

CHINESE LAW AND DEVELOPMENT

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ABSTRACT

The trade war between the United States (U.S.) and the People's Republic of China (PRC) has attracted much attention. However, bilateral U.S.-China relations occur against the broader backdrop of the U.S.'s deglobalization and the advent of Chinese economic globalization. As China has emerged as the second largest capital-exporter in the world, the analysis must attune to how China is influencing legal development outside of China, particularly in developing countries. Whereas scholars have examined China's use of trade and investment law, inadequate attention has been paid to how the PRC grapples with the domestic law of host states. As the PRC seeks to protect its investments abroad, it is confronted with questions of law and development, yet there is little understanding of China's approach or what it means for host states and global governance.

This Article seeks to fill that gap. "Chinese law and development" (CLD) consists of transnational law, some of which builds on legal infrastructures from the U.S. and some of which is Chinese, along with extralegal and nonlegal norms. These normative orders mitigate risk as a precondition to promoting China's interests overseas. Drawing on three years of fieldwork and nearly 150 interviews in China and in host states, this Article presents the first empirical study of CLD to articulate an analytical theory to understand this phenomenon. In assessing CLD, I query whether CLD is good for developing states, and identify a research agenda for the study of the legal and regulatory dimensions of Chinese economic globalization.

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## *CHINESE LAW AND DEVELOPMENT*

Society Association Annual Conference in 2019, the University of Michigan Law School, the University of Oxford, and the Junior International Law Scholars Association workshop at Cornell Law School in 2020. The author thanks Pamela Bookman, Weidong Chen, Weitseng Chen, Jacques deLisle, Ha Do, Miriam Driessen, Shitong Qiao, Tom Ginsburg, Inna Hofman and Ji Li for reading earlier drafts. All errors are the author's.

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INTRODUCTION

In 2018, DP World Djibouti FZCO (“DP World”) sued China Merchants Port Holdings Company Limited (“China Merchants”) in the High Court of Hong Kong seeking damages, interest, and a declaration that China Merchants induced the Djibouti Government to breach concession agreements, which gave DP World exclusive control over all ports in Djibouti.<sup>1</sup> Djibouti rests on the Bab el Mandab Strait, a major corridor for maritime shipping, and is thus of high geostrategic value to a number of world powers, including the United States (U.S.) and the People’s Republic of China (PRC), which both have military bases located in the small African country. The concession agreements in question date to 2004 and provided DP World with control over Djibouti’s ports and free trade zones for a thirty-year period. After the Djibouti government became dissatisfied with DP World’s control in 2009 and alleged corruption in 2012, in that year, it signed an agreement with China Merchants for development of new ports and free zones. In 2013, Djibouti sold 23.5 percent of its 66.66 percent stake in the Doraleh Terminal to China Merchants. Beginning in 2014, China Merchants and Djibouti built a number of projects, including a \$3.5 billion free trade zone, launched in 2018.

In early 2018, Djibouti terminated the contract with DP World through a presidential decree and nationalized all assets, including portions owned by not just DP World but also China Merchants. Whereas the expropriation effectively terminated Djibouti’s relations with DP World, the government pursued its projects with China Merchants. In response, DP World sought arbitration against Djibouti in London,<sup>2</sup> arguing the government’s expropriation violated their concession agreements. Djibouti counter-claimed that the concession agreements contravene state sovereignty and national interests.<sup>3</sup> The tribunal upheld the contract between Djibouti and DP World and the High Court of England & Wales issued an injunction stopping Djibouti from terminating the relationship, but these orders went unenforced. Subsequently, DP World brought the suit in Hong Kong against China Merchants, the Hong Kong-based subsidiary of the state-owned China Merchants Group, based on a claim that China Merchants tortiously interfered with the concession agreement. The outcome is pending.

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<sup>1</sup> DP World Djibouti FZCO vs. China Merchants Port Holdings Company, High Court of the Hong Kong SAR HCA 1951/2018, [hereinafter, “DP World vs. China Merchants”],

<sup>2</sup> *Djibouti Ordered to Pay DP World \$530M in Port Dispute*, MARITIME EXECUTIVE (Apr. 5, 2019), <https://www.maritime-executive.com/article/djibouti-ordered-to-pay-dp-world-530m-in-port-dispute> (finding for DP World and ordering the Djibouti government to pay \$530 million in compensation).

<sup>3</sup> Abdi Latif Dahir, *A Legal Tussle Over a Strategic African Port Sets up a Challenge for China’s Belt and Road Plan*, QUARTZ AFRICA (Feb. 28, 2019), <https://qz.com/africa/1560998/djibouti-dp-world-port-case-challenges-chinas-belt-and-road/?fbclid=IwAR3hPYrkndf0ZdXOLWsFtaaDFf0fX0zcOdVUkpo7uL52EmS65tFS2v4DZwM>.

*DP World vs. China Merchants* has been seen as one of the first cases to put the “Belt and Road Initiative” (BRI) on trial. The BRI, announced in 2013 by Xi Jinping, is generally regarded as the most ambitious development plan in history, affecting some two-thirds of the globe’s population.<sup>4</sup> *DP World vs. China Merchants* shows the complexity of the BRI, which is driven by both commercial and geopolitical factors. Running through some of the most difficult investment environments in the world, with weak legal and regulatory regimes, the initiative has one constant: high risk. BRI supporters view *DP World vs. China Merchants* as a cautionary tale for Chinese enterprises, that is, both state-owned enterprises (SOEs) and privately-owned enterprises (POEs), “going out” (*zouchuqu*).<sup>5</sup> *China Merchants* appears to have been in the wrong place at the wrong time; DP World has been involved in legal disputes with the Djibouti government for years in advance of *China Merchants* entering the picture. Problems with the China-Djibouti relationship arose as a result of Djibouti’s internal politics,<sup>6</sup> a factor not uncommon in China’s investments in developing states. The case raises a number of questions for Chinese enterprises, including how to mitigate substantial legal, business, and political risks. Likewise, the conflict highlights concerns of many host states. It is estimated that Djibouti owes China the equivalent of about 44 percent of its GDP,<sup>7</sup> and *China Merchants* is none other than the port operator that obtained a 99-year lease of Hambantota in Sri Lanka, in a move with historical parallels to Great Britain’s 99-year lease of Hong Kong, subsequently under the control of the PRC.

These types of disputes are likely to increase as China is purported to become the world’s largest net creditor,<sup>8</sup> the first time in modern history that a nondemocratic state will be the largest capital exporter in the world.<sup>9</sup> In the context of the U.S.-China trade war, the focus of much of the discussion on Chinese overseas direct investment (CODI) is on the impact of CODI in the U.S.,<sup>10</sup> but it is likely that it is in developing states where the Chinese

<sup>4</sup> Chartered Institute of Building, FROM SILK ROAD TO SILICON ROAD: HOW THE BELT AND ROAD INITIATIVE WILL TRANSFORM THE GLOBAL ECONOMY (2019), <https://www.ciob.org/sites/default/files/CIOB-Cebr%20report%20-%20From%20Silk%20Road%20to%20Silicon%20Road.pdf> (stating, “The Belt and Road Initiative is the most ambitious and largest infrastructure project arguably in history and will eventually touch more than two-thirds of the world’s population across some 65 or more countries”).

<sup>5</sup> *DP World Suing China Merchants: A Sign of Good Health for the BRI?* OBOREUROPE (Feb. 21, 2019), <https://www.oboreurope.com/en/dp-world-china-merchants/>.

<sup>6</sup> See *infra* text accompanying note 14.

<sup>7</sup> *Legal Battle for Control of Djibouti Ports Comes to Hong Kong*, FACTWIRE (Feb. 12, 2019), <https://www.hongkongfp.com/2019/02/12/legal-battle-control-djibouti-ports-comes-hong-kong/>.

<sup>8</sup> David Dollar, *China as Global Investor*, ASIA WORKING GROUP PAPER 4 1 (2016).

<sup>9</sup> See Gu Guan-Fu, *Soviet Aid to the Third World an Analysis of Its Strategy*, 35 SOVIET STUD. 71, 74 (1983) (providing comparative figures of Soviet military and economic aid to Third World countries from 1955 to 1964).

<sup>10</sup> Karl P. Sauvnt, *Is the United States ready for FDI From China? Overview*, in

footprint will be most felt. *DP World vs. China Merchants* sheds lights on China's own approach to law and development or Chinese law and development (CLD).

CLD is defined by the following elements: (1) China has elected, thus far, not to engage in direct legal transplantation of PRC law; (2) rather, China integrates Chinese norms into international law and builds transnational law; (3) formal law is but one of several normative orders that China marshals to create security in the developing states in which it is investing; and (4) as such, this law and development work operates to avoid the "bad law," mainly the procedural law and dispute resolution forums, of host states. Taking these elements in turn, for the most part, CLD does not feature the direct exportation of PRC law to domestic legal systems, an approach taken by economic hegemonies in past waves of globalization. Rather, as a latecomer to law and development, China builds transnational law, in part by integrating its norms into existing legal infrastructures, and supplementing those with its own extralegal and nonlegal mechanisms. CLD thus functions to mitigate risk and facilitate commercial transactions that avoid domestic law.<sup>11</sup> In providing this provisional definition for CLD, I note the following caveats. First, as an analytical unit, "China" requires disaggregation: there are many different actors (e.g., state-owned enterprises, private companies, officials, service providers, etc.) who have different yet overlapping goals. Second, both Chinese actors and host states vary in how they adapt to each other in a process that is bi-directional and sometimes multi-directional. Third, CLD demonstrates a learning curve and, thus, there is change over time. I assume that whereas in the early period of CODI, Chinese enterprises may exhibit approaches to compliance similar to their domestic environment, this may not be the case in the long term. Nonetheless, despite these caveats, generalizable observations about CLD are possible and indeed warranted.

Law and development has historically been associated with the U.S., which from the 1960s onward has sought to export its notion of "rule of law" to developing economies in Latin America, Asia, and elsewhere. The goals of the U.S.-led law and development movements were, broadly, both commercial and political: to create environments for transactional security and to promote democracy. China is less interested in promoting political

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INVESTING IN THE UNITED STATES: IS THE US READY FOR FDI FROM CHINA? 1 (Karl P. Sauvant ed., 2009); Ji Li, *I Came, I saw, I . . . Adapted. An Empirical Study of Chinese Business Expansion in the U.S. and its Legal and Policy Implications*, 36 NW. J. INT'L L. & BUS. 143 (2016); Mark Feldman, *China's Outbound Foreign Direct Investment: The U.S. Experience*, 13 INT'L J. PUB. POL. 304 (2017); Ji Li, *THE CLASH OF CAPITALISMS? CHINESE COMPANIES IN THE UNITED STATES* (2018).

<sup>11</sup> By "transnational law," I mean law that regulates actions that transcend national frontiers and whose primary sources and actors are not states (although enterprises may be state-owned), and involved in transnational relations, as opposed to international law, which acts on states primarily through treaties. See PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956); Terence C. Halliday & Gregory Shaffer, *Introduction: Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 19 (Terence C. Halliday & Gregory Shaffer, eds., 2015).

reform abroad (in this case, authoritarianism); it is, however, focused on safeguarding its assets, investments, and nationals in host states. Law plays a part in this process—through international agreements and cross-border dispute resolution (mainly, international commercial arbitration and, secondarily, litigation).

More broadly, China is actively shaping international legal norms and practices through mobilizing existing international organizations, building new ones, selectively using international legal mechanisms, promoting the regional harmonization of law, and onshoring international disputes. As a result, China has emerged as norm-shaper in a number of fields of international economic law, including trade law, customs, investment law, tax law, and data law, as well as certain dimensions of international public law, such as immigration law and environmental law.

China's legal and judicial institutions are in many respects the vanguard of China's engagement with international law. These include state actors such as the Supreme People's Court (SPC) and China's arbitration commissions, which are expanding their capabilities to resolve cross-border disputes and matters that touch on foreign law, as well as private entities such as globalizing PRC law firms that offer legal services to Chinese enterprises investing outside of China. As a result, some scholars view China as constructing its own transnational law regime, a combination of private contracts and international investment agreements, which is changing the tectonic architecture of international economic law.<sup>12</sup> This "law positive" view, from the perspective of Beijing, underscores the role of formal law.<sup>13</sup>

On the other hand, the view from BRI host states, such as Djibouti, differs from the foregoing: much of the transactional substance of the BRI consists of confidential "government-to-government" deals, and features mainly SOEs whose interests are promoted through political negotiation and wherein problem-solving may be more prominent than formal law. Hence,

<sup>12</sup> Gregory Shaffer and Henry Gao, *A New Chinese Economic Law Order?* LEGAL STUD. RESEARCH PAPER SERIES NO. 2019-21, <https://ssrn.com/abstract=3370452> (last visited Aug. 1, 2019).

<sup>13</sup> See Liu Jingdong (刘敬东), "Yidaiyilu" Jianshe de fazhihua yu renmin fayuan de zhize ("一带一路"建设的法治化与人民法院的职责) [*Legalization and People's Court's Duties in the Construction of "One Belt One Road"*], 6 RENMIN FAZHI (人民法治) [PEOPLE'S RULE OF LAW] 16 (2015); Liu Jingdong (刘敬东) & Wang Lulu (王路路), "Yidaiyilu" changyi chuanguozhi guojifa de lujing yanjiu ("一带一路"倡议创制国际法的路径研究) [*Research on the Route for the Belt and Road Initiative's Creation of International Law*], 6 XUESHU LUNTAN (学术论坛) [Academic Forum] 13 (2018); Wang, Guiguo (王贵国), "Yidaiyilu" zhanlüe zhengduan jiejue jizhi ("一带一路"战略争端解决机制) [*"One Belt, One Road" Strategy Dispute Resolution Mechanism*], 10 ZHONGGUO FALÜ PINGLUN (中国法律) [China Law Commentary] 33 (2016); Shi Jingxia (石静霞) and Dong Nuan (董暖), "Yidaiyilu changyi" xia touzi zhengduan jiejue jizhi de goujian ('一带一路倡议'下投资争端解决机制的构建) [*The Construction of the Investment Dispute Resolution Mechanism under the BRI Proposal*] (last visited June 29, 2018), [http://www.pkulaw.cn:83/fulltext\\_form.aspx?Gid=1510186323&Db=qikan](http://www.pkulaw.cn:83/fulltext_form.aspx?Gid=1510186323&Db=qikan).

rather than private contracts or bilateral investment treaties (BITs), it is political processes that provide normative settlement, that is, the resolution of two or more conflicting interests or claims (i.e., norms). Beijing may be motivated more by cultivating long-term relationships than by immediate economic return. Government-to-government relations may be supplemented by various forms of soft power, from globalizing organs of the Chinese Communist Party (CCP) and civil society organizations to think tanks and religious migrants.

By way of illustration, in *DP World vs. China Merchants*, Djibouti had accused DP World of making illegal payments to win a concession to operate the container terminal, the concession being the basis of DP World's legal claim that it argued Djibouti violated in signing with China Merchants. Specifically, the Djibouti government argued that DP World had bribed the former head of Djibouti's ports free trade zone authority and a long-time confidant to President Guelleh who had subsequently fallen out of favour with Guelleh.<sup>14</sup> It is noteworthy that in this case, the Chinese party is not accused of bribery, but rather, entered a transaction where there was a history of accusations of corruption. China Merchant's response to the perceived risk is instructive; not only has the Chinese party relied on formal legal means (e.g., China Merchants, in its capacity as an SOE was able to negotiate a contract with Djibouti that was perceived to be the legal equivalent to a state-to-state agreement),<sup>15</sup> but it has also engaged in a multi-pronged strategy of aligning Djibouti's military interests, economic, and public health interests with its own, for example, by building a military facility in Djibouti to assist with regional security as well as a \$4 billion Ethiopian-Djiboutian electric railway and a \$300 million-plus water pipeline system to transport drinking water into the small nation.<sup>16</sup> Such methods of establishing relationships also mitigate risk; to omit them while focusing on only international law would be to miss half the picture.<sup>17</sup> Some scholars and practitioners have gone farther and suggested what could be called a "law negative" position, that in the case of China, informal norms prevail in

<sup>14</sup> See Republic Djibouti vs. Mr. Abdourahman Mohamed Mahmoud Boreh [2016] EWHC 405 (Comm.) (rejecting the government's claim that Boreh received bribes and awarding £9.3 million to Boreh). See also *Djibouti's Most Prominent Businessman at Odds with First Couple*, WIKILEAKS (Feb. 26, 2009), [https://wikileaks.org/plusd/cables/09DJIBOUTI148\\_a.html](https://wikileaks.org/plusd/cables/09DJIBOUTI148_a.html).

<sup>15</sup> Interview with former GC of China Merchants in Shanghai (Apr. 19, 2019). Given the sensitivity of the material, I have anonymized my interviewees herein. On the legal status of SOEs under international law, see generally, Mark Feldman, *The Standing of State-Owned Entities Under Investment Treaties*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011 615 (Karl P. Sauvant ed., 2012).

<sup>16</sup> Monica Wang, *China's Strategy in Djibouti: Mixing Commercial and Military Interests*, COUNCIL ON FOREIGN RELATIONS (Apr. 13, 2018), <https://www.cfr.org/blog/chinas-strategy-djibouti-mixing-commercial-and-military-interests>.

<sup>17</sup> ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 157 (2017) (quoting a Chinese saying, "For a small case, law rules; for a mid-level case, influence rules; for a big case, politics rule.").



establishing Chinese notions of order.<sup>18</sup>

The law positive and law negative views seek to explain different sides of the same coin: the former focuses on China's external impact and the latter analyses China's experience to propose lessons for law and development more generally. They are both concerned with notions of order that bridge China's domestic growth experience with its expanding global footprint.<sup>19</sup> Nonetheless, they arrive at different conclusions in regards to the role of formal law in Chinese ordering.

In this Article, I assert that while there is some truth to both claims, they are incomplete. Instead, I propose the more holistic concept of CLD and examine its logic through one of the first empirical studies of Chinese outbound capital, drawing on fieldwork in China and in BRI states and interviews with experts within and outside of China. In doing so, this Article proposes a research agenda for the study of the legal and regulatory dimensions of Chinese economic globalization through the lens of CLD. Specifically, I argue that closer attention to Chinese approaches to and practices of ordering, as the obverse of risk, can more accurately explain the role of law in the "normative pluralism"<sup>20</sup> of this form of globalization, and to adequately understand Chinese ordering, the analytical purview should be both widened and microscoped.

To widen the lens, the Article considers the spectrum of norms that constitute a China-led order. Law operates to varying degrees at different levels in this order, so, for example, while the Chinese are building on existing legal infrastructures and designing new ones at the level of transnational law, they avoid entanglements with the local law of host jurisdictions. An emphasis on transnational law, and specifically, a corporate-made law—comprised of construction contracts, loan agreements, and arbitral awards—as opposed to transplanting Chinese law into host states or direct intervention in the legal systems of recipient economies, is partly an effect of China's own experience with law and development and partly a result of China's economic ascendance during a period when Asia is globalizing and the centers of globalization of yesteryear, namely, the U.K., Western Europe, and the U.S., are, to some extent, deglobalizing.<sup>21</sup>

<sup>18</sup> FRANK K. UPHAM, *THE GREAT PROPERTY FALLACY* 83 (2018).

<sup>19</sup> Shaffer and Gao, *supra* note 12, at [ ] (arguing that China is building a "Sino-centric trade legal order") and UPHAM, *supra* note 18, at 89 (suggesting China's economic modernization "may not have been law, but it was order...").

<sup>20</sup> William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 DUKE J. COMP. & INT'L L. 473, 476 (2010) (defining normative pluralism as "the coexistence in the same time-space context of multiple systems of norms or rules or of an institutionalized normative orders"); PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 153 (2012) (finding that normative pluralism leads to dialectical legal interactions); Jan Klabbers & Touko Piiparinen, *Normative Pluralism: An Exploration*, in *NORMATIVE PLURALISM AND INTERNATIONAL LAW: EXPLORING GLOBAL GOVERNANCE* 14 (Jan Klabbers & Touko Piiparinen eds., 2013) (observing the presence of normative pluralism in global governance).

<sup>21</sup> Pasha L. Hsieh, *Against Populist Isolationism: New Asian Regionalism and Global South*

Yet, the purview must be widened beyond law as ordering is informed not only by international commercial law, but also by quasi-legal norms like soft law and nonlegal ones such as political intervention, civil society, digital infrastructure, bureaucracy, personal and professional networks, soft power, and even religion. The normative pluralism of China's global ordering is hardly uniform, static, or even internally coherent. Certain norms may work toward different or competing ends, and some may be more apposite in specific jurisdictions or areas of dispute than others. In short, ordering may have disordering effects.

For example, whereas, at the regional level, China is harmonizing law across borders to facilitate its global value chains, at national or subnational levels, rather than formal law, given the fact that much of the BRI stems from public bodies, politics and other nonlegal norms appear to be doing more of the ordering work. At the same time, attention to nonlegal or extralegal dimensions of ordering requires microscoping to consider the fine-grain contextual factors that may not be reflected in the relevant legal documents but which may have a deterministic role in interactions. A holistic analysis should capture both the "macro" dynamics of transnational law and also the "micro" ones of national and local law, and their nonlaw equivalents. Such a holistic appraisal reveals that in China's normatively pluralistic approach to mitigating risk, its loose constellation of actors exhibit agency problems and moral hazards that may short-circuit ordering, particularly given that the investment environments differ from China's domestic regulatory ecosystem.

There are five remaining parts to the Article. First, after reviewing analyses of the role of law in Chinese economic globalization, namely, the "law positive" thesis and the "law negative" one, I propose a holistic CLD approach. Next, I draw the outlines of Chinese economic globalization and specifically the nature and extent of capital exported to developing countries in the global South. With this background, I assess one of the central goals of CLD—to mitigate commercial, legal, and political risk. Then, I analyse CLD as strategies for ordering across borders to deal with those risks. Lastly, I provide provisional assessments of the implications of cross-border Chinese order while drawing comparisons to previous attempts at ordering led by the U.S. I doing so, I lay the groundwork for the future study of the legal and regulatory dimensions of Chinese economic globalization.

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*Powers in International Economic Law*, 51 CORNELL INT'L L. J. 683 (2018); Matthew S. Erie, "The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution," VA. J. INT'L L. (forthcoming).

## I. FROM DOMESTIC GROWTH TO GLOBAL REACH

The effects of Chinese economic globalization on the global South are hotly debated. On the one hand, proponents view Chinese lenders and investors as providing critical infrastructure and energy to much of Eurasia and beyond.<sup>22</sup> Chinese enterprises, through joint ventures, international acquisitions, and greenfield investments that stimulate value chains are integrating local economies—some of which Western investors have historically avoided—into the global economy. There are positive effects in host states (e.g., poverty alleviation, market diversification, and technological access) and across inter-state regions, namely, lowering cross-border transaction costs for trade and travel and facilitating the connectivity of goods, services, and people.<sup>23</sup> The fact that the BRI has provoked policy imitations in the U.S.,<sup>24</sup> European Union,<sup>25</sup> and India<sup>26</sup> suggests that there is broad recognition of the merit to Beijing's approach.

On the other hand, sceptics, many of them China's economic rivals, have flagged a number of concerns, chiefly: the centrality of SOEs that reinforce the foreign policy aims of the Party-State,<sup>27</sup> opaque lending practices that diverge from international norms, and a tendency, under the BRI, for Chinese investments and credit finance to be directed to autocratic elites.<sup>28</sup> Perhaps most critical, the U.S. Government has labelled China's

<sup>22</sup> See e.g., CHEN FENG AND YIWEI WANG, *THE BELT AND ROAD INITIATIVE: WHAT WILL CHINA OFFER THE WORLD IN ITS RISE* (2016); MING WANG, *THE ASIAN INFRASTRUCTURE INVESTMENT BANK: THE CONSTRUCTION OF POWER AND THE STRUGGLE FOR THE EAST ASIAN INTERNATIONAL ORDER* (2016); CHINA'S BELT AND ROAD INITIATIVE: CHANGING THE RULES OF GLOBALIZATION (WENXIAN ZHANG ET AL. EDS., 2018).

