreme

[8] See Weidong ZHU, "Some Considerations on the Civil, Commercial, and Investment Dispute Settlement Mechanisms between China and the Other Belt and Road Countries"in Julien CHAISSE and Jędrzej GÓRSKI, eds., *The Belt and Road Initiative: Law, Economics, and Politics* (Leiden: Brill Nijhoff, 2018), 607 at 616 (which details the Wuhan Arbitration Commission "One Belt One Road Arbitration Court").

[9] LIN Zhiwei, "Belt and Road a Turning Point for Arbitration in China?" China Business Law Journal (16 October 2017), online: Law Asia https://law.asia/belt-road-turning-point-arbitration-china/ (which details the "One Belt One Road Arbitration Initiative", a collaboration between the Kuala Lumpur Regional Centre for Arbitration, the Cairo Regional Centre for International Commercial Arbitration, and the Beijing Arbitration Commission); the International Bar Association (IBA), "Asia Pacific Regional Forum: Subcommittees and Other Groups", online: IBA https://www.ibanet.org/unit/Regional+Fora/committee/Asia+Pacific+Regional+Forum/3107 (which details the IBA's establishment of a Belt and Road subcommittee).

[10] See, for instance, Joel SLAWOTSKY, "The Longer-Term Ramifications of China's BRI Jurisprudence" *lcbackerblog* (15 April 2019), online: Law at the End of the Day. https://lcbackerblog.blogspot.com/2019/04/joel-slawotsky-longer-term.html (an example of the term "BRI jurisprudence" being used). See also Cornell Law School, "Legal Information Institute: Jurisprudence" *Cornell Law School*, online: Cornell Law School https://www.law.cornell.edu/wex/jurisprudence (definition of jurisprudence).

[11] Qiao LIU, "Editorial" (2020) 8(1) *The Chinese Journal of Comparative Law 1* at 2 (considers the use of the term "BRI jurisprudence" and states "[n]otwithstanding the use of the term 'BRI jurisprudence', there is currently no evidence that China or Chinese lawmakers or courts are developing jurisprudence dedicated to, and tailored for the BRI. China's approach is more aptly described as building a general capacity to deal with transnational disputes, including, but not limited to, disputes arising from BRI projects or with BRI participating countries").

[12] Chiann BAO, "Negotiating the Potholes Along the Belt and Road" (2019) 21(4) Asian Dispute Review 154 at 155 (explains that not many "BRI disputes" have appeared yet, which is consistent with the expected three-to-five-year gestation period of disputes for complex infrastructure projects).

[13] Cornell Law School, "Legal Information Institute: Precedent" *Cornell Law School,* online: Legal Information Institute https://www.law.cornell.edu/wex/precedent (provides the definition of "precedent").

[14] See Asia Society Policy Institute, "Navigating the Belt and Road Initiative" (June 2019), online: Asia Society Policy Institute https://asiasociety.org/sites/default/files/2019-06/Navigating%20the%20Belt%20and%20Road%20Initiative_0.pdf at 8. The Asia Society Policy Institute frequently refers to "Chinese Precedents" in their report. In a future report, perhaps they will refer to "BRI Precedents" instead.

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People's Court (SPC) has issued two opinions relating to the BRI (in July 2015 and December 2019).[15] Second, China established the China International Commercial Court (CICC) as part of a trilogy of measures to assist BRI dispute settlement.[16] The other two measures involved establishing an international commercial experts committee and a convenient, efficient, and low-cost "one-stop" dispute resolution centre to effectively integrate diversified mechanisms, including litigation, mediation, and arbitration.[17] These two approaches represent a subtle shift by the Chinese judiciary towards "internationalizing" its domestic court system and recognizing that "BRI disputes" require different treatment than regular disputes. [18]

Further, courts in China have also "claimed to have handed numerous 'Belt and Road cases'", although the SPC has only published twenty-four model cases (which include both "typical cases" and "guiding cases").[19] Unfortunately, these model cases do not significantly add to the analysis since, as Jiangyu Wang states, "[l]eaving aside the label of 'Belt and Road', these cases are not more than ordinary civil and commercial cases involving cross-border legal relations".[20]

Outside of China, it could be contended that the term "BRI disputes" might find its way into the formation of customary international law.[21] Although this idea might seem rather

[15] See Supreme People's Court of the People's Republic of China (SPC) "Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the 'Belt and Road' by People's Courts" *Peking University Centre for Legal Information* (16 June 2015), online: PKU Law http://en.pkulaw.cn/display.aspx?cgid=96f2607d78e93212bdfb&lib=law; Susan FINDER, "Supreme People's Court and 'One Belt One Road'" (14 July 2015), online: Supreme People's Court Monitor https://supremepeoplescourtmonitor.com/2015/07/14/supreme-peoples-court-and-one-belt-one-road/ (provides English commentary); Susan FINDER, "Supreme People's Court Updates its Belt & Road Policies" (28 January 2020), online: Supreme People's Court Monitor https://supremepeoplescourtmonitor.com/2020/01/28/supreme-peoples-court-updates-its-belt-road-policies/ (provides analysis)

[16] China International Commercial Court (CICC), "A Brief Introduction of China International Commercial Court", online: CICC http://cicc.court.gov.cn/html/1/219/193/195/index.html (leads to the CICC's official website).

[17] See CICC, "Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation)" (12 May 2018), online: CICC http://cicc.court.gov.cn/html/1/219/208/210/1183.html; Herbert Smith Freehills, "Supreme People's Court Issues Rules of Procedure for the China International Commercial Courts"; Herbert Smith Freehills, "Supreme People's Court Issues Rules of Procedure for the China International Commercial Courts" *Herbert Smith Freehills* (7 December 2018), online: Asia Dispute Note https://hsfnotes.com/asiadisputes/2018/12/07/supreme-peoples-court-issues-rules-of-procedure-for-the-china-international-commercial-courts/ (considers the significance of the CICC Rules of Procedure).

[18] See Evgeny RASCHEVSKY, "When 'One Belt One Road' Project Disputes Arise, Who Will Resolve Them?" *Thomson Reuters* (23 November 2017), online: Practical Law: Arbitration Blog http://arbitrationblog.practicallaw.com/when-one-belt-one-road-project-disputes-arise-who-will-resolve-them/ (states that the CICC might resemble Singapore's International Commercial Court and Dubai's International Financial Centre Courts. In this way, the move may shift the goalposts regarding BRI dispute settlement).

[19] Jiangyu WANG, "Flexible Institutionalization: A Critical Examination of the Chinese Perspectives on Dispute Settlement for the Belt and Road" (2021) 29(1) Asia Pacific Law Review 70 at 75. See also Qiao LIU, "The Use of Case Law in China's Belt and Road Initiative" (2021) 29(1) Asia Pacific Law Review 129 (which presents a comprehensive study of the types of BRI model cases issued by the SPC); Stanford Law School, "China Guiding Cases Project", online: Stanford Law School https://law.stanford.edu/china-guiding-cases-project/ (links to Stanford Law School's discussion and database of the typical Belt and Road cases. Although the Stanford project has now closed, most of the earlier analyses are still available); Guodong DU and Meng YU "Highlights of China's Guiding Case System – Guiding Cases & Similar Cases Series (1)" (31 July 2023), online: China Justice Observer https://www.chinajusticeobserver.com/a/highlights-of-chinas-guiding-case-system-guiding-cases-similar-cases-series-1.

[20] Wang, *supra* note 19.

[21] See Patrick DUMBERRY, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge: Cambridge University Press, 2016) at 19 (which discusses the formation of customary international law *vis-à-vis* the customary usage of concepts, and explains how tribunals can sometimes grant a

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unlikely, it is widely accepted that customary international law (along with treaty law) is one of the two primary sources of international legal obligations.[22] It has also been stated that:

> Every once in a while, custom has a tendency to leap to the fore even within special fields of international law where it seemed to have ceded primacy to treaties long ago, thereby reminding the international legal profession that it is not just barely alive but is still pulsating with some intensity.[23]

Moreover, any counterargument stating that "BRI disputes" do not possess any elements of customary international law is thus invalid since not enough time has yet elapsed for the crystallization required to become part of customary international law.[24]

II. Approach of legal scholars to the term "BRI disputes"

There is a growing movement among legal scholars to talk about "BRI disputes" and types of "BRI disputes"; for example, Ernst-Ulrich Petersmann identifies at least seven different categories of "BRI disputes".[25] Therefore, the term is arguably already used in a somewhat narrower way by some scholars, some of whom also try to define the terms, such as Bernardo Cartoni. Cartoni states that "BRI disputes" are "any dispute arising of a contract related to BRI project (for instance, the construction of a highway or the renovation of a port) and any dispute arising of an investment made under the 'umbrella' of BRI".[26]

Others, such as Stephen Ngo (to whom Cartoni also refers), instead suggest some of the unique characteristics of "BRI disputes":

> As BRI's activities will be considerably broad, involving investment, financing arrangements, co-funding, insurance of projects to civil engineering work, acquisition of land, [and] construction or engineering design. Arguably, [these] will be considered "hot spots" where disputes can arise fundamentally because such mega projects are not without [their] challenges, and they come with risks.[27]

certain recognition. For example, the Statute of the International Court of Justice provides, in Article 38(1)(b), that customary international law is "a general practice accepted as law").

[22] Rebecca CROOTOF, "Change without Consent: How Customary International Law Modifies Treaties" (2016) 41 (2) The Yale Journal of International Law 237 at 241 (states that the two primary sources of international legal obligations are customary international law and treaty law). See also, Michael WOOD, "Foreword" in Dumberry, supra note 21 at xv (wrote the description that "customary international law remains the bedrock of international law").

[23] Yoram DINSTEIN, "The Interaction between Customary International Law and Treaties" (2006) 322 Recueil Des Cours 243 at 262 (which states that customary international law is frequently unexpectedly relevant).

[24] See Karol WOLFKE, *Custom in Present International Law,* 2nd ed. (Dordrecht: Martinus Nijhoff, 1993) at 54 (which states that the development of customary law is a continuous process, which often takes decades to crystallize).

[25] 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?* (Cham: Palgrave Macmillan, 2020), 45 at 55–6 (which identifies seven types of "BRI disputes").

[26] Cartoni, *supra* note 4 at 3 (discusses what is included in the term "BRI disputes").

[27] Stephen K. NGO, "International Commercial Arbitration for Belt and Road Initiative – Some Thoughts on China, Singapore and Hong Kong SAR as Dispute Resolution Locales", China-ASEAN Civil and Commercial Law Forum, Guangxi University for Nationalities, Proceedings Paper, 20 December 2018, online: SSRN https://ssrn.com/abstract=3323302 at 7 (considers the causal factors relating to "BRI disputes").

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Others who have addressed the *unique* characteristics of "BRI disputes" include Chiann Bao and Elizabeth Chan, who state, "BRI disputes possess certain unique features that impact both the potential for and timing of disputes and how such disputes are likely to be heard and resolved".[28]

The features that Bao and Chan list are as follows: first, the host country's instability; second, financing by Chinese financial institutions according to terms and conditions that other financial institutions might not accept; third, construction projects have unusually vast exposure to an extremely large spectrum of risks; and, fourth, Chinese financing is assumed to be driven by geopolitical interests rather than commercial logic.[29] Additionally, Andrii Zharikov focuses on the fact that "trade finance disputes are inevitable in the BRI" since "BRI projects [are] predominantly in trade, finance, and infrastructure".[30]

Alternatively, Priyanka Kher and Trang Tran suggest the most significant characteristic is "lack of transparency". In their analysis for the World Bank on investment protection in the BRI, they stated, "one standout finding is the consistently low score on transparency".[31] Furthermore, Kher and Tran focus on the wide variety in investor protection levels when defining "BRI disputes", stating that "[d]isputes in BRI will involve a diverse set of country laws and regulations, different legal traditions (civil or common law), and multiple court systems of varying levels of effectiveness and capacities".[32]

Additionally, many other scholars reference a unique category of "BRI disputes" and have developed the classical separation of "BRI disputes" into state-to-state disputes, state-investor disputes, and investor-investor disputes.[33] For instance, Jiangyu Wang presents a "typology of disputes in the BRI" and suggests that these three types can be elaborated upon (state-to-state disputes arising from China-invested BRI projects, transactional disputes, and international trade and investment disputes in the BRI area).[34]

Similarly, in the context of the characterization of "BRI disputes", Ping Xiong and Roman Tomasic also develop this classical model for the separation of "BRI disputes" and focus on "the question of how best to resolve disputes arising from BRI trade and investment, and the frictions that arise during the governance of the PRC SOEs in BRI

[28] Chiann BAO and Elizabeth CHAN, "Forecasting Energy Disputes in Asia" (2020) 16(1) Asian International Arbitration Journal 25 at 33 (considers that "BRI disputes" have unique features).

[29] *Ibid.* (lists the unique features of "BRI disputes").

[30] Andrii ZHARIKOV, "Cooperation of UNCITRAL and the International Chamber of Commerce: New Possibilities for Companies from the Belt and Road Initiative for Dispute Resolution in Trade Finance" (2019) Comparative Law Journal of the Pacific ISSN 1772-1644, online: Nottingham Trent University http://irep.ntu.ac.uk/id/eprint/38881/1/1258088_Zharikov.pdf at 10 (considers that trade finance disputes are commonplace in the BRI).

[31] Priyanka KHER and Trang TRAN, "Investment Protection Along the Belt and Road", Macroeconomics, Trade, Investment Global Practice, World Bank, Discussion Paper No. 12, January 2019, online: World Bank https://openknowledge.worldbank.org/handle/10986/31247 at 6.

[32] *Ibid.* at 37 (considers the unique features involved in BRI dispute settlement).

[33] See Guiguo WANG, "The Belt and Road Initiative in Quest for a Dispute Resolution Mechanism" (2017) 25(1) Asia Pacific Law Review 1 at 1–2 (separates "BRI disputes" into state-to-state disputes, state-investor disputes, and investor-investor disputes). See also Gu, *supra* note 4 (which analyses the BRI dispute resolution market, considering the BRI investors and disputants, the major means of dispute resolution on offer, and the institutions involved). See also, Malik R. DAHLAN, "Dimensions of the New Belt & Road International Order: An Analysis of the Emerging Legal Norms and a Conceptionalization of the Regulation of Disputes" (2018) 9(1) Beijing Law Review 87 at 104 (which states there is an "urgent need" for a "BRI dispute resolution mechanism"); Wang, *supra* note 2 (analyses China's approach towards the BRI from a legal perspective, and identifies that its key legal characteristic is maximized flexibility with regard to BRI dispute settlement).

[34] See Wang, *supra* note 1 at 7–10 (elaborates upon the three types of "BRI disputes").

