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### A new Chinese economic law order?

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# A New Chinese Economic Order?

Gregory Shaffer\* and Henry Gao\*\*

## ABSTRACT

China is incrementally developing a new, decentralized model of trade governance through a web of finance, trade, and investment initiatives involving memorandum of understanding, contracts, and trade and investment treaties, supported by an indigenous innovation policy that is transnational in its reach. In this way, China could create a vast, Sino-centric, legal order in which the Chinese state plays the nodal role. It is a hub and spokes model, with China at the hub. In this article, we first examine China's export of an infrastructure-based development model, implemented through Chinese state-owned and private enterprise investments and commercial contracts (Part B), before turning to China's development of a complementary web of free trade and investment agreements (Part C), and an indigenous innovation policy (Part D). The paper theorizes and empirically traces how these Chinese initiatives shape the evolving ecology of the transnational legal order for trade.

## INTRODUCTION

China is incrementally developing a new, pragmatic, decentralized model of economic governance through a web of finance, trade, and investment initiatives involving memoranda of understanding, contracts, and trade and investment treaties.<sup>1</sup> It combines private and public international law in transnational legal ordering imbued with Chinese characteristics. It builds from existing Western models, but it repurposes them. It uses

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1 We use the term 'model' not in terms of a singular archetype but rather in terms of patterns. In this way, we contrast China's approach to what was termed the 'Washington consensus'.

law to help manage the risks to its outbound investment and trade. In the process, China could create a vast, Sino-centric, regional order in which the Chinese state plays the nodal role. This article explains how.

The Chinese model for international economic law reflects a component of China's internal development in the 2000s, which supplemented economic reform and liberalization with state-led infrastructure development. The approach starts with the financing of infrastructure through Chinese state-owned banks as part of China's Belt and Road Initiative, involving telecommunications networks, roads, airports, and ports, which Chinese companies construct using Chinese standards. These projects enable China to export its excess capacity of steel, concrete, and other products. They also open new markets for Chinese products generally. They are supported by private law contract and dispute resolution. This comprises the key private international law component of China's economic law model, albeit one that is state-led. China then complements these initiatives with bilateral investment and free trade agreements that assure preferential access for Chinese goods, services, and capital. This web of agreements comprises the public international law component of its approach. In parallel, China massively subsidizes technological innovation to reduce reliance on Western technology while encouraging Chinese state-owned and private companies to acquire advanced technology abroad, luring Chinese scientists who study abroad to return to China, and enhancing the role of intellectual property within China. This component involves Chinese domestic law, but its aim and effect are transnational in scope. Here too China builds from and repurposes Western legal models. In complement, China builds relations with local political and economic elites where it retains significant economic leverage because of the size of its internal market and the importance of its lending and foreign aid.

China implements these initiatives gradually and pragmatically to learn from trial and error, analogous to the country's internal development model, reflected in the popular adage attributed to Deng Xiaoping—'crossing the river by feeling the stones.'<sup>2</sup> But now, Chinese state-owned and private enterprises are internationalized and integrated within Sino-centric global production chains. It is a hub and spokes model, with China at the hub.<sup>3</sup> These initiatives are reshaping the ecology of the international trade legal order. Their development will depend on political and economic contests within China regarding policy formation and implementation and the response to these initiatives abroad, in each case involving competition among factions. Collectively, these internal, external, and international contests will shape the future of the transnational economic legal order.

In this article, we first lay theoretical ground for understanding China's approach (Part I). We then examine China's export of a state-led, infrastructure-based development model (using predominantly private international law tools) (Part II),

2 Ezra F. Vogel, *Deng Xiaoping and the Transformation of China* (Cambridge: Harvard University Press, 2011) 2.

3 As noted by Alba, Hur, and Park, the hub and spokes model is a framework that has been used to analyze trade agreements since the 1970s. Joseph Alba, Jung Hur, and Donghyun Park, 'Do Hub-and-Spoke Free Trade Agreements Increase Trade? A Panel Data Analysis,' *ADB Working Paper Series on Regional Economic Integration*, No. 46 (April 2010) (answering positively).

complemented by its construction of a web of free trade and investment agreements (using public international law components) (Part III), together with an indigenous innovation policy (grounded in domestic law with a transnational ambition) (Part IV). We show how these distinct initiatives link to constitute a major development in the changing ecology of the transnational legal ordering of trade and economic relations (Part V).

