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ABSTRACTS

Professor Vivienne Bath

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The Belt and Road initiative and the massive number of projects, both construction and investment, is presenting a number of issues for China and Chinese companies. The weakness of the legal systems of various countries along the Belt presents issues for China's engagement with international investment law and the number of cross-border disputes is already presenting problems for China's domestic legal system. This paper looks at China's assertive approach to the international investment system, its response to the need for international legal protections for Belt and Road investments, and the steps that have been taken to expand the jurisdictional scope and operations of Chinese legal institutions. These include the proactive steps of the Chinese government in setting up new systems to handle investor-state arbitration as well as the role, and structure, of the Belt and Road courts.

Dr Michael Sullivan

President Xi Jinping's Belt & Road Initiative (B&RI): An Indo-Pacific with Chinese Characteristics?

> '[B]uilding walls to isolate ourselves from the global economy would only isolate us from the incredible opportunities it provides. Instead, America should write the rules. America should call the shots. Other countries should play by the rules that America and our partners set, and not the other way around… The United States, not countries like China, should write them.
> Let's seize this opportunity, pass the Trans-Pacific Partnership and make sure America isn't holding the bag, but holding the pen.'
> 'President Obama: The TPP would let America, not China, lead the way on global trade,' *The Washington Post*, Op Ed, 2 May 2016. (*The Washington Post* felt it necessary to advice its readers that 'Barack Obama is president of the United States.')

Abstract

As an international political economist I am interested in the B&RI as a grand strategy connecting the global economy to China. Rory Medcalf, Head of the National Security College at the Australian National University, labels it 'the Indo-Pacific with Chinese characteristics.' The B&RI is President Xi Jinping's signature economic and security initiative which aims to achieve 3 inter-related goals during the current 'favourable historical juncture': **1.** Domestic economic reform – 'transition from rapid economic growth to high quality development' and 'supply-side structural reform'; **2.** lay economic and strategic foundations for advancing 'major country diplomacy with Chinese characteristics' to realise 'national rejuvenation'; and **3.** leadership of globalisation through 'reform of the global governance system' and the Chinese development model. My paper argues that the B&RI is transformative but not 'destabilising' and that China is a 'revisionist' power but consensual and incrementalist, not 'revolutionary'. If a 'power transition' is underway in the Indo-Pacific and Eurasia it is unlike historical precedents. China's rise is constrained by the economic and strategic imperatives of maintaining, not tearing down, regional order and stability. Thus, new institutional initiatives work with not against existing domestic, regional and multilateral arrangements.

I argue that the B&RI operates at four levels, each with risks and challenges. First, it works with the national legal frameworks and policy agendas of participating states. This runs the risk of a 'race to the bottom' if local environmental and labour protections are weak or 'negotiable with suitable incentives.' The challenge for Chinas diplomacy is consistency in outcomes managing dozens of bilateral relationships.

Secondly, different parts of the Indo-Pacific and Eurasia are covered by existing and pending regional free trade agreements, such as the Regional Comprehensive Economic Partnership (RCEP) in East Asia (+India). In principle, the B&RI ought to apply the highest standards of non-predatory commercial behaviour and bank lending, but the constraints imposed by '21st century' regional 'partnerships' and agreements are weakened by their partial coverage. China fills the regional gaps with 'country groupings' organised for annual strategic dialogue hosted by Premier Li Keqiang, such as the China Plus the 16 Central and Eastern European Countries (CEEC), or '16+1', Forum. These tend to be arrangements for managing bilateral ties and imposing regional discipline, and for providing an added layer of legal coverage for less

than optimum local standards.

Thirdly, China's new international institutions, such as the Asia Infrastructure Investment Bank (AIIB), and China's sovereign wealth fund, the US$941b China Investment Corporation (CIC), work closely with existing domestic financial institutions and in partnership with, not despite, the World Bank and Asian Development Bank (ADB). How China's new institutions operate, whether in accordance with traditional lending practices or higher western institutional standards, will determine whether debt is manageable or ruinous. Debt equity swaps and conditional aid to manage delinquency may be an attractive option but run major reputational risks for the B&RI.

Finally, China stresses the importance of the WTO's multilateral rules-based system, in the context of 're-writing the rules' to fix its weaknesses. What this means is not clear and whether China will succeed or suffer pushback depends on its intentions and those of the US. China officially accepts the current western rules bases international order. Any attempt to embed 'filial piety-type' hierarchies and pseudo-tributary relations in the B&RI will be rejected as bullying and turn participants away. Any attempt to water down the rules so they better comply with China's international legal interpretations and local laws among B&RI participants will unlikely succeed, unless the US leaves the WTO and China is left to pick up the pieces of its choosing.

I conclude that either way the B&RI is era shaping. It either achieves its ambitions in the long term or stumbles and fails because it did not manage the risks. The shape of regional order and prosperity across the Indo-Pacific and Eurasia is changing rapidly. New political and economic dynamics are determining its future which has decidedly 'with Chinese characteristic' features.

Soft Law Rules and China's SOEs on the Silk Road

– Governance and Dispute Resolution Issues

Dr Ping Xiong, Professor Roman Tomasic

ABSTRACT

The 'Belt Road Initiative' (BRI) is China's national strategy to promote economic and foreign policies to help China take a larger role in global affairs. This is being implemented through China-centred trading and investment in infrastructure projects in more than 68 countries in Asia, Europe, Oceania and in Africa. It is estimated that the BRI is one the largest infrastructure mega-investment. As China's "national champions", Chinese State-owned Enterprises (SOEs) will seek to undertake investments in infrastructure projects in the countries along the Economic Belt and Maritime Silk Road; this is being done in order to achieve economic advantages for China and to demonstrate China's economic and political prowess, as well as to extend its soft-power. Given the considerable diversity in legal, cultural and societal conditions in the countries along this Silk Road, Chinese SOEs face more challenging environments in the governance of their companies abroad and in the resolution of commercial disputes arising from their investments. This paper explores the use of soft law rules in the governance of state-owned Chinese companies and in the resolution of commercial disputes that China's SOEs encounter in their investment in infrastructure projects abroad. Through country-specific case study and discussion of the use of international institutional mechanisms, this paper argues that reliance on soft law rules can be a pragmatic and effective means of governing China's SOEs overseas and in resolving investment and infrastructure-related commercial disputes involving Chinese SOEs in host countries.

Nie, Zilu

"One Belt and One Road" and the Anti-Corruption Legislation in the field of the Government Procurement

(Law School of Hunan University)

Abstract： Since the "One Belt and One Road"(OBOR) initiative was put forward and implemented in September 2013, it has won the most enthusiastic and widespread responses from the international community. On behalf of the Chinese government, the Chairman Xi, Jingping makes a solemn commitment to the international community to ensure that the OBOR could become an integrity construction. This Commitment not only shows the determination and the confidence of the Chinese government, but also show the Chinese government's attitude towards the anti-corruption cooperation that advocating the integrity around the world to guarantee the investment and procurement more robust, the business environment purer and the economy more prosperous. The construction of the integrity in the OBOR first lies in the government procurement. So, promoting the legislation of the anti-corruption in the field of the government procurement is urgently required. This article tries to interpret the anti-corruption clauses in the international regulation of the government procurement from the anti-corruption legislative perspective. Finally, the government could ensure that the OBOR become an integrity construction through promoting the anti- corruption legislation in the field of the government procurement.

Keywords： the "One Belt and One Road" Initiative, Government Procurement, Anti-corruption Legislation

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The Vital Place of Restorative Justice Along the Silk Road

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Abstract

If we can embrace the religious roots that connect with modern practices of restorative justice, then a better understanding, and hence implementation, of those practices may emerge. In this paper, I explore some key legal practices from countries through which the Silk Road passed for their restorative themes. I conclude that restorative themes have enjoyed a long history in religious traditions and customs in China, Persia and the Middle East, and are strongly connected to theocratic principles. Restorative justice is not counter-cultural. It sits well with those who treasure their heritage. Hence, religious traditions could and should continue to inform restorative practices, empowering and enlivening modern-day justice practitioners generally.

The legal protection of women's rights against the background of Implementing the Belt and Road Initiative

Cao, Weiwei

(Law School, Hunan University)

Abstract: The implement of the Belt and Road Initiative requires a modernised legal system in order to protect citizens' rights and benefits. By a feminist lens, this paper aims to explore the challenges and chances brought by the Belt and Road Initiative to gender equality and women's welfare. I selected three typical gender problems in China: 'unwanted girls', 'battered wives' and 'inglorious women'. First, I will analyse their cultural and legal causes. By doing so, I aim to help the reader have a better understanding of the problems of women in the region where one fifth of the global population lives and examine how the current law in China promote women's rights. Second, to further discuss the spirit of the Initiative relating to gender equality and human rights, I will make some possible proposals for law reform.

Key words: Women's Rights, Gender Equality, Legal Protection, the Belt and Road Speaker:
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International Legislative Cooperation on the Silk Road

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Abstract: It is well known that the economic and cultural exchanges are more and more frequent between the countries on the Silk Road. In the meantime, the conflicts caused by different legal systems are increasing significantly, which is a major impediment for the Silk Road construction. Therefore, it is necessary to strengthen legislative cooperation to reduce legal differences and unify legal rules. The legislative cooperation includes co-drafting bills, jointly approving laws and collectively modifying or interpreting laws. For co-drafting bills, a bill drafting committee would be established, which consist of representatives from every country on the Silk Road. And the bill drafting committee would deal with all drafting matters and submit a bill which reflects the common will of all countries. Of course, the countries on the Silk Road can also jointly appoint a research institute or other NGO to draft a bill. For jointly approving laws, the countries on the Silk Road should promise to complete domestic legislative procedures in a certain time, which means the countries on the Silk Road should transform the international treaty into domestic law. That is the key to the international legislative cooperation on the Silk Road. For collectively modifying or interpreting laws, a modification or interpretation conference should be convened timely by the countries on the Silk Road when they found some provisions of the law are outdated or unclear. And only in this way, the legal rules can be unified in a long term. Certainly, the international legislative cooperation on the Silk Road should follow some principles such as respect for sovereignty, equal consultation, cultural diversity and economic priority.

Keywords: Legislative Cooperation, Co-drafting bills, Jointly approving laws, Collectively modifying or interpreting laws.

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Abstract
The "One Belt One Road" Initiative combines the Silk Road Economic Belt and the Twenty-First Century Maritime Silk Road. The hardware of this Initiative is most impressive, particularly in infrastructure construction. By examining the participation of China's lawyers, we can come to understand the "software" which is vital to the success of this Initiative. We will examine eight points about China's lawyers: 1. Young and Eastern; 2."Going Global" Strategy; 3. Preparations; 4. Support Materials; 5. Recruitment of Foreign Lawyers; 6. Dispute Settlement and Arbitration; 7. The Chinese Communist Party; 8. Legal Culture and Ethics. This examination will be largely descriptive, as it is too early to analyse their successes and failures in the new environment.

摘要
"一□一路"倡□是□□之路□□□和二十一世□海洋□□之路。□个倡□的"硬件"非常可□，特□是基□□施建□。在分析中国律□参与"一□一路"□，我□会知道□"□件"□□个倡□的重要性。我□要□述关于中国律□□□的八个特点：1. 律□的年□性和□方性。2. 走出去□略。3. "一□一路"的准□。4. 支援材料。5. 聘□外籍律□。6. 争□的解决与仲裁。7. 律□与中国共□党。8. 法治文化与法治道德。□个推究(分析)的大部分是描述，因□分析新□境的成□□□之□早。

Introduction: The One Belt One Road Initiative and its evolution
The "One Belt One Road" Initiative (sometimes shortened to "Belt Road Initiative" or BRI) combines the Silk Road Economic Belt and the Twenty-First Century Maritime Silk Road.[i] The hardware of this Initiative is most impressive, particularly in infrastructure construction, in housing, and in power generation. I have been visiting mainland China since 1975, and have seen both cities and countryside transformed by construction. Any observer must be impressed. I would be happy to share with you some stories of great projects I have seen – but perhaps I would sound too much like a promoter for tourism in China.

But there have been cautions expressed around planning and risk. In China itself, construction has been funded by rising levels of local debt. While some projects have been successful, China has also built beautiful cities that remain largely empty, the results of poor planning. While the hardware is very impressive, the software represented by services such as financing, planning, contracting, taxation, anti-corruption, dispute settlement and ethics[ii] is still developing. Recent events in Sri Lanka, Malaysia, and Tonga, have shown that the single issue of debt and debt stress has been enough to cause revision and perhaps abandonment of One Belt One Road projects. There is a need for caution. China's great achievements have caught the imagination of many observers, but we must always be cautious – perhaps that is the motto of lawyers!

By examining the participation of China's lawyers, we can come to understand the "software" which is vital to the success of this Initiative. We will examine eight points about China's lawyers. This will be largely descriptive, as it is too early to analyse their successes and failures in the new environment.

This Initiative is not set in concrete: we can expect it to evolve. Already the "One" in One Belt and One Road is already no longer apt, as the planning incorporates a wider range of new silk roads. We will see that the role of China's lawyers is also evolving, in response to the lessons of early projects.

1. China's Legal Profession: Young and Eastern

While there were earlier versions of a legal profession since the Chinese Communist Party began its leadership of China in 1949, a revived legal profession on the Soviet model began in 1980. It is not yet forty years, but this profession has grown rapidly. By 2016 there were 325,540 lawyers (214,968 in 2011) and 26,150 law firms (18,235).[iii] Moreover, the profession of "lawyer" 律□ is only one of a number of professions related to the law in China. Perhaps in Australia the same word would include judges, procurators, and notaries, adding hundreds of thousands to our total. While lawyers began in 1980 on the Soviet model, from 1996 they were un-linked from the state, thus creating a private profession or occupation, largely organised into law firms.