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countries".[35] Xiong and Tomasic also state that these characteristics have "now become widely recognized in the academic literature".[36]

Further, by developing (and expanding) this classical model for the separation of "BRI disputes" (that is, separation into state-to-state disputes, state-investor disputes, and investor-investor disputes), legal scholars have presented a narrower approach to the term "BRI disputes". For instance, and as already mentioned, Petersmann uses the term "BRI disputes" several times and explicitly declares that "[a]t least 7 different kinds of BRI disputes should be distinguished".[37] These seven types are Trade Disputes and World Trade Organization (WTO) disputes, investment disputes, financial disputes, intellectual property disputes, commercial disputes, maritime disputes, and energy trade and investment disputes.

However, this separation (state-to-state disputes, state-investor disputes, and investor-investor disputes) appears to miss two important points. First, where a state-owned enterprise (SOE) is the investor, is the enterprise still an investor, or is it the state? Second, are domestic "BRI disputes" fully captured? This is what Susan Finder calls "invisible BRI disputes". Finder (who is a member of the CICC Panel of Experts) identified this concept of "*invisible BRI disputes*", which are "disputes between two or more Chinese parties but linked with a BRI project", so-called because "In academic and many professional discussions of Belt & Road Initiative (BRI) disputes, the focus is on disputes between the Chinese and foreign parties."[38]

However, whether or not the delineation of "BRI disputes" is broad or narrow does not affect their uniqueness. Indeed, identifying "BRI disputes" as unique is necessary to justify that "BRI disputes" should have their own label and be treated in a bespoke way. This idea has already been raised partly by China's apparent wish to limit the use of its BRI brand. Indeed, China began drafting rules for projects to be considered BRI projects in 2019 to prevent companies from misusing the BRI label. Specifically, the National Development and Reform Commission was reported to have been working on identifying a list of legitimate BRI projects officially endorsed by the Chinese government so as to prevent confusion about the BRI's scope and limit damage to the BRI's reputation and, at the same time, improve the regulation of BRI projects.[39] The idea of a "BRI label" is discussed further in Part V.

Nevertheless, the argument of whether "BRI disputes" are unique largely occurs outside of China. For instance, Alyssa Wall states that there is a clear "understanding within China that BRI development leads naturally to conflict, and such conflict requires [a] unique means of resolution".[40] To exemplify this, Wall quotes Gao Xiaoli, a Vice-President of the Fourth Civil Division of the SPC and a sitting judge on the CICC,

[35] Ping XIONG and Roman TOMASIC, "Soft Law, State-Owned Enterprises, and Dispute Resolution on PRC's Belt and Road — Towards An Emerging Legal Order?" (2019) 49(3) Hong Kong Law Journal 1025 at 1031 (which describes how Chinese SOEs dominate the BRI projects as a means for China to extend its soft-power capacities).

[36] *Ibid.* (states that this is widely recognized in the academic literature).

[37] Petersmann, *supra* note 25 at 55–6 (identifies seven types of "BRI disputes"). As regards the WTO, see Julien CHAISSE and Jamieson KIRKWOOD, "One Stone, Two Birds: Can China Leverage WTO Accession to Build the BRI?" (2021) 55(2) Journal of World Trade 287.

[38] Susan FINDER, "Invisible Belt & Road Disputes" (22 June 2021), online: Supreme People's Court Monitor https://supremepeoplescourtmonitor.com/2021/06/22/invisible-belt-road-disputes/ (states that "invisible BRI disputes" are disputes between two or more Chinese parties and linked with a BRI project).

[39] Bloomberg News, "China Moves to Define 'Belt and Road' Projects for First Time" (3 April 2019), online: Bloomberg https://www.bloomberg.com/news/articles/2019-04-03/china-moves-to-define-belt-and-road-projects-for-first-time (describes the plan as regards a BRI "label").

[40] Alyssa V.M. WALL, "Designing a New Normal: Dispute Resolution Developments along the Belt and Road" (2019) 52 New York University Journal International Law and Policy 279 at 281 (which states that there is a greater understanding regarding "BRI disputes" within China).

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who stated, "[t]he construction of 'Belt and Road' is mainly about economic cooperation, which inevitably leads to disputes in the field of trade and investment".[41]

Unfortunately, within and outside of China, there is still neither a common consensus nor a common framework for the *unique* characteristics of a "BRI dispute". Therefore, the following Part of this article presents some examples of the unique features of "BRI disputes" that can help fill this gap in the existing literature. Similarly, this article also considers whether there is any common consensus on defining a "BRI dispute".[42]

III. Examples of unique features of "BRI disputes"

This Part presents some of the unique features of "BRI disputes", supported by examples. The analysis represents an attempt to identify common unique features of "BRI disputes" and is not meant to be a comprehensive study. As regards the examples of "BRI disputes", these were chosen as a random cross-section of "BRI disputes" (based on the availability of data).

Although there is not much data available regarding "BRI disputes", some actual examples are required to demonstrate the unique features of these disputes.[43] As regards the number of BRI projects, it has been estimated that there are (only) 2,500–3,000 BRI projects, and it is also estimated that the number is (only) growing at a rate of approximately 500 projects per year (or more).[44] Furthermore, except for a few cases where official data can be obtained, most available data originates from newspaper sources.[45] This is unsatisfactory for a few reasons. First, there is the obvious unreliability of newspaper sources (such as the risk of bias, etc.). Second, over-reliance on newspaper reports regarding "BRI disputes" likely skews the analysis by emphasizing certain types of "BRI disputes" over others; for example, newspaper articles are far more likely to surface if the matter is of national significance. Thus, most of the project examples reported in newspapers inher-

[41] *Ibid.* (referring to GAO Xiaoli). See also, CICC, "Building the Judicial Guarantee of International Commercial Court 'Belt and Road' Construction: An Exclusive Interview with Gao Xiaoli" (19 March 2018), online: CICC http://cicc.court.gov.cn/html/1/219/208/209/774.html (GAO also said, "with the continuous promotion and deepening of the 'Belt and Road' initiative, the number of foreign commercial disputes in China will continue to increase").

[42] For instance, see Jonathon HILLMAN, "Statement Before the U.S.-China Economic and Security Review Commission: 'China's Belt and Road Initiative: Five Years Later'" *Centre for Strategic & International Studies* (25 May 2018), online: JSTOR www.jstor.org/stable/resrep22612 (which states, "[a] major challenge is that the BRI label evades classification. There is no agreed-upon definition for what qualifies as a BRI project... By design, the BRI is more a loose brand than a program with strict criteria.")

[43] See Bao, *supra* note 12 (explains that not many "BRI disputes" have appeared yet, which is consistent with the expected three-to-five-year gestation period of disputes for complex infrastructure projects, and the nature of BRI-related dispute cases means that very few have become public, and these have not been the subject of adjudication in any tribunal). This explains the absence of established dispute settlement practices in the BRI.

[44] See Chris DEVONSHIRE-ELLIS, "China's Belt and Road Initiative All Participating Countries by Income Group" *Dezan Shira & Associates* (16 September 2021), online: Silk Road Briefing https:// www.silkroadbriefing.com/news/2020/10/02/chinas-belt-and-road-initiative-all-participating-countries-by-income-group/; Refinitiv, "BRI Connect: An Initiative in Numbers" (2019), online: Refinitiv www.refinitiv.com/content/dam/marketing/en_us/documents/reports/refinitiv-zawya-belt-and-road-initiative-report-2019.pdf; and the Ministry of Commerce of People's Republic of China (MOFCOM), "Chinese Investment Cooperation with Countries Along the 'Belt and Road' in January 2021" (28 February 2021), online: MOFCOM http://english.mofcom.gov.cn/article/statistic/foreigntradecooperation/202103/20210303044017.shtml. See also Christoph Nedopil WANG, "China Belt and Road Initiative (BRI) Investment Report 2021", Green Finance & Development Centre, FISF Fudan University, Shanghai, January 2022, online: Green Finance & Development Centre https://greenfdc.org/wp-content/uploads/2022/02/Nedopil-2022_BRI-Investment-Report-2021.pdf.

[45] Although an attempt has been made to refer to official documents, published reports, or academic articles where available, the source is frequently from a newspaper.

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ently involve the state.[46] The following examples of "BRI disputes" are used in the analysis.

First, in *Beijing Urban Construction v Yemen*, the Chinese investor claimed, according to the China-Yemen Bilateral Investment Treaty (1998), that it was unlawfully deprived of its infrastructure investment (an airport terminal).[47] While this case is not always identified as a BRI-related dispute because the facts of the case predate the BRI. The case shows the potential for investors in BRI projects to invoke investment arbitration claims when there is an investment claim based on a bilateral investment treaty (BIT) with a BRI participating country. The cause of the dispute was that the Beijing Urban Construction Group alleged that its 2006 construction contract with the Yemen Civil Aviation and Meteorology Authority was unlawfully terminated in 2009 following weeks of state-orchestrated harassment and intimidation.[48] The case went to the International Centre for Settlement of Investment Disputes (ICSID) in 2014 before it was settled.

Second, in the *Hambantota Port Development Project*, the Sri Lankan government agreed to convey the Hambantota Port on a 99-year lease to China Merchant Port Holdings in July 2017, which raised an estimated USD 1 billion in debt for the infrastructure project (the port), which was finalized in 2007.[49] Although the project was agreed upon in 2007 before the BRI was launched, this project can nevertheless be included as an example of a BRI-related dispute since the dispute occurred between 2016 and 2017. China also includes this project as a BRI project.[50]

Third, in *East Coast Rail Link*, the Malaysian government suspended (in July 2018) and then restarted (in July 2019) an infrastructure project (a high-speed rail line) agreed upon in 2016 because the costs were renegotiated (the original construction costs of RM 65.5 billion were reduced to RM 44 billion).[51]

[46] Nevertheless, rather than detracting from this article, the lack of available data highlights a lack of transparency in BRI dispute settlement.

[47] See *China–Yemen BIT (1998)*, 16 February 1998 (entered into force on 10 April 2002), online: United Nations Conference Trade and Development – Investment Policy Hub https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/996/china---yemen-bit-1998.

[48] *Beijing Urban Construction Group Co. Ltd. v Republic of Yemen*, Decision on Jurisdiction of 31 May 2017, ICSID Case No. ARB/14/30, online: italaw https://www.italaw.com/sites/default/files/case-documents/italaw8968.pdf [*Beijing Urban v Yemen*] at paras. 23–5.

[49] See Neil DEVOTTA, "China's Influence in Sri Lanka" in Evelyn GOH, ed., *Rising China's Influence in Developing Asia* (Oxford: Oxford University Press, 2016), 129 at 143 (which explains that there were three phases with China's Exim Bank funding 85% of the first phase of approximately USD 400 million. The remaining phases cost another USD 1 billion); Maria-Adele CARRAI, "China's Malleable Sovereignty Along the Belt and Road Initiative: The Case of the 99-Year Chinese Lease of Hambantota Port" (2019) 51 New York University Journal of International Law and Policy 1061–99 (considers the 99-year lease in the context of China's perceived interventionist and expansionist attitude). See also, Maria ABI-HABIB, "How China Got Sri Lanka to Cough Up a Port" *New York Times* (25 June 2018), online: New York Times https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html (which summarizes that the revenues generated had fallen substantially short of projections and, by 2016, the loans could not be repaid).

[50] See China Xinhua News, "Another Milestone Along Path of #BeltandRoad. Sri Lanka Officially Hands Over Southern Port of Hambantota to China on 99-Year Lease" *Xinhua News Agency*(10 December 2017), online: Twitter https://twitter.com/xhnews/status/939753813115789312?lang=en (China's State news agency announced on Twitter that the Hambantota Port Project had become "another milestone along the path of #BeltandRoad").

[51] See Joseph SIPALAN, "China, Malaysia Restart Massive 'Belt and Road' Project After Hiccups", *Reuters* (25 July 2019), online: Reuters https://www.reuters.com/article/us-china-silkroad-malaysia-idUSKCN1UK0DG (it was agreed that the first two phases of the project would now cost significantly less). See also Tom MITCHELL and Alice WOODHOUSE, "Malaysia Renegotiated China-Backed Rail Project to Avoid $5bn Fee" *Financial Times* (15 April 2019), online: Financial Times https://www.ft.com/content/660ce336-5f38-11e9-b285-3acd5d43599e (reported that the Malaysian government changed their minds about cancelling the project after discovering a cancellation fee of USD 5.3 billion, leaving them with a choice of either renegotiating the project contract or paying the cancellation fee with nothing to show for it). See also, Reuters Staff, "Malaysia Suspends

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Fourth, in *Dolareh Container Terminal / Dolareh Multi-Purpose Port*, the government of Djibouti had (allegedly) unlawfully terminated a 30-year container terminal contract (the concession agreement was signed in 2006) with the United Arab Emirate-based DP World in 2018 and unlawfully allowed China Merchants Port Holdings to operate an alternative multi-purpose port (since 2014) and to construct a new container terminal.[52] DP World launched (and won) several claims at the London Court of International Arbitration and obtained a United Kingdom High Court injunction against the Djibouti government.[53] This "BRI dispute" is also said to be the first "BRI dispute" to be heard in a Hong Kong court since DP World also filed a claim at the Hong Kong High Court against China Merchants Port Holdings Company.[54]

Fifth, in *Kyauk Pyu Deepwater Port*, the Myanmar government delayed (until 2018) an infrastructure project (a port) that was first agreed upon in 2015 as part of the China-Myanmar Economic Corridor.[55] The project was restarted when a new agreement was reached at a significantly lower cost.[56] The price was radically renegotiated down from approximately USD 7 billion to USD 1.3 billion.[57]

Sixth, in *Jakarta-Bandung High-Speed Railway*, the Indonesian government delayed (in May 2018) an infrastructure project (a high-speed rail line) first agreed upon in 2015,

Construction of Major Belt and Road Rail Project" *Reuters* (4 July 2018), online: Reuters https://www.reuters.com/article/malaysia-politics-projects/malaysia-suspends-construction-of-major-belt-and-road-rail-project-idUSL4N1U03O6 (provides details of the suspension).

[52] See Andrew MIZNER, "Djibouti Loses Port Arbitration to DP World" *African Law & Business* (14 August 2018), online: African Law and Business https://iclg.com/alb/8450-djibouti-loses-port-arbitration-to-dubai-owned-company (which explains that new legislation was enacted in Djibouti in 2018 that allowed the Djibouti government to renegotiate long-term infrastructure contracts (Law 202 and the 2018 Decrees). Therefore, the Djibouti government terminated the Concession Agreement with DP World in 2018 and nationalized the container terminal). See also David STYAN, "China's Maritime Silk Road and Small States: Lessons from the Case of Djibouti" (2020) 29(122) The Journal of Contemporary China 191–206 (which considers the BRI projects in Djibouti, evaluates the military-security implications of Chinese ports, and suggests that China is intentionally wielding the "debt trap" to gain equity).

