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# Chinese Law and Development: Implications for US Rule of Law Programs

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## Abstract

China is emerging as an alternative source for law and development for low-income and middle-income states. This is despite its conventional reluctance to engage in policy export abroad and, more immediately, its slowing economy, calcified rule, and a somewhat deprioritized foreign policy in the post-COVID era. A number of supply and demand factors account for the increasingly important role of law in its global development. On the supply side, against the backdrop of the decade-old “Belt and Road Initiative” and newer initiatives including the Global Development Initiative, Global Security Initiative, and Global Civilization Initiative, China is becoming increasingly assertive in offering “Chinese-style modernization” to host states in the Global South, part of which includes policy and law diffusion. Specifically, the Party-State has endorsed what is called “foreign-related ‘rule of law’” which is a bi-directional policy initiative that seeks to both integrate more foreign law into the Chinese legal system and also incorporate more Chinese law into foreign and international law. Beyond the political bluster and political signalling, there is evidence of such initiatives affecting legal practice and institutions. Legal organs are creating transnational networks with lawyers, judges, and businesspeople in host states to mitigate investment risk, share resources, and problem solve. Some of these networks have led to the establishment of legal institutions which, even if primarily symbolic, may gain traction over time. On the demand side, which is arguably more salient, host states value Chinese industrial policy, governance strategies, and digital ecosystem as facilitative of China’s economic growth model, of which law and regulation is part. Hence, host states borrow from Chinese law, policy, and standards. Even where China is not intentionally seeking to export its law, by the sheer size of its economic footprint in smaller states, the Chinese presence may have unintended effects on the domestic legal system. In the long run, these innovations may promote South-South solidarity but they may just as likely support the commercial and geo-strategic interests of Chinese enterprises which may have aggregate effects on access to justice, procedural transparency, and human rights in vulnerable states. How should US promoters of rule of law respond to Chinese law and development? While it is still early days for China’s legal development abroad, US policymakers should start thinking now about how to confront Chinese law and development, how to

work with host states on building local knowledge about Chinese law, and where the US may even learn from China's experimental efforts.

## Policy Implications and Key Takeaways

- Whereas the US has held a privileged position in legal development assistance in the past several decades, it is no longer the only donor and needs to prepare for a more active China in this field. Against the backdrop of an increasingly visible China in the Middle East, Latin America, Central Asia, and Indo-Pacific in the post-COVID era, the normative resources of Chinese governance, including law, policy, and standards, hold some attraction to elites in nondemocratic or weakly democratic states.
- Rather than mimic what China is doing, which is, to some degrees the US approach in development generally (e.g., the Build Back Better World and Blue Dot Network are billed as alternatives to the Belt and Road Initiative), the US should build on its traditional strengths in supporting local actors in host states who are promoting rule of law. In fact, the US should not blunt its rule of law and democratization edge; the message needs to be communicated both more decisively and more broadly.
- Whereas the US has rejected engagement with certain regimes as a matter of principle, for example, as reflected in the Biden Administration's 2022 National Security Strategy with its emphasis on competition between democracies and autocracies, it may want to engage more coherently with those states on matters of legal development. Many states are trying to hedge between the US and China in a "decoupled" or "de-risked" world. Rather than non-engagement with those states, the US needs to develop long-term and comprehensive strategies to support rule of law in those states.
- China's efforts to nudge international law, especially international economic law, towards its own commercial and geo-strategic interests, which is one dimension of Chinese law and development, may present

a long-term challenge to US interests. The US needs to “ally shore” not just other G7 states but also emerging economies within multilateral organizations and international law bodies.

- The US needs to improve its record of access to justice and quality of rule of law at home to avoid charges of hypocrisy. As part of this, state and federal legislatures must reject out-of-hand laws which discriminate against Chinese in the US, for example, in terms of their right to purchase real estate. Such discriminatory laws significantly erode the rule of law in the US. The US can only engage in rule of law promotion abroad when it has sufficiently addressed such instances of injustice on its own soil.
- The US needs to stimulate innovation both within would-be partner states and also domestically. As to the former, a greater focus on building communities on the ground that can help communicate local needs is critical. Problem-based approaches should supersede mere technical programming. One dimension of the problem-based approach is being more actively part of local knowledge production about China’s footprint in-country. As to the latter (domestic innovation), members of the legal industry in the US have not yet sufficiently tapped the deep symbolic capital of US legal institutions to build connections with partner states, for example, through dispute resolution networks. In short, the US can learn from what China is doing without following its agenda.

## Introduction

In the years following the 2008 world financial crisis, China became the largest trading country, one of the largest outbound investors, and the largest aid donor in the world. These trends accelerated with the launch of the decade-old “Belt and Road Initiative” (BRI), a program to create “connectivity” between the Chinese economy and those of partner states mainly in low-income and middle-income countries throughout the world through infrastructure and energy projects. Along with its increasing economic footprint throughout the world and especially in developing states, and despite its conventional reluctance to engage in the domestic affairs of host states and its own economic slow-down, China is becoming a player in the “law and development” industry. Most broadly, law and development refers to policy prescriptions for legal reform to facilitate economic growth. While it is still early days for China’s emerging role as a home state for law and development and China’s approach varies in important ways from traditional Anglo-American donors, this trend is likely to continue and has implications for US rule of law programs.

