

2020

## The Complexities of Democracy, Development, and Human Rights in China's Belt and Road Initiative

Diane A. Desierto

Follow this and additional works at: <https://opencommons.uconn.edu/cjil>



Part of the [International Law Commons](#)

---

### Recommended Citation

Desierto, Diane A., "The Complexities of Democracy, Development, and Human Rights in China's Belt and Road Initiative" (2020). *Connecticut Journal of International Law*. 3.  
<https://opencommons.uconn.edu/cjil/3>

THE COMPLEXITIES OF DEMOCRACY, DEVELOPMENT, AND HUMAN  
RIGHTS IN  
CHINA'S BELT AND ROAD INITIATIVE

*Diane A. Desierto*<sup>1</sup>

---

<sup>1</sup> *Associate Professor of Human Rights Law and Global Affairs*, Keough School of Global Affairs, University of Notre Dame; *Faculty Fellow*, Kellogg Institute of International Studies, Liu Institute for Asia and Asian Studies, Klau Center for Civil and Human Rights, Pulte Institute for Global Development, and Nanovic Institute of European Studies; *Professor of International Law*, Philippines Judicial Academy of the Supreme Court of the Philippines. I am grateful to Notre Dame's Kellogg Institute of International Studies for organizing a workshop for the first draft of this Article in September 2019, where I benefited from the valuable comments of Paolo Carozza, Roger Alford, Lionel Jensen, Anibal Perez-Liñan, and Kellogg scholars, as well as comments from Mary Ellen O'Connell and the faculty of the Notre Dame Law School. Pulte Institute Director Ray Offenheiser also lent significant practical insights on rights-based approaches to development in several exchanges we had on this subject. My thanks also to Gabriella Blum, William Alford, Gerard Neuman, Harvard Law students and faculty present at the vigorous discussion of this article at the Harvard Law School International Law Workshop in October 2019, as well to Joel Trachtman, Steve Block, Tom Dannenbaum, Ian Johnstone, Monica Toft Duffy, Hurst Hannum, Eileen Babbitt, and students and faculty at the Fletcher School of Law and Diplomacy where the latest version of this Article benefited from their comments. All errors, of course, are mine alone. I can be reached at [ddesiert@nd.edu](mailto:ddesiert@nd.edu).



# CONNECTICUT JOURNAL OF INTERNATIONAL LAW

## TABLE OF CONTENTS

Introduction: A Protean Paradigm of “Development” Through China’s Belt and Road Initiative (BRI) .....	304
I. Democracy and the BRI: Choice, Consent, and Consultation in Sovereign Lending 324	
a. Malaysia’s East Coast Rail Link (ECRL) .....	328
b. Sri Lanka’s Hambantota Port and Colombo Port .....	330
c. China-Pakistan Economic Corridor (CPEC) .....	333
d. Laos’ Kunming-Vientiane Railway .....	336
e. Kazakhstan’s Khorgos Gateway .....	337
II. Development and Human Rights in the BRI: Participation, Transparency, Monitoring, Impacts .....	343
Conclusion: Development <i>is</i> Human Rights and Human Rights <i>is</i> Development: Paths Forward for the BRI .....	352
a. Transparency of BRI negotiations with host constituencies .....	355
b. Joint partnership governance over BRI projects .....	355
c. Open monitoring and accountability of BRI projects to all affected stakeholders	356
d. Publicly available country and community impact assessments .....	356
e. Embedded human rights auditing .....	357

### Abstract

China's Belt and Road Initiative (BRI)—a dense network of China-funded multi-year infrastructure projects in over 65 countries from the Western Pacific to the Baltic Sea, collectively aiming to establish China's strategic "Maritime Belt" and "Silk Road" connectivity using an estimated range of USD\$1 Trillion to USD\$8 Trillion<sup>2</sup>—is as unprecedented phenomenon in sovereign project financing and bilateral investment lending, since the United States' grant of USD \$800 Billion for the Marshall Plan<sup>3</sup> was for Europe's post World War II reconstruction. The scale, scope, and terms of BRI projects remain shrouded in relative opacity, with China as of this writing only incrementally disclosing debt sustainability policies and lending terms, largely after there was significant international public clamor for more transparency.<sup>4</sup>

The 2017 formal handover of Hambantota<sup>5</sup> port in Sri Lanka to China (under a 99-year lease as part of debt repayment due to Sri Lanka's default) raises caution for populations of other BRI debtor states concerned, such as: (1) ensuring accountable democratic sovereignty in bilateral lending agreements with China;<sup>6</sup> (2) building in transparency as BRI debtor states act in partnership with China to design short-term and long-term development strategies;<sup>7</sup> and (3) determining Chinese firms operating the BRI projects can be held to observe guaranteed human rights standards in the performance of business activities under the aegis

<sup>2</sup> 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>; Nadège Rolland, *A Concise Guide to the Belt and Road Initiative*, THE NAT'L BUREAU OF ASIAN RES. (Apr. 11, 2019), <https://www.nbr.org/publication/a-guide-to-the-belt-and-road-initiative/>.

<sup>3</sup> Benn Steil, *The Marshall Plan and "America First"*, PROJECT SYNDICATE (Aug. 4, 2017), <https://www.project-syndicate.org/onpoint/the-marshall-plan-and-america-first-by-benn-steil-2017-08?barrier=accesspaylog>

<sup>4</sup> See Amanda Lee, *China Must Ensure Transparency to Boost Credibility of Belt and Road Projects*, *Former US Diplomat Says*, SOUTH CHINA MORNING POST (July 12, 2019, 7:30 AM), <https://www.scmp.com/economy/china-economy/article/3018185/china-must-ensure-transparency-boost-credibility-belt-and>. See also, Ninon Bulckaert, *Europe Raises Transparency Issues with China's Belt and Road Initiative*, EURACTIV (May 25, 2018), <https://www.euractiv.com/section/china/news/eu-raises-transparency-issue-in-chinas-belt-and-road-initiative/>; Daniel R. Russel & Blake Berger, *Navigating the Belt and Road Initiative*, ASIA SOCIETY POLICY INSTITUTE 16 (2019).

<sup>5</sup> Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html>.

<sup>6</sup> See Nyshka Chandran, *Fears of Excessive Debt Drive More Countries to Cut Down Their Belt and Road Investments*, CNBC (Jan. 18, 2019, 12:10 AM), <https://www.cnbc.com/2019/01/18/countries-are-reducing-belt-and-road-investments-over-financing-fears.html>; Christopher Balding, *Why Democracies are Turning Against Belt and Road: Corruption, Debt, and Backlash*, FOREIGN AFF. (Oct. 24, 2018), <https://www.foreignaffairs.com/articles/china/2018-10-24/why-democracies-are-turning-against-belt-and-road>; Dipanjan Roy Chaudhury, *Africa Cancels a Belt and Road Initiative Project for the First Time*, ECON. TIMES (Oct. 25, 2018, 6:01PM), <https://economictimes.indiatimes.com/news/international/world-news/africa-cancels-a-bri-project-for-the-first-time/articleshow/66363312.cms>.

<sup>7</sup> See James Crabtree, *China Needs to Make the Belt and Road Initiative More Transparent and Predictable*, CHATHAM HOUSE (Apr. 26, 2019), <https://www.chathamhouse.org/expert/comment/china-needs-make-belt-and-road-initiative-more-transparent-and-predictable>.

of BRI financing.<sup>8</sup>

**Part I** (*Democracy and the BRI: Choice, Consent, and Consultation in Sovereign Lending*) explores a sample of five publicly documented case studies in Malaysia, Sri Lanka, Pakistan, Kazakhstan, and Laos as to the negotiation of BRI projects in these countries, drawing as well from China's publicly-available BRI documentation (including its most recent document on debt sustainability for the BRI) to examine how these negotiations measure up to the international community's articulated expectations as to responsible sovereign lending in the United Nations Monterrey Consensus on Financing for Development<sup>9</sup> and the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing.<sup>10</sup> **Part II** (*Development and Human Rights in the BRI: Participation, Transparency, Monitoring, Impacts*) examines several publicly reported human rights impacts as of this writing in relation to the BRI, against China's own professed commitments<sup>11</sup> towards the: (1) 1986 Declaration on the Right to Development;<sup>12</sup> (2) UN Guiding Principles on Business and Human Rights;<sup>13</sup> (3) Sustainable Development Goals;<sup>14</sup> (4) the Paris Agreement on Climate Change;<sup>15</sup> (5) China's own commitment to adhere to environmental and social norms in international financial institutions, such as the Equator Principles and the Environmental Social Framework authored by the World Bank; (6) China's own expressed commitments to respect human rights in its foreign investments;<sup>16</sup> and (7) most importantly, China's significant international obligations as a full treaty party of the International Covenant on Economic, Social and Cultural Rights (including General Comment No. 24 to the ICESCR).<sup>17</sup>

Significantly, China has already declared its openness to internalize human rights in its foreign investment activities abroad in other jurisdictions. Since 2014, the Committee on Economic, Social and Cultural Rights (CESCR) has specifically called upon China:

<sup>8</sup> See Human Rights Watch, *China: 'Belt and Road' Projects Should Respect Rights*, HUM. RTS. WATCH (Apr. 21, 2019, 8:00 PM), <https://www.hrw.org/news/2019/04/21/china-belt-and-road-projects-should-respect-rights>; Oliver Ward, *Is China Meeting its International Environmental and Human Rights Obligations on BRI?*, ASEAN TODAY (Apr. 23, 2019), <https://www.aseantoday.com/2019/04/is-china-meeting-its-international-environmental-and-human-rights-obligations-on-bri/>.

<sup>9</sup> See U.N. Int'l Conference on Financing for Development, *Monterrey Consensus on Financing for Development*, U.N. Doc. A/CONF.198/11 (Mar. 2002). See also U.N. INTER-AGENCY TASK FORCE ON FINANCING FOR DEVELOPMENT, *FINANCING FOR SUSTAINABLE DEVELOPMENT REPORT 2019* 117 – 28 (2019).

<sup>10</sup> U.N. Conference on Trade and Development, *Principles on Promoting Responsible Sovereign Lending and Borrowing*, 3 – 13, U.N. Doc. UNCTAD/GDS/DDF/2012/Misc.1 (Jan. 10, 2012).

<sup>11</sup> See Juan Pablo Bohoslavsky, *A Human Rights Focus to Upgrade China's International Lending*, 5 CHINESE J. OF GLOBAL GOVERNANCE 69, 71 – 74 (2019).

<sup>12</sup> G.A. Res. 41/128 (Dec. 4, 1986).

<sup>13</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER, *GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK*, 1 – 35 (2011).

<sup>14</sup> G.A. Res. 70/1 (Oct. 21, 2015).

<sup>15</sup> Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

<sup>16</sup> Press Release, *Colectivo sobre Financiamiento e Inversiones Chinas, Derechos Humanos y Ambiente (CICDHA)*, China Commits to the United Nations Human Rights Council to Respect Human Rights in its Foreign Investments (Mar. 19, 2019).

<sup>17</sup> See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

to adopt a human rights-based approach to ... international cooperation, by: (a) [u]ndertaking a systematic and independent human rights impact assessment prior to making funding decisions; (b) [e]stablishing an effective monitoring mechanism to regularly assess the human rights impact of its policies and projects in the receiving countries and to take remedial measures when required; [and] (c) [e]nsuring that there is an accessible complaint mechanism for violations of economic, social and cultural rights in the receiving countries.<sup>18</sup>

Notably, in its March 2019 Third Universal Periodic Review before the United Nations Human Rights Council, China had accepted and committed to examine and report on specific recommendations that it should, among others, “consider the establishment of a legal framework to guarantee that activities carried out by industries subject to its jurisdiction do not negatively impact human rights abroad... [and] [t]ake further measures on business and human rights in line with its international obligations and ensure that companies operating in high-risk or conflict areas conduct human rights due diligence in line with the Guiding Principles on Business and Human Rights.”<sup>19</sup>

The **Conclusion** (*Development IS Human Rights and Human Rights IS Development: Paths Forward for the BRI*) I will address certain “human rights imperialism”<sup>20</sup> critiques against the “rights-based approach to development,”<sup>21</sup> distinguishing the same from the crystallizing “right to development.”<sup>22</sup> Human rights-based approaches to development are focused on the centrality of human rights to “legislation, administrative practice, and policy delivery,”<sup>23</sup> but the crystallizing right to development (both as customary norm and in the pending draft Convention on the Right to Development<sup>24</sup>) goes much further by calling for the internalization of human rights in the processes, outcomes, and assessments of development. While the proliferation of external capital sources is crucial to achieving raw economic growth, no single sovereign—including China—can reject the full application of international labor, environmental, social, and all other human rights obligations in sovereign project financing activities and the long-term implementation of infrastructure connectivity to achieve genuine integral human development. This article provides five paths forward for the negotiation and implementation of BRI projects to ensure consistency with international

<sup>18</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations on the Second Periodic Report of China, including Hong Kong, China, and Macao, China, U.N. Doc. E/C.12/CHN/CO/2 (Jun. 13, 2014).

<sup>19</sup> U.N. Human Rights Council, Rep. of the Working Group on the Universal Periodic Review: China, ¶¶ 28.131, 28.133, U.N. Doc. A/HRC/40/6 (Dec. 26, 2018).

<sup>20</sup> See Hannah Miller & Robin Redhead, *Beyond ‘Rights-Based Approaches’? Employing a Process and Outcomes Framework*, 23 INT’L J. HUM. RTS. 699 (2019).

<sup>21</sup> See Peter Uvin, *From the Right to Development to Rights-Based Approach: How ‘Human Rights’ Entered Development*, 17 DEV. PRAC. 597, 600–03 (2007).

<sup>22</sup> See Leon E. Irish, *The Right to Development Versus a Rights-Based Approach to Development*, 3 INT’L J. CIV. SOC’Y L. 6 (2005).

<sup>23</sup> See Máire Braniff & Paul Hainsworth, *A HUMAN RIGHTS BASED APPROACH TO DEVELOPMENT* 39 (Gerard McCann & Stephen McCloskey eds., 2015).

<sup>24</sup> Draft Convention on the Right to Development, A/HRC/WG.2/21/2, 17 January 2020, full text available at [https://www.ohchr.org/Documents/Issues/Development/Session21/3\\_A\\_HRC\\_WG.2\\_21\\_2\\_AdvanceEditedVersion.pdf](https://www.ohchr.org/Documents/Issues/Development/Session21/3_A_HRC_WG.2_21_2_AdvanceEditedVersion.pdf) [last accessed 1 May 2020].

obligations, namely: (1) transparency of BRI negotiations to host State constituencies; (2) joint partnership governance over BRI projects; (3) open monitoring and accountability of BRI projects to all affected stakeholders; (4) publicly available country and community impact assessments; and (5) embedded human rights auditing.

#### INTRODUCTION: A PROTEAN PARADIGM OF “DEVELOPMENT” THROUGH CHINA’S BELT AND ROAD INITIATIVE (BRI)

The global need for infrastructure—estimated<sup>25</sup> thus far at around US\$94 Trillion by 2040 with a further US\$3.5 Trillion required to meet the United Nations Sustainable Development Goals for electricity and water—is spurring the race for cross-border connectivity projects around the world.<sup>26</sup> Said projects include the Association of Southeast Asian Nations (ASEAN) Master Plan on Connectivity 2025,<sup>27</sup> plans for fiber optic, digital and physical infrastructure connectivity in Africa,<sup>28</sup> South Asia plans for infrastructure connectivity,<sup>29</sup> the World Bank’s support for the Global Infrastructure Connectivity Alliance (GICA),<sup>30</sup> as well as recent European Union initiatives to build climate change adaptation for major infrastructure projects.<sup>31</sup>

Arguably, of the many cross-border infrastructure connectivity projects proliferating throughout the globe in this decade, none might be as staggering in scope, scale, and breadth as the People’s Republic of China’s announcement of its Belt and Road Initiative (BRI) announced in 2013.<sup>32</sup> As of this writing, the full contours of financing, projects, partnerships, and contract terms under the BRI are elusive for researchers, lending the impression that this fluidity is both a key strength and at the same time a point of critique. While there is considerable official documentation detailing China’s grand dramatic geopolitical vision for the BRI,<sup>33</sup> it is significant to note that, as of this writing, the BRI does not have an identifiable

<sup>25</sup> See *Forecasting Infrastructure Investment Needs and Gaps*, GLOBAL INFRASTRUCTURE OUTLOOK, <https://outlook.gihub.org/> (last visited January 15, 2020).

<sup>26</sup> See *Competing Visions*, CTR. FOR STRATEGIC & INT’L STUD., <https://reconnectingasia.csis.org/analysis/competing-visions/> (last visited 15 January 2020).

<sup>27</sup> *Master Plan on ASEAN Connectivity 2025*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS [ASEAN] (2016).

<sup>28</sup> Ibrahim Mayaki, *Why Infrastructure Development in Africa Matters*, U.N.: AFR. RENEWAL (July 8, 2014), <https://www.un.org/africarenewal/web-features/why-infrastructure-development-africa-matters>; Organization for Economic Co-operation for Development (OECD), *2019 Policy Note on Africa: Infrastructure and Regional Connectivity*, 33 (2019).

<sup>29</sup> Darshana M. Baruah, *India’s Answer to the Belt and Road: A Road Map for South Asia*, CARNEGIE INDIA (Aug. 21, 2018), <https://carnegieindia.org/2018/08/21/india-s-answer-to-belt-and-road-road-map-for-south-asia-pub-77071>.

<sup>30</sup> *Global Infrastructure Connectivity Alliance*, WORLD BANK (Apr. 12, 2017), <https://www.worldbank.org/en/topic/transport/brief/global-infrastructure-connectivity-alliance>.

<sup>31</sup> *Climate Change Adaptation of Major Infrastructure Projects*, EUROPEAN COMM’N (May 12, 2018).

<sup>32</sup> See *President Xi Jinping Delivers Important Speech and Proposes to Build a Silk Road Economic Belt with Central Asian Countries*, MINISTRY OF FOREIGN AFF. OF CHINA (Sept. 7, 2013), [https://www.fmprc.gov.cn/mfa\\_eng/topics\\_665678/xjpfwzysiesgjthshzzfh\\_665686/t1076334.shtml](https://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpfwzysiesgjthshzzfh_665686/t1076334.shtml). See also, OECD, *China’s Belt and Road Initiative in the Global Trade, Investment, and Finance Landscape*, 3 (2018).

<sup>33</sup> Office of the Leading Grp. for Promoting the Belt and Rd. Initiative, *The Belt and Road Initiative Progress, Contributions and Prospects*, BELT AND ROAD PORTAL (Apr. 22, 2019), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/86739.htm>; Nat’l Dev. and Reform Comm’n and the Gov’t of the H.K.

centralized institution for managing and overseeing the BRI projects,<sup>34</sup> with the Chinese Government relying instead on existing institutional cooperative arrangements under bilateral agreements with partner States.<sup>35</sup> For such a long-term grand infrastructure, energy,

Special Administrative Region, *Arrangement on Supporting Hong Kong's Participation in the Belt and Road Construction*, BELT AND ROAD PORTAL (Mar. 30, 2018), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/51374.htm>; The State Council Info. Office of the People's Republic of China, *China's Arctic Policy*, BELT AND ROAD PORTAL (Jan. 29, 2018), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/46076.htm>; Office of the Leading Grp. for Promoting the Belt and Rd. Initiative, *Action Plan on Belt and Road Standard Connectivity (2018-2020)*, BELT AND ROAD PORTAL (Jan. 11, 2018), <https://www.yidaiyilu.gov.cn/zchj/qwfb/43480.htm>; The National Development and Reform Commission and the State Oceanic Administration, *Vision for Maritime Cooperation under the Belt and Road Initiative* 1–15 (2017); Ministry of Commerce of the People's Republic of China, *Initiative on Promoting Unimpeded Trade Cooperation Along the Belt and Road*, BELT AND ROAD PORTAL (May 22, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/14216.htm>; The Nat'l Dev. and Reform Comm'n, *China Outbound Investment Report* 1–26 (2017); The Nat'l Dev. and Reform Comm'n & the Nat'l Energy Administration of China, *Vision and Actions on Energy Cooperation in Jointly Building Silk Road Economic Belt and 21<sup>st</sup> Century Maritime Silk Road*, BELT AND ROAD PORTAL (Mar. 16, 2015), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13754.htm>; Ministry of Fin. of the People's Republic of China, *Guiding Principles on Financing the Development of the Belt and Road*, BELT AND ROAD PORTAL (May 16, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13757.htm>; *Joint Communique of Leaders Roundtable of Belt and Road Forum*, BELT AND ROAD PORTAL (May 16, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13694.htm>; The Ministry of Env'tl. Prot. of the People's Republic of China, *The Belt and Road Ecological and Environmental Cooperation Plan*, BELT AND ROAD PORTAL (May 14, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13392.htm>; The National Development and Reform Commission, et al., *Vision and Actions on Jointly Building Silk Road Economic Belt and 21<sup>st</sup> Century Maritime Silk Road*, BELT AND ROAD PORTAL (Mar. 30, 2015), <https://eng.yidaiyilu.gov.cn/qwyw/qwfb/1084.htm>; MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, REPORT ON DEVELOPMENT OF CHINA'S OUTWARD INVESTMENT AND ECONOMIC COOPERATION 1 (2016); Ministry of Culture of the People's Republic of China, *Ministry of Culture's Action Plan on Belt and Road Culture Development (2016-20)*, BELT AND ROAD PORTAL (Nov. 11, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/35973.htm>; CPC Central Committee & the State Council of the People's Republic of China, *Guidance on Promoting Green Belt and Road*, BELT AND ROAD PORTAL (May 8, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/12479.htm>; Ministry of Education of the People's Republic of China, *Education Action Plan for the Belt and Road Initiative*, BELT AND ROAD PORTAL (Oct. 12, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/30277.htm>; OFFICE OF THE LEADING GROUP FOR THE BELT AND ROAD INITIATIVE, BUILDING THE BELT AND ROAD: CONCEPT, PRACTICE, AND CHINA'S CONTRIBUTION 1 (2017); Ministry of Agriculture of the People's Republic of China, et al., *Vision and Action on Jointly Promoting Agricultural Cooperation on the Belt and Road*, BELT AND ROAD PORTAL (Nov. 15, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/34829.htm>; OFFICE OF THE LEADING GROUP FOR THE BELT AND ROAD INITIATIVE, ACTION PLAN ON BELT AND ROAD CONNECTIVITY (2015-2017) 1 (2015); OFFICE OF THE LEADING GROUP ON THE CONSTRUCTION OF THE BELT AND ROAD, DEVELOPMENT PLAN OF CHINA-EUROPE FREIGHT TRAIN CONSTRUCTION (2016-2020) 1 (2016); CHINA NATIONAL TOURISM AND GENERAL ADMINISTRATION OF SPORT OF CHINA, "BELT AND ROAD" SPORTS TOURISM DEVELOPMENT ACTION PLAN (2018-2020) 1 (2017); Supreme People's Court, *Opinions on the People's Courts Providing Judicial Services and Guarantees for the Construction of the Belt and Road Initiative*, BELT AND ROAD PORTAL (Mar. 16, 2015), <https://www.yidaiyilu.gov.cn/zchj/zcfg/2401.htm>; THE NATIONAL DEVELOPMENT AND REFORM COMMISSION, GUIDELINES ON THE CONSTRUCTION OF THE CHINA-MONGOLIA-RUSSIA ECONOMIC CORRIDOR 1 (2016); Ministry of Science and Technology of the People's Republic of China, *Promote the "Belt and Road" Special Plan for Scientific and Technological Innovation Cooperation*, BELT AND ROAD PORTAL (Sept. 20, 2016), <https://www.yidaiyilu.gov.cn/zchj/jggg/326.htm>; General Administration of Quality Supervision, Inspection, and Quarantine of the People's Republic of China, *The Belt and Road' Vision and Actions for Cooperation in Metrology*, BELT AND ROAD PORTAL (Mar. 31, 2017), <https://eng.yidaiyilu.gov.cn/zchj/qwfb/10477.htm>; ASIAN INFRASTRUCTURE INVESTMENT BANK, ARTICLES OF AGREEMENT 1 (2015).