<sup>23</sup> See e.g., CHINA'S BELT AND ROAD INITIATIVES: ECONOMIC GEOGRAPHY REFORMATION (WEI LIU ET AL. EDS., 2018); REMOVING TAX BARRIERS TO CHINA'S BELT AND ROAD INITIATIVE (MICHAEL LANG AND JEFFREY OWENS, EDS., 2018).

<sup>24</sup> Dezan Shira & Associates, *Trump Targets Belt and Road Initiative with US\$60 Billion International Finance Development Corporation*, SILK ROAD BRIEFING (Oct. 22, 2019), <https://www.silkroadbriefing.com/news/2019/10/22/trump-targets-belt-road-initiative-us60-billion-international-finance-development-corporation/> (describing the establishment of the United States International Development Finance Corporation, to counter the BRI).

<sup>25</sup> European External Action Service, *The European Way to Connectivity – A New Strategy on how to Better Connect Europe and Asia*, EUROPEAN UNION (Sept. 19, 2018), [https://eeas.europa.eu/headquarters/headquarters-homepage/50752/european-way-connectivity—new-strategy-how-better-connect-europe-and-asia\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/50752/european-way-connectivity—new-strategy-how-better-connect-europe-and-asia_en) (announcing a strategy for “sustained connectivity” between Europe and Asia).

<sup>26</sup> Dipanjan Roy Chaudhury, Centre Outlines Plan to Counter China's BRI, *THE ECONOMIC TIMES* (July 1, 2019), <https://economictimes.indiatimes.com/news/politics-and-nation/centre-outlines-plan-to-counter-chinas-bri/articleshow/70017176.cms?from=mdr> (discussing India's extension of lines of credit on concessional terms to 63 countries).

<sup>27</sup> By “Party-State,” I refer to the fusion of organs of the Chinese Communist Party into the government at all administrative levels.

<sup>28</sup> Center for Strategic & International Studies, *How Will the Belt and Road Initiative Advance China's Interests?* CHINAPOWER, <https://chinapower.csis.org/china-belt-and-road-initiative/> (last visited Aug. 1, 2019) (noting that the BRI targets Central and South Asia where many of the countries “lack good governance and robust rule of law”).

approach to financing a “debt trap.”<sup>29</sup> Not all criticism, however, derives from rival donor states; host states have also become increasingly critical of the Chinese presence.<sup>30</sup>

As an analytical question, much of the difficulty in understanding how China is ordering its version of economic globalization stems from the challenge of explaining Chinese behaviour through existing theory. This problem became clear to me while attending a closed-door workshop for international lawyers in Shanghai, with a focus on the legal and regulatory challenges of the BRI. One exchange about the lack of standard terms and conditions in Chinese loans for infrastructure projects is illustrative. A U.K. finance lawyer stated, with no small amount of vexation, “There is a \$26 trillion infrastructure deficit in the region. The Chinese are providing some \$6 trillion. China has the upper hand. Why doesn’t it say, ‘if you, country X, want to access this pot, then you must sign a standard agreement which provides clear rules? Why isn’t China imposing its own conditions on the funds?’” Various rationales were offered by the Chinese lawyers in the room, including, incidentally, a former general counsel of China Merchants: “China abides by a principle of ‘non-intervention,’” “Chinese prefer negotiation and dialogue,” “these are equal relations and [it’s] not about self-interest [of China].” A U.K.-trained Chinese lawyer then spoke up: “Chinese understand rules differently from Westerners, and tend to emphasize relationships. In the West, even a marriage is based on contract, whereas in China, we didn’t have our first contract law until 1999. Chinese think ‘this is my goal...’, while Westerners think ‘this is the rule...’”<sup>31</sup>

Many foreign observers, like the frustrated U.K. finance lawyer, encounter difficulty fitting Chinese behaviour into their own explanatory paradigms. They want China to behave the way they think economic superpowers should behave; alternately, China is the great exception. In other words, China exists along a teleology with expected outcomes, or, pursuant to the literature on emergent economies and alternative international orders,<sup>32</sup> it demonstrates a kind of international law

<sup>29</sup> Mike Pence, *Remarks by Vice President Pence on the Administration’s Policy Toward China*, WHITE HOUSE BRIEFINGS (Oct. 4, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-administrations-policy-toward-china/>.

<sup>30</sup> Tang Siew Mun et al., *THE STATE OF SOUTHEAST ASIA: 2020 SURVEY REPORT 36* (2020) (finding 62.6% of respondents from ASEAN states had “no confidence” or “little confidence” in the BRI).

<sup>31</sup> Personal observation. Shanghai University of Political Science and Law in Shanghai (Apr. 19, 2019). The figures quoted herein are debated in the literature. *See e.g.*, Jonathan E. Hillman, *How Big is China’s Belt and Road?* CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Apr. 3, 2018), <https://www.csis.org/analysis/how-big-chinas-belt-and-road> (arguing that the \$8 trillion estimate of BRI costs is a conflation with estimates of Asia’s total infrastructural demand.) *See also* WORLD BANK, *BELT AND ROAD ECONOMICS: OPPORTUNITIES AND RISKS OF TRANSPORT CORRIDORS* 44 (2019), <https://www.worldbank.org/en/topic/regional-integration/publication/belt-and-road-economics-opportunities-and-risks-of-transport-corridors> (calculating total Chinese investment in BRI projects to be \$575 billion).

<sup>32</sup> *See e.g.*, CHINA, INDIA, AND THE INTERNATIONAL ECONOMIC ORDER

revisionism.<sup>33</sup> One result is that rule-obsessed lawyers from Anglo-American traditions, many socialized into thinking through the paradigm of the “rule of law,” which is foundational to liberal approaches to global governance, are left puzzled. There are analytical slippages that have consequences not only for academic study but also for legal practice and foreign policy.

I choose law and development as the explanatory frame for studying China’s approach to cross-border ordering as Chinese actors have learned from US efforts; hence, there is some path dependency.<sup>34</sup> At the same time, the analysis cannot simply extrapolate from established models, as some of the mechanics, aims, and effects of the Chinese approach may differ from U.S. precedents. Thus, law and development must be reinvented through the Chinese perspective, and CLD endeavors to chart out this new analytical terrain.

CLD occurs against the backdrop of China’s positioning itself as a model for developing countries, a positioning which reflects the PRC’s strategic goals of elevating its standing in the world, particularly in the global South.<sup>35</sup> There is demand to learn from China’s industrial policy, and the extent to which PRC law facilitated China’s economic growth.<sup>36</sup> This Article focuses on the donor side, and specifically the commercial incentive to secure Chinese investments overseas. There, conventional law and development knowledge hold that, given the large volumes of outbound Chinese capital, formal law, including international investment agreements, sovereign guarantees, and robust mechanisms for dispute resolution, would

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(Muthucumaraswamy Sornarajah & Jiangyu Wang, eds., 2010); RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH (Fabio Morosini & Michelle Ratton Sanchez Badin eds., 2018); WORLD TRADE AND INVESTMENT LAW IN A TIME OF CRISIS: DISTRIBUTION, DEVELOPMENT AND SOCIAL PRODUCTION (David M. Trubek, Alvaro Santos, and Chantal Thomas, eds., 2019); SONIA E. ROLLAND & DAVID M. TRUBEK, EMERGING POWERS IN THE INTERNATIONAL ECONOMIC ORDER: COOPERATION, COMPETITION AND TRANSFORMATION (2019).

<sup>33</sup> See Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 EURO. J. INT’L ECON. L. 755 (2013); Ming Du, *China’s State Capitalism and World Trade Law*, 63 INT’L & COMP. L. Q. 409 (2014); CHINA IN THE INTERNATIONAL ECONOMIC ORDER: NEW DIRECTIONS AND CHANGING PARADIGMS (Lisa Toohey, Colin B. Picker, and Jonathan Greenacre, eds., 2015); Mark Wu, *The ‘China, Inc.’ Challenge to Global Trade Governance*, 57 HARV. INT’L L. J. 1001 (2016); Qingjiang Kong, *Beyond the Love–Hate Approach?: International Law and International Institutions and the Rising China*, 15 CHINA: INT’L J. 41 (2017); CHINESE LEGAL REFORM AND THE GLOBAL LEGAL ORDER (Yun Zhao & Michael Ng, eds., 2017).

<sup>34</sup> Guillermo Garcia Sanchez, *The Footprint of the Chinese Petro-Dragon: The Future of Investment Law in Transboundary Resources*, TUL. L. REV. (Forthcoming) (arguing that China is learning from the U.S. example in transboundary hydrocarbon law).

<sup>35</sup> See RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL TO THE REST? (2007); Zhu Yunhan (朱云汉), et al., *Gongheguo liushinian yu Zhongguo moshi* (共和国六十年与中国模式) [People’s Republic at 60 Years and the China Model], 9 DUSHU (读书) [Reading] 16 (2009); Suisheng Zhao, *The China Model: Can It Replace the Western Model of Modernization*, 19 J. CONTEMP. CHINA 419 (2010);

<sup>36</sup> See *infra* text accompany note 273.

## CHINESE LAW AND DEVELOPMENT

secure Chinese trade and investments.<sup>37</sup> Traditional law and development thinking seems to explain, in part, how China is building order transnationally. At the same time, there are limits to this received knowledge as much of it originates from the U.S. experience over the past sixty years, a period during which the U.S. aligned the goals of major international financial and governance bodies with its own.<sup>38</sup> In this section, I first review the promises of law and development orthodoxy and then assess scholarly views of China's own use of law in the course of its cross-border deals.

### *A. Law and Development*

Law and development is a wide field of inquiry but it has a number of identifiable characteristics. First, law and development grew out of the U.S.'s foreign policy in Latin America in the 1960s, and subsequently in Asia, for two main purposes: first, to create environments for transactional security for U.S. companies investing in those states and, two, to promote political reform, specifically, democratization.<sup>39</sup> The early promoters of law and development were, chiefly, the U.S. Government, including the U.S. Agency for International Development, development agencies such as the Ford Foundation, and academics.

David Trubek, a founder of law and development, has identified a number of different "waves" of law and development including an early version that emphasized the role of the state in managing the economy with law as a tool for economic management, an iteration in the 1980s that saw the infusion of neoliberal ideas that prioritized law as the basis for market relations, and a third movement, following the critique of neoliberalism, that recognized that, first, markets can fail and, second, the definition of "development" should be expanded.<sup>40</sup> The specific mechanisms for promoting economic development through legal reform have varied over

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<sup>37</sup> ERIK GILBERT JENSEN & THOMAS C. HELLER, *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* (2003); MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT* (2008); MICHAEL J. TREBILCOCK & MARIANA MOTA PRADO, *ADVANCED INTRODUCTION TO LAW AND DEVELOPMENT* (2014).

<sup>38</sup> NILS GILMAN, *MANDARINS OF THE FUTURE: MODERNIZATION THEORY IN COLD WAR AMERICA* (2003); DAVID EKBLADH, *THE GREAT AMERICAN MISSION: MODERNIZATION AND THE CONSTRUCTION OF AN AMERICAN WORLD ORDER* (2009); RICHARD PEET, *UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO* (2009).

<sup>39</sup> Jacques deLisle, *Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L Econ. L. 179, 180 (1999) (explaining how American law and development fulfills a number of aims including promoting democratization); Laura Nader, *Promise or Plunder? A Past and Future Look at Law and Development*, 7 Global Jurist 1, 3 (2007) (arguing that the transplantation of U.S. economic law overseas has supported American corporate interests).

<sup>40</sup> David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1* (David M. Trubek & Alvaro Santos eds., 2006).

time. Broadly speaking, there are two such methods: direct or “horizontal” transplantation of law from the donor to the recipient state and indirect or “vertical” integration of a dominant economy’s norms into international law that may be subsequently adopted by member states via domestic legislation as well as through the impact of global financial and governance institutions on host state law.<sup>41</sup> The critique of law and development as ethnocentric has, in many senses, come to define the movement.<sup>42</sup> Nonetheless, just as the law and development has undergone cycles of attack, so, too, has it experienced periodic renewal, such as in the “rule of law” revival in the 1990s, and, more recently, the development industry’s promotion of indicators.<sup>43</sup>

Whereas the PRC lacks capacity to promote political reform abroad, it does seek to protect its investments, assets, and citizens in fragile states, thus it has an incentive to promote law and development. The extent to which it does so or how it may achieve this aim is a question that has given rise to a range of responses. Generally, views congregate around two poles: the majority opinion holds that China is actively shaping international economic law (the “law positive” view), others argue rather than formal law, informal means, such as state diktat, diplomatic and bureaucratic channels, or even corruption, govern (the “law negative” view). The “law positive” view focuses on China’s global engagement as an instance of its increasing proficiency in international economic law, and the “law negative” view describes China’s domestic situation but in such a way that the diagnostic potentially carries lessons for comparative cases. In what follows, I weigh the assertions and findings of these two views, finding that they contain elements of the CLD story.

<sup>41</sup> Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and the Argentine Example to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 840 (2003); John K. M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. INT’L ECON. L. J. 220, 238 (2007); Laura Nader, *The Americanization of International Law*, in MOBILE PEOPLE, MOBILE LAW: EXPANDING LEGAL RELATIONS IN A CONTRACTING WORLD 199 (Franz von Benda-Beckmann, et al. eds., 2016).

<sup>42</sup> David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WISC. L. REV. 1062 (1974); JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980); Brian Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT’L L. 470 (1995); Yves Dezalay & Bryant Garth, *The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars*, in ADAPTING LEGAL CULTURES (David Nelken ed. 2001); Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2002); TIMOTHY LINDSEY, *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES* (2007); JEDIDIAH J. KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW* (2016).

<sup>43</sup> Thomas Carothers, *The Rule-of-Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed., 2006); SALLY ENGLE MERRY, ET AL., *THE QUIET POWER OF INDICATORS: MEASURING GOVERNANCE, CORRUPTION, AND RULE OF LAW* 94 (2015).

## B. “Law Positive” Views

In recent years, there has been a growth in efforts to explain how law may play a role in China’s global ordering. Scholarship on the role of law in Chinese globalization, based primarily on policy documents issued by the main governmental divisions which are charged with governance of the BRI, namely, the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), Ministry of Foreign Affairs (MFA), and the State Council, demonstrates a growing consensus that the Chinese approach exhibits a number of features including: (1) pragmatism and flexibility, (2) soft law over hard law (3) integration of Chinese norms into existing international organization, (4) bilateralism over multilateral agreements, and (5) dispute resolution.<sup>44</sup> Taking these in turn, China has not sought to implement a set of formal rules to govern, for instance, trade and investment under the BRI, and, instead, prefers pragmatic and flexible arrangements with individual trade partners.<sup>45</sup> Such arrangements consist of soft law, such as memoranda of understanding (MOUs),<sup>46</sup> or BITs.<sup>47</sup> This approach to “uploading” Chinese norms to

<sup>44</sup> LUTZ-CHRISTIAN WOLFF & CHAO XI, LEGAL DIMENSIONS OF CHINA’S BELT AND ROAD INITIATIVE (2016); YUN ZHAO, INTERNATIONAL GOVERNANCE AND THE RULE OF LAW IN CHINA UNDER THE BELT AND ROAD INITIATIVE (2018); JULIEN CHAISSE & JĘDRZEJ GÓRSKI, THE BELT AND ROAD INITIATIVE: LAW, ECONOMICS, AND POLITICS (2018); Julien Chaisse & Mitsuo Matsushita, *China’s ‘Belt and Road’ Initiative: Mapping the World Trade Normative and Strategic Implications*, 52 J. WORLD TRADE 163 (2018); Heng Wang, *China’s Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, 22 J. INT’L ECON. L. 29 (2018); Weixia Gu, *China’s Belt and Road Development and A New International Commercial Arbitration Initiative in Asia*, 51 VAND. J. TRANSNAT’L L. 1306 (2018); Ding Tongmin (丁同民), *Jianli jianquan “yidaiyilu” falü zhili jizhi de sikao* (建立健全“一带一路”法律治理的思考) [*Thoughts on Establishing and Perfecting the ‘Belt and Road Initiative’ Legal Governance Mechanism*], 6 Henan Shifan Daxue Xuebao (Zhaxue Shehui Kexueban) (河南师范大学学报 (哲学社会科学版)) [J. Henan Norm. U. (Philos. & Soc. Sc. Ed.)] 45 (2018); Wang Xigen (汪习根) & Li Xiguang (李曦光), *“Yidaiyilu” shijiao xia fazhi fuwu tixi de youhua: jiyu falü jiazhi linian de fenxi* (“一带一路”视角下法治服务体系的优化: 基于法律价值理念的分析) [*Optimization of the Service System of Rule of Law from the Perspective of ‘One Belt, One Road’: Based on the Analysis of Legal Values*], 1 Wuhan Daxue Xuebao (Zhaxue Shehuixue Xueban) (武汉大学学报 (哲学社会科学版)) [Wuhan U. J. (Philos. & Soc. Sc.)] 106 (2018); Jiangyu Wang, *China’s Governance Approach to the Belt and Road Initiative (BRI): Partnership, Relations, and Law*, 14 GLOBAL TRADE & CUSTOMS J. (forthcoming 2019); Joel Slawotsky, *The Longer-Term Ramifications of China’s BRI Jurisprudence*, LAW AT THE END OF THE DAY (Apr. 15, 2019), <http://lcbackerblog.blogspot.com/2019/04/joel-slawotsky-longer-term.html>.

<sup>45</sup> Wang, *China’s Governance*, *supra* note 44 and Wang, *China’s Approach*, *supra* note 44.

<sup>46</sup> See e.g., Memorandum of Agreement 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 (Mar. 17, 2017), Memorandum of Understanding between the United Nations Economic Commission for Europe and the National Development and Reform Commission of China (May 17, 2017), Memorandum of Understanding between the United Nations Environmental Programme and Ministry of Environmental Protection of the People’s Republic of China on Building a Green Belt and Road (Aug. 12, 2016).



international law<sup>48</sup> includes not just trade law but also investment law,<sup>49</sup> customs,<sup>50</sup> and other non-trade concerns under international economic law.<sup>51</sup> On the topic of dispute resolution, Chinese have been extremely active, including expanding international commercial arbitration,<sup>52</sup> upgrading the SPC to accept more foreign law cases,<sup>53</sup> building bespoke alternative dispute resolution institutions such as the China International Commercial Court (CICC),<sup>54</sup> and revising conflict of law rules.<sup>55</sup> Chinese thinking about dispute resolution innovations under the BRI demonstrates a degree of creativity in working within and improving upon existing arrangements.<sup>56</sup>

<sup>47</sup> Kate Hadley, *Do China's BITS Matter? Assessing the Effect of China's Investment Agreements on Foreign Direct Investment Flows, Investors' Rights, and the Rule of Law*, 45 GEO. J. INT'L L. 255 (2013).

<sup>48</sup> Wang, *China's Approach*, *supra* note 44, at 8.

<sup>49</sup> Karl P. Sauvant, *China Moves the G20 towards an International Investment Framework and Investment Facilitation*, in CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY 311 (Julien Chaisse ed., 2019).

<sup>50</sup> On June 25, 2019, China implemented the Customs Convention on the International Transport of Goods under Cover of TIR Carnets of November 14, 1975, at all its checkpoints at border and inland customs offices. See *Full Implementation of the TIR System in China*, UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (June 12, 2019), <http://www.unece.org/tir/news/20190612.html>.

<sup>51</sup> See Paolo Davide Farah & Elena Cima, CHINA'S INFLUENCE ON NON-TRADE CONCERNS IN INTERNATIONAL ECONOMIC LAW (2016).

<sup>52</sup> See Gu, *supra* note 44.

<sup>53</sup> Zuigao renmin fayuan (最高人民法院) [Supreme People's Court], *Renmin fayuan wei "Yidaiyilu" jianshe tigong sifa fuwu he baozhang de dianxing anli* (人民法院为“一带一路”建设提供司法服务和保障的典型案列) [The People's Court's Model Cases for Providing Judicial Service and Guarantees to the “Belt and Road Initiative” Construction], SUPREME PEOPLE'S COURT (July 7, 2015), <http://www.court.gov.cn/zixun-xiangqing-14897.html> (selecting eight model cases that involve foreign law).

<sup>54</sup> Zuigao renmin fayuan (最高人民法院) [Supreme People's Court], *Zuigao renmin fayuan guanyu sheli guoji shangshi fating ruogan wenti de guiding* (最高人民法院关于设立国际商事法庭若干问题的规定) [Supreme Peoples Court Regulations on Certain Issues in Establishing an International Commercial Tribunal], SUPREME PEOPLE'S COURT (June 29, 2018), <http://www.court.gov.cn/fabu-xiangqing-104602.html> (establishing the CICC).

<sup>55</sup> Shen Hongyu (沈红雨), *Yidaiyilu beijing xia guoji shangshi susong yu yuwaifa chaming zhidu de xin fazhan* (一带一路背景下国际商事诉讼与域外发查明制度的新发展) [New Developments in Ascertaining Foreign Law Systems and International Commercial Litigation against the Backdrop of the Belt and Road Initiative], Zuigao renmin fayuan guoji shangshi fating (最高人民法院国际商事法庭) [China International Commercial Court] (Nov. 3, 2018), <http://cicc.court.gov.cn/html/1/218/62/164/1098.html> (explaining that prior to the establishment of the CICC, parties had to identify and pay for their own legal experts to explicate matters of foreign law).

<sup>56</sup> Wang Guiguo (王贵国), et al., *Yidaiyilu zhengduan jie jue jizhi* (一带一路争端解决机制) [A Belt and Road Initiative Dispute Resolution Mechanism] (2017) (proposing a suite of “good offices” that combine mediation, arbitration, and litigation, in each BRI states); Wang Guiguo (王贵国), et al., *“Yidaiyilu” yanxian guojia falu jingyao* (一带一路沿线国家法律精要) [Essentials of BRI States' Law] (2017) (providing a survey of applicable state law in 33 BRI countries, in 11 volumes). See also Jiaxiang Hu & Jie (Jeanne) Huang, *Dispute Resolution Mechanisms and Organizations in the Implementation of 'One Belt, One Road' Initiative: Whence and Whither*, 52 J. WORLD TRADE 815 (2018); see Gu, *supra*

One of the main questions is what does the above mean for understanding China's use of law for ordering and its relationship to pre-existing orders? Although interpretations vary, descriptive analyses point to the novelty of the Chinese approach and yet one that, for the most part, does not conflict with existing international norms,<sup>57</sup> perhaps with the exception of data governance, an issue with increasing salience via the "Digital Silk Road." A more robust version of the "law positive" view is found in Greg Shaffer and Henry Gao's "A New Chinese Economic Legal Order." In their article, Shaffer and Gao assert that China's approach to law suggests a new model of infrastructure-based development, comprised of a complementary web of free trade and investment agreements, and an indigenous innovation policy, and that the foregoing, vis-à-vis liberal internationalism, constitute a "rival transnational legal order."<sup>58</sup>

### C. "Law Negative" Views

Another set of assessments that center on the notion that formal law's role is peripheral or secondary to the place of informal norms provide a different viewpoint. Although a minority opinion, the "law negative" view warrants mention as it opens up a wider purview on Chinese notions of ordering and one that may have traction empirically. There are diverse inputs into these views and many proponents of analyses that may be "law negative" would disagree with being lumped together; consequently, I differentiate within this broader category.

First, some who hold this position reflect what Lisa Toohey has called the image of "lawless China."<sup>59</sup> In the context of international economic law, this is the idea that China inadequately implements its WTO

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note 44 at 1351 (noting, "a golden opportunity for China to take the lead in considering the possibility of harmonizing the public policy exception in international commercial arbitration").

