

## Chinese Law and Development

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*The COVID-19 pandemic has cast doubt on taken-for-granted economic and governance models. Against the backdrop of increasing tension between the United States and the People's Republic of China ("PRC" or "China"), China is presenting itself as an alternative center for governance. Pursuant to these seismic shifts, the analysis must attune to how China creates cross-border order. 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 and promote its geopolitical interests, it is confronted with challenges familiar to capital-exporting countries, yet there is little understanding of China's approach to ordering or what it means for host states, developed economies, and global governance.*

*This Article seeks to provide an analytical framework for China's approach, and specifically the role of law in global development. Instead of previous approaches to "law and development," China is reluctant to engage in legal reform of host states that receive Chinese capital; rather, Chinese investors try to avoid local law. "Chinese law and development" ("CLD") creates order through transnational law, which builds on legal infrastructures both from the United States and from China, supplemented by extralegal and nonlegal norms. These normative orders protect Chinese investments by mitigating risk as a precondition to promoting China's economic and political 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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## 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 the 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 world powers, including the United States and the People’s Republic of China (“PRC” or “China”). Both these governments have military bases located in the small African country. The concession agreements in question 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 management in 2009 and alleged corruption in 2012, it signed an agreement with China Merchants for development of new ports and free zones. In 2013, Djibouti sold 23.5% of its 66.66% stake in the major port of 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.

In early 2018, Djibouti terminated the contract with DP World and nationalized all assets, including portions owned by not just DP World, but also China Merchants. Since 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> The tribunal upheld the contract between Djibouti and DP World, but this order went unenforced. Subsequently, DP World brought the suit in Hong Kong against China Merchants. The outcome is pending.

*DP World v. 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>3</sup> Specifically, China promotes the BRI to further economic cooperation be-

1. DP World Djibouti FZCO v. China Merchants Port Holdings Company, [2019] H.K.C. 3104 (C.F.I.) [hereinafter DP World v. China Merchants]; *Sbouzong “Yidaiyilu” Xiangmu Nao Shang Xianggang Fating Zhaoshangju Gangkou Bei Zhi Wushi Texu Jingying Quan Jibudi Jian Xin Matou* (首宗「一帶一路」項目鬧上香港法庭 招商局港口被指無視特許經營權吉布地建新碼頭) [“Belt and Road Initiative” Project Sued in Hong Kong Court for the First Time China Merchants Port Accused of Ignoring Concession Agreement When Building New Port in Djibouti], FACTWIRE (Feb. 10, 2019), <https://www.factwire.org/single-post/2019/02/10/Legal-battle-for-control-of-Djibouti-ports-comes-to-Hong-Kong> [https://perma.cc/4644-4AJM].

2. See DP World v. China Merchants, *supra* note 1, ¶ 22.

3. Chris Soffe, *Foreword* to CHARTERED INST. OF BLDG., FROM SILK ROAD TO SILICON ROAD: HOW THE BELT AND ROAD INITIATIVE WILL TRANSFORM THE GLOBAL ECONOMY (2019) (“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.”)

tween the PRC and BRI partner states to build a “community of shared interests, destiny, responsibility” primarily through increased trade and investment with a focus on Chinese-supplied construction, energy, and digital infrastructure.<sup>4</sup> *DP World v. 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 nascent legal and regulatory regimes, the initiative has one constant: high risk.<sup>5</sup> BRI supporters view *DP World v. China Merchants* as a cautionary tale for Chinese enterprises, both state-owned enterprises (“SOEs”) and privately-owned enterprises (“POEs”), “going out [to invest overseas]” (*zouchuqu*).<sup>6</sup> *China Merchants* appears to have been in the wrong place at the wrong time; DP World had been involved in legal disputes with the Djibouti government for years before *China Merchants* entered the picture. Problems with the China-Djibouti relationship arose as a result of Djibouti’s internal politics,<sup>7</sup> a factor not uncommon in China’s investments in emerging economies. The case raises a number of questions for Chinese enterprises, including how to mitigate substantial legal, business, and political risks.<sup>8</sup> Likewise, the conflict highlights concerns of many host states in regards to China’s territorial acquisitions. It is estimated that Djibouti owes China the equivalent of about forty-four percent of its GDP.<sup>9</sup> *China Merchants* is none other than the port operator that obtained a ninety-nine-year lease of Hambantota in Sri Lanka, in a move with historical parallels to Great Britain’s ninety-nine-year lease of Hong Kong.

These types of disputes are likely to increase as China becomes one of the largest net creditors in the world,<sup>10</sup> one of the first times in modern history that a nondemocratic state will be among the largest capital exporters.<sup>11</sup> In the context of the U.S.-China trade war, while much of the discussion on Chinese overseas direct investment (“CODI”) focuses on the impact of

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4. See VISION AND ACTIONS ON JOINTLY BUILDING SILK ROAD ECONOMIC BELT AND 21ST-CENTURY MARITIME SILK ROAD, NAT’L DEV. & REFORM COMMISSION, MINISTRY OF FOREIGN AFF. AND MINISTRY OF COM. OF THE PRC (2015).

5. See *infra* Part II.B.

6. *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> [<https://perma.cc/TMG5-4ERW>].

7. See *infra* parenthetical text accompanying note 37.

8. Some of the issues raised by the *DP World v. China Merchants* case, for example, sovereign immunity defenses, are specific to state-owned enterprises (“SOEs”). See, e.g., *Democratic Republic of Congo v. FG Hemisphere Assocs. LLC*, [2011] 1 H.K.C.F.A.R. 41, 524 (C.F.A.) (finding that SOEs enjoy absolute immunity in Hong Kong based on the strict doctrine of sovereign immunity as understood in the PRC). *But see* *TNB Fuel Serv. SDN BHD v. China Nat’l Coal Grp. Corp.*, [2017] 3 H.K.C. 588 (C.F.I.) (rejecting respondent SOE’s immunity claim).

9. *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> [<https://perma.cc/3WCV-5GDJ>].

10. DAVID DOLLAR, *CHINA AS GLOBAL INVESTOR* 1 (2016).

11. By way of comparative historical reference, 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).

CODI in the United States,<sup>12</sup> it is likely that developing states will most experience the Chinese footprint. Additionally, the COVID-19 pandemic is accelerating both America's disengagement with the international legal order and China's increased presence in that order.<sup>13</sup> One result is that many developing countries strengthen ties with China.<sup>14</sup> Pursuant to the foregoing, *DP World v. China Merchants* sheds lights on China's own approach to law and development ("LD") or Chinese law and development ("CLD"), centrally, how China uses law (and nonlaw) to create cross-border order.

As an analytical theory, CLD requires several adjustments to LD. First, CLD is broader in scope than LD. LD is commonly thought of as a home state providing legal development assistance to a host state, guided by a theory of the role of law in economic development (for example, neoliberalism).<sup>15</sup> Due to the relative nascence of its own legal system, non-interventionist foreign policy, and lack of experience, China is so far not engaging in this type of LD.<sup>16</sup> Rather, China promotes "integrated," "joint," and "common" development through its supply of global value chains, hard and digital infrastructures, energy projects, financing, and labor to developing countries throughout the world.<sup>17</sup> "Development," in the Chinese view, is necessary not only for poverty alleviation but also for security, human rights, and public health, a conceptualization China is popularizing around the world.<sup>18</sup> Second, CLD turns conventional LD theory on its head by focusing

12. See, e.g., JI LI, THE CLASH OF CAPITALISMS? CHINESE COMPANIES IN THE UNITED STATES (2018).

13. Compare President Donald Trump, Videotaped Remarks to the United Nations General Assembly Addresses and Remarks, Daily Comp. Pres. Docs., 2020 DCPD No. 00713 (Sept. 22, 2020) (stating, "As President, I have rejected the failed approaches of the past, and I am proudly putting America first") with Xi Jinping (习近平), Zai Diqishiwu Jie Lianheguo Dahui Yibanxing Bianlun Shang de Jianghua (在第七十五届联合国大会一般性辩论上的讲话) [Speech at the General Debate of the 75th United Nations General Assembly], XINHUANET (Sept. 22, 2020), [http://www.xinhuanet.com/2020-09/22/c\\_1126527652.htm](http://www.xinhuanet.com/2020-09/22/c_1126527652.htm) [<https://perma.cc/MZ22-TRQT>] (proclaiming "COVID-19 reminds us we are living in an interconnected global village with a common stake. . .").

14. BRUNSWICK, UNDERSTANDING GLOBAL OPINION OF CHINESE BUSINESSES: A GROWING DIVIDE BETWEEN DEVELOPED AND EMERGING MARKETS 17 (2020) (finding that eighty percent of the respondents in emerging markets had trust in Chinese companies versus only fifty-one percent of respondents in developed markets).

15. MICHAEL J. TREBILCOCK & MARIANA MOTA PRADO, ADVANCED INTRODUCTION TO LAW AND DEVELOPMENT xi (2014) (defining law and development ("LD") as "attempts to understand the relationship between legal systems and legal institutions and a wide variety of development outcomes").

16. Samuli Seppänen, *Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?*, 51 VAND. J. TRANSNAT'L L. 101, 110, 119 (2018) (finding that China includes elements of legal assistance in its foreign aid, although generally law attains "relative unimportance").

17. See VISION AND ACTIONS, *supra* note 4.

18. See, e.g., Zhonghua Renmin Gongheguo Guowuyuan Xinwen Bangongshi (中华人民共和国国务院新闻办公室) [The St. Info. Off. of the PRC], *Fazhanquan: Zhongguo de Linian, Shijian yu Gongxian Baipishu* 《发展权：中国的理念、实践与贡献》白皮书 [White Paper on the Right to Development: China's Philosophy, Practice and Contribution] (Dec. 2, 2016), <http://www.scio.gov.cn/fzbp/ndhf/34120/Document/1532313/1532313.htm> [<https://perma.cc/6EPM-V4WK>] (defining the centrality of "development" in Chinese governance); H.E. Xi Jinping, "Working Together to Forge a New Partnership of Win-win Cooperation and Create a Community of Shared Future for Mankind," General Debate of the 20th Session of the UN General Assembly (Sept. 28, 2015), <https://gadebate.un>

on the interests of the home state or, more specifically, how home state interests may (re)shape the relationship between “donor” and “recipient.”<sup>19</sup> Hence, CLD draws on not only the critique of LD, a critique that viewed LD as reflecting more the values of the home state than those of the host state,<sup>20</sup> but also studies of legal imperialism,<sup>21</sup> investment law,<sup>22</sup> and globalization.<sup>23</sup> CLD updates LD analysis to encompass the relationship between domestic and transnational legal orders.<sup>24</sup> Third, CLD privileges order over law, reflecting China’s own development experience.<sup>25</sup> Chinese development does not present a unified theory of law;<sup>26</sup> instead, CLD is chiefly concerned with *ordering*, a process that, unlike LD, may not necessarily center upon formal law. Legal development assistance occurs at the periphery of CLD. Law may be smuggled in—often just as much by host state “pull” as by Chinese “push”—as in the examples of the export of China’s industrial policy,<sup>27</sup> the establishment of Chinese legal studies programs to facilitate China-related trade,<sup>28</sup> and, building dispute resolution mechanisms that allow Chinese investors to bypass local courts.<sup>29</sup> Yet CLD prioritizes order and one that, in addition to law, draws resources from extralegal and nonlegal norms, the former denoting norms that may be outside formal law (for example, rules of the Chinese Communist Party or CCP) and the latter unrelated to law (for example, political connections). In short, CLD, like LD, queries the role of law in economic development but, unlike LD, acknowl-

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org/sites/default/files/gastatements/70/70\_ZH\_en.pdf [https://perma.cc/PHQ6-GQWS] (linking Chinese conceptions of “development” to UN goals).

19. EMILY YEH, TAMING TIBET: LANDSCAPE TRANSFORMATION AND THE GIFT OF CHINESE DEVELOPMENT 15 (2013) (demonstrating the logic of Chinese development as a national project through the example of Tibet, a logic that is helpful in understanding China’s overseas development.)

20. Jedidiah Kroncke, *Law and Development as Anti-Comparative Law*, 45 VAND. J. TRANSNAT’L L. 477, 480 (identifying LD as “a form of cultural identity politics.”)

21. UGO MATTEI & LAURA NADER, PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL 25 (2008) (finding causality between neoliberal prescriptions for legal reform in poor states and corporate profits for wealthy countries).

22. MUTHUCUMARASWAMY SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2015) (arguing that international investment law has developed to focus on investor protection and excludes advancements in other areas of international law including human rights).

23. Duncan Kennedy, *Three Globalizations of Law and Legal Thought, 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19 (David M. Trubek & Alvaro Santos eds., 2006) (locating LD within a “third globalization”).

24. Terence C. Halliday & Gregory Shaffer, *Introduction: Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 3, 5 (Terence C. Halliday & Gregory Shaffer eds., 2015) (defining transnational legal order as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions”).

25. Donald C. Clarke, *Order and Law in China*, GWU LEGAL STUDIES RESEARCH PAPER NO. 2020-52 (2020) (on file with author) (drawing attention to how “law” operates as order in China).

26. See generally THE BEIJING CONSENSUS: HOW CHINA HAS CHANGED THE WESTERN IDEAS OF LAW AND DEVELOPMENT (Weitseng Chen ed., 2017) (arguing that there is no “Chinese model” of law and development).

27. See *infra* text accompanying notes 313–315.

28. See *infra* text accompanying note 297.

29. See *infra* text accompanying note 311.

edges the limitations of exporting “models” and hence raises the possibility of LD alternatives.

With these differences in mind, CLD is defined by the following elements: (1) Generally, China seeks to avoid entanglements with local political and legal systems in host states; consequently, 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, CLD operates to avoid the “bad law,” mainly the procedural law and dispute resolution forums, of host states. In short, as a latecomer to LD, 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>30</sup>

I note the following caveats with respect to the provisional definition of CLD. First, as an analytical unit, “China” requires disaggregation: there are many actors (for example, state-owned enterprises, private companies, officials, multilateral institutions, 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 that exhibits change over time. I assume that, whereas in the early period of CODI, Chinese enterprises may have exhibited 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.

By way of background, the LD movement has historically been associated with the United States.<sup>31</sup> Historically, the United States 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 LD movements were both commercial and political: to create environments for transactional security and to promote democracy. In shifting from the functions of LD to CLD, there are some basic similarities but core differences. As with the U.S., there are both economic and political reasons for China’s ordering abroad. However, one of the key differences between U.S. LD and CLD is that the former came about

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30. By “transnational law,” I mean law that regulates actions that transcend national frontiers and which may include international law (i.e., the law between states) but is broader to include private sources and actors. See PHILIP C. JESSUP, *TRANSNATIONAL LAW* 1–3 (1956); Halliday & Shaffer, *supra* note 24, at 19.

31. While the modern development is largely exogenous to the PRC, historically, imperial China did exert influence on legal development outside of its territories. See, e.g., YANG HONGLIE (杨鸿烈), *ZHONGGUO FALÜ ZAI DONGYA ZHUGUO ZHI YINGXIANG* (中国法律在东亚诸国之影响) [THE INFLUENCE OF CHINESE LAW ON THE STATES OF EAST ASIA] (1999) (finding that imperial Chinese law shaped legal development in Korea, Japan, and Thailand amongst other countries).

at the same time as the United States was building the basic instruments of international economic law (for example, GATT/the WTO, IMF, World Bank) that reflect its values, whereas China is coming into a world that does not necessarily reflect its core values.<sup>32</sup> Hence, Chinese proponents of CLD must decide whether to operate within those institutions, and seek to “nudge” them towards Chinese values, or create alternatives. While there is, as of yet, no consensus in China on these issues, one consequence of the timing of China’s rise is that the PRC is more limited in its ability to engage in political intervention overseas. While China may use its investment and aid to promote its geopolitical interests—namely, securing access to natural resources and maritime ports, discrediting Western democracy, pluralizing financial systems and internationalizing the *renminbi*, and advocating its view of international law in order to strengthen its position in the world<sup>33</sup>—to do so, it must first safeguard its assets, investments, and nationals in host states. Thus, the primary goal of risk mitigation is not purely economic; it is a necessary precursor to China’s geo-strategic aims.

As a reflection of its conundrum of whether to accept, reform, or reject the existing international economic order, China is actively shaping international legal norms and practices by repurposing 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 the norm-shaper in a number of fields of international economic law, including trade law, customs, investment law, tax law, and cyber law, as well as certain dimensions of public international law, including definitions of “development” as a human right.<sup>34</sup>

China’s legal and judicial institutions are the vanguard of China’s engagement with private international law in many respects. These include state actors such as the Supreme People’s Court (“SPC”), China’s arbitration commissions, and 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,

32. See generally Lu Nan (鲁楠), ‘Yidaiyilu’ Changyizhong de Falü Yizhi—Yi Meiguo Liangci ‘Falü yu Fazhan Yundong’ Wei Jingjian (‘一带一路’倡议中的法律一直—以美国两次‘法律与发展运动’为镜鉴) [Transplantation of Laws in the ‘Belt and Road Initiative’: Taking the Two “Law and Development” Movements in the U.S. as a Mirror] 11 TSINGHUA U. L.J. 22, 31 (2017).

33. See, e.g., NADÈGE ROLLAND, CHINA’S VISION FOR WORLD ORDER 40–49 (2020); Andrew J. Nathan, *China’s Rise and International Regimes: Does China Seek to Overthrow Global Norms?*, in CHINA IN THE ERA OF XI JINPING: DOMESTIC AND FOREIGN POLICY CHALLENGES 171–85, 189 (Robert S. Ross & Jo Inge Bekkevold eds., 2016); ROSEMARY FOOT, CHINA, THE UN, AND HUMAN PROTECTION, ch. 8 (2020); Zhang Xiping (张西平), *Pochu Xifang Zbongxin Zbuyi Shi Wenhua Zixin de Qiantu* (破除西方中心主义是文化自信的前提) [Breaking the Doctrine of Western Centrality is the Premise of Cultural Confidence] 1 QIAN XIAN (前线) [FRONT LINE] 40, 40–44 (2017).