The People’s Republic of China (PRC or China) is, at least rhetorically, committed to reforming global governance.<sup>1</sup> In recent years, the PRC has launched the China Development Initiative, China Security Initiative, and China Civilization Initiative, which have built on relationships established through the BRI, and which promote China’s norms through existing and new multilateral efforts. Bilaterally, along with China’s capital export, China’s influence in recipient countries has grown considerably, and will likely continue to do so given recent diplomatic overtures and the push for “Chinese-style modernization.” Scholars have studied these evolving relationships through a number of lenses including, notably, international relations, diplomacy, lending practices, and “soft power,” among others.<sup>2</sup> Many of these are undergirded by law; in fact, law serve as a blueprint for such relationships by identifying parties’ rights and obligations, the terms by which agreements are made, and how the parties’ relationship is affected by disputes. In the Chinese context, formal law works adjacent to other sources of norms including policy, soft law, and technical and industrial standards, all of which can shape not only the bilateral relationship between China and host state but also, potentially, the host state’s legal and regulatory regimes.

This report, funded by the Carnegie Corporation of New York, focuses on a subset of a broader project, the “China, Law and Development” (CLD) project, based at the University of Oxford. A multi-disciplinary and international team of researchers with a background in law and social sciences have examined the role of law in China’s global development.<sup>3</sup> This includes two levels of analysis: international and transnational law as well as the internal legal orders of host states that rely on Chinese capital. Started in 2019, the CLD project has collected empirical data from host states throughout the world, mainly low-income and middle-income states, as well as from the People’s Republic of China (PRC or China). As part of this larger project, this report identifies the key findings to date as pertains to legal development assistance, including China’s approach to bilateral development assistance as well as providing a typology of how Chinese parties are engaging with different areas of international law. The report also provides a set of policy responses for US rule of law programs.

## **The Background**

China is a non-traditional legal donor and, in fact, its role in affecting change in other legal systems defies conventional definitions of legal development assistance. As traditionally understood, legal development assistance is a strategy by developed countries to provide advice and capacity-building to less developed or developing countries for a variety of reasons.<sup>4</sup> These include the diplomatic importance of the bilateral relationship, historical ties, the volume of trade and investment between the countries, presence of cross-border diaspora, whether the host country functions as a satellite state for the host, and other causes. Specific support may take the form of providing expertise to draft legislation, advising on constitutional reform, reforming civil or criminal procedures, establishing law school curriculums, designing legal aid, providing training for lawyers, judges, and other legal experts, and establishing academic exchange. A number of countries provide such assistance, including the United States, United Kingdom, Germany, Japan, South Korea, and Singapore. International financial institutions such as the World Bank and International Monetary Fund as well as regional development banks are also important actors in legal development assistance usually through conditions imposed on recipient states in the course of borrowing loans.

The academic field that studies legal development assistance is called “law and development” and, reflecting its large role in the field, has been dominated by the United States.<sup>5</sup> Starting in the 1960s, different types of US institutional actors such as the USAID and Ford Foundation but also prominent legal scholars at elite law schools began advising developing states in Latin America on how legal reform could stimulate economic growth.<sup>6</sup> These actors brought with them certain assumptions about the nature of law, the adversarial process, and the relative roles of the state and the market.<sup>7</sup> While these projects had a mixed record, law and development was given a boost in the 1990s through the “rule of law revival” which expanded such projects into Asia and former Soviet states to provide legal development support to transitional economies.<sup>8</sup> Projects were informed by neoliberal prescriptions, and showed varied adaptation to local circumstances. Contemporaneous with such legal development assistance, US law in particular was gaining more importance in international transactions and international law through globalizing US law firms and the US’s ascendant position in multilateral organizations like the United Nations and NATO as well as its close links to the international financial institutions.<sup>9</sup>

China’s entry into the field of law and development, including its integration into international law, has very different origins from that of the United States. China was classified as a developing country in the 1960s and was a major recipient of World Bank and Asian Development Bank loans.<sup>10</sup> Despite the fact that China’s own planned economy was only just industrializing at the time, and further, despite the fact that the PRC was undergoing domestic turmoil during the Cultural Revolution (1966–1976), nonetheless, the PRC became a donor to less developed states.<sup>11</sup> The main reason for China’s early entry into the development field was the interpretation of Marxist-Leninist principles by Mao Zedong and the Chinese Communist Party (CCP), specifically, Third World solidarity against imperialism. Afro-Asian connections were particularly vibrant following the Bandung Conference of 1955 and the establishment of the Asian African Legal Consultative Organization a year later. Chinese overseas projects followed. For instance, the PRC issued an interest-free loan of about a billion yuan to Tanzania and Zambia to finance the construction of the Tazara Railway between 1970 and 1975, and not only financed the project but built it with its own laborers.<sup>12</sup> Tazara became the first of many such mega infrastructure projects in Africa. Notably, these were

not legal development assistance, which is an important distinction from the US experience.