<sup>34</sup> See Saleh Shahriar, et al., *Institutions of the 'Belt & Road' Initiative: A Systematic Literature Review*, 77 J.L., POL'Y, & GLOBALIZATION 1 (2018).

<sup>35</sup> THE WORLD BANK, BELT AND ROAD ECONOMICS: OPPORTUNITIES AND RISKS OF TRANSPORT CORRIDORS 80 (2019).

mining, IT, transport, and communications development plan under sovereign financing,<sup>36</sup> it is likewise surprising that the list of BRI development projects is also frequently in flux.<sup>37</sup> From publicly available documentation, the BRI does not appear to have a fixed blueprint template of standard contract terms for project financing.<sup>38</sup> So much of the details of the BRI's contractual, legal, and financial arrangements with debtor countries is not standardized (or readily available to the public),<sup>39</sup> that the relative opacity alone of the BRI is itself a source of research and policy complexity for scholars and practitioners.<sup>40</sup> Perhaps much in keeping with Deng Xiaoping's famous *Tao Gang Yang Hui* ("hide brightness and cherish obscurity") foreign policy strategy,<sup>41</sup> the protean nature of the BRI lays it open both to outsiders' optimism and pessimism regarding the BRI's development consequences for debtor countries.

What is readily known about the BRI since the announcement of its creation in 2013, is its massive scope of allegedly available (but not necessarily already earmarked, allocated, or actually distributed or transferred to BRI debtor countries<sup>42</sup>) funding, estimated at between USD\$1 Trillion to USD\$1.2 Trillion<sup>43</sup> and USD\$8 Trillion<sup>44</sup>, and which is to be drawn predominantly from a single sovereign source, the People's Republic of China. (Although it

<sup>36</sup> See Zheng Yongnian & Zhang Chi, *The Belt and Road Initiative and China's Grand Diplomacy*, 56 CHINA INT'L STUD. 52, 55–63 (2016).

<sup>37</sup> See *BRI Projects*, BELT AND ROAD INITIATIVE, <https://www.beltroad-initiative.com/projects/> (last visited Aug. 1, 2019); *Where is the funding for a \$26 Trillion Initiative Coming From?*, CNBC (Mar. 6, 2018), <https://www.cnbc.com/advertorial/2018/03/06/where-is-the-funding-for-a-26-trillion-initiative-coming-from.html>. See also TOM MILLER, *GREAT LEAP OUTWARD: CHINESE ODI AND THE BELT & ROAD INITIATIVE* 241–42 (Jacques deLisle & Avery Goldstein eds., 2019).

<sup>38</sup> See DANIEL R. RUSSEL & BLAKE BERGER, *NAVIGATING THE BELT AND ROAD INITIATIVE* 11–15 (2019).

<sup>39</sup> As of this writing, neither the Belt and Road initiative website (<https://www.beltroad-initiative.com/projects>) or the Belt and Road Portal (<https://eng.yidaiyilu.gov.cn/>) contain any copies of contracts executed for BRI projects.

<sup>40</sup> Many studies note the paucity of verifiable, publicly available data on procedures, practices, contracts, and operational standards for projects listed as part of the BRI. See BAKER MCKENZIE, *BELT & ROAD: OPPORTUNITY AND RISK* 3–26 (2017); PETER CAI, *UNDERSTANDING CHINA'S BELT AND ROAD INITIATIVE* 3–22 (2017); PETERSON INST. FOR INT'L ECON., *CHINA'S BELT AND ROAD INITIATIVE: MOTIVES, SCOPE, CHALLENGES* 3–35 (2016); TANIA GHOSSEIN, ET AL., *PUBLIC PROCUREMENT IN THE BELT AND ROAD INITIATIVE* 4–41 (2018); Guiguo Wang, *Legal Challenges to the Belt and Road Initiative*, 4 J. INT'L & COMP. L. 309 (2017); Guiguo Wang, *Towards A Rule-Based Belt and Road Initiative – Necessity and Directions*, 6 J. INT'L & COMP. L. 29 (2019); Julien Chaisse & Mitsuo Matsushita, *China's 'Belt and Road' Initiative: Mapping the World Trade Normative and Strategic Implications*, 52 J. WORLD TRADE 163 (2018); Gong Hongliu, *The Belt and Road Initiative (BRI): A China-Specific Approach for Global Governance*, 8 J. WTO & CHINA 36 (2018).

<sup>41</sup> See Dingding Chen & Jianwei Wang, *Lying Low No More?: China's New Thinking on the Tao Gang Yang Hui Strategy*, 9 CHINA INT'L J. 195 (2011).

<sup>42</sup> Jonathan Hillman, *Five Myths About China's Belt and Road Initiative*, WASH. POST (May 31, 2019, 6:00 AM), [https://www.washingtonpost.com/outlook/five-myths/five-myths-about-chinas-belt-and-road-initiative/2019/05/30/d6870958-8223-11e9-bce7-40b4105f7ca0\\_story.html](https://www.washingtonpost.com/outlook/five-myths/five-myths-about-chinas-belt-and-road-initiative/2019/05/30/d6870958-8223-11e9-bce7-40b4105f7ca0_story.html).

<sup>43</sup> See *Inside China's Plan to Create a Modern Silk Road*, MORGAN STANLEY (Mar. 14, 2018), <https://www.morganstanley.com/ideas/china-belt-and-road>.

<sup>44</sup> See Nadège Rolland, *A Concise Guide to the Belt and Road Initiative*, NAT'L BUREAU OF ASIAN RES. (Apr. 11, 2019), <https://www.nbr.org/publication/a-guide-to-the-belt-and-road-initiative/>.

should be noted that there are recent reports<sup>45</sup> indicating the possibilities of broadening the financing base for BRI projects beyond China.) In his 2017 keynote address at the May 2017 Belt and Road Forum for International Cooperation held in Beijing, China's President Xi Jinping described the BRI as exemplifying China's grand vision for global development, with political, economic, cultural, scientific, and multilateral dimensions built under a China's state-driven development architecture:

First, *we should build the Belt and Road into a road for peace.* The ancient silk routes thrived in times of peace, but lost vigor in times of war. The pursuit of the Belt and Road Initiative requires a peaceful and stable environment. We should foster a new type of international relations featuring win-win cooperation; and we should forge partnerships of dialogue with no confrontation and of friendship rather than alliance. All countries should respect each other's sovereignty, dignity and territorial integrity, each other's development paths and social systems, and each other's core interests and major concerns...Some regions along the ancient Silk Road used to be a land of milk and honey. Yet today, these places are often associated with conflict, turbulence, crisis and challenge. *Such state of affairs should not be allowed to continue.* We should foster the vision of common, comprehensive, cooperative and sustainable security, and create a security environment built and shared by all. We should work to resolve hotspot issues through political means, and promote mediation in the spirit of justice. We should intensify counter-terrorism efforts, address both its symptoms and root causes, and strive to eradicate poverty, backwardness and social injustice.

Second, we should build the Belt and Road into a road of prosperity. Development holds the master key to solving all problems. *In pursuing the Belt and Road Initiative, we should focus on the fundamental issue of development, release the growth potential of various countries and achieve economic integration and interconnected development and deliver benefits to all...We should establish a stable and sustainable financial safeguard system that keeps risks under control, create new models of investment and financing, encourage greater cooperation between government and private capital and build a diversified financing system and a multi-tiered capital market. We should also develop inclusive finance and improve financial services networks...* Infrastructure connectivity is the foundation of development through cooperation. We should promote land, maritime, air and cyberspace connectivity, concentrate our efforts on key passageways, cities and projects and

---

<sup>45</sup> See DELOITTE INSIGHTS, CHINA'S BELT AND ROAD INITIATIVE: RECALIBRATION AND NEW OPPORTUNITIES 2 (2019); Evelyn Cheng, *Amid Criticism, China's Xi Says Belt and Road Projects can be 'Shared by the World'*, CNBC (Apr. 27, 2019, 7:47 AM), <https://www.cnbc.com/2019/04/27/belt-and-road-initiative-chinas-xi-concludes-bri-forum-in-beijing.html>.



connect networks of highways, railways and sea ports... Third, we should build the Belt and Road into a road of opening up.... *The Belt and Road Initiative should be an open one that will achieve both economic growth and balanced development.* [...]

We should build an open platform of cooperation and uphold and grow an open world economy. We should jointly create an environment that will facilitate opening up and development, establish a fair, equitable and transparent system of international trade and investment rules and boost the orderly flow of production factors, efficient resources allocation and full market integration. We welcome efforts made by other countries to grow open economies based on their national conditions, participate in global governance and provide public goods. Together, we can build a broad community of shared interests. [...]<sup>46</sup>

Despite the above language emphasizing equality of cooperation and joint partnerships not just in BRI projects but for shaping the international economic system as a whole, scholarship in Chinese academic journals themselves superlatively depict the BRI as “a China-specific approach for global governance;”<sup>47</sup> “China’s grand diplomacy;”<sup>48</sup> “shaping a shared 21<sup>st</sup> Century;”<sup>49</sup> “China’s Exploration in the Construction of International Institutions;”<sup>50</sup> China creating a “Regional Community of Common Destiny;”<sup>51</sup> “China’s Marshall Plan;”<sup>52</sup> with China’s vast “potential to redefine international trade governance and the laws that establish its order.”<sup>53</sup> There is no official map of the BRI projects. The World

<sup>46</sup> H.E. Xi Jinping, President, Speech at the Opening Ceremony of The Belt and Road Forum for International Cooperation: Work Together to Build the Silk Road Economic Belt and the 21<sup>st</sup> Century Maritime Silk Road (May 14, 2017).

<sup>47</sup> Gong Hongliu, *The Belt and Road Initiative (BRI): A China-Specific Approach for Global Governance*, 8 J. WTO & CHINA 36 (2018).

<sup>48</sup> Zheng Yongnian & Zhang Chi, *The Belt and Road Initiative and China’s Grand Diplomacy*, 56 CHINA INT’L STUD. 52 (2016).

<sup>49</sup> Ruan Zongze, *The Belt and Road Initiative is Shaping a Shared 21st Century*, 76 CHINA INT’L STUD. 5 (2019).

<sup>50</sup> He Zhipeng, *The “Belt and Road” Initiative and China’s Exploration in the Construction of International Institutions*, 7 J. WTO & CHINA 14 (2017).

<sup>51</sup> Zeng Lingliang, *Conceptual Analysis of China’s Belt and Road Initiative: A Road Towards a Regional Community of Common Destiny*, 15 CHINESE J. INT’L L. 517 (2016).

<sup>52</sup> Jin Ling, *The “New Silk Road” Initiative: China’s Marshall Plan?*, 50 CHINA INT’L STUD. 70 (2015).

<sup>53</sup> Malik R. Dahlan, *Dimensions of the New Belt & Road International Order: An Analysis of the Emerging Legal Norms and a Conceptionalisation of the Regulation of Disputes*, 9 BEIJING L. REV. 87 (2018).

Bank used the following graphic to illustrate the 71 economies located in the BRI's transport corridors:<sup>54</sup>



As described by China's National Development and Reform Commission, Ministry of Foreign Affairs, Ministry of Commerce, and State Council, the BRI will:

[R]un through the continents of Asia, Europe, and Africa, connecting the vibrant East Asia economic circle at one end and [the] developed European economic circle at the other, and encompassing countries with huge potential for economic development. The Silk Road Economic Belt focuses on bringing together China, Central Asia, Russia and Europe (the Baltic); linking China with the Persian Gulf and the Mediterranean Sea through Central Asia and West Asia; and connecting China with Southeast Asia, South Asia, and the Indian Ocean. The 21<sup>st</sup> Century Maritime Silk Road is designed to go from China's coast to Europe through the South China Sea and the Indian Ocean in one route, and from China's coast through the South China Sea to the South Pacific in the other. On land, the Initiative will focus on jointly building a new Eurasian Land Bridge and developing China-Mongolia-Russia, China Central Asia-West Asia and China-Indochina Peninsula economic corridors by taking advantage of international transport routes, relying on core cities along the Belt and Road and using key economic industrial parks as cooperation platforms.

<sup>54</sup> *Belt and Road Initiative*, WORLD BANK (Mar. 29, 2018), <https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative>.

At sea, the Initiative will focus on jointly building smooth, secure, and efficient transport routes connecting major [seaports] along the Belt and Road. The China-Pakistan Economic Corridor and the Bangladesh-China-India-Myanmar Economic Corridor are closely related to the BRI. [...]"<sup>55</sup>

All told, the BRI comprises six land corridors, one maritime corridor, and more recently including "an Arctic 'Ice Silk Road'...extend[ing] to more than 71 countries, together [comprising] up to 65% of the world's population and mak[ing] up 40% of global GDP as of 2017."<sup>56</sup> The unprecedented scale of these projects run parallel with China's global drive for resources, that according to an environmental scholar, creates a "dizzying variety of resource extraction, energy, agricultural, and infrastructure projects — roads, railroads, hydropower dams, mines — that are wreaking unprecedented damage to ecosystems and biodiversity."<sup>57</sup>

The China-centric approach in the vision for the BRI stands in sharp contrast with the United States' Marshall Plan (the postwar European Recovery Program),<sup>58</sup> which did not create any American economic corridors in Europe, in the way that China envisions its economic corridors globally for the BRI. Nobel Peace Prize winner General George C. Marshall made it clear that the Marshall Plan was a foreign aid program, largely to be determined by European states based on their own agreement:

[...] It is logical that the United States should do whatever it is able to do to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace. Our policy is directed not against any country or doctrine but against hunger, poverty, desperation and chaos. Its purpose should be the revival of a working economy in the world so as to permit the emergence of political and social conditions in which free institutions can exist. Such assistance, I am convinced, must not be on a piecemeal basis as various crises develop. Any assistance that this Government may render in the future should provide a cure rather than a mere palliative. Any government that is willing to assist in the task of recovery will find full co-operation I am sure, on the part of the United States Government. Any government which maneuvers to block the recovery of other countries cannot expect help from us. Furthermore, governments, political parties, or groups which seek to

<sup>55</sup> Press Release, Nat'l Dev. and Reform Comm'n & Ministry of Com. of the People's Republic of China, *Visions and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road* (Mar. 28, 2015).

<sup>56</sup> Michael Amouyal, *The Belt & Road Initiative: Scope of Projects and Financing Issues*, EUROBIZONLINE (Jan. 3, 2019), <https://www.eurobiz.com.cn/the-belt-road-initiative-scope-of-projects-and-financing-issues/>.

<sup>57</sup> William Laurance, "The Dark Legacy of China's Drive for Global Resources", *Yale Environment* 360, 28 March 2017, at <https://e360.yale.edu/features/the-dark-legacy-of-chinas-drive-for-global-resources> [last accessed 1 May 2020].

<sup>58</sup> See Linda Christenson & Eric Christenson, *The Marshall Plan: "A Short Time to Change the World,"* in *POLITICS AND CULTURES OF LIBERATION: MEDIA, MEMORY, AND PROJECTIONS OF DEMOCRACY* 344 (Hans Bak et al. eds., 2018); David J. Steinberg et al., *Marshall Plan Productivity*, 107 *FOREIGN POL'Y* 174 (1997).

perpetuate human misery in order to profit therefrom politically or otherwise will encounter the opposition of the United States.

It is already evident that, before the United States Government can proceed much further in its efforts to alleviate the situation and help start the European world on its way to recovery, *there must be some agreement among the countries of Europe as to the requirements of the situation and the part those countries themselves will take in order to give proper effect to whatever action might be undertaken by this Government. It would be neither fitting nor efficacious for this Government to undertake to draw up unilaterally a program designed to place Europe on its feet economically. This is the business of the Europeans. The initiative, I think, must come from Europe. The role of this country should consist of friendly aid in the drafting of a European program and of later support of such a program so far as it may be practical for us to do so.* The program should be a joint one, agreed to by a number, if not all European nations.<sup>59</sup>

Comparing the vision for the BRI with that of the Marshall Plan, it is clear that the BRI will not constitute foreign aid but rather creates a global program for financing China's massive investments into infrastructure, energy, mining, telecommunications, and IT projects with strategic partners along the "Belt and Road." The March 2018 Amendment<sup>60</sup> to the Constitution of the People's Republic of China enshrined the *Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era*,<sup>61</sup> whose 14-point fundamental principles include "a new vision for development."

The 14-point fundamental principles are as follows:

1. Ensuring Party leadership over all work;
2. Committing to a people-centered approach;
3. Continuing to comprehensively deepen reform;
4. Adopting a new vision for development;
5. Seeing that the people run the country;
6. Ensuring every dimension of governance is law-based;
7. Upholding core socialist values;
8. Ensuring and improving living standards through development;
9. Ensuring harmony between humans and nature;
10. Pursuing a holistic approach to national security;
11. Upholding absolute Party leadership over the people's forces;

<sup>59</sup> George C. Marshall, *The Marshall Plan Speech at Harvard University* (June 5, 1947), <https://www.oecd.org/general/themarshallplanspeechatharvarduniversity5june1947.htm> (last visited Aug. 1, 2019) (Italics added).

<sup>60</sup> Thirteenth National People's Congress, Xianfa Xiuzheng'an, (The Amendments to the Constitution of the People's Republic of China), 1st Sess., Mar. 11, 2018, [http://www.fdi.gov.cn/1800000121\\_39\\_4866\\_0\\_7.html](http://www.fdi.gov.cn/1800000121_39_4866_0_7.html).

<sup>61</sup> Xiang Bo, *Backgrounder: Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era*, XINHUA (Mar. 17, 2018), [http://www.xinhuanet.com/english/2018-03/17/c\\_137046261.htm](http://www.xinhuanet.com/english/2018-03/17/c_137046261.htm).

12. Upholding the principles of 'one country, two systems' and promoting national reunification;
13. Promoting the building of a community with a shared future for humanity;
14. Exercising full and rigorous governance over the Party.<sup>62</sup>

Noting China's vision for development, the March 2018 Amendment to China's Constitution specifically amended the seventh paragraph of the Preamble to the Constitution to read as follows:

The victory in China's New-Democratic Revolution and the successes in its socialist cause have been achieved by the Chinese people of all nationalities, under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, by upholding truth, correcting errors and surmounting numerous difficulties and hardships. China will be in the primary stage of socialism for a long time to come. The basic task of the nation is to concentrate its effort on socialist modernization along the road of Chinese-style socialism. Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the important thought of Three Represents, the Scientific Outlook on Development, and the Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era, *the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road, persevere in reform and opening to the outside world, steadily improve socialist institutions, develop the socialist market economy, develop socialist democracy, improve the socialist rule of law, implement the new development concept, and work hard and self-reliantly to modernize the country's industry, agriculture, national defense and science and technology step by step and promote the coordinated development of the material, political, spiritual, social, and ecological civilizations, to turn China into a great modern socialist country that is prosperous, powerful, democratic, culturally advanced, harmonious, and beautiful and achieve the rejuvenation of the Chinese nation.*<sup>63</sup> (Italics added.)