<sup>57</sup> See e.g., Chaisse and Matsushita, *supra* note 44, at 167 (remarking that the BRI is a "radically new approach towards international trade and investment"); Wang, *China's Approach*, *supra* note 44 (finding that China selectively uses international institutions like the UN, WTO, and IMF to gain recognition of the BRI); Wang, *China's Governance*, *supra* note 44 (stating that the Chinese approach may offer an alternative governance model); Henry Gao, *China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Ruler Maker?*, in MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT: PERSPECTIVES AND PRIORITIES FOR DEVELOPING COUNTRIES 153 (Carolyn Deere-Birkbeck ed., 2011) (observing that China has transitioned from a passive "taker" of rules to a country that will "shake" the rules for its own interests or even "make" new rules); Gregory Shaffer & Henry S. Gao, *China's Rise: How It Took on the U.S. at the WTO*, 1 U. ILL. L. REV. 115 (2017) (explaining how China built capacity within and around the WTO system to strategically position itself for trade purposes).

<sup>58</sup> Shaffer and Gao, *supra* note 12, at [ ].

<sup>59</sup> Lisa Toohey, *Regarding China: Images of China in the International Economic Order*, in CHINA IN THE INTERNATIONAL ECONOMIC ORDER: NEW DIRECTIONS AND CHANGING PARADIGMS 27 (Lisa Toohey, et al. eds., 2015).

commitments as opposed to an idealized image of the U.S.<sup>60</sup> Teemu Ruskola has demonstrated how such images are embedded in discourses of “legal orientalism” which legitimize U.S. hegemony.<sup>61</sup> Orientalist imagery is produced by the uneven playing field in knowledge production concerning Chinese involvement in international law.<sup>62</sup> Such biases may be heightened during a period of U.S.-China trade war. Hence, as a baseline, China runs a deficit when it comes to the possibility that law may play a role in facilitating CODI.

Another variant of the law negative view is supported by Chinese experts who emphasize policy as the catalyst for China’s economic growth to the exclusion of law. For instance, former World Bank Chief Economist Justin Yifu Lin’s Institute for New Structural Economics, which advises developing countries with respect to China’s own industrial policy, omits the role of law in its research, analysis, and recommendations.<sup>63</sup> Rather, experts may emphasize the role of standards. Importantly, these are, for the most part, industrial and technical standards, for example, in the field of information and communications technology, and not legal standards.<sup>64</sup>

A third input is produced by scholars who are experts on Chinese law and test the central assumption of law and development – that law matters as a source of order in economic development.<sup>65</sup> These studies find that China demonstrates a widespread use of informal alternatives to law, including the central role of the state, bureaucracy, and economic policy; malleable property rights; public-private partnerships; networks based on family, guilds, professional reputation, and diaspora (sometimes summarized as “*guanxi*” or social connections); and even corruption.<sup>66</sup> This

<sup>60</sup> *Id.* at 34.

<sup>61</sup> TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* (2013).

<sup>62</sup> See ROBERTS, *supra* note 17, at Ch. 5 (explaining power imbalances between U.S. and Chinese legal academia).

<sup>63</sup> Institute for New Structural Economics, *INTERNATIONAL DEVELOPMENT COOPERATION* <http://www.nse.pku.edu.cn/en/policy/internation/index.htm> (last visited Oct. 17, 2019).

<sup>64</sup> Shin-yi Peng, *Standards as Means to Technological Leadership? China’s ICT Standards in the Context of the International Economic Order*, in *CHINA IN THE INTERNATIONAL ECONOMIC ORDER: NEW DIRECTIONS AND CHANGING PARADIGMS* 128 (Lisa Toohey et al. eds., 2015); Olivier Peyrat, *Normes: Un Outil Cache de la Stratégie Économique Chinoise* [Standards: A Cache Tool of the Chinese Economic Strategy], 6 *LE JOURNAL DE L’ÉCOLE DE PARIS DU MANAGEMENT* [The Journal of the Paris School of Management] 30 (2012).

<sup>65</sup> Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 *AM. J. COMP. L.* 89 (2003); Randall Peerenboom, *What Have We Learned about Law and Development - Describing Predicting, and Assessing Legal Reforms in China*, 27 *MICH. J. INT’L L.* 823 (2006); Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 *VA. L. REV.* 1517 (2006); Guanghua Yu, *RETHINKING LAW AND DEVELOPMENT: THE CHINESE EXPERIENCE* (2013); *THE BEIJING CONSENSUS: HOW CHINA HAS CHANGED THE WESTERN IDEAS OF LAW AND DEVELOPMENT* (Weitseng Chen ed., 2017).

<sup>66</sup> See UPHAM, *supra* note 18, at 89, 103, 105; Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 *L. & SOC. REV.* 834 (2000); Tom Ginsburg, *Eastphalia and Asian Regionalism*, 44 *U.C. DAVIS L. REV.* 859 (2011); Weitseng

view may include sources of private ordering such as contract, but either de-emphasizes formal law or suggests such forms are subservient to methods of public order that derive from nonlegal sources. Frank Upham, an authority on law and development in Asia, entitled the China chapter of his book *The Great Property Fallacy: Theory, Reality, and Growth in Developing Countries* (2018), “Law and Development without the Law Part.”

While scholars differ in their assessments as to the relative weight of informal norms vis-à-vis legal ones, nonetheless, these studies, taken together, complicate received knowledge about law and development by highlighting the normative pluralism that has been operative in China’s experience. In short, the “law negative” view, minimally, identifies additional sources of norms to the law-focused one above, including technical standards over legal ones, public over private order, and relationships over rules, and, in its more full-bodied form, may discount the role of law altogether.

To summarize, the “law positive” and “law negative” stances reflect different assessments of China’s relationship with law: the former is optimistic about the role of China in international economic law whereas the latter is dismissive of the role of economic law in China domestically. Part of the problem is the disciplinary bias of the different interpretations with scholars of international economic law tending to view Chinese globalization through the lens of free trade agreements (FTAs) and contracts whereas comparative law scholars may operate in their own silos. This problem is exacerbated in the study of the BRI, an unprecedented mega-development project that is somehow everywhere at once (i.e., Eurasia, Africa, Southeast Asia, Oceania, Latin America, the Arctic, and outer space). The BRI is similar to a magic mirror in that it tends to reflect what the viewer wants to see. Such issues are not just a matter of discipline, but also of methodology. Certain types of data and methods of data analysis can lead to varying conclusions.

#### *D. Methodology*

Rather than viewing the BRI solely through the prism of international economic law, this Article re-orientates the analysis of Chinese economic globalization through a broader assessment of its approaches to ordering, as

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Chen, *Arbitrage for Property Rights: How Foreign Investors Create Substitutes for Property Institutions in China*, 24 WASH. INT’L L. J. 47 (2015); Zhu Suli, *The Function of Legal Evasion in China’s Economic Reform - From a Socio-Legal Perspective*, in LEGAL DEVELOPMENT IN CHINA: MARKET ECONOMY AND LAW 294 (Wang Guiguo & Wei Zhenying eds., 1996); Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT’L L. & POL. 551 (2009); Jacques deLisle, *Law and the China Development Model*, in IN SEARCH OF CHINA’S DEVELOPMENT MODEL: BEYOND THE BEIJING CONSENSUS 147 (S. Philip Hsu et al. eds., 2011); YUEN YUEN ANG, *HOW CHINA ESCAPED THE POVERTY TRAP* (2016); SHITONG QIAO, *CHINESE SMALL PROPERTY: THE CO-EVOLUTION OF LAW AND SOCIAL NORMS* (2018).

a core interest in, if not precondition to, its outbound investment strategy.<sup>67</sup> Concomitant with this analytical shift, this Article proposes a socio-legal methodology to grapple with the legal and nonlegal or extralegal dimensions of Chinese ordering. Such an approach encompasses the normative pluralism of Chinese globalization while also allowing for the analyst to hone in on particular sources of order, whether through doctrinal analysis (in the case of formal law), socio-legal explanations, or both. Hence, this Article attempts to identify prominent sources of such norms in order to lay the groundwork for future research that can further study the legal and regulatory dimensions of Chinese economic globalization.

This research is based on fieldwork I have conducted in China (the home state), Hong Kong and Singapore (conduits for Chinese capital), and Pakistan (a host state). In total, since 2016 to 2020, I have conducted six fieldtrips to China, two to Hong Kong, two to Pakistan, and one to Singapore, of various lengths (two weeks to one month). During those fieldtrips, I conducted 148 interviews with lawyers, judges, arbitrators, officials, scholars, think tank members, businesspeople, and non-elite members of the population affected by CODI. I or research associates have also attended nine conferences on the BRI in different countries, some sponsored by Chinese organizations such as the China Law Society and others more purely academic, as such conferences provide empirical windows into network formation between Chinese BRI exponents and their counterparts in host states.

David Trubek has written, “There is little empirical work of any kind on the role of law in developing countries, yet the whole law and development enterprise requires such knowledge.”<sup>68</sup> This challenge applies not just to monitoring specific programs’ outcomes, but also to the assessment of the origins and trajectories of law and development movements, more generally. CLD requires an opening up of the study of law and development to consider how home states may use resources to promote stability in host states that both borrow and diverge from the established practices of past donor nations.

This empirical approach suggests that the significance of law varies according to which “legal level,” to repurpose Leopold Pospisil’s term, one prioritizes in China’s globalism.<sup>69</sup> The picture that emerges is that, at the transnational level, law matters but operates alongside nonlegal norms whereas at the national and subnational levels, law is avoided and nonlegal norms play an even greater role. The broader picture is that China benefits from the latecomer advantage and seeks to integrate its norms into existing

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<sup>67</sup> On social scientific research design of global problems, see Eve Darian-Smith & Philip C. McCarty, *THE GLOBAL TURN: THEORIES, RESEARCH DESIGNS, AND METHODS FOR GLOBAL STUDIES* (2017).

<sup>68</sup> See Trubek, *supra* note 40, at 321.

<sup>69</sup> See LEOPOLD POSPISIL, *THE ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY OF LAW* (1971).

international legal bodies, similar to other Asian states.<sup>70</sup> At the same time, it is building its own legal and financial instruments as parallel to those designed by Western democratic states.

This Article uses insights from the study of Chinese law and society over the last forty plus years to support these claims, as it views Chinese notions of cross-border ordering as reflective of past practices domestically, although such mapping of internal rules onto global governance is not a simple process.<sup>71</sup> In what follows, I first describe the scale and nature of Chinese capital exported, then identify risks as a major concern of both the Chinese Party-State and Chinese enterprises, explain how such actors enhance transactional security through recourse to transnational law and nonlaw ordering, and, finally, highlight issues relevant for a future research agenda.

## II. CAPITAL, RISK, AND ORDER

### A. Capital

By most metrics, China is one of the largest economies in the world. China became the world's largest economy in purchasing power parity in 2014.<sup>72</sup> As of 2016, China is the second largest outbound investment supplier in the world, and in that year, China also became a net capital exporting country, and as of 2019, China is the world's largest official creditor, outpacing the IMF and World Bank.<sup>73</sup> China has 110 Global

<sup>70</sup> Veronica L. Taylor, *New Markets, New Commodity: Japanese Legal Technical Assistance*, 23 WIS. INT'L L. J. 251 (2005); Per Bergling, et al., *Rule of Law Promotion: Global Perspectives, Local Applications* (2009); John Gillespie, *Law and Development in 'The Market Place': An East Asian Perspective*, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 118 (Kanishka Jayasuriya ed. 1999); Yuka Kaneko, *A Procedural Approach to Judicial Reform in Asia: Implications from Japanese Involvement in Vietnam*, 23 COLUM. J. ASIAN L. 313 (2010); Teilee Kuong, *Legal Assistance in the Japanese ODA: The Spark of a New Era*, 5 ASIAN J. L. & SOC. 271 (2018); Andrew Harding, *Multi-Level, Recursive Law and Development: Singapore's Legal Role in ASEAN*, 5 ASIAN J. L. & SOC. 251 (2018).

<sup>71</sup> See generally CHINA ACROSS THE DIVIDE: THE DOMESTIC AND GLOBAL IN POLITICS AND SOCIETY (Rosemary Foote, ed., 2013); Matt Ferchen and Renny Babiarz, *The Development-Stability Nexus At Home and Abroad*, ASIA DIALOGUE (Oct. 5, 2017), <https://theasiadialogue.com/2017/10/05/the-development-stability-nexus-at-home-and-abroad/>.

<sup>72</sup> Janet Bush et al., CHINA AND THE WORLD: INSIDE THE DYNAMICS OF A CHANGING RELATIONSHIP (July 2019) 1, <https://www.mckinsey.com/~media/mckinsey/featured%20insights/china/china%20and%20the%20world%20inside%20the%20dynamics%20of%20a%20changing%20relationship/mgi-china-and-the-world-full-report-june-2019-vf.ashx>.

<sup>73</sup> United Nations Conference on Trade and Development, UNCTAD STAT, [http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx?sCS\\_ChosenLang=en](http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx?sCS_ChosenLang=en) (last visited May 20, 2019); Sebastian Horn, Carmen Reinhart, and Christoph Trebesch, *China's Overseas Lending*, KIEL WORKING PAPER 5 (No. 2132, June 2019), <https://www.ifw-kiel.de/fileadmin/Dateiverwaltung/IfW->

Fortune 500 companies, including three in the top five, all of which are SOEs.<sup>74</sup> The country accounted for 11.4% of global goods traded in the year 2017.<sup>75</sup> China has the world's largest banking system, the second-largest stock market and the third-largest bond market in the world.<sup>76</sup> Driven by the most Internet users in the world (more than 800 million), China's four tech giants known as "BATX" (Baidu, Alibaba, Tencent, and Xiaomi), have not only dominated China's domestic market for Internet services, e-commerce and digital payments, social media, and consumer electronics, and in so doing, outraced the U.S.'s "GAFA" (Google, Apple, Facebook, and Amazon), but are also globalizing at an unprecedented rate.<sup>77</sup> In the future, foreign transactions are increasingly likely to use the Chinese *yuan*.<sup>78</sup> As a result, Chinese economic globalization is complemented by soft power and, not to mention, hard power.<sup>79</sup>

Observers have called China's form of capital "state capitalism," in contrast to private capital.<sup>80</sup> Chinese state capitalism is defined as having the following characteristics: (1) SOEs are dominant players in the economy, (2) players whose controlling stakes are held by a central holding company, the State-Owned Assets Supervision and Administration Commission (SASAC) of the State Council; (3) POEs are increasingly an important fixture in globalizing China; (4) the CCP has management capacity over both SOEs and to some extent POEs; and (5) although the public, private, and CCP structures are separate, they are also overlain by cross-cutting networks and embedded hierarchies that ensure some degree of coordination.<sup>81</sup>

The logic of state capitalism is unique. Simply put, state capitalism is that which is owned or controlled by the Party-State and hence exists to

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Publications/Christoph\_Trebesch/KWP\_2132.pdf.

<sup>74</sup> See *Fortune Global 500*, <https://fortune.com/global500/> (last visited July 9, 2019) (listing State Grid, Sinopec Group, and China National Petroleum).

<sup>75</sup> See Bush et al., *supra* note 72, at 2.

<sup>76</sup> See *id.* at 3.

<sup>77</sup> Jeff Desjardins, *China's Home-Grown Tech Giants Are Dominating Their US Competitors*, BUSINESS INSIDER (Feb. 7, 2018), <https://www.businessinsider.com/chinas-home-grown-tech-giants-are-dominating-their-us-competitors-2018-2?r=UK>.

<sup>78</sup> Weitseng Chen, *Lost in Internationalization: Rise of the Renminbi, Macprudential Policy, and Global Impact*, 21 J. INT'L ECON L. 31 (2018) (finding that currency internationalization depends not only on market forces but also on state-led actions).

<sup>79</sup> STATE COUNCIL INFORMATION OFFICE, CHINA'S NATIONAL DEFENSE IN THE NEW ERA 9 (2019), [http://english.www.gov.cn/archive/whitepaper/201907/24/content\\_WS5d3941ddc6d08408f502283d.html](http://english.www.gov.cn/archive/whitepaper/201907/24/content_WS5d3941ddc6d08408f502283d.html) (stating the goal to "fully transform the people's armed forces into world-class forces by the mid-21<sup>st</sup> century").

<sup>80</sup> Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697 (2013); BARRY NAUGHTON & KELLE S. TSAI, STATE CAPITALISM, INSTITUTIONAL ADAPTATION, AND THE CHINESE MIRACLE (2015); Benjamin L. Liebman & Curtis J. Milhaupt, REGULATING THE VISIBLE HAND? THE INSTITUTIONAL IMPLICATIONS OF CHINESE STATE CAPITALISM (2016).

<sup>81</sup> See Lin & Milhaupt, *supra* note 80, at 699-700.

support its interests.<sup>82</sup> In her ethnographic study of Chinese state capitalism in Zambia, sociologist Ching Kwan Lee argues that Chinese SOEs not only seek profit-maximization but also to pursue “the nation’s strategic, lifeline, security interests” through political patronage, influence, and access to communities.<sup>83</sup> One way to understand the difference between state capitalism and private capitalism is with reference to corruption. In the aftermath of the Watergate scandal in the U.S., the Federal Government discovered that some U.S. multi-national corporations were interfering in domestic politics in emergent economies in the Middle East in ways that contravened governmental interests.<sup>84</sup> As a result, the U.S. Congress passed the Foreign Corrupt Practices Act (“FCPA”), which penalizes employees of U.S. companies that bribe officials overseas.<sup>85</sup> China also has its own version of the FCPA but the law is unenforced because, through its control, the Party-State has aligned the interests of SOEs with its own.<sup>86</sup>

In order to assess the role of law in state capitalism and Chinese economic globalization more generally, it is important to make a few distinctions in terms of types and destinations of Chinese capital. To begin with the types of Chinese capital, Chinese financing derives from a number of sources: credit lines from the Chinese policy banks, namely, the China Development Bank and Export-Import Bank (“EximBank”), the China Investment Corporation (est. 2007 to invest Chinese wealth in foreign companies with some \$200 billion in overseas investments), the Silk Road Fund (est. 2014 as China’s largest intergovernmental cooperation fund, with a cap of \$40 billion), China-led multilateral development banks, such as the Asian Infrastructure Investment Bank (AIIB, est. 2016) and the New Development Bank, and, lastly, equity from SOEs and POEs.

There are, roughly, three forms of capital that these various financing bodies provide: investment, loans, and a third category called, variably, “aid,” “official flows,” or “development assistance.” To take these in turn, investment is the most straightforward as MOFCOM’s definition of “investment” accords with that of such international organizations as the IMF and OECD.<sup>87</sup> MOFCOM publishes annual statistical bulletins that

<sup>82</sup> See also Wu, *supra* note 33, at 265 (identifying the role of the Party-State as central to “China Inc.”).

<sup>83</sup> CHING KWAN LEE, *THE SPECTER OF GLOBAL CHINA: POLITICS, LABOR, AND FOREIGN INVESTMENT IN AFRICA* 32-3 (2018).

<sup>84</sup> Thomas O. Gorman, *The Origins of the FCPA: Lessons for Effective Compliance and Enforcement*, 43 SEC. REG. L. J., 43, 45-6 (2015) (detailing the “illicit or foreign payments” cases involving U.S. multi-nationals conducting business in the Middle East).

<sup>85</sup> Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§78dd-1 to 78ff (2012).

<sup>86</sup> See *infra* note 257.

<sup>87</sup> Zhonghua renmin gongheguo shangwu bu duiwai touzi he jingji hezuo si (中华人民共和国商务部对外投资和经济合作司) [Ministry of Commerce of the PRC Department of Outward Investment and Economic Cooperation], “Duiwai zhijie touzi tongzhi zhidu” de tongzhi (《对外直接投资统计制度》的通知) [Notice on “FDI Statistics System”], Jan. 9, 2015, <http://hzs.mofcom.gov.cn/article/zcfb/b/201603/20160301277128.shtml> (specifying that MOFCOM’s statistical system incorporates the statistical standards and principles of



include total CODI figures. In the early years of the BRI, CODI shot up, from \$107.84 billion in 2013 to \$145.67 billion in 2015, an increase of 35%.<sup>88</sup> In 2016, in the face of a decline of foreign direct investment (FDI) across the globe, CODI reached a record high of \$196.15 billion, an increase of 34.7% from the previous year and accounted for 13.5% of the global total.<sup>89</sup> In 2017, China's FDI flows were \$158.29 billion, a decrease of 19.3% from the previous year, and the first time since China released its annual FDI statistics that it experienced negative growth.<sup>90</sup> This decrease seems to be an effect of several trends, both exogenous and internal to China, including an overall slow-down in global trade, the U.S.-China trade war, and decreased economic growth in the Chinese domestic economy, as well as Beijing's own rechanneling of CODI.<sup>91</sup> While China's economic growth has slowed and CODI has similarly decreased, it should be remembered that relative to other countries, China accounts for more than 10% of the total global FDI.<sup>92</sup>

China's loans or credit finance is more complicated than investment; it blurs with the third category, aid, and thus it is helpful to assess them together. China defines "aid" or "Official Development Assistance" (ODA) broadly, including aid, interest-free loans, and concessional loans. In addition to ODA, analysts use another category called "Other Official Finance" (OOF) that captures official financing sources that do not qualify

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FDI in accordance with the relevant provisions of the OECD's *Definition on FDI* (4<sup>th</sup> ed.). See also Thierry Pairault, *China in Africa: Much Ado about Investment-Part 2*, CHINA AFRICA RESEARCH INITIATIVE (Feb. 21, 2018), <http://www.chinaafricarealist.com/2018/02/guest-post-china-in-africa-much-ado.html> (identifying China's FDI definition as the same as that of the OECD).

<sup>88</sup> Zhonghua renmin gongheguo shangwu bu, Guojia tongji ju, Guojia waihui guanli ju (中华人民共和国商务部) [Ministry of Commerce of the PRC, National Bureau of Statistics, State Administration of Foreign Exchange], 2013nian Zhongguo duiwai zhijie touzi tongji gongbao (2013 年中国对外直接投资统计公报) [2013 CHINA FDI STATISTICAL BULLETIN] 3 2014 and Zhonghua renmin gongheguo shangwu bu, Guojia tongji ju, Guojia waihui guanli ju (中华人民共和国商务部) [Ministry of Commerce of the PRC, National Bureau of Statistics, State Administration of Foreign Exchange], 2015nian Zhongguo duiwai zhijie touzi tongji gongbao (2015 年中国对外直接投资统计公报) [2015 CHINA FDI STATISTICAL BULLETIN] 3 2016.

<sup>89</sup> Zhonghua renmin gongheguo shangwu bu, Guojia tongji ju, Guojia waihui guanli ju (中华人民共和国商务部) [Ministry of Commerce of the PRC, National Bureau of Statistics, State Administration of Foreign Exchange], 2016nian Zhongguo duiwai zhijie touzi tongji gongbao (2016 年中国对外直接投资统计公报) [2016 CHINA FDI STATISTICAL BULLETIN] 3 2017.

<sup>90</sup> Zhonghua renmin gongheguo shangwu bu, Guojia tongji ju, Guojia waihui guanli ju (中华人民共和国商务部) [Ministry of Commerce of the PRC, National Bureau of Statistics, State Administration of Foreign Exchange], 2017nian Zhongguo duiwai zhijie touzi tongji gongbao (2017 年中国对外直接投资统计公报) [2017 CHINA FDI STATISTICAL BULLETIN] 3 2018.

<sup>91</sup> See *infra* text accompanying note 109.

