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The treaties' dilemma

Economic-based explanations of the Belt and Road Initiative's non-treaty-based configuration

Natan Colombo [1]

Abstract
This paper aims to highlight the advantages and disadvantages of either a soft law-based or a hard law-based configuration for newly established multilateral partnerships, through the elaboration of the concept of Treaties' Dilemma and its contextualisation in the analysis of the practical case of the Belt and Road Initiative. The work is structured as follows. The introduction emphasises the relevance of treaties in modern times, concisely addresses the main contributions in the literature of the economic analysis of treaties and international agreements, and provides necessary information on the Belt and Road Initiative. Section 2 thoroughly presents and describes the Treaties' Dilemma, underlining the relationship between formality and flexibility and between complexity and commitment of both hard-law instruments and soft-law tools, while the next section lists and addresses the advantages and disadvantages of the Belt and Road Initiative's soft law-based legal architecture. Then, Section 4 puts forward economic explanations of the Treaties' Dilemma, corroborating the necessity and significance of the application of the economic approach to the analysis of treaties able to clarify the reasons why treaties, as one of the main source of international law, in specific situations can be perceived as less attractive international legal instruments compared to soft law's tools. Conclusive remarks end the work.

Keywords: treaties' dilemma, economic analysis of treaties, belt and road initiative, hard-law instruments, soft-law tools

JEL Classification: K33, F15

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> «The Belt and Road Initiative is a great undertaking which requires dedicated efforts.
> Let us pursue this initiative step by step and deliver outcome one by one.
> By doing so, we will bring true benefit to both the world and all our people!».
> *Excerpt from President Xi Jinping's Speech at the Opening Ceremony of The Belt and Road Forum for International Cooperation, May 14, 2017.* [2]

1. Introduction[3]

1.1 The Relevance of Treaties in Modern Times

In the XIX century, great expectations were put on treaties to regulate interstate (mainly bilateral) relationships with the objective, at that time considered feasible, to establish a harmonised international judicial society based on common norms produced through treaties, aligning different legal systems for the prosperity of human kind.[4] Different conflicts between states and two world wars drastically arrested that ideal goal which, however, was attempted to be pursued (in other forms) by the formation and implementation of the UN system to provide the international community with an 'efficient and stable' order. A general (somehow inevitable) trend towards harmonisation of different legal systems and jurisdictions has also been supported by the globalisation of economy and technology which affected the last decades of the XX century and the first ones of the XXI century.

The international society can be considered as a political and legal-based community organised horizontally rather than through a vertical hierarchy and made up of states and other entities which contribute in the formation, application, and interpretation of international law.[5] According to the principle *ubi societas, ibi jus*, whenever the

[2] *See* Xi Jinping, *Speech at the Opening Ceremony of The Belt and Road Forum (BRF) for International Cooperation*, May 14, 2017. Available at http://chinaplus.cri.cn/news/politics/11/20170514/4628.html (Accessed February 1, 2024).

[3] This paper is an extended and re-elaborated version of paragraphs 3.5.4 and 3.7.4 of the PhD dissertation the author wrote and defended at the China University of Political Science and Law in 2020. *See* Natan Colombo, "From the Economic Analysis of International Law to The Economic Analysis of Treaties: The Configuration and Application of a Holistic Economic Model to the Analysis of Treaties" (PhD diss., Beijing: China University of Political Science and Law, 2020). For the footnotes and the sources' citations, the author applied the format offered by the *Chicago Manual of Style*. *See* University of Chicago, *The Chicago Manual of Style* (Chicago: University of Chicago Press, 17th ed., 2017). The author wishes to thank Professor Huo Zhengxin (the author's PhD supervisor) for the fruitful discussions and considerations arisen during the development of the PhD dissertation and the production of this work. This paper is written for the 10th Anniversary of the establishment of the Belt and Road Initiative and in memory of Professor Gian Antonio Carnaghi, devoted academic to Physics and Mathematics, unfortunately prematurely passed away, with great gratitude and unlimited admiration.

[4] In 1888, Ernst Zitelmann strongly supported the idea that a *Weltrecht*, a global law constituted as a mix of the law applied by every nation, would have eventually been established due to the shared formalities of different countries' legal provisions and their policies' common objectives. His position called for an inevitable harmonisation of international law. *See* Ernst Zitelmann, *Die Möglichkeit eines Weltrechts. Unveränderter Abdruck der 1888 Erschienenen Abhandlung mit einem Nachwort* [*The Possibility of a Global Law. Unchanged Printed Version of the Work of 1888 with an Afterword*] (Berlin: Duncker & Humblot Reprints, 2013) (1888) (in German).

[5] International law can be defined as the *corpus* of principles and rules regulating the rights and obligations of international legal subjects when interacting with each other in order to preserve their peaceful coexistence.

existence of an international society is recognised, therefore, the existence of an efficiency-based[6] legal system must be automatically acknowledged because there can be no society without a system of norms specifically aimed to regulate the relationships between the members constituting that society. Thus, the international legal system is characterised by unique peculiarities, specific actors (states and supranational organisations), and more or less formalised ways (hard-law or soft-law international legal instruments) to govern the interactions between its actors.

Compared to the creation of municipal laws through the consent of the citizens who exercise their rights and obligations in the forms set forth in their national constitutions, international law cannot be imposed upon states and is the product of decentralised-law making processes mainly based on treaties and Customary International Law,[7] because of the international society's inner structure, without a central authority (a supranational legislature) able to create, enforce, and modify rules and a judiciary (a supranational court) possessing compulsory jurisdiction. For these reasons, treaties not only played a central role in the evolution of international law, but also contributed deeply in its development after the establishment of the UN system and have a deep relevance in the regulation of interstate relationships in modern times not just from a bilateral perspective, but from a multilateral one as well.[8]

International law can be created through the formation and establishment of treaties which, indirectly, involve its determination and enforcement. Specifically, international

Because of its unique characteristics, differentiating it from any other branch of law and, in particular, from municipal law, questions were arisen on whether international law is indeed a form of law. John Austin believed that international law could not be considered a form of law. *See* John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832). *See also* William L. Morison, *John Austin* (Stanford, CA: Stanford University Press, 1982). Herbert L.A. Hart emphasised that international law is a form of law, but cannot be compared to a developed legal system. *See* Herbert L. A. Hart, "Positivism and the Separation of Law and Morality," *Harvard Law Review* 71, no. 4 (1958): 593–629 and Herbert L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 3rd ed. 2012). An exhaustive discussion of this issue goes far beyond the purpose and objective of this paper. Thus, it is assumed that, since created and accepted by the members of the international community and enforceable by a supranational organ (the UN Security Council), international law is a special form of law, but law indeed. *See generally* James L. Brierly, *The Law of Nations* (Oxford: Clarendon Press, 6th ed. rev. Sir Humphrey Waldock, 1963); Andrew Altman, *Arguing about Law: An Introduction to Legal Philosophy* (Belmont, CA: Wadsworth, 2nd ed. 2001); and Anthony D'Amato, "Is International Law really 'Law'?" *Northwestern University School of Law Scholarly Commons*, *Faculty Working Papers* 103 (2010): 1–20

[6] The (economic) efficiency and effectiveness of international law are complex and vast issues which certainly deserve to be addressed in individual works.

[7] In particular, the provisions of the resolutions of the UN General Assembly can eventually evolve into Customary International Law.

[8] *See generally* Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2nd ed. 2010) and Lord Arnold D. McNair, *The Law of Treaties* (Oxford: Clarendon, 1961). *See also* Jan Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer Law International, 1996). In particular, by the mean of treaties, great progresses have been reached in matter of human rights and environmental protection. Indeed, since the Universal Declaration of Human Rights of 1948, many treaties have been promoted on human rights' protection as well as treaties on the protection of global environment. *See* United Nations, General Assembly, *Universal Declaration of Human Rights*, 217 (III) A, adopted December 10, 1948 and United Nations, General Assembly, *United Nations Framework Convention on Climate Change*, adopted May 9, 1992, A/RES/48/189, entered into force March 21, 1994 and United Nations, General Assembly, *United Nations Framework Convention on Climate Change*, *Third Conference of the Parties* [*Kyoto Protocol*], adopted December 11, 1997, 37 I.L.M. 22.

law's determination, i.e. the identification of the applicable law governing an international legal issue, is based on the interpretation of international law made by states themselves (auto-interpretation), international organisations, or international courts. Except for the case of auto-interpretation, treaties are fundamental because the international organisations and courts in charge of interpreting international law are established through treaties. In terms of international law's enforcement as well, the subjects entitled to enforce international law (the UN Security Council, when international peace and security is jeopardised, and international courts) are created by the mean of treaties.

From the instrument inscribed in the Stele of the Vultures between the representatives of the Mesopotamia's city-states of Lagash and Umma on the settlement of their borders,[9] dated c. 2500 B.C. making it the oldest treaty in History, through the Treaty of Westphalia of 1648 until nowadays, treaties and international agreements played an integral and predominant role as founding element of interstate and international relationships based on the establishment of legal rights and obligations between countries. In the last two centuries, a dramatic increase in the number of bilateral and multilateral treaties and agreements can be observed due to various reasons. In the XIX century, by the mean of more or less unequal treaties, the main colonial powers extended their territories in Africa, Asia, and Oceania while, in the first half of the XX century, treaties became extremely relevant in the pre-war and post-war periods of both the two world wars. The end of WWII and the establishment of the UN system (with all the treaties produced in its context) put the bases for a relatively peaceful period of prosperity.