A May 2019 article of Chinese President Xi Jinping, titled "Deepening Understanding of the New Vision of Development,"<sup>64</sup> speaks of China's creation of "development models

<sup>62</sup> *Id.*

<sup>63</sup> Thirteenth National People's Congress, Xianfa Xiuzheng'an, (The Amendments to the Constitution of the People's Republic of China), art. 32, 1st Sess., Mar. 11, 2018, [http://www.fdi.gov.cn/1800000121\\_39\\_4866\\_0\\_7.html](http://www.fdi.gov.cn/1800000121_39_4866_0_7.html).

<sup>64</sup> *Xi's Article Stresses Deep Understanding of the New Vision of Development*, CHINA DAILY (May 16, 2019), <http://www.chinadaily.com.cn/a/201905/16/WS5cdcd1f8a3104842260bc001.html>.

that give full play to [China's] first-mover advantages.”<sup>65</sup> This gives substance to China's articulated philosophy on the Right to Development,<sup>66</sup> which is fairly distinct from the definition of the right to development in Article 1 of the 1986 UN General Assembly Declaration on the Right to Development.<sup>67</sup> To recall, Article 1 of the 1986 UN General Assembly Declaration on the Right to Development defines the right to development as “an inalienable human right by virtue of which every human person and all peoples are entitled to *participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.*”<sup>68</sup> The same Article 1 goes on to emphasize that the “human right to development also implies *the full realization of the right of peoples to self-determination*, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”<sup>69</sup> On the other hand, China defines the right to development largely from material well-being terms and quite distinctly set apart from the full corpus of civil, political, economic, social, and cultural rights themselves: “the right to development is an inalienable human right, symbolizing dignity and honor...a means of eliminating poverty [that] provides the necessary conditions for realizing other human rights...the right to development is incorporated into other human rights, while the latter create the conditions for people to facilitate development and realize the right to development. Safeguarding the right to development is the *precondition* for realizing economic, cultural, social, and environmental rights, and obtaining civil and political rights.”<sup>70</sup>

The subtle but significant difference between these two conceptions lies with China's sequenced (and fairly statist) approach to achieving desired material well-being before realizing all other human rights, whereas the 1986 Declaration on the Rights refers to the full corpus of *simultaneous* participation, contribution, and enjoyment rights with respect to economic, social, cultural, and political development in a manner that fully realizes all human rights and fundamental freedoms.<sup>71</sup> In this sense, China's articulated philosophy on the right to development dovetails with another scholar's observations that:

[i]n official Southern discourses, the right to development has mainly been advanced to rationalize and justify national priorities as well as legitimize statist political and economic agendas using the language of rights...it is articulated not so much against the developed West, but as a means of maintaining the status quo and to counter domestic and international

<sup>65</sup> *Id.*

<sup>66</sup> *The Right to Development: China's Philosophy, Practice, and Contribution*, STATE COUNCIL INFO. OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA (Dec. 1, 2016), [http://english.www.gov.cn/archive/white\\_paper/2016/12/01/content\\_281475505407672.htm](http://english.www.gov.cn/archive/white_paper/2016/12/01/content_281475505407672.htm).

<sup>67</sup> G.A. Res. 41/128, art. 1, Declaration on the Right to Development (Dec. 4, 1986).

<sup>68</sup> *Id.* at art. 1(1) (emphasis added).

<sup>69</sup> *Id.* at art. 1(2) (emphasis added).

<sup>70</sup> STATE COUNCIL INFO. OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 66, pmbl. (emphasis added).

<sup>71</sup> Arjun Sengupta, *Right to Development as a Human Right*, 36 ECON. & POL. WKLY. 2527, 2528 (2001); Karin Arts & Atabongawung Tamo, *The Right to Development in International Law: New Momentum Thirty Years Down the Line?*, 63 NETH. INT'L L. REV. 221, 231 (2016).

pressures for political liberalization. While the earlier phase of the discourses on the right to development tended to reflect a polemic of resistance, more recent debates increasingly reflect an international politics of power.

The paradox of the right to development talk coming from the South is that it is at once deployed to demand radical change in the international economic order and to resist change in the national political order. When Chinese officials invoke the right to development to demand more favorable trade terms or when the Ugandan government invokes it to push for more development assistance from the West, the emphasis is often on challenging a hegemonic international economic system with a view to challenging the status quo. Yet, when China invokes the right to development to deflect criticism of its human rights record, or to resist pressure to cap environmental emissions, the intent is clearly to maintain the domestic economic order and preserve the political status quo.<sup>72</sup>

It is against the backdrop of these conceptual, philosophical, and normative differences on the right to development that this paper examines China's vision, actions, and commitments in its BRI. Clearly, the BRI is "not a selfless venture",<sup>73</sup> and it is "not China's Marshall Plan".<sup>74</sup> Rightly or wrongly, various militaristic, geopolitical, strategic, hegemonic, motives have been ascribed to the BRI,<sup>75</sup> particularly as the BRI will more predominantly involve China's state-owned enterprises (SOEs) – rather than the Chinese private sector – clearly making the BRI a vehicle for "China's economic statecraft."<sup>76</sup> It is not the purpose of this paper to engage those particular issues, but rather to take it as a given fact that the BRI is the globalized epitome of Chinese development financing.

Globalizing China's paradigm for sovereign development financing through the BRI<sup>77</sup> introduces various complexities to questions of democracy, development, and human rights.

<sup>72</sup> Bonny Ibhawoh, *The Right to Development: The Politics and Polemics of Power and Resistance*, 33 HUM. RTS. Q. 76, 79 (2011). See also Wouter Vandenhoe, *The Human Right to Development as a Paradox*, 36 L. & POL. AFR., ASIA & LATIN AMERICA 377 (2003).

<sup>73</sup> Sean Kenji Starrs, *Belt and Road Initiative is No Selfless Venture*, FIN. TIMES (Aug. 10, 2018), <https://www.ft.com/content/098d85c4-9a6d-11e8-ab77-f854c65a4465>.

<sup>74</sup> See Gu Bin, *The Belt and Road Initiative is Not China's Marshall Plan*, FIN. TIMES (Aug. 7, 2018), <https://www.ft.com/content/29dedffe-9a1c-11e8-88de-49c908b1f264>. See also Simon Shen & Wilson Chan, *A Comparative Study of the Belt and Road Initiative and the Marshall Plan*, 4 PALGRAVE COMM. 1 (2018).

<sup>75</sup> Nyshka Chandran, *Reports of China Using its 'Belt and Road' Program for Military Purposes are 'No Real Surprise'*, CNBC (Dec. 24, 2018), <https://www.cnbc.com/2018/12/24/china-belt-and-road-reported-military-implications.html>; Colin Flint & Cuiping Zhu, *The Geopolitics of Connectivity, Cooperation, and Hegemonic Competition: The Belt and Road Initiative*, 99 GEOFORUM 95, 98 (2019); Shirley Z. Yu, *Belt and Road Initiative: Defining China's Grand Strategy and the Future World Order* 1, 2 (Mar. 2018) (unpublished Master's thesis, Harvard University) (on file with Harvard Library, Harvard University).

<sup>76</sup> Xiaojun Li & Ka Zeng, *To Join or Not to Join? State Ownership, Commercial Interests, and China's Belt and Road Initiative*, 92 PAC. AFF. 5 (2019).

<sup>77</sup> See David Murphy, *One Belt One Road: International Development Finance with Chinese Characteristics*, in CHINA STORY YEARBOOK 2015: POLLUTION 245 (Gloria Davies et al. eds., 2015).

Other scholars have elaborated on this paradigm, contrasting China's development financing paradigm's differences with Western-backed development finance in terms of: (1) the scale and business model of Chinese finance relative to its Western counterparts; (2) the composition and approach of China's lending portfolio; and (3) the governance of China's development finance institutions.<sup>78</sup> China's development financing paradigm has been described as follows:

...Chinese national [development finance institutions or DFIs] operating abroad do not have callable capital, they do take deposits, and they issue bonds on both the Chinese and global markets. The [Asian Infrastructure Investment Bank or AIIB] and the [New Development Bank or NDB] do have callable capital, but borrow in both Chinese and global capital markets. Western-led [multilateral development banks or MDBs] have callable and paid-in capital like the AIIB and NDB, but issue bonds in global as well as local currency markets.

In terms of lending practices, China's national DFIs operating abroad tend to lend in extraordinarily large lines of credit and loans for bundles of infrastructure and energy and other overseas national development projects, and do so in a coordinated fashion – with a number of different (Chinese) bank and non-bank corporate actors taking part in creating what we term in this article 'coordinated credit spaces'. The NDB, on a smaller scale, uniquely thus far, on-lends to national development banks in member countries such that the national development banks, in turn, provide financing for a number of loans. The AIIB is more like the Western MDBs, following an individual project finance approach....

Chinese national DFIs lend in both US dollars and in Chinese currency...[a]ll of these DFIs expect to be repaid in the currency that they lend in, with the exception of China's policy banks, which have often required that a certain amount of loans be paid back with commodity sales.

In terms of the composition of lending, all of the DFIs in which China is a key shareholder tend to focus on energy and infrastructure, which is distinct from what the Western DFIs have done until recently...

With respect to governance, China's national DFIs have a single shareholder governance structure...Unlike the Western-led MDBs, none of the Chinese DFIs attach explicit or overt policy conditionalities to their

---

<sup>78</sup> Gregory T. Chin & Kevin P. Gallagher, *Coordinated Credit Spaces: The Globalization of Chinese Development Finance*, 50 DEV. & CHANGE 245 (2019).



loans, although there is some evidence that China attaches purchasing and procurement conditions at times at the project level...<sup>79</sup>

The absence of policy conditions to China's development financing has been argued as both an opportunity for borrower governments making wise and prudent investments (and with higher risk tolerances), as well as being itself a moral hazard risk of encouraging developing country governments towards irresponsible and imprudent fiscal decisions.<sup>80</sup> It was also only in mid-2019 that China announced it would begin to embed anti-graft and anti-corruption officers and joint inspection teams in BRI projects, following reports of alleged corrupt practices occurring in BRI projects.<sup>81</sup> Other researchers have found that Chinese development finance "is indifferent to risk, in particular it is uncorrelated with indices of political stability and rule of law...[s]ome major borrowers from China have encountered debt sustainability problems while other borrowers are in good fiscal shape... Chinese banks have been reluctant to follow international norms for environmental safeguards but seem to be evolving towards those norms."<sup>82</sup> This model, which blends dimensions of autocratic, authoritarian, pragmatic, and fluid decision-making in sovereign development financing, has been used to emphasize the rise of the "Beijing Consensus,"<sup>83</sup> as an alternative to the "Washington Consensus" that forged the International Monetary Fund and the World Bank.

The main types of China's financing into the BRI projects have been identified as: (1) syndicated bank loans by the China Development Bank, China Eximbank, and the four biggest state-owned commercial banks; (2) sectoral loans exclusively provided by the China Development Bank and China Eximbank; (3) equity investments by the state-owned Silk Road Fund; and (4) cross-border investments by Chinese (primarily state-owned) enterprises.<sup>84</sup> However these sources are also changing, inasmuch as the tenor and focus of BRI projects themselves appear to frequently change according to China's pronouncements.<sup>85</sup> In response to criticisms of the fluidity of this financing framework and concerns raised over the BRI as a 'debt trap' for lower income countries,<sup>86</sup> China's Ministry

<sup>79</sup> *Id.* at 247-49.

<sup>80</sup> Stephen B. Kaplan, *The Rise of Patient Capital: The Political Economy of Chinese Global Finance* (Feb. 1, 2018) (unpublished paper, George Washington University) (on file with Wilson Center).

<sup>81</sup> Don Weinland, *China to Tackle Corruption in Belt and Road Projects*, *FIN. TIMES* (July 18, 2019), <https://www.ft.com/content/a5815e66-a91b-11e9-984c-fac8325aaa04>.

<sup>82</sup> David Dollar & John L. Thornton, *Is China's Development Finance a Challenge to the International Order?* 2 (Oct. 2017) (unpublished manuscript) (on file with the Brookings Institution).

<sup>83</sup> See THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT (Weitseng Chen ed. 2017); John Williamson, *Is the "Beijing Consensus" Now Dominant?*, 13 *ASIA POL'Y* 1, 3 (2012); Yasheng Huang, *Debating China's Economic Growth: The Beijing Consensus or The Washington Consensus*, 24 *ACAD. MGMT.* 31 (2010).

<sup>84</sup> Lihuan Zhou et al., *Moving the Green Belt and Road Initiative: From Words to Actions* 2 (2018).

<sup>85</sup> See Sitao Xu & Lydia Chen, *China's Belt and Road Initiative: Recalibration and New Opportunities*, *DELOITTE INSIGHTS* (Aug. 15, 2019), <https://www2.deloitte.com/us/en/insights/economy/asia-pacific/china-belt-and-road-initiative-update.html>.

<sup>86</sup> See Dylan Gerstel, *It's a (Debt) Trap! Managing China-IMF Cooperation Across the Belt and Road*, *NEW PERSP. FOREIGN POL'Y* 12 (2017); Lucy Hornby & Archie Zhang, *Belt and Road Debt Trap Accusations Hound China as it Hosts Forum*, *FIN. TIMES* (Apr. 23, 2019), <https://www.ft.com/content/3e9a0266-6500-11e9-9adc->

of Finance issued its *Debt Sustainability Framework for Participating Countries of the Belt and Road Initiative*,<sup>87</sup> “with the aim to promote sustainable economic and social development of BRI countries while ensuring debt sustainability.”<sup>88</sup> However, in the same document, the framework is disavowed immediately by China’s Ministry of Finance as “a non-mandatory policy tool...[since] the financial institutions of China and other BRI countries are encouraged to use this framework to conduct debt sustainability analysis and manage debt risks according to the risk rating results, as an important reference for lending decisions.”<sup>89</sup> The Ministry of Finance then recommends nine (9) procedures that could be undertaken for debt sustainability analysis: (1) debt coverage; (2) macroeconomic projections; (3) realism tools; (4) country classification and debt carrying capacity; (5) stress tests; (6) risk signals; (7) the use of judgment; (8) the final risk ratings; and (9) the debt sustainability analysis write up.<sup>90</sup> There is nothing in the text of this document that indicates whether China’s Ministry of Finance will disallow lending for BRI projects that fail this method of debt sustainability analysis, or otherwise provide oversight for the short-term and long-term impacts of the BRI debtor country’s assumption of debt. The document tacitly conveys that the onus falls more on BRI debtor countries to do a sufficient debt sustainability analysis for them as sovereign borrowers, rather than reining in China’s financing for BRI projects that might not meet any of these standards within a satisfactory bandwidth or range consistent with international standards and best practices consistent with both lawful, as well as legitimate, methods for debt sustainability, public debt transparency, or sovereign debt restructuring.<sup>91</sup>

The seeming ambiguity of China’s views about its role and responsibility as a sovereign lender to BRI borrower countries stands in sharp contrast with China’s stated commitments during its Third Universal Periodic Review before the Human Rights Council, where China’s Vice-Foreign Minister hailed China’s “human rights achievements, human rights development path, and the country’s determination to promote the human rights situation...China has decided to accept 284 out of 346 recommendations put forward by various parties.”<sup>92</sup> It is reported that among these recommendations, in particular, are commitments to respect human rights in its foreign investment activities, especially to “promote measures that ensure that development and infrastructure projects inside and

98bf1d35a056; JOHN HURLEY ET AL., CTR. FOR GLOB. DEV., EXAMINING THE DEBT IMPLICATIONS OF THE BELT AND ROAD INITIATIVE FROM A POLICY PERSPECTIVE (2018); Agatha Kratz, et al., *New Data on the “Debt Trap” Question*, RHODIUM GROUP (Apr. 29, 2019), <https://rhg.com/research/new-data-on-the-debt-trap-question/>; *China’s Belt and Road Initiative: Why the Price is Too High*, WHARTON SCH. OF THE UNIV. OF PA. (Apr. 30, 2019), <https://knowledge.wharton.upenn.edu/article/chinas-belt-and-road-initiative-why-the-price-is-too-high/>.

<sup>87</sup> MINISTRY OF FIN. OF THE PEOPLE’S REPUBLIC OF CHINA, DEBT SUSTAINABILITY FRAMEWORK FOR PARTICIPATING COUNTRIES OF THE BELT AND ROAD INITIATIVE (2019).

<sup>88</sup> *Id.* at 1.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1–2.

<sup>91</sup> See, e.g. G.A. Res. 69/313, Addis Ababa Action Agenda (July 27, 2015); IMF & World Bank, *G20 Notes on Strengthening Public Debt Transparency*, Highlights and Work Agenda (June 2018). See also Salvatore Dell’Erba et al., *Debt Levels, Debt Composition, and Sovereign Spreads in Emerging and Advanced Economies*, 29 OXFORD REV. ECON. POL’Y 518 (2013); Shalendra D. Sharma, *Resolving Sovereign Debt: Collective Action Clauses or the Sovereign Debt Restructuring Mechanism*, 38 J. WORLD TRADE 627 (2004); Odette Lienau, *The Challenge of Legitimacy in Sovereign Debt Restructuring*, 57 HARV. INT’L L.J. 151 (2016).

<sup>92</sup> *China Completes 3rd Universal Periodic Review at UN Human Rights Council*, CHINA DAILY (Mar. 17, 2019), <https://global.chinadaily.com.cn/a/201903/17/WS5c8d82e0a3106c65c34ceff3.html>.

outside of its territory are fully consistent with human rights and respect the environment and natural resource sustainability, in line with national and international law and with the commitments from the 2030 Agenda for Sustainable Development.”<sup>93</sup> China is also reported to have committed itself to report to the Human Rights Council on the specific recommendation to “[c]onsider the establishment of a legal framework to guarantee that activities carried out by industries subject to its jurisdiction do not negatively impact human rights abroad...[t]ake further measures on business and human rights in line with its international obligations and ensure that companies operating in high-risk or conflict areas conduct human rights due diligence in line with the Guiding Principles on Business and Human Rights.”<sup>94</sup> Even assuming some equivocation as to the nature of what China has committed to report on to the Human Rights Council, it nevertheless bears stressing that China’s obligations as a treaty party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) were already called upon by the Committee on Economic, Social and Cultural Rights in 2014 “to adopt a human rights-based approach to international cooperation, by: (a) undertaking a systematic and independent human rights impact assessment prior to making funding decisions; (b) establishing an effective monitoring mechanism to regularly assess the impact of its policies and projects in the receiving countries and to take remedial measures when required; [and] (c) ensuring that there is an accessible complaint mechanism for violations of economic, social and cultural rights in the receiving countries.”<sup>95</sup>

The clamor for transparency and predictability with respect to China’s most massive sovereign foreign investment program through the BRI, therefore, is clearly well-founded under China’s own voluntarily stated commitments to the UN Human Rights Council, as well as in its obligations as a treaty party to the ICESCR. Neither is China unused to transparency norms affecting its foreign investments. China has shown that it can conclude a foreign investment treaty imposing mutual transparency obligations of host States and home States of foreign investment with respect to all laws, regulations, and policies relating to foreign investment.<sup>96</sup> As observed by another scholar, China has in fact already begun including some provisions recognizing sustainable development, environment, transparency, labour and human rights in China’s international investment agreements.<sup>97</sup> As a treaty party to the Paris Agreement on Climate Change, China has also assumed the responsibility that “[p]arties shall account for their nationally determined contributions. In accounting for

<sup>93</sup> Press Release, CICDHA, “China Commits to the United Nations Human Rights Council to Respect Human Rights in its Foreign Investments” (Mar. 19, 2019).

<sup>94</sup> Rep. of the Working Group on the Universal Periodic Review: China, Human Rights Council, at 12–13, U.N. Doc. A/HRC/40/6 (2018).

<sup>95</sup> Econ. and Soc. Council: Comm. on Econ., Soc. and Cultural Rights, Concluding Observations on the Second Periodic Report of China, Including Hong Kong, China, and Macao, China, at 4, U.N. Doc. E/C.12/CHN/CO/2 (2014).

<sup>96</sup> See, e.g., Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments art. 17, Can.-China, Sept. 9, 2012, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3476/download>.

<sup>97</sup> See Manjiao Chi, *Addressing Sustainable Development Concerns through IIAs: A Preliminary Assessment of Chinese IIAs*, in CHINA’S INTERNATIONAL INVESTMENT STRATEGY: INTERNATIONAL, REGIONAL, AND GLOBAL LAW AND POLICY 100–115 (Julien Chaisse ed., 2019).

anthropogenic emissions and removals corresponding to nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency....<sup>98</sup> Thus, even for purposes of enabling the open determination of the complete environmental and climate change impacts of BRI projects, such open transparency and information access policies are essential.

Furthermore, as summarized from an academic article by the UN Independent Expert on the effects of foreign debt and other international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, China's own domestic regulations appear to already require such transparency and compliance with environmental and social safeguards as part of China's external lending and outbound investment activities:

Over the past decade, an increasing number of guidelines relating to business and finance have been adopted by different government bodies. Some relate to human rights, such as the principles of non-discrimination, compensation of losses in case of resettlement and consultation with affected communities.