34. See, e.g., CAI CONGYAN, THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY 10, 102, 135, 140–50 (2019) (noting how China’s conception of human rights considers not only the individual but also the community).

which is changing the tectonic architecture of international economic law.<sup>35</sup> This “law positive” view, from the perspective of Beijing, underscores the role of formal law.<sup>36</sup>

In contrast, the view from BRI host states, such as Djibouti, differs: 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, 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. Beijing may be motivated more by cultivating long-term relationships than by immediate economic return and may supplement government-to-government relations with various forms of soft power, from globalizing organs of the CCP and civil society organizations to think tanks and religious migrants.

By way of illustration, in *DP World v. China Merchants*, Djibouti accused DP World of making illegal payments to win its concession to operate the container terminal while DP World argued Djibouti violated the concession 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 long-time confidant to President Guelleh—who had subsequently fallen out of favor.<sup>37</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 (for example, 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>38</sup> but it has also engaged in a multi-pronged strategy of aligning Djibouti’s military, economic, and public health interests with its own. For example, China is building a military facility in Djibouti to assist with regional security as

35. Gregory Shaffer & Henry Gao, *A New Chinese Economic Law Order?* 23 J. INT’L ECON. L. 607, 607, 609, 611 (2020).

36. See generally Shi Jingxia (石静霞) & 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 “Belt and Road Initiative Proposal”*], 2 WUDA GUOJIFA PINGLUN (武大国际法评论) [WUHAN U. INT’L L. REV.] 1 (2018); Wang Guiguo (王贵国), “Yidaiyilu” Zhanlie Zhengduan Jiejue Jizhi (“一带一路”战略争端解决机制) [*“Belt and Road Initiative” Strategic Dispute Resolution Mechanism*], 2 ZHONGGUO FALÜ PINGLUN (中国法律评论) [CHINA L. REV.] 33 (2016).

37. See, e.g., Republic of Djibouti v. 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) [<https://perma.cc/3CSV-FJBS>].

38. Interview with former GC of China Merchants in Shanghai, China (Apr. 19, 2019). 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 at 615 (Karl P. Sauvant ed., 2012).



well as a \$4 billion Ethiopian-Djiboutian electric railway.<sup>39</sup> Such methods of establishing relationships also mitigate risk; to omit such relationships while focusing only on international law would be to miss half the picture.<sup>40</sup> Some scholars and practitioners have gone further and suggested what could be called a “law negative” position: that, in the case of China, informal norms prevail in establishing Chinese notions of order.<sup>41</sup>

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, interviews with experts within and outside of China, and primary source documents. 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>42</sup> of this form of globalization. I contend that the analytical purview should be both widened and microscoped to adequately understand Chinese ordering.

To widen the lens, this Article considers the spectrum of norms that constitute a China-led order. Law operates to varying degrees at different levels in this order. For example, while the Chinese actors, including investors, financial institutions, and aid agencies, are building on existing legal infrastructures and designing new ones at the level of transnational law, they seek to avoid (not always successfully) 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 domestic experience with LD. It is also partly a result of China’s economic ascendance during a period when Asia is globaliz-

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39. Monica Wang, *China’s Strategy in Djibouti: Mixing Commercial and Military Interests*, COUNCIL ON FOREIGN RELS.: ASIA UNBOUND (Apr. 13, 2018), <https://www.cfr.org/blog/chinas-strategy-djibouti-mixing-commercial-and-military-interests> [<https://perma.cc/A6EB-9LWF>].

40. 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.”).

41. FRANK K. UPHAM, THE GREAT PROPERTY FALLACY 83 (2018).

42. William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 DUKE J. COMP. & INT’L L. 473, 476 n.4 (2010) (defining normative pluralism as “the coexistence in the same time-space context of multiple systems of norms or rules or of 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 Klabbbers & Touko Piiparinen, *Normative Pluralism: An Exploration*, in NORMATIVE PLURALISM AND INTERNATIONAL LAW: EXPLORING GLOBAL GOVERNANCE 13, 15 (Jan Klabbbers & Touko Piiparinen eds., 2013) (observing the presence of normative pluralism in global governance).

ing and the centers of globalization of yesteryear are, to some extent, deglobalizing.<sup>43</sup>

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 norms 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.

There are five remaining parts to the Article. First, in Part I, 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, in Part II, I provide a background to CLD by drawing the outlines of Chinese economic globalization and specifically the nature and extent of capital exported to developing countries in the Global South. In Part III, I assess one of the central goals of CLD—to mitigate commercial, legal, and political risk. I subsequently analyze CLD in terms of strategies for ordering across borders to deal with those risks. Lastly, in Part IV, I provide provisional assessments of the implications of cross-border Chinese order while drawing comparisons to previous attempts at ordering led by the United States. In doing so, I lay the groundwork for the future study of the legal and regulatory dimensions of Chinese economic globalization.

## I. FROM DOMESTIC GROWTH TO GLOBAL REACH

Before assessing the role of law in Chinese economic globalization, I first consider the stakes. 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>44</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 (for example, poverty alleviation, market diversification, and technological access) and across inter-state regions, namely, lowering cross-

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43. Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L L. 225, 234–38 (2020).

44. See, e.g., 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).

border transaction costs for trade and travel and facilitating the connectivity of goods, services, and people.<sup>45</sup>

On the other hand, skeptics have flagged a number of concerns, chiefly: the centrality of SOEs that reinforce the foreign policy aims of the Party-State,<sup>46</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>47</sup> Perhaps most critically, the U.S. government has labelled China's approach to financing a "debt trap."<sup>48</sup> Not all criticism, however, derives from rival donor states; host states have also become increasingly critical of the Chinese presence.<sup>49</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 behavior through existing theory. This problem became clear to me while attending a workshop for international lawyers in Shanghai, with a focus on the legal 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?"<sup>50</sup> 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>51</sup>

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45. See generally CHINA'S BELT AND ROAD INITIATIVE: ECONOMIC GEOGRAPHY REFORMATION (Wei Liu et al. eds., 2018); REMOVING TAX BARRIERS TO CHINA'S BELT AND ROAD INITIATIVE (Michael Lang & Jeffrey Owens eds., 2018).

46. By "Party-State," I refer to the fusion of organs of the Chinese Communist Party into the government at all administrative levels.

47. *How Will the Belt and Road Initiative Advance China's Interests?* CHINAPOWER, <https://chinapower.csis.org/china-belt-and-road-initiative> [<https://perma.cc/PL6K-HT8C>] (last visited Aug. 1, 2019) (noting that the Belt and Road Initiative ("BRI") targets Central and South Asia where many of the countries "lack good governance and robust rule of law").

48. Vice President Michael Pence, Remarks on the Administration's Policy Toward China (Oct. 4, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-administrations-policy-toward-china> [<https://perma.cc/UL5S-RBMT>].

49. 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).

50. Personal Observation at Shanghai University of Political Science and Law in Shanghai, China (Apr. 19, 2019).

51. *Id.* The figures quoted herein are debated in the literature. See, e.g., Jonathan E. Hillman, *How Big is China's Belt and Road?* CTR. FOR STRATEGIC & INT'L STUD. (Apr. 3, 2018), <https://www.csis.org/analysis/how-big-chinas-belt-and-road> [<https://perma.cc/96UX-CRGM>] (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),

Leaving aside the question of whether the Chinese lawyer is self-orientalizing, many foreign observers, like the frustrated U.K. finance lawyer, encounter difficulty fitting Chinese behavior into their own explanatory paradigms. They want China to behave the way they think economic superpowers should behave; alternately, China is the exception. In other words, China either follows a well trodden path, or, pursuant to the literature on alternative international orders,<sup>52</sup> it demonstrates a kind of international law revisionism.<sup>53</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.

LD provides an analytical launching pad for studying CLD, as while there are significant differences, locating LD in the respective globalizations of the United States and China shows some path dependency.<sup>54</sup> For instance, Chinese deals may draw on loans from international financial institutions, Chinese construction projects may feature standard-form International Federation of Consulting Engineers contracts, and Chinese parties may use debt restructuring instruments like debt-equity swaps. All of these are familiar to American corporations. At the same time, the analysis cannot simply extrapolate from established explanatory models, as some of the mechanics, aims, and effects of the Chinese approach may differ from U.S. precedents. Thus, LD 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>55</sup> There is demand to learn from China’s industrial policy, and the

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<https://www.worldbank.org/en/topic/regional-integration/publication/belt-and-road-economics-opportunities-and-risks-of-transport-corridors> [https://perma.cc/77GZ-XAU4] (calculating total Chinese investment in BRI projects to be \$575 billion).

52. See, e.g., CHINA, INDIA, AND THE INTERNATIONAL ECONOMIC ORDER (Muthucumaraswamy Sornarajah & Jiangyu Wang eds., 2010); RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH (Fabio Morosini & Michelle Rattton Sanchez Badin eds., 2018); WORLD TRADE AND INVESTMENT LAW IN A TIME OF CRISIS: DISTRIBUTION, DEVELOPMENT AND SOCIAL PRODUCTION (David M. Trubek, Alvaro Santos & Chantal Thomas eds., 2019).

53. See generally CHINESE LEGAL REFORM AND THE GLOBAL LEGAL ORDER (Yun Zhao & Michael Ng eds., 2017); Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 EUR. J. INT’L L. 755 (2013); Mark Wu, *The “China, Inc.” Challenge to Global Trade Governance*, 57 HARV. INT’L L.J. 261 (2016); Qingjiang Kong, *Beyond the Love-Hate Approach?: International Law and International Institutions and the Rising China*, 15 CHINA INT’L J. 41 (2017).

54. Guillermo J. Garcia Sanchez, *The Footprint of the Chinese Petro-Dragon: The Future of Investment Law in Transboundary Resources*, 94 TUL. L. REV. 313, 321 (2020) (arguing that China is learning from the U.S. example in transboundary hydrocarbon law).

55. See generally RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? (2007); Zhu Yunhan (朱云汉), Wen Tiejun (温铁军), Zhang Jing (张静) & Pan Wei (潘维), *Gongbeguo Liushi Nian yu Zhongguo Moshi* (共和国六十年与中国模式) [*People’s Republic at 60*

extent to which PRC law facilitated China's economic growth.<sup>56</sup> Conventional LD knowledge holds that, given the large volumes of outbound Chinese capital, formal law, including international investment agreements, sovereign guarantees, and robust mechanisms for dispute resolution, would secure Chinese trade and investments.<sup>57</sup> This thinking seems to explain, in part, how China is building order transnationally. At the same time, there are limits to this received knowledge since much of it originates from the United States' experience over the past sixty years, a period during which the United States aligned the goals of major international financial and governance bodies with its own.<sup>58</sup> In the next section, I first review the promises of LD orthodoxy and then assess scholarly views of China's own use of law in the course of its cross-border deals.

### A. After Law and Development

LD grew out of the United States' foreign aid in Latin America in the 1960s, and subsequently in Asia to create environments for transactional security for U.S. companies investing in those states and to promote political reform, specifically, democratization.<sup>59</sup> The early promoters of LD were, chiefly, the U.S. government (including the U.S. Agency for International Development), development agencies (such as the Ford Foundation), and academics.

LD has undergone a number of different "waves," meaning its assumptions and actors have changed over time.<sup>60</sup> The mechanisms for promoting economic development through legal reform have also varied. Broadly, 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 member states may adopt via domestic legislation as well as through the impact of global financial and

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*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).

56. See *infra* text accompanying notes 313–315.

57. Erik G. Jensen & Thomas C. Heller, Introduction to BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 1, 3 (Erik G. Jensen & Thomas C. Heller eds., 2003); MICHAEL J. TREBILCOCK & RONALD J. DANIELS, RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS 29–36 (2008).

58. See generally 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 (2010); RICHARD PEET, UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO (2003).

59. 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, 180–81 (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 GLOB. JURIST 1, 3 (2007) (arguing that the transplantation of U.S. economic law overseas has supported American corporate interests).

60. 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, 1 (David M. Trubek & Alvaro Santos eds., 2006).

governance institutions.<sup>61</sup> Whereas there is a general consensus that LD failed to achieve its aims, this latter analysis—the role of global institutions and their effects on domestic law reform—has revitalized a more ecumenical study of LD through the deepening role of international investment law in developing economies.<sup>62</sup>

Moving from the United States to China, law is one tool amongst many in China's emergent cross-border order, including its bilateral or horizontal relationships with host states and its vertical relationship to international organizations. Scholars, however, differ in their views as to the relative weight of law in promoting Chinese globalization across borders. The majority opinion finds that while horizontal transplantation may be marginal, China is actively shaping international law in the course of its worldwide development (the "law positive" view), others argue that rather than formal law, informal means, such as state diktat, diplomatic and bureaucratic channels, and 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 law, and the "law negative" view describes China's domestic situation in a way which carries lessons for comparative cases. Perhaps more precisely characterized by overlap than by opposition, the categories are more concerned with presence/absence than with making normative claims about whether law is "good" or "bad." In what follows, I weigh the assertions and findings of these two views, finding that they both contain elements of the CLD story.

### 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 is based primarily on policy documents issued by the main governmental divisions that 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. This scholarship 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 organizations, (4)

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61. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 840–41 (2003); John K. M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT'L ECON. L. 219, 238 (2007).

62. See generally Celine Tan, *Reviving the Emperor's Old Clothes: The Good Governance Agenda, Development and International Investment Law*, in INTERNATIONAL INVESTMENT LAW & DEVELOPMENT: BRIDGING THE GAP 147 (Stephan W. Schill et al. eds., 2015); MAVLUDA SATTOROVA, *THE IMPACT OF INVESTMENT TREATY LAW ON HOST STATES: ENABLING GOOD GOVERNANCE?* (2018); REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW (Wenhua Shan et al. eds., 2008); TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE (Gregory C. Shaffer ed., 2012).

bilateralism over multilateral agreements, and (5) dispute resolution.<sup>63</sup> Taking these in turn, China has not sought to implement a set of formal rules to govern trade and investment under the BRI but, instead, prefers pragmatic and flexible arrangements with individual trade partners.<sup>64</sup> Such arrangements consist of soft law, such as memoranda of understanding (“MOUs”),<sup>65</sup> Beijing has assumed a variety of relationships vis-à-vis international law, some of which are more substantive in terms of integrating its values and positions than others, with disparate results. So, although Beijing has sought to “upload” Chinese norms to international law via the United Nations and related bodies<sup>66</sup> and leadership roles in international investment law,<sup>67</sup> it has also participated in customs conventions<sup>68</sup> as well as other non-trade concerns under international economic law.<sup>69</sup> On the topic of dispute resolution, China has expanded its international commercial arbitration,<sup>70</sup> upgraded the SPC to accept more foreign law cases,<sup>71</sup> built bespoke alterna-

63. See LEGAL DIMENSIONS OF CHINA'S BELT AND ROAD INITIATIVE 13 (Lutz-Christian Wolff & Chao Xi eds., 2016); INTERNATIONAL GOVERNANCE AND THE RULE OF LAW IN CHINA UNDER THE BELT AND ROAD INITIATIVE 2 (Yun Zhao ed., 2018); Julien Chaisse & Jędrzej Górski, *Introduction to THE BELT AND ROAD INITIATIVE: LAW, ECONOMICS, AND POLITICS* 1, 2 (Julien Chaisse & Jędrzej Górski eds., 2018); Julien Chaisse & Mitsuo Matsushita, *China's "Belt and Road" Initiative: Mapping the World Trade Normative and Strategic Implications*, 52 J. WORLD TRADE 163, 167 (2018); Weixia Gu, *China's Belt and Road Development and a New International Commercial Arbitration Initiative in Asia*, 51 VAND. J. TRANSNAT'L L. 1305, 1310 (2018); Heng Wang, *China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, 22 J. INT'L ECON. L. 29, 30–32 (2019) [hereinafter Wang, *China's Approach*]; Jiangyu Wang, *China's Governance Approach to the Belt and Road Initiative (BRI): Partnership, Relations, and Law*, 14 GLOBAL TRADE & CUSTOMS J. 222, 223–24 (2019) [hereinafter Wang, *China's Governance*].

64. Wang, *China's Governance*, *supra* note 63; Wang, *China's Approach*, *supra* note 63.

65. 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. 31, 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 Environment Programme and Ministry of Environmental Protection of the People's Republic of China on Building a Green “Belt and Road” (Aug. 12, 2016).

66. Wang, *China's Approach*, *supra* note 63, at 36.

67. 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, 311 (Julien Chaisse ed., 2019).

68. 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 ECON. COMM'N FOR EUR. (June 12, 2019), <http://www.unece.org/tir/news/20190612.html> [<https://perma.cc/ZQ8K-R4MF>].

69. See CHINA'S INFLUENCE ON NON-TRADE CONCERNS IN INTERNATIONAL ECONOMIC LAW 2, 4 (Paulo Davide Farah & Elana Cima eds.) (2016).

70. See Gu, *supra* note 63 at 1309.

71. See *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例) [*The People's Court's Model Cases for Providing Judicial Service and Guarantees to the "Belt and Road Initiative" Construction*], ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN (中华人民共和国最高人民法院) [THE SUP. PEOPLE'S CT. OF THE PRC] (Jul. 7, 2015), <http://www.court.gov.cn/zixun-xiangqing-14897.html> [<https://perma.cc/X8X9-GSHC>] (selecting eight model cases that involve foreign law).

tive dispute resolution institutions such as the China International Commercial Court (“CICC”),<sup>72</sup> and revised conflict-of-law rules.<sup>73</sup>

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 both point to the novelty of the Chinese approach and underscore that, for the most part, it does not conflict with existing international norms,<sup>74</sup> perhaps with the exception of such issues as intellectual property,<sup>75</sup> industrial subsidization,<sup>76</sup> and data governance, an issue with increasing salience via the “Digital Silk Road.”<sup>77</sup> A more robust version of the “law positive” view is found in Heng Wang’s works, in which he argues that not only are hard and soft law central to China’s global governance strategy but China’s reshaping of the relevant rules will transform the system of global governance.<sup>78</sup>

72. Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan (中华人民共和国最高人民法院) [THE SUP. PEOPLE’S CT. OF THE PRC], *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, 法释【2018】11号) [*The Supreme People’s Court’s Regulations on Certain Issues About Establishing an International Commercial Tribunal, Judicial Interpretation No. 11 [2018]*] (promulgated by the Judicial Comm. Sup. People’s Ct. of the PRC, June 27, 2018, effective July 1, 2018), CLI.3.316419(EN) (Lawinforchina), <http://www.court.gov.cn/fabu-xiangqing-104602.html> [<https://perma.cc/WL8W-KLTY>] (establishing the China International Commercial Court (“CICC”)).