[53] See Sam BRIDGE, "UK High Court Grants Injunction to Protect DP World Deal in Djibouti" *Arabian Business* (5 September 2018), online: Arabian Business https://www.arabianbusiness.com/transport/403818-uk-high-court-grants-injunction-to-protect-dp-world-deal-in-djibouti; Gavin GIBBON, "DP World Wins Sixth Legal Ruling in $1bn Djibouti Port Dispute" *Arabian Business* (14 January 2020), online: Arabian Business <objidref>https://www.arabianbusiness.com/transport/437554-dp-world-wins-sixth-legal-ruling-in-1bn-djibouti-port-dispute</objidref>. These articles report how the United Kingdom High Court and the London Court of International Arbitration made awards in favour of DP World and have generally stated that the termination of the container terminal contract was illegal, but the government of Djibouti has not recognized these rulings.

[54] See Accesswire, "Legal Battle for Control of Djibouti Ports Comes to Hong Kong" *Bloomberg* (13 February 2019), online: Bloomberg https://www.bloomberg.com/press-releases/2019-02-13/legal-battle-for-control-of-djibouti-ports-comes-to-hong-kong; Staff Reporter (The Standard) "Road-Belt Case Goes to High Court" *The Standard* (11 February 2019), online: The Standard https://www.thestandard.com.hk/section-news/section/11/204856/Road-belt-case-goes-to-High-Court. These articles report how DP World launched a claim in the Hong Kong High Court in 2019.

[55] See PENG Nian, "Approached to China: Myanmar's China Policy (2016–2020)" in *International Pressures, Strategic Preference, and Myanmar's China Policy Since 1988* (Singapore: Springer, 2021) at 135–74 (which explains that the China-Myanmar Economic Corridor starts in China's Yunnan Province and runs through Myanmar's main economic cities, such as Mandalay, Yangon, and the Kyaukphyu Special Economic Zones in Rakhine State).

[56] Jenn-Jaw SOONG and Kyaw Htet AUNG, "Myanmar's Perception and Strategy toward China's BRI Expansion on Three Major Projects Development: Hedging Strategic Framework with State-Market-Society Analysis" (2021) 54(1) The Chinese Economy 20 at 23 (which details the project arrangements as regards *Kyauk Pyu Deepwater Port*).

[57] Kanupriya KAPOOR and Aye Min THANT, "Exclusive: Myanmar Scales Back Chinese-Backed Port Project Due to Debt Fears - Official" *Reuters* (2 August 2018), online: Reuters https://www.reuters.com/article/us-myanmar-china-port-exclusive/exclusive-myanmar-scales-back-chinese-backed-port-project-due-to-debt-fears-official-idUSKBN1KN106 (which details Myanmar's decision to scale back the project).

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following an Indonesian government re-evaluation of the project's design and feasibility, and the 2019 completion date was pushed back to 2021.[58]

Seventh, in *Lower Sesan II Dam*, the Cambodian government delayed and extended the completion date of an infrastructure project (a power plant) first agreed in 2012.[59]

A. The Chinese Investor is a State-Owned Enterprise (SOE)

The first unique feature of "BRI disputes" is that Chinese SOEs drive most (if not all) major BRI projects. Many scholars state that China's use of SOEs is fundamental to China's economic growth and economic strategy. For example, Ran Li and Kee Cheok Cheong state that China's use of SOEs is the primary differentiating factor identified in the Chinese economy. They state that "[u]nlike the rest of the world, China follows [s]tate-led growth, not private sector growth. State enterprises are at the heart of this model."[60] Then, as regards the BRI, Li and Cheong also state, "[g]iven the scale of the BRI, it should be no surprise that [s]tate enterprises will be at the forefront to drive the major projects".[61]

China's use of SOEs is also crucial to its regionalist foreign policy. For example, Carla Freeman contended that the announcement of the BRI in 2013 marked a "turning point in China's regionalism foreign policy" and that China's regionalism policy has now become "China's regionalism policy 2.0".[62] Furthermore, China's use of SOEs is also a significant part of China's embrace of "comprehensive and aggressive economic statecraft as part of its grand strategy".[63]

[58] Staff Reporter, "Jokowi Demands Evaluation of Jakarta-Bandung Fast Train Project after Setbacks" *Jakarta Globe* (10 May 2018), online: Jakarta Globe https://jakartaglobe.id/context/jokowi-demands-evaluation-jakarta-bandung-fast-train-project-setbacks (details the problems and delays in relation to the *Jakarta-Bandung High-Speed Railway* project).

[59] Kimkong HENG and Savinda PO, "Cambodia and China's Belt and Road Initiative: Opportunities, Challenges, and Future Directions" (2017) 1(2) University of Cambodia Occasional Paper Series 1 at 5, online: The University of Cambodia http://uc.edu.kh/userfiles/image/2017/10.%20UCOPS%20Vol%201_Iss%202.pdf#page=8 (details the project arrangements as regards *Lower Sesan II Dam*). HydroLancang is a subsidiary of China's Huaneng Group, one of the top power-generating companies in China.

[60] Ran LI and Kee Cheok CHEONG, *China's State Enterprises: Changing Role in a Rapidly Transforming Economy* (Singapore: Springer, 2018) at 2 (which considers the nature and significance of China's state-owned enterprises (SOEs) in the BRI context and focuses more on control than on ownership). See also, Carsten A. HOLZ, *China's Industrial State-Owned Enterprises: Between Profitability And Bankruptcy* (Singapore: World Scientific Publishing Company, 2003) (which analyses the decline in the profitability of China's industrial SOEs and looks at China's recent enterprise reform measures); Craig C. JULIAN, Zafar U. AHMED, and Junqian XU, eds., *Research Handbook on the Globalization of Chinese Firms* (Cheltenham: Edward Elgar Publishing, 2014) (which considers the globalization process of Chinese firms, regional economic integration, transportation costs, and the national government's role in globalization); Xiuping ZHANG and Bruce P. CORRIE, *Investing in China and Chinese Investment Abroad* (Singapore: Springer, 2018) (a detailed study of overseas investment by Chinese enterprises and foreign multinationals investing in China); Karen Jinrong LIN et al., "State-Owned Enterprises in China: A Review of 4 Years of Research and Practice" (2020) 13(1) China Journal of Accounting Research 31 (which reviews the literature on economic theories and forty years of the practices of Chinese SOEs and discusses the implications for future research); Peter J. BUCKLEY and Hinrich VOSS, eds., *Chinese Outward Foreign Direct Investment* (Northampton: Edward Elgar Publishing, 2020) (which studies the motivation, background, strategy, and impact of Chinese outward foreign direct investment and the emergence of Chinese multinationals); Wendy LEUTERT, "State-Owned Enterprises in Contemporary China" in Luc BERNIER, Massimo FLORIO, and Phillippe BANCE, eds., *The Routledge Handbook of State-Owned Enterprises* (London: Routledge, 2020), which analyses contemporary China's SOEs, particularly regarding their political embeddedness.

[61] Li and Cheong, *supra* note 60 at 175 (states the importance of Chinese SOEs to the BRI).

[62] Carla P. FREEMAN, "China's 'Regionalism Foreign Policy' and China-India Relations in South Asia" (2018) 24 (1) Contemporary Politics 81 at 86 (which states the connection between the BRI and regionalism).

[63] Yi Edward YANG and Wei LIANG, "Introduction to China's Economic Statecraft: Rising Influences, Mixed Results" (2019) 24(3) Chinese Journal of Political Science 381 at 381 (which states the connection between China's SOEs and economic statecraft).

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The fact that Chinese SOEs appear to be behind many (if not all) of the major BRI projects has a significant impact as regards the settlement of "BRI disputes". This is because negotiation with an SOE is, arguably, similar to state-to-state negotiation, and investment arbitration by an SOE is, arguably, similar to state-to-state arbitration (these propositions are based on similar arguments to the opposite side of the coin granting SOE's access to arbitration). It should be noted that this does not mean that disputes without SOE involvement do not qualify as "BRI disputes". Instead, it means only that Chinese SOEs drive most (if not all) major BRI projects. Nevertheless, different approaches are also taken. For example, in the CICC, the presence of a Chinese SOE does not appear to be relevant in determining whether a dispute is a "BRI dispute".

Furthermore, it is important to point out that the discussion has moved from *state ownership* per se to *de facto state control*. For instance, it is stated, "[c]learly the most important debate around China's state enterprises revolves around ownership and governance [although] … China's leadership has come to value control over ownership".[64] It will also be shown in the next Sub-Part on "Host Country Instability" (Part III.B) that Chinese government *control* over companies in BRI projects is key to making the companies behave in ways they might otherwise not do.

Regarding the BRI project examples, SOEs are the drivers of each BRI project example. First, in *Beijing Urban Construction v Yemen*, the Chinese investor, Beijing Urban Construction Group, was identified by the ICSID Tribunal as a Chinese SOE.[65] The Tribunal's reasoning to nevertheless allow the arbitration (that Beijing Urban Construction Group acted as a commercial investor in the "fact-specific context"[66]) was particularly controversial, and the controversial debate will be discussed in the next Part (along with other similar cases, such as *Beijing Shougang and Others v Mongolia*).[67] Nevertheless, the controversy does not change the identification of Beijing Urban Construction Group as a Chinese SOE.

In the *Hambantota Port Development Project*, the project developer was China Merchant Ports Holdings, and the funding was from the Exim Bank of China, which are both Chinese SOEs.[68] In *East Coast Rail Link*, the project developer was China Communications Construction Company, and the funding came from the Exim Bank of China, which are both Chinese SOEs.[69] In *Dolareh Container Terminal / Dolareh Multi-Purpose Port*, the project developer was China Merchant Ports Holdings, a Chinese SOE.[70] The Kyauk Pyu Deepwater Port project developer was China International Trust Investment Corporation, a Chinese SOE.[71] In *Jakarta-Bandung High-Speed Railway*, the project was awarded to a joint venture of China Railway International Group (specifically, China Railway No. 3 Engineering Group Co. Ltd, a Chinese SOE, and a consortium of four state-owned Indonesian enterprises), and the financing was provided by China Development Bank, which is also a

[64] Li and Cheong, *supra* note 60 at 5 (states how China's leadership has come to value control over ownership).

[65] *Beijing Urban v Yemen, supra* note 48 at para. 32.

[66] *Ibid.,* at para. 39.

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

[68] See DeVotta, *supra* note 49 at 143 (explains that the original project was finalized in 2007 between the Sri Lankan government and China's Exim Bank).

[69] See Zaharul ABDULLAH, Abdul Rahman EMBONG, and Sity DAUD, "China's Economic Engagement in Malaysia and Malaysia's Response" (2020) 5(1) Southeast Asian Social Science Review 26 at 37 (which explains the project had original construction costs of RM 65.5 billion, financed by China's EXIM Bank and the contract for the construction was awarded to the China Communications Construction Company).

[70] See Styan, *supra* note 52 at 191 (which states that the Dolareh Container Terminal / Dolareh Multi-Purpose Port project developer was China Merchant Ports Holdings).

[71] See Peng, *supra* note 55 at 145 (states that China International Trust Investment Corporation took a 70% stake in the *Kyauk Pyu Deepwater Port* project).

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Chinese SOE.[72] In *Lower Sesan II Dam*, the project was awarded to a joint venture between Cambodia's Royal Group and China's HydroLancang International Energy (with Vietnam retaining a minor stake). HydroLancang International Energy is a Chinese SOE.[73]

B. Host Country Instability

The second unique feature of "BRI disputes" is that many BRI projects are frequently situated in territories that have a combination of political instability, undeveloped and/or unreliable legal systems, and a reputation for weak corporate governance, which generally includes corruption.[74] Additionally, it is contended (for example, by Lingliang Zeng) that the international and regional situations faced by most of the countries participating in the BRI have become increasingly complicated in recent years.[75] Nevertheless, China has continued pursuing the BRI despite this, or maybe because of this. This is because, as identified by Patrick Norton, China has perceived geopolitical interests, which means that the substantial risk factors might discourage commercial investors from pursuing an investment altogether or require commercial investors to seek a higher rate of return to justify acceptance of the risks. However, this does not prevent BRI projects from being accepted.[76]

This does not mean that all BRI countries suffer from instability. Some developed countries and regions are listed as BRI countries on China's official BRI website (for example, Austria, New Zealand, Italy, Luxembourg, Malta, Cyprus, Portugal, and Greece).[77] Therefore, it is noted that "host country instability" may not be a compelling feature of a "BRI dispute".

Nevertheless, the fact is that many of the BRI projects do appear to be in countries that suffer from instability, and the explanation for this is largely (as stated in the previous Sub-Part, Part III.A) because most (if not all) of the Chinese companies involved in major BRI projects are Chinese SOEs. For instance, Norton states that the Chinese government effectively retains control over SOE decision making, even in formally independent commercial entities. For example, Norton refers to reports suggesting that Chinese

[72] See Edmund Terence GOMEZ et al., *China in Malaysia: State-Business Relations and the New Order of Investment Flows* (Singapore: Palgrave Macmillan, 2020) at 3–4 (reports on the project consortium involved in *Jakarta-Bandung High-Speed Railway*).

[73] See Heng and Po, *supra* note 59 at 5 (explains the structure of the *Lower Sesan II Dam* project). See also Nathaniel MATTHEWS and Stew MOTTA, "Chinese State-Owned Enterprise Investment in Mekong Hydropower: Political and Economic Drivers and Their Implications Across the Water, Energy, Food Nexus" (2015) 7(11) Water (Basel) 6269–84 (which examines the forces – political and economic – that drive Chinese SOEs to invest in hydropower in the Mekong Basin).

[74] See Patrick NORTON, "China's Belt and Road Initiative: Challenges for Arbitration in Asia" (2018) 13 University of Pennsylvania Asian Law Review 72 at 80 (which considers that many BRI projects are situated in territories that have political instability, undeveloped and unreliable legal systems, and weak corporate governance, including corruption).

[75] See Zeng, *supra* note 2 at 518 (at the time of writing, there were estimated to be around 60–70 BRI countries. This number is now significantly higher, and the increase in the number of BRI countries amplifies this opinion).

[76] Norton, *supra* note 74 at 80 (states that the risks in BRI projects are evaluated differently than other projects).

[77] Office of the Leading Group for Promoting the Belt and Road Initiative, "Belt and Road Portal", online: eng.yidaiyilu.gov.cn https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10076 (the official government website listed 143 countries as of 10 February 2023). Further, such has been the pace of expansion that it has become futile to create a list of countries participating in the BRI because any such list might quickly become obsolete. See, for example, Julien CHAISSE and Jamieson KIRKWOOD, "Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty" (2020) 23(1) Journal of International Economic Law 163 (the authors encountered difficulty when conducting a study on the use of a multilateral investment treaty in the BRI).