The Chinese authorities have made efforts to strengthen their regulations for outbound investment in order to avoid negative environmental and social impact. Achieving greater human rights protection would also require ensuring that existing guidelines and policies are more rigorously monitored in their implementation. Most are currently voluntary and lack an accountability and enforcement mechanism. In particular, affected individuals and communities should have access to effective remedies if existing regulations and international norms are not adhered to. The State's most recent national human rights plan of action (2012–2015) did not address the issue of human rights in the field of business, by for example ensuring that lending and outbound investment complied with international human rights standards. In December 2007, the State-owned Assets Supervision and Administration Council issued a set of guidelines for all central State-owned enterprises on fulfilling corporate social responsibilities. The guidelines require State-owned enterprises to give top priority to work and product safety, the legal interests of employees, compliance with regulations and laws, investment into environmental protection, and non-discrimination on grounds of gender, nationality, religion or age, including equal pay for equal work, and encourage State-owned enterprises to participate in social welfare programmes. In March 2009, the Ministry of Commerce issued Measures for Overseas Investment Management, containing detailed regulations for the approval of overseas investments. According to the regulations, any overseas investment considered likely to violate "any international treaty conducted by China

---

<sup>98</sup> Paris Agreement to the United Nations Framework Convention on Climate Change art. 5, Dec. 12, 2015, T.I.A.S. No. 16-1104.

with a foreign party” would not be approved. While in theory this allows for the consideration of obligations from international human rights treaties signed by China and partner countries, the author was not informed during his visit on how the Ministry screens overseas investments that may pose significant human rights risks. The Guidelines on Environmental Protection in Foreign Investment and Cooperation, published by the Ministry of Commerce in March 2013, focus on ensuring environmental protection and promote the sustainable development of foreign investment and cooperation. They also require, however, that enterprises should respect the religious belief, cultural traditions and national customs of community residents of the host country, safeguard the legitimate rights and interests of labourers, offer training, employment and re-employment opportunities to residents in the surrounding areas, promote the harmonious development of the local economy, the environment and the community, and cooperate on the basis of mutual benefit.

China Banking Regulatory Commission’s Green Credit Guidelines apply to all policy and commercial banks. Article 4 of the Guidelines covers “hazards and risks [to] the environment and society that may be brought about by the construction, production and operating activities of banking institutions’ clients and key affiliated parties thereof, including environmental and social issues related to energy consumption, pollution, land, health, safety, resettlement of people, ecological protection [and] climate change”. Article 10 stipulates that Chinese banking institutions are to “establish and constantly improve policies, systems and processes for environmental and social risk management”, while article 11 requires clients facing major environmental and social risks to put in place risk response plans and to establish sufficient, effective stakeholder communication mechanisms, including third-party assessment of such risks. In 2012, an article 21 was included in the Green Credit Guidelines, requiring banking institutions to strengthen explicitly environmental and social risk management for overseas projects for which credit has been granted. It requires Chinese financial institutions to ensure that project sponsors comply with applicable laws and regulations on, inter alia, environmental protection, land, health and safety in the country or jurisdiction hosting the project. In addition, banking institutions are required to pledge publicly that appropriate international practices or international norms will be followed in the implementation of the project so as to ensure alignment with good international practices.

The Green Credit Guidelines provide an opportunity to enhance respect for human rights in Chinese project financing and foreign investment. Yet, doubts remain around the implementation of the Guidelines by Chinese

banking institutions in overseas projects given that the mechanisms for monitoring and enforcing compliance still appear to be weak. While the Guidelines attribute the responsibility to supervise environmental and social risk management, including off-site and on-site examination, to the China Banking Regulatory Commission, the author did not receive any information on any investigations conducted with regard to cases of potential non-compliance of financial institutions when lending for overseas projects. Since 2016 a new set of regulation has been developed by China to be further applicable to international lending and outbound investment. These new norms try to improve the system of risk assessment (including environmental and social risks) and places this assessment as a key aspect to make the final decision on the pertinent project. They also emphasize on the comprehensiveness of that assessment which has to be both *ex ant* and *ex post*. They also reinforce the obligation of Chinese corporations to understand and respect the laws of the countries where they operate. Yet, these initiatives are not legally binding and it remains to be seen how they are operationalized. The new (2017) Environmental Risk Management Initiative for China's Overseas Investment encourages investors to consider environmental, social and governance factors when making and managing investments. This includes disclosing information and then working with environmental groups so that disclosure of information improves project management. It also calls on investors to fully understand Chinese, local and international environmental standards and wherever possible to apply the toughest of those; and to carry out full environmental due diligence. The recently (January 2018) passed Guiding Opinions of the Development and Reform Commission and the Ministry of Commerce on Strengthening the Construction of the Credit System in the Field of Foreign Economic Cooperation establish that Chinese persons and entities participating in international economic cooperation should respect relevant laws and regulations of domestic and cooperating countries and regions, and United Nations resolutions, among other aspects...<sup>99</sup>

It begs explanation, therefore, that as of this writing China has not yet opened the BRI to the fullest transparency and information access to all communities likely to be affected by the environmental, climate change, labor, and human rights impacts of BRI projects. Other regions—such as Europe through its Aarhus Convention,<sup>100</sup> Latin America and the Caribbean through its own Escazú Agreement<sup>101</sup>—have long recognized the importance of such transparency and information access for infrastructure and other forms of development

<sup>99</sup> Juan Pablo Bohoslavsky, *A Human Rights Focus to Upgrade China's International Lending*, 5 CHINESE J. GLOBAL GOVERNANCE 69, 82-85 (2019).

<sup>100</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447.

<sup>101</sup> Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean art. 1, Mar. 4, 2018, U.N. Doc. LC/CNP10.9/5 (not yet in force).

projects. As it appears, the most inexplicably elusive feature of the BRI, taken alongside China's articulated philosophy and normative approach to what it asserts as the content of the right to development, is not just the presence of a so-called "rule of law-based" sovereign development financing paradigm,<sup>102</sup> but an actual predictable legal and contractual framework for assessing project responsibility and the assumption of project, operational, political, credit, regulatory, and other types of risks;<sup>103</sup> regularizing joint sovereign oversight over BRI projects;<sup>104</sup> and ensuring not just timely and apt piecemeal project completion,<sup>105</sup> but the salience of the conceptualization and implementation of BRI projects in full compliance with both domestic and international laws on environment, labor, and other key norms of participation, contribution, enjoyment, and fullest realization of civil, political, economic, social, and cultural rights that comprise the right to development in international law.<sup>106</sup>

Close to a decade into the grand speeches and promotional pronouncements,<sup>107</sup> numerous international fora staged,<sup>108</sup> and a growing constellation of lionizing commentaries attesting to the vast potentials of the BRI projects for the future of humanity,<sup>109</sup> what stands more deafening thus far is China's silence on the role of actual binding law to ensure

<sup>102</sup> See Guiguo Wang, *Towards a Rules-Based Belt and Road Initiative – Necessity and Directions*, 6 J. INT'L & COMP. L. 29 (2019).

<sup>103</sup> See Scott L. Hoffmann, *A Practical Guide to Transactional Project Finance: Basic Concepts, Risk Identification, and Contractual Considerations*, 45 BUS. LAW. 181, 183 (1989); Michael P. Malloy, *International Project Finance: Risk Analysis and Regulatory Concerns*, 18 TRANSNAT'L L. 89, 94 (2004).

<sup>104</sup> See John W. Head et al., *Changing Norms in International Development Finance: Transparency, Accountability, and Mission Creep*, 98 AM. SOC'Y INT'L L. PROC 63 (2004); Nagla Nassar, *Project Finance, Public Utilities, and Public Concerns: A Practitioner's Perspective*, 23 FORDHAM INT'L L.J. S60 (1999).

<sup>105</sup> See Alex He & Anton Malkin, *China Tweaks its Belt and Road Initiative to Avoid Further Backlash*, THE HILL (May 6, 2019, 5:00 PM), <https://thehill.com/opinion/finance/442306-china-tweaks-its-belt-and-road-initiative-to-avoid-backlash>.

<sup>106</sup> See Isabella D. Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. U. INT'L L. REV. 1425, 1434 (2000); Sheldon Leader, *Project Finance and Human Rights*, in MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 199 (Juan Pablo Bohoslavsky & Jernej Letnar Černej eds., 2014).

<sup>107</sup> See, e.g., *President Xi Jinping Delivers Important Speech and Proposes to Build a Silk Road Economic Belt with Central Asian Countries*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Sept. 7, 2013), [https://www.fmprc.gov.cn/mfa\\_eng/topics\\_665678/xjpfwzysiesgjtfshzzfh\\_665686/t1076334.shtml](https://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpfwzysiesgjtfshzzfh_665686/t1076334.shtml); *Full Text of President Xi's Speech at the Opening of Belt and Road Forum*, XINHUA NET (May 14, 2017, 11:23 PM), [http://www.xinhuanet.com/english/2017-05/14/c\\_136282982.htm](http://www.xinhuanet.com/english/2017-05/14/c_136282982.htm); *Xi Jinping Chairs and Addresses Leaders' Roundtable of the Second Belt and Road Forum for International Cooperation (BRF)*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Apr. 27, 2019), [https://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1659377.shtml](https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1659377.shtml).

<sup>108</sup> See *Joint Communiqué of the Leaders' Roundtable of the 2nd Belt and Road Forum for International Cooperation*, MINISTRY OF FOREIGN AFFAIRS OF CHINA (Apr. 27, 2019), [https://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1658766.shtml](https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1658766.shtml).

<sup>109</sup> Vladimir Yakunin, *The Belt and Road Initiative as a New Model for Global Inclusive Development and Solidarity* (Apr. 30, 2019), <https://doc-research.org/2019/04/the-belt-and-road-initiative-as-a-new-model-for-global-inclusive-development-and-solidarity/>; *China Focus: Belt and Road Initiative Makes Solid Progress, Embraces Brighter Future: Report*, XINHUA NET (Apr. 23, 2019), [http://www.xinhuanet.com/english/2019-04/23/c\\_137999264.htm](http://www.xinhuanet.com/english/2019-04/23/c_137999264.htm); Mei Guanqun, *Proposals to Promote the "Belt and Road" Initiative*, 8 J. WORLD TRADE ORG. & CHINA 114 (2018).

transparency and accountability in the supposed ‘win-win cooperation’<sup>110</sup> that China seeks to forge with most of the world under the aegis of ‘development’ through the BRI. In April 2019, Chinese President Xi Jinping declared for the first time that the BRI will “adopt widely accepted rules and standards and encourage participating companies to follow general international rules and standards in project development, operation, procurement and tendering and bidding. The laws and regulations of participating countries should also be respected.”<sup>111</sup> As of this writing, however, it has not been disclosed what precise international rules, operational standards, and international, regional, or local laws Chinese President Xi Jinping made binding or applicable to all BRI Projects. During the COVID-19 pandemic, it has been reported that China has received, and not granted, numerous applications for debt relief from BRI projects, on the reasoning that “the BRI loans are not foreign aid...[China] need[s] to at least recoup principal and a moderate interest.”<sup>112</sup>

There is abundant academic literature speculating on various substantive international rules that may or should apply to the BRI,<sup>113</sup> but nothing yet that has been publicly disclosed by China to apply to all the contract language and legal documentation for each BRI Project it has listed in its BRI website. Other documents released in April 2019 along with China’s *Debt Sustainability Framework* (such as the *Beijing Initiative for the Clean Silk Road*,<sup>114</sup> the *Cooperation Initiative on Silk Road of Innovation*,<sup>115</sup> and the *Green Investment Principles for the Belt and Road*<sup>116</sup>) all have a similar non-binding tenor and articulate visions and principles, rather than actual hard law applicable to BRI contracts. What is known, is that, as of July 1, 2018, the Supreme People’s Court of China issued its “Regulations on Several Issues Regarding the Establishment of International Commercial Courts” (one in Xian and one in Shenzhen), which will reportedly take jurisdiction over any disputes involving BRI projects.<sup>117</sup> There is no equivalent mechanism set up similar to the World Bank Inspection Panel or other compliance and accountability mechanisms in all other development banks

<sup>110</sup> See *Working Together to Deliver a Brighter Future for Belt and Road Cooperation*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA (Apr. 26, 2019), [https://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1658424.shtml](https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1658424.shtml).

<sup>111</sup> *Id.*

<sup>112</sup> James Kynge and Sun Yu, “China faces wave of calls for debt relief on ‘Belt and Road’ projects”, *The Financial Times*, 30 April 2020, full text at <https://www.ft.com/content/5a3192be-27c6-4fe7-87e7-78d4158bd39b> [last accessed 1 May 2020].

<sup>113</sup> See INTERNATIONAL GOVERNANCE AND THE RULE OF LAW IN CHINA UNDER THE BELT AND ROAD INITIATIVE (Yun Zhao ed., 2018); Heng Wang, *China’s Approach to the Belt and Road Initiative: Scope, Character, and Sustainability*, 22 J. INT’L ECON. L. 29 (2019); Jiangyu Wang, *China’s Governance Approach to the Belt and Road Initiative (BRI): Partnership, Relations, and Law*, 14 GLOBAL TRADE & CUSTOMS J. 222 (2019).

<sup>114</sup> *Full Text: Beijing Initiative for the Clean Silk Road*, CHINA DAILY (Apr. 26, 2019, 9:03 PM), <http://www.chinadaily.com.cn/a/201904/26/WS5cc301a6a3104842260b8a24.html>.

<sup>115</sup> *Cooperation Initiative on Silk Road of Innovation*, MINISTRY OF SCI. & TECH. OF CHINA (Apr. 25, 2019), [http://en.most.gov.cn/eng/pressroom/201904/t20190425\\_146255.htm](http://en.most.gov.cn/eng/pressroom/201904/t20190425_146255.htm).

<sup>116</sup> *Green Investment Principles for the Belt and Road*, GREEN FIN. LEADERSHIP PROGRAM, <http://www.gflp.org.cn/public/ueditor/php/upload/file/20181201/1543598660333978.pdf> (last visited Jan. 15, 2020).

<sup>117</sup> Freshfields Bruckhaus Deringer, *China Establishes International Commercial Courts to Handle Belt and Road Initiative Disputes*, OXFORD BUS. L. BLOG (Aug. 17, 2018), <https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/china-establishes-international-commercial-courts-handle-belt-and>.



that are part of the Independent Accountability Mechanisms Network,<sup>118</sup> which enable local communities to directly raise concerns and complaints about development-financed-projects. Projects may already be in the process of being initiated,<sup>119</sup> but all of the stakeholders to BRI projects beyond China and the BRI debtor government—particularly affected local communities—still remain behind an iron curtain as to crucial information on the long-term governance, social, financial, and fiscal consequences, as well as all the human rights impacts, of all of the BRI projects.<sup>120</sup> As illustrated in five case studies of Malaysia, Pakistan, Sri Lanka, Laos, and Kazakhstan in the following Part I (*Democracy and the BRI: Choice, Consent, and Consultation in Sovereign Lending*), the dearth of hard law and transparent and open information regarding BRI development projects,<sup>121</sup> itself creates significantly problematic deficits in the exercise of informed choice, consultation with local communities, and the process of determining the meaningful consent of all constituencies and stakeholders of BRI development projects.

#### I. DEMOCRACY AND THE BRI: CHOICE, CONSENT, AND CONSULTATION IN SOVEREIGN LENDING

Project finance refers to a “nonrecourse or limited recourse financing structure in which debt, equity, and credit enhancement are combined for the construction and operation, or the refinancing of a particular facility in a capital-intensive industry, in which lenders base credit appraisals on the projected revenues from the operation of the facility, rather than the general assets or the credit of the sponsor of the facility, and rely on the assets of the facility, including any revenue-producing contracts and other cash flows generated by the facility, as collateral for debt.”<sup>122</sup> When it is a sovereign state that finances a project in a borrowing state, this introduces even further complexities to the ordinary contractual dynamics of project financing. As Lee Buchheit and Mitu Gulati famously cautioned in 2010:

There are three reasons for attempting to reach a common understanding of the responsibilities of sovereign borrowers and their lenders. First, the flow of capital to sovereign debtors is exceptionally important to the world economy. Industrialized countries rely on it to finance their budget deficits, these days to a breathtaking extent. Developing countries need it to develop. *Misbehavior, either by the sovereign debtors or by the*

<sup>118</sup> See Laurence Boisson de Chazournes, *Public Participation in Decision-Making: The World Bank Inspection Panel*, 31 AM. SOC'Y INT'L L. STUD. TRANSNAT'L LEGAL POL'Y, 84, 85 (1999).

<sup>119</sup> See Veasna Kong et al., *The Belt and Road Initiative – Six Years On*, MOODY'S ANALYTICS (June 2019), <https://www.moodysanalytics.com/-/media/article/2019/belt-and-road-initiative.pdf>.

<sup>120</sup> See Abbas Faiz, *Is China's Belt and Road Initiative Undermining Human Rights?*, THE DIPLOMAT (June 7, 2019), <https://thediplomat.com/2019/06/is-chinas-belt-and-road-initiative-undermining-human-rights/>.

<sup>121</sup> See James Crabtree, Opinion, *China Needs to Make BRI More Transparent and Predictable*, FIN. TIMES (Apr. 25, 2019), <https://www.ft.com/content/3c5d6d14-66ac-11e9-b809-6f0d2f5705f6>.

<sup>122</sup> SCOTT L. HOFFMANN, *THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE: A RESOURCE FOR GOVERNMENTS, SPONSORS, LAWYERS, AND PROJECT PARTICIPANTS* 4 (Cambridge Univ. Press, 3rd ed. 2007).

*creditors, destabilizes this key component of the international financial system, making credit less available and more costly.*

Second, *sovereign finance is uniquely unforgiving of mistakes.* Unlike corporate or personal debtors, sovereigns do not have access to a formal bankruptcy process in which insupportable liabilities can be adjusted according to preestablished rules. From a legal standpoint, sovereign debts are therefore ineradicable absent the consent and cooperation of the creditors. Unfortunately, the process by which that consent and cooperation must be sought – sovereign debt restructuring – remains unpredictable and disorderly.

Third, *the human cost of prodigal sovereign borrowing, reckless sovereign lending or incompetent sovereign debt restructuring is incalculable...A consensus about the responsibilities of sovereign borrowers and lenders, together with improvements in the way in which sovereign loans are planned, executed, documented, and, when necessary, restructured, will directly affect the lives of most of the people that live on this planet.*<sup>123</sup>

The above three reasons make it all the more crucial that there is transparency of information<sup>124</sup> for all BRI project stakeholders—not just the finance ministry of the borrowing state, but affected local communities, taxpayers, civil society organizations, and all other constituencies impacted by a borrowing state incurring foreign debt through a BRI project.<sup>125</sup> Because these are long-term and intergenerational commitments by the government of a borrowing BRI state to repay China over time—either through the allocation of infrastructure, energy, mining, communications, or other project revenues, or through China's recovery or repayment of debt from the actual assets and resources comprising the facilities of the project (whether through outright ownership of the assets or enjoyment of other associated long-term property rights such as usufructuary rights, long-term leases, among others over such assets, resources, and facilities)—the civilian populations of BRI borrowing states have a direct stake over the consent that their government ultimately gives to owe debt to China that would be used for the construction of BRI megaprojects.<sup>126</sup> Since

<sup>123</sup> Lee C. Buchheit & G. Mitu Gulati, *Responsible Sovereign Lending and Borrowing*, 73 LAW & CONTEMP. PROBS. 63, 64–65 (2010). Italics added.

<sup>124</sup> See IMF & IDA, *G-20 Note: Strengthening Public Debt Transparency: The Role of the IMF and the World Bank* (June 13, 2018), <http://documents.worldbank.org/curated/en/991171532695036951/pdf/128725-repl-For-VP-G-20-NOTE-STRENGTHENING-PUBLIC-DEBT-TRANSPARENCY-clean.pdf>.

<sup>125</sup> See David L. Goldwyn, *Extracting Transparency*, 5 GEO. J. OF INT'L AFF. 5 (2004); Diane Desierto, *China's 'One Belt, One Road' Initiative: Can a Bilaterally-Negotiated 'Globalization 2.0' Internalize Human Rights, Labor, and Environmental Standards?*, BLOG OF THE EUROPEAN JOURNAL OF INT'L LAW: TALK! (May 16, 2017), <https://www.ejiltalk.org/chinas-one-belt-one-road-initiative-can-a-bilaterally-negotiated-globalization-2-0-internalize-human-rights-labor-and-environmental-standards/>.

<sup>126</sup> See W. Richard Scott & Raymond E. Levitt, *Institutional Challenges and Solutions for Global Megaprojects*, in THE OXFORD HANDBOOK OF MEGAPROJECT MANAGEMENT (Bent Flyvbjerg ed., 2017) (“distinguish ‘megaprojects’ from other large projects in terms of the degree to which managers can reduce

none of the publicly available BRI official documents from China's official websites indicate what China's actual debt repayment terms are, the unfortunate result is an "opaque build-up of debt...[which could cause] risk[s] to the world economy."<sup>127</sup> The lack of transparency poses problems for measuring the ultimate cost of sovereign debt. Researchers have found that "better fiscal transparency, political trust, and credit ratings are connected with a lower cost of sovereign debt...higher corruption, budget deficits, current account deficits, and unemployment make sovereign rates increase."<sup>128</sup> Other researchers also affirm that "high debt levels can limit a sovereign government's capacity to provide social services necessary for the well-being of its citizens, and divert resources and energy from the pursuit of long-term development strategies...[and] after a government defaults, the mechanisms for managing the restructuring of sovereign debt usually act slowly, do not return the country to debt sustainability, and often leave the different classes of creditors as well as the people of the indebted country feeling as if they have been treated unfairly."<sup>129</sup>

Genuine, ongoing, and transparent consultations with affected local communities<sup>130</sup> of BRI development projects are as equally important as securing the informed consent of, and ensuring meaningful choice by, all actual stakeholders and constituencies of BRI debt to China to finance such development projects. The emerging right to development emphasizes *participation, contribution, and enjoyment* by all persons and peoples in economic, political, social, and cultural development that ensures the realization of all human rights and fundamental freedoms.<sup>131</sup> Even the right to self-determination in Article 1(1) of the International Covenant on Economic, Social, and Cultural Rights (to which China is a treaty party) requires that peoples possess *both* "the right to freely determine their political status and freely pursue their economic, social, and cultural development."<sup>132</sup> The freedom to pursue such development—howsoever envisaged—is undermined when affected communities and peoples do not have transparent access to information about the BRI projects and their likely or anticipated human rights impacts.