From the second half of the XX century, the international society has been affected by a profound process of globalisation of commerce and the fast and extensive use of new communication channels, facilitating the exchange of information between states, gave a substantial impulse to the development of international law in the attempt to govern relationships between states, supranational organisations, and other international legal entities. In particular, the globalisation of the economy, the increase of social stability at an international level, and the development of Information and Communications Technology (ICT) inevitably amplify interconnection between states. As a result, both in a bilateral and multilateral context, treaties and international agreements have been applied to regulate the rights and obligations emerging from an international environment which has become more and more interconnected. At the

[9] *See* Arthur Nussbaum, *A Concise History of the Law of Nations* (New York, NY: Macmillan Co., 1st ed. 1947), pp. 1–2.

same time, the constant development of international law and the enlargement of international legal issues to be regulated push treaties to evolve towards a higher and higher complexity with regard to their structure and the content of their provisions.

1.2 Main Contributions in the Economic Analysis of Treaties and International Agreements

Compared to the literature addressing private[10] and public international legal issues,[11] the literature on the application of economic tools, concepts, and approaches to the analysis of treaties and international agreements is rather limited.[12] The earliest contributions mainly focused on the economic analysis of the breach of international agreements and treaties. With this regard, seminal works are the ones offered by Sykes, respectively, the one on the breach of trade agreements with the adoption of an economic-based approach in the analysis of the strategic design of Section 301 of the US Trade Act[13] and another on the examination of constructive unilateral threats in international commercial relationships, referring again to the application of Section 301.[14]

Then, Morrison analyses the efficient breach of international agreements[15] stressing that states bind themselves through treaties based on self-interest's motives and breach their commitments when treaties and international agreements fail to satisfy those motives, while Ress provides a New Institutional Economics' perspective on treaties, examining how to arrange and implement *ex ante* mechanisms to prevent the adoption of *ex post* opportunistic behaviours by the parties to a treaty.[16] Setear's works are certainly worth to be mentioned, since they represent the earliest and most prominent application of a game theoretical-based approach to the analysis of treaties.[17] Besides, the analogy between contracts (municipal law) and treaties

[10] For a comprehensive and detailed literature review of the main contributions in the economic analysis of private international legal issues, *see* Colombo, *supra* note 3, pp. 116–121.

[11] For a comprehensive and detailed literature review of the main contributions in the economic analysis of public international legal issues, *see* Colombo, *supra* note 3, pp. 121–124.

[12] For a more detailed literature review of the main contributions in the economic analysis of treaties, *see* Colombo, *supra* note 3, pp. 124–129.

[13] *See* Alan O. Sykes, ""Mandatory Retaliation" for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301," *Boston University International Law Journal* 8 (1990): 301–324.

[14] *See* Alan O. Sykes, "Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301," *Law and Policy in International Business* 23 (1992): 263–330.

[15] *See* Richard Morrison, "Efficient Breach of International Agreements." *Denver Journal of International Law and Policy* 23, no. 1 (1994): 183–222.

[16] *See* Georg Ress, "Ex Ante Safeguards Against Ex Post Opportunism in International Treaties: Theory and Practice of International Public Law," *Journal of Institutional and Theoretical Economics / Zeitschrift für die Gesamte Staatswissenschaft* 150, no. 1 (1994): 279–303.

[17] *See* John K. Setear, "The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse," *Boston University Law Review* 69 (1989): 569–633; John K. Setear, "An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law," *Harvard International Law Journal* 37, no. 1 (1996): 139–230; John K. Setear, "Law in the Service of Politics: Moving Neo-Liberal Institutionalism from Metaphor to Theory by Using the International Treaty Process To Define "Iteration"," *Virginia Journal of International Law* 37

(international law), put forward by Dunoff and Trachtman,[18] is functional to understand the efficiency and effectiveness of the application of the economic approach widely used to analyse contracts, *mutatis mutandis*, in the analysis of treaties.

Surely, *International Agreements: A Rational Choice Approach*[19] by Posner and Goldsmith is much more significant for the topic this paper is focused on. In their work, the two scholars investigate the reasons why states may decide to establish relationships and interactions with each other either forming treaties (hard-law instruments, binding under international law) or establishing non-legal agreements (soft-law tools, non-binding under international law). They adopt a positivist approach and directly challenge the normativist approach supported by the traditional (and orthodox) literature of international law which refers to concepts of 'normativity', universal morality, and *pacta sunt servanda* to examine states' behaviours in an international legal context. Underlining the function of treaties to enhance cooperation between states and the important role of reputation and compliance, the two scholars reach an important conclusion. Even if the application of the Rational Choice Theory in the analysis of international law does not prove that international law does not possess normative force, they underline that the mere reference to a 'normative pull' which activates states' behaviours is rather simplistic and may fail to accurately describe how international law really works referring to the 'rhetorical practices' states often implement, reinforcing a position they put forward in a prior work.[20]

Other significant contributions are the one offered by Parisi and Pi on the economic analysis of treaty law with the application of the Game Theory to examine the cooperative, coordinative, and signalling functions of treaties, their mechanisms of formation and accession, and issues of reservations, fragmentation, and termination[21] and the one presented by Stephan on an economic analysis of treaty enforcement, referring to the incentives states possess when choosing mechanisms to enforce international law.[22] In addition, van Aaken[23] and Broude[24] offered interesting insights on

(1997): 641–724; and John K. Setear, "Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility," *Virginia Journal of International Law* 83, no. 1 (1997): 1–126.

[18] *See* Jeffrey L. Dunoff and Joel P. Trachtman, "Economic Analysis of International Law," *Yale Journal of International Law* 24, no. 1 (1999): 1–59.

[19] *See* Eric A. Posner and Jack L. Goldsmith, "International Agreements: A Rational Choice Approach," *Virginia Journal of International Law* 44, no. 1 (2003): 113–143.

[20] *See* Eric A. Posner and Jack L. Goldsmith, "Moral and Legal Rhetoric in International Relations: A Rational Choice Approach," *Journal of Legal Studies* 31 (2002): S115–S139.

[21] *See* Francesco Parisi and Daniel Pi, "The Economic Analysis of International Treaty Law," in *Economic Analysis of International Law*, ed. Eugene Kontorovich and Francesco Parisi (Cheltenham: Edward Elgar Publishing, 2018), 101–122, pp. 104–105.

[22] *See* Paul B. Stephan, "Treaty Enforcement," in *Economic Analysis of International Law*, ed. Eugene Kontorovich and Francesco Parisi (Cheltenham: Edward Elgar Publishing, 2018), 181–203.

treaties' design with the application of Behavioural Economics' concepts. The two scholars, in works developed both independently and together,[25] adopt the same methodology of Galbraith[26] who conducted a remarkable study on treaty design with specific regard to reservations, related legal mechanisms, and 'treaty options', proposing to adopt an approach produced by a combination of state behaviour's empirical observations and Behavioural Economics' theoretical concepts.

From this concise overview of the relatively limited contributions in the economic analysis of treaties and international agreements, it can be clearly noticed that there are ample spaces for improvement. Above all, the main gap in the literature the author intends to fill with this paper is to shift the field of research from a pure theoretical context to a concrete practical one (examining a real case) in the investigation of the reasons why states may opt for the implementation of a soft law-based configuration for newly established multilateral partnerships instead of a hard law-based one, firmly anchored on treaties.

1.3 The Belt and Road Initiative[27]

The 'Belt and Road Initiative' or, literally, the 'Silk Road Economic Belt and the Maritime Silk Road of the XXI Century'[28] was formally established in September 2013 by President Xi Jinping. Characterised by high levels of complexity and involving relevant international legal issues, the BRI is an open and inclusive regional cooperation initiative whose main objective is to jointly build a community of interests, a community of destiny, and a community of responsibility for political mutual trust, economic

[23] *See* Anne van Aaken, "Behavioral International Law and Economics," *Harvard International Law Journal* 55, no. 2 (2014): 421–481.

[24] *See* Tomer Broude, "Behavioral International Law," *University of Pennsylvania Law Review* 163 (2015): 1099–1157, substantially sharing the methodology, adopting the same limitations, and drawing similar conclusions of van Aaken's contributions on the issue.

[25] *See* Anne van Aaken and Tomer Broude, "Behavioral Economic Analysis of International Law," in *Economic Analysis of International Law*, ed. Eugene Kontorovich and Francesco Parisi (Cheltenham: Edward Elgar Publishing, 2018), 249–275, illustrating the assumptions and findings the two authors collected separately in their respective prior works on the issue.

[26] *See* Jean Galbraith, "Treaty Options: Towards a Behavioral Understanding of Treaty Design," *Virginia Journal of International Law* 53 (2013): 309–364, approaching treaties' reservations from the perspectives of cognitive psychology and Behavioural Economics and proving empirically the existence of a direct correlation between framing and state consent in treaty design.

[27] Since the A.Y. 2018-2019, the author has taken active part in THU - SABRI (Tsinghua University's Student Association of the Belt and Road Initiative) as executive committee member, while, since March 2019, has been covering the position of Director of the Academics and Culture Department. The comments in the following paragraphs stem from more than 50 events organised by THU - SABRI during the A.Y. 2018-2019 and 2019-2020. In addition, the author published a paper on the BRI and an article on the involvement of Italy in the Initiative. In the latter work, he emphasised the advantages of a direct involvement of Italy in the BRI which eventually took place six months after the publishing. *See* Natan Colombo, "A Multidisciplinary Analysis of the Belt and Road Initiative," *Università Cattaneo Working Papers* 5 (2018): 3–30 and Natan Colombo, "Italy can Facilitate Closer China, Europe Ties on BRI," *Chinadaily*, September 10, 2018. Available at http://www.chinadaily.com.cn/a/201809/10/WS5b960d30a31033b4f465530a.html (Accessed February 1, 2024).