There are two main reasons to help explain why China has been an “infrastructure first, law second” donor. First, the PRC has valorized the principle of non-interference in its foreign policy and perceives non-interference to be the bedrock norm of international law.<sup>13</sup> China’s position reflects its own experience of “semi-colonialism” during the late Qing dynasty when Western powers imposed extraterritorial jurisdiction on parts of south-eastern China and also China’s sensitivity about Tibet, Xinjiang, Hong Kong, and Taiwan. The second reason is that law is itself not a privileged category in Chinese political culture; rather, policy and even Party campaigns have often been more commonly used methods of social control than formal law.<sup>14</sup> As a result, compared to American evangelicalism in terms of its law, China has not traditionally shown such levels of confidence. However, both these two factors are changing.

Given China’s deepening footprint in many host states, some of which are high-risk investment environments, China’s adherence to non-interference is slackening in practice. For instance, the PRC or its proxies have favoured certain politicians and political parties in host states, installed security forces, mediated cross-border disputes, and engaged in overseas arrests and rendition without extradition treaties in place. As for law, in recent years, the PRC has attached much more importance to formal law. The 2014 Fourth Plenum of the 18th Central Committee of the CCP, colloquially called the “rule of law plenum” marks one milestone in this recent history, with another being the 2020 launch of the “foreign-related ‘rule of law’” (*shewai fazhi*) initiative.<sup>15</sup> Hence, these obstacles to a more proactive legal development assistance approach are somewhat muted. This is particularly true under the push for “Chinese-style modernization” (*Zhongguo shi xiandaihua*) which Xi has touted as a corrective to Western modernization, although the contents of his alternative remain vague.<sup>16</sup> Still, while China has studied US and other developed economies’ methods to supporting legal development overseas, China demonstrates a range of approaches that diverge from the orthodoxy.

Against this backdrop, the CLD project has sought to understand how Chinese authorities engage in the field of law and development. To be clear, the use of law and development in the CLD project refers to not just bilateral



assistance<sup>17</sup> but also the extent to which China may “nudge” international law norms, practices, and principles towards its own interests.<sup>18</sup> The two levels are related as international investment law frameworks, for example, can shape bilateral investment. As for the latter category of international law, international economic law, including trade and investment, has been the primary focus, although we view these issues as intrinsically related to questions of public international law, including human rights.

As a subset of the larger CLD project, research questions pertinent to this report include:

1. Is there a strategy of legal development that China promotes overseas?
2. What are the specific methods or mechanisms used to support China’s version of legality abroad?
3. How do host states respond to such efforts?
4. What are the effects—intentional or otherwise—of Chinese projects in recipient states?
5. How do institutional actors seek to change different areas of international law?
6. What are the lessons that non-Chinese stakeholders (e.g., host states and American proponents of rule of law) need to know?

To address these questions, the CLD research team has conducted long-term qualitative fieldwork in a number of countries, both host and home states. In the following section, I describe the methodology and data before discussing the preliminary findings.

## **Methodology and Data**

The CLD research team has been conducting research since 2019. The COVID-19 pandemic negatively affected both the method and object of the

study. First, the research design focused on qualitative data to develop comparative case studies. This research design was, in turn, predicated on long-term immersive fieldwork and international travel. Visa bans and travel restrictions thus curtailed our ability to do research and delayed much of the fieldwork. Second, as the economic relationships are first and foremost, with law a trailing consideration, the project has been dependent on the amounts of capital export over the course of the last several years, and the amounts were likely affected over the course of the pandemic.

For example, whereas the official statistics from the PRC Ministry of Commerce indicate that Chinese overseas direct investment (ODI) remained constant over the course of the pandemic, non-Chinese scholars have suggested that Chinese ODI dropped by some 60 percent.<sup>19</sup> According to both the World Bank and the United Nations Conference on Trade and Development, China's trade exports increased over the course of the pandemic while its imports slightly declined.<sup>20</sup> Chinese aid is notoriously difficult to track given that it is considered a state secret and thus figures are not made public. While the pandemic certainly rerouted central and provincial budgetary expenditures toward disease mitigation and recovery, China remains a major economy. Beijing's recent diplomatic overtures in the Middle East, Latin America, and Central Asia all suggest that China's relationships with emerging markets in the Global South will continue to grow in the post-pandemic period.

To collect data on how law may be playing a role in China's overseas development projects, the CLD research team, comprised of interdisciplinary scholars working at the intersection of law and the social sciences, conducted empirical data in China and in host states on the processes and effects of China's growing footprint in international law and the law of host states. Research produced by the CLD research team is available on the CLD website <https://cld.web.ox.ac.uk/> and has been published in a number of academic and policy-relevant outputs.<sup>21</sup> Drawing from long-term qualitative fieldwork in a number of countries, this report summarizes some of those findings with respect to both what China is doing; the report further suggests how the US may respond. With this description of the research design, the next section turns to some of the preliminary findings.