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officials might anticipate losing between 50% and 80% of their investment in BRI projects in Pakistan and Myanmar but are still willing to proceed.[78]

The following paragraph highlights that all considered BRI project examples are arguably located in countries with an unstable investment climate. Although a case can be made that the *East Coast Rail Link* project in Malaysia should be treated as an exception since Malaysia is assessed (by the World Bank) as a relatively stable country, Malaysia arguably still fits into this category as it has a relatively large problem *vis-à-vis* corruption. For example, according to the Transparency International 2022 Report, Malaysia is ranked as low as 61st regarding perceived corruption (versus, for example, Singapore at 5th or Hong Kong at 12th).[79]

Regarding the considered BRI project examples, in *Beijing Urban Construction v Yemen*, Yemen is regularly reported to be an unstable country; it was ranked 187th in the 2019 World Bank's "Ease of Doing Business" report (the 2019 World Bank Report).[80] In the *Hambantota Port Development Project,* Sri Lanka is regularly reported to be an unstable country; for example, Sri Lanka was ranked 99th in the 2019 World Bank Report.[81] In *East Coast Line* (as mentioned above), Malaysia can be considered an unstable country as it has a relatively high level of perceived corruption, and it was reported that the project involved some blatantly corrupt practices.[82] In *Dolareh Container Terminal / Dolareh Multi-Purpose Port*, Djibouti is regularly reported to be an unstable country; for example, Djibouti was ranked 112th in the 2019 World Bank Report.[83] In *Kyauk Pyu Deepwater Port*, Myanmar is regularly reported to be an unstable country; for example, Myanmar was ranked 165th in the 2019 World Bank Report.[84] In *Jakarta-Bandung High-Speed Railway*, Indonesia is regularly reported to be an unstable country; for example, Indonesia was ranked 73rd in the 2019 World Bank Report;[85] and in *Lower Sesan II Dam*, Cambodia is regularly reported to be an unstable country; for example, Cambodia was ranked 144th in the 2019 World Bank Report.[86] Additionally, the issue of environmental and social impact assessments being either incomplete and/or inaccurate is exacerbated in BRI Countries where environmental regulation by the government is not strictly enforced.

[78] Norton, *supra* note 74 at 81 (states that Chinese officials might anticipate investment losses but are still willing to proceed).

[79] See Transparency International, "Corruption Perception Index" (2022), online: Transparency International https://www.transparency.org/en/cpi/2022/index/mys (Transparency International ranking with regards to perceived corruption).

[80] See World Bank, "Ease of Doing Business Rank (1 = Most Business-Friendly Regulations) – Yemen, Rep." (2019), online: World Bank https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?locations=YE.

[81] See World Bank, "Ease of Doing Business Rank (1 = Most Business-Friendly Regulations) – Sri Lanka" (2019), online: World Bank https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?locations=LK.

[82] See Abdullah, Embong, and Daud, *supra* note 69 at 36 (which states that the Najib Razak government is accused of using Chinese loans to bail out the debt-laden sovereign wealth fund 1MDB, e.g., 1MDB was allegedly used to direct over USD 700 million to Najib's personal bank accounts). See also Raynore MERING "ECRL Will Be Built with 40pc Local Content, Says Transport Minister" *Malay Mail* (21 April 2019), online: Malay Mail https://www.malaymail.com/news/malaysia/2019/04/21/ecrl-will-be-built-with-40pc-local-content-says-transport-minister/1745482 (the construction contract was awarded without any public tender or open bidding process and consequently, local businesses were unable to integrate into the project's supply chain significantly and it was only following the project's renegotiation that the percentage of local content was raised).

[83] See World Bank, "Ease of Doing Business Rank (1 = Most Business-Friendly Regulations) – Djibouti" (2019), online: World Bank https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?locations=DJ.

[84] See World Bank, "Ease of Doing Business Rank (1 = Most Business-Friendly Regulations) – Myanmar" (2019), online: World Bank https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?locations=MM.

[85] See World Bank, "Ease of Doing Business Rank (1 = Most Business-Friendly Regulations) – Indonesia" (2019), online: World Bank https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?locations=ID.

[86] See World Bank, "Ease of Doing Business Rank (1 = Most Business-Friendly Regulations) – Cambodia" (2019), online: World Bank https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?locations=KH.

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The explanation for BRI projects being frequently located in countries with an unstable investment climate is that Chinese financing is often considered to be driven by geopolitical interests.

C. High-Risk Construction and Infrastructure Projects

The third unique feature of "BRI disputes" is that many BRI projects are high-risk construction and infrastructure projects. For instance, in many surveys and analyses, infrastructure projects account for up to 80% of BRI projects.[87] While construction and infrastructure investment is generally perceived to be risky, the risks are thought to be further increased in the BRI context. For example, Bao and Chan state that BRI construction projects, in particular, have unusually vast exposure to an extremely large spectrum of risks.[88] This is discussed in detail in several papers from Jelena Andrić and others, which state, "[c]ompared to traditional international construction projects, BRI projects are exposed to additional risks since they are geographically distributed and complex in nature and include more stakeholders".[89]

The evidence that many BRI projects are high-risk construction and infrastructure projects is set out in the preceding paragraph. It is estimated that up to 80% of BRI projects relate to construction and infrastructure projects and that scholars such as Bao and Chan have identified such projects as especially risky. Nevertheless, this does not mean high-risk construction or infrastructure projects do not qualify as BRI projects. This is just one of the characteristics that has been frequently found to be common among "BRI disputes", but it is not decisive (in determining whether a dispute is a "BRI dispute" or not). As was the case for the other common characteristics identified, attention should be given to the fact that the only purpose of this Part is to try to characterize "BRI disputes". Different approaches are taken, and, again, in the CICC, for instance, the type of project (infrastructure or construction or anything else) does not appear to be relevant in determining whether or not a dispute is a "BRI dispute".

As an additional example, which emphasizes the risks inherent in BRI-related construction projects, the Permanent Forum of China Construction Law published a book in 2019 with the specific purpose of identifying the risks to Chinese companies when participating in overseas construction projects.[90]

[87] See ZHANG Jizhong et al., "The Belt and Road Initiative 2020 Survey – A More Sustainable Road to Growth?" *International Finance Forum* (16 April 2020), online: Central Banking https://www.centralbanking.com/central-banks/economics/4737966/the-belt-and-road-initiative-2020-survey-a-more-sustainable-road-to-growth (80% of projects that received the greatest funding support among central banks were infrastructure projects). See also the Refinitiv, *supra* note 44 at 4 (captured over 2,600 BRI projects by May 2019 and split BRI projects into 44% Transportation, 23% Power and Water, 18% Real Estate, 9% Manufacturing, 5% Oil and Gas, 1% Mining, and <1% Communication).

[88] Bao and Chan, *supra* note 28 at 33 (states that BRI construction projects have unusually vast exposure to risk).

[89] Jelena M. ANDRIĆ et al., "Fuzzy Logic–Based Method for Risk Assessment of Belt and Road Infrastructure Projects" (2019) 145(12) Journal of Construction Engineering and Management (which explains that BRI projects are exposed to additional risks since they are widely geographically distributed and complex, and include more stakeholders). See also Jelena M. ANDRIĆ, Jiayuan WANG, and Ruoyu ZHONG, "Identifying the Critical Risks in Railway Projects Based on Fuzzy and Sensitivity Analysis: A Case Study of Belt and Road Projects" (2019) 11 (5) Sustainability 1302 at 1–18 (which considers the planned railway projects to be constructed in connection with the BRI and identifies the critical risks in such projects, such as changes in design, design errors, cooperation between China and the BRI country, loan risks, complex geological conditions of terrain, and geopolitical risks).

[90] See e.g., Permanent Forum of China Construction Law, *The Belt and Road Initiative: Legal Risks and Opportunities Facing Chinese Engineering Contractors Operating Overseas* (The Hague, the Netherlands: Wolters Kluwer Law International, 2019) (which aims to assist Chinese contractors in identifying, managing, and mitigating the inherent risks involved in BRI infrastructure projects, including those arising from the political, social, economic, and legal contexts of the foreign jurisdiction). See also Finder, *supra* note 38 (who explains that *The Belt and Road*

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Also, all considered BRI project examples relate to construction and infrastructure projects. *Beijing Urban Construction v Yemen* was a project to construct an airport terminal; the *Hambantota Port Development Project* was a project to construct a port; the *East Coast Rail Link* was a project to construct a high-speed rail line; the *Dolareh Container Terminal / Dolareh Multi-Purpose Port* was a project to construct a seaport; the *Kyauk Pyu Deepwater Port* was a project to construct a port; the *Jakarta-Bandung High-Speed Railway* was a project to construct a high-speed rail line, and the *Lower Sesan II Dam* was a project to construct a power plant.

D. Flexible Financing Provided by Chinese Financial Institutions

The fourth unique feature of "BRI disputes" is that many BRI projects involve flexible financing arrangements from Chinese financial institutions. Flexible financing here regards both the financing terms provided by Chinese financial institutions to other Chinese SOEs involved in the project (that is, better terms and conditions such as lower interest rates, longer repayment dates, etc. – which other financial institutions might not be able to offer)[91] and the financing amounts provided to the host states. It is claimed that China intentionally drags other countries into excessive spending beyond their means by offering a higher amount of loan than is required or the host country can afford, leading to inevitable project failures to the political advantage of China.[92] The consequences of such flexible financing are, first (as we have seen above), the financing arrangements to Chinese SOEs could even be non-recourse; that is, the loans could be granted without expectations of repayment. For example, Norton referenced reports that suggested Chinese officials anticipated losing between 50 and 80% of their investment in some BRI projects.[93] Such flexible financing arrangements are possible because the loans are often provided from Chinese SOEs to Chinese SOEs (similar to a situation of the left-hand giving to the right-hand). Second, BRI projects are said to be frequently larger and more expensive than the host country can afford, with it being asserted by the World Bank that, for some countries participating in the BRI, the financing required for the BRI projects may expand their debt to unsustainable levels (which leads to accusations that China is using debt-diplomacy to achieve political objectives).[94]

It should be noted that these views regarding flexible financing are common and appear substantiated, but this does not necessarily mean it is strictly the case. For instance, Lutz-Christian Wolff (among others) has referred instead to the idea that

Initiative: Legal Risks and Opportunities Facing Chinese Engineering Contractors Operating Overseas was written by a group of highly experienced Chinese legal advisers).

[91] Bao and Chan, *supra* note 28 at 33 (states that the financing provided by Chinese financial institutions is according to terms and conditions that other financial institutions might not accept).

[92] See John HURLEY, Scott MORRIS, and Gailyn PORTELANCE, "Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective", Centre for Global Development, CGD Policy Paper 121, March 2018, online: Centre for Global Development https://www.cgdev.org/sites/default/files/examining-debt-implications-belt-and-road-initiative-policy-perspective.pdf (which said that eight countries participating in the BRI (Djibouti, Kyrgyzstan, Laos, the Maldives, Mongolia, Montenegro, Pakistan, and Tajikistan) would likely face difficulties in servicing their debt because of future financing related to BRI projects).

[93] Norton, *supra* note 74 at 81 (states that Chinese officials might anticipate investment losses but are still willing to proceed).

[94] Michele RUTA, "Three Opportunities and Three Risks of the Belt and Road Initiative" (May 2018), online: World Bank Blogs https://blogs.worldbank.org/trade/three-opportunities-and-three-risks-belt-and-road-initiative (states, for some countries, participating in BRI projects may expand their debt to unsustainable levels).

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China furnishes "patient capital".[95] This also does not mean that projects without flexible financing are not BRI projects. Furthermore, attention should again be given to the fact that different approaches are taken. For instance, in the CICC, again, the type of financing does not appear to be relevant in determining whether a dispute is a "BRI dispute".

Each BRI project (except *Beijing Urban Construction v Yemen)* shared similar characteristics of flexible (and, potentially, non-recourse financing) provided by Chinese SOEs and the potential over-indebtedness of the host country. In *Beijing Urban Construction v Yemen*, the financing was provided by the Arab Investment Fund,[96] but in the other cases, the financing was provided by a Chinese SOE. For the *Hambantota Port Development Project*, the funding was provided by the Exim Bank of China;[97] for the *East Coast Rail Link*, the funding was provided by Exim Bank of China;[98] in *Dolareh Container Terminal / Dolareh Multi-Purpose Port*, the financing was from China Merchant Ports Holding;[99] in *Kyauk Pyu Deepwater Port*, the funding came from China International Trust Investment Corporation;[100] in *Jakarta-Bandung High-Speed Railway*, the financing of the project was mostly from China Development Bank;[101] in *Lower Sesan II Dam*, the funding for the project came mostly from HydroLancang International Energy.[102]

As regards the flexible financing arrangements provided to Chinese SOEs, the Asia Society Policy Institute states that once a project is agreed to, where the Chinese state backs the funder (or has state-backed insurance or similar guarantees), it will be in the project developers interest (that is, in the interest of the Chinese SOE) to expedite the project and bypass comprehensive due diligence.[103] Flexible financing is also said to lead to the use of "opaque workarounds and side deals" to appropriately incentivize the involved parties for non-viable BRI projects.[104] Particular instances of such flexible financing (and potentially non-recourse financing) can also be seen in the following examples. For instance, in the *East Coast Rail Link*, there was inadequate project preparation and/or poor project management because it was reported that the project had been rushed through most steps of the approval and procurement process (that is, the project developer, China Communications Construction Company, is reported to have expedited due diligence).[105]

[95] See Wolff, *supra* note 1 at 256 (which refers to scholars who discuss China's emphasis on non-intervention in sovereign affairs and restraint from imposing conditions, such as fiscal austerity or transparency, as Western governments do, so that such short-term policy targets do not influence its financing horizon).

[96] *Beijing Urban v Yemen, supra* note 48 at para. 22.

[97] See DeVotta, *supra* note 49 at 143 (explains the project structure as regards the *Hambantota Port Development Project*); Carrai, *supra* note 49 at 1072 (explains the financing details of the *Hambantota Port Development Project*).

[98] Abdullah, Embong, and Daud, *supra* note 69 at 37 (explains China's EXIM).

[99] See Styan, *supra* note 52 at 191 (explains that the financing for the Multi-Purpose Port, which commenced operations in 2017, came mainly from China Merchant Ports Holdings).

[100] See Soong and Aung, *supra* note 56 at 23 (states that the project's financing was from China International Trust Investment Corporation).

[101] See Lermie Shayne S. GARCIA, "Big Power Rivalry and Domestic Politics: Media's Portrayal of the Jakarta-Bandung High-Speed Railway Deal" (2017) 9(1) Asian Politics & Policy 169 at 169 (which explains that the original project cost was approximately USD 5.1 billion, with more than half financed by loans from the China Development Bank).