[28] The Chinese official name is *Sichou zhi lu jingjidai he ershiyi shiji haishang sichou zhi lu*, 丝绸之路经济带和21世纪海上丝绸之路. Hereinafter, the acronym 'BRI' or the generic term 'Initiative' will be alternatively used to indicate the Belt and Road Initiative.

integration, and cultural inclusiveness. Indeed, the incorporation of the expression "Community of Shared Future for Mankind" in the last amendment of the Constitution of the People's Republic of China enacted in 2017 gave proof of the great relevance the BRI plays in the foreign and economic policies of the Chinese Government (Central People's Government, hereinafter indicated with the acronym 'CPG').

Boosting Eurasian infrastructural networks, establishing new supranational organisations, and encouraging the free flow of goods and capitals in the involved regions are other significant goals of the BRI. As a large-scale and multifaceted initiative related to issues of geopolitics, international law, transnational governance, and international economics and business,[29] the BRI involves a huge number of countries (mainly Asian and African). In this regard, investments, business exchanges, and commercial relationships were and still are necessary links in the Initiative's construction and development with the intent of fostering infrastructural networks, reinforcing industrialisation processes in specific regions, and creating trade synergies between the involved countries.

As of today, 151 countries (including China) have taken part in the Initiative whose projects are mainly located in South-eastern Asian and Eastern African countries. However, since its establishment, the BRI's scope has been enlarged to encompass financial investments and trade projects in other areas, such as Eastern and Southern Europe. In this regard, the establishment of the Asian Infrastructure Investment Bank (AIIB)[30] in 2014 was an essential step in the BRI's implementation because it provided the necessary financial resources to support the many projects the Initiative is promoting and developing. Many European countries showed their interest in being involved in the AIIB's activities and major European economies also decided to join it as funding members.[31]

[29] *See* Weifang Zhou and Mario Esteban, "Beyond Balancing: China's Approach towards the Belt and Road Initiative," *Journal of Contemporary China* 27, no. 112 (2018): 487–501.

[30] Aiming to finance the infrastructural projects promoted by the BRI with a specific focus on Asia, the AIIB, as development and investment bank, was founded directly by the CPG. The goal of the AIIB is stated in Article 1 of the Articles of Agreement, affirming that:

"The purpose of the Bank shall be to: (i) foster sustainable economic development, create wealth and improve infrastructure connectivity in Asia by investing in infrastructure and other productive sectors; and (ii) promote regional cooperation and partnership in addressing development challenges by working in close collaboration with other multilateral and bilateral development institutions."

See Asian Infrastructure and Investment Bank, "Articles of Agreement." Available at https://www.aiib.org/en/about-aiib/basic-documents/_download/articles-of-agreement/basic_document_english-bank_articles_of_agreement.pdf (Accessed February 1, 2024).

[31] Including but not limited to the major European economies Germany, France, Italy, and the UK. *See* Zhongying Pang, "What Does Europe's AIIB Entry Mean for China and U.S.?." *ChinaUsFocus*, April 1, 2015. Available at https://www.chinausfocus.com/foreign-policy/what-does-europes-aiib-entry-mean-for-china-and-u-s (Accessed February 1, 2024).

In a prior work,[32] which described the background and factual characteristics of the Initiative, the author has already underlined that the BRI focuses on facilitating infrastructural connectivity (on-land and by-sea, especially between Eastern Asia and Europe), supporting industrialisation, collecting resources to finance its many projects, and reinforcing China's geopolitical influence in the international community. In his analysis, the author stressed these two important points, namely, the new model of global governance China has been shaping through the Initiative and the reinforcement of the international relationships between China and the BRI countries (with specific regard to Eastern African countries).

Moreover, the author has also identified the main obstacles and problems the Initiative will need to deal with. In particular, from a geopolitical perspective, China's neighbouring countries may implement countermeasures in a wider strategy of containment (or reduction) of the Chinese interests in the involved areas. Besides, in the long term, the Initiatives' financial sustainability represents a delicate matter which must be taken into serious account, considering that many of the BRI countries have past experiences of insolvency.[33] The CPG is promoting a win-win strategy for all the parties involved in the Initiative and international cooperation has been supporting them to reinforce their economies and build a solid competitive advantage in an economic environment which is inevitably more and more globalised.

1.4 The Rationale and Structure of the Paper

This paper has the main purpose to describe the concept of Treaties' Dilemma which corroborates the necessity and significance of the application of the economic analysis as valid approach to examine treaties and international agreements. In his previous work, the author described and discussed the main geopolitical effects of the BRI and hot global governance-related issues,[34] while he did not address directly its legal structure and relevant juridical aspects. In this regard, the available ways to handle BRI-based international disputes, the harmonisation process of the BRI countries' legal systems and traditions, the possible establishment of an *ad hoc* dispute settlement body (entirely focused on the Initiative) or a BRI tribunal are issues worth to be examined in details. Thus, the attempt to address these critical matters represents the rationale of this paper together with the analysis of the Initiative's legal structure and

[32] *See* Colombo, A Multidisciplinary Analysis of the Belt and Road Initiative, *supra* note 27.
[33] *Ibid.*, pp. 22–23
[34] *Ibid.*

the reasons why it was established through soft-law tools and not hard-law instruments.

Starting from the assumption that treaties became more and more relevant in the past decades and states adopted them to establish multilateral partnerships (e.g. the Treaty of Maastricht for the European Union), the author presumed there must be advantages in the formation of multilateral partnerships through soft-law tools as well, otherwise the BRI would have been treaty-based. Consequently, the author decided to apply the concept of Treaties' Dilemma to the BRI to highlight the advantages and disadvantages of its soft law-based configuration compared to a hard law-based one it may have possessed if it had been formally established through a treaty or a series of treaties.

The work is structured in four sections as follows. The introductive section shed light on the relevant role played by treaties in modern times, offered concise references to the main contributions in the literature of the economic analysis of treaties and international agreements, and provided necessary information on the BRI. Sections 2 thoroughly introduces and describes the Treaties' Dilemma from a theoretical perspective while, in Section 3, the concept is applied to examine the reasons why the Initiative's has a soft law-based legal architecture and not a hard law-based one, listing the advantages and disadvantages of its non-treaty-based configuration both in the short and in the long terms. The paper proceeds with Section 4 presenting economic explanations of the Treaties' Dilemma and providing a solid justification for the economic analysis of treaties. A comprehensive conclusion ends the work, underlining that the adoption of an economic-based approach in the analysis of treaties and international agreements, *inter alia*, is functional to identify feasible solutions to overcome the Treaties' Dilemma.

2. The Concept of Treaties' Dilemma

As members of the international community and essential actors in the development and constant evolution of international law, unavoidably, states interact with each other because no state is totally autonomous, can survive in a perfect isolationism, pursuing the ephemeral dream of autarchy History has many times proved not being sustainable neither in the short nor in the long term. These inevitable interstate relationships can be regulated in many different ways. In accordance with international law's cardinal principles of sovereign authority and sovereign equality, states can freely choose the international legal instrument they consider the most adequate and proper to govern a specific interstate matter. Actually, treaties are certainly the most formal international

legal instruments states can adopt to formalise legally-based relationships with another party, but there are many other available options. Some of these are similar, if not almost fully identifiable, to treaties, such as acts, concordats, conventions, covenants, declarations, protocols, or statutes. Others can be labelled as quasi-legal or non-perfectly legal[35] international agreements, such as memoranda of agreement, memoranda of understanding, exchanges of notes, joint communiqués, joint declarations, declarations of intents, declarations of principles, administrative agreements, political agreements, economic agreements, exchanges of letters, and others. For a state, the selection of the best between all these options is neither immediate nor automatic. Surely, this choice cannot be driven by superficiality, on the contrary, is strictly related to that state's credibility and reputation in the international community.

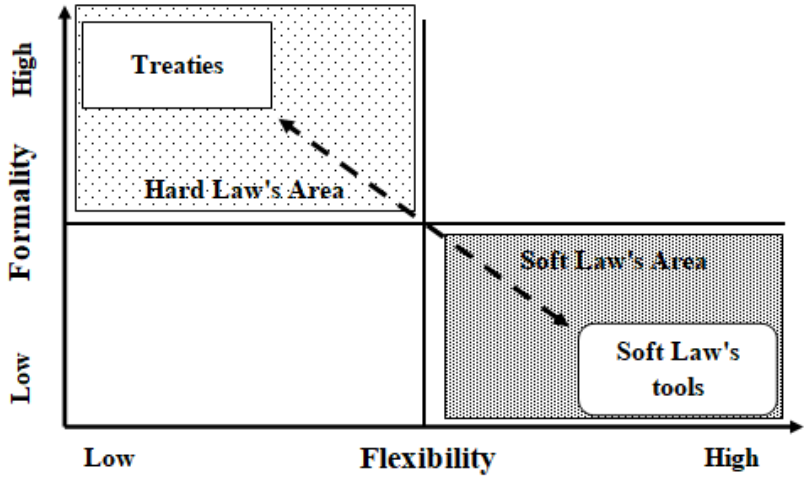
When interacting with other international legal subjects (either states or supranational institutions), a state finds itself in a delicate position where it must decide the specific form this interaction will be shaped on and regulated by. Here comes the dilemma: binding the relationship with the other subject/subjects through a treaty or promoting another (less formal and more flexible) international legal instrument? To describe this situation, extremely intriguing indeed, the author developed the concept of Treaties' Dilemma which can be defined as the condition a state has to deal with, in both the cases of interaction with another state (bilateral configuration) or other states (multilateral configuration), aiming to achieve the most efficient and effective outcome for itself and for all the other involved subjects. The Treaties' Dilemma can be compared to an impasse, represented by the uncertainty and doubts a state may face when deciding to establish a relationship with another state binding itself to the strong provisions locked down in the formality of a treaty. Metaphorically, the Treaties' Dilemma may resemble an individual (State A) who finds her/himself at an interchange or in front of different gates and must choose the right way or the right gate (different legal instruments) to enter to eventually meet another individual (State B). Each of the possible choices has its own strengths and weaknesses and it is assumed that the involved actor can assess them, more or less precisely.