## Investment Risk Mitigation

One of the primary drivers for Chinese law and development is to mitigate investment risk in the host state. The BRI, for example, covers some of the riskiest countries in the world.<sup>22</sup> Chinese investors face different types of risks in different countries, including economic, political, compliance, and legal risks. The great range of countries China is actively conducting business in present a similar diversity of such risks. Each country presents its own (different levels of) challenges.

Given the profile of investment destinations, one immediate question pertains to the nature of Chinese investment. Chinese state-owned enterprises (SOEs) and private companies have different levels of risk tolerance. Chinese SOEs in energy, construction, and telecommunications, for example, have been the vanguard of the BRI projects. Chinese SOEs are generally perceived to be instrumentalities of the state and carry out geo-strategic (and not just commercial) functions of the government.<sup>23</sup> Their risk tolerance appears higher (sometimes significantly so) compared to private companies. Oftentimes, Chinese embassies and consulates in host states will try to mediate in problems encountered by Chinese SOEs as one strategy of mitigating loss. At the end of the day, however, Chinese SOEs can bear significant economic losses in the course of their business abroad.

This calculation is different for private companies. First, the question of whether any company is truly “private” is a challenging one. Even if not “public” in terms of ownership, the PRC government and the CCP may have means of controlling nominally private companies through various horizontal linkages between the corporation and state or Party units.<sup>24</sup> Many Chinese managers may also wear “two hats” meaning they may have a position in a governmental or Party capacity. This is not to say that the CCP dictates everyday matters in private companies, but it may have oversight over major business decisions, such as investing in politically sensitive projects.

With a view to the complicated relationships between the Party-State, on the one hand, and SOEs and private companies, on the other hand, Chinese ODI to some degree challenges the conventional notion of “investment” in terms of acquiring an asset with the aim of obtaining appreciated value given that commercial logic does not always apply to Chinese projects. The clearest example of this is the China-Pakistan Economic Corridor, valued at some \$62

billion, which has struggled through regime change, labor strikes, extensive delays on the part of local governments, charges of “debt traps,” fatal terrorist attacks, and extensive litigation—all reasons why most investors would have cut their losses, and yet the Chinese remain. Clearly geo-strategic aims justify China’s losses.

In terms of the nature of the risks Chinese face in the course of their projects, one consistent source of economic and reputational damage has been domestic legal systems of host states. Chinese companies have repeatedly bemoaned the underdeveloped state of host state law.<sup>25</sup> Specifically, they complain about judicial corruption, bureaucratic morass, time delays, exorbitant costs, and distrust of local lawyers to name a few concerns. Chinese investors have three possible responses to the problem of local law: change it, avoid it, or lump it. Chinese are generally reluctant to do the first, although this is changing, as discussed below.

They evade it when they can, and this usually takes the form of choosing international commercial arbitration in their business contracts. By its nature, international commercial arbitration bypasses local courts as parties have autonomy to decide where their arbitration is seated, and therefore what law applies to the proceedings. Arbitration is conducted through a kind of “private order” that is independent of the court system belonging to the jurisdiction wherein the parties are doing business and the arbitration award is confidential, meaning that parties do not air their dirty laundry out in the public. As a result, Chinese have become strong exponents of international commercial arbitration. They often use Hong Kong or Singapore as seats or, when possible, a Chinese city, although the opposing party may balk at the idea. The Chinese have also developed their own international litigation capabilities to deal with the same problem of local courts. Not only has China established the much-discussed China International Commercial Court, but has also built municipal-level international courts in over ten cities across the country. While many of these new institutions are primarily symbolic in nature, they may gain some level of traction among parties overtime as stakeholders improve institutional capacity and proficiency. Lastly, China has pushed business mediation as an alternative to local courts. China prides itself on its long history of “popular mediation” (i.e., grassroots mediation conducted to address interpersonal disputes) and while business

or commercial mediation differs from the Chinese-style popular type, the government, chambers of commerce, and the legal services industry have created a number of mediation centers for cross-border disputes. However, as with arbitration and international courts, there is likely an over-supply of commercial mediation centers.

Chinese companies also lump it when it comes to suits in local courts of host states, meaning that they simply accept the costs, financial, reputational, and otherwise, as part of their long-term presence in (and commitment to) that jurisdiction. The CLD project has collected a number of cases across the Global South that prove that Chinese companies face a steep hill in navigating local forms of justice. Lawsuits run the gamut from civil and commercial (contractual, breach of duty, IP, product liability, privacy, etc.), public and administrative (regulatory, enforcement, tax, public procurement), torts (wrongful death, assault, etc.), and criminal law (smuggling, drugs, corruption and bribery, etc.). From the number and frequency of the suits, it is clear that there are widespread problems in Chinese firms' adaptation to local jurisdictions. While Chinese parties have opted for more informal and indirect approaches to deal with these problems, occasionally, they change the host states' formal laws or there are unintentional knock-on effects of their presence, as I show below.