A feature of China's general economic situation is the alarming diversity between the wealthier coastal provinces, and the poorer inland provinces.[iv] This is also reflected in the availability of quality legal services in the inland provinces. Yet the land components (the Belt) pass through some of the poorest regions in western China. To cope with this disparity, the entry level, and the marking level, for candidates in the National Judicial Examination for entry to the professions of lawyer, judge, procurator, and notary are discounted for inland candidates. Building up law firms through development in the One Belt One Road projects may help to remedy that disadvantage. One law firm in Xi'an has claimed to fill the gap through recruitment of specialised personnel, including those with foreign experience.[v] However, Xi'an is hardly the west of China. It is only around 1,000km from Beijing, and nearly 4,000km from the Silk Road departure city Kashgar.

China is, of course, a behemoth in international trade. China's corporations also have significant experience in international contracting, especially in construction. Even provincial law firms have shown themselves to be quite competent in dealing with cross-border tasks. The One Belt One Road project builds on years of international experience, including the participation of lawyers.

2. "Going Global Strategy": *Verein* and other law firm associations

The legal profession is the administrative responsibility of the Ministry of Justice. Generally, the Ministry has sought to support the profession in its development, always with the caution that the profession must support the Party and the state. At the same time the Ministry has shielded its young profession from the furnace of international competition. So while foreign law firms have been able to operate on a very limited basis in China, those foreign firms have been very restricted in what legal services they can provide. There is no reciprocity: Australian law firms cannot operate in China equally as Chinese law firms can operate in Australia.

As the profession has grown, the Ministry has encouraged the stronger firms in "going global" (走出去□略).[vi] Some firms have established representative offices abroad, in centres such as New York. While foreigners cannot buy into Chinese law firms or join through merger, Chinese firms can enter into contractual agreements which preserve their identity and independence.[vii] In Australia, the King and Wood 金杜 firm is perhaps the best known, having joined with Mallesons and other firms in a contractual arrangement provided by the Swiss *verein*. Another *verein* arrangement is Dentons, which includes the Chinese firm Dacheng 大成. Fieldfisher 斐石中国have formed a verein with Beijing's JS Partners □石. These firms are well placed to take advantage of the Initiative, because their *verein* co-contractors include law firms from countries such as Azerbaijan, Kazakhstan, and Uzbekistan along the Silk Road.

But there are other possible alliances besides merger. China allows association with Hong Kong and Macau law firms under the Closer Economic Partnership Arrangements (CEPA), and is experimenting with cross-border partnerships in Guangdong.[viii] Other liberalizations for China relate to law firms in the Shanghai Free Trade Zone.[ix] These provisions for some form of association do not allow for a multi-member *verein*.

In fact, the *verein* model is far from universal. Law firms also adopt the "best friend" or other models.[x] The Chinese Embassy in Australia has issued a list of the ten best law firms in China, headed by King and Wood. But perhaps only two of these use the *verein* model.[xi] One option would be to develop associations of law firms specifically along the One Belt One Road routes, with the association rules geared to the One Belt One Road projects.

3. Preparing for One Belt One Road

Are China's lawyers ready for One Belt One Road? The technological possibilities for China's construction contracts are well known, and build on many years of technological development. But that is the hardware. The software of legal skills may not be so developed. Writing in 2011 of China's corporate lawyers, both in-house, and in private firms, academic Ding Xiangshun suggested that they were unready for international challenges.[xii] And in 2016, the president of the All China Lawyers Association told reporters for the People's Court newspaper that China urgently needed to train a group of foreign-related legal personnel.[xiii] But the overall plan by a number of ministries for the development of China's legal services came only in 2017, years after the One Belt One Road Initiative began.[xiv]

Soon after this document, part-time judge Liu Jingdong of the Chinese Academy of Social Sciences has reminded us that for China and the countries along the One Belt One Road, both international law and domestic law are inadequate for the current task.[xv] Recently we have seen difficulties in a number of One Belt One Road construction contracts, of which the Hungarian rail project will serve as an example.[xvi] Since many projects are already underway, these calls for trained personnel, the "software" of One Belt One Road, may be much too late.

On the positive side, we see in the last two or three years there has been increasing effort to upgrade the law and the legal professions, both in China[xvii] and in the One Belt One Road countries. Two Shanghai lawyers record their research on the One Belt One Road, as they identify the legal issues.[xviii] Legal institutes in China have begun work in preparing China's lawyers for the tasks of negotiating, contracting, and dispute settlement. Last year, the University of International Business and Economics in Beijing established the first institute for this purpose.[xix] Others have followed. A chain of law schools in China and One Belt One Road countries have formed an alliance.[xx] Jiang Junlu of the All China Lawyers Association plans to organize an annual forum to discuss legal concerns related with the Belt and Road projects.[xxi] Some of this work has been in the areas of dispute resolution, which we will re-visit later in my presentation.[xxii] Even China's lonely National Lawyers College has sought to take a part in the training and preparation of the new corps of lawyers.[xxiii]

Another development has been to identify lawyers who are best equipped to provide cross-border service for One Belt One Road. In mid-2017, the All China Lawyers Association established a talent pool of lawyers and law firms. The first batch of 205 lawyers included 84 Chinese lawyers and 121 foreign lawyers.[xxiv]

China's lawyers, with their background in China's soviet or socialist legal system may well be able to play a significant role in translating political agreements into contractual terms. First, China's lawyers are accustomed to living in a society where the Party-State chooses and drives projects. This leads to the expectation is that the Party-State will lead in solving problems among the countries of the One Belt One Road. To some extent this has already begun in bilateral cooperation agreements.[xxv]

But the mix of politics and lead can lead to confusion. Is a document meant to have legal effect, or is aspirational? Second, how to clarify the expectations of the parties: are loans to be enforced, or to be forgiven? Where does risk lie between the parties? Some of the problems have arisen because governments have negotiated arrangements at high political levels, without commonly accepted corporate practices of competitive tendering. For example, the investment arrangements referred to in the detailed plan for the China Pakistan Economic Corridor include grants and loans for agricultural development, but

does not provide detail on where funds will be provided as a grant, and where funds will be provided as loans.[xxvi]

4. Support Materials

China's lawyers must rapidly become familiar with a number of legal systems of the Belt and Road countries. One project has been the publication, in Chinese and English, of a two-volume compendium of legal systems which a Chinese lawyer might encounter.[xxvii] The report provides laws from countries as diverse as Myanmar, the Philippines, and Russia, and include such areas as investment, labour law, environmental conservation, intellectual property, and dispute resolution.[xxviii]

The next step is for China's lawyers to prepare detailed introductions to the Chinese legal environment for lawyers of countries along the belts and roads. Huang Ningning and Jia Yong have suggested this in their *Shanghai Lawyer* article.[xxix] But I would add that such introductions need to go beyond the helpful but limited introductions provided by many law firms. Let me give you an example. Important land Belts pass through the Xinjiang Uygur Autonomous Region. Very few general overviews of Chinese law give us detail about what that autonomy means in legal transactions. Then, within Xinjiang there is a unique economic and paramilitary institution called the Xinjiang Production and Construction Corps. It is a series of territories within a territory with its own lawyers, its own judges, and its own laws. The "bingtuan", to use its shorthand name, is set to become a significant player along the route. Bingtuan leaders have identified agricultural production and construction materials as particular opportunities.[xxx] But the legal status of the 'Bingtuan" would be unfamiliar to many Chinese, much less foreign lawyers.

5. Recruitment of Foreign Lawyers

One of the decisions made by China's authorities in recent months has been to permit Chinese law firms to employ foreign lawyers.[xxxi] The Beijing Municipal Justice Bureau, in an explanatory document, has indicated that the decision to allow Beijing law firms to employ foreign lawyers is a response to increasing demand for legal services caused by the "One Belt One Road" initiative.[xxxii] Two points can be made about this decision.

First, the decision indicates the protective policies which the Ministry of Justice employs towards China's young legal firms. Foreign law firms operating in China are not allowed to employ Chinese lawyers, and this has been a point of contention in the past. Foreign law firms are not able to use the new regulations permitting recruitment of foreign lawyers as a "back door" entry to Chinese law firms: if a foreign law firm has representatives in China, these representatives are specifically banned from this new type of employment.

Second, the decision is designated as a "trial" or "experiment". Should the trial be successful, it can be extended to other regions in China. This has been a feature of China's administrative practice for lawyers and in other areas of administration.[xxxiii] In some cases, the existing law is experimentally flouted in a chosen area, and then, if deemed successful, the rules are changed. This practice, known as "benign violations", may be efficient administration, but it undermines the legitimacy of China's legislation. Two earlier "benign violations" for lawyers were the creation of individual law firms, and the employment of corporate and governmental in-house lawyers: both were later approved in the 2007 amendments to the *Lawyers Law.*

6. Dispute Settlement and Arbitration

Disputes between parties are core business in the provision of legal services. The best lawyers can identify risks, and help clients to guard against failure. But even the best negotiation and the best written contracts cannot cover every situation: so dispute settlement services are part of the lawyers' tool-box. Key questions are the choice of law to govern the contract, and the locus of the court or arbitration to make a decision.

After a recent Forum on Building One Belt one road international rule of law, China Railway Co., Ltd. vice president and general counsel Yu Tengqun said in an interview that with the expansion of One Belt One

road, the number of Chinese enterprises' foreign commercial disputes are increasing. In his view, it is very important to establish a fair and reasonable international commercial dispute settlement mechanism for the construction of One Belt One Road to provide more efficient, fast and low-cost dispute resolution for all parties involved.[xxxiv]

One possibility is for China's own courts to apply China's laws. This may be particularly attractive for two Chinese parties disputing their part in a One Belt One Road project, but can also apply to non-Chinese parties. To support this possibility, the Supreme People's Courts has released its own document on the project, as well as a set of model cases. Then in June 2018, the Supreme People's Court established two commercial courts to handle disputes. The court in Xi'an will focus on Belt (overland) cases, the court in Shenzhen on Road (maritime) cases.[xxxv]

Nevertheless, some parties are likely to prefer existing mechanisms for dispute settlement. Arbitration has many advantages, including commercial confidentiality. Arbitration bodies in Singapore and Hong Kong seem well placed to provide services for parties who do not wish to get directly involved in the Chinese legal system.[xxxvi] With both cities providing strong legal traditions and Chinese cultural familiarity, Singapore and Hong Kong can be readily accessible to China's lawyers.[xxxvii] Professor Wang Guiguo is busily promoting a dispute resolution mechanism specifically designed for "One Belt, One Road", but this does not yet seem to have gained momentum.[xxxviii]

7. Lawyers and the Chinese Communist Party

Only a small proportion of the Chinese people are members of China's ruling Communist Party. Current Party membership is close to 90 million. Yet the proportion of lawyers who are Party members is over 30%.[xxxix] The figure is open to more than one interpretation. One way of interpreting the figures is to suggest that lawyers and the Party both gain from this close relationship.[xl] The profession of law is close to politics and to government, especially for a Party which takes a very instrumentalist view of law, and so close links to the profession of lawyer assist the Party in carrying out its policies. At the same time, lawyers benefit from their close association with the party-in-power, and can display their connections through service on committees, through awards, and through other signs. These connections can be an informal guarantee for clients. In contrast to past groups, the present leadership group in China includes a number of lawyers or people who have studied law.[xli] This may enable a higher degree of trust and comprehension.

The One Belt One Road Initiative is a gigantic project, or series of projects. It has a background, in the "Going Global" policies. It is timely to note that some "Going Global" projects have recently been re-assessed, leading to large corporate purchases abroad being reversed. In some ways, One Belt One Road is more focussed than Going Global, while the scale of the projects – some of them begun before Xi Jingping's promotion in 2013 – is much larger than anything seen before. The Party has staked its own credibility and China's future on a bold commitment, and the lawyers are inevitably bound up in that future.

8. Laws, Culture, and Ethics

At the recent Forum on Building One Belt One Road international rule of law, China Railway Co. general counsel Yu Tengqun quoted an experience of the China Iron and Steel Co: when they first came to Africa, they did not appreciate that the local people had the custom of being paid weekly. Because they paid monthly, they were met with absenteeism and demands for early payment. When understanding the situation, the company paid its workers weekly, thus solving the problem.[xlii] Perhaps this must have been the easiest problem to solve – China's corporations have faced many difficulties in complying with local labour laws and customs.[xliii] Yet is does give us a pithy example: China's lawyers face not only questions of black-letter law. China's lawyers must also enter into the culture and customs of its One Belt One Road partners.

Australian listeners will be familiar with the difficulties which faced investor Sino-Iron (CITIC Pacific) in Western Australia, where the company encountered major differences in the institutional environment,

restrictions on foreign (Chinese) workers, and different attitudes to the work-life balance.[xliv]

Relying on personal interviews with lawyers in China, Tsinghua University academic Tommi Yu has pointed out that Chinese lawyers face an ethical minefield. For some of the One Belt One Road countries, he says, the rule of law might still be in its infancy, and corrupt practices such as illicit payments to government officials take place.[xlv] Recently Mr Wang Junfeng, the President of the All China Lawyers Association and the leading lawyer in King Wood Mallesons, has reiterated the need for China's own lawyers to develop their legal ethics.[xlvi] As a young profession, working within the particular ethics of the socialist legal system with Chinese characteristics, China's own legal ethics are a work in progress. The development of these ethics will be challenged by the diverse systems in countries along the Belt and Road.

Conclusion

Tsinghua University academic Tommi Yu has written: "Due to the character of the Chinese economy and the involvement of foreign businesses, today's legal professionals in China are generally people with a superb ability to respond to the changing landscapes of the legal industry not only domestically but also but also internationally."[xlvii] The Chinese legal profession is still young and developing. The speed of development of the One Belt One Road initiative means that the legal environment is changing rapidly. Encountering foreign legal systems, international legal structures, and foreign legal personnel: these changes are coming rapidly.

While the hardware of the One Belt and One Road has been developed over many years, the software has not. Lawyers' services are part of that software. It seems that the lawyers are having to rapidly respond to the new environment, and even those of superb ability will find the changes challenging. The profession of lawyer in China has been sheltered from competition by the Ministry of Justice, now it must rapidly go out into a competitive global environment. The profession of lawyer in China operates as part of system of socialist law, now it must interact with a wide variety of legal systems and customs.