Precisely because affected stakeholders, local communities, and wider constituencies in the borrower BRI state stand to absorb all of the impacts, externalities, and consequences of BRI development projects, they cannot be left out of the process of BRI project

---

overall project coordination costs for handling overall project complexity through partitioning of the project into more or less autonomous subprojects. Further, 'Global Megaprojects' also involve significant levels of cross-institutional complexity because they involve participants and outside groups from multiple countries with differing languages and institutions.").

<sup>127</sup> Weizhen Tan, *China's Loans to Other Countries are Causing 'Hidden' Debt. That May be a Problem*, CNBC (June 11, 2019, 8:50 PM), <https://www.cnbc.com/2019/06/12/chinas-loans-causing-hidden-debt-risk-to-economies.html>.

<sup>128</sup> Francisco Bastida et al., *Fiscal Transparency and The Cost of Sovereign Debt*, 83 INT'L REV. ADMIN. SCI. 106, 106 (2015).

<sup>129</sup> Christian Barry & Lydia Tomitova, *Fairness in Sovereign Debt*, 73 SOC. RES. 649 (2006).

<sup>130</sup> See Brid Walsh et al., *The Effect of Community Consultation on Perceptions of a Proposed Mine: A Case Study from Southeast Australia*, 51 RESOURCES POL'Y, 163 (2017); James C. N. Paul, *International Development Agencies, Human Rights, and Humane Development Projects*, 17 DENVER J. INT'L LAW & POL'Y 67 (1988); George K. Foster, *Community Participation in Development*, 51 VAND. J. TRANSNAT'L L. 39 (2018).

<sup>131</sup> G.A. Res. 41/128, Declaration on the Right to Development, at art. 1(1) (Dec. 4, 1986).

<sup>132</sup> G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at art. 1(1) (Dec. 16, 1966).

conceptualization, execution, implementation, and oversight.<sup>133</sup> The World Bank's development finance model, for example, (and however much this model is critiqued),<sup>134</sup> still ultimately evolved to embed community participation in identifying and assessing project needs, incorporating concerns and experiences over project implementation, and engaging communities for evaluation, monitoring, and impact assessment of development projects.<sup>135</sup> The World Bank reports that community-driven development (CDD) and service delivery, engaging local communities as partners in development planning and decision-making, has proven more effective and sustainable for its development-financed projects.<sup>136</sup> The World Bank's CDD programs are committed to operate on "principles of transparency, participation, local empowerment, demand-responsiveness, greater downward accountability, and enhanced local capacity."<sup>137</sup> In contrast, the publicly available documentation on policies and regulations for BRI development projects<sup>138</sup> thus far do not indicate any such comparable data on local community engagement, needs assessment, monitoring, and oversight partnerships. Even the publicly available data in the category of "Bilateral Documents" are little more than a collection of vision-driven joint communiqués and statements by the leaders of China and BRI debtor states,<sup>139</sup> short of actual operational detail on any community consultations, monitoring, oversight, and partnership. The following five case studies of BRI development projects—Malaysia's East Coast Rail Link (ECRL); Sri Lanka's Hambantota Port and Colombo Port; Pakistan's China-Pakistan Economic Corridor (CPEC); Laos' Kunming-Vientiane Railway; and Kazakhstan's Khorgos Gateway—further illustrate some of the democratic deficits in BRI development programming, with respect to the dimensions of meaningful choice and informed consent by the BRI debtor state and all its constituencies and affected stakeholders, and consultations with all affected local communities.

<sup>133</sup> See Catherine Buerger & Elizabeth Holzer, *How Does Community Participation Work? Human Rights and the Hidden Labour of Interstitial Elites in Ghana*, 7 J. HUM. RTS. PRAC. 72 (2015).

<sup>134</sup> See Ngaire Woods, *Making the IMF and World Bank More Accountable*, in REFORMING THE GOVERNANCE OF THE IMF AND THE WORLD BANK 149 (Ariel Buira ed., 2005); Niamh Gaynor, *The Politics of Democracy and the Global Institutions: Lessons and Challenges for Community Development*, in POLITICS, POWER AND COMMUNITY DEVELOPMENT 179 (Rosie R. Meade et al., 2016).

<sup>135</sup> See SUSAN PARK, WORLD BANK GROUP INTERACTIONS WITH ENVIRONMENTALISTS: CHANGING INTERNATIONAL ORGANISATION IDENTITIES (2010); Sabine Schlemmer-Schulte, *The World Bank and Human Rights*, 4 AUSTRIAN REV. INT'L & EUR. L. 230 (1999).

<sup>136</sup> *Community-Driven Development and Service Delivery: Engaging Local People Gets Development Projects Rights*, WORLD BANK, <https://www.worldbank.org/en/webarchives/archive?url=httpzxxweb.worldbank.org/archive/website00518/WEB/OTHER/COMMUNIT.HTM> (last visited Feb. 29, 2020).

<sup>137</sup> *Results*, WORLD BANK, <https://www.worldbank.org/en/topic/communitydrivendevelopment#3> (last visited Feb. 20, 2020); See also Ben Moxham, *The World Bank's Land of Kiosks: Community Driven Development in Timor-Leste*, 15 DEV. PRAC. 522, 523 (2005); Michael A. Clemens & Michael Kremer, *The New Role for the World Bank*, 30 J. ECON. PERSP. 53, 65 (2016).

<sup>138</sup> See *Policies and Regulations*, BELT & ROAD PORTAL, [https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat\\_id=10062&cur\\_page=3](https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10062&cur_page=3) (last visited Feb. 29, 2020).

<sup>139</sup> See *Bilateral Documents*, BELT & ROAD PORTAL, [https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat\\_id=10061&cur\\_page=2](https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10061&cur_page=2) (last visited Feb. 29, 2020).

### a. Malaysia's East Coast Rail Link (ECRL)

In late 2018, Malaysian Prime Minister, Mahathir Mohamad, announced the cancellation of three BRI infrastructure projects (the East Coast Rail Link connecting the South China Sea with shipping routes in Malaysia's western provinces, and two gas pipeline projects),<sup>140</sup> raising concerns over possible bankruptcy and the terms of repayment to China. The East Coast Rail Link (ECRL) would connect Malaysia's Port Klang on the Strait of Malacca with Kelantan on the Gulf of Thailand.<sup>141</sup> After many negotiations over a year, China and Malaysia announced in July 2019 that they are restarting the ECRL railway project, after project costs were reduced by a third, to USD\$10.7 Billion.<sup>142</sup> Malaysia Rail Link will operate the project in a 50:50 joint venture with China Communications Construction Company, subject to the regulatory supervision of Malaysia's Ministry of Transport.<sup>143</sup> Construction had started in August 2017, and the expected completion date is 2026. The renegotiation of the cost, however, did not affect the terms of the original November 2016 Engineering, Procurement, Construction, and Commissioning (EPCC) Agreement.<sup>144</sup> While the Land Public Transport agency of the Malaysian Government had conducted market consultations with respect to proposed business, technical models, and procurement strategies for this project,<sup>145</sup> the full extent and nature of community consultations conducted for the ECRL is not yet known,<sup>146</sup> even as Malaysia's regional

<sup>140</sup> Amanda Erickson, *Malaysia Cancels Two Big Chinese Projects, Fearing they will Bankrupt the Country*, WASH. POST (Aug. 21, 2018), [https://www.washingtonpost.com/world/asia\\_pacific/malaysia-cancels-two-massive-chinese-projects-fearing-they-will-bankrupt-the-country/2018/08/21/2bd150e0-a515-11e8-b76b-d513a40042f6\\_story.html](https://www.washingtonpost.com/world/asia_pacific/malaysia-cancels-two-massive-chinese-projects-fearing-they-will-bankrupt-the-country/2018/08/21/2bd150e0-a515-11e8-b76b-d513a40042f6_story.html); Blake H. Berger, *Malaysia's Canceled Belt and Road Initiative Projects and the Implications for China*, THE DIPLOMAT (Aug. 27, 2018), <https://thediplomat.com/2018/08/malaysias-canceled-belt-and-road-initiative-projects-and-the-implications-for-china/>.

<sup>141</sup> Ben Bland, *Malaysia Rethinks \$20B "Belt and Road" Project*, THE MARITIME EXEC. (Jan. 31, 2019), <https://www.maritime-executive.com/editorials/malaysia-rethinks-20b-belt-and-road-project-on-strait-of-malacca>.

<sup>142</sup> *China, Malaysia Restart East Coast Rail Link Project After Year-Long Suspension*, CHANNEL NEWS ASIA (July 25, 2019), <https://www.channelnewsasia.com/news/asia/china-malaysia-restart-belt-road-east-coast-rail-link-11752570>.

<sup>143</sup> *East Coast Rail Link (ECRL) Project, Malaysia*, RAILWAY TECH., <https://www.railway-technology.com/projects/east-coast-rail-link-ecrl-project/> (last visited Jan. 15, 2020).

<sup>144</sup> *See Malaysia Rail Link: Improved ECRL Deal Driven by Transparency, Accountability*, THE STAR (May 9, 2019), <https://www.thestar.com.my/business/business-news/2019/05/09/malaysia-rail-link-improved-ecrl-deal-driven-by-transparency-accountability>.

<sup>145</sup> *East Coast Rail Line (ECRL) Project*, OFFICIAL PORTAL AGENSI PENGANGKUTAN AWAM DARAT, <http://www.apad.gov.my/en/land-public-transport/rail/east-coast-rail-line-ecrl-project> (last visited Jan. 15, 2020) (Malay.).

<sup>146</sup> *See Terengganu MB: Construction of ECRL Project Puts Local Residents First*, MALAY MAIL (Apr. 24, 2019), <https://www.malaymail.com/news/malaysia/2019/04/24/terengganu-mb-construction-of-ecrl-project-gives-priority-to-local-resident/1746315>.

development policies have changed significantly to confront spatial income inequalities.<sup>147</sup> The following graphic<sup>148</sup> demonstrates the scope of the project:



Malaysia Rail Link (MRL) announced that it would work on a new feasibility study and environmental impact assessment report for the ECRL.<sup>149</sup> Malaysia's Department of Environment declared that it had not yet received the Environmental Impact Assessment (EIA) and no final date had been set thus far for the submission of the report.<sup>150</sup> With the project construction and operation wholly devolved to the joint venture between Malaysia Rail Link and the state-owned China Communications Construction Company, it is well worth examining the existing EIA report dated March 2017.<sup>151</sup> The EIA Report did not contain much information on the extent of community participation in the process of

<sup>147</sup> See Francis E. Hutchinson, *Evolving Paradigms in Malaysia's Regional Development Policy*, 34 J. SOUTHEAST ASIAN ECON. 462, 462 (2017).

<sup>148</sup> Tashny Sukumaran, *Future of Malaysia's China-Backed East Coast Rail Link Hinges on Elusive Report*, S. CHINA MORNING POST (Jan. 3, 2019), <https://www.scmp.com/news/asia/southeast-asia/article/2180576/future-massive-china-backed-malaysian-rail-link-hinges>.

<sup>149</sup> Surin Murugiah, *MRL To Work on New EIA For ECRL in 3Q19*, THE EDGE MARKETS (May 9, 2019), <https://www.theedgemarkets.com/article/mrl-work-new-eia-ecrl-3q19>.

<sup>150</sup> *DOE Says Yet to Receive EIA Report on New ECRL Alignment*, MALAY MAIL (Apr. 16, 2019), <https://www.malaymail.com/news/malaysia/2019/04/16/doe-says-yet-to-receive-eia-report-on-new-ecrl-alignment/1743829>.

<sup>151</sup> See ERE CONSULTING GROUP, *EAST COAST RAIL LINK PROJECT: ENVIRONMENTAL ASSESSMENT REPORT: VOLUME 1: EXECUTIVE SUMMARY & RINGKASAN EKSEKUTIF* (2017).

environmental impact assessment. The 2017 EIA Report noted that “[l]and and property acquisition is the main impact during the pre-construction phase...people affected by the acquisition could potentially endure problems such as disruption to lives and loss of social cohesion.”<sup>152</sup> Malaysia Rail Link committed to “provide early and adequate information to the affected parties to ensure that they are well-informed about acquisition process and ensure continuous engagement.”<sup>153</sup> The 2017 EIA Report also specified that potential environmental impacts during the construction phase would include “soil erosion and sedimentation from site clearing and earthworks, flooding due to restriction of waterways, waste and spoil generation from construction activities, geological risks, increased noise and air pollution levels, ecological impacts, disruption to traffic, social impacts, and issues related to public safety.”<sup>154</sup> While the 2017 EIA Report prescribed several mitigation measures for these impacts,<sup>155</sup> the Report said nothing about regularly engaging local communities as actual development partners in ongoing consultations for this multi-province undertaking by Malaysia Rail Link and the China Communications Construction Company. Instead, Malaysia Rail Link committed to “mainstreaming environmental protection into the Project and towards self-regulation to ensure that the quality of the environment is protected during the construction of and operation of ECRL. MRL will ensure organizational commitment to environmental regulatory compliance by all personnel at all levels of the organization, including its consultants, contractors, suppliers, and all other parties involved in the Project implementation. MRL is also committed to continuous communication and engagement with all stakeholders throughout the life of the Project.”<sup>156</sup> Nothing in the 2017 EIA Report indicated that local communities impacted by the East Coast Rail Link project could have direct recourse to ensure the accountability of MRL and all parties involved in the Project’s implementation, for any environmental, social, and human rights impacts.

#### **b. Sri Lanka’s Hambantota Port and Colombo Port**

The Hambantota Port Development Project in Sri Lanka forms part of the BRI projects as part of the Maritime Silk Road, with the project antedating the announcement of the BRI (this project was started in 2009).<sup>157</sup> In December 2017, due to non-repayment of BRI debts, the Sri Lankan government turned over the Hambantota port and 15,000 acres of land around it to China for a 99 year-lease, as well as giving China controlling equity over the port.<sup>158</sup> The Hambantota Port is managed by a joint venture company formed by the Sri Lanka Hambantota Port Authority and China Merchant Port Holdings Company, with Sri Lanka’s

<sup>152</sup> *Id.* at ¶ 98.

<sup>153</sup> *Id.* at ¶ 101.

<sup>154</sup> *Id.* at ¶ 103.

<sup>155</sup> *Id.* at ¶¶ 104-65.

<sup>156</sup> *Id.* at ¶ 184.

<sup>157</sup> See Pabasara Kannangara, *Sri Lanka’s Port Development and the Role of the BRI*, ASIA DIALOGUE (May 24, 2019), <https://theasiadialogue.com/2019/05/24/sri-lankas-port-development-and-the-role-of-the-bri/>.

<sup>158</sup> Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html>; JONATHAN E. HILLMAN, *GAME OF LOANS: HOW CHINA BOUGHT HAMBANTOTA* (2018).

Hambantota Port Authority only retaining 20% equity in the joint venture company.<sup>159</sup> Even as Sri Lankan local communities had raised many concerns about the environmental impacts, land losses, and lack of public consultation from the project (along with other China-funded projects),<sup>160</sup> the port had failed various feasibility studies and still opened in 2010 with China funding 85% of the estimated US\$361 Million project costs.<sup>161</sup> Researchers had already reported that Sri Lanka's environmental impact assessment (EIA) framework had serious defects due to "lack of environmental, social protection policies and proper post monitoring plan...[as well as problems with the assessment process as to] lack of incorporate[ion] [of] cumulative effects and sustainability concepts in evaluation."<sup>162</sup>

The Hambantota Port Development Project is part of China's seaport-related projects in the Indian Ocean that have been described as "win-win cooperation between China and the developing countries in the Indian Ocean and the Gulf – a China-styled mode of development-oriented governance strategy."<sup>163</sup> The following graphic<sup>164</sup> situates the Hambantota Port contrasting with the more maritime and shipping traffic-heavy Colombo Port:



<sup>159</sup> D. Godage *Efficient Operation of the Hambantota Port*, SUNDAY TIMES (Jan. 29, 2017), <http://www.sundaytimes.lk/170129/sunday-times-2/efficient-operation-of-the-hambantota-port-226421.html>.

<sup>160</sup> Amantha Perera, *Fears Grow Over Chinese Projects in Sri Lanka*, CHINA DIALOGUE (Dec. 5, 2018), <https://www.chinadialogue.net/article/show/single/en/10954-Fears-grow-over-Chinese-projects-in-Sri-Lanka>.

<sup>161</sup> Samira Shackle, *The Cost of China's Belt and Road*, WASH. INT'L TRADE ASS'N (Oct. 16, 2018), <https://wita.org/atp-research/the-cost-of-chinas-belt-and-road/>.

<sup>162</sup> I.M. Gamalath et al., *Environmental Impact Assessment of Transport Infrastructure Projects in Sri Lanka: Way Forward*, 4 J. TROPICAL FORESTRY & ENV'T 85 (2014).

<sup>163</sup> Degang Sun, *Between Geoeconomics and Geopolitics: China's Participation in the Seaport Constructions in the Indian Ocean and the Gulf*, in THE GULF STATES, ASIA & THE INDIAN OCEAN: ENSURING THE SECURITY OF THE SEA LANES 75 (Tim Niblock et al. eds., 2018).

<sup>164</sup> Kiran Stacey, *China Signs 99-Year Lease on Sri Lanka's Hambantota Port*, FIN. TIMES (Dec. 11, 2017), <https://www.ft.com/content/e150ef0c-de37-11e7-a8a4-0a1e63a52f9c>.



In examining the takeover of the Hambantota Port, several scholars have been quick to assign blame to Sri Lanka's government for mishandling the port project altogether.<sup>165</sup> Significantly, however, neither the Sri Lankan government as the BRI borrower or China as the BRI lender have made any pronouncements in regard to the centrality of local community engagement, transparency to all stakeholders, and engagement with communities as development partners in the Hambantota Port Development Project.<sup>166</sup>

The Colombo Port City Development Project is another BRI project undertaken by a Chinese state-owned company, China Communications and Construction Company, creating massive infrastructure through land reclamation near Sri Lanka's capital of Colombo, for the amount of USD\$1.4 Billion.<sup>167</sup> The Colombo Port City Development Project is indicated as a "foreign direct investment (FDI) by CHEC Port City Colombo (Pvt) Ltd (the Project Company), a fully owned subsidiary of China Harbour Engineering Company (CHEC) whose parent company is China Communications and Construction Company (CCCC)...major components of Port City at a glance are: 1) total land area reclaimed 269 hectares..."<sup>168</sup> The December 2015 Environmental Impact Assessment (EIA) Report for this Project indicated consultations with the fishing communities to be impacted by the project,<sup>169</sup> but did not specifically indicate the nature and frequency of community engagement as actual development partners, instead couching the language on impacts to affected communities mainly from a mitigative standpoint. Similarly, the October 2017 EIA did not indicate the nature and contents of the community consultation process, nor the manner by which local communities would be engaged as actual development partners in monitoring the project. The focus of the October 2017 EIA was largely on providing proposed mitigation measures for anticipated impacts on air quality, noise and vibration, water quality, biodiversity, traffic management, water and sewerage management, solid waste management, archaeology and heritage, landscape, energy, and natural as well as man-made disaster management.<sup>170</sup> Even as fishing communities and environmental groups in Sri Lanka continue to object to the ongoing construction of the Colombo Port City metropolis on reclaimed land,<sup>171</sup> it is not shown from the project documentation if these communities are even considered as actual

<sup>165</sup> See Ning Shengnan, *Rethinking the External Debt Issue of Sri Lanka: Causes and Implications*, 74 CHINA INT'L STUD. 138 (2019); Bhagya Senaratne, *Enhancing China's Overseas Investment Image through Public Diplomacy*, 72 CHINA INT'L STUD. 166, 173 (2018).

<sup>166</sup> See Patrick Mendis, *Destiny of the Pearl: How Sri Lanka's Colombo Consensus Trumped Beijing and Washington in the Indian Ocean*, 7 YALE J. INT'L AFF. 68, 71 (2012).

<sup>167</sup> Agence France-Presse, *Chinese Firm Completes US\$1.4 Billion Land Reclamation Works for Sri Lanka's Colombo Port City Project*, S. CHINA MORNING POST (JAN. 17, 2019), <https://www.scmp.com/news/asia/south-asia/article/2182461/chinese-firm-completes-14-billion-land-reclamation-works-sri>.

<sup>168</sup> MINISTRY OF MEGAPOLIS & W. DEV., ENVIRONMENTAL IMPACT ASSESSMENT: DEVELOPMENT ACTIVITIES AND INFRASTRUCTURE FACILITIES WITHIN THE RECLAIMED LAND AREA OF PROPOSED COLOMBO PORT CITY DEVELOPMENT PROJECT 2 (2017).

<sup>169</sup> See CTR. ENGINEERING CONSULTANCY BUREAU, PROPOSED COLOMBO PORT CITY DEVELOPMENT PROJECT, COLOMBO, SRI LANKA: SUPPLEMENTARY ENVIRONMENTAL IMPACT ASSESSMENT REPORT 6 (2015).