## Networked Justice

One of the defining features of Chinese law is its relationality. This is the idea that law is embedded in social relationships, and those relationships are more important than legal rights or redress for harm. Scholars have noted the networked nature of the legal profession in China, including judges, lawyers, and other experts.<sup>26</sup> Networks are both a seemingly naturally-occurring feature of the legal profession in China and also a concerted effort by members of the network. These networks are extending outside of China, suggesting that *guanxi* (what are perceived to be distinctively Chinese social ties) can also be cross-cultural.

A number of actors in China are building transnational networks. On the governmental side, the China Law Society, Supreme People's Court, Supreme People's Procuratorate, All China Lawyers Association, the Ministry of

Justice, National Judges College, and Ministry of Foreign Affairs are all creating professional networks. They do so by holding conferences, trainings, and other cooperative events, which were held online during the pandemic. Foreign lawyers attend the sessions to learn about developments in Chinese law (especially law and technology like smart courts). While content is usually more bread-and-butter such as Chinese commercial law, Chinese constitutional law, and the like, it can also be ideological as in the instance of “Xi Jinping Rule of Law Thought” being taught to foreign judges in the National Judicial College trainings. The events that bring the networks together can be mainly ceremonial, but the resulting networks can be instrumental for cross-border business. Both trainer and trainees have said that the people they met through the network have helped them on a variety of matters, whether referrals for local counsel, identifying potential clients, or for contacting relevant officials.

Sometimes, networks may lead to legal change and even institutional outcomes. For example, it was trainings of Uzbek officials along with members from 35 other BRI countries on cyberspace, big data, and media management in 2019 that led those Uzbek officials to introduce a Data Protection Law and bylaws later that year. As with most recipient states, Uzbekistan looked to a number of different sources of law in promulgating its own law and yet the Ministry of Justice put particular emphasis on legal cooperation with the PRC. Similarly, it was the traveling back and forth of political elites in Cambodia to China that led to the borrowing of language in the Chinese Constitution for amendments to the Cambodian Constitution in 2018. Those amendments made Cambodia the only other country in the world, other than China, to include a specific prohibition against actions by citizens that can be construed as having a negative impact on state interests. A third example comes from Vietnam where consultants from Shenzhen travelled to Hanoi to advise the Vietnamese on drafting a Special Economic Zone bill in 2018. While that bill ultimately failed due to popular protest fuelled by concerns that Chinese investors were gaining preferential treatment, Vietnam’s Cybersecurity Law, also modelled, in part, on the Chinese version, was passed in that same year.<sup>27</sup> A final example is the China-Africa Joint Arbitration Centre (CAJAC) which was founded in 2015 in Johannesburg after extensive consultation with Chinese arbitrators and in fact the earliest

version of CAJAC's institutional rules borrowed extensively from those of the Shenzhen Court of International Arbitration.<sup>28</sup> In each instance, transnational networks led to legal or institutional change in the recipient state. While some of these new institutions, like CAJAC, are often more about signalling collaboration than functional competence, they should not be dismissed prematurely and may grow in the future.

## Chinese Views on International Law

China's and its host states' networked method to introducing legal change is reflected, in part, in China's approach to international law. International law, especially international economic law (i.e., trade and investment) provide frameworks for China's overseas development projects. For instance, China has entered into more bilateral investment treaties (BITs) than any other country except for Germany. The PRC has also entered into a large number of free trade agreements (FTAs), including the Regional Comprehensive Economic Partnership (RCEP), the largest free trade agreement in the world. For the most part, scholars have viewed China's adoption of these instruments as no different from any other state.<sup>29</sup> Indeed, in some regards, China acts like (developed) home or donor states.<sup>30</sup>

This may be true, for the most part, in terms of China's approach to international economic law, but once the top layer of international investment agreements are peeled back and the analysis focuses on more granular aspects of practice, then the story becomes more complicated. In line with this, Chinese parties have varying approaches to different areas of international law. Briefly, I summarize them as: status quo power (international economic law, health law, environmental law), revisionist power (public international law, boundary disputes), and first-comer advantage in "frontier" (*qianyan*) areas of international law (data governance, global emissions, green finance, IP standards, health, international law enforcement, maritime, space, and oil and gas). China's different approaches to these areas depends on a number of factors, including its foreign affairs priorities, domestic policy needs, relative experience and capacity, and competitive advantage of the U.S. and other non-allies. Given space constraints for this report, I will not be able to provide a comprehensive assessment of each area; rather, I provide a basic characterization.