This challenge has elements of crisis, but of course is also a great opportunity. China's lawyers will be able to take their status among the legal professions of the world, to contribute to the setting of legal and ethical standards, and to show leadership in the creation of a new legal institutions. This is a time for great hopes, and for dreaming not just a China dream, but a dream for a new international legal order along the One Belt and One Road.

Thanks

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Does China Really Need a Political Strongman and a Singaporean Mode of the Rule of Law?

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Abstract: After seven years'reign as the top leader, Xi Jinping, aged 65, has undoubtedly become the most influential and powerful political leader in present China, quite beyond the imagination and expectations of many people home and abroad. Meanwhile, as the core engine of One Belt and One Road Initiative, China has been applauded yet also faced with numerous oversea suspicions and doubts, along with optimistic as well as pessimistic predictions. As an observer of China's politics and the development of the rule of law, the writer points out that in a certain aspect China maybe, in the short run, really needs a political strongman like Xi, and actually still has much to learn from Singapore as far as the establishment of the rule of law or the upgrading of the soft power is concerned. In a broad sense, this is how the goal of setting up a mode of strong leadership and strong system is to attain from the perspective of building a socialist country with Chinese characteristics, which sounds like shadowy political ideology but is political reality and the destiny Chinese people closely involved in no matter whether it is called political realism or pessimism. The key to the problem, however, is what the Strong Leader should not do even if his power seemingly unchallengible and what should not be learned from Singaporean mode of the rule of law. This is what the paper will focus on from a comparative and historical perspective. A better understanding of China today and its future, will surely lead to a better understanding of the Silk Road and the rule of law.

Keywords: political strongman, the rule of law, anti-corruption, political tolerance and openness

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On International Coordination Mechanism to Solve Investment and Commercial Dispute in the Belt and Road

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Abstract: To solve investment or commercial disputes of involved countries or areas has become an unavoidable reality, with the frequent transnational investment and business activities in the Belt and Road. It could not satisfactorily solved to the particularity about investment or commercial disputes involved countries or regions in the Belt and Road, because there are great differences such as the domestic judicial or arbitration mechanism, bilateral coordination mechanism, multilateral investment dispute settlement mechanism. In this case, it should become a necessary and feasible choice that the new international coordination mechanism would be established or have participated broad in by the countries or regions, and there is a certain guarantee with agreement for resolving the dispute about investment and commercial in the Belt and Road.

Key words: The Belt and Road; Investment and commercial dispute; Multilateral investment dispute settlement mechanism; International cooperation mechanism.

Introduction

1. On realistic demand analysis to solve investment and commercial dispute in the Belt and Road.

2. On defect analysis about existing mechanisms to solve investment and commercial dispute in the Belt and Road.

3. On necessity and feasibility analysis about the new international coordination mechanism to solve investment and commercial dispute in the Belt and Road.

4. The new international coordination mechanism should be structured to solve investment and commercial dispute in the Belt and Road.

Conclusion

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On the Protection of Consumer's Rights and Interests along with One Belt and One Road Countries

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Abstract: Many countries located in Asia and Europe, even future in America will be connected through the high speed railway under the practices of China's policy of One Belt and One Road. Persons and Goods will accelerate their flow, and the cross border consumption of persons and online shopping will sure rapidly develop among these countries. The protection of consumer's right and interests will become more important than ever before. The conflicts will definitely be caused among One Belt and One Road Countries because of their differences of consumer's definition and contents of consumers' rights and interests. These differences come from these countries' different economic development levels, cultures, legislations, especially their competition laws, etc. Jurisdiction of cases, application of law, implementation of adjudications, even new available dispute settlement body, etc. aroused from above conflicts should be soon negotiated among One Belt and One Road countries.

Keywords: Consumer, Cross border Consumption, Online Shopping, Protection of consumer's rights and Interests, One Belt and One Road, Competition law

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Insolvency Law and Debt on the Silk Road:

A New Frontier for Cross-Border Insolvency? [1]

by Roman Tomasic
University of South Australia

ABSTRACT

China's One Belt One Road program, also known as the Belt and Road Initiative (BRI), is having a transformative effect on infrastructure development and international trade. The BRI program was initiated by President Xi Jinping, China's newly appointed President for life. This strategic development reflects China's rapid emergence as a dominant player in the new international economic order and its competition with other major powers. It also reflects China's championing of globalization, such as in President Xi's speech at the World Economic Forum in 2017. The BRI program will inevitably have an effect on the emerging body of international commercial law operating in the over seventy countries that have signed up to be part of the BRI. Although there are many legal issues that have been raised by these developments, ranging from private international law to the development of appropriate dispute resolution mechanisms, this paper will examine the emerging shape of cross-border insolvency law on the maritime and overland "Silk Roads". It is clear that solvency problems are already emerging as serious concerns arising out of China's infrastructure investments under this initiative. To-date, only ten BRI countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency, creating a tension between territorial and more universalist approaches. This suggests that, in the short term, insolvency issues are likely to be dealt with by resort to "soft law" or by using administrative or political mechanisms. Given China's commitment to the rule of law (with Chinese characteristics), it is inevitable that efforts will be made to give some normative shape to this new global space. This paper seeks to explore this emerging frontier for cross-border insolvency law which remains largely closed to outside scrutiny.

[1] An earlier version of this paper was presented at the INSOL Academic's Colloquium held in London in July 2018.

1. INTRODUCTION

In an increasingly globalized world it might be expected that the adoption of universalist cross-border insolvency approaches would be seen as efficient and desirable. However, in regard to their approach to insolvency law, States rarely implement "universalism" in a pure manner and instead adopt a form of "modified universalism". As a result, these States often retain some commitment to "territorialism" to reflect the policy preferences of the particular state rather than the fundamental principle of the unity of the insolvent estate.

Many countries that adopt a form of universalism, merely subscribe to what Bork describes as "outgoing universalism"; for example, China assumes that its domestic insolvency proceedings should have worldwide effect. But, such countries generally do not accede to the idea of "incoming universalism" of the kind that is also assumed in the UNCITRAL Model Law on Cross- Border Insolvency.[2]

If the limited adoption to-date of the UNCITRAL Model Law is any guide, a broader commitment to universalist principles is not widely shared by most nations; by 2017 the Model Law was adopted by only 44 States.[3] Of over 70 states that have joined China's Belt and Road Initiative, only 10 have implemented a form of the Model Law.[4] However, as will be seen below, some of these adopting States have significantly modified the Model Law in response to local public policy preferences.

International law and cross-border insolvency draw heavily upon State-based ideas of sovereignty that evolved since the Peace of Wesphalia in 1648.[5] However, it was not until decolonization after World War Two that many of today's nation States came into being. The insolvency law systems of these new States had not developed significantly to support cross- border trade, although some of these newer states have inherited more developed insolvency law ideas from their former European colonial rulers. Modernization of insolvency law systems has often occurred after crises, such as the Asian Financial Crisis in 1997, which accelerated insolvency law reform in the Asian region.[6]

Increasing globalization of global trade over the last four decades has however challenged the power of smaller and weaker States and has seen the emergence of new commercial law norms and global networks. During this period, there has also been a movement away from a focus

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[2] Bork, R, *Principles of Cross-Border Insolvency Law*, Cambridge, Intersentia, 2017, at pp. 26-27.

[3] See further, Status, UNCITRAL Model Law on Cross-Border Insolvency, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

[4] These are: Israel, The Republic of Korea, Montenergo, New Zealand, The Philippines, Romania, Serbia, Singapore, Slovenia and South Africa. India was due to adopt the UNCITRAL Model Law in 2018; Lexology, "Cross-border insolvency in India", Khaitan & Co, 30 May 2018; see further at: https://www.lexology.com/library/detail.aspx?g=6b86a565-7764-4bf6-a2de-22be94f6713c .

[5] See generally, Croxton, D, *Westphalia: The Last Christian Peace*, Basingstoke, UK: Palgrave Macmillan, 2013.

[6] See generally, Halliday, TC and BG Carruthers, *Bankrupt*: *Global Lawmaking and Systemic Financial Crisis* , Palo Alto, Stanford University Press, 2009.

upon international law with the increasing globalization of law.[7] Some have described this as the emergence of a post-Westphalian conception of law.[8] Former Harvard University international law scholar Anne-Marie Slaughter has charted the nature of this change and emphasized the importance of new global networks in the context of globalization. She pointed to the formation of the Asian Infrastructure Investment Bank as an example of a Chinese dominated new global network.[9] Slaughter argued that whilst the old "chessboard" view of competing states still operates, the rise of networks cannot be ignored; as she explained, when viewing the world as a web or network:

> "It is a map not of separation, marking off boundaries of sovereign powers, but of connection, of the density and intensity of ties across boundaries. To see the international system as a web is to see a world not of states but of networks, intersecting and closely overlapping in some places and more strung out in others."[10]

Slaughter argued that it is necessary to move beyond the seventeenth century lenses of the Peace of Westphalia and recognize the significance of what Manuel Castells described as the Network Age.[11] Within these networks, the rise of core cities such as London, Hong Kong and Singapore, has provided important hubs within these networks.[12] The transformation of the modern state that has occurred over this period has also seen the redistribution of power within the state, and, as Sassen puts it, has seen the movement towards "new organizing logics" which have reoriented "state capabilities towards global projects."[13] As Sassen explains, this has led to "a new alignment of critical aspects of territory, authority, and rights."[14] Increasing globalization has been seen as leading to the emergence of a new constitutional order where resort to "soft" law norms become increasingly important.[15]

The rise of new global networks may lead to other forms of insolvency and debt resolution which depart from universalist models, such as the UNCITRAL Model Law on Cross-Border Insolvency. The UNCITRAL Model Law is an example of an emerging body of soft law norms. In the context of China's Belt and Road Initiative (BRI), one such possibility arising from China's economic

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[7] Schiff, PS, "From International Law to law and Gobalization", (2004-2005) 43 *Columbia Journal of Transnational Law* 485.

[8] Twining, W, "A Post-Westphalian Conception of Law", (2003) 37 *Law & Society Review* 199.

[9] Slaughter, A-M, *The Chess-Board and the Web: Strategies of Connection in a Networked World*, New Haven Yale University Press, 2017 at pp. 1-3.

[10] Ibid at p. 7.

[11] Ibid at p. 9. See further, Castells, M, *The Rise of the Network Society*, Oxford, Blackwell, 1996 and 2010.

[12] On the importance of major cities in economic development, see further, Jacobs, J, *Cities and the Wealth of Nations: Principles of Economic Life*, New York, Random House, 1984. In more recent times, writers such as David Harvey have also highlighted the important role of cities in the crisis of capitalism and capital accumulation; see further, Harvey, D, *Rebel Cities*, London, Verso, 2012; and Harvey, D, *The Enigma of Capital and the Crisis of Capitalism*, London, Profile Books, 2011.

[13] Sassen, S, *Territory, Authority, Rights – From Medieval to Global Assemblages*, Princeton, Princeton University Press, 2006 at 148.

[14] Ibid at 156.

[15] See generally, Kjaer, PF, *Constitutionalism in the Global Realm – A Sociological approach*, London, Routledge, 2014.

dominance, is the adoption of local insolvency regimes with Chinese characteristics, the greater use of soft law mechanisms, and the use of Chinese laws and legal mechanisms to resolve disputes; at the same time, we have seen increasing reliance upon politically inspired settlements.

There is no doubt that the rise of China as a world power will see massive changes in patterns of international trade and infrastructure development over coming decades.[16] China has announced that it is prepared to play a leading role in making such investments and in facilitating globalization. At the 2017 World Economic Forum held in Davos, China's President Xi Jinping made this very clear. In his Davos speech, President Xi observed:

> "It is true that economic globalization has created new problems. But this is no justification to write off economic globalization altogether. Rather we should adapt to and guide globalization, cushion its negative impact, and deliver its benefits to all countries and all nations," [17]

Section two of this paper will introduce China's Belt and Road Initiative (BRI), a scheme that is creating a new network of nation States across large areas of the developing world. This will be followed (in section three) by a discussion of debt problems that have been identified along the new corridors that have received investment under the BRI. Whilst much of this debt is currently sovereign debt, it is likely that non-state corporate actors may also encounter significant solvency problems under the BRI.

Section four will provide an overview of China's approach to cross-border insolvency law issues as Chinese models of resolving debt disputes may well be exported to other countries along the Silk Road. Section five discusses the degree to which universalist ideas, such as the UNCITRAL Model Law, have been implemented by States that have signed up to participate in the BRI. The final section will consider the prospects for multilateralism and universalism in dealing with debt and insolvency problems along the new Silk Road.

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[16] See generally, Miller, T, *China's Asian Dream - Empire Building Along the New Silk Road*, London, Zed Books, 2017. **[17]** World Economic Forum, "China's Xi Jinping defends globalization from the Davos stage", 17 January 2017; available at: https://www.weforum.org/agenda/2017/01/chinas-xi-jinping-defends-globalization-from-the-davos-stage/

2. CHINA'S BELT AND ROAD INITIATIVE AND GLOBAL ECONOMIC DEVELOPMENT

China's Belt and Road Initiative (BRI) is likely to have a transformative effect on global economic development and commerce.[18] It may also have a major effect on legal mechanisms for the handling of debt and insolvency problems arising out of this development, although this has yet to be fully evaluated.[19]

As part of the BRI, massive infrastructure development is occurring at strategic places in countries that have joined this strategic Initiative.[20] The first Belt and Road Summit of world leaders was held in Beijing in May 2017, with the presence of 30 state leaders and delegates from 100 nations.[21] A second Summit is planned for 2019.[22]

After the first Summit, the BRI was entrenched in China's political system and became state policy when it was formally adopted at the 19th National Congress of the Communist Party of China in October 2017. In a rare development, the BRI was then included within the Party's Constitution.[23] Subsequently, President Xi Jinping's position and policies, such as the BRI, were further entrenched when he was given lifetime tenure as China's President.[24]

The BRI has seen the construction of new ports, railways, energy and transportation infrastructure through the use of bi-lateral agreements between China and many of the countries that have agreed to join this Initiative. At least 68 countries have been listed as participants in this China-led BRI program. In 2016, the *Financial Times* reported that:

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[18] See generally, Wang, Y, *The Belt and Road Initiative: What will China offer the world in its rise*, Beijing, New World Press, 2016. For a graphic portrayal of China's new Silk Road see: tmsnrt.rs/2q4UEs2 .