[102] See Oliver HENSENGERTH, "Regionalism, Identity, and Hydropower Dams: The Chinese-Built Lower Sesan 2 Dam in Cambodia" (2017) 46(3) Journal of Current Chinese Affairs 96 at 97 (which states that HydroLancang provided cash injections and the project also obtained an "undisclosed loan").

[103] See Asia Society Policy Institute, *supra* note 14 at 12 (which stated that the consequence is that later problems necessitate politically and financially expensive changes to projects after they are underway).

[104] *Ibid.* (which states that flexible financing leads to "opaque workarounds and side deals").

[105] See Surin MURUGIAH "Liow's Justification of ECRL Cost Raises More Questions Than Answers, Says Pua" *Edge Prop* (16 November 2016), online: Edge Prop https://www.edgeprop.my/content/972547/liow%E2%80%99s-justification-ecrl-cost-raises-more-questions-answers-says-pua (which states the problems with the ECRL's feasibility studies).

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In *Jakarta-Bandung High-Speed Railway*, there was reported to be inadequate project preparation and/or poor project management by the consortium (led by China Railway International Group). For example, the Indonesian government re-evaluation in 2018 found a lack of due diligence and described the project as deeply troubled,[106] there being a lack of transparency. There were reported irregularities in the project bidding, and it was reported that even Indonesian government ministers encountered difficulties obtaining information regarding the project when it was first agreed to.[107] In *Lower Sesan II Dam* (in a project led by the Chinese SOE HydroLancang International Energy), there were reported to be inadequate environmental and social impact assessments. For example, the original environmental impact assessment and environmental management plan, which was approved by the Cambodian government two years prior to the project's launch, was criticized for both underestimating the impacts of the project and failing to address concerns regarding the protection of local communities and indigenous culture as well as food security and health.[108] The *Lower Sesan II Dam* dispute is also said to be an example of *time bombs* often created by BRI projects (in this case, there were environmental issues, but in other cases there were other issues such as, for example, the entire project feasibility. By following unreliable environmental and social impact assessments, the extent of the environmental damage might only become evident later on in the project's life cycle, which results in a large disconnect between Chinese rhetoric on implementing best practices and the actual procedures implemented (in this case, the commitment to implement a "green BRI" and the reported substandard environmental practices on the ground).[109]

As regards the over-indebtedness of host countries, in all seven of the BRI project examples considered, it could be seen that the host countries generally have difficulties with debt sustainability. In particular, in the *Hambantota Port Development Project,* China took possession of the port it built in Sri Lanka because the Sri Lankan government could not afford to repay its debts (particularly its debt to China).[110] In *East Coast Rail Link*, the Malaysian government said they decided to suspend the project because the cost was too high and Malaysia did not have the financial capacity to proceed.[111] In *Kyauk Pyu Deepwater Port*, the government in Myanmar stopped the project, examined

[106] Asia Society Policy Institute, *supra* note 14 at 12 (in particular, comprehensive assessments for land acquisition and feasibility studies were not properly conducted).

[107] *Ibid.,* at 16 (states that contractors have difficulty participating in BRI-related project procurement processes since BRI projects are not competitively bid and may go exclusively to Chinese companies or a politically connected host country company, which is completely disconnected from any established procurement practices). See also Karlis SALNA and Arys ADITYA, "Indonesia May Be Next Asian Country to Spurn China in Election" *Bloomberg* (31 May 2019), online: Bloomberg https://www.bloomberg.com/news/articles/2019-03-31/indonesia-may-be-next-asian-country-to-spurn-china-in-election (discusses several issues as regards the *Jakarta-Bandung High-Speed Railway* project).

[108] See Guy ZIV et al., "Trading-Off Fish Biodiversity, Food Security, and Hydropower in the Mekong River Basin" (2012) 109(15) Proceedings of the National Academy of Sciences 5609, online: Proceedings of the National Academy of Sciences https://www.pnas.org/content/pnas/109/15/5609.full.pdf (which explains how later independent studies showed the adverse impact the project would have had went far beyond what the project's environmental impact assessment first presented. For example, according to a report by the National Academy of Sciences, the value of the fish stocks lost in the waters surrounding the dam is expected to be approximately USD 800 million per year, far higher than the USD 2.8 million annual loss in revenue that the projects EIA initially estimated).

[109] Asia Society Policy Institute, *supra* note 14 at 13 (explains that the additional causes of the unreliability of such assessments might be because they are not translated into the local language and made publicly available and that consultations between project developers and local civil society and environmental groups are insufficient).

[110] See DeVotta, *supra* note 49; Carrai, *supra* note 49; Abi-Habib, *supra* note 49.

[111] Staff Reporter, "Malaysia Cancels China-Backed Rail Project Due to RM500m Annual Interest: Economics Affairs Minister Azmin Ali" *Reuters* (26 January 2019), online: The Straits Times https://www.straitstimes.com/

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its scale and terms, and found it to significantly exceed what Myanmar could afford or needed. The project was delayed, and the price was reduced from approximately USD 7 billion to about USD 1.3 billion.[112]

E. Project Driven by Geopolitical Interests

The fifth unique feature of "BRI disputes" is that geopolitical interests frequently drive BRI projects. This explains why the Chinese financial institutions advance flexible financing arrangements and, potentially, non-recourse financing to the Chinese SOEs driving the projects. While it has been stated that it is hard to define the term "geopolitical", a useful summary of its meaning is provided by Boute, who states:

> Although the notion of geopolitics is the subject of controversy, the literature generally agrees that, within its broad meaning, geopolitics concerns the interaction between geographical attributes (spatial location, size, topography, borders, climate, and distribution of resources) and international political power.[113]

Other scholars, such as Ziqiang Wan and Shanman Li, discuss the "great strategic significance" of BRI investments.[114] Furthermore, each of the "BRI disputes" considered is reported to be an example of the project being driven by geopolitical interests.[115] In *Beijing Urban Construction v Yemen*, although this was a small project and the financing involved was minor, it is considered that China sees Yemen as having critical geography along maritime routes of strategic importance. That is, Yemen occupies a geostrategic location in international shipping lanes at the juncture of maritime chokepoints, and high-sea strategic access is critical to China's military and economic interests.[116] In the *Hambantota Port Development Project,* Carrai refers to Hambantota Port as "A Strategic 'Pearl' Along The Maritime Silk Road".[117] In *East Coast Rail Link* (among others) it is said that the construction and operation of the East Coast Rail Link will serve China's strategic goals in Southeast Asia by helping to secure the delivery of Chinese goods by bypassing Singapore and the Straits of Malacca.[118] In *Dolareh Container Terminal / Dolareh Multi-Purpose Port*, Djibouti is stated to be the most important port in East Africa due to its strategic location at the junction of the African Horn.[119] In *Kyauk Pyu Deepwater Port*,

asia/se-asia/malaysia-cancelling-us20-billion-china-backed-rail-project-says-economics-affairs (which explains that the costs of the *East Coast Rail Link* project were too high).

[112] See Kapoor and Thant, *supra* note 57 (details Myanmar's decision to scale back the *Kyauk Pyu Deepwater Port* project).

[113] See Anatole BOUTE, "Economic Statecraft and Investment Arbitration" (2019) 40 U. Pa. J. Int'l Econ. L. 383 at 389–90 (which defines "geopolitics").

[114] Ziqiang WAN and Shanman LI, "National Economic Security and the 'Belt and Road' Initiative" in Lutz-Christian WOLFF and Chao XI, eds., *Legal Dimensions of China's Belt and Road Initiative* (Hong Kong: Wolters Kluwer, 2016) Chapter 10 at 261 (which discusses how BRI investments have great strategic significance).

[115] See Wolff, *supra* note 1 at 256 (which states "[i]t would, in fact, be naive to believe that China is not pursuing its own geopolitical BRI goals").

[116] See I-wei Jennifer CHANG, "The Chinese Perspective on the Yemen Crisis" in Stephen W. DAY and Noel BREHONY, eds., *Global, Regional, and Local Dynamics in the Yemen Crisis* (Cham: Palgrave Macmillan, 2020), 97 at 97 (which explains China's strategic perspective regarding Yemen).

[117] Carrai, *supra* note 49 at 1067 (which describes Hambantota Port as "A Strategic 'Pearl' Along The Maritime Silk Road").

[118] Abdullah, Embong, and Daud, *supra* note 69 at 34 (which states that the *East Coast Rail Link* project will serve China's strategic goals in Southeast Asia).

[119] See Yan WAN et al., "Djibouti: From a Colonial Fabrication to the Deviation of the 'Shekou Model'" (2020) 97 Cities 102488, online: ScienceDirect https://doi.org/10.1016/j.cities.2019.102488 (states the strategic importance of Djibouti to China).

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it was reported that the Deep Sea Port offers access for China to the Bay of Bengal and could also solve the Malacca energy security dilemma via the gas pipeline from Kyaukphyu to Kunming, Yunnan.[120] In *Jakarta-Bandung High-Speed Railway*, the project is said to demonstrate (among others) the rise in China's economic influence versus Japanese geopolitical and geoeconomic rivalry. Japan has long been a major trade partner, investor, and aid donor to Southeast Asia, but the assignment of the project to China can be interpreted as China eclipsing Japan.[121] In *Lower Sesan II Dam*, the project has several potential geopolitical objectives, including furthering China's regional influence and ensuring energy security in Southern China and Cambodia.[122]

Nevertheless, the above can also be seen as conjecture only; asserting that political interests drive the projects is not a fact. Only the stakeholders involved in the specific projects will know for sure. Therefore, there are BRI projects not driven by geopolitical interests, which should not be excluded from the definition of BRI projects.

IV. Alternative approach to characterizing "BRI disputes"

Whilst the previous Part (Part III) provided examples of the unique features of "BRI disputes", this Part (Part IV) develops a framework for formally identifying "BRI disputes". We consider each of the following four elements – *ratione materiae*, *ratione loci*, *ratione temporis*, and *ratione personae* – and then take the ICSID as a proxy for a specific BRI dispute settlement framework. The ICSID, primarily, can be chosen as a proxy for a specific BRI dispute settlement framework since the ICSID is arguably similar to the BRI; that is, it has a limited scope (that is, investment disputes), a limited membership (that is, contracting parties), and limited jurisdiction (that is, based on consent). There are, however, certain key differences between the ICSID and the BRI. For instance, the ICSID is based on a convention and the ICSID's jurisdiction is treaty based, whereas, until now, there has been no BRI convention or specific BRI treaties. [123] The reference to ICSID dispute settlement does not mean that the definition of "BRI disputes" excludes all disputes that do not fall into the ICSID scope. Accordingly, while some "BRI disputes" might fall into the ICSID scope, the dispute may or may not be settled at the ICSID.[124]

A. Identifying "BRI Disputes" Ratione Materiae

The expression *ratione materiae* means subject-matter jurisdiction and refers to the tribunal or court's authority to adjudicate in a particular case. Here, the jurisdiction of the ICSID is limited to investment disputes and does not have jurisdiction to hear other

[120] See Soong and Aung, *supra* note 56 at 22 (which explains the strategic importance of the *Kyauk Pyu Deepwater Port* project).

[121] See Garcia, *supra* note 101 at 169–71 (which explains the China-Japan rivalry in Indonesia).

[122] See Fang HU et al., "Chinese Enterprises' Investment in Infrastructure Construction in Cambodia" (2019) 43 (1) Asian Perspective 177 (which analyses Chinese investment in Cambodian infrastructure construction and reviews the background and approach to investment by Chinese enterprises in the Cambodian context); Thearith LENG, "Underlying Factors of Cambodia's Bandwagoning with China's Belt and Road Initiative" (2019) 36(3) East Asia 243 (which examines China's bid to expand its influence in the Mekong Region and the motives behind Cambodia's support for the BRI).

[123] Note: a further difference is that the ICSID is concerned with investor-state dispute resolution, whereas there are three types of "BRI disputes": investor-state, state-state, and investor-investor.

[124] The fact that a similar dispute can be settled in different forums is a significant problem in the BRI. It gives rise to the twin problems of *multiplication of procedure* and *abuse of procedure*.

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types of cases.[125] The requirements for *ratione materiae* jurisdiction at the ICSID are limited to situations where there is a legal dispute, the dispute arises from an investment transaction, and there is a direct relationship between the investment transaction and the dispute. However, the ICSID Convention does not provide a definition of investment; hence, whether an investment meets the *ratione materiae* jurisdiction of the ICSID will be determined with reference to the relevant treaty; that is, the respective treaty (alongside ICSID jurisprudence and precedent). The ICSID has also developed further jurisprudence, such as the requirement of good faith in the investment.[126] Other relevant ICSID decisions relating to *ratione materiae* include *Salini v Morocco*,[127] *Philip Morris v Uruguay*,[128] *and Phoenix v Czech Republic.*[129]

The *ratione materiae* problem regarding the BRI is that there is not yet any recognized BRI subject matter. How can we define what is "in" and what is "out"? Therefore, to accurately characterize "BRI disputes", proposing minimum standards vis-à-vis ratione materiae is necessary. For example, any BRI project must meet the following criteria (mostly taken from the *Phoenix v Czech Republic* case referenced above): first, a transaction involving two or more BRI countries;[130] second, a contribution in money or other assets;

[125] See World Bank, "ICSID Convention, Regulations, and Rules" (April 2006), online: World Bank https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf (ICSID provides the *ratione materiae* clearly in Article 25(1) of the ICSID Convention, which states that its jurisdiction regards "any legal dispute arising directly out of an 'investment' between a Contracting State and a national of another Contracting State, where the parties to the dispute have given consent").

[126] See Özge ÇEVIK and Can ŞIMŞEK, "Turkey: Principle of Good Faith in Determining the Jurisdiction of ICSID and Commentary on the *Phoenix* Case" *Mondaq* (24 July 2018), online: Mondaq https://www.mondaq.com/turkey/arbitration-dispute-resolution/722160/principle-of-good-faith-in-determining-the-juristicdion-of-icsid-and-commentary-on-the-phoenix-case (which discussed further ICSID jurisprudence regarding *ratione materiae* such as the requirement of good faith in the investment).

[127] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4 [*Salini*]. The *Salini* Tribunal was the first to consider the meaning of investment under Article 25 of the ICSID Convention (separate from the definition required under the applicable bilateral investment treaty (BIT)). The Tribunal also introduced a definition (known as the *Salini* test); namely, that an investment should contain the following elements: first, the contribution of money/assets; second, risk; third, duration; and fourth, (controversially) a contribution to the host state's economy. See also, Aceris Law LLC, "The Salini Test in ICSID Arbitration" (16 September 2018), online: Aceris Law LLC https://www.acerislaw.com/the-salini-test-in-icsid-arbitration/ (notes that the *Salini* test has evolved and that tribunals now use more flexibility than provided. That is, the test has only partially survived).