To reduce the complication of an exhaustive and comprehensive analysis of the advantages and disadvantages of each single option, a comparison will be drawn between treaties and the other instruments, gathering them in two single groups,

[35] The terms 'non-perfectly legal' do not imply a degree of illegality, of course. They just refer to the quasi-legal (non complete) nature of soft-law tools in contrast with the 'perfectly legal' nature of hard-law instruments.

respectively, treaty-based agreements (hard-law instruments) and non-treaty-based agreements (soft-law tools). It is evident that the concept of Treaties' Dilemma is connected by causality to different variables such as reputation, commitment, political leverage, economic influence, and many others. Besides, the more or less manifest objectives a state has when establishing a legal-based relationship with another state definitely play a relevant role. The most critical variables characterising the Treaties' Dilemma can be grouped into two couples, namely, flexibility and formality, and commitment and complexity. The first two variables are inversely proportional and opposite to each other i.e. a high flexibility corresponds to a low formality and a high formality is opposite to a low flexibility. On the contrary, commitment and complexity are directly proportional since a high commitment is opposite to a low complexity and a high complexity corresponds to a high commitment.

FIGURE 1. The Treaties' Dilemma: Relationship between Formality and Flexibility

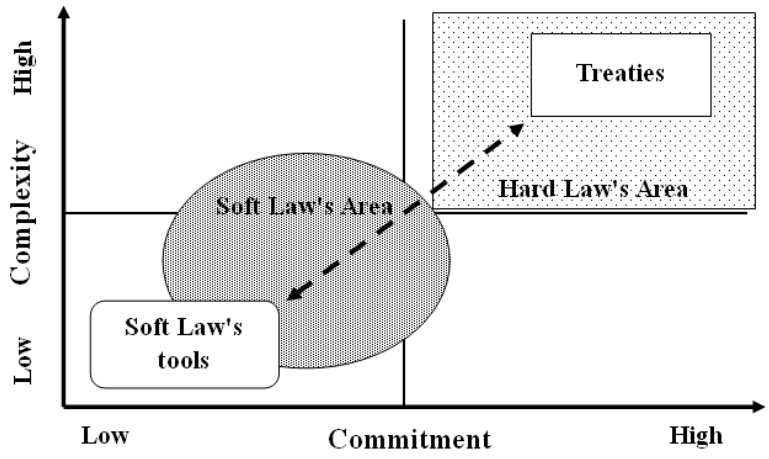


Source: Colombo (2020), p. 43.

Above Fig. 1 represents treaties and the other disposable instruments according to their high or low degree of flexibility and formality. As it can be instantly noticed, treaties are characterised by a high level of formality and a low degree of flexibility while, on the contrary, a low level of formality and a high degree of flexibility are soft-law tools' main attributes. Intuitively, someone may claim that finding a solutions for the Treaties' Dilemma is extremely easy. Whenever a State A favours formality over flexibility, it will support the establishment of a treaty-based relationship with a State B;

and, whenever State A prefers flexibility over formality, then it will promote the adoption of a soft law-based tool. Although logical, this position is tremendously simplistic because it is based on only two key variables (when the variables to be taken into account are many, as it will be practically illustrated in below Section 3 describing the case of the BRI), ignores the attitude of the other party (state B's predisposition and behaviours), and fails to consider all the possible disposable options states have to formalise interstate relationships.

FIGURE 2. The Treaties' Dilemma: Relationship between Complexity and Commitment



Source: Colombo (2020), p. 44.

Above Fig. 2 relates complexity in the formation and negotiation process of an interstate relationship and the involved subjects' commitment to the rights and obligations formalised in the instrument regulating their relationship. Treaties and hard-law instruments occupy the area delimited by a high level of complexity and a high level of commitment, while soft-law tools are characterised by a lower level of complexity and a medium level of parties' commitment. As it can be seen, Fig. 2 clearly shows the direct proportional relationships characterising complexity and commitment.

The concept of Treaties' Dilemma has a solid economic-based justification based on the concept of transaction costs which, together with other economic-based explanations, will be described in Section 4. Besides, the solution to resolve the Treaties' Dilemma cannot but be related to the principles of economics, rationality, efficiency, and effectiveness which must hold in any economic analysis and are the

foundations of the Economic Analysis of International Law. It is now time to corroborate the above theoretical intuitions through the examination of a practical case.

3. Predilection of a Non-treaty-based Configuration for Newly Established Multilateral Partnerships: the Belt and Road Initiative

From an analytic legal perspective, the BRI offers concrete evidences justifying the concept of Treaties' Dilemma presented in the previous section. In particular, the case of the BRI corroborates the assumption that a non-treaty-based configuration for newly established multilateral partnerships is preferable to a treaty-based one, at least, in the short term, in the first stages of their development.

For scholars who are not familiar with the BRI, the absence of a proper *corpus* of rules (BRI-based rules) regulating it could be rather surprising. Actually, given the Initiative's extent and aims, it may appear strange that it was not established through a treaty signed by the involved countries. This peculiarity can be explained by the BRI's nature which is more bilateral-oriented (relationships between China and another country or country-to-country relationships) than multilateral-oriented (relationships between China and a group of countries or groups-to-groups relationships). As for its legal framework, the Initiative has been developed through soft law's tools[36] rather than being anchored to hard law's instruments. This condition may find several explanations based on the attitude the CPG has with respect to the Initiative and its evolution. It is still rather unclear whether the BRI is/was supposed to be a multilateral networking initiative aiming to resemble the structure of the EU or to become a competitor or a substitute of the WTO in the long term, or even something else, for instance, a strategic platform to promote Chinese-oriented Free Trade Agreements (FTAs) and standards.[37] However, if China's objective is to establish an alternative to the US-

[36] For instance, the 2018 Joint Statement between China and Pakistan, the Vision for Maritime Cooperation under the Belt and Road Initiative and The Belt and Road Ecological and Environmental Cooperation Plan (both signed in 2017), and The Riga Guidelines for Cooperation between China and Central and Eastern European Countries formalised in 2016. *See* The Joint Statement between the People's Republic of China and the Islamic Republic of Pakistan on Strengthening China-Pakistan All-Weather Strategic Cooperative Partnership and Building Closer China-Pakistan Community of Shared Future in the New Era (2018). Available at https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1610025.shtml (Accessed February 1, 2024); The Vision for Maritime Cooperation under the Belt and Road Initiative (2017). Available at http://english.www.gov.cn/archive/publications/2017/06/20/content_281475691873460.htm (Accessed February 1, 2024); The Belt and Road Ecological and Environmental Cooperation Plan (2017). Available at https://eng.yidaiyilu.gov.cn/zchj/qwfb/13392.htm (Accessed February 1, 2024); and The Riga Guidelines for Cooperation between China and Central and Eastern European Countries (2016). Available at http://english.www.gov.cn/news/international_exchanges/2016/11/06/content_281475484363051.htm (Accessed February 1, 2024).

[37] *See* Julien Chaisse and Mitsuo Matsushita, "China's 'Belt and Road' Initiative: Mapping the World Trade Normative and Strategic Implications," *Journal of World Trade* 52, no. 1 (2018): 163–185.

oriented WTO, which is solidly institutionally-based and built on multilateral agreements and hard-law instruments, in this case, it is clear that the BRI's evolution towards a treaty-based structure is inevitable.

It can be inferred that a less formal legal framework not regulated by hard law's instruments is functional to the CPG's intention of giving the Initiative an imprint towards flexibility rather than formality. The CPG's attitude can be interpreted as a 'let-it-be' approach or driven by a meticulous map (which has not been revealed yet), with predetermined time schedules and check-points or a mix of both. The idea that the BRI was created and implemented just to contrast American hegemonism and break the chains of the US strategy to contain China (the so-called 'China Containment Policy')[38] certainly makes sense, but fails to embrace all the (manifest and hidden) intents and characteristics of the Initiative. More than a simple counter-reaction to specific conditions in the international environment which push towards the establishment of a new bipolarised Cold War-oriented World order centred on the contrast between the USA and China, the BRI emphasises China's proactive attitude in increasing its international influence not just in Asia but also in Africa, reinforcing its geopolitical role in the international community and enhancing its interactions with the BRI countries' jurisdictions and related supranational organisations.[39] Because of the Initiative's large-scale scope involving a comprehensive interaction within the BRI countries on many and various issues, China adopted an inclusive rather than exclusive approach based on the negotiation and establishment of bilateral and multilateral non-treaty-based agreements facilitating cooperation and development of joint projects.[40]

The BRI has a soft law-based architecture because built on non-hard law international legal instruments. The implemented soft-law tools present a variety of forms with regard to the matter they regulate and the characteristics of the involved countries' legal and political systems. The most widely used tools are MOAs,[41] MOUs,[42] guiding

[38] *See* Alan Cafruny, "Can the United States Contain China?" *Russia in Global Affairs*, March 26, 2019. Available at https://eng.globalaffairs.ru/number/Can-the-United-States-Contain-China-19991 (Accessed February 1, 2024).
[39] *See* Colombo, A Multidisciplinary Analysis of the Belt and Road Initiative, *supra* note 27, pp. 25 *et seq.*
[40] *Ibid.*, pp. 14–16.
[41] *See, e.g.*, Memorandum of Arrangement on Strengthening Cooperation on the Belt and Road Initiative between the Government of the People's Republic of China and the Government of New Zealand (2017). Available at https://eng.yidaiyilu.gov.cn/zchj/sbwj/10479.htm (Accessed February 1, 2024).
[42] For instance, the MOU signed by China and Italy. Its paragraph VI states:
"This Memorandum of Understanding does not constitute an international agreement which may lead to rights and obligations under international law. No provision of this Memorandum is to be understood and performed as a legal or financial obligation or commitment of the Parties. This Memorandum of Understanding will be interpreted in accordance with the legislations of the Parties and as well as with applicable international law and, as for the Italian Party, with the obligations arising from its membership of the European Union." *See* Memorandum of Understanding between the Government of the Italian Republic and the Government of the People's Republic of China on Cooperation within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road

principles,[43] joint communiqués and statements,[44] and letters of intent.[45] Broadly speaking, the BRI's sources of law can be divided into two main groups, respectively, MOU-based materials and rules existing in other international legal instruments, which are adopted in similar contexts and can be directly applied to BRI-related situations. The former are mainly made up of bilateral agreements between states (mostly between China and other BRI countries) which take different forms, include more proactive provisions rather than lists of rights and obligations, and indicate the Initiative's general guidelines. The latter group consists of existing rules, such as rules applied in WTO-based contexts or contained in previous FTAs or Bilateral Investment Treaties (BITs)[46] which are applied to BRI-related issues and constitute the path the effective development of the Initiative is following. In fact, most of the BRI-related rules are formalised in agreements and treaties which were produced before the establishment of the Initiative itself, such as the provisions on dispute resolution mechanisms in the WTO agreements.