In terms of international economic law, which again, is the main area of law involved in China's integration into the world economy, China has for the most part been a supporter of the status quo. China's ascension to the WTO in 2001 came at a significant cost as the "WTO-plus obligations" were exacting and heavy, much more so than was the case for other members.<sup>31</sup> Yet China accepted them and gained proficiency in the relevant rules over the last two decades.<sup>32</sup> It is clear that the US takes issue with some of China's interpretation and application of those rules, especially in terms of the lightning rod issues of subsidies and anti-dumping.<sup>33</sup> Hence, there are apparent differences in terms of how a "state capitalist" system views trade law. In addition to these, and below the level of BITs and FTAs, China has built a thick lattice-work of soft law, including memoranda of understanding (MOUs) and memoranda of guidance (MOGs). These sources of soft law permit more flexibility, adaptability, and, frankly, non-transparency, than public-facing treaties or contractual agreements.<sup>34</sup> While below the MOUs and MOGs, there may be yet another layer of contracts (e.g., EPC contracts and sub-contracts). Yet the soft law layer is instrumental as it allows the parties which are often the PRC government and the host state government to create a framework for transactions, including their financial terms, which is outside the public domain, effectively excluding regulators, civil society, affected stakeholders, and so on. While Western governments and parties also use MOUs, the Chinese practice is much more extensive particularly in the context of the BRI.

China is more active in trying to shape international law in other areas, for example public international law, namely human rights. Starting in 2017, the PRC has supported a number of resolutions that have been adopted by the United Nations Human Rights Council (UNHRC) proposing the idea of "the contribution of development to the enjoyment of all human rights" (CDEHR). The CDEHR is a Chinese innovation although it overlaps with the "right to development" which originated with African initiatives in the 1960s. The CDEHR identifies development, understood chiefly in socio-economic terms, as a foundational human right, that is, human rights cannot exist without development. The prioritization of development creates a degree of hierarchy within human rights and addresses a long-standing interpretive difference between Western liberal proponents of human rights and Chinese ones, often inspired by Marxist views.



The CDEHR has gained traction in the UNHRC. For example, on May 28, 2021, the UNHRC held a virtual seminar on “The Contribution of Development to the Enjoyment of All Human Rights” that featured speeches by not only the Permanent Representative of the PRC to the UN and Chinese intellectuals, but also the UN High Commissioner of Human Rights, representatives from Brazil and Pakistan, and Jeffrey Sachs of Columbia University. Along these lines, China has supported five regional seminars in developing countries to further popularize the concept of CDEHR. While it cannot be said that the CDEHR has gained a consensus support in the UNHRC or that it is shaping domestic law in host states, it does demonstrate the gradual change that Chinese delegates can bring to create alternative ideas in public international law.

Another third category is the “frontier” (*qianyan*) areas of law where China is informing international law norms and practices given that the areas of law are either relatively new or unsettled. Unlike certain areas of law like the law of war where the norms are long established, the twenty-first century has introduced increasingly complex problems relating to technology, artificial intelligence, environmental crisis, outer space, and global terrorist networks that require appropriate international law responses. China is leading the way in some of these emerging areas. One example is data governance. China is developing a regime of data governance laws that is in many ways more sophisticated than many other developed economies.<sup>35</sup> This regime includes not only formal legislation and governmental agencies that regulate data content, transfer, and storage, but also the very prominent role of Chinese technology companies which act as “infrastructural agents” overseas.<sup>36</sup> China’s data governance regime is having effects in host states that may have more nascent laws for data and privacy concerns, although it is not a story of simple domination of Chinese norms.<sup>37</sup>

In summary, on the question of China’s interpretation and application of international law as a developmental framework (domestically or overseas), the analysis has to drill down on specific areas. Different domains of law show different types of Chinese behavior. Transnational law and international law are not the only fields for Chinese activity, however, as it engages in questions of law and development abroad. There is yet another type of interaction with local law which is more inadvertent. I next turn to this question in the following section.

## Accidental Empire

One of the chief insights that has come out of the study of “Global China” in recent years is contrary to the narrative of Beijing’s “long game.” In fact, much of what happens is ad hoc, unplanned, and unpredictable.<sup>38</sup> Diverse actors have their own interests and agendas, and, while they may seek to promote these within the broad outlines of a Beijing initiative, (e.g., BRI, “Chinese-style modernization,” or “foreign-related ‘rule of law’”), they may also try to nudge those outlines themselves, carve out their own projects, and even compete against each other. This is very much the story of Western empires that expanded often not necessarily through top-down well-planned strategies but rather through exigencies of extending rule over domains where home state entities were based and whose interests were endangered in some way or another.<sup>39</sup> Related to this, actors can have inadvertent effects in host states. The main reason for this is that Chinese businesses bring capital, resources, technology, labor, managerial know-how, and other forms of organizational expertise. These may have unintended effects on local state systems and those systems may respond in ways that are not always knowable *ex ante*. In short, there is a grey space between intentional and unintended effects.

One area that highlights these questions is the special economic zones China is helping to establish in host states, and what the governing law is in those zones (SEZs). One narrative is that China applies its law extraterritorially to those zones to create jurisdictional carve-outs in challenging legal systems. While China has created such carve-outs in its own SEZs, China’s SEZs in bordering Southeast Asian states and in Africa do not necessarily have the same form or function as these other ones. China clearly has much more control over SEZs in its own territory as well as Hong Kong where the PRC Central Government is indeed restructuring the legal system. It can design or experiment with applicable rules, accordingly, whether tax, customs, duties, labor, immigration, dispute resolution, and so on.