[19] See generally, Sooksripaisarnkit, P and Ramani, S (eds) *China's One Belt One Road Initiative and Private International Law*, London, Routledge, 2018; and Shan, W, Nuotio, K and Zhang, K (eds), *Normative Readings of the Belt and Road Initiative*, Springer, 2018. Also see generally, Mayer, M (ed), *Rethinking the Silk Road: China's Belt and Road Initiative and Emerging Eurasian Relations*, Palgrave Macmillan, 2018; and Zhang, W, Alon, I and Lattemann, C, (eds), *China's Belt and Road Initiative: Changing the Rules of Globalization*, London, Palgrave Macmillan, 2018.

[20] See generally, Kaplan, RD, *The Return of Marco Polo's World*, New York, Random House, 2018; and Habid, B and V Faulknor, "The Belt and Road Initiative: China's vision for globalisation, Beijing-style", *The Conversation*, 17 May 2017; available at: http://theconversation.com/the-belt-and-road-initiative-chinas-vision-for-globalisation-beijing- style-77705.

[21] Leng, S, "Xi's new Silk Road 'has no political agenda'", *South China Morning Post*, 15 May 2017, available at: http://www.scmp.com/news/china/diplomacy-defence/article/2094410/china-hold-next-global-trade-summit- 2019-xi-jinping .

[22] Cai, J, "Next Silk Road summit set for 2019 as Beijing ramps up global drive", *South China Morning Post*, 15 May 2017; available at: http://www.scmp.com/news/china/diplomacy-defence/article/2094447/next-silk-road-summit- set-2019-beijing-ramps-global .

[23] China Daily, "CPC congress concludes, opening new chapter for new era", *Xinhua*, 24 October 2017, available at: http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-10/24/content_33653630.htm ; also Goh, B and J Ruwitch, "Pressure on as Xi's 'Belt and Road' enshrined in Chinese party charter", *Reuters*, 24 October 2017; available at: https://www.Reuters.com/article/US-China-Congress-Silkroad/pressure-on-as-xis-belt-and-road- enshrined-in-chinese-party-charter-iduskbn1ct1/w .

[24] Callick, R, " Xi Jinping tightens grip as China's leader for life", *The Australian*, 12 March 2018; available at: https://www.theaustralian.com.au/news/world/xi-jinSpringwer, 2018. ping-tightens-grip-as-chinas-leader-for-life/news-story/917535c58923b3e357c2e5457f56ac7e .

> "China has long been a key driver of infrastructure investment and construction in Central Asia, covering a wide range of sectors. It has invested heavily in the region's natural resource extraction, with gas, oil, uranium, gold and copper making up key exports from the region.
>
> However, China has done far more than just invest in extractives. Chinese companies have built roads, railways, tunnels, power lines and refurbished oil refineries as well as special economic zones. It is also actively involved in agribusiness and telecommunications investments."[25]

At the time of the first Belt and Road Summit in 2017 it was reported that two Chinese policy lenders, the China Development Bank (CDB) and the Export-Import Bank of China (EXIM) had provided $200 billion in loans in Asia, the Middle East and Africa and that another $55 billion in loans would also become available.[26] Although many Western private companies are keen to participate in the BRI process, Chinese state-owned companies have been the primary vehicles for the construction of these infrastructure project under the BRI. In 2017, Reuters reported that:

> "Forty-seven of China's 102 central-government-owned conglomerates participated in 1,676 Belt and Road projects, according to government statistics…China Communications Construction Group alone has notched up $40 billion of contracts and built 10,320 kilometers of road, 95 deep-water ports, 10 airports, 152 bridges and 2,080 railways in Belt and Road countries."[27]

A five-year review of the operation of the BRI by the Washington-based Center for Strategic and International Studies was published in January 2018; this found that Chinese companies dominated BRI infrastructure projects:

> "Chinese projects are less open to local and international participation. Out of all contractors participating in Chinese-funded projects within the Reconnecting Asia database, 89 percent are Chinese companies, 7.6 percent are local companies (companies headquartered in the same country where the project was taking place), and 3.4 percent are foreign companies (non-Chinese companies from a country other than the one where the project was taking place). In comparison, out of the contractors participating in

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[25] Lain, S, "China's Silk Road in Central Asia: transformative or exploitative?", *The Financial Times*, 27 April 2016; available at https://www.ft.com/content/55ca031d-3fe3-3555-a878-3bcfa9fd6a98

[26] Zhang, S and M Miller, "Behind China's Silk Road vision: cheap funds, heavy debt, growing risk", *Reuters*, 15 May 2017; available at: https://www.reuters.com/article/us-china-silkroad-finance/behind-chinas-silk-road-vision- cheap-funds-heavy-debt-growing-risk-idUSKCN18B0YS

[27] Ibid.

> projects funded by the multilateral development banks, 29 percent are Chinese, 40.8 percent are local, and 30.2 percent are foreign.[28]

As foreign commercial banks have not been very eager to provide infrastructure funds for BRI projects, it has been left to Chinese government-owned banks (as virtual lenders of last resort) to provide the usually low interest loans that have so far characterized the BRI. As Reuters also reported in 2017:

> "China's state-owned commercial banks are being pushed to support the government initiative. Top lender Industrial and Commercial Bank of China participated in 212 Belt and Road projects, providing $67.4 billion in credit in total, Chairman Yi Huiman said ….Bank of China plans to offer $100 billion in credit to such projects by year-end."[29]

In 2018, *The Economist* added that:

> "The scale of the initiative is enormous. So far China is estimated to have underwritten over $900bn of loans—some on concessionary terms, many on commercial terms—in 71 countries, ranging from Poland to Pakistan."[30]

However, in July 2018, it was reported by the *Financial Times* that China's development banks, such as the China Development Bank and the Export-Import bank of China, are seeking to enhance their level of cooperation with foreign financial institutions in regard to BRI projects as many such projects have encountered difficulties.[31] Quoting a study by the Washington-based RWR Advisory Group, this *Financial Times* report noted that: "some 14 per cent, or 234 out of 1,674, Chinese-backed infrastructure projects announced in 66 BRI countries since 2013 have hit trouble."[32]

Many of the countries on this new Silk Road in Central Asia and the Caucuses are already heavily indebted and may experience problems in repaying Chinese loans. As *The Economist* noted: "[i]f the returns on BRI investment prove underwhelming, they could struggle to repay China's loans and to pay for maintenance, and bilateral relations could sour."[33] This pattern has been

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[28] Center for Strategic and International Studies, "China's Belt and Road Initiative: Five Years Later", CSIS Washington, 25 January 2018; available at: https://www.csis.org/analysis/chinas-belt-and-road-initiative-five-years-later-0 .

[29] Zhang, and Miller, "Behind China's Silk Road vision", above.

[30] ML, "What's in it for the Belt-and-Road countries? How might the states of Central Asia and the Caucasus benefit from China's grand new investment initiative?" *The Economist*, 19 April, 2018; available at: https://www.economist.com/the-economist-explains/2018/04/19/whats-in-it-for-the-belt-and-road-countries .

[31] Kynge, J, Hornby, L and Weinland, D, "Chinese banks seek more foreign partners", *The Financial Times*, 16 July 2018 at p. 6.

[32] Ibid.

[33] *The Economist* above at note 30. For a more detailed assessment of these problems, see: The Economist, "Briefing China's Belt and Road Initiative: Gateway to the globe", *The Economist*, 28 July 2018 at pp. 13-16.

identified in other parts of the world, such as in Sri Lanka and Pakistan, where China has also funded substantial infrastructure developments.

As discussed further below, similar debt problems have been identified by other observers, such as the Washington-based Center for Global Development (CGD).[34] A 2018 CGD study examined sovereign debt problems that were evident in 68 countries that have participated in the BRI. The CGD study found that whilst the implementation of the BRI has largely relied upon bi-lateral investment agreements between China and other states on the new "Silk Road", some multilateral mechanisms have been used in achieving the financing goals of the bi-lateral parties.[35]

At the same time, there has also been a significant expansion in the use of the Chinese Yuan or RMB as a major currency used in these BRI projects.[36] The BRI has thereby served to facilitate the internationalization of the RMB; it has been reported that:

> "China is becoming a major creditor on the platform of the Belt and Road. Many projects undertaken by Chinese companies are supported by Chinese financial institutions. In other words, China is the largest lender of many projects in countries along the Belt and Road routes. Therefore, though RMB internationalization is still limited in scope and depth on a global scale, it is a historic opportunity for China to promote its currency's global status and knock down hindrance in financing for its businesses."[37]

China's implementation of the Belt and Road Initiative and the spread in the use of the RMB as an international currency on the Silk Road are likely to have a transformative effect upon legal and economic relations in the region, which are likely to increasingly reflect Chinese characteristics.[38]

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[34] Hurley, J, S Morris, and G Portelance, "Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective", Center for Global Development, Washington, March 2018; (hereinafter referred to as Hurley, Morris, and Portelance, 2018) available at: https://www.cgdev.org/publication/examining-debt-implications-belt-and-road-initiative-a-policy-perspective .

[35] Ibid at p. 1

[36] See further, Olsson, D and A Fei, "Why international use of RMB is about to be propelled", King & Wood Mallesons, available at: http://www.kwm.com/en/au/knowledge/insights/why-international-use-rmb-will-increase-20180404 [37] Xu Yanzhuo, "Belt and Road boosts RMB internationalization", State Council Information Office (PRC), available at: http://www.scio.gov.cn/31773/35507/35520/Document/1615654/1615654.htm

[38] In July 2018 China opened the Forum on Belt and Road Legal Cooperation; this was held in Beijing and involved legal officials from BRI signatory countries; see further, *China Daily,* 9-15 July 2018 at p. 2

3. DEBT SUSTAINABILITY PROBLEMS ON THE SILK ROAD

The sustainability of some infrastructure loans provided by China under the BRI has been called into question by both observers and recipients of these loans. The sustainability of debt in transactions occurring on China's new Silk Road is an issue for both sovereign borrowers and for China as a lender. It is also an issue for corporations operating in this space, whether these are privately owned or government-controlled. At this stage, most available information regarding debt sustainability relates to sovereign borrowers.

In 2018, the IMF warned China regarding problems of debt sustainability experienced by some countries participating in the BRI. In April 2018 the IMF's Christine Lagarde announced the opening of the China-IMF Capacity Development Center, which will seek to train Chinese development officials to work abroad on BRI projects. [39] In response to such concerns, Chinese development banks have begun to seek foreign partners to help fund infrastructure developments under the BRI. [40] This was prompted by the fact that by the end of 2014, the China Development Bank and the Export-Import Development Bank of China reportedly had extended almost $700 billion in loans to foreign borrowers.[41]

Since 2013, it has been reported that some 14% or 234 out of 1,674 Chinese infrastructure projects in 66 BRI nations had experienced difficulties.[42] Some countries, such as Malaysia's newly elected government, have even suspended Chinese infrastructure loans amounting to US$22 billion.[43] At a meeting with 50 African leaders held in Beijing in September 2018, in announcing that China would extend a further US$60 billion in infrastructure loans to support projects under the BRI program, President Xi Jinping acknowledged that some countries were having problems in servicing these loans and noted China would waive some debts incurred to China by the poorest countries in Africa.[44]

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[39] Clover, C, "IMF's Lagarde warns China on Belt and Road debt", *The Financial Times*, 12 April 2018; available at: https://www.ft.com/content/8e6d98e2-3ded-11e8-b7e0-52972418fec4 .

[40] See for example, Kynge, J, Hornby, L and Weinland, D, "Chinese banks seek more foreign partners", *The Financial Times*, 16 July 2018 at p. 6.

[41] Ibid at p. 6

[42] Ibid at p. 6. These statistics are based on a report by the Washington-based consultancy, RWR Advisory Group. However, these statistics have been questioned in mass media in China: see further, RWR Advisory Group, "RWR Statistics Targeted by Chinese State-Run Tabloid, Global Times", available at: https://www.rwradvisory.com/rwr-statistics-targeted-chinese-state-run-tabloid-global-times/

[43] Palma, S, "Malaysia suspends $US22bn in China-backed infrastructure", *The Australian Financial Review*, 6 July 2018 at p. 25.

[44] Korporal, G, "China stumps up another $83bn to Africa", *The Australian*, 5 September 2018 at p. 12. This generosity did not occur without criticism from observers within China; See further, Korporal, G, "Xi's African largesse cops heat at home", *The Australian*, 7 September 2018 at p. 12.

Arguably, systemic debt problems for sovereign state borrowers will not arise as a result of the BRI simply because of the degree of monitoring and control being exercised by China.[45] The Washington-based Center for Global Development (CGD) in 2018 argued that:

> "…multilateral actors can, and should, encourage policies and procedures for BRI that would improve the initiative's development impact. To do so, they should obtain clear commitments from the Chinese architects of BRI about the applicability of multilateral standards that pertain to debt sustainability."[46]

The 2018 CGD study concluded that:

> "…it is appropriate to identify debt sustainability as a key variable in BRI…and one that deserves scrutiny during the early stages of the initiative."[47]

These debt sustainability issues have been amplified where the debts incurred as part of infrastructure development represent a major proportion of the GDP in borrower BRI countries. For example, the provision by China of $1.4 billion in infrastructure funding in Djibouti was the equivalent to 75% of that country's GDP; in Laos, the $6 billion cost of the new China-Laos railway represented about half of Laos's GDP; in Montenegro, the BRI debt to GDP ratio was likely to reach 83% in 2018, and in the Kyrgyz Republic "public and publicly guaranteed debt amounted to roughly 65% of GDP."[48]

Pakistan is seen as being especially vulnerable to BRI debt problems and "currently serves as the centerpiece for BRI."[49] Pakistan is due to receive some $40 billion in loans from China under the BRI pipeline and it also faces relatively high interest rates of up to 5% on these loans.[50] The CGD study pointed to an IMF estimate of Pakistan's public debt being well above 70%.[51]

China has used a variety of *ad hoc* measures in response to debt servicing problems with BRI loan recipients. For example, Sri Lanka had received an $8 billion loan (at 6% interest) to finance the construction of the Hambantota Port, but as it was unwilling to service this loan, in July 2017 Sri Lanka engaged in a debt-for-equity swap with China and also provided a 99-year lease to allow it manage this strategically located new Sri Lankan port. [52]

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[45] Hurley, J, S Morris, and G Portelance, "Examining the Debt Implications of the Belt and Road Initiative…" above at p. 5.