<sup>92</sup> *Id.*

as ODA, such as non-concessional loans.<sup>93</sup> The PRC does not make aid data publicly available. According to the most recent official statistics, from a 2014 white paper entitled “China’s Foreign Aid,” China spent \$14.41 billion on ODA from 2010 to 2012.<sup>94</sup> Non-official sources put the figure much higher, for example, AidData, a research lab at the College of William & Mary, has conducted research on 4,300 projects in 140 countries and cites the figure of \$350 billion committed for ODA, OOF, and a third category “Vague Official Finance” (including finance for which there is insufficient data to categorize as ODA or OOF) for the years of 2000 to 2014.<sup>95</sup> In terms of credit finance, China offers loans that are zero-interest, commercial (i.e., market rate), or concessional (generally, 2% with a 5-year grace period and 15-year repayment term, given by the EximBank), but the majority of its credit finance, at least to Africa where it has been documented by the China-Africa Research Initiative at Johns Hopkins University, has been non-concessional.<sup>96</sup>

With this overview of the sources and nature of cross-border Chinese capital in mind, it is possible to identify how state capitalism may diverge from international norms. By way of caveat, it should be noted that many of the infrastructure projects China finances in Africa and elsewhere demonstrate co-financing between, for example a Chinese-led multilateral bank and traditional multilateral development banks and hence follow the governance of the latter. Nonetheless, China’s policy banks, which finance the majority of BRI projects, are a black box of governance. Specific sub-optimal features are lending practices and deal structures that prevent competitive market principles.

Taking these in turn, China has opted out of most international reporting systems; as China is not a member of the OECD, it does not follow the OECD Reporting System, nor does it adhere to the International Aid Transparency Initiative. China is also not a member of the Paris Club, a body of creditors that meet monthly to negotiate debt which is guided by good disciplines about data reporting and adhering to common terms, nor does it belong to the UN Conference on Trade and Development’s 2012 “Principles on Promoting Responsible Sovereign Lending and Borrowing,” which establishes internationally-recognized principles for sovereign lending and borrowing.<sup>97</sup> As a result, one of the most comprehensive studies

<sup>93</sup> SAMANTHA CUSTER AND MICHAEL J. TIERNEY, CHINA’S GLOBAL DEVELOPMENT SPENDING SPREE: WINING THE WORLD ONE YUAN AT A TIME? (2019).

<sup>94</sup> STATE COUNCIL OF THE PRC, WHITE PAPER ON CHINA’S FOREIGN AID (2014), [http://english.gov.cn/archive/white\\_paper/2014/08/23/content\\_281474982986592.htm](http://english.gov.cn/archive/white_paper/2014/08/23/content_281474982986592.htm).

<sup>95</sup> AidData, *China’s Global Development Footprint*, <https://www.aiddata.org/china-official-finance#first-panel> (last visited July 9, 2019).

<sup>96</sup> China-Africa Research Initiative, *Data: Chinese Loans to Africa*, <http://www.sais-cari.org/data-chinese-loans-to-africa> (last visited July 9, 2019) (finding that from 2000 to 2017, the Chinese government, banks and contractors extended \$143 billion in loans to African states and their SOEs).

<sup>97</sup> *Responsible Sovereign Lending and Borrowing*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, <https://unctad.org/en/Pages/GDS/Sovereign-Debt->

to date, based on 1,974 Chinese loans and 2,947 Chinese grants to 152 countries, from 1949 to 2017, has found that about one half of China's overseas loans to the global South are "hidden," meaning that the figures and terms are not reflected in official statistics of the IMF, World Bank, or Bank for International Settlements.<sup>98</sup> The study further concludes that China accounts for roughly a quarter of total bank lending to emergent markets.<sup>99</sup> Both the nature and scale of Chinese lending thus warrants attention given that it is largely unknown how or whether Chinese lending practices conform to the legal standards of host states, particularly in the areas of environmental impact and labor standards.

Whereas the AIIB has emerged as a proponent of environmental and social standards via its "Environmental and Social Framework,"<sup>100</sup> the AIIB does not fund the majority of BRI deals; rather, the majority of financing comes from the policy banks, the China Development Bank and the EximBank. For example, while the AIIB invested \$1.5 to 2 billion in 2016, the EximBank loaned more than \$80 billion in 2015.<sup>101</sup> In 2018, China established the China International Development Cooperation Agency (CIDCA) to coordinate its ODA and it is hoped that the CIDCA will bring more transparency to Chinese aid.<sup>102</sup> Following increasing international criticism of nontransparency in China's lending practices, MOFCOM and other regulators have sought greater alignment with international standards in cross-border financing.<sup>103</sup> In sum, in terms of the forms Chinese outbound capital can take, depending on the destination, credit finance can be a significant proportion of capital, and yet its non-transparency makes detailed analysis difficult. Consequently, this Article focuses mainly on

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Portal/Sovereign-Lending-and-Borrowing.aspx (last visited Aug. 1, 2019).

<sup>98</sup> See Horn et al., *supra* note 73, at 3.

<sup>99</sup> *Id.*

<sup>100</sup> ASIAN INFRASTRUCTURE INVESTMENT BANK, ENVIRONMENTAL AND SOCIAL FRAMEWORK (Feb. 2016), [https://www.aiib.org/en/policies-strategies/\\_download/environment-framework/20160226043633542.pdf](https://www.aiib.org/en/policies-strategies/_download/environment-framework/20160226043633542.pdf)

<sup>101</sup> Raffaello Pantucci and Sarah Lain, *China's Eurasian Pivot: The Silk Road Economic Belt*. RUSI WHITEHALL PAPER NO. 88 63 (2017).

<sup>102</sup> For example, the CIDCA has been involved in drafting a "Foreign Aid Management Measures" (*Duiwai yuanzhu guanli banfa*) for which it was seeking public comment up to the deadline of December 12, 2018. For a current draft, see [http://www.cidca.gov.cn/2018-11/13/c\\_129992970.htm](http://www.cidca.gov.cn/2018-11/13/c_129992970.htm) (last visited July 9, 2019). But see Yun Sun, *One year on, the role of the China International Development Cooperation Administration remains cloudy*, BROOKINGS (Apr. 30, 2019), <https://www.brookings.edu/blog/africa-in-focus/2019/04/30/one-year-on-the-role-of-the-china-international-development-cooperation-administration-remains-cloudy/> (showing that MOFCOM, not the CIDCA, retains the budget for foreign aid).

<sup>103</sup> See e.g., Shangwu bu deng 19 bumen (商务部等 19 部门) [Ministry of Commerce and 19 other Departments], *Cujin duiwai chengbao gongcheng gao zhiliang fazhan de zhidao yijian* (促进对外承包工程高质量发展的指导意见) [Guiding Opinion on Promoting the High-Quality Development of Foreign Project Contracting], <http://hzs.mofcom.gov.cn/article/zcfb/a/201909/20190902900658.shtml> (last visited Oct. 18, 2019).

investment while incorporating lending where applicable.

At a general level, there are two types of destinations for Chinese capital: post-industrial economies in North America and Western Europe and developing countries in the global South. Beginning in the early 1990s, Chinese enterprises, led by SOEs, like China Merchants, have been “going out” in larger numbers. CODI to developed countries is motivated by access to technology and financial markets whereas CODI to developing countries is aimed at resource acquisition, exporting excess capacity in cement and steel, and gaining entry to consumer markets, and in the process, building one of the largest global supply chains in the world.<sup>104</sup> China is exporting a higher proportion of capital to developed countries than developing ones.<sup>105</sup>

This Article assumes that the Chinese footprint will be greater in developing states than in the post-industrial ones, given that the former have, for the most part, insufficient governance required to manage the type of control that accompanies the export of Chinese capital. While I note that in many post-industrial economies, such as the U.S., Japan, and Germany, there are increasing regulatory barriers to Chinese investment that present their own type of risk, the focus here is on China’s presence in developing countries. Starting in 2013 when the PRC Government announced the BRI, Chinese enterprises have looked increasingly to developing countries for investment. Following government incentives, Chinese enterprises have relabelled many of their earlier deals as BRI ones. For the most part, BRI projects entail infrastructure and energy deals with SOEs playing the major role; POEs have also financed industries outside of infrastructure projects and energy deals.

It is important to note that the BRI has a decentralized governance structure. There is no one governmental entity that oversees BRI investments. Rather, MOFCOM, the NDRC, MFA, and the State Council each issue action plans, guiding principles, joint communiqués, declarations, and other normative documents.<sup>106</sup> As such, there is no macro-free trade agreement that governs BRI trade; instead, the BRI consists of a latticework of BITs and FTAs with member states.<sup>107</sup> There is no overarching set of

<sup>104</sup> Karl P. Sauvant & Michael D. Nolan, *China’s Rising Outward FDI, Its Reception in Host Countries and Implications for International Investment Law and Policy*, in *REGULATING THE VISIBLE HAND? THE INSTITUTIONAL IMPLICATIONS OF CHINESE STATE CAPITALISM* 285 (Benjamin L. Liebman & Curtis J. Milhaupt eds., 2016); Julien Chaisse, *Introduction: China’s International Investment Law and Policy Regime - Identifying the Three Tracks*, in *CHINA’S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY* (Julien Chaisse ed., 2018); ANDREW COLLIER, *CHINA BUYS THE WORLD: ANALYZING CHINA’S OVERSEAS INVESTMENTS* (2018).

<sup>105</sup> *But see infra* text accompanying note 114.

<sup>106</sup> *See Vision and Actions on Jointly Building Silk Road Economic Belt and 21<sup>st</sup>-Century Maritime Silk Road*, issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the PRC, with State Council authorization (March 2015), <https://eng.yidaiyilu.gov.cn/qwyw/qwfb/1084.htm> (citing as the “principles” of the BRI, the “five principles of peaceful existence” and, as a “framework,” a “community of shared interests, destiny, and responsibility.”).

<sup>107</sup> Identifying the number of “BRI states” is difficult given that countries have signed

rules, nor a standard-form BRI contract, and companies, whether state-owned or private, and provincial-level governments have appeared to pursue their own interests in making BRI deals with little or no coordination. In 2015, the State Council created “leading groups” to provide oversight yet there is little public information available regarding their managerial scope and enforcement powers.<sup>108</sup>

The proportion of investment in developing countries is increasing for a number of reasons. In 2017, in an attempt to curb speculative investment, MOFCOM imposed new regulations that sought to end “blind and irrational” overseas investments in areas such as English football clubs and luxury hotel lines.<sup>109</sup> MOFCOM required POEs to submit outbound investment plans to the government, which gives high scrutiny to “sensitive countries or industries.”<sup>110</sup> More generally, MOFCOM proclaimed that, in the future, the government’s management of overseas investment will achieve “three guarantees”: ensuring that the company’s overseas

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different kinds of agreements with China, which may or may not be labeled “BRI.” Of the approximately 137 countries that are involved in cooperation with China for the BRI, some 117 have BITs with China, of which 97 are in force. See *Belt and Road Portal*, PRC GOVERNMENT, [https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat\\_id=10076](https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10076) (last visited July 17, 2019); *China Bilateral Investment Treaties*, INVESTMENT POLICY HUB <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited July 17, 2019). In addition, China has 9 FTAs with such BRI states, in addition to an FTA with ASEAN. See “China FTA Network,” <http://fta.mofcom.gov.cn/english/index.shtml> (last visited July 17, 2019).

<sup>108</sup> See Nadège Rolland, *Beijing’s Response to the Belt and Road Initiative’s ‘Pushback’: A Story of Assessment and Adaptation*, 50 ASIAN AFFAIRS 216, 226 (2019). In recent years, a number of governmental organs have issued rules and regulations for overseas investment, generally, that is, not necessarily tied to the BRI. See e.g., *Caizhengbu guanyu yinfa “Guoyou qiye jingwai touzi caiwu guanli banfa” de tongzhi* (财政部关于印发《国有企业境外投资财务管理办法》的通知) [Ministry of Finance, Notice on Issuing the Measures for the Financial Management of the Overseas Investments by State-Owned Enterprises] issued June 12, 2017, effective Aug. 1, 2017; Ministry of Commerce, *Jingwai touzi guanli banfa* (境外投资管理办法) [Measures for the Administration of Overseas investment], issued Sept. 6, 2014, effective Oct. 6, 2014; Guojia fazhan gaigewei, shangwubu, renmin yinhang deng guanyu fabu “minying qiye jingwai touzi yingying xingwei guifan” de tongzhi (国家发展改革委, 商务部, 人民银行等关于发布《民营企业境外投资经营行为规范》的通知) [Notice of the National Development and Reform Commission, the Ministry of Commerce, and the People’s Bank of China, et al. on Issuing the Code of Conduct for the Operation of Overseas Investments by Private Enterprises], issued Dec. 6, 2017, effective Dec. 6, 2017; and Asset Supervision and Administration Commission, *Zhongyang qiye jingwai touzi jian du guan li ban fa* (中央企业境外投资监督管理办法) [Measures for the Supervision and Administration of Overseas Investments by Central Enterprises], issued Jan. 7, 2017, effective Jan. 7, 2017.

<sup>109</sup> See *Duiwai Touzi Zhongzai Xingweng Zhiyuan* (对外投资重在行稳致远) [PBOC’s Notice on Further Clarification of Issues Concerning Overseas Renminbi Lending by Enterprises in China], Xinhuanet (新华网) [XINHUA NET] (Nov. 29, 2016), [http://www.xinhuanet.com/comments/2017-09/16/c\\_1121672329.htm](http://www.xinhuanet.com/comments/2017-09/16/c_1121672329.htm).

<sup>110</sup> Sara Hsu, *China Tightens Overseas Investment to Reduce Risks*, FORBES (Dec. 22, 2017), <https://www.forbes.com/sites/sarahsu/2017/12/22/china-tightens-overseas-investment-to-reduce-risks/#79acb1f6772c>.

investment will be stable and far-reaching, ensuring the smooth development of the BRI, and ensuring national financial and economic security.<sup>111</sup> As a result, whereas in 2016, the net stock of BRI investment was \$14.53 billion or 8.5 percent of the total CODI stock by the third quarter of 2018, CODI into BRI states was \$11.9 billion or 13.3 percent of total CODI stock.<sup>112</sup> According to official statistics, from 2013 to 2017, China has invested some \$82 billion in BRI states.<sup>113</sup>

At the same time that the PRC government is rechanneling funding toward bread-and-butter BRI deals, China is confronting the challenge of the U.S-China trade war. Due to tightening investment review in the U.S. and in the European Union, Chinese investment is dropping in these countries.<sup>114</sup> Trade protectionism has, in turn, contributed to China's economic slowdown, subtracting some \$1 trillion from its foreign exchange reserves, making it doubtful whether China can generate adequate foreign exchange surplus to finance BRI projects at the same level it has since 2013.<sup>115</sup> Along these lines, Chinese media accounts of the BRI became less triumphant in late 2018.<sup>116</sup> U.S. efforts to slow Chinese economic globalization at least in the global North appear to have some measure of effectiveness; it remains to be seen whether Beijing will continue to rechannel North-bound capital to the South and what consequences such adjustments would have on China's technology innovation capacity.

Nonetheless, following both Italy and Luxembourg's joining the BRI

<sup>111</sup> Shangwubu (商务部) [Ministry of Commerce], *Jiang Jiaqiang Jingwai Touzi Zhenshixing Shencha Jianchi Sange Budongyao* (将加强境外投资真实性审查 坚持三个不动摇) [Hold Fast to the Three Unshakeables in Strengthening the Overseas Investment Authentication Examination] (Aug. 24, 2017), <http://caiec.mofcom.gov.cn/article/diaoyan/xianggjs/201708/20170802632743.shtml>.

<sup>112</sup> Ministry of Commerce, *Investment and Cooperation Statistics about Countries along Belt and Road in 2016* (Jan. 20, 2017), <http://english.mofcom.gov.cn/article/statistic/foreigntradecooperation/201702/20170202522280.shtml>; Ministry of Commerce, *Year-end Overview XXIV for Commerce Work in 2017: Outward Investment and Cooperation Enjoys a Healthy and Standard Development, and China Accelerates its Stride from a Large Country of Outward Investments toward a Strong Country of Outward Investment* (Feb. 26, 2018), [http://english.mofcom.gov.cn/article/zt\\_overview2017/news/201803/20180302718793.shtml](http://english.mofcom.gov.cn/article/zt_overview2017/news/201803/20180302718793.shtml); Ministry of Commerce, *Investment and Cooperation Statistics about Countries along Belt and Road of 2018* (Nov. 23, 2018), <http://english.mofcom.gov.cn/article/statistic/foreigntradecooperation/201812/20181202815840.shtml>.

<sup>113</sup> Shangwubu (商务部) [Ministry of Commerce], *Zhongguo duiwai touzi fazhan baogao* (中国对外投资发展报告) [REPORT ON DEVELOPMENT OF CHINA'S OUTWARD INVESTMENT] 93 (2018).

<sup>114</sup> Evelyn Cheng, *Chinese Investment in the US Drops 90% Amid Political Pressure*, CNBC (June 20, 2018), <https://www.cnbc.com/2018/06/20/chinese-investment-in-the-us-drops-90-percent-amid-political-pressure.html>.

<sup>115</sup> Minxin Pei, *Will China Let Belt and Road Die Quietly?* ASIAN REVIEW (Feb. 15, 2019), <https://asia.nikkei.com/Opinion/Will-China-let-Belt-and-Road-die-quietly>.

<sup>116</sup> This observation is based on reading online media regarding the BRI on a weekly basis from 2015 to 2019 through relying on news alerts of search engines.

and the Second Belt and Road Forum For International Cooperation in Beijing in April 2019, the BRI seems to have undergone recalibration, although the jury is still out as to whether such efforts will satisfy its critics.<sup>117</sup> Much analysis of the BRI suffers from presentism, however. In the long-term, it is likely that a more mature and less speculative form of the BRI will continue into the future. The recent history of PRC governmental efforts to channel CODI and reinvigorate the BRI suggests such a conclusion. To summarize, CLD operates to secure Chinese investment, assets, and nationals abroad. In the next section, I discuss the specific challenges faced by Chinese enterprises investing in BRI states.

### B. Risk

Perhaps the main obstacle facing CODI in developing countries and the success of the BRI is high risk. Chinese enterprises want to protect their investments and assets abroad; likewise, risk is a problem for the banks that finance for such projects.<sup>118</sup> The BRI covers some of the most fragile countries in the world, according to world transparency indicators. The Corruption Perception Index, produced by Transparency International, for example, ranks many of the BRI states, located in Sub-Saharan Africa, Central Asia, the Middle East, South Asia, and Eastern Europe as having the highest levels of perceived corruption in the public sector.<sup>119</sup> Likewise, the TRACE Bribery Risk Matrix ranks most BRI states in the lower 50 percent of risky states and 10 are among the riskiest 25 countries in the world.<sup>120</sup> Similarly, the World Bank's Ease of Doing Business ranks these regions, home to BRI host states, as the lowest in the world, meaning that their regulatory environments are not conducive to starting and operating a local business.<sup>121</sup> Of the 68 or so original members of the BRI, the sovereign debt of 27 is rated as 'junk' or below investment grade by the top three international rating firms.<sup>122</sup>

Risk can be categorized into a number of types, including political, economic, environmental and legal.<sup>123</sup> *Political risk* takes the form of

<sup>117</sup> See *supra* note 30.

<sup>118</sup> See COLLIER, *supra* note 104, at 71.

<sup>119</sup> Transparency International, *Corruption Perception Index 2018*, <https://www.transparency.org/cpi2018> (last visited Aug. 1, 2019). But see Chao Xi, *Legal and Regulatory Risks of 'Belt and Road' Countries: An index-Based Approach*, in LEGAL DIMENSIONS OF CHINA'S BELT AND ROAD INITIATIVE 33, 35-9 (Lutz-Christian Wolff & Chao Xi eds., 2016).

<sup>120</sup> TRACE, *Trace Bribery Risk Matrix*, <https://www.traceinternational.org/trace-matrix> (last visited Aug. 1, 2019).

<sup>121</sup> World Bank, *Rankings & Ease of Doing Business Score*, <http://www.doingbusiness.org/en/rankings> (last visited Aug. 1, 2019).

<sup>122</sup> *China's Silk Road Cuts Through Some of the World's Riskiest Countries*. BLOOMBERG (Oct. 25, 2017), <https://www.bloomberg.com/news/articles/2017-10-25/china-s-new-silk-road-runs-mostly-through-junk-rated-territory>.

<sup>123</sup> See also Gu Jia (顾嘉), "Yidaiyilu" xiangmu de neisheng fengxian he duoyuan



instable political systems or regime change. A well-known example is the Myitsone Dam project in Myanmar. The project was initially approved by the military junta in 2007 and then inherited by Aung San Suu Kyi's government. The \$3.6 billion hydropower plant, to be financed by China, featured 80 percent ownership by the State Power Investment Corporation. As of 2018, some \$800 million had been disbursed when popular protests against the environmental and societal impact of the dam project halted the project.<sup>124</sup> In a more recent case, Nawaz Sharif, the prime minister of Pakistan, was removed from his position following allegations of corruption in 2017. Sharif had championed the China Pakistan Economic Corridor (CPEC), China's \$62 billion investment mega-project and a keystone in the BRI. When Sharif was replaced by Imran Khan, a perceived "populist" leader, Pakistan's tolerance level for indebtedness to China decreased, hence changing the CPEC calculus.<sup>125</sup>

As a third example, in 2016, the Kenyan government cancelled a contract with a consortium of two Chinese SOEs, the China Aero-Technology International Engineering Corporation and the Anhui Construction Engineering Group, to build a new terminal at the Jomo Kenyatta International Airport in Nairobi, one of the largest airports in Africa.<sup>126</sup> The consortium sued, claiming 22 billion Kenyan shillings in damages, of which it obtained 4.3 billion from the Kenyan Airport Authority (KAA), but the KAA then counter-sued claiming it would not only resist paying additional sums but also required the Chinese consortium to pay back the damages awarded.<sup>127</sup> In a pattern seen in the *DP World vs. China Merchants* case, the contract cancellation appears to have been motivated principally by intra-governmental infighting on the Kenyan side, specifically between President Mwai Kibaki and the prime minister. The former supported the project against the objections of the latter, who,

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zhengduan jie jue jizhi ("一带一路"项目的内生风险和多元化争端解决机制) [*Endogenous Risks and Pluralized Dispute Resolution Mechanisms of the BRI Program*], 23 RENMIN FAZHI (人民法治) [PEOPLE'S RULE OF LAW] 18 (2019).

<sup>124</sup> Myo Lwin, *China Hopes to Resume Myitsone Hydro Dam*, MYANMAR TIMES (Mar. 9, 2016), <https://www.mmmtimes.com/business/19377-china-hopes-to-resume-myitsone-hydro-dam.html>.

<sup>125</sup> *IMF Reaches Staff-Level Agreement on Economic Policies with Pakistan for a Three-Year Extended Fund Facility*, INTERNATIONAL MONETARY FUND (May 12, 2019), <https://www.imf.org/en/News/Articles/2019/05/12/pr19157-IMF-Reaches-Staff-Level-Agreement-on-Economic-Policies-with-Pakistan-for-a-Three-Year-EFF> (promising a \$6 billion bailout to Pakistan).

<sup>126</sup> Kenniya quxiao zhong qi chengjian neiluobi jichang xinghang zhan hetong, guanyuan cheng buxiang fu peikuan (肯尼亚取消中企承建内罗毕机场新航站楼合同, 官员称不想付赔款) [Kenya Cancelled the Contract for the Chinese Company to Build a New Terminal at Nairobi Airport. Officials Said They Did Not Want to Pay the Compensation...], SHIJIESHUO (世界说) [WORLD SPEAKS] (May 15, 2016) [https://mbd.baidu.com/newspage/data/landingshare?pageType=1&isBdbboxFrom=1&context=%7B%22nid%22%3A%22news\\_9497770251764717464%22%2C%22sourceFrom%22%3A%22bjh%22%7D](https://mbd.baidu.com/newspage/data/landingshare?pageType=1&isBdbboxFrom=1&context=%7B%22nid%22%3A%22news_9497770251764717464%22%2C%22sourceFrom%22%3A%22bjh%22%7D).

<sup>127</sup> *Id.*



subsequent to his 2013 failed presidential election, became the opposition leader of Congress. On-going investigations in Kenya suggest that Kibaki's cabinet granted the contract to the consortium in violation of public procurement laws, and the KAA is under investigation for corruption.<sup>128</sup> Given the protracted duration of the kinds of infrastructure deals that make up the BRI, often the host government Beijing initially negotiates with is not the government in power subsequent to signing which may be outright hostile to the project agreed to by the previous government.