Co-establishing SEZs in other sovereign states is a different matter and requires a different sort of calculation. On the one hand, it does seem that Chinese companies and Chinese law may be given some level of preference in certain SEZs in some countries. To be more precise, preferences for Chinese companies in terms of the bidding process for major construction contracts, for example, may exist outside of SEZs in host states. This is the case, at least, for Pakistan.

Yet, the question of which law applies in SEZs is a complicated one and is determined by state legislation and any additional regulations specific to SEZs. International agreements and MOUs may also shape legal regimes on the ground and this is where the non-transparency of some of the soft law sources factors in. Some evidence suggests that some soft law agreements provide exemptions for Chinese companies operating in the country and in its SEZs. Whether Chinese law applies is a separate question and may likewise be determined by soft law or informal agreement. A third question is whether Chinese public officials and investors pushed such exemptions and applicability of their law or if host states simply acceded extraterritoriality to them.

A fourth question is whether it is Chinese authorities or unofficial, and often, illicit Chinese actors, who push Chinese “extraterritoriality” in these SEZs. Fieldwork in Cambodia’s Sihanoukville SEZ, a joint venture between Chinese and Cambodian developers and approved in 2006, shows that it suffers from some of these negative externalities. Approximately six years after the SEZ’s founding, when Beijing rolled out its anticorruption campaign, some of south-eastern China’s criminal underworld, the “black society” (*hei shehui*), moved over the border to Cambodia and became active in a host of illegal and quasi-legal activities in the Sihanoukville SEZ including online gambling, human trafficking, and prostitution. Problems grew so alarming that in 2020, Hun Sen, the Prime Minister of Cambodia, had to ban online gambling, the economic lifeblood of much of the criminals’ presence, resulting in hundreds of thousands of Chinese leaving Sihanoukville. Such SEZs, then, are less Chinese legal carve-outs and more zones of lawlessness; they show the negative spill-over effects of Chinese law and political campaigns across borders. Meanwhile, local law enforcement either is ineffective or is itself benefiting from kickbacks. Either way, local communities suffer. There are similar accounts in countries like Laos, Thailand, Myanmar, and elsewhere.<sup>40</sup> In summary, usually, the deeper the analysis drills into the empirics of the context, the more complicated the picture becomes.

By way of another example, against a backdrop of indebtedness to China, Sri Lanka passed a controversial Colombo City Economic Zone Bill in 2021 that provides the governance structure for an SEZ financed by a subsidiary of China Communications Construction Company for a cost of \$1.4 billion in exchange for a 99-year lease from the Sri Lankan government. The

bill does not expressly provide for the application of Chinese law but it does propose an International Commercial Dispute Resolution Centre that would use arbitration, effectively ousting the jurisdiction of Sri Lankan courts. As discussed above, such dispute resolution mechanisms have been preferred by Chinese investors in the past, and the bill's provision opens the door to the use of Chinese law as governing law of arbitration pertaining to SEZ-related disputes. Yet, this possibility differs from the blanket application of Chinese law in the Sri Lankan SEZ. Many SEZs likely endorse choice of law provisions which similarly opens the door to the application of Chinese law without explicitly providing for the sole use of PRC law. To summarize: while *de jure* (even soft law "formal") extraterritorial application of Chinese law may be happening in certain circumstances, often Chinese law may *de facto* apply as a choice of law.

The question of intentionality, for example, who in the Sri Lankan example, pushed for the dispute resolution provision, and the role of Chinese investors, in particular, is hard to ascertain empirically. There is no question that Chinese authorities have deployed trade or economic coercion in some of its dealings with smaller states.<sup>41</sup> Host state initiatives to create carve-outs for Chinese parties may occur against these backdrops or may also occur under softer forms of influence and mutual desire to maintain the bilateral relationship. It is important to understand the difference as more accurate diagnoses can lead to better policy responses on the part of host states and the United States.

## Conclusion

It is still the early stage of Chinese law and development, a multi-pronged and evolving set of relationships between Chinese law, on the one hand, and foreign and international law, on the other hand, in the context of China's global development initiatives. It is important not to overstate what China is doing. China is not transplanting its "rule of law" system overseas through industrial policy transplant and extraterritorial jurisdiction. Likewise, China is not dominating local judges by indoctrinating them into Xi Jinping Rule of Law Thought. What China is doing is creating transnational networks of legal professionals to support its commercial and geo-strategic interests abroad; and some of these networks lead to institutional or legislative change in those

host state destinations. Moreover, the PRC authorities are creating platforms within the PRC to deal with more foreign law and international law issues in the course of cross-border business, including development projects.