[46] Ibid at p. 2.

[47] Ibid at p. 5. The CDG study (at p. 6) argued that, of the 68-member countries examined, there were eight countries "for whom BRI creates the potential for debt sustainability problems". These countries were identified as: Djibouti, Kyrgyzstan, Laos, the Maldives, Mongolia, Montenegro, Pakistan and Tajikistan. The study found that "the expected levels of debt in the eight focus countries are well above the average for their peers." (Hurley, Morris, and Portelance, 2018 above, at pp. 11 and 13; see also at pp. 16-19).

[48] Ibid at p. 18.

[49] Ibid at p. 19.

[50] This is in contrast to the concessional interest rates of 2 – 2.5% that has been provided by China Exim Bank to other BRI borrowers; Hurley, Morris, and Portelance, 2018, above, at p. 19.

[51] Quoted by Hurley, Morris, and Portelance, 2018, above at p. 19.

[52] Ibid p. 20.

In 2011, in regard to a debt owed by Tajikistan, China agreed to write off a substantial debt in exchange for 1,158 square kilometers of disputed Tajik territory.[53] In 2018 the former President of heavily indebted Maldives, also a BRI signatory, reportedly stated that the country may be forced to cede some of its territory to China; China has apparently leased 16 islands in the Maldives and was constructing ports in some of these.[54] But, in some cases, China has simply forgiven a debt, as it did with some of Cuba's $4-6 billion in debt. In 2018, it was reported that Kyrgyzstan was also looking for ways of reducing its foreign debt, as China's share of this foreign debt had grown from 2% to 44% over a five-year period. It was reported that Kyrgyzstan's debt agreements with the China Exim Bank were not subject to write-offs and could not be extended.[55]

The 2018 CGD study argued that China's strategy of dealing with debt relief problems on a case by case basis was likely to remain in place until it committed to the adoption of a more multilateral framework, such as through membership of the Paris Club.[56] China considered becoming a member of the Paris Club in 2016, when it held the G20 presidency, but decided not to proceed with this option, remaining merely as an observer. Paris Club members are committed to sharing loan data in regard to their claims as creditors.[57] However, some have raised questions about the compatibility of the Paris Club with the nature of the BRI project. [58]

In the absence of a broad commitment to multilateral standards in China's debt management practices, there has been a lack of consistency in dealings with BRI borrowers. However, the China Banking Regulatory Commission (CBRC)[59] has responded to the risks of allowing borrowers to accumulate unsustainable debt burdens and has called for greater risk control upon the part of Chinese lenders such as the China Exim Bank, the China Development Bank and the Agricultural Development Bank of China. [60] The Asian Infrastructure Development Bank (AIDB) in 2016 also released guidelines regarding the environmental and social framework for infrastructure development, although it is too soon to assess how effective these are likely to be in regulating

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[53] Ibid at p. 20. See further, BBC, "Tajikistan cedes land to China", 13 January 2011, available at: https://www.bbc.com/news/world-asia-pacific-12180567

[54] Riordan, P, "Maldives accused of undermining democracy amid China push", *The Australian*, 26 June 2018.

[55] "Kyrgyzstan searching for ways to get out of debts", *The Times of Central Asia*, 6 May 2018, available at: https://www.timesca.com/index.php/news/26-opinion-head/19706-kyrgyzstan-searching-for-ways-to-get-out-of-debts

[56] Hurley, Morris, and Portelance, 2018, above at p. 20.

[57] Paris Club, "Who are the members of the Paris Club?", available at: http://www.clubdeparis.org/en/communications/page/who-are-the-members-of-the-paris-club . Information sharing is one of the six principles of the Paris Club: see further: AIDB, Environmental and Social Framework http://www.clubdeparis.org/en/communications/page/the-six-principles

[58] See further, Pike, L, "Is the Belt and Road compatible with Paris?", China Dialogue, 12 December 2017; available at: https://www.chinadialogue.net/article/show/single/en/10284-Is-the-Belt-and-Road-compatible-with-Paris-

[59] See further, Reuters, "China banking regulator issues draft rules on liquidity risk management" 6 December 2017, available at: https://www.reuters.com/article/us-china-regulation-banks/china-banking-regulator-issues-draft- rules-on-liquidity-risk-management-idUSKBN1E00WX ; also see: Reuters, "China's banking regulator issues notice on financial risk", 12 April 2017, available at: https://www.reuters.com/article/us-china-banks-regulation- idUSKBN17E0HG

[60] Hurley, Morris, and Portelance, 2018, above at p. 21.

BRI projects.[61] The creation of the Asian Infrastructure Development Bank and its adoption of Multilateral Development Bank rules has been seen as a sign of a:

> "…willingness to embrace multinational norms in some instances. But the AIIB remains very small as a share of China's international financing, with annual investments so far of about $2 billion, compared to annual lending from the bilateral institutions of $30-$40 billion."[62]

Importantly, these loan agreements provide that:

> "all disputable issues on loans should be settled under Chinese laws and in Hong Kong."[63]

Chinese choice of Law provisions in infrastructure contracts may lead to greater reliance upon Chinese legal mechanisms where a legal solution is adopted.[64] It is also likely that this will lead to the use of *ad hoc* solutions and Chinese soft law principles rather than the development of more rigid statutory insolvency law provisions. This is especially so in so far as the handling of sovereign debt issues is concerned.

Unfortunately, in contrast to multilateral practices, the precise details of the terms of Chinese bank loans to countries that have joined the BRI have not generally been publicized. However, the use of multilateral debt management approaches in support of the BRI is still at an early stage. This may be relevant in encouraging the adoption of more universalist approaches to dealing with cross-border insolvency problems in the terrain of the BRI. But this is likely to be some way off.[65]

It is anticipated that the future involvement of banks, such as the Asia Infrastructure Investment Bank (AIIB), and partnerships with banks such as the Asian Development Bank (ADB), may lead to more transparent governance arrangements in the BRI, such as resort to an open tendering process. Currently, loans extended by major Chinese banks, such as the China Exim Bank, have been linked to infrastructure construction being undertaken by Chinese companies and the almost exclusive use of Chinese workers; this has led to local tension in countries where these investments have taken place.[66]

It is appropriate to ask which laws will be relied upon when debt related disputes arise on the new Silk Road. As China has usually entered into bilateral investment treaties with partner

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[61] AIDB, *Environmental and Social Framework*, February 2016, available at: file:///C:/Users/Roman/Desktop/AIIB%20enviromental%20and%20social%20policy%20of%20AIIB%20(1).pdf

[62] Hurley, Morris, and Portelance, 2018, above at pp. 21-22.

[63] "Kyrgyzstan searching for ways to get out of debts", above .

[64] This may see Chinese infrastructure investments disrupting existing legal orders in countries where they invest; see further, Flynn, C, "China the disrupter looms large", *The Australian*, 7 September 2018 at p. 26.

[65] See further, Mevorach, I, *The Future of Cross-Border Insolvency – Overcoming Biases and Closing Gaps*, Oxford, Oxford University Press, 2018.

[66] Lain, S, "China's Silk Road in Central Asia: transformative or exploitative?", *The Financial Times*, 27 April 2016; available at https://www.ft.com/content/55ca031d-3fe3-3555-a878-3bcfa9fd6a98.

countries, it is likely that these treaties will provide the answer to this question.[67] Professor Bath has noted that most countries involved in the BRI have agreed to a Bilateral Investment Treaty (BIT) with China.[68] This has included some movement to use Investor State Dispute Settlement (ISDS) procedures.[69] In recent years, China has sought to legalize its investment treaties and provide a higher degree of protection to Chinese investors.

As Bath has noted "[t]his generation of BITs not only gives investors more rights in terms of national and most favoured nation treatment, but also potentially expand options for enforcement though ISDS".[70] Sauvant and Nolan add that the latest version of these agreements also seek to ensure that SOEs, as the main vehicle through which Chinese investment takes place, are expresslyMevorach covered by the protections that are given to investors.[71]

Dolzer and Schreuer, provide an example of a 2003 Chinese Model of a BIT; this model provided that the settlement of disputes under the BIT was to be resolved by resort to negotiation between the parties; if these efforts were not successful, the dispute was to be submitted either "to the competent court of the Contracting Party that is a party to the dispute" or to the International Center for Settlement of Investment Disputes (ICSID). This Model BIT adds that once a dispute has been submitted to one of these forums, "the choice of one of the two procedures shall be final." [72]

However, it seems that neither of these legal dispute resolution avenues tend to be used by China in resolving disputes arising under China's BITs. Instead, disputes often tend to be resolved by political methods. This may be due to the very substantial amounts that are often involved in Chinese investment loans under the BRI. As Bath has also observed:

> "Chinese investors and the Chinese government often appear to rely on government intervention and negotiation rather than the enforcement of legal rights, an approach that can be necessary in the case of states with a relatively poor record of investment protection."[73]

In addition to Bilateral Investment Treaties, individual infrastructure project financing agreements would normally contain provisions regarding dispute resolution and loan default

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[67] See generally, Gallagher, N and W Shan, *Chinese Investment Treaties: Policies and Practice*, Oxford, Oxford University Press, 2009. Also see generally, C Cai, "China" (pp. 243-285) in *The Legal Protection of Foreign Investment – A Comparative Study*, (ed by Wenhua Shan), Oxford, Hart Publishing, 2012.

[68] See the list of these countries in the Annex to: Bath, V, "'One Belt, One Road' and Chinese Investment", Sydney Law School, Legal Studies Research Paper No 16/98 available at: http://ssrn.com/abstract=2866169 .

[69] In regard to the settlement of investment disputes, see further, Dolzer, R and C Schreuer, *Principles of International Investment Law*, Oxford, Oxford University Press, 2008 at pp. 211-313.

[70] Bath above at p. 7

[71] Sauvant, PK and MD Nolan, "China's Rising Outward FDI, Its Reception in Host Countries and Implications for International Investment Law and Policy", (pp. 285-311) in *Regulating the Visible Hand? The Institutional Implications of Chinese State Capitalism*, (ed. by Liebman BJ and CJ Milhaupt), Oxford, Oxford University Press, 2016 at p. 310.

[72] Dolzer and Schreuer, above at p. 357.

[73] Bath, above, at p. 12.

under these agreements. Unfortunately, in contrast to multilateral financing agreements, little is known about the precise terms of these agreements. One would expect that as the virtual lender of last resort, China will seek to have solvency related disputes dealt with by political negotiation or in legal forums that Chinese lenders have some control over.

In these circumstances, Chinese bankruptcy laws, and its policies and practices in the management of debt problems in BRI borrower countries, may become very important in responding to outward-bound debt problems. This is suggested by the first paragraph of Article 5 of China's Enterprise Bankruptcy Law of 2006. In regard to inward bound applications under this Law, the second paragraph of Article 5 provides that regard is to be had to the terms of any Treaty between the parties; the bilateral investment treaties discussed above will be relevant here. These legislative provisions may become more important as Chinese non-state commercial actors also seek to benefit from the BRI.

4. CROSS-BORDER INSOLVENCY WITH CHINESE CHARACTERISTICS

Effective cross-border insolvency systems depend heavily upon values that are integral to the rule of law. The World Bank has argued that a sound credit relationship requires the existence of transparency, accountability and predictability.[74] Deane and Mason argue that these principles are commonly associated with a commitment to the rule of law.[75] Due to the bilateral nature of Chinese infrastructure loans to countries that are involved in the BRI, limited amounts of information are available regarding the terms of these loans and the procedures for the resolution of debt problems under them.

China is avowedly committed to the rule of law, albeit with Chinese characteristics.[76] This is a different conception of the rule of law to the liberal democratic rights-focused versions that are found in different Western states.[77] Comparative law scholars have however argued that it is necessary to adopt a broader conception of law which recognizes that law serves a number of other important functions apart from the protection of personal and property rights. Professors Milhaupt and Pistor, for example, argue that it is necessary to recognize other important

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[74] The World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes*, (2016), available at: http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes- 2016.pdf

[75] Deane, F and R Mason, "The UNCITRAL Model Law on Cross-border Insolvency and the Rule of Law", (2016) 25 *International Insolvency Review* 138-159 at p. 140.

[76] See generally, Thomas, JE, "Rule of Law with Chinese Characteristics: An Empirical Cultural Perspective on China, Hong Kong and Singapore", (2014) 22 *Asia Pacific Law Review* , available at: https://www.tandfonline.com/doi/abs/10.1080/10192557.2014.11745927 **;** also see: Backer LC "Party, people, government and state: on constitutional values and the legitimacy of the Chinese state-party rule of law system", (2012) 30 *Boston University International Law Journal* 331–408.