[128] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, Decision on Jurisdiction of 2 July 2013, ICSID Case No. ARB/10/7 [*Philip Morris*] at para. 206. The *Philip Morris* Tribunal diluted the *Salini* decision by stating that the *Salini* requirements *"are typical features of investments under the ICSID Convention, not a set of mandatory legal requirements. As such, they may assist in identifying or excluding the presence of an investment in extreme cases. However, they cannot defeat the broad and flexible investment concept under the ICSID Convention to the extent it is not limited by the relevant treaty, as in the present case."*

[129] *Phoenix Action Ltd. v The Czech Republic,* ICSID Case No. ARB/06/5 [*Phoenix*]. In the *Phoenix* decision, the Tribunal added two additional criteria to the Salini test: (v) – assets invested per the law of the host state and (vi) – assets invested *bona fide*. Consequently, the Tribunal ruled that, even without relevant provisions in the specific treaty, an investment will not benefit from treaty protection. Hence, a tribunal will not have jurisdiction unless the investment is made in accordance with the law of the host state. See also Christophe VON KRAUSE and Nathalie MAKOWSKI, "Phoenix Action Ltd. v. The Czech Republic – Concept of investment under the ICSID Convention revisited" *Wolters Kluwer* (8 July 2009), online: Kluwer Arbitration Blog http://arbitrationblog.kluwerarbitration.com/2009/07/08/phoenix-action-ltd-v-the-czech-republic-icsid-case-no-arb065-award-of-april-15-2009-concept-of-investment-under-the-icsid-convention-revisited/?doing_wp_cron=1591000323.5682570934295654296875 (discusses the fifth element developed by the Tribunal; *that is,* assets invested in accordance with the law of the host state).

[130] Office of the Leading Group for Promoting the Belt and Road Initiative, *supra* note 77 (the official government website listed 143 countries as of 10 February 2023). Although there is something of an official list of BRI countries on the official Chinese BRI website, the criteria to appear on this list (and hence, the accuracy of the list) is not known.

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third, a certain duration; fourth, an element of risk; fifth, an operation made to develop economic activity in the host state; sixth, assets invested in accordance with the law of the host state; and seventh, assets invested *bona fide*. Furthermore, it is submitted that the best way to prove a "BRI dispute's" *ratione materiae* jurisdiction would be by using a BRI "project register"; these minimum standards could be used to develop the "terms of reference" for the BRI project registration, and once a BRI project is registered, the *ratione materiae* jurisdiction (as regards "BRI disputes") can no longer be contested.

However, it is also acknowledged that these characteristics seem to be more suitable for investment-related "BRI disputes" and less suitable for other types of "BRI disputes" – for example, trade-related "BRI disputes". Therefore, it is important to consider this when proposing holistic solutions to settle all "BRI disputes".

B. Identifying "BRI Disputes" Ratione Loci

The *ratione loci* jurisdiction of the ICSID is problematic as the ICSID Convention does not define its territorial reach. Hence, whether an investment meets the *ratione loci* jurisdiction of the ICSID will be determined with reference to the relevant treaty (alongside ICSID jurisprudence and precedent).[131] Many treaties (although not all) contain the requirement that the investment has to be made in the territory of the host state, and, as such, this issue has only been addressed briefly in the ICSID cases of *Fedax v Venezuela,*[132] *COB v Slovakia,*[133] *SGS v Pakistan,*[134] *SGS v Philippines,*[135] and *LESI Dipenta v Algeria.*[136]

The *ratione loci* problem regarding the BRI is that there is not yet any recognized BRI territory, so how can we define what is "in" and what is "out"? To accurately characterize "BRI disputes", it is necessary to propose minimum standards *vis-à-vis ratione loci* – for example, any investment made in a BRI country (recognized as such at the date of the investment). Therefore, if a country – for example, Malaysia – was on a list of BRI countries at the time of a BRI investment, such as the *East Coast Rail Line* project, it is a BRI project. Alternatively, if a country – for example, Italy – was not on such a list of BRI countries when the investment was made, it is not a BRI project. Regarding *ratione loci* jurisdiction for "BRI disputes", similar to *ratione materiae*, the possibility of officially registering BRI projects will remove many contentious issues concerning the territorial

[131] See, generally, Christina KNAHR, "Investments 'in the Territory' Of The Host State" in Christina BINDER et al., eds., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009), 42 (which examines provisions on the definition of investment in international treaties, considering previous ICSID cases and recent NAFTA cases that have addressed the issue).

[132] *Fedax NV v Venezuela*, ICSID Case No. ARB/96/3 [*Fedax v Venezuela*]. Venezuela claimed that the investment was not made within its territory so ICSID could not have jurisdiction. However, the Tribunal opined that not all types of protected investments would be made within the territory of host states – for example, financial transactions, loans, or credits.

[133] *Ceskoslovenska obchodni banka, a.s. v Slovak Republic*, ICSID Case No. ARB/97/4 [*CSOB v Slovak*]. Slovakia claimed that CSOB had not made an investment within its territory. Hence, the ICSID Tribunal did not have jurisdiction. However, the Tribunal again rejected this claim based on the reasoning in *Fedax v Venezuela.* Thus, the Tribunal considered it decisive that the activities as a whole qualified as an investment within the meaning of the BIT.

[134] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 [*SGS v Pakistan*]. In *SGS v Pakistan,* the Tribunal found that the transfer of funds by the investor into the territory of Pakistan was sufficient to meet the requirements of *ratione loci* jurisdiction.

[135] *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/6 [*SGS v Philippines*]. In *SGS v Philippines,* the Tribunal found that "a substantial and non-severable aspect of the overall service was provided in the Philippines", which, again, was sufficient to meet the requirements of *ratione loci* jurisdiction.

[136] *LESI SpA et ASTALDI SpA v Algeria*, ICSID Case No. ARB/05/3. The Tribunal confirmed that parts of an investment might be carried out outside of the host state's territory and that this was not problematic regarding the *ratione loci* jurisdiction of the ICSID. Moreover, the Tribunal opined that, to meet the territoriality requirement, the activities at issue only need to be allocated to the investment destined for the host country.

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requirements of the BRI project. The issues are as follows: first, whether a list of BRI countries, even if maintained on an official Chinese government website, should be recognized by tribunals[137] and, second, the means of accurately deciding if any investments or transactions were made in a country that was a BRI country at the date of the investment or transaction. Additionally, ICSID jurisprudence shows us that the physical connection is not conclusive. However, the tribunal should consider that not all types of protected investments will be made within the territory of host states – for example, financial transactions, loans, or credits.[138]

C. Identifying "BRI Disputes" Ratione Temporis

Numerous ICSID tribunals have dismissed claims based on *ratione temporis*.[139] In particular, the ICSID tribunals considered significant aspects relating to the timing of an investment, such as: first, what happens when the investment was made before the treaty came into force? (*Cortec Mining v Republic of Kenya)*; second, what happens if a treaty has not come into force, but a state has signed it? (*Tecmed v Mexico* and *MCI v Ecuador)*;[140] third, whether a claim can be initiated after the treaty has been terminated;[141] fourth, whether continuous or composite acts occurring before the treaty enters into force should be considered in assessing an alleged breach of a treaty (*El Paso v Argentina* and *Spence v Costa Rica*);[142] fifth, whether a claim can become time-barred (*Wena Hotels v Egypt*, *Kardassopoulos v Georgia*, and *Ansung Housing v China*); [143] sixth, whether it is possible and what

[137] See Office of the Leading Group for Promoting the Belt and Road Initiative, *supra* note 77 (the official government website listed 143 countries as of 10 February 2023).

[138] *Fedax v Venezuela*, *supra* note 132. The Tribunal considered protected investments made outside the territory of host states; for example, financial transactions, loans, or credits.

[139] See Barton LEGUM, Obioma OFOEGO, and Catherine GILFIDDER, "Ratione Temporis or Temporal Scope" in Barton LEGUM, ed., *The Investment Treaty Arbitration Review*, 4th ed. (London: Law Business Research, 2019), online: The Investment Arbitration Review https://www.nera.com/content/dam/nera/publications/2019/NERA%20Makholm%20&%20Olive%20Investment-Treaty-Arbitration-Review%20Edition-4.pdf at 26 (discusses how numerous tribunals have dismissed claims based on *ratione temporis*).

[140] *Técnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003; *MCI Power Group LC and New Turbine Inc v Republic of Ecuador*, ICSID Case No. ARB/03/6, Award of 31 July 2007; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility of 30 November 2009. See Robert E. DALTON, "Provisional Application of Treaties" in Duncan B. HOLLIS, ed., *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012), 220 at 221. (These cases show that, despite a general principle of non-retroactivity, a state can nevertheless be bound by a treaty before it enters into force where the treaty is provisionally applicable and avoids defeating the object and purpose of the signed treaty. Tribunals have also considered the Vienna Convention on the Law of Treaties and the Energy Charter Treaty).

[141] See Kathryn GORDON and Joachim POHL, "Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World", Organization for Economic Co-operation and Development (OECD), OECD Working Papers on International Investment 2015/02, 2015, at 18–9 (which discusses that, until now, BITs have rarely been terminated and, in any event, often contain termination provisions – typically a survival clause for treaty protections to continue for around 10-15 years for existing investments).

[142] *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011; *Aaron C. Berkowitz et al. (formerly Spence International Investments et al.) v Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) of 30 May 2017; and *Walter Bau v Thailand*, UNCITRAL, Award of 1 July 2009. In these cases where a state action is deemed a continuous or composite act, tribunals have (cautiously) considered conduct that occurred before the treaty entered into force.

[143] *Wena Hotels LTD v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000; *Ioannis Kardassopoulos v Republic of Georgia*, ICSID Case No. ARB/05/18, Award of 3 May 2010; and *Ansung Housing Co., Ltd. v People's Republic of China*, ICSID Case No. ARB/14/25, Award of 9 May 2017. These cases show that although some treaties provide strict time limitations on claims, a tribunal might still allow a claim unless the delay is unreasonable. The delay is attributable to the claimant.

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should happen if the investment occurred after the breach of the relevant treaty?;[144] and seventh, what is the impact of a state's denunciation of the adjudicating tribunal; for example, the ICSID? (*Venoklim v Venezuela*, *Blue Bank v Venezuela*, *Fábrica de Vidrios Los Andes CA, and Owens-Illinois de Venezuela CA v Venezuela*).[145]

The *ratione temporis* problem as regards the BRI is primarily threefold. First, there is no specific BRI treaty. Second, various countries joined the BRI at different times (which might be signalled by signing a cooperation document regarding the BRI with China, such as a BRI-specific Memoranda of Understanding or Cooperation Agreement). Third, it is not precisely clear when the BRI started. Although the official launch is often said to have been in September and October 2013, there are BRI projects which predate this. For instance, the *Hambantota Port Development Project* in Sri *Lanka* can be regarded as having been claimed by China as a BRI project, although the project was first agreed to in 2007.[146] These three reasons mean that there are different time frameworks for BRI investments and BRI membership to characterize "BRI disputes accurately". It is necessary to propose minimum standards *vis-à-vis ratione temporis*; for example, any BRI project commencing after September 2013 (the date often considered to be the official launch of the BRI). If these three particular *ratione temporis* jurisdictional problems are not resolved, it might be problematic for a tribunal to interpret whether or not it has *ratione temporis* jurisdiction as regards a BRI project. Again, a BRI project registration system could help to resolve the *ratione temporis* problems.

D. Identifying "BRI Disputes" Ratione Personae

In ICSID arbitration, *ratione personae* means that the tribunal will generally only have jurisdiction as regards the state that is a party to the investment treaty and an investor who is a national of the other state covered by that treaty. The issue of *ratione personae* has been relatively common in the ICSID context because if the dispute is not between an ICSID Contracting State and an investor who is a national of another ICSID Contracting State, ICSID will not have jurisdiction.[147] Relevant ICSID decisions relating to *ratione personae* are *COB v Slovakia,* [148]

[144] See *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015 and *Mesa Power Group LLC v Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award of 24 March 2016. These cases show that a tribunal does not need to have jurisdiction *ratione temporis* to consider breaches of a treaty in relation to acts occurring before an investment is made.

[145] *Venoklim Holding BV v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award of 3 April 2015; *Blue Bank International & Trust Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award of 26 April 2017; *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award of 13 November 2017. These cases show that where some countries have withdrawn from the ICSID Convention – for example, Bolivia, Ecuador, and Venezuela – the effect of such withdrawal is to remove the consent element required for tribunals to have jurisdiction, although this is not yet fully settled.

[146] See China Xinhua News, *supra* note 50 (as stated earlier, China's state news agency announced on Twitter that the Hambantota Port Project had become "another milestone along the path of #BeltandRoad").

[147] See Omar E. GARCIA-BOLIVAR, "Protected Investments and Protected Investors: The Outer Limits of ICSID's Reach" (2010) 2 Trade Law and Development 145 (which considers the outer limits of the ICSID in terms of protected investments and protected investors and refers to existing criteria to define the jurisdiction of an ICSID tribunal *ratione materiae* and *ratione personae*).

[148] *CSOB v Slovakia*, *supra* note 133, (although the Slovak Republic claimed that ICSID could not have jurisdiction because CSOB was acting as an agent of the Czech Republic. Because this was a dispute between states, the Tribunal determined they had jurisdiction because a government-owned corporation is not disqualified *per se* unless it is *de facto* acting as an agent of its government.)

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Maffezini v Spain,[149] *SOABI v Senegal*,[150] *Champion Trading and Ameritrade v Egypt*,[151] and *Tokios Tokeles v Ukraine*.[152]

The *ratione personae* problem regarding the BRI is that there is no commonly agreed framework regarding whether a claimant and defendant will qualify to receive the protection and adjudication of a tribunal. Moreover, no specific BRI treaty defines ratione personae jurisdiction: to accurately characterize "BRI disputes", proposing minimum standards vis-à-vis ratione personae is necessary. For example, BRI project "terms of reference" can be agreed upon because of the need for detailed guidance. These could define a BRI investor (for example, a public or private investor from a BRI country).[153] The "terms of reference" should also address a joint-venture situation. For example, a workable proposal might consider that the BRI investor must own over 50% of the relevant legal entity at the time of the applicable transaction to qualify as a BRI investment. Again, a BRI project registration system could help to resolve the *ratione personae* problems.

V. A BRI "project register" and BRI "terms of reference"

Part IV develops an alternative definition of "BRI disputes" utilizing the concepts of *ratione materiae*, *ratione loci, ratione temporis,* and *ratione personae*. Further, as regards each of these concepts, it was suggested that the introduction of a BRI "project register" (together with a corresponding BRI project "terms of reference") might ensure a greater degree of certainty in the BRI.