73. Shen Hongyu (沈红雨), *Yidaiyilu Beijing Xia Guoji Shangshi Susong yu Yuwajfa Chaming Zbidu de Xin Fazhan* (一带一路背景下国际商事诉讼与域外发明制度的新发展) [*New Developments in Ascertaining Foreign Law Systems and International Commercial Litigation against the Backdrop of the Belt and Road Initiative*], ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN GUOJI SHANGSHI FATING (中华人民共和国最高人民法院国际商事法庭) [CHINA INT’L COM. CT.] (Nov. 3, 2018), <http://cicc.court.gov.cn/html/1/218/62/164/1098.html> [<https://perma.cc/7QTM-BN3E>] (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).

74. See, e.g., Chaisse & Matsushita, *supra* note 63, at 167 (remarking that the BRI is a “radically new approach towards international trade and investment”); Wang, *China’s Approach*, *supra* note 63 (finding that China selectively uses international institutions to gain recognition of the BRI); Wang, *China’s Governance*, *supra* note 63 (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 Rule 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 Gao, *China’s Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115 (2018) (explaining how China built capacity within the WTO system to strategically position itself for trade purposes).

75. See generally OFFICE OF U.S. TRADE REP., FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018).

76. James Bacchus, et al., *Disciplining China’s Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented?* 856 CATO INST. POL’Y ANALYSIS 1, 7–8 (2018), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa856.pdf> [<https://perma.cc/MJ54-9GTT>] (“After 17 years in the WTO, China still falls far short of fulfilling its WTO obligations to protect copyrights, trademarks, patents, and other intellectual property rights.”).

77. Matthew S. Erie & Thomas Streinz, *The Beijing Effect: China’s ‘Digital Silk Road’ as Transnational Data Governance* (forthcoming) (draft on file with the author).

78. Heng Wang, *Selective Reshaping: China’s Paradigm Shift in International Economic Governance*, J. INT’L ECON. L. 1, 1 (2020) (cataloging China’s reshaping of hard law rules in, for example, cross-border e-commerce and investment facilitation through the WTO and its free trade agreements (“FTAs”) and also



### 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. First, some who hold this position reflect what Lisa Toohy has called the image of “lawless China.”<sup>79</sup> In the context of international economic law, this is the idea that China inadequately implements its WTO commitments as opposed to an idealized image of the United States.<sup>80</sup> Teemu Ruskola has demonstrated how such images are embedded in discourses of “legal orientalism” that legitimize U.S. hegemony.<sup>81</sup> Orientalist imagery is produced by the uneven playing field in knowledge production concerning Chinese involvement in international law.<sup>82</sup>

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 sidelines the role of law in its research, analysis, and recommendations.<sup>83</sup> Rather, experts may emphasize the role of industrial and technical standards, and not legal standards.<sup>84</sup>

A third approach is one in which scholars on Chinese law test the central assumption of LD—that law matters as a source of order in economic development.<sup>85</sup> These studies find that China demonstrates a widespread use of

soft law rules in such areas as e-commerce and fintech via the G20 and International Organization for Standardization).

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

80. *Id.* at 34. *But see generally* Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 MICH. J. INT’L L. 525 (2014) (critiquing the quality of compliance in three WTO disputes where China was the respondent).

81. *See generally* TEEMU RUSKOLA, LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW (2013).

82. *See* ROBERTS, *supra* note 40, at ch. 5 (explaining power imbalances between U.S. and Chinese legal academia).

83. JUSTIN YIFU LIN & YAN WANG, GOING BEYOND AID: DEVELOPMENT COOPERATION FOR STRUCTURAL TRANSFORMATION 26 (2017) (emphasizing structural change, industrial upgrading, state-facilitated infrastructure, and competitive markets over legal reform).

84. 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 Toohy et al. eds., 2015); Olivier Peyrat, *Normes: Un Outil Cache de la Stratégie Économique Chinoise* [Standards: A Hidden Tool of the Chinese Economic Strategy], 98 LE JOURNAL DE L’ÉCOLE DE PARIS DU MANAGEMENT [J. PARIS SCH. MGMT.] 30, 30 (2012).

85. *See, e.g.*, GUANGHUA YU, RETHINKING LAW AND DEVELOPMENT: THE CHINESE EXPERIENCE 2 (2013); Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 109 (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, 831 (2006); Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1554 (2006).

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>86</sup> This view may include sources of private ordering such as contracts, but either de-emphasizes formal law or suggests such forms are subservient to methods of public order that derive from nonlegal sources.

While scholars differ in their assessments as to the relative weight of informal norms vis-à-vis legal ones, nonetheless, these studies complicate received knowledge about LD by highlighting the normative pluralism that has been operative in China’s experience. In short, the “law negative” view can be understood to have two variations. The minimal “law negative” perspective identifies additional sources of norms than the law-positive view, including technical standards over legal ones, public over private order, and relationships over rules. The second or full-bodied form of the “law negative” approach 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 disciplinary bias, 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 be operating in their own silos. This problem is exacerbated in the study of the BRI, which is like 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 lead to varying conclusions. In the next section, I introduce my methodology to address such concerns.

#### D. Methodology

Rather than viewing the BRI solely through the prism of international economic law, the orientation of the “law positive” view or the “law negative” view (which typically focuses on the social), this Article re-orientes the analysis of Chinese economic globalization through a broader assessment of

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86. See UPHAM, *supra* note 41, at 89, 103, 105; Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 L. & SOC’Y REV. 829, 830 (2000); see also Weitseng Chen, *Arbitrage for Property Rights: How Foreign Investors Create Substitutes for Property Institutions in China*, 24 WASH. INT’L L.J. 47, 48 (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, 301 (Wang Guiguo & Wei Zhenying eds., 1996); Jacques deLisle, *Law and the China Development Model*, in IN SEARCH OF CHINA’S DEVELOPMENT MODEL: BEYOND THE BEIJING CONSENSUS 147, 147 (S. Philip Hsu et al. eds., 2011).

its approaches to ordering for the protection of its outbound investment.<sup>87</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 and allows for the analyst to hone in on particular sources of order, whether through doctrinal analysis (in the case of formal law) or socio-legal explanations or both. Hence, this Article attempts to identify prominent sources of such norms 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, from 2016 to 2020, I have conducted six fieldtrips to China, two to Hong Kong, three 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.<sup>88</sup> My research associates or I 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, a founder of the study of LD, 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>89</sup> This challenge applies not just to monitoring specific programs’ outcomes, but also to the assessment of the origins and trajectories of LD movements, more generally. CLD requires an opening up of the study of LD 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>90</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 (if possible) and nonlegal norms play an even greater role. The broader picture is that

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87. 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* 76 (2017). See also Kimberly Kay Hoang, *Risky Investments: How Local and Foreign Investors Finesse Corruption-Rife Emerging Markets* 83 *AMER. SOCIO. REV.* 657, 658 (2018) (providing an empirical approach to assess investors’ strategies to manage risky investments).

88. To respect the wishes of interviewees, I have anonymized interviews cited herein.

89. See David M. Trubek, *Law and Development: Forty Years after “Scholars in Self-Estrangement”*, 66 *U. TORONTO L.J.* 301, 321 (2016).

90. See LEOPOLD POSPISIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* 111 (1971).

China benefits from the latecomer advantage and seeks to integrate its norms into existing international legal bodies, similar to other East Asian states.<sup>91</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>92</sup> In what follows, Part II describes the nature and scale of Chinese capital exports and the risks that are a concern to the Chinese Party-State and Chinese enterprises, since CLD holds that China uses transnational normative orders to mitigate risks to Chinese capital. Specifically, Part II.A explores the nature of Chinese capital and state capitalism, Part II.B details the nature of risks Chinese enterprises confront, and Part II.C addresses the possibilities for Chinese order.

## II. CAPITAL, RISK, AND ORDER

### A. Capital

#### 1. Size of Chinese Economy

China's economic growth is likely the main reason why it is a supplier of development around the world. China became the world's largest economy in purchasing power parity in 2014.<sup>93</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.<sup>94</sup> As of 2019, China is the world's largest official creditor, outpacing the IMF and World Bank.<sup>95</sup> China has 110 Global Fortune 500 companies, including three in the top five, all of

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91. Significant literature has observed other East Asian states adopting approaches similar to that of China. See, e.g., Veronica L. Taylor, *New Markets, New Commodity: Japanese Legal Technical Assistance*, 23 WIS. INT'L L.J. 251 (2005); 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).

92. See generally CHINA ACROSS THE DIVIDE: THE DOMESTIC AND GLOBAL IN POLITICS AND SOCIETY (Rosemary Foot ed., 2013); Matt Ferchen & 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> [https://perma.cc/59CS-NWZ4].

93. JONATHAN WOETZEL ET AL., CHINA AND THE WORLD: INSIDE THE DYNAMICS OF A CHANGING RELATIONSHIP 1 (2019), <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-Feb-2020-EN.pdf> [https://perma.cc/J8X2-ZCHC].

94. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, UNCTAD STAT, [http://unctad-stat.unctad.org/wds/ReportFolders/reportFolders.aspx?sCS\\_ChosenLang=EN](http://unctad-stat.unctad.org/wds/ReportFolders/reportFolders.aspx?sCS_ChosenLang=EN) [https://perma.cc/JJ7K-SA9G]; Sebastian Horn et al., *China's Overseas Lending* 5 (Kiel Inst. for the World Econ., Working Paper No. 2132, 2019), [https://www.ifw-kiel.de/fileadmin/Dateiverwaltung/IfW-Publications/Christoph\\_Trebesch/KWP\\_2132.pdf](https://www.ifw-kiel.de/fileadmin/Dateiverwaltung/IfW-Publications/Christoph_Trebesch/KWP_2132.pdf) [https://perma.cc/KA2X-ARFT].

95. *Id.*

which are SOEs.<sup>96</sup> The country accounted for 11.4% of global goods traded in the year 2017.<sup>97</sup> China has the world's largest banking system, the second-largest stock market, the third-largest bond market in the world, and one of the fastest growing digital economies in the world.<sup>98</sup> Chinese economic globalization is complemented by soft power and, not to mention, hard power.<sup>99</sup> While the Chinese economy contracted under the strains of the COVID-19 pandemic, China has been one of the quickest countries to recover.<sup>100</sup>

## 2. Nature of Chinese State Capitalism

It is important to understand China's version of "state capitalism" in order to analyze CLD, particularly given the pivotal role of SOEs in promoting development abroad.<sup>101</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 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>102</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 support its interests.<sup>103</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

96. See *Global 500*, FORTUNE, <https://fortune.com/global500> [<https://perma.cc/87DY-HTVX>] (last visited July 9, 2019) (listing State Grid, Sinopec Group, and China National Petroleum).

97. See WOETZEL et al., *supra* note 93, at 2.

98. See *id.* at 3; see also Jeff Desjardins, *China's Home-Grown Tech Giants Are Dominating Their US Competitors*, BUS. INSIDER (Feb. 7, 2018), <https://www.businessinsider.com/chinas-home-grown-tech-giants-are-dominating-their-us-competitors-2018-2?r=UK> [<https://perma.cc/AUP6-NA99>].

99. THE ST. COUNCIL INFO. OFF. OF THE PRC, CHINA'S NATIONAL DEFENSE IN THE NEW ERA 9 (1st ed. 2019) (stating the goal to "fully transform the people's armed forces into world-class forces by the mid-21st century.").

100. Gerry Shih, *China Pulls Ahead Among Major Economies in Pandemic Recovery*, WASH. POST (Oct. 19, 2020), [https://www.washingtonpost.com/world/asia\\_pacific/china-economy-recovery-covid/2020/10/19/d574d08c-1204-11eb-a258-614acf2b906d\\_story.html](https://www.washingtonpost.com/world/asia_pacific/china-economy-recovery-covid/2020/10/19/d574d08c-1204-11eb-a258-614acf2b906d_story.html) [<https://perma.cc/EL8D-F6H3>].

101. BARRY NAUGHTON & KELLE S. TSAI, STATE CAPITALISM, INSTITUTIONAL ADAPTATION, AND THE CHINESE MIRACLE (2015); REGULATING THE VISIBLE HAND? THE INSTITUTIONAL IMPLICATIONS OF CHINESE STATE CAPITALISM (Benjamin L. Liebman & Curtis J. Milhaupt eds., 2016); 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).

102. See Lin & Milhaupt, *supra* note 101, at 699–700.

103. See Wu, *supra* note 53, at 265 (identifying the role of the Party-State as central to "China Inc.").

to communities.<sup>104</sup> Corruption offers one instance to understand the difference between state capitalism and private capitalism. In the aftermath of the Watergate scandal in the United States, the federal government discovered that some U.S. multi-national corporations were interfering in the domestic politics of Middle Eastern countries in ways that contravened governmental interests.<sup>105</sup> As a result, the U.S. Congress passed the Foreign Corrupt Practices Act (“FCPA”), which penalizes employees of U.S. companies who bribe officials overseas.<sup>106</sup> China also has its own version of the FCPA but the law is unenforced because the Party-State, through its control, has aligned the interests of SOEs with its own.<sup>107</sup>

As a result of capitalism, geopolitical concerns cannot be divorced from commercial ones. Compared to the United States, the PRC generally lacks capacity to directly intervene in political reform abroad (for example, by effecting regime change);<sup>108</sup> instead, it has adopted more gradualist approaches, including supporting autocratic leaders and seeking to shape public opinion of China.<sup>109</sup> An increased presence of Chinese security contractors overseas is also one of the consequences of China securitizing its investments and nationals overseas.<sup>110</sup>

### 3. *Types of Chinese Capital*

To assess the role of law in Chinese development overseas via its form of state capitalism, making a few distinctions in terms of types and destinations of Chinese capital is helpful. 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 the Export-Import Bank (“EximBank”); the China Investment Corporation (established in 2007 to invest Chinese wealth in foreign companies with some \$200 billion in overseas investments); the Silk Road Fund (established in 2014 as China’s largest intergovernmental cooperation fund, with a cap of \$40 billion); China-led multilateral development banks, such as the Asian

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104. CHING KWAN LEE, *THE SPECTER OF GLOBAL CHINA: POLITICS, LABOR, AND FOREIGN INVESTMENT IN AFRICA* 32–33 (2018).

105. Thomas O. Gorman, *The Origins of the FCPA: Lessons for Effective Compliance and Enforcement*, 43 SEC. REG. L.J., 43, 45–46 (2015) (detailing the “illicit or foreign payments” cases involving U.S. multinationals conducting business in the Middle East).

106. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to 78ff (2012).

107. *See infra* note 280.

108. *But see* Vasabjit Banerjee & Timothy S. Rich, *Diamonds and the Crocodile: China’s Role in the Zimbabwe Coup*, DIPLOMAT (Nov. 22, 2017), <https://thediplomat.com/2017/11/diamonds-and-the-crocodile-chinas-role-in-the-zimbabwe-coup> [https://perma.cc/Z5R6-383M].

109. David O. Shulman, *Protect the Party: China’s Growing Influence in the Developing World*, BROOKINGS (Jan. 22, 2019), <https://www.brookings.edu/articles/protect-the-party-chinas-growing-influence-in-the-developing-world> [https://perma.cc/7LBS-5STG].

110. Paul Nantulya, *Chinese Security Contractors in Africa*, CARNEGIE-TSINGHUA CTR. FOR GLOB. POL’Y (Oct. 8, 2020), <https://carnegietsinghua.org/2020/10/08/chinese-security-contractors-in-africa-pub-82916> [https://perma.cc/9R93-X9SX].

Infrastructure Investment Bank (“AIIB,” established in 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 the Organization for Economic Cooperation and Development (“OECD”).<sup>111</sup> MOFCOM publishes annual statistical bulletins that 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 thirty-five percent.<sup>112</sup> However, starting in 2017 and continuing in 2018, Chinese FDI fell to \$143 billion.<sup>113</sup> This decrease seems to be an effect of several trends, both exogenous and internal to China, including an overall slowdown in global trade, the U.S.-China trade war, decreased economic growth in the Chinese domestic economy, as well as Beijing’s own rechanneling of CODI.<sup>114</sup> The COVID-19 pandemic will also almost certainly curtail CODI, as Beijing prioritizes domestic economic stimulus. While China’s economic growth has

111. Guanyu Yinfa Duiwai Zhijie Touzi Tongji Zhidu de Tongzhi (关于印发《对外直接投资统计制度》的通知) [Notice on Issuing the Statistical Rules on FDI] (promulgated by the Ministry of Com. of the PRC, Nat’l Bureau of Stat. of the PRC & St. Admin. of Foreign Exchange of the PRC, Jan. 9, 2015, effective Jan. 1, 2015; rev’d Dec. 30, 2016, Jan. 8, 2019), CLI.4.241636(EN) (Lawinfochina), <http://hzs.mofcom.gov.cn/article/zcfb/b/201603/20160301277128.shtml> [https://perma.cc/WSB5-NJDM] (specifying that the Ministry of Commerce’s (“MOFCOM’s”) statistical system incorporates the statistical standards and principles of FDI in accordance with the relevant provisions of the OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT (4th ed. 2008)); see also Thierry Pairault, *China in Africa: Much Ado About Investment - Part 2*, CHINA AFRICA RESEARCH INITIATIVE (Feb. 21, 2018), <http://www.chinaafricarealstory.com/2018/02/guest-post-china-in-africa-much-ado.html> [https://perma.cc/2653-W8DV] (identifying China’s FDI definition as the same as that of the OECD).