Thus, with the exclusion of the specific norms developed in the related MOAs or MOUs, there is an absence of explicit BRI-based proper norms. The reasons of this condition can be traced back to two, the former is economic-related, the latter is more political-oriented. First, the use of rules already existing in hard-law instruments results in saving a huge amount of costs (in terms of transaction costs) not to be sustained to coordinate the involved countries, with their different legal systems and traditions, in the delicate attempt to produce new rules when applicable rules to regulate analogous situations already exist. Thus, the *ex novo* codification of a system of BRI-related rules appears a waste of time and resources. Even if the BRI does not possess treaties of its own, however, it cannot work without referring to provisions contained in other treaties which, however, mark a tangible problem of specificity because not exclusively created

Initiative (2019), § VI. Available at http://www.governo.it/sites/governo.it/files/Memorandum_Italia-Cina_EN.pdf (Accessed February 1, 2024).

[43] *See, e.g.*, The Suzhou Guidelines for Cooperation between China and Central and Eastern European Countries (2015). Available at https://eng.yidaiyilu.gov.cn/zchj/sbwj/1432.htm (Accessed February 1, 2024).

[44] *See, e.g.*, Joint Press Communiqué between the Government of the People's Republic of China and the Government of the Kingdom of Thailand (2014). Available at https://eng.yidaiyilu.gov.cn/zchj/sbwj/1436.htm (Accessed February 1, 2024) and Joint Statement between the People's Republic of China and the Islamic Republic of Afghanistan (2016). Available at https://eng.yidaiyilu.gov.cn/zchj/sbwj/1425.htm (Accessed February 1, 2024).

[45] *See, e.g.*, Letter of Intent between the United Nations Economic and Social Commission for Asia and the Pacific and the Ministry of Foreign Affairs, People's Republic of China on Promoting Regional Connectivity and the Belt and Road Initiative (2016). Available at https://eng.yidaiyilu.gov.cn/zchj/zcjd/1848.htm (Accessed February 1, 2024).

[46] Such as the provisions of the China-Pakistan Free Trade Agreement. *See* Free Trade Agreement between the Government of the Islamic Republic of Pakistan and the Government of the People's Republic of China (2006). Available at https://wits.worldbank.org/GPTAD/PDF/archive/China-Pakistan.pdf (Accessed February 1, 2024). For a comprehensive list of FTAs signed by China, *see* http://www.china.org.cn/business/node_7233287.htm (Accessed February 1, 2024). For an overview of China's BITs, *see* Tyler Cohen and David Schneiderman, "The Political Economy of Chinese Bilateral Investment Treaty Policy," *The Chinese Journal of Comparative Law* 5, no. 1 (2017): 110–128 and Shu Zhang, "China's Approach in Drafting the Investor-State Arbitration Clause: A Review from the 'Belt and Road' Regions' Perspective," *The Chinese Journal of Comparative Law* 5, no. 1 (2017): 79–109.

to regulate BRI-related issues, but just similar ones. The second reason of the absence of explicit BRI-based norms is political. A soft law-based architecture grants the Initiative a high level of flexibility, as it will be explained more thoroughly in the following paragraphs.

TABLE 1. Advantages and Disadvantages of a Non-treaty-based Configuration for the BRI

Advantages of a non-treaty-based configuration		**Disadvantages of a non-treaty-based configuration**
Avoiding the impression of the adoption of an unequal treaties-based approach and reducing the perception of a 'new' sinocentric attitude	**1** ⟷	Facing reputational problems in the long term
Assuring a high degree of flexibility with a low institutional structure	**2** ⟷	Intentionally increasing vagueness and dealing with problems in the minimisation of risks
Creating economies of network and promoting an inclusive rather than exclusive approach	**3** ⟷	Emerging complexity in the management of the economies of network

Source: author's elaboration from Colombo (2020), p. 48.

The BRI countries refer to and make constant use of norms contained in existing treaties, in particular, the WTO rules, which are particularly suitable because the majority of the BRI countries are WTO members, so, using an already got-up-to-speed system of norms appears rather natural and makes perfect sense. Moreover, the WTO rules are also preferred by China because they tend to favour export-oriented countries (China is one of the most important export country worldwide). However, those rules are applied to trade and investment matters which, by definition, are associated with high levels of risk. Since the largest amount of the BRI-related trade, financial, and infrastructural investments are addressed to developing or underdeveloped countries, characterised by special structural conditions, soft law fails to provide a comprehensive legal protection for the (institutional) investors which, on the contrary, can be

guaranteed by the provisions formalised in specific treaties. The issue of the investments' protection is directly connected to the problem of soft law's enforcement, compared to the more reliable mechanisms of hard-law instruments' enforcement. The advantages and related disadvantages of the predilection of a non-treaty-based configuration for the BRI are systematically addressed in the following paragraphs and synthetically summed up in above Tab. 1.

3.1 Advantages of the Predilection of a Non-treaty-based Configuration for the Belt and Road Initiative

Advantage 1: Avoiding the impression of the adoption of an unequal treaties-based approach and reducing the perception of a 'new' sinocentric attitude

Two centuries ago China experienced a series of so-called unequal treaties (不平等的条约, *bu pingdengde tiaoyue*) imposed by foreign invading powers as *diktat*, without adhering to principles of mutual respect, bilateral interests, and reciprocity. Thus, a non-treaty-based configuration for the BRI is functional to reduce the perception of a neo-imperialist or neo-colonialism attitude of China towards the countries involved in the Initiative,[47] avoiding the risk of being accused to follow the same path based on unequal treaties Western countries utilised when dealing with Qing-ruled China in the XIX century. Promoting a soft power-based image, China put and is still putting a great deal of efforts so that the BRI can be seen globally as an opportunity and not as an imposition, centred on a horizontal relationship between the involved countries and not on a vertical one, product of an inclusive mutual respect-based approach rather than of an exclusive top-down approach to regional multilateralism.

In this regard, the implementation of efficient bilateral and multilateral communication channels (the Belt and Road Forum - BRF,[48] for instance) encouraged dialogues

[47] The perception that the commercial and infrastructural agreements between China and the BRI countries resemble the form of unequal treaty and corroborate the willingness of the CPG to re-establish a tributary system, with the aim of fostering a strong sinocentrism in the involved areas, is misjudged and fails to describe what the Initiative is really promoting. However, in 2018, this position was strongly supported by the Malaysian PM Mahathir Mohamad when he suspended China-funded projects (in particular the East Coast Rail Link project), claiming that China was pursuing a new form of colonialism. The decision of the Malaysian Government led to the suspension and a consequent renegotiation of the agreements previously stipulated between the CPG and Chinese investors with the Malaysian Government and local investors in order to develop strategic areas which are of extreme importance for the BRI in terms of on-sea transportation of goods. *See* Lucy Hornby, "Mahathir Mohamad Warns against 'New Colonialism' during China Visit." *Financial Times*, August 20, 2018. Available at https://www.ft.com/content/7566599e-a443-11e8-8ecf-a7ae1beff35b (Accessed February 1, 2024); Christopher Bodeen, "Malaysian PM Says China-financed Projects Cancelled." *AP News*, August 21, 2018. Available at https://apnews.com/0c8e113c2dae4205a5fc28f567422f00 (Accessed February 1, 2024); and Dasgupta, "Mahathir Fears New Colonialism, Cancels 2 Chinese Projects on Beijing Visit." *The Times of India*, August 21, 2018. Available at https://timesofindia.indiatimes.com/world/china/mahathir-fears-new-colonialism-cancels-2-chinese-projects-on-beijing-visit/articleshow/65493634.cms (Accessed February 1, 2024).

[48] The Belt and Road Forum for International Cooperation (usually referred to as 'Belt and Road Forum' or with the acronym 'BRF') is an international forum whose first session took place on 14 and 15 of May 2017 in Beijing while the second session was held from 25 to 27 of April 2019. Its aim is to offer a platform where to develop and

between the BRI countries in order to contrast the erroneous perception that the Initiative is nothing more than steered by the CPG as a way to affirm a 'new' Asian or global sinocentrism. The adoption of strict treaty provisions and top-down rules directly enacted by the CPG or by a China-led supranational executive organisation hypothetically governing the Initiative could not have been accepted by the involved countries and could have been wrongly interpreted as recognition of the possibility of interferences by a BRI country's government in another BRI country's affairs. Actually, considering China, such a situation cannot occur because it contravenes directly four of the 'Five Principles of Peaceful Coexistence' promoted by the CPG as mutual respect for sovereignty and territorial integrity, mutual non-aggression, and non-interference in another country's internal affairs.