Greater certainty is also required since there is currently no official list of BRI projects and, additionally, the "*yidaiyilu*" website does not contain any database or specific details concerning BRI projects – for example, procurement information, project contracts, financing details, or environmental and social impact assessments.[154] The CICC contains no database or specific information concerning BRI projects. However, the CICC website does list some older examples of typical BRI project-related cases, but it falls far short of a BRI "project register".[155]

A. BRI "Project Register"

Maintaining a publicly available BRI "project register" would be a significant step in providing certainty to BRI dispute settlement. A BRI "project register" will essentially be a

[149] *Emilio Agustín Maffezini v Spain*, ICSID Case No. ARB/97/7 (Spain claimed that since the dispute was between an individual and a company, that is, a legal entity rather than a state, ICSID lacked jurisdiction. The Tribunal set out two tests to determine if an entity was an agent of the state: first, structural and, second, functional. In this case, the company failed both tests, and the Tribunal rejected the objection to jurisdiction).

[150] *Société Ouest Africaine des Bétons Industriels v Senegal*, ICSID Case No. ARB/82/1 (although Senegal claimed that the investor did not qualify under the ICSID Convention due to nationality, the Tribunal decided to look beyond direct control to determine the actual nationality of an investor because the ICSID Convention is aimed at facilitating foreign investments via locally incorporated companies).

[151] *Champion Trading Company and Ameritrade International, Inc. v Arab Republic of Egypt*, ICSID Case No. ARB/02/9 (although Egypt claimed the ICSID Tribunal did not have jurisdiction because the individual claimants were not foreign nationals/investors, the Tribunal decided that, while the individual claimants could not bring a claim due to their Egyptian nationality, the Tribunal had jurisdiction because the claimants were also shareholders in American companies, which were considered foreign investors).

[152] *Tokios Tokeles v Ukraine*, ICSID Case No. ARB/02/18 (Ukraine claimed the ICSID Tribunal did not have jurisdiction because the claimant was not a foreign investor. However, the Tribunal decided that Tokios was a foreign investor under the express wording of the applicable treaty – Ukraine-Lithuania BIT).

[153] See Office of the Leading Group for Promoting the Belt and Road Initiative, *supra* note 77 (the official government website listed 143 countries as of 10 February 2023).

[154] *Ibid.*

[155] Note that the scope of jurisdiction of the CICC is not BRI-related and that there is no evidence that the CICC was set up to deal solely or even primarily with "BRI disputes". Therefore, it follows that any cases identified by the CICC as "typical BRI disputes" have no relevance as regards BRI registration – see CICC, "Home", online: CICC http://cicc.court.gov.cn/html/1/219/index.html (the official Chinese government's website).

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database. At a basic level, it will require that every BRI-related project be registered. It would be expected that such registration could be achieved by completing an online registration form upon the commencement of the project.

It should be hosted online (perhaps utilizing blockchain technologies).[156] Regarding each specific "BRI dispute", all project stakeholders will know they are involved in a BRI project. Furthermore, introducing a publicly available BRI "project register" of BRI projects will provide certainty regarding whether a specific dispute is (or is not) a "BRI dispute".[157] For instance, the ability to register a BRI project would be expected to generally satisfy the jurisdictional requirements of *ratione materiae*, *ratione loci*, *ratione temporis*, and *ratione persona*. That is, the minimum standards *vis-à-vis ratione materiae*, *ratione loci*, *ratione temporis*, and *ratione personae* of "BRI disputes" can be used as thresholds to be met before a project is included in the BRI "project registry".[158] Regarding establishing and maintaining the BRI "project register", it would be ideal for the Chinese government to undertake this role since it is in China's interest to provide greater certainty regarding its BRI projects. Indeed, investment amounts are increased when there is greater certainty regarding the investment landscape (for example, in a similar vein to why BITs were created or why the ICSID exists). Nevertheless, it is suggested that as far as possible, the BRI "project register" will be a neutral system on a public or private blockchain (to reduce any suspicions of unfairness in the operation of the registry). Indeed, blockchain technologies provide for processes and systems to be "based on cryptographic proof instead of trust".[159] Also, blockchain technologies simultaneously enable "the single record of truth created by a centralized system while distributing and decentralizing the data management process". [160]

In the same way, the BRI "project register" would help address the geopolitical implications of the BRI. By providing greater certainty to investors, some of the suspicions (whether real or perceived) that China (or other countries) are manipulating the rules to suit their purposes can be assuaged.[161] Further, to address privacy concerns regarding the BRI "project register", the publicly available data should be considered carefully.

[156] For a discussion on bringing a greater amount of technology into BRI dispute resolution, see Julien CHAISSE and Jamieson KIRKWOOD, "Smart Courts, Smart Contracts, and the Future of Online Dispute Resolution" (2022) 5(1) Stanford Journal of Blockchain Law & Policy 62.

[157] Other scholars have discussed a suggestion of a BRI project registry. See, for example, Wolff, *supra* note 1 at 295–6 (which mentions that it has been suggested that each BRI country should centralize the BRI data collection by establishing (at least) one unit or platform where all BRI data can be accessed by authorized parties whenever the need arises).

[158] For instance, the minimum standards *vis-à-vis ratione materiae* might be: first, a transaction involving two or more BRI countries; second, a contribution in money or other assets; third, a certain duration; fourth, an element of risk; fifth, an operation made to develop economic activity in the host state; sixth, assets invested in accordance with the law of the host state; and seventh, assets invested *bona fide*. The minimum standards *vis-à-vis ratione loci* might be any investment made in a BRI country (recognized as such at the investment date). The minimum standards *vis-à-vis ratione temporis* might be any BRI project commencing after September 2013 (the date often considered to be the official launch of the BRI). The minimum standards *vis-à-vis ratione personae* might be agreed upon and defined in the BRI project "terms of reference"; that is, these could define a BRI investor and should also address a joint-venture situation – for example, a BRI investor must own over 50% of the relevant legal entity at the time of the relevant transaction to qualify as a BRI investment.

[159] See Satoshi NAKAMOTO, "Bitcoin: A Peer-to-Peer Electronic Cash System" (31 October 2008), online: Bitcoin https://bitcoin.org/bitcoin.pdf (this paper, published under the pseudonym Satoshi NAKAMOTO, sets out how the Bitcoin system operates).

[160] Joseph "Joey" RYAN and Sean Stein SMITH, *The Emerald Handbook of Blockchain for Business* (Bingley: Emerald Publishing, 2021) at 22 (which explains the purpose of blockchain).

[161] In the author's opinion, China could do more to address the political implications of the BRI and assuage the suspicions of its BRI partner countries. A BRI "project register" would help, but there are other means to bring certainty to the BRI. What is needed is a greater presence of the "rule of law" in the BRI – see

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Figure 1. Example of the BRI "project register" Registration Form Checklist
Source: Created by the author on 10 February 2023.

Perhaps any part of the database with sensitive information could be encrypted and only accessible with appropriate authorization.

An example of such a registration form could be similar to that provided in Figure 1:

Of course, the above example (in Figure 1) of an online BRI "project register" registration form checklist is basic. It is not meant to provide comprehensive details of the form that should be used, but it gives an example of how such a BRI "project register" system might work. Further, if some issues are not resolved by registration, then, presumably, BRI-related investment dispute precedents and jurisprudence could fill in the gaps over time.

Additionally, there are secondary benefits for the BRI as a whole. The benefits would depend upon the details inserted into the BRI "project register" database and its availability to other users. First, BRI project standards can be raised when there are criteria for a project to be classified as a BRI project. For instance, scholars such as Mimi Zou have stated that standards should be raised in the BRI to avoid a "race to the bottom" because "there have been growing controversies over Chinese firms 'exporting' poor working conditions to host countries".[162] While Zou stated this in the context of labour standards, the principle applies to other areas: the environment.

Indeed, as mentioned in Part I, it is said that the BRI label is unclear and that China has increasingly become aware that there is an element of global criticism towards the BRI label and has started the process of clarifying the purpose, priorities, and scope of the BRI.[163] Moreover, the BRI brand has become tarnished since many BRI projects have

Jamieson M. KIRKWOOD, "Constructing a Theoretical Framework For a Rules-Based Approach in BRI Dispute Resolution" (2023) Singapore Journal of Legal Studies (forthcoming).

[162] Mimi ZOU, "Labour Standards Along 'One Belt, One Road'" in Lutz-Christian WOLFF and Chao XI, eds., *Legal Dimensions of China's Belt and Road Initiative* (Hong Kong: Wolters Kluwer, 2016), 357 at 359 (which explains how the BRI has faced controversies relating to labour standards and how China has a unique opportunity through the BRI to raise standards).

[163] See Yuen Yuen ANG, "Demystifying Belt and Road: The Struggle to Define China's 'Project of the Century'" *Foreign Affairs* (22 May 2019), online: Foreign Affairs https://www.foreignaffairs.com/articles/china/2019-05-22/demystifying-belt-and-road (describes the idea of a BRI "label"). See also Wolff, *supra* note 1 at 269 (who explains that "China realizes that BRI goals must be clearly defined and that a convincing roadmap for future implementation must be produced to avoid the degeneration of BRI into an empty phrase covering everything and nothing").

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generated a number of problems; for example, controversies related to financing and unsustainable debt, corruption, environmental damage, legal issues, and community opposition.[164] By introducing a BRI "project register", there can be a specific protocol to follow to confirm that a project is a BRI project. The label of being listed in a BRI "project register" can become an external indication of quality, similar to how credit ratings work. Consequently, only projects that meet sufficiently high quality, transparency, and accountability standards should be entitled to use the BRI label. It is suggested that a way to do this is to define specific BRI projects by promulgating BRI project "terms of reference" for the entire operation of BRI projects, including BRI dispute settlement (which is addressed in Part V.B).

Second, corruption could be curtailed if a publicly available BRI "project register" existed.[165] For instance, there does not seem to be any particular operational anti-corruption mechanisms for monitoring, enforcement, and accountability in BRI projects at the moment. However, when maintaining a BRI "project register", many project-specific details could be provided and made available for public scrutiny, such as procurement information, project contracts, financing details, and environmental and social impact assessments. Furthermore, the BRI "project register" could also provide a link for whistleblowing, which is how many corruption cases are revealed.[166]

Third, if there was a publicly available BRI "project register", value and efficiency in BRI projects could be increased (depending upon the scope of the registry). First, the value could be increased, especially in project procurement (in case project procurement details are included in the register), because it is widely understood that an open and accessible procurement process will result in improved value in all tenders. In this regard, the bids submitted at the time of the procurement will benefit from these higher standards when the activity in question is disclosed and made available to all project stakeholders.[167] There would also be a similar increase in value to the entire project management during the project's life cycle (should these project details be inserted into the register). Second, efficiency can also be increased in these cases because project bids can be submitted and evaluated online at the time of procurement, and the entire project's management during its life cycle could also be made available to all project stakeholders transparently and timely.

Additionally, Tim Bunnel states, "'the BRI' is a label that serves to bring previously unassociated project sites and non-place-based infrastructural developments into

[164] Asia Society Policy Institute, *supra* note 14 (which considers some negative descriptions of BRI projects).

[165] See, for example, Michelle MIAO, "Audacity and Dilemma – China's One Belt, One Road Initiative and Xi Jinping's Anti-Corruption Campaign" in Lutz-Christian WOLFF and Chao XI, eds., *Legal Dimensions of China's Belt and Road Initiative* (Hong Kong: Wolters Kluwer Hong Kong Ltd., 2016), 543 at 543–67 (which explains how the BRI can be used to facilitate an anti-corruption campaign).

[166] See also, Thomas JOHN and Rishi GULATI, "The 'One Belt One Road' Strategy – the Role of Private International Law in Combatting and Strengthening Anti-Corruption Standards Transnationally" in Poomintir SOOKSRIPAISARNKIT and Sai Ramani GARIMELLA, *China's One Belt One Road Initiative and Private International Law* (London: Routledge, 2018) at 182–197 (which considers how to strengthen the anti-corruption framework in the BRI through focusing on the role of private international law. That is, issues of jurisdiction, forum, and enforcement).

[167] See Tania GHOSSEIN, Bernard HOEKMAN, and Anirudh SHINGAL, "Public Procurement, Regional Integration, and the Belt and Road Initiative", Macroeconomics, Trade, and Investment Global Practice, World Bank, Discussion Paper No. 10, December 2018, online: World Bank https://openknowledge.worldbank.org/bitstream/handle/10986/31069/132786-MTI-Discussion-Paper-10-Final.pdf?sequence=1&isAllowed=y at 131 (which considers the integrity of public procurement processes and the realizing of value-for-money objectives in the BRI). See also, Tania GHOSSEIN, Bernard HOEKMAN, and Anirudh SHINGAL, "Public Procurement, Regional Integration, and the Belt and Road Initiative" (2021) 36(2) The World Bank Research Observer 131 (updated analysis regarding BRI procurement).

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comparative relation".[168] Bunnel also considers the work of Sidway and others as well as van Schendel, who believed "placing BRI developments in a critical comparative register … can open new 'geographies of knowledge'".[169] Bunnel's ideas effectively state that a BRI "project register" has value when comparing projects that use the BRI label. Therefore, an additional benefit of a BRI "project register" is that it can enable project comparison and project study. Without a BRI "project register", different BRI projects cannot easily be formally compared and studied. In the context of BRI dispute settlement, for example, a BRI "project register" can provide significant value in facilitating comparison between different BRI project dispute resolution procedures (Part V.C below considers the registration of BRI project disputes).

Besides the *prestige* of being officially listed as a BRI project, further incentives can be put in place to encourage maximum participation in the BRI "project register". For example, lower risk insurance premiums for projects officially identified as BRI projects (or even a centralized BRI investment project insurance scheme geared towards registered BRI investment projects and, perhaps, a BRI "project register" guarantee scheme (discussed below)); lower financing costs; and greater financing availability for projects officially identified as BRI projects. Punitive measures could be implemented for non-participation in the BRI "project register". Such measures might include the non-availability of insurance from a centralized BRI investment project insurance scheme, the non-availability of financing for registered BRI projects from authorized providers, an inability to participate in any official BRI procedures, etc.

It is not unreasonable that registered BRI projects should be entitled to certain advantages, such as lower financing costs, since finance providers generally provide preferential rates to *safer* projects (presumably, a registered project will be safer than an unregistered project since it would be legitimate and have government backing) and, second, funds and financing entities geared to the BRI (such as the Silk Road Fund) can be directed to discriminate towards BRI registered projects when providing financing.