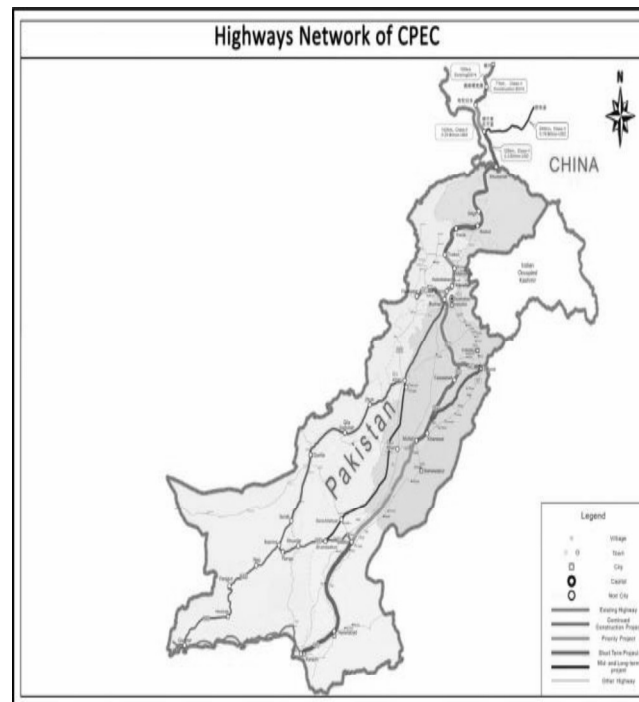
<sup>170</sup> See *Id.*

<sup>171</sup> Marcello Rossi, *Next Hambantota? Welcome to the Chinese-funded US \$1.4 billion Port City Colombo in Sri Lanka*, S. CHINA MORNING POST (May 12, 2019), <https://www.scmp.com/week-asia/geopolitics/article/3009731/next-hambantota-welcome-chinese-funded-us14-billion-port-city>.

development partners, or merely seen as immediate recipients of economic mitigation measures and compensation for the project operators.

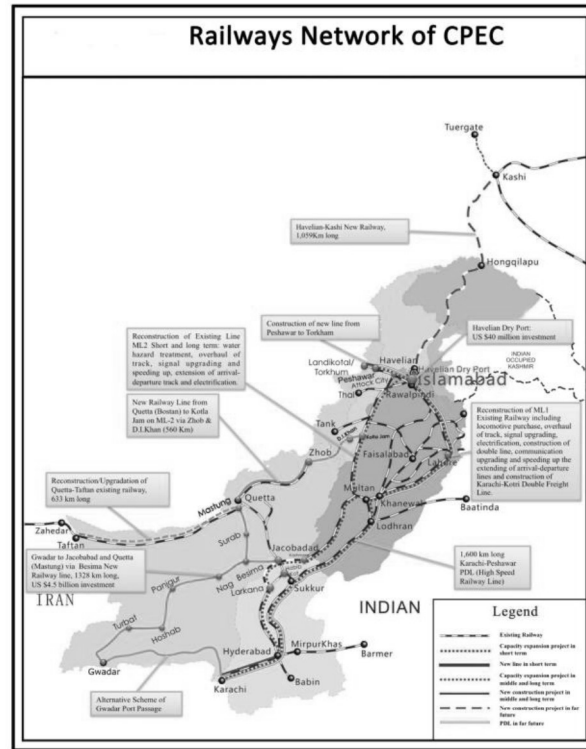
### c. China-Pakistan Economic Corridor (CPEC)

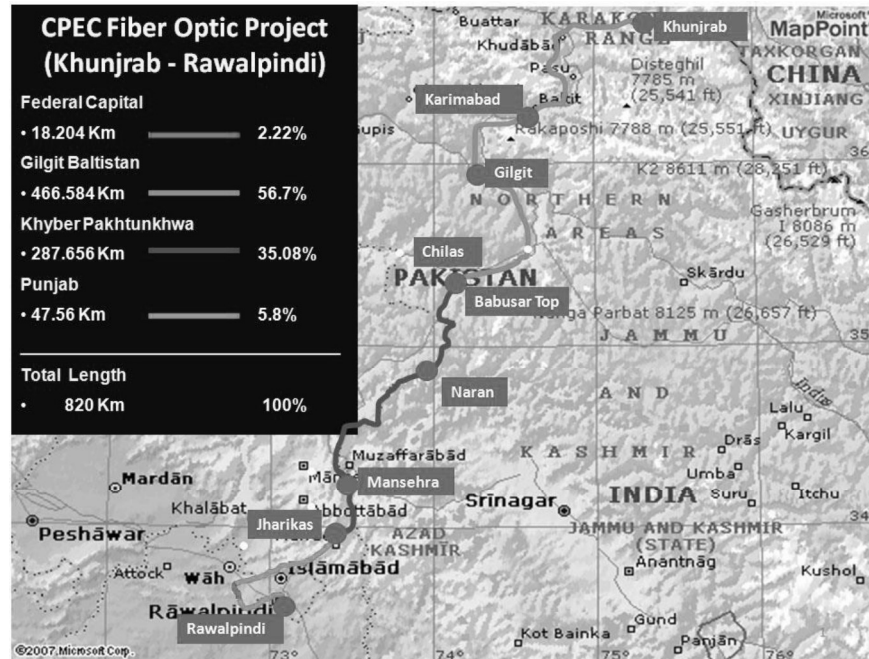
The China-Pakistan Economic Corridor (CPEC) comprises USD\$51 Billion financing for a vast array of regional infrastructure connectivity projects, spanning “integrated transport and [information technology] systems...energy cooperation, spatial layout, functional zones, industries and industrial parks, agricultural development, socio-economic development...tourism cooperation...[livelihood cooperation], financial cooperation, and human resource development.”<sup>172</sup> CPEC combines networks for highways, rail, and fiber optics, as seen below:<sup>173</sup>



<sup>172</sup> China-Pakistan Economic Corridor [CPEC], *CPEC Vision & Mission*, <http://cpec.gov.pk/vision-mission/3> (last visited Jan. 15, 2020).

<sup>173</sup> Map available at (see <https://cpec.gov.pk>) [last accessed 1 May 2020].





Scholars and practitioners have raised questions on various legal questions with respect to the nature of CPEC,<sup>174</sup> the actual development impacts of CPEC on various regions in Pakistan,<sup>175</sup> labor conditions in CPEC projects,<sup>176</sup> social impacts,<sup>177</sup> environmental impacts,<sup>178</sup> as well as deepening regional cleavages.<sup>179</sup> Concerns have also been raised regarding CPEC's non-participatory nature, tending to exclude Pakistani businesses and other local economic stakeholders,<sup>180</sup> although some have argued beneficial effects on local

<sup>174</sup> See Asif H. Qureshi, *China/Pakistan Economic Corridor: A Critical National and International Law Policy Based Perspective*, 14 CHINESE J. INT'L L. 777 (2015).

<sup>175</sup> See Shirin Lakhani, *The China-Pakistan Economic Corridor: Regional Effects and Recommendations for Sustainable Development and Trade*, 45 DENV. J. INT'L L. & POL'Y 417 (2017).

<sup>176</sup> 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 (2019).

<sup>177</sup> See Ruilian Zhang et. al., *Social Impact Assessment of Investment Activities in the China-Pakistan Economic Corridor*, 36 Impact Assessment & Project Appraisal 331 (2018).

<sup>178</sup> See Mahmood A, Khwaja et al., *Preliminary Environmental Impact Assessment (EIA) Study of China-Pakistan Economic Corridor (CPEC) Northern Route Road Construction Activities in Khyber Pakhtunkhwa (KPK), Pakistan*, SUSTAINABLE DEV. POL'Y INST. 1 (2018); Shah Meer Baloch, *CPEC's Environmental Toll*, DIPLOMAT (Apr. 18, 2018), <https://thediplomat.com/2018/04/cpecs-environmental-toll/>.

<sup>179</sup> See Maham Hameed, *The Politics of the China-Pakistan Economic Corridor*, 4 PALGRAVE COMM. 64 (2018); Abdur Rehman Shah, *How Does China-Pakistan Economic Corridor Show the Limitations of China's 'One Belt One Road' Model*, 5 ASIA & THE PAC. POL'Y STUD. 2 (2018).

<sup>180</sup> See Hammad Siddiqui & Max Scherzer, *Pakistani Businesses Consider CPEC Projects Non-Participatory*, CTR. FOR INT'L PRIV. ENTERPRISE (July 11, 2019), <https://www.cipe.org/blog/2019/07/11/pakistani-businesses-consider-cpec-projects-non-participatory/>.

Pakistanis' living standards.<sup>181</sup> What is clear, at least, from publicly available data from the CPEC website is that there is no document therein indicating the nature and frequency of local community consultations conducted (or if they are even conducted prior to project implementation) for each CPEC project. Neither is there any indication that there is any direct recourse mechanism established for local communities to articulate their concerns in an accountability process involving any environmental, social, labor, and human rights-related impacts arising from any CPEC project.

#### d. Laos' Kunming-Vientiane Railway

The Kunming-Vientiane Railway project is a 414 kilometer railway line between China's Yunnan provincial capital of Kunming and the Laotian capital of Vientiane, estimated at a project cost of around USD\$7 Billion.<sup>182</sup> This is an extremely significant project cost, since Laos remains "one of Southeast Asia's poorest countries...[with annual Gross Domestic Product of just USD\$16 Billion]...[O]f the [estimated] USD\$6 Billion cost for the China-Laos railway, the Chinese government will pay 70 percent. Laos will pay the remaining 30 percent with loans from Chinese financial institutions."<sup>183</sup> The Kunming-Vientiane Railway is intended to "connect south to lines in Thailand, Malaysia, and Singapore."<sup>184</sup>

The Financial Times reported that this project was "carried out with little public consultation. . . . Laos's government has taken on \$480m of loans from China's Eximbank, on concessional terms. The amount is equivalent to about 2 per cent of Laos's gross domestic product. However, the IMF classifies Laos as a country with an 'elevated' risk of debt distress because of its high existing debt, which amounts to nearly 65 per cent of GDP. The project's backers have not made the business plan public, so little is known about its assumptions of how many passengers will use the train. . . . [T]he main problem is that the high-speed train is driven by a political economy agenda that serves the promoting nation much more than the recipient country. . . . Apart from the debt incurred by Laos, it will also be very difficult for the Lao private sector to gain benefit from this new infrastructure, as they are less competitive than the Chinese-related business ecosystem."<sup>185</sup>

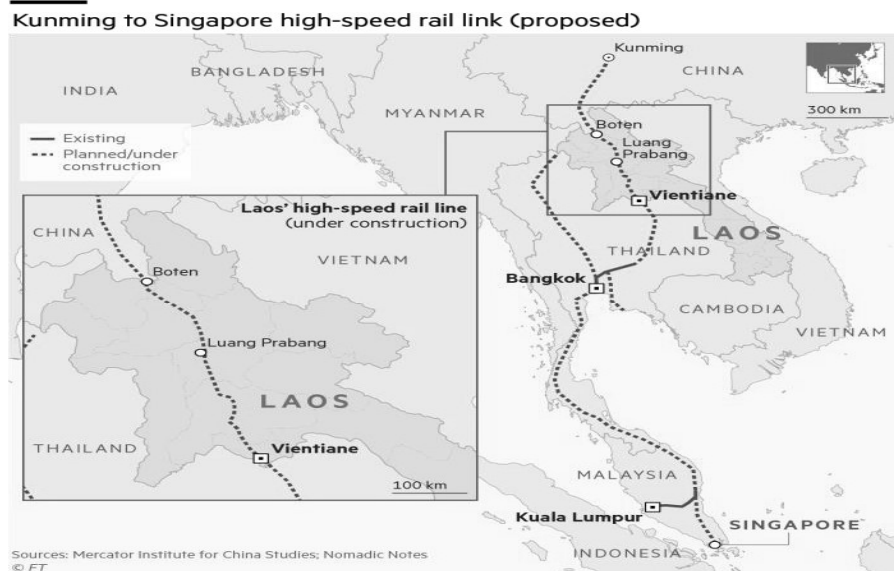
<sup>181</sup> See Shamsa Kanwal et. al., *China-Pakistan Economic Corridor Projects Development in Pakistan: Local Citizens Benefits Perspective*, 19 J. PUB. AFF. J. 1 (2019); Murad Ali, *The China-Pakistan Economic Corridor: Tapping Potential to Achieve the 2030 Agenda in Pakistan*, 4 CHINA Q. INT'L STRATEGIC STUD. 301 (2018).

<sup>182</sup> Xie Yu, *China's US\$7 Billion Railway Link to Laos is Almost Half Done, on Schedule to Begin Service in 2021*, S. CHINA MORNING POST (Mar. 21, 2019), <https://www.scmp.com/business/banking-finance/article/3002518/chinas-us7-billion-railway-link-laos-almost-half-done>.

<sup>183</sup> Ashley Westerman, *In Laos, a Chinese-Funded Railway Sparks Hope for Growth – And Fear of Debt*, NPR (Apr. 26, 2019, 5:00 PM), <https://www.npr.org/2019/04/26/707091267/in-laos-a-chinese-funded-railway-sparks-hope-for-growth-and-fears-of-debt>.

<sup>184</sup> Surya Chuen, *Gallery: The China-Built Railway Cutting Through Laos*, CHINA DIALOGUE (Aug. 2, 2019), <https://www.chinadialogue.net/article/show/single/en/11068-Gallery-The-China-built-railway-cutting-through-Laos>.

<sup>185</sup> John Reed and Kathrin Hille, *Laos's Belt and Road Project Sparks Questions Over China Ambitions*, FIN. TIMES (Oct. 29, 2019), <https://www.ft.com/content/a8d0bdae-e5bc-11e9-9743-db5a370481bc>.



A May 2019 policy paper of the Center for Global Development (CGDEV) reported on various deficiencies in the environmental and social safeguards associated with the railway project, its predominant reliance on Chinese workers to the exclusion of local Laotian labor sources, and the stresses on Laos' ability to service foreign debt.<sup>186</sup> As of this writing, the environmental impact assessment and social safeguards assessment for this project does not appear to be publicly available.

#### e. Kazakhstan's Khorgos Gateway

The Khorgos Gateway has been described as "the biggest dry port in the world...connect(ing) Kazakhstan to China by rail. Khorgos will soon enter the record books as home to the world's biggest dry port. Perhaps appropriately, Khorgos occupies one of the furthest points on Earth from any ocean."<sup>187</sup>

<sup>186</sup> SCOTT MORRIS, THE KUNMING-VIENTIANE RAILWAY: THE ECONOMIC, PROCUREMENT, LABOR, AND SAFEGUARDS DIMENSIONS OF A CHINESE BELT AND ROAD PROJECT 1 (2019).

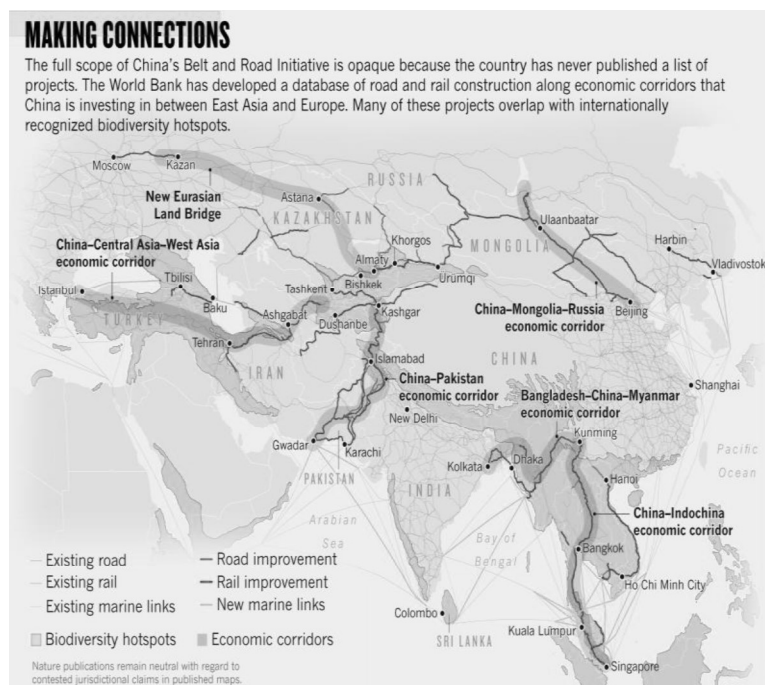
<sup>187</sup> *Khorgos: The Biggest Dry Port in The World: A Visual Explainer*, S. CHINA MORNING POST, <https://multimedia.scmp.com/news/china/article/One-Belt-One-Road/khorgos.html> (last visited Jan. 15, 2020).



The Khorgos Gateway combines a dry port and special economic zone that has been described as a “much less transformative project than its proponents believe...Khorgos is less of a global hub for trade than a regional rail terminal for Chinese goods to Russia and Central Asia.”<sup>188</sup> Beyond the reported economic underperformance of the Khorgos Gateway, scarcely anything has been reported about the environmental impacts of the project, a problematic information deficit, considering that Khorgos falls squarely within biodiversity hotspots identified by the World Bank.<sup>189</sup>

<sup>188</sup> Henry Ruehl, *The Khorgos Hype on the Belt and Road*, THE DIPLOMAT (Sept. 27, 2019), <https://thediplomat.com/2019/09/the-khorgos-hype-on-the-belt-and-road/>.

<sup>189</sup> Ehsan Masood, *How China is Redrawing the Map of World Science*, NATURE (May 1, 2019), [https://www.nature.com/immersive/d41586-019-01124-7/index.html?fbclid=IwAR173whGJs6FqZJ7THpzP-Wcp3RDdBMH1RdA\\_VcqgmL7mEK\\_r33tJ\\_TsFQ](https://www.nature.com/immersive/d41586-019-01124-7/index.html?fbclid=IwAR173whGJs6FqZJ7THpzP-Wcp3RDdBMH1RdA_VcqgmL7mEK_r33tJ_TsFQ).



The Carnegie Endowment for International Peace observed that the Khorgos Gateway provokes

deep societal concerns at grassroots level. In Kazakhstan, there is a clear veil of reticence towards the Chinese embrace. It is due to a mix of popular ignorance (no one knows exactly how many Chinese live in Kazakhstan) and disinformation. The availability of new information and direct experience of dealing with the Chinese at different levels and travel contribute to a better sense of goodwill and trust . . . but the picture is diverse, mixed and dynamic, and growing familiarity does not necessarily lead to greater amity and trust. Although there have been few public surveys on the issue, experts and officials during conversations report a palpable anxiety on the part of the locals [with] main fears in the Kazakh society: the first is that there will be an ‘invasion’ of Chinese migrants who will settle and take away local jobs. The second is that China will start questioning the border agreements and suddenly demand more land.”<sup>190</sup>

<sup>190</sup> Philippe Le Corre, *Kazakhs Wary of Chinese Embrace as BRI Gathers Steam*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Feb. 28, 2019), <https://carnegieendowment.org/2019/02/28/kazakhs-wary-of-chinese-embrace-as-bri-gathers-steam-pub-78545>.



The absence of transparency of information and open public consultations with all affected local communities as to the environmental, climate change, social, labor, and human rights impacts of Kazakhstan's Khorgos Gateway likewise does not assuage any of the local community anxieties<sup>191</sup> over this project.

As the above five case studies demonstrate, BRI projects themselves represent the infusion of China's vast surplus capital on largely non-transparent and information-sparse commercial, operational, debt repayment, and project implementation terms to civilian populations in BRI debtor states. The development model fostered under the BRI relies heavily on state to state interactions, with China largely leaving it to the BRI debtor state to be accountable to its own civilian population. Disputes involving the BRI projects are confidentially negotiated at the highest level of the Chinese government and the BRI debtor state's government, and often beyond the purview of public transparency and third-party scrutiny by civil society organizations. The 'democratic' nature of the BRI is to be seen mainly from the official consent of the BRI debtor government to the terms set by China as the BRI's sovereign lender, on the assumption that BRI debtor governments functionally respond to and consult their own local constituencies and project stakeholders. This lens of 'democracy' in financing development projects is problematic, and does not meet international standards requiring transparency, full stakeholder participation, and the broadest range of due diligence for environmental, social, labor, and other human rights-related impacts from international development projects. The 2002 United Nations Monterrey Consensus on Financing for Development stressed the importance of transparent and accountable systems for mobilizing resources for development, as well as the *shared responsibility* of debtors and creditors for preventing and resolving unsustainable debt situations:

An effective, efficient, transparent, and accountable system for mobilizing public resources and managing their use by Governments is essential. . . . While Governments provide the framework for their operation, businesses, for their part, are expected to engage as reliable and consistent partners in the development process. We urge businesses to take into account not only the economic and financial but also the developmental, social, gender, and environmental implications of their undertakings. . . . Sustainable debt financing is an important element for mobilizing resources for public and private investment. . . . *Debtors and creditors must share responsibility for preventing and resolving unsustainable debt situations.*<sup>192</sup>

The UNCTAD Consolidated Principles on Promoting Responsible Sovereign Lending and Borrowing are also particularly apropos with respect to China's role as the sovereign

<sup>191</sup> See Reid Standish, *China's Path Forward is Getting Bumpy*, ATLANTIC (Oct. 1, 2019), <https://www.theatlantic.com/international/archive/2019/10/china-belt-road-initiative-problems-kazakhstan/597853/>.