[77] See generally, and Kennedy, D and JE Stiglitz (eds.), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century,* Oxford, Oxford University Press, 2013.

functions of law in addition to protection, such as coordination, signaling and credibility enhancement.[78]

China's version of the rule of law prioritizes greater governmental coordinating power over the protection of individual human rights. At the 19th National Party Congress, held in October 2017, President Xi Jinping spoke of China's efforts to enhance adherence to the rule of law and proclaimed that: *"*[w]e have taken major steps in developing democracy and the rule of law". President Xi went on to elaborate that this will be done under the leadership of the Party:

> "We have actively developed socialist democracy and advanced law-based governance. We have stepped up institution building across the board to make integrated advances in Party leadership, the running of the country by the people, and law-based governance; and we have continuously improved the institutions and mechanisms by which the Party exercises leadership….. Our efforts to build a country, government, and society based on the rule of law have been mutually reinforcing; the system of distinctively Chinese socialist rule of law has been steadily improved; and public awareness of the rule of law has risen markedly."[79]

By way of comparison, Milhaupt and Pistor suggest that the rule of law in the United States is unusual in that:

> "…few countries have decentralized and 'judicified' governance and enforcement to the extent of the United States. Instead, many successful systems place greater confidence in state regulators and prosecutors. Thus, although formal legal governance may play an increasingly important role in China, administrative coordination of state- and private-sector interests is likely to remain the dominant feature of Chinese law, even in a capitalist China."[80]

As an expression of China's commitment to the rule of law, it has undertaken extensive legislative reforms to support its "socialist market economy".[81] One example of such reforms has been the enactment of new PRC bankruptcy laws in 2006. After a protracted law-making process[82], China

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[78] Milhaupt, CJ and K Pistor, "The China Aviation Oil Episode: Law and Development in China and Singapore" (pp. 329-357) in *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty- First Century,* (ed. by Kennedy, D and JE Stiglitz), Oxford, Oxford University Press, 2013 at p. 330.

[79] China Daily, "Full Text of Xi Jinping's Report at 19th CPC National Congress", *Xinhua*, 4 November 2017; available at: http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content_34115212.htm

[80] Milhaupt and Pistor above at p. 351.

[81] See generally, Kennedy and Stiglitz, above.

[82] See further: Booth, C, "The 2006 PRC Enterprise Bankruptcy Law: The Wait is Finally Over", (2006) 20 *Singapore Academy of Law Journal* 275; Tomasic, R and M Wang, "The Long March Towards China's New Bankruptcy Law", (pp. 93-124) in *Insolvency Law in East Asia* (ed. by R Tomasic), Aldershot, Ashgate Publishing Limited, 2006; Lee, E and K Ho, "China's new enterprise bankruptcy law : a great leap forward, but just how far?", (2010) 19(2*) International Insolvency Review* 145-177; Shi, J, "Twelve Years to Sharpen One Sword.: The 2006 Enterprise Bankruptcy Law and China's Transition to a Market Economy", (2007) 16 *Norton Journal of Bankruptcy Law & Practice* 645.

enacted a modern Enterprise Bankruptcy Law (EBL) replacing its more limited 1986 Enterprise Bankruptcy Law.[83]

The 2006 EBL contains many principles and provisions that parallel insolvency laws enacted in Western countries, however, these may be implemented differently in China.[84] These procedures include the new corporate reorganization provisions that mirror Western corporate rescue procedures, such as those now found in the UNCITRAL Legislative Guide on Insolvency Law.[85] However, a major problem with insolvency law reform in Asia has been one of implementation.[86]

This in part reflects the large size of the Chinese economy, the power of local as opposed to central government forces, and the degree to which these legislative reforms have changed pre- existing policies and practices. This implementation problem has been officially recognized by China's law makers and discussed in the scholarly literature, such as in regard to the implementation of the corporate restructuring reforms now found in the EBL.[87]

China's new cross-border insolvency provisions are also to be found in the EBL 2006, although they are somewhat limited in their scope; Article 5 of the EBL provides a somewhat cautious approach to dealing with cross-border issues. This narrow provision is clearly in need of reform over the next few years so as to make it more fit for purpose.[88] This provision does not clearly reflect the principle of the unity of the debtor's estate and allows territorial concerns to fragment

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[83] The 2006 Enterprise Bankruptcy Law came into effect on 1 June 2007 and can be found at: http://www.npc.gov.cn/englishnpc/Law/2008-01/02/content_1388019.htm.

[84] See further, Tomasic, R, "The Conceptual Structure of China's New Corporate Bankruptcy Law", (pp. 21-41) in, *China's New Enterprise Bankruptcy Law – Context, Interpretation and Application*, (ed. by R Parry, Y Xu and H Zhang), Farnham, Ashgate Publishing, 2010.

[85] UNCITRAL Legislative Guide on Insolvency; See further at: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html; also see: Arsenault, SJ, "The Westernization of Chinese Bankruptcy: An Examination of China's New Corporate Bankruptcy Law through the Lens of the UNCITRAL Legislative Guide to Insolvency Law", (2008) 27(1) *Penn State International Law Review* 45.

[86] See further, Halliday, TC, "Law making and Institution Building in Asian Insolvency Reforms: Between Global Norms and National Circumstances, Paper presented at 5th FAIR conference held in Beijing in April 2006 and available at: http://siteresources.worldbank.org/GILD/Resources/Halliday5.pdf . See also, Jiang, Y, "The Curious Case of Inactive Bankruptcy Practice in China: A Comparative Study of US and Chinese Bankruptcy Law", (2014) 34 *Northwestern Journal of International Law & Business* 559.

[87] See further, Zhao, H, "Reorganization of Listed Companies with Chinese Characteristics", (2017) 91 *American Bankruptcy Law Journal* 87; Also see: Tomasic, R and Z Zhang, "China's enterprise bankruptcy law – Implementation of the corporate reorganization provisions", (pp. 55-69) in *Law and Policy for China's Market Socialism*, (ed. by J Garrick), London, Routledge, 2012.; and Tomasic, R and Z Zhang, "From Global Convergence in China's Bankruptcy Law 2006 to Divergent Implementation: Corporate Reorganisation in China", (2012) 12(2) *Journal of Corporate Law Studies* 295.

[88] See for example, Parry, R and N Gao, "The Future Direction of China's Cross-border Insolvency Laws, Related Issues and Potential Problems," (2018) 27 *International Insolvency Review* 5-31. See also, Arsenault, SJ, "Leaping over the Great Wall: Examining Cross-Border Insolvency in China under the Chinese Corporate Bankruptcy Law," (2011) 21 *Indiana International & Comparative Law Review* 1.

the insolvency process where claims are made in foreign insolvency proceedings.[89] Thus, Article 5 of the EBL provides:

> "Once the procedure for bankruptcy are initiated according to this Law, it shall come into effect in respect of the debtor's property outside of the territory of the People's Republic of China.
>
> Where a legally effective judgment or ruling made on a bankruptcy case by a court of another country involves a debtor's property within the territory of the People's Republic of China and the said court applies with or requests the people's court to recognize and enforce it, the people's court shall, according to the relevant international treaties that China has concluded or acceded to or on the basis of the principle of reciprocity, conduct examination thereof and, when believing that the said judgment or ruling does not violate the basic principles of the laws of the People's Republic of China, does not jeopardize the sovereignty and security of the State or public interests, does not undermine the legitimate rights and interests of the creditors within the territory of the People's Republic of China, decide to recognize and enforce the judgement or ruling."

The first paragraph of Article 5 extends the jurisdiction of Chinese bankruptcy courts to allow orders to be made regarding that part of a debtor's estate that is located outside the territorial boundaries of China. To this extent it adopts the idea of "outgoing universalism" referred to above. This provision does however depend upon foreign courts being prepared to accept an insolvency order or decision made by a Chinese court. This may not be an issue if that foreign country has implemented the UNCITRAL Model Law. This has been seen in some cases, such as in the recognition by a New Jersey bankruptcy court in 2014 of the Zhejiang Topoint Photovoltaic Co Ltd bankruptcy proceeding.[90]

Drawing upon approaches found in the Model Law, Parry and Gao suggest that the first paragraph of Article 5 should be amended to recognize the differences between main and non-main proceedings; as they urge:

> "..for China, the adoption of the concept of non-main proceedings, in cases where the COMI is in another jurisdiction, as part of its cross-border insolvency legal framework would bring its approach into line with the dominant approach that is developing internationally, even while China remains at the first stage of development of cross-border insolvency laws."[91]

Parry and Gao add that the inclusion of such a distinction would fill a major gap in the EBL:

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[89] However, Article 30 of the EBL does state that all of the debtor's property will be subject to Chinese bankruptcy proceedings; this provision provides that: "A debtor's property includes all of the property that belongs to a debtor when the application for bankruptcy is accepted, as well as the property as obtained by the debtor during the period from the time when the application for bankruptcy is accepted to the time when the procedures for bankruptcy are concluded."

[90] Referred to by Parry, and Gao, above at p. 10 (fn 25).

[91] Ibid at p. 11.

> "The introduction of the distinction between main and non-main insolvency proceedings is arguably the core issue for China in the further development of its legislation concerning the recognition of the extraterritorial effect of foreign insolvency proceedings. The employment of such concepts would primarily help to safeguard the legitimate rights and interests of Chinese creditors, but they could also be conducive to better enforcement of foreign insolvency judgments and better assistance of foreign insolvency proceedings to realise their extraterritorial effect." [92]

However, the second paragraph of Article 5 provides a much narrower basis for the application of "incoming universalism" in regard to a debtor's property located within China. Recognition of foreign insolvency proceedings and orders will only arise in a number of specified circumstances:

(i) Where such recognition is sanctioned under an international treaty that China has acceded to;
(ii) Where the foreign judgment or ruling does not violate the basic principles of the laws of the People's Republic of China;
(iii) Where the foreign judgment or ruling does not jeopardize the sovereignty and security of the State or public interests; and
(iv) Where recognition of the foreign order does not undermine the legitimate rights and interests of the creditors within China.

This might be characterized as a kind of universalism with Chinese characteristics and is perhaps consistent with the current state of development of the rule of law in China. It is an approach that is similar to that found in a number of other countries that have imposed flexible public policy exceptions upon the recognition of foreign insolvency orders and proceedings. In one case, even where an international treaty was found to exist, whilst the Chinese court (in Foshan) recognized an Italian judgment, it refused to enforce the foreign insolvency order.[93]

It should be noted that China has not sought to implement the UNCITRAL Model Law on Cross-Border Insolvency. However, this could be more easily done if the conditional approach reflected in Article 5 was applied when the Model Law was adopted in China. Singapore has done something like this by modifying the public policy exception found in Article 6 of the Model Law when it adopted the Model Law in 2017; this issue will be discussed further below. In the meantime, the fact that many of China's major trading partners have adopted the Model Law (these countries include the USA, UK, Japan, Korea, Canada and Australia), might lead China to consider adopting a greater degree of reciprocity in the handling of inbound insolvency cases coming to China from these Model Law implementing countries. [94]

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[92] Ibid at p. 23

[93] See further: Bu, Qingxiu, "China's Enterprise Bankruptcy Law (EBL 2006): Cross-border Perspectives" (2009) 18 *International Insolvency Review* 187; and Parry and Gao, above at pp. 8-9.

[94] See further the discussion in Parry and Gao at p. 14.

In 2011, Arsenault argued that the permissive language of Article 5 was vague and imprecise and that it differed from the more prescriptive language that was used in other parts of the EBL:

> "While much of the Corporate Bankruptcy Law is written in terms of requirements, including the provision that bankruptcy proceedings in China are binding on the debtor's property outside of China, the language involving recognition of foreign judgments is permissive - providing that the foreign judgment can be recognized and that after scrutiny the People's Court may recognize the judgment.… Foreign parties, already uneasy about the application of China's laws to foreign entities, are likely to view this language with concern. This concern has the potential to undermine both the goals of cooperation under the UNCITRAL Model Law and the foreign economic investment activity that China seeks."[95]

Arsenault therefore urged that the EBL 2006 should be revised to provide Chinese courts with more precise guidance as to how they should exercise their discretion; this was because the breadth of Article 5 may undermine the rule of law in China:

> "The language most likely to concern foreign investors is the reference to the 'security and sovereignty of the country and social and public interests'. This type of language is directed at protecting the state rather than the economic interests of the debtors and creditors involved in the insolvency proceedings. Modified universalism preserves the ability of local courts to evaluate the fairness of the main case proceeding, to protect the interests of local creditors, and, in some cases, even assess whether compliance offends the country's public policy. However, modified universalism's focus on the state interest outside the insolvency proceeding is too broad. This type of language has historically caused foreign investors to question the applicability of the rule of law to foreigners in China."[96]

In their powerful analysis, Parry and Gao have more recently argued that China's EBL is still at an early stage of development in regard to cross-border insolvency, if the experience of other countries is any guide. They suggest that there is a three-stage process of development of cross-border insolvency rules, with China still being at the first stage, as illustrated by provisions such as Article 5. A second stage of development may involve designating a list of countries whose insolvency orders or decisions would be recognized,[97] whilst the third stage involves a broader recognition of the kind that is provided under the Model Law.[98] Arguably there may yet be other stages that have not been seen in the West and that may emerge in a more globalized post-

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[95] Arsenault, SJ, "Leaping over the Great Wall: Examining Cross-Border Insolvency in China under the Chinese Corporate Bankruptcy Law," (2011) 21 *Indiana International & Comparative Law Review* 1 at pp. 19-20.

[96] Ibid at p. 21.

[97] This list approach previously existed under ss. 304– 306 of US Bankruptcy Code and can be found under s 426 of the UK Insolvency Act 1986.

[98] Parry and Gao, above at p. 9.