A BRI "project register" guarantee scheme could be introduced to complement the BRI "project register" as it could provide all stakeholders with confidence regarding the BRI "project register", as well as compensate the injured party in limited and agreed situations (which can be defined in the BRI project's "terms of reference". For example, where the registry has been used incorrectly or illegally or to provide some compensation to an injured party, such as a contractor, and where a BRI project party fails due to insolvency or illegal acts, etc.).

It is suggested that a BRI "project register" guarantee scheme be implemented as follows. First, a registration fee should be paid when registering a BRI-related project in the BRI "project register" (where, as stated, registration can become an external signal of quality, but not every project can be registered). Second, a portion of the registration fee can be added to a BRI "project register" guarantee scheme fund, which can then be disbursed according to the BRI project "terms of reference".

[168] See Tim BUNNELL, "BRI and Beyond: Comparative Possibilities of Extended Chinese Urbanization" (2021) 62 (3) Asia Pacific Viewpoint 270 (which discusses the BRI "label").

[169] *Ibid.*, at 271 (considers a BRI register). See also James D. SIDAWAY et al., "Introduction: Research Agendas Raised by the Belt and Road Initiative" (2020) 38(5) Environment and Planning C: Politics and Space 795 (which considers a comparative BRI register); Willem VAN SCHENDEL, "Geographies of Knowing, Geographies of Ignorance: Jumping Scale in Southeast Asia", in Paul H KRATOSKA, Remco RABEN, and Henk SCHULTE, eds., *Locating Southeast Asia: Geographies of Knowledge and Politics of Space* (Singapore: Singapore University Press, 2005) at 275–307 (which considers a geographical registration system in Asia generally).

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B. BRI Project "Terms of Reference"

Since only certain projects will be able to be registered in the BRI "project register", and for the BRI "project register" to provide as comprehensive information as possible consistently *vis-à-vis* each BRI-related project registered, it will be necessary to develop detailed BRI project "terms of reference". For instance, the previous section (Part V.A) discussed many project details, including procurement information, project contracts, financing details, and environmental and social impact assessments, where it is necessary to design the BRI "project register" in such a way that it can capture all of this information, not only at the commencement of the BRI project but also whenever a *significant event* occurs in relation to a particular BRI project.

Accordingly, the BRI project "terms of reference" would be a comprehensive document or protocol and contain comprehensive information and instructions regarding participation in the BRI "project register" and any other significant information regarding the operation and organization of the entire BRI project. The document or protocol could be issued unilaterally by China (perhaps following a public consultation period) or agreed to multilaterally between China and its BRI partners. It is suggested that the document or protocol be issued by China (following a public consultation period) since a multilateral process might be lengthy and/or face delays. The document or protocol may also be promulgated more efficiently via the issuance of an official *guidance document* (or similar), perhaps from the Office of the Leading Group on Promoting the Implementation of Belt and Road Initiatives, which is the official overseeing body of the BRI and falls under the remit of the National Development and Reform Commission.

The document or protocol could include the following: a description and templates of the BRI "project register" registration form checklist that must be completed to participate in the BRI "project register"; comprehensive details of the minimum standards *vis-à-vis ratione materiae, ratione loci*, *ratione temporis,* and *ratione personae* of "BRI disputes" in case such an alternative approach is used to identify the thresholds to be met for inclusion in the BRI "project register"; and a description of a *significant event* about a BRI project so that the BRI "project register" can capture information, not only at the commencement of the BRI project but also whenever a *significant event* occurs about that BRI project. Furthermore, it can contain the details and parameters of the BRI "project register" guarantee scheme, including a comprehensive description of the situations where the injured party can be compensated by the scheme (in case such a scheme is introduced).

C. Registration of BRI Project Disputes

BRI project disputes could also be registered in the same BRI "project register" or a separate BRI "project dispute register". It would be expected that such registration can be achieved by completing an online registration form upon the commencement of a dispute, similar to a project being registered in the BRI "project register".

An example of such a registration form could be as follows:

The above example, in Figure 2, of an online BRI "project dispute register" registration form checklist is very basic. It is not meant to provide comprehensive details of the actual form that should be used, but it provides an example of how a BRI "project dispute register" system might work. Most significantly, there might be a provision in the BRI project "terms of reference" to the effect that the dispute resolution provisions must be agreed upon at the commencement of the BRI project and that these should not be altered. For example, where a dispute resolution forum has been selected, neither party are allowed to submit a claim to a different forum.

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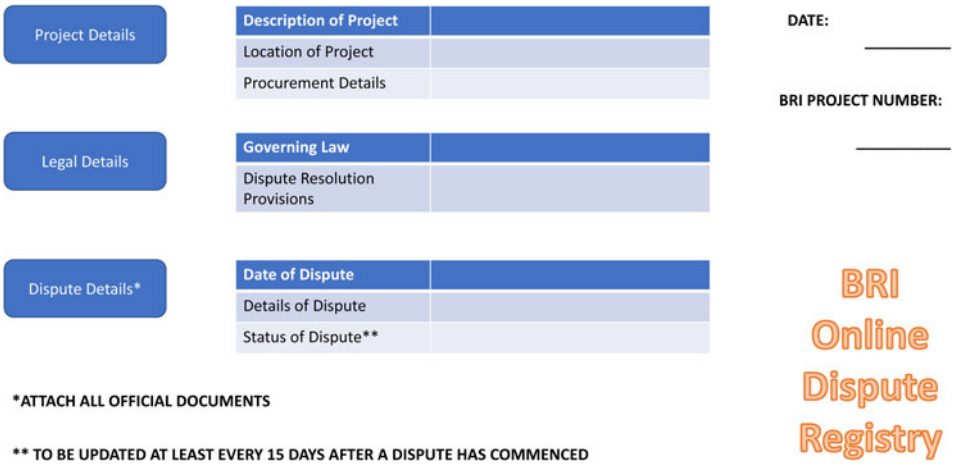

Figure 2. Example of the BRI "Project Dispute Register" Registration Form Checklist
Source: Created by the Author on 10 February 2023.

Introducing a publicly available BRI "project dispute register" will provide transparency for the investors involved and all BRI stakeholders regarding, among others: first, whether a specific project is in dispute (or not); second, the reasons identified for the dispute; third, the status of the dispute; and fourth, the dispute process.

In the case of the implementation of a BRI "project dispute register", there are several advantages. First, there will be increased transparency since project stakeholders will be informed regarding the specific dispute on a timely basis. For instance, all project stakeholders can be alerted whenever there is a development in the dispute. Second, the efficiency of handling each specific "BRI dispute" would be increased because all project stakeholders will be able to participate in the dispute process more easily throughout the dispute's life cycle. For instance, the stakeholder concerned might be able to access specific documents and might also be able to contribute more appropriately to the selected settlement forum or adjudicating body in a timely fashion. Third, predictability can be increased because all BRI stakeholders will be informed regarding all disputes on a timely basis and fully track each dispute process. In particular, all BRI stakeholders might benefit by being better able to see the causes of other (similar) disputes more transparently – for example, by using the BRI "project dispute register" and seeing the choices made (by other parties) as well as the outcomes reached. Fourth, the consistency of adjudication and the efficiency of resolving BRI project disputes can be greatly increased by publishing details of all decisions and awards made by the selected settlement forum or adjudicating body (similar to how the ICSID publishes decisions). It is not suggested that all BRI project disputes be settled in a single forum, as this would be too restrictive of party autonomy. Still, if details are published of all decisions and awards made by each selected settlement forum or adjudicating body, then, very soon, a set of BRI-related investment dispute precedents and jurisprudence will emerge.[170] This

[170] See, for example, James CRAWFORD AC, "China and the Development of an International Dispute Resolution Mechanism for the Belt and Road Construction" in Wenhua SHAN, Sheng ZHANG, and Jinyuan SU, eds., *China and International Dispute Resolution in the Context of the "Belt and Road Initiative"* (Cambridge: Cambridge University Press, 2021), 11 at 20 (which states that "a unified system does not have to identify a single mechanism for all types of disputes").

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will surely result in more consistent and harmonized adjudication across many available settlement fora and adjudicating bodies. It is also well established that consistency in adjudication is enhanced where there is a set of precedents and jurisprudence to refer to.[171]

The BRI project "terms of reference" (discussed in Part V.B) could provide comprehensive details of how the "project dispute register" would operate and also provide a template for the BRI "project dispute register" registration form checklist that must be completed to participate in the BRI "project dispute register" (in the case of an additional registry, the document or protocol could alternatively specify how BRI project disputes will be recorded). The BRI project "terms of reference" for the entire operation of BRI projects, including BRI dispute settlement, can also provide a pathway for a limitation regarding the range of forums for BRI-related project dispute resolution, and there could also be greater certainty regarding which law or set of rules apply in a "BRI dispute". This can result in greater transparency regarding the forum selection and choice of law for BRI dispute resolution. For instance, when registering the BRI project dispute in the BRI "project dispute register", the parties might select a specific dispute settlement option (which cannot be changed later). In this way, it is suggested that the range of forums for BRI dispute resolution can be reduced, and the transparency regarding the forum selection for BRI dispute resolution can be increased. Similarly, by conforming with the BRI project "terms of reference" for the entire operation of BRI projects, including BRI dispute settlement, it is suggested that there can be greater consistency in resolving a "BRI dispute". Therefore, developing BRI project "terms of reference" can be a powerful way to introduce greater certainty and consistency regarding the resolution of "BRI disputes".

VI. Conclusion

This article has filled a research gap within the BRI scholarship related to resolving "BRI disputes". The gap was identifying whether "BRI disputes" have distinct and visible characteristics (and, hence, can be identified). The article has not only presented such a *characterization* of "BRI disputes", it has also outlined a practical method for determining the existence and attributes of "BRI disputes" in the future (and with legal certainty) via a BRI "project register".

Following an exploration of the customary usage of the terms "BRI disputes" and "BRI jurisprudence" in Part I and a consideration of the contribution made by other legal scholars in this area in Part II, this article, subsequently in Part III, identified five unique features of "BRI disputes" (and presented examples from seven "BRI disputes"). The five unique characteristics of "BRI disputes" were found generally in all of the cases looked at: first, that most (if not all) Chinese SOEs drive major BRI projects; second, that many BRI projects are frequently situated in territories that have a combination of political instability, undeveloped and/or unreliable legal systems, and a reputation for weak corporate governance, which generally includes corruption; third, that many BRI projects are high-risk construction and infrastructure projects; fourth, that many BRI projects involve flexible financing arrangements made by Chinese financial institutions (regarding both the financing provided by Chinese financial institutions to other Chinese SOEs involved in the project and the funding provided to the host states); and fifth, that frequently the BRI projects are reputed to be driven by geopolitical interests.

[171] Gilbert GUILLAUME, "The Use of Precedent by International Judges and Arbitrators" (2011) 2(1) Journal of International Dispute Settlement 5 at 6 (which states that "[a]ny system of law requires a minimum of certainty, and any dispute settlement system a minimum of foreseeability", and that precedents provide such).

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Further, in Part IV, an alternative method to identify "BRI disputes" (for their legal categorization) was identified; that is, the establishment of academic criteria to formally identify "BRI disputes". The alternative approach to identifying "BRI disputes" was based on the identification of the *ratione materiae*, *ratione loci*, *ratione temporis,* and *ratione personae* of "BRI disputes" (that is, utilizing the well-known concepts in the context of jurisdictional disputes). After this was identified, minimum standards were presented. For instance, minimum standards *vis-à-vis ratione materiae* might be: first, a transaction involving two or more BRI countries; second, a contribution in money or other assets; third, a certain duration; fourth, an element of risk; fifth, an operation made to develop economic activity in the host state; sixth, assets invested in accordance with the law of the host state; and seventh, assets invested *bona fide*. Minimum standards *vis-à-vis ratione loci* might be any investment made in a BRI country (recognized as such at the date of the investment). Minimum standards *vis-à-vis ratione temporis* might be any BRI project commencing after September 2013 (the date often considered to be the official launch of the BRI). Minimum standards *vis-à-vis ratione personae* might be agreed upon BRI project "terms of reference" so that these could define a BRI investor and also address a joint venture situation; for example, a BRI investor must own over 50% of the relevant legal entity at the time of the relevant transaction to qualify as a BRI investment. The consequence might be that only disputes that meet these four criteria could be called "BRI disputes".

Finally, since the overwhelming contribution of the alternative approach discussed in Part IV has been to highlight the need for the registration of BRI projects, a BRI "project register" and accompanying BRI project "terms of reference" was presented in Part V. This is because, the ability to register a BRI project would generally satisfy the jurisdictional requirements of *ratione materiae*, *ratione loci*, *ratione temporis*, and *ratione persona*. If some issues are not resolved by registration, then BRI-related investment dispute precedents and jurisprudence would fill in the gaps over time. Additionally, since the focus of this article is on "BRI disputes", the implementation of a separate and specific BRI "project disputes register" was also presented.

In identifying the unique features of "BRI disputes", this article has shown that "BRI disputes" appear to have distinct and visible characteristics (and hence, are capable of being identified). Moreover, while it is acknowledged that the characteristics developed are not perfect, the analysis suggests that "BRI disputes" are a unique form of dispute and potentially require commensurate bespoke treatment in the form of further specific BRI-wide protocols. In this regard, it is particularly important to define the category of "BRI disputes" because without identifying what "BRI disputes" are, it is more difficult to propose mechanisms to improve BRI dispute settlement – that is, to formulate and identify specific measures for introducing reforms in BRI dispute settlement.

Additionally, it is important to note that the article provides definitions for the term "BRI disputes" and presents a characterization of "BRI disputes" according to the author's research. However, it has not been established that "BRI disputes" are anything other than ordinary disputes that happen to be associated with a BRI project. As such, the analysis in this article highlights the need for more certainty as regards the BRI project and has suggested that a BRI "project register" is a useful way of providing greater certainty. Indeed, while an academic can make suggestions, it is required that the Chinese state (and courts) create explicit definitions, such as the WTO does for its members.

Similarly, from a more practical perspective, classifying a dispute as a "BRI dispute" without explicit definitions from the Chinese state (and courts) is unrealistic. This is because disputes can be categorised in many ways, and the BRI also encompasses a broad geographical context. Without such explicit definitions, there will also be little impact on dispute settlement since the existing dispute resolution mechanisms (such as litigation, arbitration, and mediation) can (largely) be used without any restriction.

Whether or not the dispute resolution institutions currently available in the BRI countries (domestic courts, international commercial courts, arbitration institutions, etc.) can be used depends upon each party's commercial strategy. This arguably creates uncertainty as forum shopping can occur where parties can pursue various dispute resolution avenues based on their power and commercial strategy (rather than on the facts of the case). It is therefore recommended to establish a dispute resolution institution specifically designed for "BRI disputes" (based on BRI projects in the BRI "project register").

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