<sup>192</sup> Emphasis added. International Conference on Financing for Development, *Monterrey Consensus of the International Conference on Financing for Development*, U.N. Doc. A/CONF.198/11, annex I (Mar. 2002).

lender in the BRI, given its current largely “hands-off” approach to how BRI debtor governments incur debt and make fiscal decisions for BRI projects:

#### Responsibilities of Lenders

1. **Agency:** *Lenders should recognize that government officials involved in sovereign lending and borrowing transactions are responsible for protecting public interest (to the State and citizens for which they are acting as agents). Lenders to sovereign borrowers are dealing with agents (the government officials directly involved in the borrowing process) who owe responsibility to the State to its citizens for which they act. Any attempt by a lender to suborn a government official to breach that duty is wrongful (for example, instances of bribes or corruption).*

2. **Informed Decisions:** *Lenders have a responsibility to provide information to their sovereign customers to assist borrowers in making informed credit decisions. Applicable due diligence standards should be followed by lenders including reasonable steps to ensure that the sovereign understands the risks and benefits of the financial product being offered. The level of financial sophistication among sovereigns differs widely. Some are well informed about markets and financial techniques, others less so. The lender's responsibility increases when dealing with an unsophisticated sovereign counterparty.*

3. **Due Authorization:** *Lenders have a responsibility to determine, to the best of their abilities, whether the financing has been appropriately authorized and whether the resulting credit agreements are valid and enforceable under relevant jurisdiction(s). A lender has an independent duty to ensure to the best of its ability, that the government officials are authorized under applicable law to enter into the transaction and that the arrangement is otherwise consistent with such law. Should the lender determine that these conditions do not exist, it should desist from concluding the agreement.*

4. **Responsible credit decisions:** *a lender is responsible to make a realistic assessment of the sovereign borrower's capacity to service a loan based on the best available information and following agreed technical rules on due diligence and national accounts. Lending beyond a borrower's reasonable capacity to repay not only risks a default on the loan in question, it adversely affects the position of all other creditors of that sovereign debtor. When assessing the borrower's situation, lenders should consider the broad and real*

financial scenario, including direct and contingent liabilities according to the System of National Accounts adopted by the United Nations Statistical Commission. In a transaction in which a lender is motivated solely by commercial considerations, the lender should have a direct economic interest in assessing the borrower's repayment capacity. Credits extended to sovereign borrowers as a means of enhancing a bilateral lender's geopolitical influence, however, will involve other motivations...The desire to realize such benefits from a financing transaction should not replace a serious assessment of the borrower's repayment capacity. Lending decisions are critically dependent on the willingness of borrowers to provide timely and accurate information.

**5. Project financing:** *Lenders financing a project in the debtor country have a responsibility perform their own ex ante investigation into and, when applicable, post-disbursement monitoring of, the likely effects of the project, including its financial, operational, civil, social, cultural, and environmental implications. This responsibility should be proportional to the technical expertise of the lender and the amount of funds to be lent.* In the context of project financing, a lender carries some of the responsibility for the reasonably foreseeable effects of the project and the host government shares a corresponding responsibility. When applicable, this investigation will normally include post-disbursement monitoring of the use of the proceeds of the loan...This monitoring should be transparent and not affect any sovereign's faculty to decide on its developmental priorities.

**6. International cooperation:** *all lenders have a duty to comply with United Nations sanctions imposed against a governmental regime.* UN sanctions are imposed against a state in order to maintain or restore international peace and security. In instances of serious misconduct where sanctions are deemed to be necessary, lenders should not participate in financial transactions that evade or hamper such sanctions.

**7. Debt restructurings:** *in circumstances where a sovereign is manifestly unable to service its debts, all lenders have a duty to behave in good faith and with cooperative spirit to reach a consensual re-*

*arrangement of those obligations. Creditors should seek a speedy and orderly resolution to the problem.*<sup>193</sup>

Recalling that Chinese President Xi Jinping committed in April 2019 to ensure adoption and implementation of all international rules and standards for BRI projects,<sup>194</sup> greater confidence can be expected from BRI project financing if China internalizes both the Monterrey Consensus and the UNCTAD Consolidated Principles as part of the binding applicable law to its BRI projects. By assuming legal responsibility as potentially the world's largest single sovereign lender for all BRI projects, China could more authentically advance a responsible democratic vision for the BRI premised on the meaningful choices, informed consent, and regular community engagement and consultation with the affected civilian populations and local communities impacted by BRI projects, instead of relying largely on the capacities and political wherewithal of BRI debtor governments. A truly "win-win cooperation" to realize the right to development, as defined in Article 1(1) of the 1986 United Nations Declaration on the Right to Development, would hearken back to the participation, contribution, and enjoyment of all persons and peoples in the economic, political, social, and cultural development that realizes *all* human rights and fundamental freedoms.

The Beijing Consensus could outpace the Washington Consensus in this regard, if China commits to internalizing as hard law for all BRI projects the above international standards and norms ensuring the responsibility of sovereign lenders, as well as international standards of full information transparency and operational accountability to *all* project stakeholders beyond that of a BRI debtor government—affected local communities, civil society organizations, and all other groups absorbing the environmental, social, and human rights impacts of BRI development projects in the short and long run. Transparency and operational accountability, after all, are part and parcel of what China has already committed to as a treaty party to the ICESCR; the Paris Agreement; as part of China's Third Universal Periodic Review commitments to the Human Rights Council; as part of China's own domestic rules and regulations; and most importantly, as the binding pronouncement of Chinese President Xi Jinping to subject the BRI to all applicable international standards to international development projects.

## II. DEVELOPMENT AND HUMAN RIGHTS IN THE BRI: PARTICIPATION, TRANSPARENCY, MONITORING, IMPACTS

To reiterate, China is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), signing this treaty on October 27, 1997 and ratifying the same on March 27, 2001.<sup>195</sup> This reinforces China's responsibilities to maintain oversight over BRI projects, and particularly to ensure that Chinese state-owned companies and other Chinese firms implementing BRI projects in the territories of BRI debtor states are acting in ways that are fully consistent with the ICESCR. Consistent with the obligations to respect, protect,

<sup>193</sup> Emphasis added. U.N. Conference on Trade and Development [UNCTAD], *Principles on Promoting Responsible Sovereign Lending and Borrowing*, §§ 1 – 7, U.N. Doc. UNCTAD/GDS/DDF/2012/Misc.1 (Jan. 10, 2012).

<sup>194</sup> See *Id.* at 4.

<sup>195</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

fulfil, and remedy economic, social, and cultural rights guaranteed under the ICESCR, the Committee on Economic, Social, and Cultural Rights (CESCR) General Comment No. 24 (On State Obligations under the ICESCR in the Context of Business Activities) stresses that “States parties may be held directly responsible for the action or inaction of business entities: (a) if the entity concerned is in fact acting on that State party’s instructions or is under its control or [directly] carrying out the particular conduct at issue, as may be the case in the context of public contracts; (b) when a business entity is empowered under the State party’s legislation to exercise elements of governmental authority or if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities; or (c) if and to the extent that the State party acknowledges and adopts the conduct as its own.”<sup>196</sup> China’s ICESCR obligations may, in these circumstances, apply even for extraterritorial<sup>197</sup> conduct of Chinese state-owned companies and other Chinese firms abroad, all the more so for BRI development projects which are arguably well within the scope of control and oversight by China’s government ministries as seen from the list of official documents for the BRI.

At the very least, well beyond China’s voluminous non-binding documentation on its vision for BRI projects, it should already be requiring human rights due diligence<sup>198</sup> to be conducted by all Chinese state-owned companies and private Chinese firms implementing and operating BRI projects. Human Rights Watch understandably called for transparency and public consultations to ensure that BRI projects fully respect human rights,<sup>199</sup> precisely in a climate where China’s promotion of the BRI does not include complete disclosure of all information enabling public analysis of the human rights impacts of BRI projects. While the China Development Bank and China Export-Import Bank released its January 2016 *Emerging Sustainability Frameworks* document,<sup>200</sup> the standards indicated therein for environmental review made no reference to any international environmental treaty commitments of China and the BRI debtor state or actual domestic environmental law, with the document vaguely referring only to China’s possible inclusion of “environmental and social responsibilities...in [a] loan contract.”<sup>201</sup> In the conduct of environmental impact assessments (EIAs) for overseas projects, the same document refers to the host country’s environmental policies and standards for evaluation, and “[w]hen the host country does not

<sup>196</sup> Comm. on Econ., Soc. and Cultural Rights, UN. Doc. E/C.12/GC/24, at 4 (2017); See also Diane A. Desierto, *The ICESCR as a Legal Constraint on State Regulation of Business, Trade, and Investment: Notes from CESCR General Comment No. 24 (August 2017)*, EJIL: TALK! (Sept. 23, 2017), <https://www.ejiltalk.org/the-icescr-as-a-legal-constraint-on-state-regulation-of-business-trade-and-investment-notes-from-cescr-general-comment-no-24-august-2017/>.

<sup>197</sup> See Comm. on Econ., Soc. and Cultural Rights, UN. Doc. E/C.12/GC/24, at 8 – 10 (2017); See also Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11 HUM. RTS. L. REV. 1 (2011).

<sup>198</sup> U.N. HUM. RTS.: OFFICE OF THE COMM’R, THE CORPORATE RESPONSIBILITY TO PROTECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE 5 – 6 (2012).

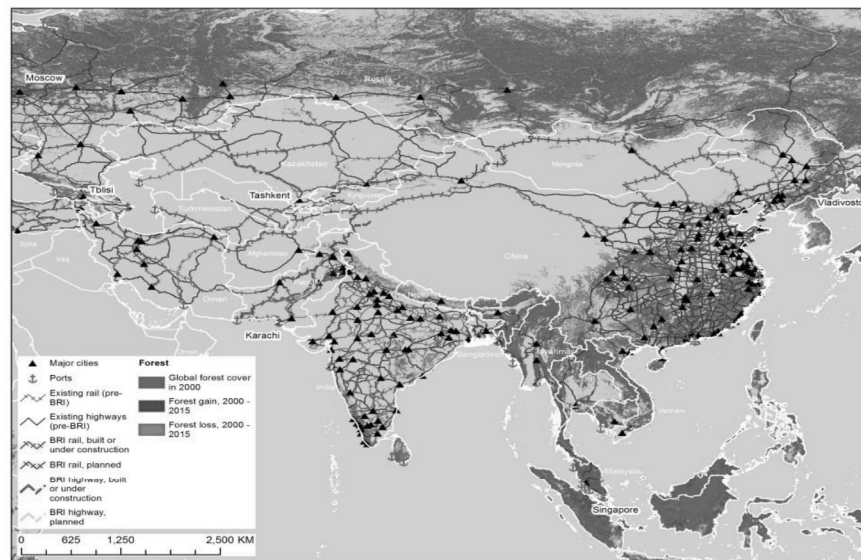
<sup>199</sup> China: ‘Belt and Road’ Projects Should Respect Rights: Commit to Transparency, Public Consultation at Upcoming Forum, HUM. RTS. WATCH (Apr. 21, 2019), <https://www.hrw.org/news/2019/04/21/china-belt-and-road-projects-should-respect-rights>.

<sup>200</sup> See FRIENDS OF THE EARTH (U.S.), EMERGING SUSTAINABILITY FRAMEWORKS: CHINA DEVELOPMENT BANK AND CHINA EXPORT-IMPORT BANK (2016).

<sup>201</sup> *Id.* at 29.

have a complete environmental protection mechanism or lacks an environmental or social impact assessment policy and standards, *Chinese standards* or international standards should be referred to.”<sup>202</sup> The same document also baffles, in that it explicitly draws a caveat that if “a borrowing nation is unable to provide a bank or sovereign guarantee, it is possible that a *natural resource* can be used as a replacement for a sovereign guarantee.”<sup>203</sup>

Having a borrowing State actually offer up natural resources—which it merely holds in trust for its entire civilian population—as a sovereign guarantee for debts incurred to China, violates several ICESCR obligations: (1) the obligation under ICESCR Article 1(2) never to deprive any people of its own means of subsistence; (2) the obligation not to endanger a population’s rights to the enjoyment of the highest attainable standard of health under ICESCR Article 12; (3) the ICESCR right to take part in cultural life under ICESCR Article 15 (especially when the natural resource is central to a local community’s identity, culture, and way of life); as well as (4) the rights of the BRI debtor country’s population to an adequate standard of living and the continuous improvement of living conditions under ICESCR Article 11. There is increasing urgency for China to exercise regular institutional oversight over the role of its state-owned companies and other Chinese firms in BRI projects, given reports of various environmental, labor, and human rights impacts. A January 2019 article reported on the increased deforestation risks and associated risks to biodiversity, carbon storage, water provision, and other eco-services, resulting from the massive forest cover change for declared BRI projects, illustrating the estimated forest cover loss below:<sup>204</sup>



<sup>202</sup> *Id.* at 30 (emphasis added).

<sup>203</sup> *Id.* at 31(emphasis added).

<sup>204</sup> Elizabeth Losos et al., *The Deforestation Risks of China's Belt and Road Initiative*, BROOKINGS (Jan. 28, 2019), <https://www.brookings.edu/blog/future-development/2019/01/28/the-deforestation-risks-of-chinas-belt-and-road-initiative/>.

Some policy practitioners argue that the BRI's threat to human rights and good governance is inherent in the nature of the BRI's model of development financing:

To understand how the Belt and Road Initiative can threaten human rights and good governance, consider first how its projects are financed. Thus far, China has largely favored loans over grants. It is not a member of the Paris Club of major creditor nations, and it has shown little inclination to adhere to internationally recognized norms of debt sustainability, such as the sovereign lending principles issued by the United Nations Conference on Trade and Development. At the same time, many of the recipient countries participating in the project lack the capability to assess the long-term financial consequences of China's loans — or they may simply accept them, assuming the bills will come due on a future government's watch... Ballooning, unsustainable debt is the predictable result. Sri Lanka, where in 2017, some 95 percent of government revenue went to debt repayment, represents the best-known example of Belt and Road's negative impact on a country's balance sheet. But Sri Lanka is only the most prominent case; a recent study by the Center for Global Development identified eight countries — Djibouti, the Maldives, Laos, Montenegro, Mongolia, Tajikistan, Kyrgyzstan, and Pakistan — that are at particular risk of debt distress due to future Belt and Road-related financing.

Naturally, large government-backed loans to foreign countries come with political strings attached. The potentially destructive international economic consequences of failing to make repayments breeds long-term dependence on China and expands Beijing's influence. As a result, recipient countries will find their foreign-policy choices constrained — even if future governments seek to exit Beijing's orbit....

The Belt and Road Initiative provides a vector through which China can exert influence well beyond countries' foreign policy choices. The geographic expanse covered by the initiative includes many nations with high levels of corruption, and with domestic institutions that range from fragile democracies to full-blown autocracies. With Chinese companies being generally less transparent than their international peers, and with Beijing's zeal to curb bribery and corporate malfeasance limited to its domestic economy, a massive influx of Chinese funds into countries with weak governance is likely to exacerbate ongoing corruption problems. And given that some projects are clearly linked to geopolitical objectives — like gaining control over commercial assets with potential military uses — Beijing may well employ graft to ensure that foreign political elites look favourably on its offers.

China's planned development of a "new digital Silk Road has received comparatively less attention than other elements of the initiative but is equally troubling. China's digital blueprint seeks to promote information technology connectivity across the Indian Ocean rim and Eurasia through new fiber optic lines, undersea cables, cloud computing capacity and even artificial intelligence research centers. If realized, this ambitious vision will serve to export elements of Beijing's surveillance regime. Indeed, Chinese technology companies already have a track record of aiding repressive governments. In Ethiopia, likely prior to the advent of Belt and Road, the *Washington Post* reports that China's ZTE Corporation "sold technology and provided training to monitor mobile phones and Internet activity." Today, Chinese tech giant Huawei is partnering with the government of Kenya to construct "safe cities" that leverage thousands of surveillance cameras feeding data into a public security cloud "to keep an eye on what is going on generally" according to the company's promotional materials. Not all elements of China's domestic surveillance regime are exportable, but as the "New Digital Silk Road" takes shape, the public and online spaces of countries along it will become less free.

Beyond fueling corruption and enhancing surveillance, the initiative will stifle free speech, at a minimum by strengthening Beijing's ability to silence criticism. States financially beholden to China will become less willing to call out Beijing's domestic human rights abuses, for instance, and less eager to object to its foreign-policy practices. This dynamic is already playing out within the European Union. In mid-2017, for the first time, the EU failed to issue a joint condemnation of China at the U.N. Human Rights Council. Greece, which had recently received a massive influx of Chinese investment into its Port of Piraeus, scuttled the EU statement. Other cash-strapped democratic governments, when confronting the choice between Belt and Road's immediate – even if one-sided – economic benefits and the need to defend human rights globally, may well follow Greece's example. Similarly, companies dependent on the Chinese market are already acquiescing to Beijing's demands – such as by firing an American employee who "liked" a pro-Tibetan independence tweet – and by self-censoring, as in the efforts by some Hollywood producers to ensure that films contain no lines (supportive of Tibet, say, or critical of Xi Jinping) that might arouse anger within the Chinese Communist Party. As the initiative extends its reach, it is easy to imagine government officials feeling similarly compelled."<sup>205</sup>

---

<sup>205</sup> Richard Fontaine & Daniel Kliman, *On China's New Silk Road, Democracy Pays a Toll: China's Vast Foreign Investment Program Comes at a Sharp Cost to Human Rights and Good Governance*, FOREIGN POL'Y (May 16, 2018), <https://foreignpolicy.com/2018/05/16/on-chinas-new-silk-road-democracy-pays-a-toll/>.



In contrast, however, United Nations Secretary-General Antonio Guterres declared that the BRI could also be an important platform of opportunity to realize the Sustainable Development Goals and commitments on climate change, remarking that the United Nations is “poised” to support a BRI that is fully aligned with the Sustainable Development Goals:

...China's leadership on climate action is helping to show the way. New renewable energy jobs in China now outnumber those created in the oil and gas industries. In 2017, China invested over \$125 billion in renewable energy, an increase of at least 25 per cent over the previous year. And China's new cutting-edge transmission line that sends electricity along a pathway 600 miles longer than anything built to date is a further potential boon for renewables. China also played a pivotal role in building bridges and securing an agreement at last December's United Nations Climate Conference in Katowice — and will host next year's second Global Sustainable Transport Conference...

In moving forward, I would point to three very important opportunities that can be seized. First, the world will benefit from a Belt and Road Initiative that accelerates efforts to achieve the Sustainable Development Goals. The five pillars of the Belt and Road — policy coordination, facilities connectivity, unimpeded trade, financial integration and people-to-people exchanges — are intrinsically linked to the 17 Sustainable Development Goals. These are conceptual pillars that can be translated into real-life progress for all people.

United Nations country teams stand ready to support Member States in capacity- and governance-building, and in achieving a harmonious and sustainable integration of the Belt and Road projects in their own economies and societies in accordance with national development plans, anchored in the 2030 Agenda for Sustainable Development.

Second, the world needs to take profit of the Belt and Road Initiative to help close significant financing gaps for achieving the Sustainable Development Goals, especially in the developing world, in particular, the need for about \$1 trillion needed for infrastructure investments in developing countries. This underlines the importance of economic growth that can generate inclusive, sustainable and durable social and environmental gains.

Third, I see the Belt and Road Initiative as an important space where green principles can be reflected in green action. Countries today not only require the physical roads and bridges to connect people and markets; they

need roads and bridges from the unsustainable, fossil-fueled grey economy to a clean, green, low-carbon energy future. Fully expanding our policy options for green and sustainable development backed by green financing instruments must become the new norm. In these three areas and more, the United Nations is poised to support the alignment of the Belt and Road Initiative with the Sustainable Development Goals, to share knowledge, and to make the most of the opportunities of this large-scale initiative for maximum sustainable development dividends. Let us work together to restore trust by making good on the shared promise of the 2030 Agenda and our common commitment to leave no one behind.”<sup>206</sup>

As of this writing, it is not yet known whether China has required the conduct of human rights impact assessments for all BRI development projects.<sup>207</sup> It is also unknown if China has institutionalized human rights due diligence requirements with appropriate, meaningful, and regular consultation and cooperative mechanisms with indigenous peoples and local communities impacted by BRI development projects, taking into account China’s explicit commitments on climate change and commitments to align the BRI with the Sustainable Development Goals.<sup>208</sup> Requiring these human rights impact assessments for BRI development projects is arguably well within the purview of China’s treaty obligations to protect all rights under the ICESCR. As the CESCR reminded in General Comment No. 24:

16. The obligation to protect entails *a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights.* States should adopt measures such as imposing *due diligence requirements to prevent abuses of Covenant rights in a business entity’s supply chain and by subcontractors, suppliers, franchisees, or other business partners.*

17. States parties should ensure that, where appropriate, the impacts of business activities on indigenous peoples specifically (in particular, actual

<sup>206</sup> Press Release, Office of the United Nations Secretary-General, United Nations Poised to Support Alignment of China’s Belt and Road Initiative with Sustainable Development Goals, Secretary-General Says at Opening Ceremony U.N. Press Release SG/SM/19556, (Apr. 26, 2019).

<sup>207</sup> See WORLD BANK GROUP & NORDIC FUND, HUMAN RIGHTS IMPACT ASSESSMENTS: A REVIEW OF THE LITERATURE, DIFFERENCES WITH OTHER FORMS OF ASSESSMENTS, AND RELEVANCE FOR DEVELOPMENT (2013) (discussing Human Rights Impact Assessments).

<sup>208</sup> See *Jointly Advancing the Belt and Road Initiative to Achieve the SDGs*, UNDP (Feb. 27, 2019), <http://www.cn.undp.org/content/china/en/home/presscenter/pressreleases/2019/jointly-advancing-the-belt-and-road-initiative-to-achieve-the-sd.html>. See also Yuanbo Li & Xufeng Zhu, *The 2030 Agenda for Sustainable Development and China’s Belt and Road Initiative in Latin America and the Caribbean*, 11 SUSTAINABILITY 1 (2019); Ling Jin, *Synergies Between the Belt and Road and the 2030 SDGs: From the Perspective of Development*, 6 ECON. & POL. STUD. 278 (2018).

or potential adverse impacts on indigenous peoples' rights to land, resources, territories, cultural heritage, traditional knowledge and culture) are incorporated into human rights impact assessments. *In exercising human rights due diligence, businesses should consult and cooperate in good faith with the indigenous peoples concerned through indigenous peoples' own representative institutions in order to obtain their free, prior and informed consent before the commencement of activities.* Such consultations should allow for identification of the potentially negative impact of the activities and of the measures to mitigate and compensate for such impact. They should also lead to design mechanisms for sharing the benefits derived from the activities, since companies are bound by their duty to respect indigenous rights to establish mechanisms that ensure that indigenous peoples share in the benefits generated by the activities developed on their traditional territories.