Both Chinese investors and the host state face *economic risk*, the second category. MOFCOM has reported that 65 percent of Chinese investments abroad, including BRI projects, have incurred losses.<sup>129</sup> State entities, including SOEs, policy banks, and, to a lesser degree, China-led multilateral development banks, must pay for risky projects under the political pressure the Chinese leadership has placed on the finance sector to support the BRI.<sup>130</sup> There is, however, competition for capital within this sector, and companies and banks bear the burden of failure in the event that a project fails.<sup>131</sup>

Host states face economic risk when project finance is overleveraged, specifically, when servicing the debt is unsustainable. As mentioned at the beginning of this Article, the cautionary tale of the Hambantota Port in Sri Lanka has become *de rigueur* in popular analyses of the BRI, even if events are broadly misconstrued. The Hambantota Port project consisted of two phases. Phase one begun in 2007 (well before the announcement of the BRI), and was financed by the Exim Bank which financed 85% of the construction with a 15-year commercial loan valued at \$307 million, with an interest rate of 6.3%.<sup>132</sup> China Harbor Engineering Construction was designated as the construction contractor.<sup>133</sup> Phase two started in 2012, when the Exim Bank provided a \$757 million loan at a 2% interest rate.<sup>134</sup> As part of this deal, China Harbor and China Merchants (the same SOE involved in *DP World*) jointly operated the container terminal, taking 65% equity for 35 years, leaving 35% to pay back the loan, and upon the expiry of the 35-year term, they would return the terminal to the Sri Lankan Ports Authority.<sup>135</sup> Following a regime change in 2015, and a balance of payments crisis a year later, the Sri Lanka Ports Authority first rescinded the

<sup>128</sup> Moses Njagih, *How Botched JKIA Upgrade Deal May Cost Kenya Sh22b for Work Not Done*, STANDARD (May 12, 2019), <https://www.standardmedia.co.ke/article/2001325107/kenya-risks-sh22b-loss-in-chinese-airport-deal>.

<sup>129</sup> See COLLIER, *supra* note 104 at 72.

<sup>130</sup> *Id.* at 74.

<sup>131</sup> *Id.*

<sup>132</sup> Meg Rithmire and Yihao Li, "Chinese Infrastructure Investments in Sri Lanka: A Pearl or a Teardrop on the Belt and Road," HARVARD BUSINESS SCHOOL CASE STUDY 9 (Jul. 12, 2019).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

agreement but then renegotiated a concession agreement with China Merchants in 2017.<sup>136</sup> Under this arrangement, the Sri Lanka Ports Authority and China Merchants formed joint ventures to develop, operate, and manage Hambantota Port for 99 years under which China Merchants obtained an 85% equity position, with provisions for Sri Lanka to buy back shares over time.<sup>137</sup>

Rather than an example of Chinese control, Hambantota shows the fiscal management of the host government, exacerbated by political uncertainty, but also a host state's capacity to revalue deals not necessarily to China's advantage. Nonetheless, Hambantota has raised concerns of Chinese control in a number of analogous port projects: Pakistan's Gwadar, Myanmar's Kyaukphyu, Kenya's Mombasa, and Greece's Piraeus, to name a few. Fearing unserviceable debt, the Prime Minister of Malaysia Mahathir Mohamad backed out of two projects with Chinese partners valued at \$22 billion,<sup>138</sup> although he subsequently renegotiated with Beijing.<sup>139</sup>

A third category is *environmental risk*, including both natural and human. For example, infrastructure projects financed by Chinese entities must cope with environmental degradation (e.g., desertification in Central Asia and deforestation in Southeast Asia), and critics point out that the BRI, due to lack of environmental impact assessments, may exacerbate water, soil, and air pollution, loss of biodiversity, and exotic species invasion.<sup>140</sup> In the context of the human environment, the most pressing concern is cross-border terrorism. The BRI runs directly through Al-Qaeda strongholds in Afghanistan, the Islamic State Khorasan Province, Al-Shabaab on the Horn of Africa, and the Islamic State of East Africa. China has been engaging in "joint counter-terrorism operations" in Afghanistan and elsewhere in Central Asia for years, in part through the Shanghai Cooperation Organization (SCO), to securitize these regions and to prevent radicalization of Uyghurs in Xinjiang. In sum, investment along the BRI faces enormous uncertainty, a fact that challenges commercial logic, and suggests that Beijing's goals are not limited to material profit.

The final category is *legal risk*, and specifically, the legal environment of host states. Studies are inconclusive as to whether CODI correlates with rule of law and good governance in host states.<sup>141</sup> For the

<sup>136</sup> *Id.*, at 11.

<sup>137</sup> *Id.*, at 11-12.

<sup>138</sup> Alexandra Ma, *Malaysia Has Axed \$22 Billion of Chinese-Backed Projects, in a Blow to China's Grand Plan to Dominate World Trade*, BUSINESS INSIDER (Aug. 21, 2018), <https://www.businessinsider.com/malaysia-axes-22-billion-of-belt-and-road-projects-blow-to-china-2018-8?r=US&IR=T>.

<sup>139</sup> Marrian Zhou, *Mahathir: 'We Have to Go to the Chinese' for Infrastructure*, ASIAN REVIEW (Sept. 27, 2019), <https://asia.nikkei.com/Politics/International-relations/Mahathir-We-have-to-go-to-the-Chinese-for-infrastructure2> (nothing that Mahathir subsequently renegotiated the East Coast Rail Link project with terms more favorable to Malaysia).

<sup>140</sup> Xuan Liu et al., *Risks of Biological Invasion on the Belt and Road*, 29 1 CURRENT BIOLOGY (2018).

<sup>141</sup> See Dollar, *supra* note 8, at 6 (concluding that "Chinese ODI appears indifferent to the

most part, Chinese enterprises are not averse to investing in weak governance environments as SOEs lead the way in such deals and to some extent, the government protects them against market pressure. Moreover, such contracts are often part of larger government-to-government deals that are insulated from the local legal environment.<sup>142</sup>

Nonetheless, host states present a number of sources of concern, including, *inter alia*, weak legal systems, under-professionalized courts, corruption, nationalism, and the potential for the expropriation of foreign-invested projects. Some of these are the same obstacles foreign companies have faced in investing in China since the early 1980s.<sup>143</sup> More importantly, Chinese enterprises may demonstrate a certain attitude toward compliance and corporate governance, an attitude that they may bring with them to host states. While obviously Chinese enterprises have varying degrees of sophistication and experience overseas, some at least apply their own norms and practices of ordering to non-Chinese jurisdictions. As one London-based Chinese barrister who provides legal advice to Chinese enterprises investing overseas stated, “It’s a mentality issue. They don’t do as Romans do; it’s the Chinese way.”<sup>144</sup>

To date, there is a paucity of platforms for horizontal learning between Chinese enterprises to share experiences working in difficult legal environments abroad. This is changing, however. Many provincial and municipal governments are starting to collect data regarding companies registered in their jurisdiction that are “going out.” For example, the Shanghai municipal bar association conducted a survey on *yangqi* (a type of major SOE) and the law firms that provide them with legal services and found that almost all of the *yangqi* that invested in BRI projects were assisted by foreign law firms.<sup>145</sup> The purpose of the survey was to identify the needs of those companies and to develop PRC law firms’ capacity to service their needs, especially in dispute resolution.<sup>146</sup> Similarly, the Zhejiang Province Commercial Affairs Department’s Outbound Investment Enterprises Association has compiled successful cases of Zhejiang-based companies that have invested overseas, and shared them with PRC law

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governance environment”). *But see* Ka Zeng, *The Political Economy of Chinese Outward Foreign Direct Investment in ‘One-Belt, One-Road (OBOR)’ Countries*, in CHINA’S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY 360-1 (Julien Chaisse ed., 2019) (arguing that CODI is more likely to go to countries with low political risk, including authoritarian ones).

<sup>142</sup> *Id.* at 7.

<sup>143</sup> James V. Feinerman, *The Rule of Law Imposed from Outside: China’s Foreign-Oriented Legal Regime since 1978*, in THE LIMITS OF THE RULE OF LAW IN CHINA 304 (James V. Feinerman Karen G. Turner, and R. Kent Guy eds., 2000). Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments* 10 COLUM. J. ASIAN L. 1 (1996).

<sup>144</sup> Interview with barrister in London (Feb. 5, 2018).

<sup>145</sup> Interview with lawyer in Shanghai (Apr. 22, 2019).

<sup>146</sup> *Id.*

firms.<sup>147</sup> There are also a few sector-specific initiatives in progress.<sup>148</sup> Notwithstanding these initiatives, as I discovered speaking to a group of CEOs at a training center for high-ranking members of the CCP who are executives, often Chinese enterprises “going out” have no recourse but to often repeat the mistakes of previous Chinese enterprises abroad.<sup>149</sup>

The China Institute of Corporate Legal Affairs (CICLA)<sup>150</sup> has conducted one of the few studies on the attitudes of Chinese enterprises to investing in developing countries. Beginning in 2015, CICLA has conducted an annual survey on risks encountered by Chinese enterprises investing overseas. The questionnaire is given to Chinese enterprises (SOEs, POEs, foreign-invested enterprises (FIEs), and joint ventures (JVs)) representing a number of different sectors to develop data on firm perception of risk in host states. Reliability is questionable as the sampling strategy is unclear (i.e., whether there is overlap in the respondents year-on-year) and the way that questions are written is not consistent between surveys. The CICLA survey reports nonetheless help shed light on Chinese enterprises’ perception of risks.

The CICLA survey reports provide two main insights. First, survey respondents indicated that “the unstable legal system” and “incomplete legal systems of host states” were major risks. Second, respondents self-reported the frequency of their legal disputes. The main errors committed by Chinese enterprises are inadequate information gathering and due diligence as well as a lack of familiarity with the legal systems of host states,<sup>151</sup> consequently,

<sup>147</sup> See *Zhejiang sheng shangwu ting de Zhejiang jingwai touzi qiye xiehui* (浙江省商务厅下属的浙江省境外投资企业协会) [Zhejiang Province Commercial Affairs Department’s Outbound Investment Enterprises Association], *Zhejiang qiye kuaguo bing gou shili fenxi yu pingshu (chu gao)* (浙江企业跨国并购实例分析与评书 (初稿)) [Analysis and Commentary on Actual Cases of Zhejiang Enterprises’ Transnational Acquisitions (First Draft)], undated, on file with the author.

<sup>148</sup> Zhonghui lufahui (中国绿发会) [China Biodiversity Conservation and Green Development Foundation], “Xuke bei che, huanjing shehui yingxiang youdai chongxin...” (许可被撤, 环境社会影响有待重新。。。) [The License is Withdrawn and the Environmental and Social Impact Need to be Renewed] (June 27, 2019), [https://tieba.baidu.com/p/6176945416?red\\_tag=3251675562](https://tieba.baidu.com/p/6176945416?red_tag=3251675562) (stating that the China Biodiversity Conservation and Green Development Foundation, a Chinese NGO, is building an “Ecological Belt and Road Case Databank” to inform Chinese companies to adhere to local environmental standards in their investments overseas).

<sup>149</sup> Matthew S. Erie, Lecture at the China Executive Leadership Academy Pudong, Shanghai, “Legal and Regulatory Issues in the Belt and Road Initiative: Focus on Dispute Resolution” (Mar. 10, 2018).

<sup>150</sup> CICLA was established in 2014 under *The Legal Daily (Fazhi Ribao)*, the official organ of the CCP Central Political and Legal Committee (*Zhongguo Gongchandang Zhongyang zhengfawei*), an organ of the CCP, which coordinates legal work in the government with CCP policy. CICLA was specifically founded to enhance the role of corporate legal affairs in business practice.

<sup>151</sup> See also Hui Yao Wang & Lu Miao, *China’s Outbound Investment: Trends and Challenges in the Globalization of Chinese Enterprises*, IN CHINA’S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY 41, 48 (Julien Chaisse ed., 2019) (conducting an analysis of CODI failure cases that finds that 16

the self-reported figures of legal conflicts are high. For example, 50 percent of respondents in the 2015 survey report state that they were involved in civil lawsuits or arbitration, and nearly 8 percent were involved in criminal lawsuits. In 2016, the number of firms involved in criminal lawsuits doubled, but then fell in 2017 (Table).<sup>152</sup> There are a number of areas of law that appear problematic, including anti-trust investigations, environmental protection investigations, limits on foreign capital, labor, tax, intellectual property, and choice of law concerns.<sup>153</sup> Another area of difficulty is public procurement. For example, in Eastern Europe, Chinese firms have committed public tender violations in such mega-projects as a highway in Poland<sup>154</sup> and a railway between Budapest and Bucharest.<sup>155</sup>

[insert Table here]

In part because of such frictions, investor-state disputes involving Chinese enterprises will no doubt multiply in the near term.<sup>156</sup> The 2017 survey report concludes, “Following the increase and speeding up of investment, it is foreseeable that in the future, the number and amount of disputes along the BRI will also increase and speed up. This is especially so for disputes between investors and host state governments which will increase dramatically.”<sup>157</sup> Some of these disputes are settled by the domestic courts of host states where host states—through their courts—may have greater control over the outcome of the dispute than in international arbitration.

In one case, in 2016, a Chinese company, the Anhui Foreign Economic Construction (Group) Company Limited (“Anhui”), sued the Minister of Mines and Mining Development of Zimbabwe, the Zimbabwe Minister of Home Affairs, and four other respondents (“the Zimbabwe parties”) in the High Court of Zimbabwe claiming loss of diamond mining rights.<sup>158</sup> The

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percent of failures are due to legal factors).

<sup>152</sup> Zhongguo gongsifawu yanjiuyuan (中国公司法务研究院) [China Institute of Legal Corporate Affairs], *Zhongguo qiye “zouchuqu” diaoyan baogao* (中国企业“走出去”调研报告) [SURVEY REPORT ON CHINESE COMPANIES’ “GOING OUT”] 2015-16, 2016-17, and 2017-18 (on file with the author) [hereinafter “[year] SURVEY REPORT”].

<sup>153</sup> See 2018 SURVEY REPORT, *supra* note 152, at 5.

<sup>154</sup> Jan Cieski, *Poland to China: You’re Fired*, FINANCIAL TIMES (June 14, 2011), <https://www.ft.com/content/77f1d8c3-d258-3760-b035-6edee87cb6c2>.

<sup>155</sup> Wade Shepard, *Another Silk Road Fiasco? China’s Belgrade to Budapest High-Speed Rail Line is Probed By Brussels*, FORBES (Feb. 25, 2017), <https://www.forbes.com/sites/wadeshepard/2017/02/25/another-silk-road-fiasco-chinas-belgrade-to-budapest-high-speed-rail-line-is-probed-by-brussels/>.

<sup>156</sup> Sonia E. Rolland & David M. Trubek, *Legal Innovation in Investment Law: Rhetoric and Practice in Emerging Countries*, 39 U. PA. J. INT’L L. 355 (2017).

<sup>157</sup> See 2018 SURVEY REPORT, *supra* note 152, at 5.

<sup>158</sup> Anhui Foreign Economic Construction Group Company Ltd v. Minister, Mines and Mining Development & Others (HH 219-16 HC 2287/16) [2016] ZWHHC 219 (Mar. 24, 2016), <https://zimlii.org/zw/judgment/harare-high-court/2016/219/> [hereinafter, “Anhui vs. Minister”].

background of the case was that in 2011, Anhui formed a JV with Marange Resources (Private) Limited, a Zimbabwe company, forming Jinan Mining (Private) Limited (the “JV”). In 2016, the Zimbabwe parties cancelled various licenses and permits (the “grants”) of the JV causing the cessation of mining rights. Anhui then sued the Zimbabwe parties in the High Court, instead of resorting to investor-state arbitration. The High Court ruled, as a technical matter, that the individual that Anhui deposed as its owner was not legally authorized to represent Anhui. The High Court cited that whereas Anhui justified the authority of the affidavit of the individual deposed on the basis of ownership structures pursuant to the PRC Company Law, the High Court cited the JV agreement and shareholders’ agreement, which identified the laws of Zimbabwe as the governing law of the JV. Under that logic, the individual deposed was the JV’s owner and not that of Anhui. In a didactic mode, the High Court’s decision states:

It was on the basis of the foregoing that the court agreed with the submissions of Advocate *Uriri* who, in a paraphrased manner, insisted that the laws and regulations of Zimbabwe, and not those of China, applied to the present application. He, to the stated extent, remained rooted in the old adage which goes ‘when you are in Rome do as they do in Rome’. The applicant cannot, in view of the foregoing, apply Chinese Law(s) of practice and procedure when its application was placed before this court the practice and procedure of which are totally different from those of the courts in China.<sup>159</sup>

In an additional dressing-down, the decision reads:

... The applicant is, in fact, approaching the court with dirty hands. It should clean itself before it seeks the court’s attention to assist it...The court, in other words, cannot assist it to continue to live outside, but within, the law.<sup>160</sup>

In finding for the Zimbabwe parties, the High Court found that rather than using the legal mechanism to renew the grants, Anhui failed to do so and thus had no basis for a claim.<sup>161</sup> Local law and, particularly, host state courts may present problems for Chinese enterprises, some of which are engaging in CODI for the first time.<sup>162</sup>

### C. Order

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<sup>159</sup> See Anhui vs. Minister, *supra* note 158.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* See also parallel suit, Anjin Inv. (Pvt) Ltd v. Minister, Mines & Mining Development & Others (HH 228-16 HC 2183/16) [2016] ZWHHC 228 (30 March 2016), <https://zimlil.org/zw/judgment/harare-high-court/2016/228/> (tracing the ownership of the grants from the Zimbabwe entity to the JV, and finding that the JV failed to renew the grants).

<sup>162</sup> See Wang and Miao 2019, *supra* note 151, at 48-9 (stating, “Chinese firms have also been relatively weak at using laws to safeguard their interests and rights, instead all too often turning to the Chinese government and its foreign embassies for help”).

Even if, under state capitalism, Chinese SOEs have a higher tolerance for risk than private capital, there nonetheless is a certain threshold; within that comfort zone, Chinese firms or the Party-State have an incentive to mitigate risk or, conversely, create order. Order takes the form of normative settlement whereby variables that introduce uncertainty are accounted for, potentially negated, but most likely minimized and rendered manageable through a number of processes, ranging from private parties' calculation in their business decisions to policy adjustments by the state. Whereas trust was the basis of order in pre-capitalist societies,<sup>163</sup> capitalist exchanges depend on the "spontaneous order"<sup>164</sup> which stems from the aggregate of human social actions (e.g., individual transactions that form a market) or state design (e.g., court systems, social welfare, taxation, socialist state planning, etc.).<sup>165</sup>

To return to the earlier analogy that Chinese commercial behaviour outside of China mirrors such behaviour domestically, state capitalism appears to have its own ordering elements. These include administrative decentralization coupled with legislative centralization and accountability through a combination of formal legal measures, CCP control that has become more vertically aligned under Xi Jinping, and internal compliance rules for corporations.<sup>166</sup> The principle underlying these elements is state control. Law undergirds many—but not all—of these sources of order. Law has a long history in China as a source of order, and not necessarily justice.<sup>167</sup> Yet law in historical China was far from monopolistic in producing order.<sup>168</sup> The literature on contemporary Chinese law and society confirms this general idea, showcasing the range of norms, from extralegal

<sup>163</sup> SIR HENRY SUMNER MAINE, *ANCIENT LAW* (1920[1861]).

<sup>164</sup> FRIEDRICH HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (1988).

<sup>165</sup> MAX WEBER, *ECONOMY & SOCIETY* § 1, Part II, Ch. 1 (Guenther Roth & Claus Wittich eds., 1978[1922]) (outlining the difference between legal orders and economic orders). *See also* KARL POLANYI, *THE GREAT TRANSFORMATION* Ch. 4 (1957[1944]) (re-examining ethnographic evidence to argue that the market economy emerged only through state intervention).

<sup>166</sup> *See* Du, *supra* note 33, at 410. Wei Cui, *The Legal Maladies of "Federalism, Chinese Style," in THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED THE WESTERN IDEAS OF LAW AND DEVELOPMENT* 97 (Weitseng Chen ed., 2017); SEBASTIAN HEILMANN, *CHINA'S POLITICAL SYSTEM* (2016) (describing the role of the CCP in China's political economy).

<sup>167</sup> Traditional Chinese legal philosophy established a strong tie between law and order, a link reflected in statecraft. *See e.g.*, BRIAN E. MCKNIGHT, *LAW AND ORDER IN SUNG CHINA* (2009) (discussing law-enforcement practices and policies used in imperial China as a method of supporting social order). *Compare with* Edgar Bodenheimer, *Law as Order and Justice*, 194 J. PUBLIC LAW 194 (1957) (positing that law reflects the two values of "order" and "justice").

<sup>168</sup> Liang Zhiping (梁治平), XUNQIU ZIRAN ZHIXU ZHONG DE HEXIE: ZHONGGUO CHUANTONG FALÜ WENHUA YANJIU (寻求自然秩序中的和谐: 中国传统法律文化研究) [EXPLORING HARMONY IN THE NATURAL ORDER: RESEARCH ON CHINA'S TRADITIONAL LEGAL CULTURE] (1991); FALÜ DE WENHUA JIESHI [THE CULTURAL INTERPRETATION OF LAW] (1994); *Tradition and Change: Law and Order in a Pluralist Landscape*, 11 CULTURAL DYNAMICS 215 (1999).

Party directives to secularization of religion, which order society.<sup>169</sup> Further, the study of politics in China shows that domestic governance is messy with administrative misfires, experiments gone awry, internal discoordination, and authorities struggling to exert control over a massive and diverse population.<sup>170</sup> Order within China is far from a *fait accompli*, and China's capacity to effect order outside of the PRC appears even more tenuous.

Chinese globalization strategies like the BRI are yet another level of complexity given the range of political, socio-economic, and ethno-religious pluralities with which Chinese authorities must engage and negotiate and, ultimately, whom they must persuade. The BRI has since its inception had the flavour of a domestic CCP campaign whereby the central government issues directives and the rank and file officials must execute them.<sup>171</sup> Given that it is campaign-like, Chinese enterprises are expected to support the BRI and are given incentives by the central government to do so, such as relaxing capital controls and facilitating their obtaining loans abroad. At the same time, the rush to label ones deal a "BRI project" has complicated Chinese regulators' task to standardize projects and their impacts, which causes negative externalities.

The key question, then, for Chinese firms engaging in CODI, is how to enhance cross-jurisdictional ordering to protect assets and personnel and ensure return on investments. In the remainder of this section, I chart out the norms, methods, and practices that Chinese actors promote or exhibit for purposes of ordering. The purpose of this approach is to weigh the relative significance of the formal and informal as well as the legal, extralegal, and nonlegal norms. The picture that emerges is that Chinese are building transnational law, regimes that consist of "public" and private contracts along with international investment agreements, regional legal harmonization, soft law, judicial networks, and lawtech. Transnational law avoids local law, and specifically, host states' courts. At the same time, it is

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<sup>169</sup> See e.g., Neil Jeffrey Diamant et al., *ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE* (2005) (advocating a broader and inclusive perspective on law and rights in the study of Chinese law-and-society). See also Chen, *supra* note 65 (showing how foreign investors in China find substitutes for formal law to protect their property); QIAO, *supra* note 66 (demonstrating how property developers in Shenzhen mobilize informal property markets); Trebilcock and Leng, *supra* note 65 (finding that at low levels of economic development, informal substitutes for contract enforcement suffice to promote growth); MATTHEW S. ERIE, *CHINA AND ISLAM: THE PROPHET, THE PARTY, AND LAW* (2016) (finding interaction between informal and formal norms in the relations between the Party-State and Muslim minorities).