Advantage 2: Assuring a high degree of flexibility with a low institutional structure

By definition, treaties are characterised by a high level of formality (the highest possible granted by an international legal instrument), counterbalanced by low flexibility.[49] All the BRI-related arrangements and agreements are characterised by a high level of flexibility in order to guarantee that their modification can be made *in itinere* and relatively fast.[50] Most of the BRI's sources of law are MOU-based materials without the element of binding force which, on the contrary, is fundamental in treaties. Voluntary cooperation encouraged through soft-law agreements between the BRI countries is preferable with respect to obligations imposed from the top, *ex machina*, contained in hard-law instruments, and granted through specific enforcement mechanisms. The adoption of soft-law tools has also a timing advantage because represents a much faster process opposite to the necessary (long) time of treaties' formation and consequent ratification procedures which vary according to each state party's legal system. Generally, the Initiative seems to favour speed instead of institutionalism. A low institutional structure can also grant China to operate without being locked in a rigid web of institutional-based norms of hard law, assuring a wider and more flexible *modus operandi* to be applied in a case-by-case basis.

implement the Initiative's projects and a network to facilitate the establishment of cooperation agreements between the BRI countries.

[49] *See supra* Section 2 and Fig. 1. In this context, the adoption of an approach based on the Economic Analysis of International Law can facilitate the assessment of treaties' levels of complexity and flexibility in order to determine a balance between these two key elements.

[50] The importance attributed to flexibility, characterising also the BRI, appears to be a dominant element of China's *forma mentis*. Underlining a propensity to pragmatism and to avoid failure, flexibility not only is the distinctive character of China's approach towards international relationships and politics, but also of its way to do business and deal with international legal issues. From this perspective, a soft law, non-treaty-based structure for trade agreements functions as an alternative model in contrast with the hard law, treaty-based approach adopted by the USA.

From a normative perspective, the adoption of a flexible and rather informal soft law-based approach is justified by the necessary elasticity related to the Initiative's projects. This condition allows China and the involved countries to be free to choose the modality of application of international norms to regulate their transnational relationships in order to deal with possible emerging conflicts, promptly answer to unexpected changes in the projects, and establish new practices. Another important advantage not to be underestimated is that soft-law norms can be renegotiated fast and relatively easily. Assuring flexibility appears to be an inevitable objective due to the BRI countries' different legal systems and traditions. Indeed, the formation of a treaty, which must have been ratified by all the involved countries, would have been extremely hard, costly, and time consuming, while, surely, a soft law-based structure facilitated the promotion and the expansion of the Initiative's scope.

Advantage 3: Creating economies of network and promoting an inclusive rather than exclusive approach

Since the launch of the Initiative in 2013, the intent of the CPG was to encourage the formation of commercial and infrastructural agreements with the targeted Asian and African countries, adopting a mutual beneficial win-win approach, in order to create an inclusive infrastructural network and enjoy the emerging synergies (i.e. the so-called economies of network) creating benefits which grow exponentially as the BRI members increase in number. The Initiative's non-institutional-based architecture confirms the willingness of establishing what nowadays in business is often called a 'smart environment' characterised by the absence of a heavy hierarchy and a strict and formalised chain of power and encouraging a creative and fast decisional process. MOAs and MOUs, as non-treaty-based instruments, have been promoted to establish that configuration. The preference of an inclusive rather than exclusive approach can be clearly observed by the various forms of the soft law-based tools at the basis of the relationships between the BRI's countries and the range of issues regulated by those tools.

Even if it cannot be asserted that the BRI is not institutional-based at all, it is also true that it does not operate through a specific (formalised) institutional architecture. This characteristic is understandable in the short term (actually, it should not be forgotten that just few years have passed from the BRI's launch), however, with regard to the Initiative's future evolution in the long term, it is foreseeable that this non-institutional structure will leave space for a structural legal system of rules, the identification and institution of executive and judicial organs, as well as the establishment of an *ad hoc*

tribunal (probably in the form of a supranational court) in charge of the settlement of BRI-related disputes. Therefore, the trade-off between institutionalism and flexibility should always be taken into account. Actually, the Initiative not only makes use of already existing supranational organisation and regional platforms (such as, for instance, the Shanghai Cooperation Organization[51] and the Asia-Pacific Economic Cooperation),[52] but also has institutional bodies characterised by an advanced legal structure, for instance, its financial engine (the AIIB),[53] a sort of political branch (the BRF),[54] and platforms to manage commercial arbitrations which, as just underlined few lines before, may evolve in a supranational court entitled to settle BRI-related disputes.

3.2 Disadvantages of the Predilection of a Non-treaty-based Configuration for the Belt and Road Initiative

Disadvantage 1: Facing reputational problems in the long term

In the long term, a non-treaty-based configuration may risk to undermine not only the reputation of the Initiative, but also the reputation of the BRI countries and its major promoter. The unexpected attitude of the Malaysian Government[55] expressed by then-PM Mahathir Mohamad in May 2018 established a precedent which should be taken into serious account because other BRI countries may emulate it. The election's mechanisms of many BRI countries may lead to the constitution of governments which are more or less openly against the agreements taken by the previous governments in the context of the BRI to the point of even having second thoughts on the participation of their countries in the Initiative. This can affect the investments allocated in the BRI's projects and destabilise its entire architecture.

Someone may argue that China has enough resources to influence the politics of many Asian and African countries. Although this statement may have some reasonable and logical bases related to the safeguarding of Chinese investments addressed to key BRI countries, China's fundamental foreign policy pillar of non-interference in other states' internal issues prevents any kind of direct or indirect intervention. In general, soft-law agreements are easier to be renegotiated as well as infringed than hard-law

[51] The Shanghai Cooperation Organization, established in June 2001 replacing the 1996 Shanghai Five, is an intergovernmental organisation initially made up of China, Russia, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan and expanded with the entry of India and Pakistan as full members in June 2017. Its scope encompasses mainly joint military activities and cooperation on economic, cultural, and security-based issues.

[52] Established in 1989, the Asia-Pacific Economic Cooperation is an international forum aimed to promote economic and trade-based projects and agreements between its 21 members located in the Asia-Pacific region with the objective of establishing a Free Trade Area of the Asia-Pacific through the implementation and entering into force of the Trans-Pacific Partnership Agreement of 2016.

[53] *See supra* note 30.

[54] *See supra* note 48.

[55] *See supra* note 47.

instruments. On the one hand, this condition assures soft-law agreements a high level of flexibility and a relatively high efficiency in adapting to new conditions, on the other, it may be a double-edged sword in terms of the involved parties' commitment and reputation, in particular when there are massive investments at stake.

Furthermore, in the context of the BRI, signals of resentment against China (which may even take the form of a real sinophobia) should absolutely not be underestimated. For instance, resentments arose due to the huge Chinese workers' migration[56] and allegedly privileged conditions in land renting given to Chinese investors in Kazakhstan as well as Chinese workers' migration to Indonesia,[57] bringing social instability which may slowly corrode the solidity of the Initiative in the long term.

Disadvantage 2: Intentionally increasing vagueness and dealing with problems in the minimisation of risks

Soft-law tools produce advantages in terms of flexibility but, at the same time, contain more statements and principles rather than clear norms. This condition results in a problem of vagueness which cannot be ignored, especially when interpreting specific provisions. One may asserts that this vagueness represents a strategy to leave space for a voluntary ambiguity. Although this position may be backed up by a certain logic in the short term, it is evident how it cannot last in the long term. In fact, the decision not to provide the BRI with an institutional and treaty-based structure not only increases the vagueness of many aspects of the Initiative, but also, to some extent, undermines its level of legitimacy and steadiness in the long term.

In this regard, the adoption of an establishing treaty would have granted the BRI a concrete international legal ground and would have resolved criticisms emerging inside and outside the Initiative on key aspects such as transparency of the investments' mechanisms and norms on environmental protection. Moreover, a treaty-based configuration would have assured a higher degree of protection of the (institutional and non-institutional) investors. Strictly connected with the absence of treaty-based norms

[56] *See* Nazira B. Boldurukova, "Sinophobia in the Kazakh Society: Content Analysis of Mass Media," *The Social Sciences* 10, no. 6 (2015): 1375–1378 and Elena Y. Sadovskaya, *The Chinese Migration into the Republic of Kazakhstan: Cooperation Silk Road Traditions and New Opportunities for Cooperation* (Almaty: Raritet, 2014). *See generally* Sébastien Peyrouse, "Discussing China: Sinophilia and Sinophobia in Central Asia," *Journal of Eurasian Studies* 7, no. 1 (2016): 14–23.

[57] *See, e.g.*, Endy M. Bayuni, "Democracy Shields Indonesia from Belt and Road Fallout." *The Jakarta Post*, June 10, 2019. Available at https://www.thejakartapost.com/academia/2019/06/10/democracy-shields-indonesia-from-belt-and-road-fallout.html (Accessed February 1, 2024) and News Desk, "No Protest Against Chinese Workers in Morowali Nickel Mining Site, Say Police." *The Jakarta Post*, January 31, 2019. Available at https://www.thejakartapost.com/news/2019/01/31/no-protest-against-chinese-workers-in-morowali-nickel-mining-site-say-police.html (Accessed February 1, 2024). *See generally* Lanya Feng, "The Chinese Problem in Indonesia: A Ghost from the Past that Haunts the Present." *The McGill International Review*, May 25, 2018. Available at https://www.mironline.ca/the-chinese-problem-in-indonesia-a-ghost-from-the-past-that-haunts-the-present/ (Accessed February 1, 2024).

regulating investments, the lack of specific enforcement mechanisms is another great problem of a non-institutional-based structure. Thus, the establishment of hard law-based multilateral agreements on aspects which are particularly relevant for China, such as transnational taxation, investments' protection, and technical standards, appears very likely to occur in the near future.