112. ZHONGHUA RENMIN GONGHEGUO SHANGWU BU, ZHONGHUA RENMIN GONGHEGUO GUOJIA TONGJI JU & ZHONGHUA RENMIN GONGHEGUO GUOJIA WAIHUI GUANLI JU (中华人民共和国商务部, 中华人民共和国国家统计局&中华人民共和国国家外汇管理局) [MINISTRY OF COM. OF THE PRC, NAT’L BUREAU OF STAT. OF THE PRC & ST. ADMIN. OF FOREIGN EXCHANGE OF THE PRC], 2013 NIANDU ZHONGGUO DUIWAI ZHIJIE TOUZI TONGJI GONGBAO ENMIN2013nian (2013 年度中国对外直接投资统计公报) [2013 STATISTICAL BULLETIN OF CHINA’S OUTWARD FOREIGN DIRECT INVESTMENT] 3 (2014); ZHONGHUA RENMIN GONGHEGUO SHANGWU BU, ZHONGHUA RENMIN GONGHEGUO GUOJIA TONGJI JU & ZHONGHUA RENMIN GONGHEGUO GUOJIA WAIHUI GUANLI JU (中华人民共和国商务部, 中华人民共和国国家统计局 & 中华人民共和国国家外汇管理局) [MINISTRY OF COM. OF THE PRC, NAT’L BUREAU OF STAT. OF THE PRC & ST. ADMIN. OF FOREIGN EXCHANGE OF THE PRC], 2015 NIANDU ZHONGGUO DUIWAI ZHIJIE TOUZI TONGJI GONGBAO (2015 年度中国对外直接投资统计公报) [2015 STATISTICAL BULLETIN OF CHINA’S OUTWARD FOREIGN DIRECT INVESTMENT] 3 (2016).

113. See e.g., ZHONGHUA RENMIN GONGHEGUO SHANGWU BU, ZHONGHUA RENMIN GONGHEGUO GUOJIA TONGJI JU & ZHONGHUA RENMIN GONGHEGUO GUOJIA WAIHUI GUANLI JU (中华人民共和国商务部, 中华人民共和国国家统计局&中华人民共和国国家外汇管理局) [MINISTRY OF COM. OF THE PRC, NAT’L BUREAU OF STAT. OF THE PRC & ST. ADMIN. OF FOREIGN EXCHANGE OF THE PRC], 2018 NIANDU ZHONGGUO DUIWAI ZHIJIE TOUZI TONGJI GONGBAO (2018 年度中国对外直接投资统计公报) [2018 STATISTICAL BULLETIN OF CHINA’S OUTWARD FOREIGN DIRECT INVESTMENT] 3 (2019).

114. See *infra* text accompanying note 130.

slowed and CODI has similarly decreased, relative to other countries, China accounts for more than ten percent of the total global FDI.<sup>115</sup> There are roughly 27,000 Chinese enterprises investing in 188 countries and 43,000 Chinese-invested enterprises are active overseas.<sup>116</sup> Chinese enterprises will continue to invest in emerging markets in the near and mid-term.<sup>117</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 as ODA, such as non-concessional loans.<sup>118</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>119</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>120</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 a Chinese-led multilateral bank and another established entity such as a traditional multilateral development bank and hence follow the governance of the latter. Nonetheless, China's policy banks, which finance the majority of BRI projects, are a black box. 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. Neither does it adhere to the International Aid Transparency Initiative. China is also not a member of the Paris Club, a

115. See *supra* text accompanying note 113.

116. *Id.*

117. See *supra* note 14 (showing that ninety-seven percent of Chinese business leaders surveyed viewed the BRI as important to their company and ninety-eight percent believed it would be important to their company five years from now.)

118. See generally SAMANTHA CUSTER & MICHAEL J. TIERNEY, CHINA'S GLOBAL DEVELOPMENT SPENDING SPREE: WINNING THE WORLD ONE YUAN AT A TIME? (2019).

119. 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) [<https://perma.cc/828L-EEDZ>].

120. *China's Global Development Footprint*, AIDDATA, <https://www.aiddata.org/china-official-finance#first-panel> [<https://perma.cc/WDT8-4QY3>] (last visited July 9, 2019).



body of creditors that meet monthly to negotiate debt which is guided by good disciplines about data reporting and adhering to common terms. As a result, one of the most comprehensive studies 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>121</sup> The study further concludes that China accounts for roughly a quarter of total bank lending to emergent markets.<sup>122</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. Emergent market restructuring following the COVID-19 pandemic will likely bring urgent attention to the terms of Chinese loans. Chinese lending, which assumes the form of loan agreements, most of which remain nontransparent to public view, thus represents one form of transnational ordering, in the CLD mold, which may potentially circumvent local legal requirements.

Whereas the AIIB has emerged as a proponent of environmental and social standards via its "Environmental and Social Framework,"<sup>123</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. 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>124</sup> Following increasing international criticism of non-transparency in China's lending practices, MOFCOM and other regulators have sought greater alignment with international standards in cross-border financing.<sup>125</sup> In sum, in terms of the

121. See Horn et al., *supra* note 94, at 2–4.

122. See *id.* at 5.

123. ASIAN INFRASTRUCTURE INV. BANK, ENVIRONMENTAL AND SOCIAL FRAMEWORK (Feb. 2016), [https://www.aiib.org/en/policies-strategies/\\_download/environment-framework/20160226043633542](https://www.aiib.org/en/policies-strategies/_download/environment-framework/20160226043633542). pdf [<https://perma.cc/7TSD-SWUZ>].

124. For example, the China International Development Cooperation Agency ("CIDCA") has been involved in drafting a "Foreign Aid Management Measures" (*Duiwai Yuanzhu Guanli Banfa*) for which it sought public comment. For a current draft, see GUOJIA GUOJI FAZHAN HEZUOSHU (国家国际发展合作署) [CHINA INT'L DEV. COOPERATION AGENCY], DUIWAI YUANZHU GUANLI BANFA (ZHENGQIU YIJIAN GAO) (对外援助管理办法 (征求意见稿)) [FOREIGN AID MANAGEMENT MEASURES (DRAFT DOCUMENT FOR PUBLIC COMMENTS)] (2018), [http://www.cidca.gov.cn/2018-11/13/c\\_129992970.htm](http://www.cidca.gov.cn/2018-11/13/c_129992970.htm) [<https://perma.cc/3UB6-QPXA>]. But see Yun Sun, *One Year On, the Role of the China International Development Cooperation Administration Remains Cloudy*, BROOKINGS (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> [<https://perma.cc/Z3RR-BE8V>] (showing that MOFCOM, not the CIDCA, retains the budget for foreign aid).

125. See, e.g., Shangwu Bu Deng 19 Bumen Guanyu Cujin Duiwai Chengbao Gongcheng Gao Zhiliang Fazhan de Zhidao Yijian (商务部等19部门关于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 from 19 Ministries including the Ministry of Commerce] (promulgated by 19 ministries including the Ministry

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 investment while incorporating lending where applicable.

#### 4. *Destinations of Chinese Capital*

Generally, 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. Even though China has been investing more heavily in post-industrial economies since the 1990s, this Article focuses on the latter given that CLD is more salient in emerging markets. Starting in 2013, when the PRC Government announced the BRI, Chinese enterprises have looked increasingly to developing countries as destinations for CODI. Following government incentives, Chinese enterprises have relabeled many of their earlier deals as BRI ones.<sup>126</sup> 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>127</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>128</sup> As such, there is no overarching set of 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

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of Com. of the PRC, Aug. 29, 2019, effective Aug. 29, 2019), CLI.4.337671(EN) (Lawinfochina), <http://hzs.mofcom.gov.cn/article/zcfb/a/201909/20190902900658.shtml> [https://perma.cc/9VVGK-3R3K].

126. Interviews with Chinese businesspeople in Islamabad, Pak. (Feb. 3, 2020).

127. See NAT'L COMMISSION OF THE PRC, MINISTRY OF FOREIGN AFF. OF THE PRC, MINISTRY OF COM. OF THE PRC & THE ST. COUNCIL OF THE PRC, VISION AND ACTIONS ON JOINTLY BUILDING SILK ROAD ECONOMIC BELT AND 21ST-CENTURY MARITIME SILK ROAD (2015), <https://eng.yidaiyilu.gov.cn/qyww/qwfb/1084.htm> [https://perma.cc/45DU-MBD4].

128. Identifying the number of “BRI states” is difficult given that countries have signed 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 bilateral investment treaties (“BITs”) with China, of which ninety-seven are in force. See PRC GOV'T, BELT AND ROAD PORTAL (2019), [https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat\\_id=10076](https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10076) [https://perma.cc/2XXX-ZR6K] (last visited July 17, 2019); UNCTAD INVESTMENT POLICY HUB, CHINA BILATERAL INVESTMENT TREATIES (2019), <https://investmentpolicy.unctad.org/international-investment-agreements> [https://perma.cc/TXN6-6VR4] (last visited July 17, 2019). In addition, China has nine FTAs with such BRI states, in addition to an FTA with ASEAN. See MINISTRY OF COM. OF THE PRC, CHINA FTA NETWORK (2019), <http://fta.mofcom.gov.cn/english/index.shtml> [https://perma.cc/844N-QQPJ] (last visited July 17, 2019).

there is little public information available regarding their managerial scope and enforcement powers.<sup>129</sup>

The proportion of investment in developing countries is increasing for several 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>130</sup> MOFCOM required POEs to submit outbound investment plans to the government, which gives high scrutiny to “sensitive countries or industries.”<sup>131</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 investment will be stable and far-reaching, the smooth development of the BRI, and national financial and economic security.<sup>132</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>133</sup> According to offi-

129. See Nadège Rolland, *Beijing’s Response to the Belt and Road Initiative’s ‘Pushback’: A Story of Assessment and Adaptation*, 50 *ASIAN AFFS.* 216, 226 (2019). In recent years, several governmental organs have issued rules and regulations for overseas investment, generally, that is, not necessarily tied to the BRI. See, e.g., Guoyou Qiye Jingwai Touzi Caiwu Guanli Banfa (国有企业境外投资财务管理办法) [Measures for the Financial Management of the Overseas Investments by State-Owned Enterprises] (promulgated by the Ministry of Fin. of the PRC, June 12, 2017, effective Aug. 1, 2017), CLI.4.299146(EN) (Lawinfochina), [http://www.gov.cn/gongbao/content/2017/content\\_5241932.htm](http://www.gov.cn/gongbao/content/2017/content_5241932.htm) [https://perma.cc/JHL3-RCN5]; Jingwai Touzi Guanli Banfa (境外投资管理办法) [Measures for the Administration of Overseas Investment] (promulgated by the Ministry of Com. of the PRC, Sept. 6, 2014, effective Oct. 6, 2014), CLI.4.233396(EN) (Lawinfochina), <http://www.mofcom.gov.cn/article/b/c/201409/20140900723361.shtml> [https://perma.cc/W4NS-DYTD]; Minying Qiye Jingwai Touzi Jingying Xingwei Guifan (民营企业境外投资经营行为规范) [Code of Conduct for the Operation of Overseas Investments by Private Enterprises], (promulgated by the Nat’l Dev. & Reform Commission of the PRC, Ministry Com. of the PRC & the People’s Bank of China, et al., Dec. 6, 2017, effective Dec. 6, 2017), CLI.4.306767(EN) (Lawinfochina), <https://www.ndrc.gov.cn/xxgk/zcfb/tz/201712/W020190905503620399571.pdf> [https://perma.cc/N6MJ-7JVU]; Zhongyang Qiye Jingwai Touzi Jiandu Guanli Banfa (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] (promulgated by the State-owned Assets Supervision & Admin. Commission of the St. Council of the PRC, Jan. 7, 2017, effective Jan. 7, 2017), CLI.4.289032(EN) (Lawinfochina), [http://www.gov.cn/gongbao/content/2017/content\\_5216436.htm](http://www.gov.cn/gongbao/content/2017/content_5216436.htm) [https://perma.cc/34A2-3LP4].

130. See *Duiwai Touzi Zhongzai Xingwen Zhiyuan* (对外投资重在行稳致远) [Slow and Steady Wins the Race When It Comes to Overseas Investment], XINHUANET (Sept. 16, 2017), <https://www.chinacourt.org/article/detail/2017/09/id/2999509.shtml> [https://perma.cc/U6D5-5NHV].

131. 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> [https://perma.cc/CV7U-V4GN].

132. *Shangwu Bu Jiaqiang Jingwai Touzi Zhenshixing Shencha Jianchi Sange Budongyao* (商务部将加强境外投资真实性审查坚持三个不动摇) [Hold Fast to the Three Unshakables in Strengthening the Overseas Investment Authentication Examination], SINA NEWS (Aug. 25, 2017), <http://www.pinlue.com/article/2017/08/2514/354238292656.html> [https://perma.cc/RB6N-CXB4].

133. Ministry of Com. of the PRC, *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> [https://perma.cc/H4DU-WP2Z]; 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*

cial statistics, from 2013 to 2017, China has invested some \$82 billion in BRI states.<sup>134</sup> More recently, trade protectionism in Western democracies has contributed to China's economic slowdown, subtracting some \$1 trillion from its foreign exchange reserves, leading to questions regarding China's capacity to generate adequate foreign exchange surplus to finance BRI projects at the same level it has since 2013.<sup>135</sup> Along these lines, Chinese media accounts of the BRI became less triumphant in late 2018.<sup>136</sup> The United States' 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 re-channel 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 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>137</sup> However, much analysis of the BRI suffers from presentism. In the long-term, it is likely that a less speculative form of the BRI will continue. To summarize, CLD is fueled by considerable injections of state capital, including investment, loans, and aid, from Beijing to developing states. As many of these host states feature nascent legal systems or otherwise lack robust investment protection, 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 CLD, and specifically CODI, in developing countries, is high risk. Chinese enterprises want to protect their investments and assets abroad; likewise, risk is a problem for the banks that finance such projects.<sup>138</sup> The BRI covers some of the most fragile countries in the world, according to world transparency indicators. Many of the BRI

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*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) [<https://perma.cc/9SUN-RAFB>]; Ministry of Commerce, *Investment and Cooperation with Countries along Belt and Road Routes in January-October of 2018* (Nov. 23, 2018), <http://english.mofcom.gov.cn/article/statistic/foreigntrade/cooperation/201812/20181202815840.shtml> [<https://perma.cc/AMS8-XX9J>].

134. ZHONGHUA RENMIN GONGHEGUO SHANGWU BU (中华人民共和国商务部) [MINISTRY OF COM. OF THE PRC], 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).

135. Minxin Pei, *Will China Let Belt and Road Die Quietly?*, ASIAN REV. (Feb. 15, 2019), <https://asia.nikkei.com/Opinion/Will-China-let-Belt-and-Road-die-quietly> [<https://perma.cc/42RE-EUL7>].

136. News alerts set on Baidu for keywords "yidaiyilu" (一带一路) [Belt and Road Initiative], weekly, Feb. 2015-Aug. 2019.

137. See *supra* note 47.

138. See ANDREW COLLIER, CHINA BUYS THE WORLD: ANALYZING CHINA'S OVERSEAS INVESTMENTS 71 (2018).

states<sup>139</sup> are highly corrupt,<sup>140</sup> indulgent of bribery,<sup>141</sup> not conducive to starting and operating a local business,<sup>142</sup> and hold sovereign debts that are below investment grade.<sup>143</sup>

Risk can be categorized into a number of types, including political, economic, and legal. *Political risk* takes the form of unstable political systems or regime change. For example, in 2016, the Kenyan government cancelled a contract with a consortium of two Chinese SOEs to build a new terminal at the Jomo Kenyatta International Airport in Nairobi, one of the largest airports in Africa.<sup>144</sup> The consortium sued, claiming twenty-two billion Kenyan shillings in damages, of which it obtained 4.3 billion from the Kenya Airports Authority (“KAA”). 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>145</sup> In a pattern seen in *DP World v. China Merchants*, 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.<sup>146</sup> The former supported the project against the objections of the latter, who, subsequent to his 2013 failed presidential election, became the opposition leader of Congress. Ongoing 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>147</sup> Given the pro-

139. “BRI states” is not a legally-defined term, but refers to those states that have signed a cooperative agreement with China. See Zhongguo Yidaiyilu Wang (中国一带一路网) [Belt and Road Portal], [https://www.yidaiyilu.gov.cn/info/iList.jsp?cat\\_id=10008](https://www.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10008) [<https://perma.cc/JBT5-GZ8N>] (last visited Oct. 22, 2020).

140. *Corruption Perception Index 2018*, TRANSPARENCY INT’L, <https://www.transparency.org/cpi2018> [<https://perma.cc/YKU7-N87G>] (last visited Aug. 1, 2019) (ranking many of the BRI states as having the highest levels of perceived corruption).

141. See *TRACE Bribery Risk Matrix*, TRACE INT’L, INC., <https://www.traceinternational.org/trace-matrix> [<https://perma.cc/X7PL-UNEA>] (last visited Aug. 1, 2019) (placing most BRI states in the lower fifty percent of risky states and identifying ten as among the riskiest twenty-five countries in the world).

142. See *Ease of Doing Business Rankings*, WORLD BANK, <http://www.doingbusiness.org/en/rankings> [<https://perma.cc/S328-5MQ5>] (last visited Aug. 1, 2019) (ranking BRI states as some of the lowest in the world in terms of the ease of doing business).

143. *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> [<https://perma.cc/7LCE-GXEP>] (finding that of the sixty-eight original members of the BRI, the sovereign debt of twenty-seven is rated as “junk” or below investment grade by the top three international rating firms).

144. See *Kenniya Quxciao Zhongqi Chengjian Neiluobi Jichang Xin 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 Chinese Companies to Build a New Terminal at Nairobi Airport, Officials Said They Did Not Want to Pay Compensation . . . . .*], SHIJI SHUO (世界说) [WORLD SPEAKS] (May 15, 2019), [https://mbd.baidu.com/newspage/data/landingshare?pageType=1&isBdboxFrom=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&isBdboxFrom=1&context=%7B%22nid%22%3A%22news_9497770251764717464%22%2C%22sourceFrom%22%3A%22bjh%22%7D) [<https://perma.cc/7ADX-LGCR>].