<sup>170</sup> See e.g., ELIZABETH J. PERRY, *CHALLENGING THE MANDATE OF HEAVEN: SOCIAL PROTEST AND STATE POWER IN CHINA* (2002); KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* (2<sup>nd</sup> ed., 2004); CHING KWAN LEE, *AGAINST THE LAW: LABOR PROTESTS IN CHINA'S RUSTBELT AND SUNBELT* (2007); KEVIN J. O'BRIEN, *POPULAR PROTEST IN CHINA* (2009); SULMAAN WASIF KHAN, *HAUNTED BY CHAOS: CHINA'S GRAND STRATEGY FROM MAO ZEDONG TO XI JINPING* (2018); JEFFREY N. WASSERSTROM, *POPULAR PROTEST AND POLITICAL CULTURE IN MODERN CHINA* (2<sup>nd</sup> ed., 2018).

<sup>171</sup> See ANG, *supra* note 66.



supplemented and, in some senses, dependent on nonlegal mechanisms such as political risk insurance, industrial and technical standards, as well as government-to-government and military-to-military ties, bureaucracy, civil society, and cultural brokers and intermediaries (Figure).

[insert Figure here]

1. Transnational law

a. “Public contracts”

The “law positive” view gets many elements of the story right while overstating or excluding others. In what follows, I build on its observations to both expand the analysis of what is “legal” about China’s cross-border ordering while also drilling down on some of the more important features of legal ordering. Commercial contracts are the connective tissue of this form of ordering. As much of the work of Chinese economic globalization consists of loans for infrastructure and energy projects, many of the projects are governed by the relevant public procurement rules of the host states. Generally, when a host government contracts with a POE or SOE, the ensuing “public contract” would be subject to disclosure rules.

However, in a typical BRI deal, the structure of the loan may run afoul of local public procurement rules. Under so-called “tied loans,” only Chinese companies may bid for contracts financed under that loan. Hence, Chinese companies have a monopoly particularly in construction and energy infrastructure, even as they may compete against one another.<sup>172</sup> Chinese banks lending to Chinese enterprises operating overseas further “closes the loop,” ensuring that loans are not subjected to host state governance, even if CODI regulations require adherence to local law.<sup>173</sup> Consequently, the terms and conditions of the loan agreement and the non-financial contracts are often not disclosed. CPEC, for instance, illustrates this problem as none of the foundational agreements have been disclosed and hence the exact amount of borrowing, the cost of borrowing, and dispute resolution mechanisms for the loan agreements are unknown.<sup>174</sup> As a result, “public contracts” in Chinese infrastructure and energy projects may be public in name only; however, because of their non-transparency, these contracts do function to work around local law and potentially remove disputes from the

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<sup>172</sup> See COLLIER, *supra* note 104, at 48.

<sup>173</sup> See e.g., Shangwu bu, Huanjing Baohu bu (商务部, 环境保护部) [Ministry of Commerce and Ministry of Ecology and Environment], “Duiwai touzi hezuo huanjing baohu zhinan” de tongzhi (《对外投资合作环境保护指南》的通知) [Notice on “Guidelines for Environmental Protection of Foreign Investment Cooperation”] (Feb. 18, 2013), art. 5 (stating “Enterprises should understand and abide by the laws and regulations of the host country related to environmental protection.”).

<sup>174</sup> Faiza Ismail, CPEC: *When the Alarm Goes Off*, DAWN (Mar. 25, 2019), <https://www.dawn.com/news/1471610>.

host state. Functionally, the structure of a Chinese lender/Chinese borrower transaction operates to internalize positive and negative externalities. Such externalities as political and commercial risk, and the costs they generate, are theoretically subsumed by such an approach. Closing the loop is the closest approximation to the exportation of a “China model,” and yet it is one that is not necessarily transplanted into the host state to be taken over by host state actors; instead, it is designed to simply extend the Chinese approach to project finance beyond the sovereign territory of the PRC and to retain Chinese control.

Choice of law for BRI contracts is a vital area for understanding the order-making of Chinese business practices overseas. Such contracts involve both non-financial documents for infrastructure deals and loan agreements, the former which are often tiered contracts to multiple parties, including sub-contractors, which each may have different choice of law provisions. The non-financial agreements (e.g., project agreement, property documents, construction contract, concession agreement, service contracts, sub-contracts, etc.), as a general rule, usually apply local law, although Chinese parties negotiate for non-local forums for dispute resolution. As one Hong Kong-based lawyer told me who has worked on such deals, “in places like in Ghana or Nigeria, the law is okay. It’s based on common law. What’s much more important is the dispute resolution mechanism. For concession agreements and construction agreements, you won’t want a local court. You want arbitration and outside the country so that you can control the nationality of arbitrators.”<sup>175</sup>

Based on my research, for loan agreements, the governing law is often U.K. law or New York law as these sources of law are perceived, including by Chinese parties, as the most “time-tested.” Loan negotiations often exhibit the sharpest asymmetries between Chinese and host borrowers, where the borrower is a local party. There are a few instances whereby PRC law was the governing law of the loan agreement. For example, the loan agreement for the Mombasa-Nairobi railway, signed between the Kenyan government and the EximBank on May 11, 2014, specifies that PRC law is the governing law.<sup>176</sup> It is not uncommon for those lawyers who are providing legal services on such a deal to have some impact on the choice of law in the relevant contracts. One reason why U.K. law has been the first choice for lending arrangements is not only because of the inherent quality of U.K. law but also because, to date, U.K. magic circle firms have been the main lawyers for such transactions, although these trends may be changing.<sup>177</sup> PRC lawyers I spoke with in Beijing, Shanghai, Hangzhou, and other cities, who are starting to receive some of this work, are also keen to promote PRC law in BRI contracts.

<sup>175</sup> Interview with lawyer in Hong Kong (Mar. 11, 2019).

<sup>176</sup> Edwin Okoth, *SGR Pact with China a Risk to Kenyan Sovereignty, Assets*, DAILY NATION (Jan. 13 2019), <https://www.nation.co.ke/news/Hidden-traps-in-SGR-deal-with-China/1056-4932764-ebw46r/index.html>.

<sup>177</sup> See *supra* text accompanying note 145.

Closely related to choice of law issues is the dispute resolution forum. Chinese lenders and SOEs often prefer conciliation over litigation as a means of resolving disputes, an observation often overlooked by the “law positive” position. International arbitration is a second preference.<sup>178</sup> Chinese parties often push for onshore options (e.g., the China International Economic and Trade Commission),<sup>179</sup> although Hong Kong and Singapore are the most common as a compromise forum. The Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC) have been successful in attracting disputes. For example, of the 250 to 300 cases that the HKIAC handles per year, meaning that the HKIAC provides full administrative support including applying HKIAC Adminstrated Arbitration Rules or UNCITRAL Arbitration Rules, about 40 percent involve a mainland party.<sup>180</sup> Since 2014, the HKIAC has handled more than 488 cases involving a party from a BRI jurisdiction.<sup>181</sup> From 2014 to 2018, 82 cases involving a party or parties from the PRC and a party or parties from a BRI jurisdiction were filed with the HKIAC under its rules.<sup>182</sup> These disputes included commercial, maritime, construction and corporate disputes, professional services, and intellectual property issues with a total value of \$779 million.<sup>183</sup> Of these 82 cases, 35 percent of the time, the PRC party was the claimant and 66 percent of the time, it was the respondent.<sup>184</sup> For the SIAC, Chinese parties are the second most frequent user, after Indians.<sup>185</sup> From 2014 to 2017, an average of 18.5 percent of new filings involved a Chinese party.<sup>186</sup> In summation, international commercial arbitration produces transnational law as it is a mostly corporate-made law that is confidential. These features effectively “lift” the dispute out of the jurisdiction of the host state, making it transnational, and ensure that it is not subject to public disclosure through the enforcement powers of local courts or public regulatory bodies.

#### b. BITs & FTAs

The “law positive” view has made much of China’s investment strategy through relying on its existing international investment agreements, namely, BITs and investment chapters in FTAs, and instruments such as double-taxation treaties.<sup>187</sup> Fundamentally, these treaties protect Chinese

<sup>178</sup> Patrick M. Norton, *China’s Belt and Road Initiative: Challenges for Arbitration in Asia*, 13 U. PA. ASIAN L. REV. 72 (2018).

<sup>179</sup> See Gu, *supra* note 44.

<sup>180</sup> Interview with HKIAC secretariat in Hong Kong (Mar. 11, 2019).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Interview with SIAC registrar in Singapore (Aug. 13, 2018).

<sup>186</sup> Figures calculated from SIAC annual reports, <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report>.

<sup>187</sup> NORAH GALLAGHER & WENHUA SHEN, CHINESE INVESTMENT TREATIES: POLICIES AND

investors from discriminatory treatment by host states and through their selection of dispute resolution mechanisms ensure that disputes are not litigated in local courts. Hence, these agreements can be powerful tools to create transnational law.

While China has become a champion of BITs, in part, by emulating the U.S.,<sup>188</sup> many of China's BITs with host states, however, are out of date, including ambiguous definitions of "investor" and "investment," the lack of national treatment, and limited options for investor-state dispute resolution.<sup>189</sup> Several African students pursuing advanced law degrees at Chinese universities told me that reform to their countries' BITs with China is long overdue.<sup>190</sup> Likewise, the FTAs that China has concluded with BRI states are deemed to be "economically insignificant."<sup>191</sup> However, where China does have an FTA with a BRI partner, such as Pakistan, the FTAs can provide a structure for facilitating BRI projects.<sup>192</sup> For instance, at the Second Belt and Road Forum for International Cooperation, Pakistan and China signed phase-II of their FTA, which provides market access to 90 percent of Pakistani commodities at zero duty.<sup>193</sup> Moreover, BITs can remove disputes from local courts by designating the International Centre for Settlement of Investment Disputes as the forum for dispute resolution. In short, while China's international investment agreements require updating as China transitions from a capital-importing to capital-exporting country, such agreements can contribute to the construction of transnational law, as part of China's law and development strategy.

### c. Regional legal harmonization

One largely overlooked area by the "law positive" literature is regional legal harmonization. The PRC has become a champion of the harmonization of commercial law between host states to standardize rules and minimize transaction costs entailed in engaging with diverging systems. It is important to note that the unit of such harmonization is contiguous states in specific geographic regions, often trade blocs. Thus legal harmonization operates

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PRACTICE (2009); Jie (Jeanne) Huang, *Silk Road Economic Belt: Can Old BITs Fulfill China's New Initiative?*, 50 J. WORLD TRADE 733 (2016); Jie (Jeanne) Huang, *Procedural Models to Upgrade BITs: China's Experience*, 31 LEIDEN J. INT'L L. 93 (2018).

<sup>188</sup> See *supra* note 34 at [ ].

<sup>189</sup> See Huang, *Silk Road Economic Belt*, *supra* note 187, at 736.

<sup>190</sup> Interview with African students at law schools in Hangzhou (June 10, 2017).

<sup>191</sup> See Huang, *Silk Road Economic Belt*, *supra* note 187, at 736.

<sup>192</sup> THE FREE TRADE AGREEMENT BETWEEN THE GOVERNMENT OF THE PRC AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN, signed on Nov. 18, 2006 and effective on July 1, 2007.

<sup>193</sup> APP, *Second Phase of China-Pakistan FTA To Be Signed On April 28*, THE EXPRESS TRIBUNE (Apr. 23, 2019), <https://tribune.com.pk/story/1956779/2-second-phase-china-pakistan-fta-signed-april-28/>. But see *China Pakistan FTA Phase II more beneficial than Phase I*, CPEC PORTAL (May 7, 2019), <http://www.cpecinfo.com/news/china-pakistan-fta-phase-ii-more-beneficial-than-phase-i/NzA2MA==> (noting that phase-II was, in part, initiated by the Pakistani side after unequal gains of phase-I favoring China).

through intra-regions rather than inter-nations. Often, globalization is construed in unitary terms as if processes occur everywhere at once simultaneously; this is not the case in China's approach. Rather, Chinese economic globalization operates through existing multilateral forums, which it uses to promote its own interests. The logic is not unlike how China interacts with international legal and financial organizations, such as the G20.<sup>194</sup> At the same time, working through existing forums means China must often learn to play by the rules of others as well as gain proficiency in the politics of the forum's membership.

Examples of China's use of existing forums abound. Beijing is a major funder of the Secretariat of the Organisation pour L'Harmonisation en Afrique du Droit des Affaires (OHADA), which seeks to increase coordination in the corporate law among Francophone African countries.<sup>195</sup> China has been active in Southeast Asia through forming an FTA with the Association of Southeast Asian Nations (ASEAN), supporting the work of the Asian Business Law Institute,<sup>196</sup> which seeks to harmonize commercial and civil law in the region, signing on to the Singapore Mediation Convention which will foster mediation throughout the region and potentially the world,<sup>197</sup> and showing commitment to the Regional Comprehensive Economic Partnership (RCEP), the largest FTA in the world.<sup>198</sup> In exceptional cases, China may build its own multilateral institutions such as the SCO, which functions not only as an international counter-terrorism apparatus but also as an economic bloc, albeit a mostly unproductive one.<sup>199</sup> In each case, Beijing pushes for the harmonization of

<sup>194</sup> Interview with Shi Jingxia, Dean of University of International Business and Economics Law School, in New York City (Sept. 25, 2018). For example, when it became China's turn to lead the G20, Beijing established the G20 Trade and Investment Working Group. Subsequently, the Trade Ministers agreed on a non-binding Guiding Principles for Global Investment Policymaking (hereinafter, "G20 Principles") in 2016. Since China acceded to the WTO, there has been speculation as to what kind of member China would be. The G20 Principles provided some response to this question by agreeing to the avoidance of FDI protectionism and non-discrimination and imposing no obligations on the home state. See Karl P. Sauvant, *China Moves the G20 towards in International Investment Framework and Investment Facilitation*, in CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY 311, 318 (Julien Chaisse ed., 2019); See also Rolland & Trubek, *supra* note 156, at 402 (2017) (stating "Overall, though, China seems to be increasing the scope of protection for foreign investors in its agreements, which represents a move away from its earlier more restrictive position.").

<sup>195</sup> Interview with Justin Monsenepwo Joost, Ph.D. candidate Julius Maximilian University of Würzburg, in Shanghai (Apr. 18, 2019) (specifying that China is the third largest funder after France and the World Bank).

<sup>196</sup> Interview with Prof. Adeline Chong in Singapore (Aug. 15, 2018). See also RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN ASIA, ASIAN BUSINESS LAW INSTITUTE 49-69 (Adeline Chong, ed.), (2017) (including a PRC report).

<sup>197</sup> Xiaoxia, *40-Odd Countries Including China Sign Singapore Mediation Convention*. XINHUA (Aug. 7, 2019), [http://www.xinhuanet.com/english/2019-08/07/c\\_138291506.htm](http://www.xinhuanet.com/english/2019-08/07/c_138291506.htm).

<sup>198</sup> See Hsieh, *supra* note 21.

<sup>199</sup> To date, the SCO's main achievements for legal harmonization have been in the field of antiterrorism law. See e.g., SHANGHAI CONVENTION ON COMBATING TERRORISM,

law, whether corporate, trade, enforcement of foreign judgments, or security. By integrating its norms into multilateral bodies—whether existing or ones it has established—China contributes to building a transnational law, although it is one whose agenda is not necessarily imposed by Beijing. Rather, Beijing must learn to negotiate complicated intra-regional politics.

#### d. Soft law

In the absence of formal treaties (e.g., bilateral, regional, or multilateral mechanisms like BITs, FTAs, and double-taxation treaties) or forums, China has become a strong advocate for soft law.<sup>200</sup> Soft law consists of rules that lack the binding force of law but which may have practical effect.<sup>201</sup> Soft law is a particular feature of financial law,<sup>202</sup> and China's entry into global financial governance is no exception. Sources include, in the Chinese case, declarations, recommendations, guidelines, resolutions, codes of conduct, opinions, MOUs, and memoranda of guidance issued by the MOFCOM or other regulators.<sup>203</sup> The Chinese predilection for soft law is an outcome of preferences for cooperative models of ordering rather than coercive or legalistic ones. However, indicative of problems, in a 2018 speech, legal scholar Wang Guiguo noted the soft law nature of cross-border governance under the BRI has drawbacks. He stated "...The project-oriented BRI implementation method lacks legal coordination that provides reliable legal protection to enterprises and effective specific treatment standards, including damages for enterprises when they are harmed."<sup>204</sup>

Hence, the soft law nature of the BRI allows for flexibility but it may

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SEPARATISM AND EXTREMISM (June 15, 2001), <https://www.refworld.org/docid/49f5d9f92.html> (last visited July 29, 2019).

<sup>200</sup> Wang, *China's Approach*, *supra* note 44, at 2; Wang, *China's Governance*, *supra* note 44.

<sup>201</sup> Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 MOD. L. REV. 19, 19 (1993).

<sup>202</sup> John Flood, *Capital Markets, Globalization and Global Elites*, in TRANSNATIONAL LEGAL PROCESSES 114, 116 (Michael B. Likosky ed., 2002) (stating, "global law is *soft law* made by professionals during the construction of deals... Yet soft law has been remarkably successful in constituting the global legal order."); CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21<sup>ST</sup> CENTURY* (2012); CHRIS BRUMMER, *MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW, AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT* (2014).

<sup>203</sup> See e.g., *List of Deliverables of the Second Belt and Road Forum for International Cooperation*, (Apr. 27, 2019), <http://www.chinese-embassy.org.uk/eng/zgyw/t1658767.htm>.

<sup>204</sup> Wang Guiguo (王贵国), *Quanqiu zhili yu "yidaiyilu" de yuanze he fangxiang -- zai fazhi yu gaige guoji gaoduan luntan (2018) shang de jianghua* (全球治理与“一带一路”的原则和方向——在法治与改革国际高端论坛(2018)上的讲话) [*Global Governance and the Principles and Directions of the "Belt and Road Initiative": A Speech at a High Level Meeting on the Rule of Law and Reforming the International [System] (2018)*], Zhejiang Daxue Faxue Qingnian (浙江大学法学青年) [Zhejiang University Legal Studies Youth] (Nov. 11, 2018), <https://mp.weixin.qq.com/s/KN6bEYua6ZLS4Vmpajy1Ew>.

leave Chinese enterprises inadequately protected. From the Chinese side, soft law is not sufficient to protect investments, but rather, requires hard law or additional sources of ordering. There are enforceability concerns on the other side, as well. From the vantage of the host state, there are questions as to whether Chinese uphold their “obligations” under soft law arrangements. This became clear to me during a think tank dialogue in Islamabad with young lawyers and officials, many of whom were from the poorer provinces of Balochistan and Khyber Pakhtunkhwa. The conversation centered on the question, “do Chinese uphold soft law agreements?”<sup>205</sup> As soft law is more exposed to political discretion than hard law, it requires an analysis that is more attuned to such context.

e. Judicial cooperation

To complement intra-regional harmonization of commercial and civil law, China has also embarked on a number of initiatives to foster networks between legal and judicial experts between China and BRI states. From a socio-legal perspective, spotlighting the work of these professionals is essential as they are the ones who, through their conferencing, form the cross-jurisdictional coordination that is a requirement for the formation of transnational law. Led by the SPC and the China Law Society, these initiatives include conferences in Beijing and in BRI states that are principally for purposes of network-formation and less to train foreign judges in PRC law,<sup>206</sup> although this, too, is happening, particularly under the auspices of the National Judges College in Beijing.<sup>207</sup> Such efforts have culminated in more soft law, such as the “Shanghai Declaration of the World Enforcement Conference,” a multilateral MOU that antecedes the delayed Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.<sup>208</sup>

Such cooperation and networking may be dismissed as epiphenomenal, a weak form of people-to-people diplomacy, and yet, research in this area suggests that such venues as international conferences for BRI lawyers can be initial steps for forming relationships that may assist in problem solving

<sup>205</sup> Personal observation in Islamabad (June 19, 2019).

<sup>206</sup> Samuli Seppänen, *Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?*, 51 VAND. J. OF TRANSNAT'L L. 131-2 (2018) (describing legal capacity-building programs led by the China Law Society, ASEAN, Legal Forums, the Forum for China-Africa Cooperation, and the Academy for International Business Officials under MOFCOM).

<sup>207</sup> For instance, thirty judges from Pakistan attended training at the National Judges College for two weeks in June 2019, funded by MOFCOM.

<sup>208</sup> See *Shijie zhixing dahui shanghai xuanyan* (世界执行大会上海宣言) [Shanghai Declaration of the World Enforcement Conference], signed Jan. 22, 2019, effective Jan. 22, 2019, <http://lawinfochina.com/display.aspx?id=7888&lib=tax&SearchKeyword=&SearchCKeyword=>.

down the line.<sup>209</sup> In Chinese practice, rule-bending pragmatism may trump legalistic formalism, and means-end reasoning may outweigh commitment to established procedure.<sup>210</sup> If the goal is to minimize risks and facilitate commercial transactions, then knowing the key individuals who can obtain a governmental approval or fast-track licensing requirements, particularly in post-colonial bureaucratic states is indispensable.

#### f. Lawtech

In addition to judicial and lawyer networks, another complement to transnational law is “lawtech,” that is, the use of technologies, such as big data, artificial intelligence, and machine learning, to support the delivery of legal services, including courts. Perhaps more than any other country, China has embraced lawtech, in part due to overburdened courts, a state-backed hyper-modernized tech sector, pro-innovation regulation for technology, media, and telecommunications, and little cultural caché for privacy. As a result, the SPC has turned to lawtech to facilitate adjudication, minimize dockets, improve standardization of rulings across PRC courts, and provide greater access to justice.<sup>211</sup>

China’s “Internet courts” may be one of the few exceptions to the rule that China does not export its legal institutions overseas. There have been MOUs between China and Thailand<sup>212</sup> and Laos<sup>213</sup> to transfer such legal technologies to host states. To date, however, the MOUs have not appeared

<sup>209</sup> On judicial networking, see generally Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L. J. 191 (2003); Paul B. Stephan, *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 VA. L. REV. 17 (2014).

<sup>210</sup> See Samuli Seppänen, *Anti-formalism and the Preordained Birth of Chinese Jurisprudence*, 4 CHINA PERSPECTIVES 31 (2018) (analyzing such preferences according to contemporary Chinese legal theory).

<sup>211</sup> Zhou Qiang (周强), *Zuigao renmin fayuan gongzuo baogao* (最高人民法院工作报告) [Supreme People’s Court Work Report] Zhongguo fayuan wang (中国法院网) [CHINA COURT NET] (Mar. 12, 2019), <https://www.chinacourt.org/article/detail/2019/03/id/3792001.shtml> (mentioning the priority of developing China’s Internet Courts to assist with case management and dispute resolution services).

<sup>212</sup> *Zhonghua renmin gongheguo zuigao renmin fayuan he Taiwangguo daliyuan sifa jiaoliu yu hezuo liangjie beiwanglu* (中华人民共和国最高人民法院和泰国大理院司法交流与合作谅解备忘录) [MEMORANDUM OF UNDERSTANDING ON JUDICIAL EXCHANGE AND COOPERATION BETWEEN THE SUPREME PEOPLE’S COURT OF THE PEOPLE’S REPUBLIC OF CHINA AND THE SUPREME COURT OF THE KINGDOM OF THAILAND], signed June 12, 2016 (identifying the transfer of information technologies and “wisdom courts” (*zhihui fayuan*) as areas for cooperation).

<sup>213</sup> *Zhonghua renmin gongheguo zuigao renmin fayuan yu Laowu renmin minzhu gongheguo zuigao renmin fayuan sifa jiaoliu yu hezuo liangjie beiwanglu* (中华人民共和国最高人民法院与老挝人民民主共和国最高人民法院司法交流与合作谅解备忘录) [MEMORANDUM OF UNDERSTANDING ON JUDICIAL EXCHANGE AND COOPERATION BETWEEN THE SUPREME PEOPLE’S COURT OF THE PEOPLE’S REPUBLIC OF CHINA AND THE SUPREME COURT OF THE LAO PEOPLE’S DEMOCRATIC REPUBLIC], signed June 7, 2018.



to have born much fruit in terms of viable PRC-inspired Internet courts outside of China.