From an economic perspective, a non-institutional-based architecture increases rather than minimises the risks, emphasising an anti-economic element which goes against the basic principle of investment management asserting that joint venture (interstate) investments cannot be guaranteed until the end of the projects they are financing. Without formalising the rights and obligations of the involved parties in binding hard-law instruments, unexpected changes in the status quo, such as the election of a government against the implementation of BRI-related projects, can undermine the development and positive conclusions of those projects. The signature of a treaty by a BRI country's head of state and the consequent ratification by its legislative organs not only bind that country's current government (whose composition may change through new elections), but also act as a strong signal and commitment to the investment projects.[58]

Disadvantage 3: Emerging complexity in the management of the economies of network

Generally speaking, from an economic perspective, the main strength of a network is also its main weakness. As economies of network create positive effects, negative networks' externalities can be originated as well in the forms of negative feedbacks or exponential decays. In fact, the virtuous cycle originated by the connectivity between the network's members can degenerate into a vicious cycle when one of the members is in great difficulty or encounters serious problems. In other words, when a crisis will affect a critical node, it will fast influence the entire network in what can be described as a domino effect or an epidemic effect.

This is particular evident in international finance. Due to the globalisation of the financial markets, when countries which are economically and financially strong link themselves and cooperate in a more or less close network with countries whose markets are characterised by financial instability and high volatility, there is the concrete risk that the default of one of these 'weak' countries may 'infect' and seriously damage all the other linked countries. Therefore, in the context of the BRI, a concrete problem of managing the economies of network arises strongly. In the absence of a

[58] *See supra* note 47.

'control tower' (a supranational entity resembling, for instance, the European Commission or the UN Security Council) able to prevent that such a crisis will take place or capable to take fast and drastic measures to contain the 'infection', the entire BRI network could be put in jeopardy. One may claim that the Initiative's larger promoter is 'too big to fail' and that the CPG has proved in many occasions to be ready to promptly act against the emersion of financial bubbles. However, no matter how strong China's macroeconomic power is, China and the other BRI countries may be seriously affected by one (or more) member's default. The proactive rather than reactive attitude adopted by China will be certainly shaken in case of dealing with a severe (financial, because of insolvency, or of other nature) crisis of a key BRI country.

TABLE 2. General Factors Favouring a Non-treaty-based Configuration for Newly Established Multilateral Partnerships

Positive factors (in the short term)		**Negative factors (in the long term)**
Lower profile		Lower reputation
Higher flexibility		Higher risk
Lower formality	⟷	Lower institutionalisation
Lower complexity		Lower commitment
Higher efficiency in the short term		Lower efficiency in the long term
Higher effectiveness in the short term		Lower effectiveness in the long term

Source: author's elaboration from Colombo (2020), p. 54.

All the reasons described above reasonably suggest that an indispensable evolution of the BRI from a soft law-based to a treaty-based structure may take place in the future in order to safeguard all the parties' interests and investments and assure, at the same time, a high level of commitment, considering that many of the BRI countries, especially in Africa, are characterised by an history of political instability, dictatorial

regimes, and very fast and unexpected changes of governments.[59] Based on what affirmed in the previous paragraphs on the specific case of the BRI, through a process of generalisation, above Tab. 2 sums up the key factors supporting the adoption of a non-treaty-based configuration for newly-established multilateral partnerships in the short term in addition to the main negative factors emerging in the long term. A soft-law configuration for newly established multilateral partnerships presents noteworthy advantages in the short term in terms of flexibility, efficiency, and effectiveness which, however, are counterbalanced by related significant drawbacks in the long term. The next section provides economic-based explanations of the concept of Treaties' Dilemma with specific reference to an economic interpretation of the BRI's soft law-based configuration.

4. Economic-based Explanations of the Treaties' Dilemma

The Treaties' Dilemma has a solid economic rationale and its main economic justification in the notion of opportunity costs which play a central role not only in the economic analysis of individuals' behaviours and in any microeconomics-based model, but, clearly, also in Law and Economics,[60] in the Economic Analysis of International Law,[61] and in the Economic Analysis of Treaties.[62] With regard to the Treaties' Dilemma, the preponderance and centrality of opportunity costs is evident because, in the consideration of whether or not implementing a treaty to regulate a specific relationship with another state, a state can dichotomously choose between hard-law instruments and soft-law tools, as already underlined in the above Sections 2 and 3. Thus, the best (rational, economic-based, most efficient, and most effective) choice between several available options must necessarily be driven by opportunity costs-based considerations. In particular, the advantages and disadvantages of the disposable options must be weighed in a case-by-case basis in what very closely resembles a Scenario planning-based configuration,[63] widely used in business management's contexts.

[59] *See* Avery Goldstein, "A Rising China's Growing Presence: The Challenges of Global Engagement," in *China's Global Engagement: Cooperation, Competition, and Influence in the 21st Century*, eds. Jacques deLisle and Avery Goldstein (Washington, DC: Brookings, 2017), 1–34.

[60] The terms 'Law and Economics' (another label used alternatively to 'Economic Analysis of Law') indicate the application of theories, models, and concepts of economics to the analysis of (mainly municipal) legal issues.

[61] The label 'Economic Analysis of International Law' refers to the application of theories, models, and concepts of economics to the analysis of international (both private and public) legal issues.

[62] The terms 'Economic Analysis of Treaties', constituting a sub-field of research in the larger area of the Economic Analysis of International Law, indicate the application of theories, models, and concepts of economics to the analysis of treaties, international agreements, and treaties-related issues.

[63] The Scenario planning is a strategic forecasting tool adopted in business management-related contexts aiming to consider different alternatives with the objective of evaluating the perceptions towards the evolution of a specific

A valid way to select the best alternative is the *ex ante* evaluation of the related opportunity costs i.e. not just the mere assessment of the advantages and disadvantages of choosing one alternative, but also the costs which are borne opting for that specific selection, while refusing another one. In other words, a solution for the Treaties' Dilemma is the assessment of the costs not to be borne and the benefits to be lost when choosing a treaty-based configuration or a non-treaty-based configuration to regulate interstate relationships. This assessment of potential costs and benefits can be extremely difficult because it is related to a future condition, therefore inevitably connected with uncertainty, and directly depends on the attitude of the states involved in the formalisation of the interstate relationship to be regulated through a treaty. Indeed, the concept of opportunity costs provides a justification for the concept of Treaties' Dilemma and, suggesting to compare the potential costs and benefits of each disposable alternative, provides a practical (suitable) solution to the problem.

Besides, Investment management offers an interesting interpretation to solve the Treaties' Dilemma in the context of the BRI. The fundamental principle of investment management requires a stable balance between risk, return, and time, the three essential elements any investment is characterised by. Thus, from a mere investment-based perspective, the inevitable evolution of the BRI from a (low commitment-oriented) MOU-based, non treaty-based initiative to a (high commitment-oriented) treaty-based one is justified by the necessity of safeguarding the huge amounts of investment China and the other BRI countries are allocating for the specific infrastructural projects.

Apart from the opportunity costs-based and investment management-oriented interpretations, the economic analysis of the BRI's configuration suggests another significant way to resolve the Treaties' Dilemma which can be based on two elements, respectively, a timing factor and the creation of legally binding rights and obligations through the evolution of soft law into hard law.[64] Adopting a general perspective, a state may decide to resort to soft-law tools in a preliminary stage of interstate relationships. This choice aims not only to enjoy the relatively smoothness and speed of the soft-law tool's implementation and its degree of flexibility, but also to test the

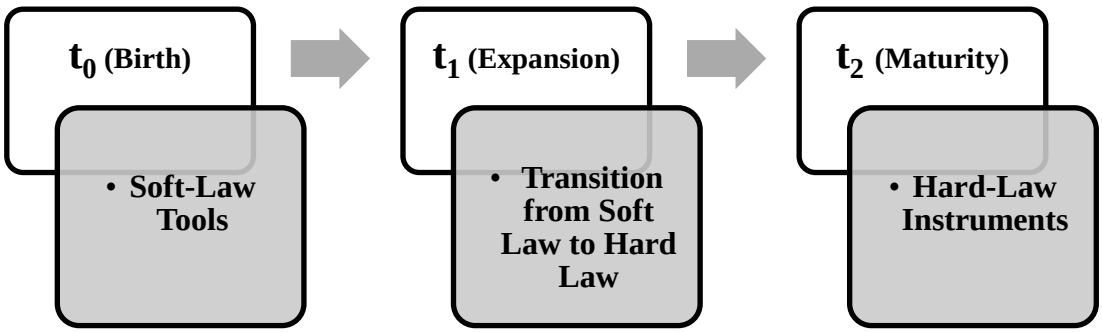
situation. In particular, it supports the understanding of the necessary decisions to be taken at present to get better development opportunities in the future by referring to the potential change in external and internal factors. *See* Paul J. H. Schoemaker, "Scenario Planning: A Tool for Strategic Thinking," *Sloan Management Review* 36, no. 2 (1995): 25–40 and Dana Mietzner and Guido Reger, "Advantages and Disadvantages of Scenario Approaches for Strategic Foresight," *International Journal of Technology Intelligence and Planning* 1, no. 2 (2005): 220–239.

[64] *See* H. Wolfang Reincke, and Jan Martin Witte, "Challenges to the International Legal System Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords," in *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, ed. Dinah Shelton (Oxford: Oxford University Press, 2003), 75–99.

possibility to transform that tool into a hard-law instrument in a consequent stage, necessary if the intention is to cement those interstate relationships into hard-law instruments.