145. See *id.*

146. See 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> [<https://perma.cc/AP45-BPZU>].

147. See *id.*

tracted duration of the kinds of infrastructure deals that make up the BRI, often the host government with which Beijing initially negotiates is not the government in power subsequent to signing, which may be outright hostile to the project agreed to by its predecessor.

Both Chinese investors and the host state face *economic risk*. MOFCOM has reported that sixty-five percent of Chinese investments abroad, including BRI projects, have incurred losses.<sup>148</sup> State entities, including SOEs, policy banks, and, to a lesser degree, China-led multilateral development banks, must pay for risky projects due to the political pressure on the finance sector by the Chinese leadership to support the BRI.<sup>149</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>150</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 though the events are broadly misconstrued.<sup>151</sup> Following a regime change in 2015, and a balance of payments crisis a year later, the Sri Lanka Ports Authority first rescinded the agreement but then renegotiated a concession agreement with China Merchants in 2017.<sup>152</sup> Under this arrangement, the Sri Lanka Ports Authority and China Merchants formed joint ventures to develop, operate, and manage Hambantota Port for ninety-nine years under which China Merchants obtained an 85% equity position, with provisions for Sri Lanka to buy back shares over time.<sup>153</sup>

Hambantota is not only an example of the risk facing the host state. Rather, it demonstrates how fiscal mismanagement by the host government may create economic risk for China; a risk exacerbated by political uncertainty. The Hambantota case shows how a state's capacity to revalue deals may not necessarily be to China's advantage. At the same time, China also holds some responsibility for lending to an unstable debtor-state. Nonetheless, Hambantota has raised concerns of Chinese control in various analogous port projects: Pakistan's Gwadar, Myanmar's Kyaukphyu, Kenya's Mombasa, and Greece's Piraeus. Fearing unserviceable debt, the Prime Minister of Malaysia Mahathir Mohamad backed out of two projects with Chinese partners valued at \$22 billion,<sup>154</sup> although he subsequently renegotiated

148. See COLLIER, *supra* note 138, at 72.

149. *Id.* at 74.

150. See COLLIER, *supra* note 138, at 74.

151. See Pence, *supra* note 48 (citing Hambantota as an example of China's "debt diplomacy").

152. 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 11 (Jul. 12, 2019).

153. *Id.*, at 11–12.

154. Alexandra Ma, *Malaysia Has Axed \$22 Billion of Chinese-Backed Projects, in a Blow to China's Grand Plan to Dominate World Trade*, BUS. INSIDER (Aug. 21, 2018), [https://www.businessinsider.com/malaysia-axes-22-billion-of-belt-and-road-projects-blow-to-china-2018-8?r=US&IRT \[https://perma.cc/GSM8-WP9F\]](https://www.businessinsider.com/malaysia-axes-22-billion-of-belt-and-road-projects-blow-to-china-2018-8?r=US&IRT=[https://perma.cc/GSM8-WP9F]).

with Beijing.<sup>155</sup> The coronavirus pandemic has further strained host countries' abilities to repay loans. Since the outbreak, such states have been in steady negotiations with Beijing as the risk of defaults has escalated.

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>156</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>157</sup> However, what distinguishes Chinese enterprises and potentially exacerbates the problems is that Chinese enterprises may demonstrate a lax attitude towards 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>158</sup>

To date, there is a paucity of platforms for horizontal learning between Chinese enterprises and sharing experiences of working in difficult legal environments abroad. Evidently, there have been improvements. 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>159</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>160</sup> Similarly, the Zhejiang Province Commercial Affairs Department's Outbound Investment Enterprises

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155. Marrian Zhou, *Mahathir: 'We Have to Go to the Chinese' for Infrastructure*, ASIAN REV. (Sept. 27, 2019), <https://asia.nikkei.com/Politics/International-relations/Mahathir-We-have-to-go-to-the-Chinese-for-infrastructure2> [<https://perma.cc/TUJ6-DUJM>] (noting that Mahathir subsequently renegotiated the East Coast Rail Link project with terms more favorable to Malaysia).

156. Compare Dollar, *supra* note 10, at 6 ("Chinese ODI appears indifferent to the governance environment."), with 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, 361 (Julien Chaisse ed., 2019) (arguing that Chinese overseas direct investment ("CODI") is more likely to go to countries with low political risk, including authoritarian ones).

157. See generally 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, 311–12 (Karen G. Turner, James V. Feinerman & R. Kent Guy eds., 2015).

158. Interview with Barrister in London, Eng. (Feb. 5, 2018).

159. Interview with Lawyer in Shanghai, China (Apr. 22, 2019).

160. *Id.*

Association has compiled successful cases of Zhejiang-based companies that have invested overseas, and shared them with PRC law firms.<sup>161</sup> There are also a few sector-specific initiatives in progress.<sup>162</sup> Notwithstanding these initiatives, as I discovered speaking at a training center for high-ranking members of the CCP who are CEOs, often Chinese enterprises “going out” have no recourse but to repeat the mistakes of previous Chinese enterprises abroad.<sup>163</sup>

Legal risk is substantial for many Chinese enterprises. The China Institute of Corporate Legal Affairs (“CICLA”)<sup>164</sup> has conducted one of the few studies on the attitudes of Chinese enterprises to investing in developing countries, resulting in two main insights. First, survey respondents indicated that the “unsound” (*bu jianquan*) law of host states and their “incomplete” (*bu wanquan*) legal systems were major risks.<sup>165</sup> 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>166</sup> consequently, the self-reported figures of legal conflicts are high. For example, fifty percent of respondents in the 2015 survey report state that they were involved in civil lawsuits or arbitration, and nearly eight percent were

161. See ZHEJIANG SHENG SHANGWU TING XIASHU DE 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 BINGGOU SHILI FENXI YU PINGSHU (CHUGAO) (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).

162. See, e.g., *Lamu Laocheng Ranmei Dianzhan Xiangmu Xuke Bei Cbe, Huanjing Shehui Yingxiang Youdai Chongxin Pinggu* (拉姆老城燃煤电站项目许可被撤, 环境社会影响有待重新评估) [*The License for Lamu Coal Plant Project is Cancelled, and the Environmental and Social Impact Need to be Reevaluated*], ZHONGGUO LÜ FA HUI (中国绿发会) [CHINA BIODIVERSITY CONSERVATION & GREEN DEV. FOUND.] (June 27, 2019), <http://www.cbcdgdf.org/NewsShow/4854/9047.html> [<https://perma.cc/9DKQ-2MSB>] (stating that the China Biodiversity Conservation and Green Development Foundation, a Chinese NGO, is building an “EBRs Case Studies” to inform Chinese companies to adhere to local environmental standards in their investments overseas).

163. 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).

164. The China Institute of Corporate Legal Affairs (“CICLA”) was established in 2014 under *The Legal Daily*, the official organ of the CCP Central Political and Legal Committee, 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.

165. See ZHONGGUO GONGSIFAWU YANJIUYUAN (中国公司法务研究院) [CHINA INSTITUTE OF CORPORATE LEGAL AFFAIRS], ZHONGGUO QIYE “ZOUCHUQU” DIAOYAN BAOGAO (中国企业“走出去”调研报告) [SURVEY REPORT ON CHINESE COMPANIES' “GOING OUT”] 3 2016–17 (on file with the author) [hereinafter “2016–17 SURVEY REPORT”]; ZHONGGUO GONGSIFAWU YANJIUYUAN (中国公司法务研究院) [CHINA INSTITUTE OF CORPORATE LEGAL AFFAIRS] ZHONGGUO QIYE “ZOUCHUQU” DIAOYAN BAOGAO (中国企业“走出去”调研报告) [SURVEY REPORT ON CHINESE COMPANIES' “GOING OUT”] 15 2017–18 (on file with the author) [hereinafter “2017–18 SURVEY REPORT”].

166. See 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 sixteen percent of failures are due to legal factors).



involved in criminal lawsuits. In 2016, the number of firms involved in criminal lawsuits doubled, but then fell in 2017 (Table).<sup>167</sup> There are a number of areas of law that appear problematic, including antitrust investigations, environmental protection investigations, limits on foreign capital, labor, tax, intellectual property, public procurement, and choice of law concerns.<sup>168</sup>

	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, 38% unstable legal system and business environment, Etc.	Incomplete legal systems of host states, 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 7.9% involved in criminal lawsuit	31% procedural or penalties, of those.... 61% civil litigation 55% arbitration 20% admin penalties 16% criminal litigation	52% procedural or penalties, of those... 39% arbitration 23% civil litigation 14% admin litigation 2% criminal litigation

Partly due to such frictions, investor-state disputes involving Chinese enterprises will multiply in the near term. 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>169</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.

167. See 2016–17 SURVEY REPORT, *supra* note 165 at 18; 2017–18 SURVEY REPORT *supra* note 165 at 18.

168. See 2017–18 SURVEY REPORT, *supra* note 165, at 5.

169. See *id.*

One case from Zimbabwe shows how host state courts can have a punitive approach to Chinese investment. 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 in the High Court of Zimbabwe, claiming loss of diamond mining rights.<sup>170</sup> 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>171</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>172</sup>

Chinese enterprises and the Chinese Party-State face different types and levels of risk in cross-border commerce. The fact that the Party-State is willing to tolerate such high levels of risk suggests that a longer-term geoeconomic strategy underlies its commercial investments. The timeline appears to be one of decades rather than fiscal quarters. As a result of the significant political, economic, environmental, and legal risks faced by Chinese enterprises and their creditors, there is a fundamental need for cross-border ordering.

### C. Order

Even if, under state capitalism, Chinese SOEs have a high tolerance for risk, 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 settlements whereby variables that introduce uncertainty are accounted for and minimized, if not negated, through a number of processes, ranging from private parties’ calculation in their business decisions to policy adjustments by the state.

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170. See Anhui Foreign Econ. Constr. Grp. Co. v. Minister of Mines & Mining Dev. (HH 219-16 HC 2287/16) [2016] ZWHHC 219 (Mar. 24, 2016) [hereinafter “Anhui v. Minister”].

171. *Id.* at 4.

172. See Wang & Miao, *supra* note 166, at 48–49 (“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.”).

Whereas status was the basis of order in pre-capitalist societies,<sup>173</sup> capitalist exchanges depend on the “spontaneous order”<sup>174</sup> that stems from the aggregate of human social actions (for example, individual transactions that form a market) or state design (for example, court systems, social welfare, taxation, socialist state planning, etc.).<sup>175</sup>

To return to the earlier analogy that Chinese commercial behavior outside of China mirrors such behavior 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>176</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, but not necessarily justice.<sup>177</sup> Yet law in historical China was far from monopolistic in producing order.<sup>178</sup> The literature on contemporary Chinese law and society confirms this general idea, showcasing the range of norms, from extralegal Party directives to secularization of religion, which order society.<sup>179</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>180</sup> Order

173. See SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 169 (1861).

174. FRIEDRICH HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 37 (W.W. Bartley III ed., 1988).

175. See generally 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: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* ch. 4 (1944) (re-examining ethnographic evidence to argue that the market economy emerged only through state intervention).

176. See generally 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); *CHINA’S POLITICAL SYSTEM* (Sebastian Heilmann ed., 2017) (describing the role of the CCP in China’s political economy).

177. 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).

178. See generally 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 (法律的文化解释) [THE CULTURAL INTERPRETATION OF LAW] (Liang Zhiping ed., 1994); Liang Zhiping, *Tradition and Change: Law and Order in a Pluralist Landscape*, 11 *CULTURAL DYNAMICS* 215 (1999).

179. See, e.g., *ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE* 4 (Neil J. Diamant, Stanley B. Lubman & Kevin J. O’Brien eds., 2005) (advocating a broader and inclusive perspective on law and rights in the study of Chinese law-and-society); MATTHEW S. ERIE, *CHINA AND ISLAM: THE PROPHET, THE PARTY, AND LAW* 314, 333 (2016) (finding interaction between informal and formal norms in the relations between the Party-State and Muslim minorities).

180. See, e.g., SULMAAN WASIF KHAN, *HAUNTED BY CHAOS: CHINA’S GRAND STRATEGY FROM MAO ZEDONG TO XI JINPING* 234 (2018); CHING KWAN LEE, *AGAINST THE LAW: LABOR PROTESTS IN*

within China is far from a *fait accompli*, and China's capacity to effect order outside of the PRC appears even more tenuous.

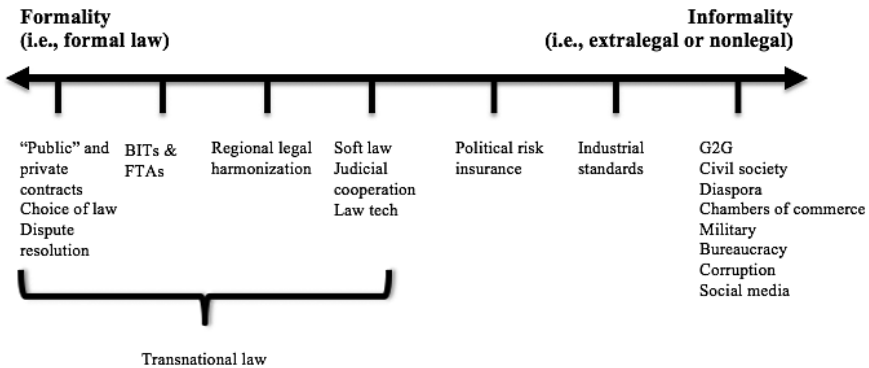
Chinese globalization strategies like the BRI are yet another level of complexity given the range of political, socio-economic, and ethno-religious pluralities with which Chinese authorities must engage and negotiate and, ultimately, whom they must persuade. The BRI has, since its inception, had the flavor of a domestic CCP campaign whereby the central government issues directives and the rank-and-file officials must execute them.<sup>181</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. 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 for development projects, 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 the 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, the use of large data sets and algorithms, including machine learning, to support the delivery of legal services, including in courts. Transnational law avoids local law, and specifically, host states' courts. At the same time, it is supplemented by 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).

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CHINA'S RUSTBELT AND SUNBELT 10–12 (2007); *see generally* JEFFREY N. WASSERSTROM, *POPULAR PROTEST AND POLITICAL CULTURE IN MODERN CHINA* (2d ed. 2018).

181. *See* Yuen Yuen Ang, *Needed for China's Belt and Road: A Roadmap*, *BLOOMBERG* (Sept. 27, 2018), <https://www.bloomberg.com/opinion/articles/2018-09-27/china-s-belt-and-road-initiative-is-a-campaign-not-a-conspiracy> [<https://perma.cc/NM49-PQ7J>].



### 1. *Transnational law*

The “law positive” view captures many elements of China’s construction of transnational law while overstating or excluding others.<sup>182</sup> 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.

#### *i. “Public contracts”*

The connective tissue of China’s legal ordering is commercial contracts, especially “public contracts.” Public contracts are contracts of pecuniary interest related to the provision of services or execution of works made between, a governmental entity on the side of the host state and a contractor, which may be domestic or foreign, including Chinese. Public contracts are of particular relevance in evaluating CLD as, according to most states’ public procurement rules, open tender and transparency in the process of bidding are required. Public procurement rules and also choice of law and dispute resolution are different aspects of China’s approach to “public contracts.” The “law positive” analysis may fail to recognize that in the CLD context, “public contracts” may be “public” in name only.

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>183</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>184</sup> Consequently, the terms

182. See *supra* Part I.B.

183. See COLLIER, *supra* note 138, at 48.

184. See, e.g., ZHONGHUA RENMIN GONGHEGUO SHANGWU BU & ZHONGHUA RENMIN GONGHEGUO HUANJING BAOHU BU (中华人民共和国商务部, 中华人民共和国环境保护部) [MINISTRY OF COM. OF THE PRC & MINISTRY OF ENVTL. PROTECTION], Guanyu Yinfa “Duiwai Touzi

and conditions of the loan agreement and the non-financial contracts are often not disclosed. The China Pakistan Economic Corridor (“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>185</sup>

However, because of their non-transparency, these contracts do function to work around local law and potentially to remove disputes from the host state. Functionally, the structure of a Chinese lender/Chinese borrower transaction operates to avoid negative externalities such 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.

When signing onto “public contracts,” Chinese parties may further instill their model through clauses such as choice of law. Generally, 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 are often tiered contracts to multiple parties, including sub-contractors, each of which may have different choice of law provisions. The non-financial agreements (for example, project agreement, property documents, construction contracts, 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.

Based on interviews with corporate lawyers whose clients include Chinese lenders, 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.”<sup>186</sup> 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 Exim

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Hezuo Huanjing Baohu Zhinan” de Tongzhi (关于印发《对外投资合作环境保护指南》的通知) [Notice on Publishing “Guidelines for Environmental Protection of Foreign Investment Cooperation”] (Feb. 18, 2013), art. 5, <http://www.mofcom.gov.cn/article/b/bf/201302/20130200039930.shtml> [<https://perma.cc/S7MZ-8MTK>] (“Enterprises should understand and abide by the laws and regulations of the host country related to environmental protection.” [author’s trans.]).

185. See Faiza Ismail, *CPEC: When the Alarm Goes Off*, DAWN (Mar. 25, 2019), <https://www.dawn.com/news/1471610> [<https://perma.cc/4M39-UV4E>].

186. Interviews with Corporate Lawyers in Beijing, Shanghai, Hangzhou, H.K., Sing., and London (2017–20).

Bank on May 11, 2014, specifies that PRC law is the governing law.<sup>187</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. U.K. law has been the first choice for lending arrangements not only because of the 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>188</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.