*States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused, for instance through lowering the criteria for approving new medicines, by failing to incorporate a requirement linked to reasonable accommodation of persons with disabilities in public contracts, by granting exploration and exploitation permits for natural resources without giving due consideration to the potential adverse impacts of such activities on the individual and on communities' enjoyment of Covenant rights, by exempting certain projects or certain geographical areas from the application of laws that protect Covenant rights, or by failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all. Such violations are facilitated where insufficient safeguards exist to address corruption of public officials or private-to-private corruption, or where, as a result of corruption of judges, human rights abuses are left unremedied."*<sup>209</sup> (Italics added.)

Thus far, however, China has not released any official documentation showing how it would operationally and legally align all BRI development projects with the Agenda 2030 Sustainable Development Goals or the Paris Agreement on Climate Change. Following from the April 2019 pronouncement of Chinese President Xi Jinping that the BRI would adopt all international laws, rules, and standards for best practices in development-financed projects,<sup>210</sup> it would be consistent with this pronouncement (and wisely respond to many

<sup>209</sup> Comm. On Economic, Social and Cultural Rights, UN. Doc. E/C.12/GC/24, at 5 – 6 (2017).

<sup>210</sup> See Ben Blanchard, *China says Silk Road not Geopolitical Tool, Understands Concerns*, REUTERS (Apr. 19, 2019), <https://www.reuters.com/article/us-china-silkroad-idUSKCN1RV09F>.

concerns raised about human rights impacts of BRI projects<sup>211</sup>) if China was to embed all of these binding legal commitments in international human rights law (especially the International Covenant on Economic, Social and Cultural Rights to which China is a party) as well as climate change treaty law directly into the operational and programmatic contracts for each and every BRI project.

China's ICESCR commitments—which should be implemented domestically by China<sup>212</sup>—could also be implemented by treating economic, social, and cultural rights under the ICESCR as part of the fabric of domestic “laws, regulations, policies, and standards” that China insists must be complied with by any foreign investment, in order to qualify for protective coverage in China's around 145 international investment agreements thus far.<sup>213</sup> These “in accordance with law”<sup>214</sup> clauses are present in many Chinese international investment agreements,<sup>215</sup> and would help ensure that before any Chinese state-owned companies or other Chinese firms (financiers, operators, contractors, among others) could resort to investor-State arbitration mechanisms against BRI debtor countries (especially those enforcing their domestic regulatory prerogatives to protect the environment, ensure respect for human rights, and address any labor and social impacts), these Chinese companies and firms must show that their investment indeed qualifies for protection under an existing

<sup>211</sup> See Oliver Ward, *Is China Meeting Its International Environmental and Human Rights Obligations on BRI?*, ASEAN TODAY (Apr. 23, 2019), <https://www.aseantoday.com/2019/04/is-china-meeting-its-international-environmental-and-human-rights-obligations-on-bri/>.

<sup>212</sup> See Zou Keyuan, *International Law in the Chinese Domestic Context*, 44 VAL. L. REV. 935, 936 (2010).

<sup>213</sup> See *International Investment Agreements (China)*, INT'L INV. AGREEMENTS NAVIGATOR, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> (last visited Jan. 15, 2020).

<sup>214</sup> See Rahim Moloo & Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 FORDHAM INT'L L.J. 1473 (2011).

<sup>215</sup> See Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments, China – Tanz., art. I, Mar. 24, 2013, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5488/download>. See also Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, China – Uzb., art. I, Nov. 8, 2011, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3357/download>; Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the People's Republic of China, China – Colom., art. I, Nov. 22, 2008, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/720/download>; Agreement Between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, China – Mex., art. I, July 11, 2008, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/759/download>; Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investments, China – S. Kor., art. I, Sept. 7, 2007, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3338/download>; Agreement Between the People's Republic of China and the Government of the Republic of Uganda on the Reciprocal Promotion and Protection of Investments, China – Uganda, art. I, May 27, 2004, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/790/download>; Agreement Between the Government of the People's Republic of China and the Government of the Republic of Guyana on the Promotion and Protection of Investments, China – Guy., art. I, Mar. 27, 2003, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/739/download>; Agreement Between the Government of the Republic of Trinidad and Tobago and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments, China – Trin. and Tobago, art. I, July 22, 2002, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/787/download>.

Chinese international investment agreement with a BRI debtor country. China can show its readiness to ensure compliance with ICESCR commitments, in line with CESCR General Comment No. 24, by purposely recognizing that the host State's international environmental, labor, and all other human rights treaty commitments forms part of that corpus of host State law to which all foreign investments operated by Chinese firms should comply. The absence of clear legal and operational commitments of China under the BRI thus far on ensuring local communities' participation, access, and transparency with respect to BRI project information, as well as the design of an open monitoring system and system for redress within BRI development projects for the actual stakeholders well beyond the governments that sign the contracts for these projects—such as civil society organizations, local communities, indigenous peoples, among others—is particularly problematic for Chinese President Xi Jinping's articulated April 2019 commitment that all BRI development projects will follow international rules, norms, standards, and best practices, and especially so for China's binding international legal commitments under the ICESCR, the Paris Agreement on Climate Change, China's own domestic regulations governing foreign investment activities and foreign lending, and China's specific voluntary commitments made to the Human Rights Council during its Third Universal Periodic Review.

**CONCLUSION: DEVELOPMENT IS HUMAN RIGHTS AND HUMAN RIGHTS IS  
DEVELOPMENT: PATHS FORWARD FOR THE BRI**

The BRI has the potential for progress, and likewise the potential for peril. On the one hand, China's commitment of massive surplus funds as investment or sovereign loans is an opportunity to access much needed capital for over 70 BRI debtor States around the world, in a manner that may or may not be as stringent with conditionalities associated with other types of foreign loans or foreign direct investment from international financial institutions or external capital markets. Thus far, there has not been any focused and detailed research streams comparing the risks of incurring foreign debt and investment from the "Beijing Consensus," as opposed to historically dominant paradigms under the "Washington Consensus." Both models of development financing have to be scrutinized continuously for their actual human rights impacts on a case by case, project by project basis—from the lens of the ultimate constituencies of foreign investment and debt: the affected civilian populations who not only have to assume the burden of repayment years down the line, but who also have to suffer any negative externalities from these development projects in the hope that these projects truly redound to these populations' rights to development. Admittedly, the right to development, as of this writing, remains pending in treaty form with the draft Convention on the Right to Development,<sup>216</sup> and is, at best, argued as a crystallizing or emerging customary norm. But it should be clear that this emerging right is not in the least simply about the narrower scope of "rights-based *approaches* to development,"<sup>217</sup> which focus largely on ensuring human rights compliance throughout the process of international

<sup>216</sup> See Human Rights Council, *Draft Convention on the Right to Development*, A/HRC/Wg.2/21/2 (Jan. 17, 2020).

<sup>217</sup> See Varun Gauri & Siri Gloppen, *Human Rights-Based Approaches to Development: Concepts, Evidence, and Policy* 485 (Policy Research, Working Paper No. 5938, 2012).

development aid programming decisions. The right to development is squarely applicable to a country's foreign lending and/or foreign investment policies, precisely because it imposes a clear responsibility to ensure that every person and all peoples participate, contribute, and enjoy economic, political, social and cultural development "in which all human rights and fundamental freedoms [are realized]"<sup>218</sup> or "that is consistent with or based on all human rights and fundamental freedoms."<sup>219</sup> Either way, the right to development speaks not only to the processes of participation, contribution, and enjoyment of development, but with the *substantive* qualification of human rights and fundamental freedoms as the ultimate premise of development. Soaring skyscrapers, railways, bridges, infrastructure projects, mining projects, energy projects, telecommunications are simply objects of infrastructure, and the employment and economic growth associated with these forms of economic activity cannot be singularly equated with the process and outcomes of human development as contemplated in the right to development.

But would embracing human rights as the premise of the right to development amount to another form of "human rights imperialism" characterized by many scholars<sup>220</sup> critical about a sense of undue privileging of human rights protection throughout all aspects of national and international life? Are human rights scholars, lawyers, defenders, practitioners, researchers simply imposing human rights standards (Western, or otherwise) on around 70 BRI countries that have decided to accept China's vast credit and investment infusions, presumably out of a sense that the governments of the BRI countries know best how to realize the human rights of their own populations?

To ask the question, in my view, is to answer it. The real imperialism lies with instantiating the State—whether through the BRI borrowing nation or China as the sovereign lender or investor—as somehow the sole or primary bearer of human rights or the gatekeeping entity for the protection of individual or group human rights. Human rights were never vested in governments, but are inherent, indivisible, interdependent, and universal on the premise of the ultimate value of the *equal moral worth*<sup>221</sup>—the actual human dignity—of the individual, his or her relationships and associations and communities, and the whole corpus of individuals, groups, and communities that forms any State's population. Assuming that queries about human rights in State decision-making is somehow 'imperialist' because only the government has the elected mandate of a population is a static conception of that mandate—at no point, in the delegation of power by the governed to the governors, did we as individuals, groups, local communities and populations of States surrender our continuing ability to hold governments to account for the decisions they make. Human rights remains, as it has always been, a residually supreme source of exacting accountability under the social contract. In the age of the Agenda 2030 for Sustainable Development, the Paris Agreement

<sup>218</sup> G.A. Res. 41/128, Declaration on the Right to Development, at art. 1 (Dec. 4, 1986).

<sup>219</sup> *Id.* at footnote 24, at article 4 therein.

<sup>220</sup> See Fidèle Ingiyimbere, *Domestication Human Rights: A Reappraisal of their Cultural-Political Critiques and their Imperialistic Use* (April 2016) (unpublished doctoral dissertation, Boston College); BONNY IBHAWOH, *IMPERIALISM AND HUMAN RIGHTS: COLONIAL DISCOURSES OF RIGHTS AND LIBERTIES IN AFRICAN HISTORY* (SUNY Press ed., 2006); MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (Princeton University Press ed., 2001).

<sup>221</sup> Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 EUR. J. INT'L L. 931, 934 (2008).

on Climate Change, the International Bill of Rights (both the International Covenant on Civil and Political Rights and the ICESCR) and the bulwark of international human rights treaties and legal commitments of all States under international law, it remains a serious phenomenon that neither the “Beijing Consensus,” the “Washington Consensus,” or any other international development lending and investment institutions have given firm answers on whether they do internalize the entirety of international human rights law in development lending and foreign investment financing practices.<sup>222</sup> To a certain extent, international financial institutions and groupings such as the World Bank and the OECD have transparently adopted identifiable standards,<sup>223</sup> the Equator Principles on social and environmental risk assessment,<sup>224</sup> and other operational directives on environmental and social rights, and created some accountability mechanisms that have been opened for direct access of civilian populations affected by development projects such as through the World Bank Inspection Panel and other compliance ombudsmen. The availability of information access, transparency, and some procedural or institutional recourse in these settings—no matter how much they are often critiqued—has at least enabled open contestations, conversations, and polemics on development with actual affected communities. The BRI development projects thus far do not appear to possess similar transparency and information accessibility, much more actual environmental, social and human rights internalization in the operational rules for project implementation and execution. The absence of this baseline of needed information for affected communities who will have to live with the consequences of the BRI projects concluded by their governments with China, itself hollows out any future meaningful or effective remedy or recourse they might have for their felt and lived experiences of any human rights, climate change, and environmental impacts from the BRI projects.

Taking into account Chinese President Xi Jinping’s April 2019 declaration to align the BRI with all international laws, rules, standards, and best practices for development-financed investment projects, China’s existing treaty commitments under the ICESCR, the Paris Agreement on Climate Change, China’s expressed support for Agenda 2030 for Sustainable Development, as well as China’s voluntary commitments to the Human Rights Council during China’s Third Universal Periodic Review, alongside the emerging or crystallizing right to development, there should be nothing extraordinary about now taking the path of verifying, monitoring, and ensuring international human rights compliance from the negotiation, planning, implementation up to the full operation of the BRI projects. There are many pathways for China to achieve and realize its stated commitments to international human rights and operationalize the same in the BRI in collaboration with the BRI debtor states, the United Nations, and all other affected constituencies of BRI projects. The

<sup>222</sup> See KIRK HERBERTSON ET AL., A ROADMAP FOR INTEGRATING HUMAN RIGHTS IN THE WORLD BANK GROUP (2010).

<sup>223</sup> See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT & THE WORLD BANK, INTEGRATING HUMAN RIGHTS INTO DEVELOPMENT: DONOR APPROACHES, EXPERIENCES, AND CHALLENGES, (2013).

<sup>224</sup> EQUATOR PRINCIPLES, THE EQUATOR PRINCIPLES JULY 2020 (2020).

following five pathways—each of which can be the object of separate streams of research in sovereign development financing—are sketched for future research:

**a. Transparency of BRI negotiations with host constituencies.**

The BRI suffers not just from perceived lack of legitimacy in contemporary opinion or commentaries, but from the vacuum on legal accountability to civilian populations in BRI debtor states, largely because the terms of these BRI development projects are negotiated and concluded in considerable secrecy at the intergovernmental or inter-State level. Rather than engaging in any attempt at global media propaganda or publicity campaigns, China could redress the clamor for transparency by practicing the recommendations of the UNCTAD Consolidated Principles on Responsible Sovereign Lending and Borrowing in all of its financing contracts for the BRI, ensuring that China's responsibilities as a sovereign borrower include acknowledging the public interest responsibilities of BRI debtor states' government officials; applying due diligence and transparent information to BRI debtor states' many constituencies (and not just finance ministries) to ensure that the terms of BRI financing are clearly understood by all affected communities; making realistic assessments of the BRI debtor state's ability to pay, based on comprehensive due diligence including meaningful consultations with affected communities from the prospective BRI development project; ensuring responsible ex-ante and post-disbursement investigation and monitoring of all the impacts of BRI development projects.

**b. Joint partnership governance over BRI projects.**

BRI development projects do not appear to be community-driven, and it is not clear the extent to which affected communities were consulted (if at all) in determining their needs for infrastructure, energy, telecommunications, mining, or all other types of BRI development projects. The long-term nature of BRI development projects makes it clear that China should be partnering not just with BRI debtor governments, but also directly with affected local communities for needs assessment, consultations on project development and implementation, and the monitoring and evaluation of BRI project impacts. It is not enough for China to leave it to a BRI debtor government to ensure that human rights, climate, change, environmental, labor, social and all other commitments are met in a BRI development project. China's ICESCR obligations are treaty commitments that, as elaborated in General Comment No. 24,<sup>225</sup> makes it imperative for a sovereign lender or investor such as China to take an active hand in ensuring that all human rights of affected populations are respected, protected, facilitated or fulfilled, and that any human rights violations committed in a BRI development project could be remedied either under the BRI debtor state's domestic law and institutions or under international human rights law. Treating affected communities equally as local partners in BRI development projects—with full transparency, meaningful

---

<sup>225</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social, and Cultural Rights in the context of business activities, paras. 13, 16, 17, 18, 26-28, 32-33, 39, 43-44.



consultations, and the community's shared ownership of oversight for project impacts—would be more consistent with the expectations of participation, contribution, and enjoyment of such economic, cultural, political, and social development and realization of all human rights and fundamental freedoms under the right to development.

**c. Open monitoring and accountability of BRI projects to all affected stakeholders**

Thus far, there has not been any authoritative mechanism set up for the resolution of any business and human rights disputes under the BRI development projects. While there has been a steady rise in contract-based arbitrations between China and BRI debtor states,<sup>226</sup> China has not announced any direct recourse mechanism for populations that experience human rights, climate change, environmental, labor, or social impacts from BRI development projects. China has announced that Chinese international commercial courts in Xi'an, Shenzhen, and Beijing would adjudicate BRI disputes,<sup>227</sup> these new international commercial courts are wholly composed of judges from China<sup>228</sup> and have been subject to some speculation as to their possible impartiality in cross-border disputes of China with BRI borrower states. Moreover, it is doubtful if the subject-matter jurisdiction of these courts would extend beyond contract claims, into tort claims premised on human rights, environmental, and/or labor violations. China could address this gap by creating a similar accountability mechanism such as the World Bank Inspection Panel (or other compliance procedures within the Independent Accountability Mechanisms Network), or it could create the opportunity for affected individuals or communities' direct recourse in the BRI contracts themselves through adoption of the Hague Rules for Business and Human Rights Arbitration.<sup>229</sup>

**d. Publicly available country and community impact assessments**

China's commitments to realize the Agenda 2030 for Sustainable Development—alongside all its stated commitments under the ICESCR, the Paris Agreement on Climate Change, as well as in its Third Universal Periodic Review at the Human Rights Council—

<sup>226</sup> See Aisha Nadar, *Construction Arbitration in the Context of China's Belt and Road Projects*, GLOB. ARBITRATION REVIEW (Oct. 31, 2019), <https://globalarbitrationreview.com/chapter/1175762/construction-arbitration-in-the-context-of-china%E2%80%99s-belt-and-road-projects>; See also Josephine Ma, *Is this Just the Beginning of 'Belt and Road' Disputes Between China and its Partners?: As Beijing's Ambitious Initiative Turns Five the Time is Ripe for Business Disagreements to Arise*, S. CHINA MORNING POST (Oct. 8, 2018), <https://www.scmp.com/news/china/diplomacy/article/2164105/just-beginning-belt-and-road-disputes-between-china-and-its>.

<sup>227</sup> Matthew S. Erie, *Update on the China International Commercial Court*, OPINIO JURIS (May 13, 2019), <http://opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court%E2%80%99s>.

<sup>228</sup> Nicolas Groffman, *Meet the 8 Chinese Judges Who'll Sit on Belt and Road Cases*, S. CHINA MORNING POST (Sept. 25, 2018), <https://www.scmp.com/week-asia/economics/article/2165567/meet-8-chinese-judges-wholl-sit-belt-and-road-cases>.

<sup>229</sup> CENTER FOR INTERNATIONAL LEGAL COOPERATION, THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION, (2019).

would readily encompass transparency to independent third-party assessment of country and community impacts of BRI development projects. As seen in the five case studies featured in this paper, such reports of environmental and social impact assessments are variably and thinly available. China could centralize data and documentation on the BRI and make the same openly accessible to all BRI debtor States, but also the United Nations and human rights treaty bodies—which could assist in tracking performance of commitments under Agenda 2030, the Paris Agreement on Climate Change, the ICESCR, and international human rights obligations.

**e. Embedded human rights auditing**

In the long-term, China could foreseeably anticipate any regulatory changes that could occur from BRI debtor states' enforcement of environmental, labor, social, and all other human rights laws to BRI development projects—and especially in a manner that would not adversely affect project risks or anticipated investment returns—if China itself were to deliberately embed comprehensive pre- and post-human right auditing<sup>230</sup> throughout the operation of a BRI development project. This would track not just individualized human rights impacts from project implementation, but from the time of project negotiation all the way to the debt repayment terms and conditions for BRI financing.

China's "Beijing Consensus" model of development financing and investment lending, as exemplified in the BRI, demonstrates a vast gulf thus far between China's articulated commitments (under the Agenda 2030 for Sustainable Development, climate change law, international human rights law, and the right to development, China's domestic regulations on overseas investment, and Chinese President Xi Jinping's April 2019 declaration aligning the BRI with all international norms, standards, rules, and best practices) and the paucity of information about the contractual, legal, technical, environmental, and human rights dimensions of BRI development projects. Whether the gulf is intentional, motivated by geopolitics, a strategy by design, or paradigmatic in the fluidity of the BRI, is not the concern of this paper. China has already declared its commitments to align the BRI with treaties and agreements on international human rights, climate change, sustainable development, alongside all international best practices. Deficits remain in the ability of populations to exercise meaningful democratic choices over development decisions in the BRI; obtain the fullest picture of the development consequences and externalities of BRI projects; and investigate the facts of human rights impacts or situations that are arising (or have arisen or may yet arise) from BRI projects. Likewise, borrower States in the BRI have the counterpart legal obligations towards their populations, to ensure that their assumption of sovereign debts under the terms China sets in the BRI do not in any way impede or imperil the enjoyment, respect, protection, or fulfillment of their civil, political, economic, and social and cultural rights of present and future generations.<sup>231</sup> China (whether in its role as creditor) and other States (as borrowers in BRI projects) each have crucial roles to cooperate, coordinate, and

<sup>230</sup> Diane A. Desierto, *Shifting Sands in the International Economic System: "Arbitrage" in International Economic Law and International Human Rights*, 49 Geo. J. Int'l L. 1019, 1103–09 (2018).

<sup>231</sup> See Cephas Lumina, *Sovereign Debt and Human Rights*, pp. 170-185 in ILIAN BANTEKAS AND CEPHAS LUMINA (EDS.), *SOVEREIGN DEBT AND HUMAN RIGHTS* (Oxford University Press, 2018).

guarantee the realization of international human rights law protections for local communities impacted by BRI projects. If indeed it were to someday internalize such international human rights law protections, the BRI could powerfully realize the authentic right to development of communities around the world.

This paper has sought to identify key deficits, but also to articulate feasible pathways, for operationalizing international human rights law in the BRI, in order to clarify and assist in removing its many complexities for the democracy, development, and human rights of the populations of over 70 BRI states for generations to come. Silence in the face of such glaring complexities would have been the real face of ‘imperialism.’