As simply shown in below Fig. 3, the process starts from an initial stage (t_0), definable as the 'birth' of a bilateral or multilateral partnership, which is just based on soft-law tools. Then, due to the enlargement of the partnership and the deepening of the involved parties' integration, there is a natural evolution to an intermediate step (t_1 or the 'expansion') characterised by a transformation of the soft law-based norms regulating the partnership into hard law-based norms, with the eventual establishment of hard-law instruments in the last step (t_2 or 'maturity'). Inevitably, this Figure represents a generalisation: the periods of time between the three steps vary on a case-by-case basis, thus the period between t_0 and t_2 may be more or less short or long according to the structure of the multilateral partnership, the characteristics of the involved parties, and other different variables.

FIGURE 3. Resolution of the Treaties' Dilemma: Transition from Soft-Law Tools to Hard-Law Instruments



Source: Colombo (2020), p. 65.

The reasons of following the path described above are rational and economic-based. Whenever a state will consider that the transformation of soft-law provisions into hard-law norms is functional and necessary to the obtainment of its final goal, then that state will proceed with it. In the case of the BRI, whenever China will estimate that it is finally time to translate the soft-law tools into hard-law instruments, it will push for it for mere rational and economical reasons of higher convenience in pursuing its general objective of establishing a solid connectivity network with the other BRI countries. Therefore, the development of hard-law instruments in the context of the Initiative, in

particular on trade, financial, infrastructural, and investment rules, surely does not appear unlikely at all, but just postponed to the future. In this regard, China may use soft-law tools as bases to develop and establish common practices in key sectors such as infrastructure, ICT, and e-commerce where in the last years acquired a considerable experience and reached significant advancements. These common practices could not only be the trigger for the evolution of China's trade and investment law, but also be formalised in a series of multilateral treaties centred on established soft-law rules and norms contained in the many BITs and FTAs China has already signed with the BRI countries.[65] However, the process of developing hard-law instruments may encounter the obstacle of harmonising the BRI countries' different legal systems and attitudes towards specific norms which, by the way, is exactly the same reason why a hard law-based structure for the BRI was not pursued in the very first place.

In addition, in terms of disputes' settlement, the huge spectrum of matters the BRI covers is contributing to a constant evolution of Chinese Courts towards a wider internationalisation with the objective of protecting Chinese investments addressed to the BRI countries. As for the dispute settlement mechanisms, it appears necessary to codify standard norms from the BRI-related disputes[66] which have been settled by international arbitration tribunals and international commercial courts because these guiding cases can provide useful suggestions on deeply improving the Initiative's smoothness from a legal perspective. The evolution process of internationalisation of the Chinese Courts, the aspiration of promoting China as the centre of BRI-related disputes' resolution by increasing the confidence international partners have in the Chinese Courts' conduct, the Chinese Courts' wider application of norms contained in related treaties and Chinese standards, the possible establishment of international commercial courts based on Chinese standards, and the indispensable reciprocity between the BRI countries' different jurisdictions cannot be achieved without considering the necessary hardening of soft-law norms through an institutional development's process. Among these issues, the most delicate one is certainly the formation of Chinese standards-based international commercial courts because understandable doubts may rise not only on the legal framework these courts should be established on, but also on practical matters such as the choice of the applicable

[65] *See supra* note 46.

[66] For a list of guiding cases, *see* Stanford Law School China Guiding Cases Project, *B&R Cases Archive - China Guiding Cases Project*. Available at https://cgc.law.stanford.edu/ (Accessed February 1, 2024). The database contains around 100 guiding cases in perspective with commentaries and 20 BRI typical cases.

law in the specific cases, the criteria of selection of the judges, and the perceived integrity and reputation of the courts.

5. Conclusion

This paper aimed to thoroughly explain the concept of Treaties' Dilemma the author elaborated to describe why the BRI has a soft-law based legal architecture and was not established through a treaty or a series of treaties. Actually, the Treaties' Dilemma was proposed to clarify the reasons why treaties, as one of the main source of international law, can be perceived as less attractive international legal instruments compared to others (soft law's tools), with specific regard to the establishment of new multilateral partnerships. In this regard, it was shown that, in the negotiation and formation process, it is necessary to take into account treaties' inversely proportional relationship between formality and flexibility and directly proportional relationship between complexity and commitment. Besides, the theoretical description of the Treaties' Dilemma was supported by references to the BRI and comments on the examination of the advantages and disadvantages of its non-treaty-based configuration in the short and in the long term.

Above Section 4 presented economic-based explanations of the Treaties' Dilemma which, in this last part, the author intends to provide valid answers and feasible solutions to. In the analysis, it emerged that the concept of transactions costs is one of the most significant factors states consider when deciding to formalise agreements either through hard law's instruments or soft law's tools. It also came to light that the concept of opportunity costs plays an extremely relevant role in the interpretation of the Treaties' Dilemma and investment management offers an interesting clarification on how to resolve it, referring to the fundamental principle which relates investments' risk, return, and time. In particular, the adoption of an economic-based approach can be of great help for the parties in the evaluation of the potential costs and benefits of creating relationships between each other regulated by international law either through the establishment of a hard law's instrument or the development of a soft law's tool from an opportunity costs-based perspective. Hence, the implementation of an accurate Transaction Costs' Analysis and Costs-benefits Analysis can support the parties in becoming objectively aware of the necessary resources and level of commitment in the formation of an interstate relationship which is necessarily characterised by the trade-off between formality and flexibility and complexity and commitment.

The author goes even further to affirm that the application of the Game Theory can facilitate the parties to identify the possible (Nash) equilibria between each other in the attempt to reach a Pareto efficient equilibrium through a hard law's instrument or a soft law's tool. In addition, the adoption of a Scenario planning-based approach can help the parties to consider *ex ante* the potential alternatives which may emerge *ex post*, taking into account the future evolution paths of the interstate relationship so to examine in depth the decisions to be made in advance to assure the most effective and efficient outcome later. All these suggestions confirm that the application of an economic-based approach can substantially offer practicable ways to resolve the Treaties' Dilemma, corroborating the necessity and relevance of the application of the economic analysis as valid approach to examine treaties and treaties-related issues and providing solid justifications for the emersion of an independent field of research, the Economic Analysis of Treaties, in the ampler area of the Economic Analysis of International Law.

More practically, through the examination of the case of the BRI, the author proposed that the Treaties' Dilemma can be generally resolved through an initial configuration of the relationship between two or more states regulated through a soft law's tool which may then evolve into a hard law's instrument. Thus, the application of an economic-based approach can be helpful to indicate the most appropriate timing and modalities of such a transition. In this regard, the perception of a party or all the involved parties that the time to transform their relationship from a soft law-based one to a hard law-based one has actually come depends on the consideration of this transition as phase necessary to the obtainment of the parties' final goal. Here again, an economic-based approach can be applied by the parties to evaluate advantages and disadvantages of such transition from an economic perspective. In particular, economic theories and concepts can support or dissuade the parties to 'harden' their relationship according to economic considerations of efficiency and effectiveness in both the short and long term and practically smooth the problems related to the parties' reputation in the long term, the minimisation of the involved risks, and the management of the economies of network.

The BRI is still in its adolescence. The initial stage of its development not only has been characterised by the promotion of soft-law tools, but has also marked its clear FTA-based orientation. This approach perfectly matches up with the gradual, case-by-case-oriented, and scientific and experimental practice China has adopted since the

implementation of the Reform and Opening Up Policy of 1978,[67] when developing the Economic Development Zones (EDZs),[68] and still drives China's policies (both domestic and international). Actually, the practice of establishing EDZs where to experiment new policies in specific area of the country before adopting them nationwide has also been followed in the promotion of Free Trade Zones in the BRI countries.

According to what was developed and shown in this paper, the author identified the BRI's inevitable transition from a soft law-based architecture to a hard law-based one in the next future as feasible (and inevitable) way to overcome the Treaties' Dilemma. In fact, he is confident that, in the near future (perhaps after 15 or 20 years from the Initiative's launch), it will be necessary for the BRI's soft law-based structure to evolve into an institutional one, formalised by the mean of treaties not only through the translation of soft-law provisions into hard-law rules, but also through the promotion of municipal norms or norms expressly elaborated by China as new standards with the final objective of creating specific (tailored) norms to govern the Initiative and all its related projects and plans. The reasons which push the author to be inclined to this position can be summarised as follows. A less-institutionalised structure can maximise the benefits of economies of network just in the short term, while may create problems in the long term; a multilateral trade and infrastructural initiative, as complex as the BRI and involving huge amounts of investments, cannot remain just a forum but has unavoidably to evolve in a structured institution characterised by rules formalised through hard law's instruments; and a larger number of disputes which will arise on BRI-related issues must be addressed and resolved by a specialised dispute settlement mechanism (created through a treaty) to assure high levels of efficiency and legality. Therefore, China could not avoid but face the Treaties' Dilemma which, until now, has just postponed to the future in order to enjoy the present benefits of the BRI's temporary non-institutionalised legal framework.

[67] The Reform and Opening-Up Policy (*Gaige kaifang*, 改革开放) was a set of radical reforms implemented by Chairman Deng Xiaoping (邓小平) (1904-1997) in December 1978 with the objective of boosting China's economy. These reforms put the bases for the profound and fast economic and industrial development which characterised China in the last decades of the XX century and the first of the XXI century.

[68] Since 1988 when the first EDZ was created in Dalian (a major city of Liaoning province), this model was replicated for more than 200 times with the aim to create a fertile environment for business opportunities in specific underdeveloped urban areas of China. The deep similarities between the EDZs and the Free Trade Zones reinforce the perception of a *leitmotif* between the Reform and Opening-Up Policy of 1978 and the BRI promoted 35 years later. *See* Colombo, A Multidisciplinary Analysis of the Belt and Road Initiative, *supra* note 27, p. 15.

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