Closely related to the 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>189</sup> Some Chinese enterprises, especially POEs or those new to outbound investment, push for onshore options (for example, the China International Economic and Trade Commission). However, Hong Kong and Singapore are the most common as compromise forums and may be first choices for SOEs and those enterprises with more experience in cross-border transactions.<sup>190</sup>

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 annum—meaning cases for which the HKIAC provides full administrative support, including applying HKIAC Administrated Arbitration Rules or UNCITRAL Arbitration Rules—about forty percent involve a PRC party.<sup>191</sup> Since 2014, the HKIAC has handled more than 488 cases involving a party from a BRI jurisdiction.<sup>192</sup> From 2014 to 2018, eighty-two 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>193</sup> These disputes included commercial, maritime, construction and corporate disputes, professional services, and intellectual property issues, with a total value of \$779 million.<sup>194</sup> Of these eighty-two cases, thirty-five percent of the time, the PRC party was the claimant and sixty-six percent of the time, it was the respondent.<sup>195</sup> For the SIAC, Chinese parties are the second most

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187. Edwin Okoth, *SGR Pact with China a Risk to Kenyan Sovereignty, Assets*, NATION (Jan. 12, 2019), <https://nation.africa/kenya/news/sgr-pact-with-china-a-risk-to-kenyan-sovereignty-assets-127328> [https://perma.cc/C5SA-YHQ3].

188. See *supra* text accompanying notes 159–160.

189. See Patrick M. Norton, *China's Belt and Road Initiative: Challenges for Arbitration in Asia*, 13 U. PA. ASIAN L. REV. 72, 73 (2018).

190. Interview with Dispute Resolution Lawyer and Arbitrator in Shanghai (Mar. 10, 2018).

191. Interview with H.K. Int'l Arbitration Ctr. (“HKIAC”) Secretariat in H.K. (Mar. 11, 2019).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

frequent user, after Indian parties.<sup>196</sup> From 2014 to 2017, an average of 18.5% of new filings involved a Chinese party.<sup>197</sup> As one Hong Kong-based lawyer who has worked on such deals told me, “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>198</sup> In summation, international commercial arbitration produces transnational law as it is a mostly corporate-made law that is confidential, meaning that the parties to the relevant arbitration agreement can apply rules they themselves choose (rather than, say, state legislatures) and any arbitral award that results from a dispute arising under the agreement will not be disclosed to third parties.

These features effectively “lift” the dispute out of the jurisdiction of the host state, and ensure that it is not subject to public disclosure through the enforcement powers of local courts or public regulatory bodies.<sup>199</sup> The extent to which Chinese parties can do so varies per host state and the instant transaction. Further, Chinese enterprises remain exposed to liability for violating local law, and one growing trend is third parties suing Chinese parties in local courts. It is worth noting that as Chinese enterprises may opt for Singapore or Hong Kong as their forum of preference for international arbitration, it is not necessarily that CLD is predicated on a China-centric transnational law. Although China’s arbitral commissions are quickly internationalizing, they remain hamstrung by a number of institutional and legislative factors.<sup>200</sup> In short, “public contracts” thus reveal some of the nuance of how CLD operates to promote transnational ordering potentially at the expense of local law.

## ii. BITs & FTAs

According to the “law positive” view, one of China’s major investment strategies is to rely on its existing international investment agreements, namely, BITs and investment chapters in FTAs, and instruments such as double-taxation treaties.<sup>201</sup> Fundamentally, these treaties protect Chinese in-

196. Interview with Sing. Int’l Arbitration Ctr. (“SIAC”) Registrar in Sing. (Aug. 13, 2018).

197. Figures calculated from SIAC Annual Reports. See SING. INT’L ARB. CTR., ANNUAL REPORT (2014, 2015, 2016, 2017), <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report> [<https://perma.cc/EG4Q-JQ6Q>].

198. Interview with Lawyer in H.K. (Mar. 11, 2019).

199. See William J. Moon, *Contracting Out of Public Law*, 55 HARV. J. ON LEGIS. (2018) 323, 326 (finding an “unconnected choice of law” as a network of contractual relationships governed by law with little or no nexus to the jurisdiction in question and which allow private parties to contract out of the local legal regime).

200. Matthew S. Erie & Monika Prusinowska, *The Future of Foreign Arbitration in the People’s Republic of China: Current Developments and Challenges Ahead*, 28 ASIA PAC. L. REV. (forthcoming 2021).

201. See generally NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE (2009); Jie (Jeanne) Huang, *Procedural Models to Upgrade BITs: China’s Experience*, 31



vestors 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 United States,<sup>202</sup> many of China's BITs with host states are out of date, include ambiguous definitions of "investor" and "investment," lack national treatment, and have limited options for investor-state dispute resolution.<sup>203</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>204</sup> Likewise, the FTAs that China has concluded with BRI states are deemed to be "economically insignificant."<sup>205</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, by, for example, updating treaties with terms that meet the needs of BRI projects. 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 ninety percent of Pakistani commodities at zero duty.<sup>206</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 LD strategy.

### *iii. 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 through intra-regions rather than inter-nations. Often, globalization is construed in unitary terms, as if processes occur everywhere simultane-

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

202. See Sanchez, *supra* note 54, at 325.

203. See Huang, *Silk Road Economic Belt*, *supra* note 201, at 736.

204. Interview with African Students at Law Sch. in Hangzhou, China (June 10, 2017); see also *id.*

205. Huang, *Silk Road Economic Belt*, *supra* note 201, at 736.

206. Compare APP, *Second Phase of China-Pakistan FTA to Be Signed on April 28*, EXPRESS TRIB. (Apr. 23, 2019), <https://tribune.com.pk/story/1956779/2-second-phase-china-pakistan-fta-signed-april-28> [<https://perma.cc/R354-MWQL>], with *China-Pakistan FTA Phase II More Beneficial than Phase I*, CPEC PORTAL (May 7, 2019), <http://www.cpecinfo.com/archive/news/china-pakistan-fta-phase-ii-more-beneficial-than-phase-i/NzA2MA> [<https://perma.cc/LKU3-NL36>] (noting that Phase II was, in part, initiated by the Pakistani side after unequal gains of Phase I favoring China).

ously; 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>207</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>208</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>209</sup> an organization that seeks to harmonize commercial and civil law in the region, signing on to the Singapore Mediation Convention, which fosters mediation throughout the region and potentially the world,<sup>210</sup> and showing commitment to the Regional Comprehensive Economic Partnership ("RCEP"), the largest FTA in the world.<sup>211</sup> In exceptional cases, China may build its own multilateral institutions such as the Shanghai Cooperation Organization ("SCO"), which functions not only as an international counterterrorism apparatus but also as an economic bloc.<sup>212</sup> In each case, Beijing pushes for the harmonization of 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,

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207. Interview with Shi Jingxia, Dean of Univ. of Int'l Bus. and Econ. L. Sch., in N.Y.C. (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 Sauvants, *supra* note 67, at 318.

208. Interview with Justin Monsenepwo Joost, Ph.D. Candidate, Julius Maximilian Univ. of Würzburg, in Shanghai, China (Apr. 18, 2019) (specifying that China is the third largest funder after France and the World Bank).

209. Interview with Adeline Chong Swee Ling, Assoc. Professor of Law, Sing. Mgmt. Univ., in Sing. (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).

210. See Xiaoxia, *40-Odd Countries Including China Sign Singapore Mediation Convention on Mediation*, XINHUANET (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) [<https://perma.cc/7Z2M-5EWJ>].

211. See Pasha L. Hsieh, *Against Populist Isolationism: New Asian Regionalism and Global South Powers in International Economic Law*, 51 CORNELL INT'L L.J. 683, 683 (2018).

212. To date, the SCO's main achievements for legal harmonization have been in the field of antiterrorism law. See, e.g., Shanghai Cooperation Organization, Shanghai Convention on Combating Terrorism, Separatism and Extremism, June 15, 2001, <https://www.refworld.org/docid/49f5d9f92.html> <https://perma.cc/JVU7-FTU9>.

in order to build out new ecologies for trade and investment, Beijing must learn to negotiate complicated intra-regional politics.

*iv. Soft law*

Where formal treaties or forums are not in place (for example, bilateral, regional, or multilateral mechanisms like BITs, FTAs, and double-taxation treaties), China has become a strong advocate for soft law.<sup>213</sup> Soft law consists of rules that lack the binding force of law but which may have practical effect.<sup>214</sup> Soft law is a particular feature of financial law,<sup>215</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>216</sup> The Chinese predilection for soft law is an outcome of preferences for cooperative models of ordering over coercive or legalistic ones. However, indicative of problems, in a 2018 speech, legal scholar Wang Guiguo noted that the soft law nature of cross-border governance under the BRI has drawbacks. He stated, "[T]he project-oriented BRI implementation method lacks legal coordination that provides enterprises with reliable legal protection and effective, specific treatment standards, including damages for enterprises when they are harmed."<sup>217</sup>

The soft law nature of the BRI allows for flexibility but may leave Chinese enterprises inadequately protected. Chinese investors cannot rely exclusively on soft law to protect investments; they need hard law or additional sources of ordering. There are enforceability concerns on the other side as well. From the vantage point of the host state, there are questions as to whether the Chinese uphold their "obligations" under soft law arrangements. This worry became clear to me during a think tank dialogue in Islamabad with lawyers and officials. The conversation centered on the

213. See Wang, *China's Approach*, *supra* note 63, at 30; Wang, *China's Governance*, *supra* note 63, at 6.

214. For an example of the operation of soft law in the law of the European Community, see Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 MODERN L. REV. 19, 19 (1993).

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

216. See, e.g., *List of Deliverables of the Second Belt and Road Forum for International Cooperation*, EMBASSY OF CHINA IN THE U.K., OF GR. BRIT. & N. IR. (Apr. 27, 2019), <http://www.chinese-embassy.org.uk/eng/zgyw/t1658767.htm> [<https://perma.cc/DPT9-5VLR>].

217. Wang Guiguo: *Quanqin Zhili yu "Yidaiyilu" de Yuanze be Fangxiang—Zai Fazhi yu Gaige Guoji Gaoduan Luntan* (2018) *Shang de Jianghua* (王贵国：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) [Wang Guiguo: *Global Governance and the Principles and Directions of the "Belt and Road Initiative": A Speech at the High Level Forum on the Rule of Law and Reform* (2018)], ZHEJIANG DAXUE FAXUE QINGNIAN (浙江大学法学青年) [ZHEJIANG U. LEGAL STUD. YOUTH] (Nov. 10, 2018), <https://mp.weixin.qq.com/s/KN6bEYua6ZLS4Vmpajy1Ew> [<https://perma.cc/J827-JZRP>].

question: “Do the Chinese uphold soft law agreements?”<sup>218</sup> As soft law is more exposed to political discretion than hard law, soft law requires an analysis that is more attuned to such context.

*v. 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 in China and those in 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, China Law Society, SCO, and China National Institute for International Exchange and Judicial Cooperation, these initiatives include conferences in China and in BRI states that aim principally to form networks and less to train foreign judges in PRC law.<sup>219</sup> Nonetheless, training, too, is happening, particularly under the auspices of the National Judges College in Beijing.<sup>220</sup> Such efforts have culminated in more soft law, such as the Shanghai Declaration of the World Enforcement Conference, a multilateral MOU that antedates the delayed Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.<sup>221</sup>

Such cooperation and networking may be dismissed as epiphenomenal, a weak form of people-to-people diplomacy. However, 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 down the road.<sup>222</sup> In Chinese practice, rule-bending pragmatism may trump legalistic formalism, and means-end reasoning may outweigh commitment to established procedures.<sup>223</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.

218. Personal Observation in Islamabad, Pakistan (June 19, 2019).

219. See Seppänen, *supra* note 16, at 131–32 (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).

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

221. See *Shanghai Declaration of the World Enforcement Conference*, Jan. 22, 2019, [http://english.court.gov.cn/2019-01/23/content\\_37430495.htm](http://english.court.gov.cn/2019-01/23/content_37430495.htm) [<https://perma.cc/WVR8-8GD6>].

222. 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).

223. See generally Samuli Seppänen, *Anti-Formalism and the Preordained Birth of Chinese Jurisprudence*, 4 CHINA PERSP. 31 (2018) (analyzing such preferences according to contemporary Chinese legal theory).

vi. *Lawtech*

In addition to judicial and lawyer networks, another complement to transnational law is lawtech. 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 regulations on technology, media, and telecommunications, and little cultural cachet for privacy.<sup>224</sup> 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>225</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>226</sup> and Laos<sup>227</sup> to transfer such legal technologies to host states. To date, however, the MOUs have not appeared to have borne much fruit in terms of viable PRC-inspired Internet courts outside of China.

Thus far, Chinese technology has had greater traction in impacting telecommunications and e-commerce in BRI states than it has in impacting 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.<sup>228</sup> This infrastructure includes physical elements (for example, fiber-optic cables, antennas, and data centers) as well as non-physical ones (for example, transmission standards, networking protocols, and digital identifiers). Whereas host states, many of whom are nondemocratic states, are attracted to China's version of "data sovereignty" which mandates that data be stored domestically, data sovereignty may be illusory when they rely on Chinese-supplied digital infrastructure maintained by Chinese companies beholden to the Party-

224. See Jason Tashea, *China's All-Virtual Specialty Internet Courts Look Set to Expand into Other Areas of the Law*, ABA J. (Nov. 1, 2019), <https://www.abajournal.com/magazine/article/china-all-virtual-specialty-internet-courts> [<https://perma.cc/49RV-LKUC>]; Zhuhao Wang, *China's E-Justice Revolution*, JUDICATURE (forthcoming).

225. See 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*], XINHUANET (Mar. 19, 2019), [http://www.xinhuanet.com/politics/2019-03/19/c\\_1124253887.htm](http://www.xinhuanet.com/politics/2019-03/19/c_1124253887.htm) [<https://perma.cc/EY9B-QB8W>] (mentioning the priority of developing China's Internet courts to assist with case management and dispute resolution services).

226. *Taiwangguo Daliyuan he Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Sifa Jiaoliu yu Hezuo Liangjie Beiwanglu* (泰王国大理院和中华人民共和国最高人民法院司法交流与合作谅解备忘录) [Memorandum of Understanding Between the Supreme Court of the Kingdom of Thailand and the Supreme People's Court of the People's Republic of China on Judicial Exchange and Cooperation], June 12, 2017 (identifying the transfer of information technologies and "wisdom courts" (*zhibui fayuan*) as areas for cooperation).

227. *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.

228. See generally Erie & Streinz, *supra* note 77.

State.<sup>229</sup> 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.

To conclude, although the “law positive” view is correct in pointing to Chinese efforts to create transnational law through contracts, international investment agreements, and soft law, the categories of transnational law require 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 the 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 demonstrate how technology can be a conduit for ordering by establishing norms for information access, sharing, and transfer. In short, Chinese ordering is variable, and appears contingent on regional and local conditions.

## 2. *Nonlaw*

Formal law is only part of Chinese ordering, however, and a holistic analysis should additionally consider the extralegal or nonlegal means that supplement law. Such methods may even be a first-choice option over formal law, as they provide ultimate flexibility in safeguarding the parties’ interests in the context of host states’ uncertain regulatory environments. The view from many BRI host states, for example, is that the law’s role is marginal, giving some credence to the “law negative” view.<sup>230</sup> 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>231</sup> Moreover, in terms of the role of the Burmese justice system in addressing potential concerns involving CODI, he stated, “Myanmar is 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>232</sup> A judicial bureaucracy that is often known more for “performing order” than for delivering justice is problematic to any would-be litigant.<sup>233</sup>

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229. *Id.*

230. *See supra* Part I.C.

231. Video Interview with Lawyer (Nov. 21, 2018).

232. *Id.*

233. *See* NICK CHEESMAN, *OPPOSING THE RULE OF LAW: HOW MYANMAR’S COURTS MAKE LAW AND ORDER* 161, 169 (2015).

It is little wonder that foreign investors, including Chinese ones, 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>234</sup> Nonetheless, the nonlegal approach faces its own challenges. In the ethnographic record, most cases whereby order is promoted without recourse to formal law take place in homogenous communities whose members share norms.<sup>235</sup> Hence, one issue is whether, to the extent that extralegal or nonlegal norms matter in Chinese cross-border ordering, the non-Chinese are receptive to such norms. At the same time, in market contexts, a sense of belonging to a common occupation and the informal norms that cohere such communities (for example, honesty) may take the place of formal contracts.<sup>236</sup> While informal norms usually cannot sustain complex multi-country project finance deals,<sup>237</sup> China-led globalization begs the question of to what extent 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, 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 requiring a revision of assumptions about the informal norms literature on 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.

### *i. Political Risk Insurance*

Political risk insurance, like credit enhancement, is 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

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234. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (2009).

235. See, e.g., Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 116 (1992); Matthew S. Erie, *Muslim Mandarins in Chinese Courts: Dispute Resolution, Islamic Law, and the Secular State in Northwest China*, 40 L. & SOC. INQUIRY 1001, 1008 (2015); Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2087 (2001).

236. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55, 58 (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).

237. See SHITONG QIAO, *CHINESE SMALL PROPERTY: THE CO-EVOLUTION OF LAW AND SOCIAL NORMS* 72 (2018) (arguing that informal norms were sufficient for complex real estate transactions in urbanizing Shenzhen).

to legal protection.<sup>238</sup> In the context of CODI, there are multiple types of political risk insurance on which 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 those by 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>239</sup> As of 2017, Sinosure has provided \$2.8 trillion in insurance support to international projects and suffered claims of \$9.5 billion.<sup>240</sup>

Although political risk insurance is a tool to mitigate risk, it is still insufficient in many ways. For example, political risk insurance may be too expensive for POEs, and insurers may encounter difficulty pricing risk in the weakest investment environments due to the absence of credible data.<sup>241</sup> As an object of socio-legal study, political risk insurance, like other types of indicators used in global governance, is embedded in specific theoretical claims about appropriate standards for evaluating conduct.<sup>242</sup> Given that Sinosure increasingly operates outside of China, insuring non-Chinese companies, its approach to guiding decisionmaking about specific projects warrants particular attention.<sup>243</sup>

238. See generally PETER CANE, *TORT LAW AND ECONOMIC INTERESTS* (1991); Gerhard Wagner, *Tort Law and Liability Insurance*, 31 *GENEVA PAPERS ON RISK & INS.* 277 (2006).