Thus far, Chinese technology has had greater traction in impacting telecom and e-commerce in BRI states than it has judiciaries. China is doing so not by exporting legal instruments to influence other countries' data governance regimes but, rather, by supplying infrastructure that forms part of data governance. This infrastructure includes physical elements (e.g., fiber-optic cables, antennas, data centers) as well as non-physical ones (e.g., transmission standards, networking protocols, and digital identifiers). It is conceivable that such infrastructure may give Chinese authorities access to sensitive or confidential data stored in, for example, the servers or clouds of legal service providers (e.g., law firms, arbitration centers, courthouses, etc.). Hence, the kinds of physical and digital infrastructures that support lawtech could be another vector of ordering, and one with wide-scale impact given the scale of such infrastructures.

In summary, the "law positive" view is correct in pointing to Chinese efforts to create transnational law through contracts, international investment agreements, and soft law, although the category of transnational law requires further unpacking. In doing so, one finds that "public contracts" are often public in name only, choice of law issues demonstrate a high level of variation, and whereas Chinese are trying to expand existing institutions or build new ones to onshore cross-border disputes, Chinese companies appear to accept forums in third-party states for dispute resolution. Further, legal and judicial networks of professionals are instrumental in producing transnational law, showing that in such dynamics, relationships are formative of transnational law. In addition, lawtech and digital infrastructure demonstrates how technology can be a conduit for ordering by establishing norms for information access, sharing, transfer, and archiving. In short, Chinese ordering is variable in its transparency and uniformity, and appears contingent on regional and local conditions.

## 2. Nonlaw

Formal law is only part of Chinese ordering, however, and a holistic analysis should consider, in addition to formal law, the extralegal or nonlegal means that supplement law. The view from many BRI host states, for example, is that law's role is marginal, giving some credence to the "law negative" view. A lawyer based in Yangon, Myanmar, who has worked on infrastructure projects along the "Myanmar-China Economic Corridor" put it this way: "[here, in Myanmar,] the Chinese government relies on political methods, not legal methods. The lawyers' role is to provide bullets to fight. All final decisions [on projects] go to top leaders. The 'legal' is not that important."<sup>214</sup> Moreover, in terms of the role of the Burmese justice system in addressing potential concerns involving CODI, he stated, "Myanmar is

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<sup>214</sup> Interview with lawyer via video chat (Nov. 21, 2018).

far behind. There is no arbitration center, and the court system is old,” meaning that neither Chinese nor Burmese parties can rely on the local legal system to resolve disputes.<sup>215</sup> A judicial bureaucracy that is often known more for “performing order” rather than delivering justice is problematic to any would-be litigant.<sup>216</sup> It is little wonder that foreign investors, including Chinese, would resort to nonlegal means to address problems.

Myanmar may be representative of many of the weak legal systems in which China is investing, and the response, too, may suggest the need to incorporate nonlegal means of ordering in addition to transnational law. As empirically-minded legal scholars have shown, it is possible to have order (transactional, social, etc.) without law.<sup>217</sup> In the ethnographic record, most cases whereby order is promoted without recourse to formal law are homogenous communities whose members share norms.<sup>218</sup> Hence, one issue is whether, to the extent that extra- or nonlegal norms matter in Chinese cross-border ordering, non-Chinese are receptive to such norms. Alternately, in market contexts, a sense of belonging to a common occupation and the informal norms that cohere such communities (e.g., honesty) may take the place of formal contracts.<sup>219</sup> While informal norms usually cannot sustain complex multi-country project finance deals,<sup>220</sup> China-led globalization begs the question the extent to which such techniques are relevant and how they reinforce transnational law. In what follows, I include several nonlaw sources of ordering, including political risk insurance, industrial standards, and, perhaps most relevant, government-to-government relationships, as well as civil society and diasporic business communities. Many (but not all) of the nonlegal means have links to the state, suggesting the mutable nature of state capitalism, and thus requires revising assumptions in the informal norms literature about the role of the state. My rationale for prioritizing the specific items below is based on their prevalence in fieldwork, although I emphasize that such results are initial.

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<sup>215</sup> *Id.*

<sup>216</sup> NICK CHEESMAN, *OPPOSING THE RULE OF LAW: HOW MYANMAR’S COURTS MAKE LAW AND ORDER* 161, 169 (2015).

<sup>217</sup> ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (2009).

<sup>218</sup> See e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083 (2001); Eric A. Feldman, *The Tuna Court: Law and Norms in the World’s Premier Fish Market*, 94 CA. L. REV. 331 (2006); Matthew S. Erie, *Muslim Mandarins in Chinese Courts: Dispute Resolution, Islamic Law, and the Secular State in Northwest China*, 40 LAW & SOC. INQUIRY 1001 (2015).

<sup>219</sup> Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55 (1963) (finding that contract governs transactions in the manufacturing sector only when gains are thought to outweigh the costs; otherwise, individuals rely on occupational roles).

<sup>220</sup> See QIAO, *supra* note 66 (arguing that informal norms were sufficient for complex real estate transactions in urbanizing Shenzhen).

## a. Political Risk Insurance

Political risk insurance and credit enhancement are best practice for SOEs and POEs aiming to reduce their exposure to risk when investing in challenging environments overseas. Political risk insurance, like liability insurance or loss insurance, is itself a contract for indemnification but it is more accurately understood as a commercial policy that functions as an auxiliary to legal protection.<sup>221</sup> In the context of CODI, there are multiple types of political risk insurance on which that Chinese enterprises rely, including policies offered by Chinese companies, international financial institutions, and Western companies.

The most relevant insurer for CODI is the China Export and Credit Insurance Corporation (“Sinosure”), a state-owned policy-oriented insurance company that provides export credit insurance to Chinese enterprises investing in high-risk countries and projects. *Ex ante*, to guide CODI, Sinosure issues an annual Risk Analysis Report that, similar to credit rating agencies like Standard & Poor’s and Moody’s, assigns sovereign credit ratings to countries, thus ranking them as investment destinations according to current economic and political trends.<sup>222</sup> As of 2017, Sinosure has provided \$2.8 trillion in insurance support to international projects and suffered claims of \$9.5 billion.<sup>223</sup>

Sinosure is functionally analogous to the World Bank’s Multilateral Investment Guarantee Agency (MIGA), which provides insurance for currency inconvertibility and transfer restrictions, expropriation, war, terrorism, and civil disobedience, non-honouring of financial obligations, and contract breach.<sup>224</sup> During the “Conference on Legal Risks and

<sup>221</sup> Gerhard Wagner, *Tort Law and Liability Insurance* 31 GENEVA PAPERS ON RISK & INSURANCE 277 (2006); PETER CANE, *TORT LAW AND ECONOMIC INTERESTS* (1991).

<sup>222</sup> *Zuo waimao de zhuyi le! Zhe fen fengxiantu qingshou hao* (做外贸的注意了! 这份风险图请收好) [*Those Engaged in Foreign Trade, Pay Attention! Please Consider This Risk Map*], Zhongguo guoji shanghui (中国国际商会) [China International Chamber of Commerce], (Oct. 16, 2018), <https://mp.weixin.qq.com/s/xpXZjZAMabyBsT38XBQIDQ> (describing how the 2018 National Risk Analysis Report provides a national risk rating, sovereign credit risk rating and risk analysis for 62 countries using four criteria of political risk, economic risk, business risk and legal risk.) In addition, Taihe Think Tank and Beijing University jointly authored a report that generates a “five-connections index” (*wutong zhishu*) for ranking BRI countries: policy communication, infrastructural connectivity, trade capacity, financial circulation, popular inter-connectedness. See *Taihe Zhiku yu Beijing Daxue lianhe fabu “Yidaiyilu” wutong zhishu yanjiu baogao* (太和智库与北京大学联合发布“一带一路”五通指数研究报告) [*Taihe Institute and Peking University jointly publish “The ‘BRI’ Five-Connections Index Report”*], Taihe Zhiku (太和智库) [Taihe Institute] (Dec. 24, 2018), <http://www.taiheinstitute.org/Content/2018/12-24/0913043250.html>. Note that there are ongoing discussions in China to refine the system of per country risk analysis, including establishing a system to rate proposed projects in specified industries by categories of risk.

<sup>223</sup> See COLLIER, *supra* note 104 at 73.

<sup>224</sup> *Products, MULTILATERAL INVESTMENT GUARANTEE AGENCY,*

Countermeasures of International Investment and Trade” hosted by the China Law Society in Beijing in 2017, featuring some 180 people from 31 countries, mainly from African and ASEAN states, after a keynote speech by the Djibouti Ambassador to China, Professor Zhang Yuejiao, former member of the WTO Dispute Settlement Body’s Appellate Body, advocated greater use of MIGA by Chinese enterprises operating in developing countries. She explained, “... many African project and African states have not applied for this [type of] guarantee. If this guarantee is used, then like other forms of insurance, if the risk is compensated by MIGA and then compensated by the government, MIGA will make a claim to the host government... This will reduce the risk of investors (*jianshao touzizhe de fengxian*).”<sup>225</sup>

In addition to Sinosure and MIGA, private insurers like Zurich Insurance Group, AIG, Prudential and others also offer political risk insurance.<sup>226</sup> These policies are, for the most part, not mutually exclusive. Such guarantees are thus one tool to mitigate risk, however, while necessary, they may not be sufficient to address such concerns. Political risk insurance may be too expensive for POEs and insurers may encounter difficulty pricing risk in the weakest investment environments, given the absence of credible data. As an object of socio-legal study, political risk insurance, like other types of indicators used in global governance, are embedded in specific socio-political theoretical claims.<sup>227</sup> Given that Sinosure increasingly operates outside of China, insuring non-Chinese companies, its approach to guiding decision-making about specific projects warrants particular attention.<sup>228</sup>

#### b. Standards

Where possible, China has pushed for the implementation of Chinese standards of all sorts, including industry standards, technical standards, and data standards, in its overseas projects, sometimes tying the use of Chinese standards to loans offered by policy banks.<sup>229</sup> Using uniform

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<https://www.miga.org/products> (last visited Aug. 1, 2019).

<sup>225</sup> Personal observation of “Conference on Legal Risks and Countermeasures of International Investment and Trade,” hosted by the China Law Society, in Beijing (Oct. 12-13, 2017).

<sup>226</sup> Olga Boltenko, *Political Risk Insurance on the Rise along the Belt and Road: An Alternative to Investment Arbitration?* HONG KONG LAWYER (Oct. 2017), <http://www.hk-lawyer.org/content/political-risk-insurance-rise-along-belt-road-viable-alternative-investment-arbitration>.

<sup>227</sup> Kevin E. Davis, et al., *Introduction: Global Governance by Indicators*, in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 3, 19 (Kevin Davis et al. eds., 2012).

<sup>228</sup> Lisa Hielscher and Sebastian Ibold, *Sinosure*, BELT AND ROAD INITIATIVE, <https://www.beltroad-initiative.com/sinosure/> (last visited July 30, 2019) (listing Sinosure’s agreements with international companies).

<sup>229</sup> Telephone interview with banker from China Development Bank (Nov. 18, 2019).

standards, particularly in projects that may cross borders such as railways, highways, fiber-optic cables, dry ports, or 5G mobile networks, minimizes transaction costs in having to adjust for different jurisdictions' standards. Industry standards not only provide access to markets but also have a regulatory effect parallel to legal norms.<sup>230</sup>

China has been improving its standards both domestically and internationally in a kind of virtuous cycle. China is one of the few countries with legislation on standards, meaning that in China, unlike in most countries, the government sets the standards and not industry, in another example of state capitalism.<sup>231</sup> The 2017 revisions to the legislation greatly expand the chapter on legal liability signalling a commitment to enforcement.<sup>232</sup> In step, the PRC's regulatory agencies have been increasingly fine-tuned in recent years with an eye on foreign markets. For instance, the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), established in 2001 as part of China's accession to the WTO, and which oversees the Standardization Administration of China (SAC), which is responsible for standardization, suffered from a number of problems, including lack of coordination with global standards.<sup>233</sup> AQSIQ was replaced in 2018 by the State Market Regulatory Administration (SMRA), which is deemed to be the most powerful market regulator to address public concerns about quality issues. The SMRA can be seen as part of China's increasing internationalization of its standards. China joined the International Standards Organization (ISO) as early as 1978, in 2008, the SAC became the sixth permanent member of the ISO Council, and, in 2013, became a member of the Technical Management Board, thus cementing its position on both the governing side and technical side of ISO's standard-setting. As with its participation in the WTO, G20, or UN, China's involvement with the ISO has given it a broader platform from which to promote its standards abroad. Consequently, through the BRI, some Chinese enterprises are experiencing a majority of their operating income from overseas markets.<sup>234</sup>

<sup>230</sup> See e.g., PENNY HARVEY & HANNAH KNOX, *ROADS: AN ANTHROPOLOGY OF INFRASTRUCTURE AND EXPERTISE* 85-87 (2015) (arguing that engineering standards in road-building can have deterministic effects on governing space).

<sup>231</sup> *Zhonghua renmin gongheguo biaoqunhuafa* (2017 xiuding) (中华人民共和国标准法 (2017 年修订)) [Standardization Law of the PRC (2017 Revision)], issued by the Standing Committee of the National People's Congress on Nov. 4, 2017, effective on Jan. 1, 2018.

<sup>232</sup> *Id.* at Ch. 5.

<sup>233</sup> JOHN KOJIRO YASUDA, *ON FEEDING THE MASSES: AN ANATOMY OF REGULATORY FAILURE IN CHINA* 69 (2018) (providing an examination of certification and standards in China's food industry).

<sup>234</sup> 'Yidaiyilu' guoji hezuo dianxing xiangmu tuidong 'Zhongguo biaoqun' duijie guoji ("一带一路"国际合作典型项目推动"中国标准"对接国际) ['Belt and Road Initiative' International Cooperation Promotes "China Standards" to Link Up with International Ones] SINA XINWEN ZHONGXIN (Sina 新闻中心) [SINA NEWS CENTER], Mar. 18, 2019, <http://news.sina.com.cn/w/2019-03-18/doc-ihrfqzkc4962826.shtml> (illustrating how

One concrete example is Chinese road-building in Africa. The source of loans often determines which standards are used. While many of the China-constructed roads are co-financed with multilateral development banks and hence rely on international rather than Chinese standards, this is not always the case. The Addis Ababa-Djibouti railway, for example, was funded by loans from Chinese policy banks and the design was based on the Chinese National Railway Class 2 standard, with some modifications made at the request of the Ethiopian Railway Corporation.<sup>235</sup> In another case, China Harbor Engineering Company was contracted to build an expressway in Cameroon with Chinese financing, when, in the midst of construction, the Cameroon government demanded that the Chinese standards in the contract be changed to French ones (the Chinese standards were thinner, in this instance).<sup>236</sup> The Chinese side faced massive losses and sought strict contract enforcement.<sup>237</sup> As China uses standards that differ from other countries like France or the U.K. that are used in former colonies, the thickness of their blacktop may require Chinese road equipment, Chinese engineers and technical experts, and, by extension, Chinese laborers. Setting standards thus has knock-on effects throughout the economy, giving China broad access to the market. Consequently, just as the typical deal structure shows a hermeticity (i.e., a Chinese developer, borrowing from a Chinese lender), which minimizes financial risk, so, too, does project implementation demonstrate similar logic (i.e., Chinese laborers working on Chinese-managed projects and living in Chinese camps), which minimizes “community risk.”<sup>238</sup>

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Shandong Power Construction Corporation has benefitted from the BRI such that 80 percent of its operating income is from BRI states).

<sup>235</sup> Yaji tielu yunying he weihu xiangmu gongsi (亚吉铁路运营维护管理方案) [Addis Ababa Djibouti Railway's Operation and Maintenance Program Office] Yajie tielu yunying weihu guanli fang'an (亚吉铁路运营维护管理方案) [Plan for Safeguarding Addis Ababa Djibouti Railway's Operational Maintenance] 9 (2017) (on file with the author). See generally MIRIAM DRIESSEN, *TALES OF HOPE, TASTES OF BITTERNESS: CHINESE ROAD BUILDERS IN ETHIOPIA* (2019) (providing an ethnographic account of the difficulties encountered by Chinese road developers).

<sup>236</sup> Zhongguo gangwan zhongbu feizhou quyu quanli zhongxin zong jingli Xu Huajiang: Hezhou kaifa di sanfang shichang kamailong shi zuida de liyi you guan zhe (中国港湾中部非洲区域管理中心总经理许华江：合作开发第三方市场 喀麦隆是最大的利益攸关者) [Xu Huajiang, General Manager of Central China Regional Management Center, China Harbor: Cameroon is the Biggest Stakeholder in Cooperative Development of Third-Party Markets], 21SHIJI JINGJI BAODAO (21 世纪经济报道) [21ST CENTURY ECONOMIC REPORT] (Mar. 28, 2017), [http://www.21jingji.com/2017/3-28/zOMDEzNzlfMTQwNTUzOQ\\_5.html](http://www.21jingji.com/2017/3-28/zOMDEzNzlfMTQwNTUzOQ_5.html).

<sup>237</sup> *Id.*

<sup>238</sup> See *infra* note 248. See also DRIESSEN, *supra* note 235 (describing living conditions for Chinese workers in Ethiopia); Muhammad Azeem, *Theoretical Challenges to TWAIL with the Rise of China: Labor Conditions Under Chinese Investment in Pakistan*, 20 OR. REV. INT'L L. 395, (2019) (critiquing the use of China's labor practices in Pakistan).

## c. Diplomatic intervention

Perhaps the most prevalent nonlaw means of ordering is political intervention which takes two forms: managing relations with the host state at the highest levels of the government and resolving conflicts. The MFA, through its embassies and consulates in host states is engaged, at various levels, with investment strategies including risk mitigation and the protection of Chinese assets and citizens overseas.<sup>239</sup> As for managing public relations to prevent problems, in many host states, Chinese embassies actively shape local perception of Chinese projects. Such efforts include everything from “Twitter diplomacy” to working with overseas Chinese communities who may be integrated into local communities and thus act as bridges with non-Chinese hosts.<sup>240</sup> Diplomatic intervention creates channels for decision-makers in China and the partner state to address a range of issues outside of formal law.

Embassies and consulates can be particularly active in mediating disputes between Chinese enterprises and local partners in high-risk regions like Africa, South Asia, and Central Asia.<sup>241</sup> For instance, in the case of the expressway in Cameroon that applied the Chinese standard for blacktop thickness instead of the French one, rather than go to court to enforce the terms of the contract, the China Harbor Engineering Company went to the Chinese Embassy in Yaounde.<sup>242</sup> The Chinese Embassy mediated the problem by inviting Cameroonian engineers to China to inspect their projects that were built and operated under Chinese standards and explained the differences between Chinese and French standards.<sup>243</sup> The Chinese provided data to demonstrate that pursuant to the frequency and weight of traffic on the roads, which the Chinese blacktop would suffice.<sup>244</sup> The approach of diplomatic intervention worked.<sup>245</sup>

<sup>239</sup> See Huo Siyi (霍思伊), “Yidaiyilu” jinru di’er jieduan: zhuanfang Guojia Fagaiwei yidaiyilu jianshe cujin zhongxin zhuren Zhai Dongsheng (“一带一路”进入第二阶段--专访国家发改委一带一路建设促进中心主任翟东升) [The Belt and Road Initiative Enters a Second Stage: Interview with Zhai Dongsheng, the Director of the National Development and Reform Commission’s BRI Construction and Promotion Centre], ZHONGGUO XINWEN ZHOUKAN (中国新闻周刊) [CHINA NEWS WEEKLY] (Apr. 25, 2019), <https://mp.weixin.qq.com/s/jqYfbDaINKbsilJkgEmpOA> (quoting Zhai Dongsheng saying, “...we request that Chinese embassies and specialized organs conduct risk assessments in order to reduce the blindness of enterprises’ investments and to give enterprises an early warning” (women yaoqiu Zhongguo dashiguan, zhuanye jigou yao jinxing fengxian pinggu, jianshao qiye touzi de mangmuxing, tiqian xiang qiye yujing)).

<sup>240</sup> See *infra* text accompany note 248.

<sup>241</sup> Interview with member of the MFA, Oxford (Nov. 27, 2017) (stating that in 2014, Huawei was fined 300 million RMB by the Ukrainian government for failure to pay taxes. The PRC embassy to Ukraine intervened and the Ukrainian government dropped its charged).

<sup>242</sup> See Zhongguo gangwan, *supra* note 236.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* (quoting the General Manager of the China Harbor Engineering Company as saying,

The departments of the MFA have become so involved that they began to require Chinese enterprises investing in those countries to gain pre-approval from the relevant embassy or consulate.<sup>246</sup> POEs may resort to political support, even if they may not receive the same level of protection as SOEs. Whereas Chinese POEs may enter markets seeking to abide by clear rules in forming contracts, often they encounter difficulty in doing so and, as a result, resort to political connections and bribery to secure and maintain transactional relationships.<sup>247</sup> While government-to-government solutions such as diplomatic intervention may be common, such an approach suffers from an information problem. The PRC government lacks adequate resources to intervene in every conflict in which Chinese enterprises may become embroiled.

Political intervention may seem to exist in an adversarial relationship with transnational law but in relations between nondemocratic states, it may coexist with transnational law in more complex ways. Political ties may underpin or even sustain transnational law, given that transnational law is centrally about corporate relationships. While politicians' intervening in disputes further marginalizes state courts and excludes arbitration, for that matter, as China prioritizes long-term relationships with host states, ongoing political relationships beget more deals, more contracts, and, hence more developmental assistance for host states and more economic return for China. While ordering as political relationships may be good for business it is not necessarily good for the rule of law, transparency, or access to justice.

#### d. Civil society and Chinese diaspora

The Party-State may also extend its reach outside of the PRC through nonstate means such as civil society. Civil society, because it is not deemed to be governmental, can often have greater impact than state representatives in terms of accessing local populations and influencing their perceptions of Chinese activity, commercial or otherwise, creating order. The Party-State is not used to free media, labor unions, and independent civil society. Such features of political life in some states outside of the PRC present political and financial risks to Chinese parties. Chinese NGOs or GONGOs ("government-organized NGOs") and overseas Chinese associations, including second-generation Chinese who have acculturated to host states and function as intercultural brokers, all participate in forms of communication known as *minxin xiangtong* (lit. "interlinking popular sentiment") to minimize "community risk."<sup>248</sup> In many respects, civil

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"technical problems are solved through business channels, and business problems can be solved through technical means" (*jishu wenti tongguo shangwu qudao jie jue, shangwu wenti ye keyi tongguo jishu tuijin jie jue*)).

<sup>246</sup> See interview with member of the MFA, *supra* note 241.

<sup>247</sup> *Id.* See also Qingxiu Bu, *China's New Approach to CSR in Congo: Is the Leverage Turning to China?*, INT'L BUS. L. J. 485 (2010).

<sup>248</sup> Jin Xin (金鑫), YIDAIYILU MINXIN XIANGTONG BAOGAO (一带一路民心相通报告)



society is the cutting edge of Chinese soft power.

Where there are histories of Chinese diaspora and consequently thick communities across borders, in places like Southeast Asia, Chinese enterprises investing in such jurisdictions may rely on overseas Chinese as cultural brokers. Overseas Chinese have not only local language ability but also contacts with the local government, suppliers, and potential business partners. As an example, in Cambodia, Sino-Cambodians involved in the sugar industry have historically been successful in obtaining “regulatory capture” over the local government, a feature of the economy that may benefit foreign investors, including those from China.<sup>249</sup> Overseas Chinese who are familiar with the local market can provide a range of services, including legal and consulting services, to Chinese companies looking to enter those markets.<sup>250</sup>

In those geographic regions where there is a brief history of overseas Chinese, for instance, the Middle East, Chinese enterprises may look to unlikely sources—namely, Chinese Muslims—to facilitate business and decrease risks. The Party-State has been particularly focused on internationalizing Chinese civil society in Muslim majority countries in which it is investing.<sup>251</sup> Examples include the CCP’s United Front Work Department’s “thought work” among overseas Chinese Muslims in Saudi Arabia who help shape Saudi Muslims’ views of China.<sup>252</sup> When Chinese Muslims interact with local Muslims they may have greater credibility in the eyes of local Muslims than Han businesspeople or the representatives of the Chinese government. In regards to commercial matters, they can introduce potential business partners, identify governmental contacts, raise capital, and help mediate disputes. In terms of broader “community risk” concerns, in the aggregate, such interaction can positively change people’s perceptions of China, as illustrated in thirty-seven ambassadors, many from Muslim countries, issuing a joint statement to the UN in 2019 in support of China’s human rights record in Xinjiang.<sup>253</sup>

Counter-balancing a methodology that primarily examines official PRC

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[REPORT ON THE INTERLINKING OF POPULAR SENTIMENT IN THE BELT AND ROAD INITIATIVE] (2018).