Beyond the level of bilateral legal interactions, Chinese experts are active in most all major international law organizations, especially those for trade and investment. Chinese delegates are active in the UNCTAD, UNCITRAL Working Groups, industrial and standard setting organizations like the ISO, and, of course, the UN system. While it is a slippery slope to conclude that every PRC national working in such a capacity is furthering the interests of the CCP, and such equations are discriminatory, the Party-State's interests can be furthered through such activities.

If one zooms out and assesses the likely long-term effects of China's growing footprint in global governance through international and local host state law, then one can see China having more of a say in certain areas of law. The emerging "frontier" areas where China either has a first-comer advantage (e.g., AI regulation, data law, space law, etc.) or has focused its material and military resources to reshape or pre-empt the law (e.g., maritime law), are particular areas of concern. It is through these areas where China will seek to further its commercial and geo-strategic interests. In so doing, China is acting as any major state, yet what differentiates China from predecessor is the role of the CCP and its intolerance for freedom of speech, movement, belief, and other values privileged by Western liberal states.

At the level of local law in partner states, Chinese law and legal and political institutions may gain traction as host states seek alternatives to liberal law and institutions that appear less attractive than they did, say, a decade ago. Assuming China continues its economic growth (and, as of the time of the writing of this report, this is an assumption to underscore), then low-income and middle-income states, especially those in Southeast Asia, but also those in Africa and Latin America, may gravitate towards Beijing's approach to law and development. In the long-term, there may be more mimicry of China's authoritarian law in such jurisdictions, yet localized for specific jurisdictions with their own political, economic, and cultural exigencies. There may be legal development, but also *under*-development, as some of the unintended effects of China's version of economic globalization may erode host state regulatory systems or whatever checks and balances are in place.

In response, US lawmakers and policymakers must adopt a granular and empirically informed assessment of Chinese involvement either in host state or international institutions. Otherwise, they run the risk of forsaking the principles that make the US system what it is, namely, fairness, due process, and equality. Carrying those principles forward into US foreign policy on these matters remains more important than ever.

Host states are not passive vassals in the evolving de-risking landscape, and the United States needs to treat them accordingly. US actors can participate in the knowledge production about Chinese projects on the ground in these countries, and do so in a way that avoids the perception that the US experts are lecturing local counterparts. Rather, the United States can establish workshops to discuss common problems, and can also convene events that bring actors, including NGOs and activists from multiple jurisdiction together, so that they can learn from each other. One problem of Chinese law and development is that it tends to silo such actors and there is little cross-jurisdictional learning. The United States can help facilitate such new networks.

Along these lines, the United States can learn from what China is doing. At one level, Chinese authorities are trying to build dispute resolution institutions such as the China International Commercial Court that invite foreign experts, including those from developing states, to participate in proceedings. So far the China International Commercial Court has been more ceremonial than substantive, but there is value to what the Chinese purport to be doing. US rule of law promoters can also think more inclusively in terms of building platforms for sharing resources and expertise between and among states identified for development assistance. Inclusivity means inviting experts across racial, gendered, and nationality lines so that the United States can confront and disprove perceptions that its legal institutions are “male, pale, and stale” and exist to legitimize US hegemony. Conversely, the United States can make more of the deep symbolic capital of its own dispute resolution institutions and law schools, to generate more links with developing states through affiliations, partnerships, and programming. In addition to building new inclusive institutions that showcase American leadership, the United States needs to take seriously existing multilateral institutions and show true commitment.

Across areas of international law, there are opportunities for the United States to work with partner states to find equitable solutions to pressing

issues. Most immediately, given that environmental crisis is upon us and global warming represents perhaps the most urgent threat to development and human flourishing, the United States can more effectively implement the Paris Agreement. The United States can do so through its own enhanced emission reduction targets and clean energy investments. It can also foster international collaboration, including with the PRC, to share best practices and technological solutions. The United States can also be a champion of climate diplomacy and encourage other countries, including China, to enhance their own commitments to mitigating global warming and aligning their domestic laws and policies with the Paris Agreement.

The frontier areas of law also present opportunities. For example, the United States can become a leader in digital development. The Digital Economy Economic Partnership Agreement (DEPA), for example, promotes digital trade between small economies and has Chile, Singapore, and New Zealand as signatories. Large economies are not excluded, however, and China has already made inroads to accede to DEPA. The US has, thus far, shown little interest. If the United States did join, it would provide an important vehicle for the United States to demonstrate strategic engagement in the emerging field of digital trade and inclusion.

In short, there are a number of ways that the United States can continue to promote “rule of law” abroad, including through international law organizations. China has emerged as a newcomer to the area of legal development assistance. To date, many of its initiatives are marginally effective, but it is learning. The United States needs to take seriously what China is doing in this space—intentionally and in terms of the unintended knock-on effects. The United States can develop means to challenge China’s efforts, but it can and should also focus on means of collaboration. Development is not a zero-sum contest, and the most urgent problems of development, including poverty alleviation, environmental collapse, and inequality, may be too heavy a lift for either the United States or China working adversarially.

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## Notes

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