239. See ZHONGGUO GUOJI SHANGHUI (中国国际商会) [CHINA INT’L CHAMBER OF COMMERCE], *Zuo Waimao de Zhuyi Le! Zhe Fen Fengxian Tu Qing Shoubao* (做外贸的注意了! 这份风险图请收好) [*Those Engaged in Foreign Trade, Pay Attention! Please Keep This Risk Map Handy*] (Oct. 15, 2018), <https://mp.weixin.qq.com/s/xpXZjZAMabyBsT38XBQIDQ> [<https://perma.cc/23WV-P6WY>] (describing how the 2018 National Risk Analysis Report provides a national risk rating, sovereign credit risk rating, and risk analysis for sixty-two countries). In addition, Taihe Institute and Peking University jointly authored a report that generates a “five-connections index” (*wutong zhisbu*) for ranking BRI countries, covering policy coordination, facilities connectivity, unimpeded trade, financial integration, and people-to-people bond; see also TAIHE ZHIKU (太和智库) [TAIHE INST.], *Taihe Zhiku yu Beijing Daxue Lianbe Fabu “Yidaiyilu” Wutong Zhisbu 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”*] (Dec. 24, 2018), <http://www.taiheinstitute.org/Content/2018/12-24/0913043250.html> [<https://perma.cc/87EV-DNUF>]. 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.

240. See COLLIER, *supra* note 138, at 73.

241. Interview with Corporate Lawyer in H.K. (Mar. 12, 2019).

242. Kevin Davis et al., *Introduction: Global Governance by Indicators, in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS* 3, 9 (Andrew Hurrell et al. eds., 2012).

243. See Lisa Hielscher, *Sinosure, BELT AND ROAD INITIATIVE* (May 26, 2019) <https://www.beltrroad-initiative.com/sinosure/> (listing China Export and Credit Insurance Corporation’s (“Sinosure’s”) agreements with international companies).



## ii. Standards

Where possible, China has pushed for the implementation of Chinese standards of all sorts in its overseas projects, including industry standards, technical standards, and data standards, sometimes tying the use of Chinese standards to loans offered by policy banks.<sup>244</sup> Using uniform standards, particularly in projects that may cross borders such as railways, highways, fiber-optic cables, dry ports, and 5G mobile networks minimizes transaction costs in having to adjust for different jurisdictions' standards.<sup>245</sup> Industry standards not only provide access to markets but also have a regulatory effect parallel to legal norms.<sup>246</sup>

China has been improving its standards both domestically and internationally in a kind of virtuous cycle. In another example of state capitalism, China is one of the few countries with legislation on standards, meaning that in China, unlike in most countries, the government sets the standards instead of the industry.<sup>247</sup> The 2017 Standardization Law featured an expansive chapter on legal liability, signaling a commitment to enforcement.<sup>248</sup> In step, the PRC's regulatory agencies have been increasingly fine-tuned in recent years with an eye on foreign markets, but not without problems. For instance, the General Administration of Quality Supervision, Inspection and Quarantine ("AQSIQ") suffered from a number of issues, including a lack of coordination with global standards.<sup>249</sup> AQSIQ was replaced in 2018 by the State Market Regulatory Administration ("SMRA"). The SMRA can be seen as part of China's increasing internationalization of its standards.<sup>250</sup> As with its participation in the WTO, G20, or the United Nations, China's involvement with the International Organization for Standardization has given it a broader platform from which to promote its standards abroad. Consequently, through the BRI's standard-setting, some Chinese enterprises are gathering a majority of their operating income from overseas markets.<sup>251</sup>

244. Telephone Interview with Banker from China Dev. Bank (Nov. 18, 2019).

245. See generally Petja Ivanova, *Cross-Border Regulation and Fintech: Are Transnational Cooperation Agreements the Right Way to Go?*, 24 UNIF. L. REV. 367 (2019).

246. 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).

247. See *Zhonghua Renmin Gongheguo Biaozhunhua Fa* (2017 Nian Xiuding) (中华人民共和国标准化法 (2017年修订)) [Standardization Law of the People's Republic of China (2017 Revision)] (promulgated by the Standing Comm. of the Nat'l People's Cong. of the PRC, Nov. 4, 2017, effective Jan. 1, 2018). CLI.1.304266(EN) (Lawinfochina).

248. See *id.* ch. 5.

249. See JOHN K. 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).

250. China joined the International Organization for Standardization ("ISO") as early as 1978. The Standard Administration of China became the sixth permanent member of the ISO Council in 2008, and became a member of the Technical Management Board in 2013, thus cementing its position on both the governing side and the technical side of ISO's standard-setting.

251. See, e.g., "Yidaiyilu" Guoji Hezuo Dianxing Xiangmu Tuidong "Zhongguo Biaozhun" 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 Representative Projects Facilitate the Linking Up of "China Standards" with International Ones],

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 by 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>252</sup> In another case, China Harbor Engineering Company was contracted to build an expressway in Cameroon with Chinese financing, and 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).<sup>253</sup> The Chinese side faced massive losses and sought strict contract enforcement.<sup>254</sup> As China uses standards that differ from those of countries like France and the United Kingdom, which are often adopted by their former colonies, building roads whose blacktop thickness meets the Chinese standard 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 by giving China broad access to the market. Consequently, just as the typical deal structure shows a hermeticity (that is, a Chinese developer borrowing from a Chinese lender), which minimizes financial risk, so, too, does project implementation demonstrate a similar logic (that is, Chinese laborers working on Chinese-managed projects and living in Chinese camps), which minimizes “community risk,” including local crime, social instability, or other forms of fractiousness.<sup>255</sup>

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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> [<https://perma.cc/7JYN-5GK2>] (illustrating how the Shandong Power Construction Corporation has benefitted from the BRI such that almost eighty percent of its operating income is from BRI states).

252. YAJI TIELU YUNYING HE WEIHU XIANGMU GONGSI (亚吉铁路运营和维护项目公司) [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).

253. See Zhao Yining (赵忆宁), *Zhongguo Gangwan Zhongbu Feizhou Quyu Guanli Zhongxin Zongjingli Xu Huajiang: Hezuo Kaifa Disanfang Shichang Kamailong Shi Zuida de Liyi Youguan 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 略麦隆是最大的利益攸关者) [Xu Huajiang, *General Manager of China Harbor's Central Africa Regional Management Center: Cameroon is the Biggest Stakeholder in Cooperative Development of Third-Party Markets*], 21 SHIJI JINGJI BAODAO (世纪经济报道) [21ST CENTURY ECON. REPORT] (Mar. 28, 2017), [http://www.21jingji.com/2017/3-28/zOMDEzNzlfMTQwNTUzOQ\\_5.html](http://www.21jingji.com/2017/3-28/zOMDEzNzlfMTQwNTUzOQ_5.html) [<https://perma.cc/HK7Z-SWKP>].

254. See *id.*

255. See 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, 418–19 (2019) (critiquing China's labor practices in Pakistan); see generally DRIESSEN, *supra* note 252, at 60 (describing living conditions for Chinese workers in Ethiopia).

### iii. Diplomatic intervention

Perhaps the most prevalent nonlaw means of ordering is political intervention that takes two forms: managing relations with the host state at the highest levels of the government, and resolving conflicts, sometimes preemptively. The MFA, through its embassies and consulates in host states, is engaged with investment strategies at various levels including risk mitigation and the protection of Chinese assets and citizens overseas.<sup>256</sup> The PRC embassies are thus deeply involved in massaging relations with the host government and representing individual PRC enterprises in their disputes. More broadly, as for managing public relations to prevent problems, in many host states, Chinese embassies actively shape local perceptions 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>257</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>258</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 Yaoundé.<sup>259</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 to explain the differences between Chinese and French standards.<sup>260</sup> The Chinese provided data to demonstrate that the Chinese blacktop would fit the need given the frequency and

256. See Huo Siyi (霍思伊), “Yidaiyilu” Jinru Di'er Jieduan—Zhuanfang Guojia Faqaiwei 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 Its Second Stage: Interview with Zhai Dongsheng, Director of the National Development and Reform Commission's BRI Construction and Promotion Center], ZHONGGUO XINWEN ZHOUKAN (中国新闻周刊) [CHINA NEWS WEEKLY] (Apr. 25, 2019), <https://mp.weixin.qq.com/s/jqYfbDaINkbsiJkgEmpOA> (quoting Zhai Dongsheng saying, “[W]e 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, zhuanyebua jigou yao jinxing fengxian pinggu, jianshao qiye touzi de mangmuxing, tiqian xiang qiye yujing*)).

257. See *infra* text accompanying note 268.

258. Interview with a Member of the Ministry of Foreign Affairs (“MFA”) in Oxford, U.K. (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 charges).

259. See Zhao, *supra* note 253.

260. *Id.*

weight of traffic on the roads.<sup>261</sup> The approach of diplomatic intervention worked.<sup>262</sup>

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 in order to preempt potential problems that may arise.<sup>263</sup> For their part, 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>264</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 overseas.<sup>265</sup>

China's experience demonstrates political intervention does not necessarily exist in an adversarial relationship with transnational law—in relations between nondemocratic states, it may actually coexist with transnational law in more complex ways. Political ties may underpin or even sustain transnational law, particularly in the context of state capitalism. Although politicians' intervening in disputes further marginalizes state courts and excludes arbitration, 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. Thus, there are pros and cons to political intervention depending on one's perspective: ordering as political relationships may be good for business, but it is not necessarily good for the rule of law, transparency, or access to justice.

*iv. Civil society and the 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 functioning as local ombudsmen, creating order. However, 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 government-organized NGOs ("GONGOS") and overseas Chinese associa-

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261. *Id.*

262. *Id.* (quoting the General Manager of the China Harbor as saying, "[T]echnical problems are solved through business channels, and business problems can also be solved through technical means." [author's trans]).

263. See Interview with a Member of the MFA, *supra* note 258.

264. *Id.*

265. *Id.*

tions, 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>266</sup> In many respects, civil society may be the cutting edge of Chinese soft power.<sup>267</sup>

In places where there are histories of Chinese diaspora and consequently thick communities across borders, such as Southeast Asia, Chinese enterprises 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>268</sup> Overseas Chinese who are familiar with the local market can also provide a range of services, including legal and consulting services, to Chinese companies looking to enter those markets.<sup>269</sup>

In those geographic regions where there is a brief history of overseas Chinese, such as 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>270</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 and Chinese Muslims’ work as cultural ambassadors in Dubai.<sup>271</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 part-

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266. See generally GUO YEZHOU (郭业洲), *YIDAIYILU MINXIN XIANGTONG BAOGAO* (一带一路民心相通报告) [REPORT ON THE INTERLINKING OF POPULAR SENTIMENT IN THE BELT AND ROAD INITIATIVE] (2018).

267. Chinese charitable organizations may also be covers for corrupt activities. See, e.g., Richard L. Cassin, *DOJ Charges Two in Chinese Plot to Bribe Africa Officials*, FCPA BLOG (Nov. 20, 2017), <https://fcpa.blog.com/2017/11/20/doj-charges-two-in-chinese-plot-to-bribe-africa-officials> [https://perma.cc/J398-TQRA] (noting how the U.S. Department of Justice alleged that Chi Ping Patrick Ho, the head of a Hong Kong-based NGO, bribed officials in Chad and Uganda to further Chinese business interests).

268. Sokphea Young, *The Political Economy of Contestation over Land Resources in Cambodia* (2016) (unpublished Ph.D. dissertation, The University of Melbourne) at 106; see also SOKPHEA YOUNG, STRONGMEN VERSUS WEAK MEN: STRATEGIES OF AUTHORITARIAN SURVIVAL AND DISSENSUS IN SOUTHEAST ASIA (forthcoming) (finding that Sino-Cambodian intermediaries working with Chinese investors influence local regulatory institutions to the benefit of those investors).

269. See Email Correspondence with Chinese Lawyer in Myanmar (Sept. 15, 2019; 4:30PM GMT).

270. See generally ROBERT R. BIANCHI, *CHINA AND THE ISLAMIC WORLD: HOW THE NEW SILK ROAD IS TRANSFORMING GLOBAL POLITICS* (2019).

271. 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 7, 25 (2018); Yuting Wang, *The Making of China’s “Good Muslims”: From Middleman Minority to Cultural Ambassadors*, 18 CHINA REV. 131, 135 (2018).

ners, 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 United Nations in 2019 in support of China’s human rights record in Xinjiang.<sup>272</sup>

In my analysis, I have adopted a socio-legal approach to counterbalance a methodology that primarily examines official PRC documents, as in the “law positive” approach. My approach reveals the pervasive reliance on non-legal means for ordering. Such strategies, such as political risk insurance, industrial standards, government-to-government relations, civil society, and biculturalism of the Chinese diaspora 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, these non-legal components may, depending on one’s vantage, have their own advantages particularly in supplementing formal law, an insight often overlooked or characterized as harmful by the “law negative” view. 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, strong government-to-government relations, which may feature as 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. Moreover, it is important to note that the sources of ordering are best conceptualized along a spectrum as they demonstrate an intermingling of law and nonlaw (for example, the contractual basis of political risk insurance policy)—the degree to which law or nonlaw is doing the work locates their position on that spectrum. The view of CLD that emerges 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. Lastly, these interactions and the various combinations of norms, strategies, and tools may feature more or less prominently in different sectors, countries, or regions in a process that is constantly evolving.

### III. ASSESSING CLD

Since CLD is nascent, evaluations of its strengths and weaknesses, at this stage, can only be provisional. The global pandemic has introduced consid-

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272. Mingmei, *China Appreciates 37 Foreign Ambassadors’ Joint Letter Supporting Xinjiang Policy*, XINHUANET (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) [<https://perma.cc/FWA5-YRC8>].

erable precarity into the world system. However, 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.

### A. *Early Views on CLD*

The LD literature has offered a number of ways to generate questions around the stated aims of LD projects, suggestions that are helpful in assessing CLD.<sup>273</sup> From the Chinese perspective, CLD seeks to both protect China's commercial investments overseas and lay a foundation for promoting its geopolitical interests, in the course of its development projects abroad. These goals can be further sub-divided, given the diversity of actors and plural incentives involved. Guiding questions include: whether individual investment projects or "packaged" deals (for example, traditional infrastructure projects coupled with digital complements, along with aid) are economically viable? Whether individual enterprises obtain a return on their investments through the course of one or multiple projects? Whether government-to-government relations improve over the duration of such projects and in the context of ongoing trade relations? These questions may lead to divergent results. For instance, whereas many projects in the BRI require capital from nominally private Chinese companies, these companies often suffer significant losses.<sup>274</sup> At the same time, the Party-State may be willing to sacrifice losses incurred by individual firms for longer-term ties with the host state, ties that may require even more capital. Hence, the time horizons of individual firms and that of the Party-State may differ considering how Beijing is building out an agenda to further China's strategic position in the global market, a process that may take decades. This position includes broadening access to foreign markets, moving up the production ladder, including, in such sectors as telecommunications, fintech, and e-commerce, accumulating natural resources, growing China-centric global supply chains, reducing technology dependence on the United States and its allies, and popularizing Chinese brands.<sup>275</sup>

In addition to the perspective of the Chinese investor, CLD should equally be assessed from the viewpoint of the host state. At a general level, more focus on interactions between Chinese and host state law from the vantage of the recipient country may decenter some of the Anglo-American bias that undergirds the comparative analysis of China,<sup>276</sup> and open up new epistemological ground in the study of China's cross-border order and law. More specifically, if CLD seeks to further China's commercial and geostrategic interests by building transnational law and relying on nonlegal mecha-

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273. See, e.g., William P. Alford, *Exporting the "Pursuit of Happiness"*, 113 HARV. L. REV. 1677, 1703 (2000); see also Jensen & Heller, *supra* note 57.

274. See *supra* note 148; see also Interviews with Chinese Managers in Islamabad, Pak. (July 23, 2018).

275. See *supra* note 33.

276. See *supra* note 81, at 209.

nisms such as elite political ties, then one question is how CLD impacts the domestic legal system of the host state. Disputes involving Chinese parties may be removed from the instant jurisdiction to third-party arbitration seats. Transnational dispute resolution may have a neutral or possibly negative effect on the growth of commercial dispute resolution in the host state, if local courts or ADR is sidelined. Of course, Chinese parties may not always be able to avoid local law. Specifically, mandatory provisions of local law and the host state's territorial jurisdiction, particularly over matters such as labor and environmental protection, may prevent Chinese parties' resorting to third-party forums.<sup>277</sup> In addition to contractual disputes, Chinese parties are exposed to tort claims and hence litigation in local courts may be unavoidable.<sup>278</sup> The Chinese presence may, in some cases, stimulate legal reform in host states by encouraging more sophisticated dispute resolution mechanisms, legal services, and investment law and corporate law reform, more generally. In addition, the host state view underscores the issue of Chinese companies' compliance with local law and corporate governance. In short, assessments must incorporate not only the Chinese perspective but also that of host states whose economies and, in some instances, governance, are being affected by the new normal of CODI.

### B. Challenges Confronting CLD

At this relatively early stage of studying CLD, it is possible to make a number of observations and identify issues looming on the horizon, including challenges such as agency problems and moral hazards, as well as external challenges. According to Chinese officials, the trade volume between China and BRI countries has exceeded \$6 trillion, and Chinese investment in the BRI has surpassed \$90 billion.<sup>279</sup> These are remarkable achievements. Nonetheless, the governance of CODI suffers from a lack of coordination in the provision of rules. 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, by law, PRC procurators have jurisdiction to prosecute bribery committed by employees of Chinese enterprises to foreign officials overseas, however, there have been zero such reported cases till now.<sup>280</sup> Rather, the Central Commission of Discipline and Inspection, a

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277. Email from Chinese Public Interest Lawyer to Author (Aug. 20, 2020) (on file with author); Email from Chinese Labor Lawyer to Author (Sept. 7, 2020) (on file with author).

278. See Email from Chinese Labor Lawyer, *supra* note 277.

279. ZHONGGUO JINGCHA WANG (中国警察网) [CHINA POLICE NET], *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*] [https://mbd.baidu.com/newspage/data/landingshare?pageType=1&isBdboxFrom=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&isBdboxFrom=1&context=%7B%22nid%22%3A%22news_9361297468184248176%22%2C%22sourceFrom%22%3A%22bjh%22%7D) [https://perma.cc/ESA7-FKF2] (last visited Dec. 3, 2019).