<sup>249</sup> Sokphea Young, *The Political Economy of Contestation over Land Resources in Cambodia* (2016) (unpublished Ph.D. dissertation, University of Melbourne). *See also* SOKPHEA YOUNG, *RESISTING POLITICAL DURABILITY: WEAK MEN VS. STRONGMEN IN CAMBODIA AND SOUTHEAST ASIA* (Forthcoming) (finding that Sino-Cambodian intermediaries working with Chinese investors influence local regulatory institutions to the benefit of those investors).

<sup>250</sup> *See* interview with overseas Chinese in Myanmar, *supra* note 214.

<sup>251</sup> *See generally* ROBERT R. BIANCHI, *CHINA AND THE ISLAMIC WORLD* (2019).

<sup>252</sup> Mohammed Al-Sudairi, *The Communist Party of China’s United Front Work in the Gulf: The ‘Ethnic Minority Overseas Chinese’ of Saudi Arabia as a Case Study*, 34 *DIRASAT* (2018); Yuting Wang, *The Making of China’s ‘Good Muslims’: From Middleman Minority to Cultural Ambassadors*, 18 *CHINA REV.* 131 (2018).

<sup>253</sup> Mingmei, *China Appreciates 37 Foreign Ambassadors’ Joint Letter Supporting Xinjiang Policy*, *XINHUA* (July 15, 2019), [http://www.xinhuanet.com/english/2019-07/15/c\\_138229200.htm](http://www.xinhuanet.com/english/2019-07/15/c_138229200.htm).

documents, a socio-legal approach reveals the pervasive reliance on nonlegal means for ordering. Such strategies, such as political risk insurance, industrial standards, government-to-government relations, and civil society and bicultural Chinese are constitutive of Chinese order, a finding in line with the “law negative” view. However, it is also clear that, depending on the jurisdiction in question or type of investment, they may supplement formal law. They do so in different ways: political risk insurance is auxiliary to legally enforceable rights, industrial standards are substitutes for legal transplants, diplomatic intervention is a prerequisite to contract, and Chinese diaspora is insurance against risk. Of the nonlegal sources, based on my findings, strong government-to-government relations, that may feature a regular role for Chinese diplomats and officials in business transactions, appear to be the most essential, especially in deals featuring SOEs. Such relations may be a precondition for Chinese efforts to create their own transnational law, and necessary but perhaps not sufficient for cross-border ordering. The view of CLD that emerges, then, is that the interaction of law and nonlaw, formality and informality, and rules and relationships works to safeguard parties from exposure to liability under local law by maximizing parties’ discretion.

### III. ASSESSING CLD

CLD is nascent, and hence, evaluations of its strengths and weaknesses, at this stage, can only be provisional. Yet given the increasing relevance of CLD for countries in much of the global South, it is pertinent to offer initial reflections with the view of setting an agenda for future study.

On the formal law side, whereas international investment agreements will continue to play a role, more light needs to be shed on the non-financial contracts and lending agreements that comprise specific deals. In particular, analyses of deal structures should evaluate Chinese enterprises’ compliance with local law and regulations. In conjunction, studies should incorporate sources of soft law between and among private and public parties, and, in parallel with studies of formal law, ascertain parties’ compliance with soft law. Further, legal professional networks, which themselves may produce various sources of law (hard and soft) require additional scholarly attention.

On the nonlaw side, more research is needed to assess, in addition to insurance, the various types of applicable standards, and the role of non-legal professionals (whether members of diplomatic corps or diasporic communities), other sources of nonlaw ordering, such as the military, chambers of commerce, bureaucracy, corruption, and social media and other conduits of soft power. These sources of ordering should not be seen as antithetical to law but rather as constitutive of Chinese overseas order.

Analyses should track the different scales of ordering (transnational, state, parties, and local interests and third parties affected by particular projects) as well as across various sites (home state, host state, and third

party states).<sup>254</sup> For instance, multi-sited research needs to be conducted on how legal, judicial, or even legal-educational networks are formed (e.g., in Beijing) and how they are sustained (e.g., in host states).<sup>255</sup> Fundamentally, CLD suggest that research needs to be done on the interrelationships between markets, politics, and law, and ultimately how order begets power.

At this relatively early stage of studying CLD, it is possible to make a number of observations and identify issues looming on the horizon. During the “Chinese Rule of Law International Symposium,” held on October 11, 2019 in Guangzhou and sponsored by the China Law Society, officials announced that the trade volume between China and BRI countries has exceeded \$6 trillion and Chinese investment in the BRI has surpassed \$90 billion.<sup>256</sup> These are remarkable achievements. Nonetheless, the BRI and, more broadly, the governance of CODI remain hamstrung by agency problems and moral hazards. On the side of Chinese regulators, there is a multitude of governmental ministries and bureaus, as well as CCP organs, which do not always coordinate. For instance, whereas, by law, PRC procurators have jurisdiction to prosecute bribery committed by employees of Chinese enterprises to foreign officials overseas, to date, there have been zero such reported cases.<sup>257</sup> Rather, the Central Commission of Discipline and Inspection, a CCP—not state—organ, has expanded its jurisdictional reach beyond the PRC to punish corruption.<sup>258</sup> The plurality of authorities, particularly extra-state ones, introduces uncertainty to Chinese companies, many of which are in the process of building better compliance policies.<sup>259</sup> Conversely, on the investor side of the equation, for such efforts such as the BRI to succeed, they will need to continue to incorporate private capital,

<sup>254</sup> See Halliday and Shaffer *supra* note 11, at 56-58.

<sup>255</sup> See e.g., *supra* note 67.

<sup>256</sup> Zhongguo faxuehui (中国法学会) [China Law Society], Zhongguo fazhi guoji luntan (2019) fabiao chengguo wenjian (中国法治国际论坛 (2019) 发表成果文件) [China Rule of Law International Symposium (2019) Publishing End-Result Document], ZHONGGUO JINGCHA WANG (中国警察网) [China Police Net], [https://mbd.baidu.com/newspage/data/landingshare?pageType=1&isBdbboxFrom=1&context=%7B%22nid%22%3A%22news\\_9361297468184248176%22%2C%22sourceFrom%22%3A%22bjh%22%7D](https://mbd.baidu.com/newspage/data/landingshare?pageType=1&isBdbboxFrom=1&context=%7B%22nid%22%3A%22news_9361297468184248176%22%2C%22sourceFrom%22%3A%22bjh%22%7D) (last visited Dec. 3, 2019).

<sup>257</sup> See Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Of the Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980, amended 2011), art. 164 (providing a legal grounds to punish employees of PRC companies who bribe foreign officials) and Zhongguo caipan wenshu (中国裁判文书) [China Judgments Online], <https://wenshu.court.gov.cn> (last visited Nov. 3, 2019) (providing zero search results for cases that cite the foregoing article).

<sup>258</sup> Don Weinland, *China to Tackle Corruption in Belt and Road Projects*, FIN. TIMES (July 18, 2019), <https://www.ft.com/content/a5815e66-a91b-11e9-984c-fac8325aaa04> (explaining how the Central Commission for Discipline and Inspection, under the CCP, will establish graft inspectors in BRI states).

<sup>259</sup> Sharon Shi, *Anti-corruption Compliance in Outbound Investment*, ALLBRIGHT LAW (June 11, 2018), <https://www.vantageasia.com/anti-corruption-compliance-in-outbound-investment/>.

and yet many POEs do not exhibit the level of sophistication of corporate governance practiced by SOEs. To provide one example, a researcher who has reviewed public tender contracts signed by Chinese enterprises investing in Francophone Africa, identified discrepancies between SOE and POE contracts: the former were more transparent and more likely to conform to international standards whereas the latter were poorly drafted and irregular.<sup>260</sup> As more POEs take advantage of the BRI brand, and such agency problems multiply, quality control looms large as an issue for the Party-State.

Related, the reliance of SOEs on the Party-State in the form of insurance or the PRC government as an arbitrator in disputes with the host government introduces the problem of moral hazard. While other donor nations also exhibit such issues (e.g., the Export-Import Bank of the United States), this problem is more pronounced in state capitalism. Moral hazard has long been a problem in the Chinese domestic economy; governmental guarantees to enterprises against insolvency de-incentivize such firms from internalizing risk.<sup>261</sup> Such problems are compounded in overseas projects where Chinese enterprises are unmoored from the wider ecosystem of governmental support, and are exposed to a number of commercial, political, ethno-religious variables that are new to Chinese investors. As Chinese enterprises investing abroad struggle to internalize positive and negative externalities, such projects can suffer from poor business models or overleveraging.

It is clear that CLD differs from past practices of law and development, but the question remains as to whether it is a difference of kind or degree, and, further, what the Chinese approach to law in economic globalization means for global order. Taking these issues in turn, the differences between the Chinese approach and those of the U.S., U.K., France, Germany, or Japan may seem overstated. The caricature version of U.S. law and development, sometimes produced in critiques on law and development is that it was a forceful imposition of American law on weaker states. While some exponents of U.S. law and development have admitted to ethnocentrism in terms of specific policy prescriptions for developing economies,<sup>262</sup> other practitioners of U.S. law and development claim a much more dialogic method; practitioners' approach was more to identify local actors working in specified areas (e.g., private international law, clinical legal education, social justice, etc.) and provide them with support.<sup>263</sup> These

<sup>260</sup> Interview, Oxford (Jan. 30, 2019).

<sup>261</sup> Steele, Stacey, Andrew Goodwin, Jin Chun, Han Changyin, Ren Yimin, and Chi Weihong. *Trends and Developments in Chinese Insolvency Law: The First Decade of the PRC Enterprise Bankruptcy Law*. 66 AM. J. COMP. L. 669 (2018).

<sup>262</sup> Trubek and Galanter, *supra* note 42, at 1083, Trubek, *supra* note 40, at 302.

<sup>263</sup> Interview with former Ford Foundation officer in New York City (Sept. 26, 2018). See also MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD (Mary McClymont and Stephen Golub, eds., 2000) (describing the diverse programs under the Global Law Programs Learning Initiative).

views are not totally mutually exclusive given the diversity of actors promoting U.S. law and development, particularly starting in the 1990s under the “rule of law” banner.<sup>264</sup> Hence, one could argue that even the U.S. approach included elements of cooperation.

Furthermore, those looking to harmonize the U.S. and Chinese approaches might suggest that while it may be tempting to contrast the roles of the U.S. government and U.S. foundations in promoting American law during the heyday of U.S.-led economic globalization to the Chinese experience today wherein the PRC government and Chinese civil society allegedly are uninterested in the role of law while Chinese enterprises flout the law, CLD demonstrates that official actors and members of civil society are deeply invested in commercial law concerns. Moreover, the harmonists might point out that the U.S. private sector has not always been an exemplar of rule of law in its activities abroad.<sup>265</sup> Just as with the Chinese, American companies have also sought to avoid the local law of host states, by inventing inter-corporate transnational law and sometimes relying on extralegal methods. As a result, the U.S. development industry has experienced a long learning curve.<sup>266</sup> The Chinese are beginning their learning process, and perhaps their curve’s trajectory will approximate that of the Americans. There is some evidence to support this idea, namely, the on-going revision of the BRI that is more aligned with international standards, including lending practices as reflected, for instance, in the deliverables of the Second Belt and Road Forum for International Cooperation, which suggest a turn to multilateralism, transparency, risk assessment, and sustainability.<sup>267</sup>

Yet, there are noteworthy differences between the U.S. and Chinese approaches. Whereas both versions of law and development demonstrate formal law and informalism, American public actors have historically emphasized the former whereas Chinese counterparts show more of the latter. The U.S. has emphasized the building of legal institutions (e.g., law schools, courts, legal aid clinics, etc.) in host states while also endorsing international legal organizations, even if U.S. companies occasionally violated or circumvented host state institutions in practice and the U.S. government has, in part, designed international organizations to support its

<sup>264</sup> See Carothers, *supra* note 43.

<sup>265</sup> JOHN PERKINS, *CONFESSIONS OF AN ECONOMIC HIT MAN* (2005) (describing how the author, an American economist who worked for a U.S. consulting firm, persuaded autocrats to assume large loans from the U.S., IMF, and World Bank that would funnel money back to his consulting firm and others through engineering projects and bankrupt governments).

<sup>266</sup> A. Escobar, *Introduction: Development and the Anthropology of Modernity*, in *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* 3 (1995); ALBERT O. HIRSCHMAN, *DEVELOPMENT PROJECTS OBSERVED* (2014); DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (2013); MUTHUCUMARASWAMY SORNARAJAH, *RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (2015).

<sup>267</sup> See *supra* note 203. But see *supra* note 30.

own foreign policy aims.<sup>268</sup> The Chinese approach to ordering, with the exceptions of the AIIB and CICC, does not take the form of institutions; rather, they are more concerned about relationships, as illustrated by China Merchants' willingness to continue its relationship with the Djibouti government after it nationalized China Merchants' assets<sup>269</sup> and the PRC Government's willingness to forgive loans.<sup>270</sup> The assertion about relationships made by the U.K.-trained Chinese lawyer cited above<sup>271</sup> is, however, only the starting point of analysis, not the conclusion. Is an emphasis on relationships a reflection of culture? How might relationships be part of economic calculation?

Likewise, in its law and development movements, the U.S. has sought to transplant versions of its legal institutions either directly to host states or through international financial organizations via the Washington Consensus. For the most part, China has, to date, hesitated to export its own legal institutions, with a few noteworthy exceptions.<sup>272</sup> Similarly, China is not incentivized to export its industrial policy, which is generally protectionist. One area to look for potential Chinese-led legal transplantation, then, is where such law intersects with components of PRC industrial policy that it deems exportable, such as Special Economic Zones (SEZs).<sup>273</sup> For instance, China was involved in the process of drafting Vietnam's Special Zone Act, which would have created three SEZs in Vietnam.<sup>274</sup> The bill contained a controversial provision to extend 99-year leases to foreign investors, including Chinese.<sup>275</sup> As a result of the bill, in a rare show of public discontent, on June 10, 2018, thousands of Vietnamese protested against what they feared would be an infringement on Vietnamese sovereignty.<sup>276</sup> Subsequently, the bill was tabled demonstrating that local

<sup>268</sup> See *supra* note 38.

<sup>269</sup> See *supra* text accompanying notes 2-3.

<sup>270</sup> Agatha Kratz et al. *New Data on the 'Debt Trap' Question*, RHODIUM GROUP (Apr. 29, 2019), <https://rhg.com/research/new-data-on-the-debt-trap-question/> (finding that Chinese debt negotiations are common and asset seizures rare); John Hurley et al., *Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective*, CENTER FOR GLOBAL DEVELOPMENT POLICY PAPER 121 5 (Mar. 2018), <https://www.cgdev.org/sites/default/files/examining-debt-implications-belt-and-road-initiative-policy-perspective.pdf> (concluding that the BRI is unlikely to cause a systemic debt problem but that certain host states do face an increased risk of sovereign debt default). Email correspondence with Scott Morris of the Center for Global Development (Oct. 25, 2018) (confirming that China has led over one hundred debt renegotiations).

<sup>271</sup> See *supra* text accompanying note 31.

<sup>272</sup> See e.g., Seppänen, *supra* note 206, at 128 (noting that a 2014 white paper mentioned Chinese experts participation in the drafting of Benin's Agricultural Law and Agricultural Administrative Law and inferring that such involvement was to provide greater security land titles to Chinese investors).

<sup>273</sup> *Contra supra* text accompanying note 63.

<sup>274</sup> Interview with Vietnamese lawyer, Oxford (Oct. 30, 2019).

<sup>275</sup> Robyn Wilson, *Vietnam's Special Economic Zones: A Trojan Horse for Chinese Influence?* PROPERTY REPORT (Dec. 14, 2018), <http://www.property-report.com/detail/-/blogs/vietnam-s-special-economic-zones-a-trojan-horse-for-chinese-influenc-1>.

<sup>276</sup> Angie Ngoc Tran, *Workers Say No to Vietnam's 'Special Exploitation Zones.'* NEW

pushback can be fatal to a would-be Chinese transplant.

It is clear that in both U.S.-led and PRC-led globalization, there is a power imbalance between the U.S. or PRC, on one hand, and host states, on the other, and yet this asymmetry seems both to be handled differently and lead to different outcomes. For the U.S., whereas “liberal internationalism” was accompanied by, in some cases, a double standard in adherence to international law, under President Donald Trump, the U.S. has pursued an explicit “America first” policy.<sup>277</sup> The Chinese, for their part, have emphasized “win-win.”<sup>278</sup> Some of this is excessive, if not hypocritical, and yet there is conviction in such overtures. One result is that the Chinese selectively adapt to an international law that has been largely established by the U.S. and its allies, and yet they are using it to promote their own interests.<sup>279</sup> More specifically, through not-so-public contracts, international investment agreements, intraregional harmonization, and soft law, they are crafting a transnational law. This transnational law is based on enforcing inter-corporate agreements, as in *DP World vs. China Merchants*, and is buttressed by nonlegal norms. As such, it is open to discretion and abuse by both donor and host states.

Is CLD good for global governance and specifically for developing nations? While, on the one hand, Chinese are delivering public goods to states that sorely need them, on the other hand, the way that it is doing so benefits the autocratic elites of those states and not the broader population. China is mostly not (yet) exporting its authoritarian system, including its limited public sphere and narrow definition of rights, to host states, but it seeks out those governments that can broker deals outside public audit and accountability, deals which, in turn, buttress autocracy. One long-term impact is a possible convergence of authoritarian “rule of law,”<sup>280</sup> with China’s legal system as a reference point.<sup>281</sup> Such convergence will potentially marginalize those who have a vision of the public sphere that differs from that of their respective state. In addition, it is probable that those nonlegal elements that support Chinese ordering may erode international rule of law. At the same time, claims of a Chinese global order,

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MANDALA (July 18, 2018), <https://www.newmandala.org/workers-say-no-vietnams-special-exploitation-zones/>.

<sup>277</sup> Inderjeet Parmar, *The U.S.-led Liberal Order: Imperialism by Another Name?* 94 INT’L AFFAIRS 151 (2018); HAROLD KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2018) (surveying President Trump’s attack on international law).

<sup>278</sup> See e.g., Huo, *supra* note 239 (interviewing the Director of the National Development and Reform Commission’s BRI Construction and Promotion Centre, who emphasized “common development, mutual benefit, and non-zero-sum [situations] (*gongtong fazhan, huli gongying, bushi ni shu wo ying*)”).

<sup>279</sup> See Kong, *supra* note 33.

<sup>280</sup> TOM GINSBURG & TAMIR MOUSTAFA, *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (2008); Mark Tushnet, *Authoritarian Constitutionalism*, 100 Cornell L. Rev. 391 (2015).

<sup>281</sup> See China Law Society, *supra* note 256 (stating that “rule of law is an indispensable and vital foundation and guarantee for the co-construction of the ‘Belt and Road Initiative’.”)

legal or otherwise, may be over-stretched. Instead, rather than order, the cumulative effect of Chinese ordering may be closer to “minilateralism”<sup>282</sup> or inter-hub networks,<sup>283</sup> enclaves of legal modernity, that concentrate state resources including human capital and legal services but which in so doing disadvantage onshore courts and other domestic legal institutions.

Alternately, contrary to the foregoing, it is just as possible that Chinese globalization may sustain disorder over order. One constant in representations of local experts in BRI states is that in contrasting Chinese enterprises to other foreign investors, the former are relatively more comfortable with clientelism. As one Pakistani lawyer put it who has worked on several CPEC deals, “Chinese companies are more than happy to take advantage of loopholes in the system. In this sense, they are like Pakistanis, and yet differ from the British or other foreign companies.”<sup>284</sup> Yet relying on Chinese business practices, namely, arm-in-arm relationships over legal institutions and using a project finance structure that essays to “close the loop” may not be sustainable in the long run. In short, the compliance incentives alter as Chinese enterprises invest overseas, requiring them to adapt more systematically.

#### CONCLUSION

The consequences of Chinese economic globalization will likely be at least as long lasting as those of American-led globalization from the 1970s onward. Just as China was integrated into the world economy during the period of U.S.-led globalization, so too may much of Eurasia be integrated into the world economy under a Chinese regional dominance. Likewise, just as Chinese enterprises learned how to engage in financial engineering (e.g., debt-equity swaps) by doing business in advanced markets, so too are they applying these lessons in emergent economies. In other words, despite the distinct nature of state capital, in the end, Chinese enterprises pursue and exhibit the universal logic of capitalism, including its exploitative capacity. One question, then, for future research, is the extent to which host states in the BRI learn Chinese lessons (which are currently being acquired) and apply these in their own outbound growth.

Ultimately, it is too soon to say whether CLD will take root. On the one hand, some of the norms of Chinese governance, specifically business relations and public-private partnerships, may find currency in cross-border transactions in developing countries as CODI becomes a new normal, even if such norms may not be sustainable in the long term. On the other hand, because China’s industrial policy is, with the exception of some elements such as SEZs, largely un-exportable, the PRC will have to develop new approaches to governance outside of China to protect its investments.

<sup>282</sup> See Brummer, MINILATERALISM, *supra* note 202 (defining “minilateralism” as criss-crossing trade alliances, informal soft law agreements and financial engineering).

<sup>283</sup> See Erie, *supra* note 21.

<sup>284</sup> Interview with Pakistani lawyer in Oxford (Aug. 7, 2019).



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Transnational law is one such approach, and focusing on the relationship between this form of law and its nonlaw equivalents reveals the relevant “techniques, doctrines, and legal methodologies”<sup>285</sup> constitutive of China’s new globalism.

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<sup>285</sup> ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 33 (2004).

## Table and Figure

Table 1. CICLA survey reports (2015-2018)

	2015-16	2016-17	2017-18
Survey size/sample	120	160	178 (140 valid)
Respondents	25% POEs 16% FIEs 16% SOEs 26% Central SOEs 12% JVs 5% Other	55% POEs 14% FIEs 16% SOEs 11% Central SOEs 4% JVs	45% POEs 30% FIEs 11.4% SOEs 9.29% Central SOEs 5% Other
Target Industries	30% manufacturing 17% energy and mineral resources 14% real estate Etc.	30% natural resources 25% infrastructure 20% manufacturing Etc.	28% finance, insurance, securities Etc.
Method of Investment (Non-exclusive)	44% M&A 40% Office/rep office 33% Contract projects	36% M&A 31% office/rep office 24% Contract projects	M&A
Risks		39% unstable political conditions, terrorism, civil war and unrest, military conflicts, <b>38% unstable legal system</b> and business environment, Etc.	<b>Incomplete legal systems of host states,</b> Host state government inspections, Market risks, Labor risks, Tax risks
Frequency of Disputes (Non-exclusive)	50% of respondents embroiled in civil lawsuits and arbitration; 23.7% received administrative penalties <b>7.9% involved in criminal lawsuit</b>	31% procedural or penalties, of those.... 61% civil litigation 55% arbitration 20% admin penalties <b>16% criminal litigation</b>	52% procedural or penalties, of those... 39% arbitration 23% civil litigation 14% admin litigation 2% criminal litigation

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Figure. A continuum of normative sources underpinning Chinese ordering