Westphalian world that we are now entering, with a focus upon networks (such as the BRI) as the principal organizing model. [99]

Interestingly, Parry and Gao have suggested that Article 3 of the EBL, (which states that "an insolvency case shall be governed by the court where the relevant debtor is domiciled"), should also be given extra-territorial effect when considering applications made to apply a foreign insolvency order or decision within China.[100] As they correctly argue, this would "engender reciprocity and align with the exclusive jurisdiction stipulated in Article 3 of the EBL."[101]

Of relevance in regard to the bilateral agreements that China has made with partner countries participating in the BRI project, Parry and Gao suggest that these bilateral agreements should be scrutinized when considering cross-border insolvency matters as this would be justified under Article 5 of the EBL.[102] However, they add that the other considerations in the second paragraph of Article 5 will also need to be considered by Chinese courts as:

> "…the existence of a bilateral treaty is unlikely to be sufficient in itself, rather the court may have regard to public policy factors and must be satisfied that the judgment does not contravene the ordinary principles of Chinese law, that it is not detrimental to state sovereignty or security and social public interests and that it does not harm the legitimate rights of interests of Chinese creditors."[103]

In the absence of a rewritten provision, some of the ambiguities and uncertainties that currently arise from the language of Article 5 might be clarified by the issuance of a judicial interpretation, by a body such as China's Supreme People's Court.[104] Such interpretations have frequently been issued to clarify ambiguities in other commercial laws in China. This could be supplemented by the issue of soft law guidelines which may be of assistance in dealing with cross-border insolvency cases.[105]

Parry and Gao do not anticipate an early change to cross-border insolvency law in China, and predict that China will not adopt the UNCITRAL Model Law for at least a decade or more.[106] This would mean that China's narrow approach will remain as a model for those countries on the Silk Road that look to China for advice and inspiration. Alternatively, a form of cooperative

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[99] Alternatively, it could be argued that existing models of corporate law, of the kind developed by Hansmann and Kraakman in their "End of History" writings and reflected in *The Anatomy of Corporate Law, 3rd Edition* (Kraakman et al, Oxford, Oxford University Press, 2017) may have underestimated the importance of the State as a key factor in understanding corporate law in many parts of the developing world.

[100] Parry and Gao, above at p. 13.

[101] Ibid.

[102] Ibid at pp. 14-15.

[103] Ibid p. 15.

[104] This is also a suggestion made by Parry and Gao, ibid at p. 18.

[105] This is a suggest made by both Arsenault, "Leaping over the Great Wall", above at p. 22; and by Parry and Gao, ibid at p. 18. To supplement Article 5, Parry and Gao (above at p. 20) suggest that "the "Chinese Institute of Private International Law, as one of the most influential Chinese non-governmental academic organisations, bear the responsibility to draw up a Chinese soft-law cooperation guideline in cross-border insolvency."

[106] Parry and Gao, above at p. 26 and pp. 30-31.

territorialism may be adopted by BRI countries in dealing with cross-border insolvency countries.[107]

5. THE LIMITED ADOPTION OF UNCITRAL MODEL LAW BY SILK ROAD STATES

The UNCITRAL Model Law on Cross-Border Insolvency has been implemented by at least ten countries that have joined the BRI. The remaining BRI states may also take some time before they adopt the Model Law. The Model Law does however allow implementing states to modify the language of the public policy exception found in Article 6 of the Model Law. Article 6 provides that:

> "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."

The UNCITRAL Guide to the Enactment and Interpretation notes that the term "public policy" is a broad one and goes on to observe that it sometimes refers to any mandatory rule of national law and that many States restrict it to fundamental principles of law, such as constitutional law guarantees.[108] In regard to the use of the term "manifestly" in Article 6, the Guide explains that Article 6 should be restrictively interpreted and that it should only be invoked in exceptional situations:

> "… The purpose of the expression "manifestly", used also in many other international legal texts as a qualifier of the expression "public policy", is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State."[109]

At the outset, it should be noted that of the 44 States that have adopted the Model Law, only 6 have adopted Article 6 without any amendment.[110] As Garza has noted, only: "Australia,

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[107] For an argument in favour of such an approach see further: Lo Pucki, LM, "Cooperation in International Bankruptcy: A Post-Universalist Approach," (1999) 84 *Cornell Law Review* 696. Also, for an argument that a nation state focussed territorialism rather than a universalist approach is being favoured in Asia, see generally, Ginsberg, T, "Eastphalia as the Perfection of Westphalia", (2010) 17(1*) Indiana Journal of Global Legal Studies* 27-45.

[108] *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, New York, United Nations, 2014, at p 52 (Para 102 of the Guide to Enactment and Interpretation); available at http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf .

[109] Ibid at p. 52.

[110] In 2018 it was reported that India proposes to adopt the Model law; see further, the reports and discussion in: //economictimes.indiatimes.com/articleshow/65090797.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst and https://www.herbertsmithfreehills.com/latest-thinking/india-proposes-to-adopt-the-uncitral-model-law-on-cross-border-insolvency and at http://www.mondaq.com/india/x/721994/Insolvency+Bankruptcy/Indias+Proposed+Cross+Border+Insolvency+Regime+Will+It+Trump+The+Gibbs+Rule .

Colombia, England, Mauritius, New Zealand, and South Africa have adopted Article 6 into their insolvency laws verbatim."[111]

Title 1506 of the United States Bankruptcy Code has also used the language of Article 6, including the word "manifestly". By 2015, this public policy exception (in Title 1506 of the United States Bankruptcy Code) had only been invoked five times, and has been narrowly interpreted by US courts. Garza has observed of the USA's approach to invoking the exception:

> "… in determining whether to apply § 1506 courts have focused on two factors. The first is whether the foreign proceeding was procedurally unfair. The second factor requires courts to examine whether the application of foreign law or the recognition of a foreign main proceeding under Chapter 15 would severely impinge the value and import of a US statutory or constitutional right, and that granting comity would hinder the ability of US bankruptcy courts to carry out fundamental policies and purposes pursuant to these rights."[112]

Seven other States that have implemented the Model Law have merely dropped the use of the term "manifestly", in their version of Article 6.[113] The remaining States have used different formulations of Article 6 in their implementing statute. Of the 73 States that have signed up to the Belt and Road Initiative, only 11 have sought to implement a version of the UNCITRAL Model Law, and of these, only New Zealand and South Africa have reproduced Article 6 without amendment. This leaves 9 BRI States with differently expressed public policy exceptions: Israel, Republic of Korea, Montenegro, Philippines, Poland, Romania, Serbia, Singapore and Slovenia. Some of the different approaches used by these States will be discussed below.

If we look the BRI countries that have implemented the Model Law, it is interesting to see how far they have departed from Article 6 of the Model Law. For example, in the case of Singapore, it had initially resisted adopting the Model Law,[114] but in 2017, Singapore decided to implement the Model Law in an effort to buttress its position as a regional financial centre.[115] Singapore has also been a leading recipient of Chinese foreign direct investment; as *The Economist* has noted: "Singapore has overtaken the US as the most attractive destination for Chinese ODI."[116]

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[111] Garza, MA, "When is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy", (2015) 38 *Fordham International Law Journal* 1587 at p. 1595. The operation of the Model Law in some of these countries is discussed in Hannan, N, *Cross-Border Insolvency – The Enactment and Interpretation of the UNCITRAL Model Law*, Singapore, Springer, 2017.

[112] Ibid at pp. 1605-1606.

[113] Garza, above at p. 1596 notes that this was done by: British Virgin Islands, Canada, Greece, Mexico, Serbia, Montenegro, and South Korea.

[114] See, for example, Mohan, SC, "Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?," (2012) 21(3) *International Insolvency Review* 199-223.

[115] See generally, Godwin, A; I Ramsay and M Webster, "International Commercial Courts: The Singapore Experience" (2017) 18(2) *Melbourne Journal of International Law* 219.

[116] The Economist, "China Going Global Investment Index 2017 - A report by The Economist Intelligence Unit", at p. 2; available at: www.eiu.com. According to the American Enterprise Institute's China Global Investment Tracker, Chinese investment in Singapore in 2017 amounted to $36.86 billion: see further at: http://www.aei.org/china- global-investment-tracker/ .

Singapore has also been a heavy investor in China under the leadership of its investment arm Temasek, the Singaporean state-owned investment entity, and therefore has been keen to maintain close relations with China.[117] This has affected the way in which debt problems in Singapore have been handled. Despite its common law heritage, Singapore (like China) also "relies heavily on centralized administrative mechanisms other than law."[118] It has been argued that Singapore's legal regime does not focus upon individual rights protections and instead adopts a "fairly centralized and highly co-ordinative" approach.[119]

Singapore implemented the UNCITRAL Model Law by amending the Singapore Companies Act (Cap 50), by introducing Section 354B.[120] However, Article 6 of the Singapore version of the public policy exception in the Model Law does not include the phrase "manifestly contrary", and instead states that recognition of a foreign proceeding would be refused if it was "contrary" to public policy."

The ambit of this public policy exception remains unclear, despite the January 2018 decision of the High Court of Singapore in *Zetta Jet Pte Ltd*.[121] This short decision was an *ex tempore* judgment Justice Aedit Abdullah. This case concerned associated Zetta Jet companies, with Zetta Jet Pte Ltd being incorporated in Singapore and its wholly owned subsidiary, Zetta Jet USA Inc, being incorporated in California. The principal business of the company was concerned with aircraft rental and chartering.

In late 2017, these two companies filed voluntary Chapter 11 bankruptcy proceedings in the US Bankruptcy Court in California. However, shortly afterwards, two shareholders in Zetta Jet Pte Ltd (the Singapore company) took action in the High Court of Singapore, claiming that the initiation of the Chapter 11 proceedings in the USA constituted a breach of the Zetta Jet shareholder agreement. The shareholders, holding 64% of the shares in Zetta Jet Singapore, secured an injunction in the Singapore High Court and sought to stop the continuation of the US Chapter 11 proceedings. The Chapter 11 proceedings were converted into liquidation proceedings under Chapter 7 in the US Bankruptcy Courts.

The continuance of these bankruptcy proceedings, saw the appointment of Jonathan D King as the Chapter 7 Trustee of the Zetta Jet corporate entities. In Singapore, these US proceedings were argued to be in breach of the Singapore High Court injunction; King was however recognized in Singapore as the Foreign Representative under the Singapore Model Law, as the Zetta Jet entities were found to have an "establishment" in the USA. However, Justice Abdullah was not convinced that the COMI of both companies was in the USA and was not prepared to accept that the companies operated as a single group. He was therefore not prepared to lift the corporate

[117] Milhaupt and Pistor, above at p. 341.

[118] Ibid at p. 348.

[119] Ibid at p. 332

[120] The text of the Model law can be found in the Tenth Schedule of Singapore's Companies Act.

[121] See generally, Straits Law, "Singapore High Court delivers first decision on the recognition of foreign insolvency proceedings under the newly adopted UNCITRAL Model Law on Cross-Border Insolvency," February 1, 2018, available at: http://straitslaw.com.sg/singapore-high-court-delivers-first-decision-recognition-foreign-insolvency- proceedings-newly-adopted-uncitral-model-law-cross-border-insolvency/.

veil to recognize the companies as a single entity, even though they clearly had an "establishment" in the USA. The US Trustee (King) was allowed standing only for the purposes of challenging the injunction issued by the Singapore court.

But the Singapore court's interpretation of the public policy exception (in the Singapore legislation) drawn from Article 6 of the Model Law deserves some comment. The Court admitted that: "the standard of exclusion on public policy grounds in Singapore is lower than that in jurisdictions where the Model Law has been enacted unmodified."[122] The court considered that the public policy exception would arise if the administration of justice in Singapore was undermined. Justice Abdullah observed that:

> "I cannot on this occasion lay down specifically what would trigger the public policy bar in Singapore. But at the very least, I would interpret it as requiring denial of an application for recognition by foreign insolvency representatives appointed under proceedings enjoined by a Singapore court. Ignoring an injunction granted by a Singapore court undermines the administration of justice. Orders issued by a court are to be complied with. Those who do not comply are rightly subject to penalties."[123]

He argued that, based on the 2009 US decision of *In re Gold and Honey Ltd*,[124] a similar outcome would be reached in the USA, and added:

> "The fact that the Singapore injunction was obtained after the Chapter 11 proceedings were filed and any worldwide automatic moratorium in the US came into effect is irrelevant. The US moratorium does not bind the Singapore courts, any more than any Singapore moratorium or injunction would bind the US Courts either. The only thing that matters is that an order was made in Singapore, which was not complied with."[125]

This narrow approach reflected a curious understanding of the operation of the UNCITRAL Model Law; the Singapore High Court did not recognize the importance of both the stay that arises when main proceedings are initiated, or the need to preserve the principle of the unity of the estate through a collective proceeding. In the *Gold and Honey* case relied upon by Justice Abdullah in Singapore, an Israeli receiver was merely acting for one creditor and his actions were not seen as collective in nature; moreover, the receiver had been appointed under the Israeli Companies Ordinance and not under Israel's Bankruptcy Ordinance.

In the US *Gold and Honey* decision, the court concluded that the appointment of the Israeli receiver violated the automatic stay order in the US Chapter 15 proceedings, so that the recognition of the receiver would have violated US public policy by undermining the critical importance of the stay procedure under the US version of the Model Law. In some respects, the Singapore action of issuing an injunction at the behest of shareholders had parallels to the impugned Israeli receivership appointment; this was because the Singaporean shareholders who

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[122] *Re Zetta Jet Pte Ltd and others* [2018] SGHC 16 at para 23.

[123] Ibid at para 25.

[124] *In re Gold and Honey Ltd* 410 BR 357 (2009).

[125] *Re Zetta Jet Pte Ltd and others* [2018] SGHC 16 at para 28.

had obtained the injunction were not acting collectively upon behalf of all creditors and so their actions offended the basic policy reflected in the Model Law.[126]

The Singapore court's interpretation of its public policy exemption sought to strike a balance between what it saw as the protection of the administration of justice in Singapore and fair treatment of the Chapter 7 Bankruptcy Trustee; however, the US Trustee would not be allowed to proceed further in Singapore unless the injunction was struck down.[127] The failure to comply with orders of the Singapore High Court was therefore seen as undermining the integrity of the administration of justice in Singapore. This was seen as more important than adherence with key principles of the Model Law that had been incorporated into Singaporean law.

The protection of the integrity of the administration of justice is an uncertain concept and, without further clarification, seems to set a very low bar for the public policy exception; this approach can be contrasted with the approach taken in the UNCITRAL Guide to the Model Law, which argued that public policy exceptions should only be "invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State."