280. See *Zhonghua Renmin Gongheguo Xing Fa* (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. of the PRC, July 6, 1979, effective Jan. 1, 1980, amended 2011), CLI.1.314937(EN) (Lawinfochina), art. 164 (pro-



CCP—not state—organ, has expanded its jurisdictional reach beyond the PRC to punish corruption.<sup>281</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>282</sup>

On the investor side of the equation, the success of efforts such as the BRI requires the incorporation of private capital. However, many POEs do not exhibit the level of sophistication of corporate governance practiced by SOEs.<sup>283</sup> In contradistinction, in certain jurisdictions, contracting practices by POEs may adhere more closely to international business norms. 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 latter tended to be more congruent with international standards whereas the former were irregular. This discrepancy is caused by the POE contracts being more “negotiable” by African civil servants than the SOE ones, which were subject to the African presidential cabinet’s pressure.<sup>284</sup> Nonetheless, as governance over POEs is less centralized than that for SOEs, as more POEs take advantage of the BRI brand, it is possible that agency problems may multiply, and thus quality control looms large as an issue for the Party-State.

Related, there are moral hazard concerns. Because SOEs rely on the Party-State for insurance and on the PRC government as an arbitrator in their disputes with the host government, they tend to take excessive risks. While such issues may be present in other donor nations (for example, the Export-Import Bank of the United States),<sup>285</sup> this problem is more pronounced in state capitalism given the muted role of independent decision-making. Moral hazard has long been a problem in the Chinese domestic economy: governmental guarantees to enterprises against insolvency de-incentivize firms from internalizing risk.<sup>286</sup> Such problems are more severe in overseas projects where Chinese enterprises are unmoored from the wider ecosystem

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viding legal grounds to punish employees of PRC companies who bribe foreign officials). *But see Zhongguo Caipan Wenshu* (中国裁判文书) [*China Judgments Online*], <https://wenshu.court.gov.cn> [<https://perma.cc/3WNB-QHT9>] (last visited Nov. 3, 2019) (providing zero search results for cases that cite the foregoing article).

281. 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> [<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).

282. Sharon Shi, *Anti-Corruption Compliance in Outbound Investment*, *ALLBRIGHT LAW* (June 11, 2018), <https://www.vantageasia.com/anti-corruption-compliance-in-outbound-investment> [<https://perma.cc/UBU5-WALW>].

283. Thus, many suffer repeated commercial losses. *See* Interview with Chinese Managers, *supra* note 274.

284. Interview with Folashadé Soulé-Kohndou, Visiting Scholar, Blavatnik Sch. of Gov’t, in Oxford, U.K. (Jan. 30, 2019).

285. Ian Vásquez, *The Export-Import Bank*, *CATO INST.* (July 17, 1997), <https://www.cato.org/publications/congressional-testimony/exportimport-bank> [<https://perma.cc/TW7X-356G>].

286. Stacey Steele et al., *Trends and Developments in Chinese Insolvency Law: The First Decade of the PRC Enterprise Bankruptcy Law.*, 66 *AM. J. COMP. L.* 669 (2018).

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.

Chinese economic globalization, however, may continue in the absence of external shocks. The COVID-19 pandemic is one such shock, and while it is too early to make full assessments, the pandemic affords an opportunity to evaluate how CLD responds to such an external challenge. There are both immediate and long-term implications of the pandemic for CLD. In terms of immediate ramifications, whereas the BRI has been billed as enhancing global “connectivity,” the pandemic has brought the opposite: severed global supply chains, frozen markets, blocked migrant laborers, and increased Sinophobia. Not only did local authorities in Hubei Province seek to initially cover up the COVID-19 outbreak, thus delaying a coordinated national response and exacerbating the spread of the disease,<sup>287</sup> but subsequently, due to travel restrictions, Chinese laborers were unable to return to their worksites in host states after the Chinese New Year in early 2020. Meanwhile, the rupture of labor and supply chains introduced delays to many BRI deals, and some Chinese investors invoked force majeure, hardship, or frustration, depending on their contracts and the applicable law. In many instances, Chinese embassies intervened to facilitate the return of Chinese laborers to worksites and to mediate disputes between Chinese companies and local counterparties.<sup>288</sup> Further, COVID-19 seems to have increased demands among host states for more Chinese health aid and investments in such sectors as the digital economy.<sup>289</sup> China has responded to these demands.<sup>290</sup> Hence, CLD seems to have some resilience if not adaptability. It is clear, however, that the strains imposed by the pandemic may test some of China’s relationships, particularly in the wake of sovereign debt and corporate debt restructuring. The longer-term ramifications of the pandemic for CLD, however, are more uncertain. The question remains whether the Chinese governance approach, one that prioritizes social stability over trans-

287. Carrie Gracie, *China’s Coronavirus Cover Up*, BBC NEWS (July 27, 2020), <https://www.bbc.co.uk/player/episode/m000k4dq/panorama-chinas-coronavirus-coverup> [<https://perma.cc/E8KP-MFPR>].

288. Interview with Chinese Businessperson in Islamabad, Pak. (Apr. 27, 2020); Email Correspondence from Shanghai-based Chinese Lawyer (Oct. 8, 2020) (on file with author).

289. See *Hou Yiqing Shidai, Shuzi Sichou Zhibu Jiazhi Jiang Gengwei Zhangxian* (后疫情时代, 数字丝绸之路价值将更为彰显) [*In the Post-Epidemic Era, the Value of the Digital Silk Road Will Be More Prominent*], ZHONGHUA RENMIN GONGHEGUO SHANGWUBU (中华人民共和国商务部) [MINISTRY OF COM. OF CHINA] (Aug. 16, 2020), <http://www.mofcom.gov.cn/article/i/jyjl/e/202008/20200802992825.shtml> [<https://perma.cc/8KD8-QDUU>] (outlining initiatives to deepen digital cooperation, expand e-commerce, construct digital infrastructure, and build smart cities along the “digital Silk Road.”)

290. See e.g., *Jianchi Duobian Zhubi Tuanjie Yingdui Yiqing* (坚持多边主义 团结应对疫情) [*Adhere to Multilateralism and Unite to Deal with the Pandemic*] RENMINWANG (人民网) [PEOPLE.COM] (June 10, 2020), <http://world.people.com.cn/n1/2020/0610/c1002-31740910.html> [<https://perma.cc/F353-NNES>] (stating that China is in the process of providing health aid to 150 countries).

parency and accountability, is one that offers more moral authority and public goods to developing countries than the so-called Washington Consensus.

### C. *Areas for Future Research*

Building on the above-mentioned guiding questions for assessment,<sup>291</sup> and keeping the ongoing challenges faced by CLD in mind,<sup>292</sup> there are a number of areas that are ripe for future research. Such research can, in particular, develop metrics to assess the relative success or failure of CLD.<sup>293</sup> In consideration of the Chinese and host state views on CLD, the guiding questions can be assessed,<sup>294</sup> using either quantitative or qualitative data analysis (or both). For instance, on the formal side of law, as researchers gain more access to the non-financial contracts and lending agreements involved in such deals, their dispute resolution provisions can be mined to determine patterns of dispute resolution preferences.

Chinese companies' compliance can be measured by the host state regulators' treatment of Chinese investors, namely, regulators' records of licensing, permitting, and imposition of penalties or recourse to other forms of administrative sanction. Whereas arbitrated cases remain confidential, host state courts, for the most part, have public records of cases, including those involving Chinese parties. Further, Chinese companies' compliance with local law and standards in such contested areas as labor and environmental protection as well as public procurement, tax, antimonopoly and other matters can be triangulated through consulting diverse stakeholders, including not only host state regulators and local industry but also civil society and local communities impacted by Chinese-financed and -built projects.

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. By paying greater attention to these areas of inquiry, scholarship can advance knowledge of Chinese compliance with host state local law and international law.

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

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291. See *supra* Part III.A.

292. See *supra* Part III.B.

293. See *supra* note 273.

294. See *supra* Part III.A.

law but rather as constitutive of Chinese overseas order. COVID-related uncertainties notwithstanding, these elements of CLD may gain more traction in the future.

Analyses should track the different scales of ordering (transnational, state, parties, local interests, and third parties affected by particular projects) as well as ordering across various sites (home state, host state, and third party states).<sup>295</sup> Multi-sited research needs to be conducted on how legal, judicial, or even legal-educational networks are formed and how they are sustained.<sup>296</sup> For instance, leading universities in Pakistan and Cambodia have established Chinese legal studies programs. Studies should track students' careers and the extent to which they integrate PRC law and developmental strategies into domestic governance.<sup>297</sup> Fundamentally, CLD suggests that research needs to be done on the interrelationships between markets, politics, and law, and ultimately how order begets power. Such multi-scalar studies are particularly relevant during a period when traditional pillars of international order and global governance, whether the WHO or investor-state dispute resolution, are increasingly questioned.

#### D. Comparison between CLD and U.S. Law and Development

It is clear that CLD differs from past practices of LD, 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 United States may seem overstated. The version of U.S. LD, sometimes produced in critiques on LD, is that it was a forceful imposition of American law on weaker states.<sup>298</sup> While some exponents of U.S. LD have admitted to ethnocentrism,<sup>299</sup> other practitioners of U.S. LD claim a much more dialogic method; practitioners' approach was more to identify local actors working in specified areas (for example, clinical legal education, social justice, etc.) and to provide them with support.<sup>300</sup> These views are not totally mutually exclusive given the diversity of actors promoting U.S. LD.<sup>301</sup> Hence, one could argue that even the U.S. approach

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295. See Halliday & Shaffer, *supra* note 24, at 56–58.

296. See, e.g., *supra* note 87.

297. In 2020, the author taught at the law school in Pakistan and planned to teach at the law school in Cambodia later that year but could not due to COVID-19 travel restrictions.

298. See generally JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980).

299. See, e.g., 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, 1080 (1974).

300. Interview with a Former Ford Found. Officer in N.Y.C. (Sept. 26, 2018); see also MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD 2 (Mary McClymont & Stephen Golub eds., 2000) (describing the diverse programs under the Global Law Programs Learning Initiative).

301. See Thomas Carothers, *The Rule of Law Revival*, 77 FOR. AFFS. 95, 95 (1998).

included elements of cooperation between donor incentives and host state demands.

Furthermore, those looking to harmonize the U.S. and Chinese approaches might suggest the following: 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, on the one hand, 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—on the other hand, 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>302</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>303</sup> The Chinese are beginning their learning process. The ongoing revision of the BRI serves as evidence. There is some evidence that it is becoming more aligned with international standards, including lending practices. This change is reflected, for instance, in the deliverables of the Second Belt and Road Forum for International Cooperation, which suggest, at least rhetorically, a turn to multilateralism, transparency, risk assessment, and sustainability.<sup>304</sup>

Yet, there are noteworthy differences between the U.S. and Chinese approaches. Whereas both versions of LD combine formal law and informality, American public actors have historically emphasized the former whereas Chinese counterparts show more of the latter. The United States 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, despite the fact that U.S. companies occasionally violated or circumvented host state institutions in practice, and that the U.S. government itself has, in part, designed international organizations to support its own foreign policy aims.<sup>305</sup> In contrast, the Chinese approach to ordering, with the exceptions of the AIIB and CICC, does not take the form of institutions. Rather, the Chinese approach is more concerned about relationships, as illustrated by China Merchants' willingness to continue its relationship with the Djibouti government even after it nationalized China Merchants' assets<sup>306</sup>

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302. See generally JOHN PERKINS, *CONFESSIONS OF AN ECONOMIC HIT MAN* (2004) (describing how the author, an American economist who worked for a U.S. consulting firm, persuaded autocrats to assume large loans from the United States, IMF, and World Bank that would funnel money back to his consulting firm and others through engineering projects and bankrupt governments).

303. DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY* 245–55 (2013); ALBERT O. HIRSCHMAN, *DEVELOPMENT PROJECTS OBSERVED* 172–74 (2015).

304. See *supra* note 216. *But see supra* note 50.

305. See *supra* note 58.

306. See *supra* text accompanying note 58.

and the PRC Government's willingness to forgive loans.<sup>307</sup> The assertion about relationships made by the U.K.-trained Chinese lawyer cited above<sup>308</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 LD movements, the United States has sought to transplant versions of its legal institutions either directly to host states or through international financial organizations.<sup>309</sup> For the most part, China has, to date, hesitated to export its own legal institutions, with a few exceptions.<sup>310</sup> For this reason, it will be interesting to watch whether such collaborative initiatives as the China Africa Joint Arbitration Centre, established in 2015 by the Arbitration Foundation of Southern Africa and the Shanghai International Arbitration Center, will take root.<sup>311</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 (in terms of costs, expertise, local demand, and most importantly, advantages to Chinese parties), such as Special Economic Zones ("SEZs") or smart cities.<sup>312</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>313</sup> However, the bill contained a controversial provision to extend ninety-nine-year leases to foreign investors, including Chinese investors.<sup>314</sup> As a result of the bill, on June 10, 2018, thousands of Vietnamese protested against what they feared would be an infringement on Vietnamese sovereignty.<sup>315</sup> Subsequently, the bill was tabled, demonstrating that local pushback can be fatal to a would-be Chinese transplant.

307. See John Hurley et al., *Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective*, 5 *CTR. FOR GLOBAL DEV. POLICY PAPER* 121 (2018) (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); see also Email from Scott Morris, Senior Fellow, Center for Global Development, to Author (Oct. 25, 2018, 3PM GMT) (on file with author) (confirming that China has led over one hundred debt renegotiations).

308. See *supra* text accompanying note 51.

309. See generally deLisle, *supra* note 59.

310. See, e.g., Seppänen, *supra* note 16, 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).

311. CAJAC, CHINA-AFR. JOINT ARB. CTR., <https://cajacjhb.com> [<https://perma.cc/D5DU-XDZN>] (last visited Oct. 8, 2020).

312. But see *supra* text accompanying note 83.

313. Interview with Vietnamese Lawyer in Oxford, U.K. (Oct. 30, 2019).

314. Robyn Wilson, *Vietnam's Special Economic Zones: A Trojan Horse for Chinese Influence?* PROP. REP. (Dec. 14, 2018), <http://www.property-report.com/detail/-/blogs/vietnam-s-special-economic-zones-a-trojan-horse-for-chinese-influenc-1> [<https://perma.cc/9B94-N9MM>].

315. Angie Ngoc Tran, *Workers Say No to Vietnam's 'Special Exploitation Zones.'* NEW MANDALA (July 18, 2018), <https://www.newmandala.org/workers-say-no-vietnams-special-exploitation-zones> [<https://perma.cc/8JL3-MZ9Z>].

It is clear that in both U.S.-led and PRC-led globalization, there is a power imbalance between the United States or PRC, on one hand, and host states, on the other. However, it seems the two countries have handled the asymmetry differently, leading to different outcomes. For the United States, whereas “liberal internationalism” was accompanied by, in some cases, a double standard in adherence to international law, under President Donald Trump, the United States has pursued an explicit “America first” policy.<sup>316</sup> The Chinese, for their part, have emphasized “win-win.”<sup>317</sup> Some of this is hyperbolic, 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 United States and its allies, but are using it to promote their own interests.<sup>318</sup> More specifically, they are crafting a transnational law through not-so-public contracts, international investment agreements, intraregional harmonization, and soft law. This transnational law is based on enforcing inter-corporate agreements, as in *DP World v. China Merchants* and is buttressed by nonlegal norms. As such, it is open to discretion but also abuse by both donor and host states.

### E. CLD and Global Governance

Is CLD good for global governance and specifically for developing nations? On the one hand, China delivers 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. In the future, China may become more emboldened to export its authoritarian system, including its limited public sphere and narrow definition of political and civil rights, to host states, but it seeks out those governments that can broker deals outside public audit and accountability; deals that, in turn, buttress autocracy. One long-term impact is a possible convergence of authoritarian “rule of law,”<sup>319</sup> with China’s legal system as a reference point.<sup>320</sup> Such a 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, legal or otherwise, may be over-stretched. Instead, the

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

317. See, e.g., Huo, *supra* note 256 (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*)”).

318. See Kong, *supra* note 53.

319. See generally 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).

320. See *supra* note 279 (stating that “rule of law is an indispensable and vital foundation and guarantee for the co-construction of the ‘Belt and Road Initiative’.”)

cumulative effect of Chinese ordering may not be producing order. Rather, the product may be closer to “minilateralism”<sup>321</sup> or inter-hub networks,<sup>322</sup> enclaves of legal modernity which concentrate state resources—including human capital and legal services—but, 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 who has worked on several CPEC deals put it, “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>323</sup> However, China’s preferences of arm-in-arm business practices over legal institutions may not be sustainable in the long run. The compliance incentives alter as Chinese enterprises invest overseas, requiring them to adapt more systematically. In short, the inherent flexibility and adaptability of CLD may short-circuit its long-term sustainability.

## CONCLUSION

The year 2020 marks a turning point in global affairs given the disruption of the COVID-19 pandemic. Despite these obstacles or perhaps because of them, a more chastised form of Chinese global developmentalism is likely to emerge, perhaps one more concentrated within certain spheres of geopolitical influence. The long-term consequences of Chinese economic globalization will likely be at least as enduring as those of American-led globalization. Just as China was integrated into the world economy during the period of U.S.-led globalization, so too much of Eurasia (and beyond) may be integrated into the world economy under a Chinese influence or dominance. Likewise, just as Chinese enterprises learned how to engage in financial engineering by doing business in advanced markets, so too are they applying these lessons in emergent economies. In other words, despite the distinct nature of Chinese 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. It is likely that increasing links between China and host states will foster more and diverse forms of transnational law, as one approach to cross-border order. Focusing on the relation-

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321. See BRUMMER, MINILATERALISM, *supra* note 215 (defining “minilateralism” as criss-crossing trade alliances, informal soft law agreements, and financial engineering).

322. See Erie, *supra* note 43.

323. Interview with Pakistani Lawyer in Oxford, U.K. (Aug. 7, 2019).



ship between this form of law and its political analogues reveals the relevant “techniques, doctrines, and legal methodologies”<sup>324</sup> constitutive of China’s contested globalism.

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324. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 33 (2004).