It may be noted that, in contrast to the approach adopted in the *Zetta Jet* case, Singapore has previously relied heavily upon administrative measures in dealing with cross-border commercial disputes. This can be seen in its response to the 2004 collapse and rescue in Singapore of China Aviation Oil (CAO), a subsidiary of a major Chinese holding company; CAO was also a leading company listed on the Singapore Stock Exchange. The rescue of CAO was undertaken through co-ordinated action between China and Singapore's state-controlled agency, Temasek Holdings, with the support of other Singapore government linked agencies the Monetary Authority of Singapore (MAS) and the Singapore Stock Exchange (SGX).[128]

The modest use of legal remedies and sanctions for insider trading conduct that arose as a result of the efforts of the CAO parent company to rescue its Singapore registered subsidiary is to be contrasted to the sizeable injection of funds by Temasek into CAO as part of this rescue. As Milhaupt and Pistor note, in reality, the "…resolution of the financial crisis at CAO rested on a negotiated solution among governmental entities and affiliates from Singapore and China. Put differently, investor protection was achieved not principally by enforcement of corporate and securities laws but through political mechanism."[129] Although the China Aviation Oil case arose over a decade ago, it reflects an administrative and political response to corporate rescue that is likely to be reflected in the handling of cross-border insolvency cases in countries on China's BRI.

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[126] *In re Gold and Honey Ltd* 410 BR 357 (2009) at 371-72 (per Trust J).

[127] *Re Zetta Jet Pte Ltd and others* above at paras 34 and 36.

[128] See further Milhaupt and Pistor, above at pp 348-349. Legal proceedings arising out of the collapse of China Aviation Oil in Singapore are also discussed in: Wan, WY, "Civil Liabilities for False or Misleading Statements Made by Listed Companies to the Securities Markets in Singapore", (2008) 26(6) *Company and Securities Law Journal* 377- 391.

[129] Milhaupt and Pistor, above at p 349.

6. CONCLUSIONS

The prospects for the adoption of universalist insolvency and debt management principles, and for the wider use of multilateral mechanism by Chinese government-owned banks making loans under the BRI, are not high. It is unlikely that China will adopt the UNCITRAL Model Law anytime soon and few other BRI countries have yet adopted it. Some of those that have done so have modified the public policy exclusions under the Model Law to give them more room for movement and to reduce the operation of universalism.

The discussion of how Singapore has applied and interpreted the UNCITRAL Model Law will probably be echoed in other countries along the Silk Road. Space precludes a discussion here of how other BRI countries which have implemented the UNCITRAL Model Law have dealt with public policy issues under the Model Law, let alone how those BRI countries that have not yet implemented it will respond. It may well be that *ad hoc*, administrative and politically-inspired solutions will be commonly turned to in dealing with cross-border insolvency problems on the new Silk Road. This may lead to a post-universalist future for cross-border insolvency resolution regarding investment disputes along the new Silk Road.[130]

Further research will however be needed to shine more light on this somewhat closed world as the BRI develops. However, it is clear that China has recognized the need to develop more clear-cut legal rules in regard to commercial dispute resolution regarding investments under the BRI program.[131] One very positive outcome from the BRI legal cooperation Forum held in Beijing in July 2018 was the declaration of support from participants for greater legal cooperation between countries involved in BRI project:

> "We support the parties participating in the BRI in their efforts to deepen cooperation in judicial affairs and law enforcement, including exploring the establishment of cooperation mechanisms to strengthen mutual recognition and enforcement of judgments in civil and commercial matters and to promote service of judicial documents as well as investigation and evidence collection in civil and commercial matters. The parties participating in the BRI are encouraged to strengthen exchanges and cooperation regarding the ways and means of settling disputes other than by judicial settlement, such as mediation, arbitration and so on."[132]

Only time will tell how these cooperative legal efforts will evolve along China's new silk road.

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[130] See further Lo Pucki, L, "Cooperation in International Bankruptcy: A Post-Universalist Approach", (1999) 84 *Cornell Law Review* 696.

[131] See further, Ministry of Foreign Affairs, PRC, "Forum on the Belt and Road Legal Cooperation Opens in Beijing" 2 July 2018; available at: https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1573758.shtml and Silk Road Media, Forum on Belt and Road Legal Cooperation Promotes International Rule of Law for BRI Projects, 8 July 2018. (see further: http://www.silkroadnews.net/index.php/obor/955-forum-on-belt-and-road-legal-cooperation-promotes-international-rule-of-law-for-bri-projects).

[132] Ibid

[i] Xinhua News Agency: "Full Text: Vision and Actions on Jointly Building Belt and Road" 29 March 2015 http://english.cri.cn/12394/2015/03/29/2941s872030.htm (accessed 13 August 2018) and Xinhua News Agency: "China unveils Action Plan on Belt and Road Initiative" 28 March 2015 http://english.gov.cn/news/top_news/2015/03/28/content_281475079055789.htm (accessed 13 August 2018)

[ii] Anon: "□信是建□一□一路的道德基石" □路网； anon: "Honesty is the moral cornerstone for building One Belt One Road" *Silk Road Net*. (3 August 2015) available at http://sl.china.com.cn/2015/0803/1310.shtml (accessed 28 August 2018)

[iii] *China Statistical Yearbook 2017,* www.stats.gov.cn/tjsj/ndsj/2017/indexch.htm (accessed 12 August 2018)

[iv] Peter Cai: *Understanding China's Belt and Road Initiative*, Lowy Institute, 2017. Available at https://www.lowyinstitute.org/sites/default/files/documents/Understanding%20China%E2%80%99s%20Belt%20and%20Road%20Initiative_WEB_1.pdf (accessed 20 August 2018).

[v] Silk Road Law: "About Us" (undated) available at http://www.silkroadlaw.com/about.asp (accessed 21 August 2018)

[vi] Jing Li: "The Legal Profession of China in a globalized world: innovations and new challenges" (2018) *International Journal of the Legal Profession*, (2018) available at https://www.tandfonline.com/doi/full/10.1080/09695958.2018.1491853 (accessed 28 September 2018)

[vii] Anthony Lin: " The Rise of the Megafirm" *ABA Journal,* 1 September 2015 http://www.abajournal.com/magazine/article/the_rise_of_the_megafirm/?icn=mostread (accessed 13 August 2018)

[viii] 香港、澳□特□行政区律□事□所□内地代表机构管理□法 Administrative Measures on Representative Offices of Law Firms from the Hong Kong and Macao Special Administrative Regions in the Interior (PRC) Ministry of Justice, Order No 70, 13 March 2002, article 15. See also 司法部关于修改《香港、澳□特□行政区律□事□所□内地代表机构管理□法》的决定 Decision of the Ministry of Justice on the amendment of the administrative measures of the Hong Kong and Macao Special Administrative Region law firms ' representative offices in the Interior Ministry of Justice, Order No 131, 28 April 2015.

[ix] 中国（上海）自由□易□□区中外律□事□所互派律□担任法律□□的□施□法 Implementing Measures for Joint Operations between Chinese and Foreign Law Firms in the China (Shanghai) Pilot Free Trade Zone, issued on 18 November 2014, available at Shanghai Government http://www.shanghai.gov.cn/nw2/nw2314/nw2319/nw2404/nw32764/nw32766/u26aw41019.html (accessed 3 March 2017). And see Andrew Godwin and Timothy Howse: *Legal Services under the China-Australia Free Trade Agreement: Surveying the Landscape*, (2015) Asian Law Centre, Melbourne

[x] Asen Velinov: "Chinese Law Firms Going Global" *American Bar Association*, (undated), available at https://www.americanbar.org/groups/international_law/membership/chinese-law-firms-going-global.html (accessed 21 August 2018).

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[xii] Ding Xiangshun: "Chinese Corporate Lawyers Face Challenges in Maintaining Corporate Social Responsibility in the Age of Globalization, *Indiana International and Comparative Law Review,* 2011, 21:3, 509-521.

[xiii] 郭士辉: 王俊峰委员：法治护航 "一带一路"建设 Guo Shihui: [Chinese People's Consultative Congress Committee member] Wang Junfeng: a legal escort vessel for construction of One Belt One Road.《人民法院报》*People's Court* available at http://www.scio.gov.cn/ztk/wh/slxy/slzf/Document/1472122/1472122.htm (accessed 22 august 2018)

[xiv] Ministry of Justice: *Opinions on the Development of Foreign-Related Legal Services* 司法部：《关于□展涉外法律服□□的意□》(9 January 2017) available at http://www.moj.gov.cn/index/content/2017-01/09/content_6946567.htm (accessed 27 August 2018)

[xv] 刘敬□：《"一□一路" 法律保障体系需要完善》Liu Jingdong: "'One Belt One Road' legal safeguard system needs improvement" (29 August 2017) available at www.yidaiyilu.gov.cn/ghsl/gnxjgd/25249.htm (accessed 21 August 2018)

[xvi] Belt and Road Advisory: "Legal Quagmire Blocks Belt and Road Initiative in CEE?" (11 November 2017) *Belt and Road Blog* https://beltandroad.ventures/beltandroadblog/2017/11/11/legal-quagmire-blocks-belt-and-road-initiative-in-cee (accessed 21 August 2018)

[xvii] 熊□国：推□"一□一路"法律服□是我□共同的□任,《法□网》 Xiong Jinguo: "Promoting the One Belt One Road legal service is our common responsibility" *Legal Daily,* 30 June 2017 available at http://www.legaldaily.com.cn/Lawyer/content/2017-06/30/content_7227251.htm?node=87287 (accessed 7 September 2018)

[xviii] 黄宁宁, □勇：《一□一路与中国律□服□》（2017.6）上海律□ Huang Ningning, Jia Yong: "'One Belt One Road' and Chinese lawyers service" (2017 no 6) *Shanghai Lawyer*, available at http://www.lawyers.org.cn/info/9b3cd7cf7af4470ba2853f14cd639849 (accessed 22 August 2013)

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[xx] Yojana Sharma: "University Collaboration takes the Silk Road Route" *University World News* (12 June 2015) available at http://www.universityworldnews.com/article.php?story=20150611130705830 (accessed 21 August 2018)

[xxi] Zhang Yan: "Guide to Help Lawyers Navigate Belt and Road" *China Daily*, 23 June 2017 available at http://www.chinadaily.com.cn/china/2017-06/23/content_29856854.htm (accessed 21 august 2018)

[xxii] https://beltandroad.ventures/beltandroadblog/2018/08/05/understanding-the-bri-legal-framework (accessed 21 August 2018)

[xxiii] 周宵□: 律□□展□□聚焦"一□一路" 《法制日□》Zhou Xiaopeng: Lawyers Development Forum meets One Belt One Road (3 May 2017) available at http://www.legaldaily.com.cn/Lawyer/content/2017-05/03/content_7131684.htm?node=87291 (accessed 27 August 2018)

[xxiv] 无名 《"一□一路"跨境律□人才□成立：首批 205 名中外律□》anon: "One Belt One Road cross-border lawyers talent pool established: First Batch of 205 Chinese and foreign lawyers" (24 June 2017) available at http://china/cnr/cn/gdgg/20170624/t20170624_523817017.shtml (accessed 21 August 2018)

[xxv] 李玉壁、王□："一□一路建□中的法律□□□□及□□此略" 《国家行政学院□》Li Yubi, Wang Lan: "Legal Risk Identification and Coping Strategies in the construction of One Belt One Road" *Journal of the National School of Administration*, (25 May 2017) available at http://theory.people.com.cn/n1/2017/0525/c217904-29299958.html (accessed 28 August 2018)

[xxvi] Khurram Husain: "Exclusive: CPEC Master Plan Revealed" *Dawn* (newspaper) (21 June 2017) available at https://www.dawn.com/news/1333101 (accessed 24 August 2018)

[xxvii] All China Lawyers Association: *Legal Environment Report of the "Belt and Road" Countries,* 2016 Peking University Press, Beijing. 中□全国律□□会 （□）：《"一□一路"沿□国家法律□境国□□告》2016 北京大学出版社， 北京

[xxviii] Zhang Yan: "Guide to help lawyers navigate Belt, Road" *China Daily* 23 June 2017 available at http://www.chinadaily.com.cn/china/2017-06/23/content_29856854.htm (accessed 20 August 2018); See also King Wood Mallesons: 《□"一□一路" 建□提供法律□航》 "Providing a law escort vessel for the construction of "one belt one road"" available at https://www.chinalawinsight.com/2017/06/articles/uncategorized/%E4%B8%BA%E4%B8%80%E5%B8%A6%E4%B8%80%E8%B7%AF%E5%BB%BA%E8%AE%BE%E6%8F%90%E4%BE%9B%E6%B3%95%E5%BE%8B%E6%8A%A4%E8%88%AA/ (accessed 20 August 2018)

[xxix] 黄宁宁, □勇：《一□一路与中国律□服□》（2017.6）上海律□ Huang Ningning, Jia Yong: "'One Belt One Road' and Chinese lawyers service" (2017 no 6) *Shanghai Lawyer*, available at http://www.lawyers.org.cn/info/9b3cd7cf7af4470ba2853f14cd639849 (accessed 22 August 2013)

[xxx] 戚□平:《中外嘉宾相聚新疆兵团共话丝绸之路经济带建设中外嘉宾相聚新疆兵团共话丝绸之路经济带建设》Qi Yaping: "Chinese and foreign guests gather in Xinjiang Bingtuan to discuss Silk Road Economic Belt construction" 22 September 2016 *China Belt and Road Portal.* Available at https://www.yidaiyilu.gov.cn/yw/gnyw/472.htm (accessed 20 August 2018)

[xxxi] 北京市司法局：《北京律□事□所聘□外籍律□担任外国法律□□□点工作□施□□》28 December 2017 available at www.bjsf.gov.cn/publish/portal0/tab5292/info131415.htm (accessed 10 August 2018)

[xxxii] 北京市司法局：《关于开展北京律□事□所聘□外籍律□ 担任外国法律□□□点工作德□施□□》政策解□ 28 December 2017 Beijing Justice Bureau: "On the implementation of the Beijing law firm to employ foreign lawyers to serve as foreign legal advisers of the implementing rules" policy interpretation available at http://zhengce.beijing.gov.cn/library/192/34/738532/1426670/index.html (accessed 10 August 2018)

[xxxiii] See, for example, Madeleine Martinek: *Experimental Legislation in China: between Efficiency and Legality.* 2018, Springer, Cham.

[xxxiv] □平凡：携手共建一□一路国□法治《人民日□海外□》 （5 July 2018）
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