This article assesses Chinese legal developments to complement accounts that focus on geopolitics and economics and that often ignore law or treat law as epiphenomenal. In practice, these three dimensions—economics, politics, and law—interact and intermesh to shape global outcomes, such that legal ordering is a critical (and often missing) part of policy analysis. In a field in which scholars increasingly attend to the question of what to do about China, the article aims to assess these developments in a neutral manner since meaningful normative and policy prescription depends on clear analysis. If the United States indeed pursues a decoupling of its economy with China's, then we need to understand China's approach, especially if the rest of the world is pressed to take sides in an economically contested Cold War.

### I. MIMICKING WHILE REPURPOSING: THE EVOLVING ECOLOGY OF THE ECONOMIC LAW ORDER

China's model is not completely new. It has its forbearers with those of former colonial empires that built ports, railroads, roads, and bridges around the world to extract natural resources and create new markets for their manufactured products. As in those earlier times, China will encounter local resistance while working with local allies to create economic ties to advance its interests. Westerners made their fortunes in the process, as will many Chinese today.

Similarly, neither does China offer a completely new model of finance, trade, and investment law norms and institutions since it borrows heavily from Western models. China's model mimics and repurposes Western laws and institutions.<sup>4</sup> China is developing new institutions and structures that build from and interact with existing ones, such as the WTO for trade, ICSID for investment arbitration, the World Bank for finance, the London Commercial Court for transnational contract disputes, and various other Western institutions for intellectual property. China is mimicking these institutions with its own while repurposing them to advance its interests in ways that are more accommodating of state sovereignty and state involvement in the economy, and that are less demanding in terms of domestic social regulation and the use of judicialized dispute settlement.

4 Compare Elkins et al., 'The Content of Authoritarian Constitutions,' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2014) 141 (on mimicking and repurposing constitutions); and Tom Ginsburg, 'Authoritarian International Law,' 114 *American Journal of International Law* 221 (2020), at 260. This is a different dynamic than that of 'selective adaptation' scholars used earlier to address China's internal law reforms. Pitman B. Potter, 'Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices,' 2 *Washington University Global Studies Law Review* 119 (2003), at 150. In part, China is mimicking and repurposing because it has been reluctant to engage in wholly new lawmaking and because it is not in the position to create a new international economic law regime.

In contrast to a liberal model of development grounded in private enterprise and market competition, the Chinese model emphasizes the key role played by government planning and industrial policy, involving massive investment in infrastructure. As the Chinese economy grew increasingly strong, China gained confidence in its economic model and started to promote it as an alternative to development models advocated by US-dominated Bretton Woods institutions that rely on private property, markets, and a non-interventionist state. Several Chinese initiatives illustrate China's approach, especially the Belt and Road Initiative, which it complements with new development finance institutions and trade and investment agreements. Through them, China aims to develop new markets for Chinese products governed through a combination of contracts and treaties, backed by new dispute resolution mechanisms. They spur economic integration that creates new ties with Beijing, providing Beijing with greater leverage politically.<sup>5</sup>

In law and development circles, this model is often referenced as the 'Beijing model' or 'Beijing consensus', constituting a rival to the so-called neoliberal 'Washington consensus', as summarized in [Table 1](#).<sup>6</sup> Western analysts originally coined the term, but the Chinese government adopted it under a new name, the "China Model."<sup>7</sup> The government initially was cautious and emphasized that China would not export its model or ask other countries to replicate it.<sup>8</sup> Yet, as China gained confidence, President Xi Jinping predicted that the Chinese Model would have increasing influence around the world.<sup>9</sup> These models are archetypes and involve ideological contestation within countries, including within China, but Xi's consolidation of power and the US frontal challenge to China that threatens to divide the world into competing blocs have given them greater salience.

China is not aiming to displace existing institutions such as the WTO and World Bank. Rather, China supports the WTO and Bretton Woods institutions, which have served it well. Indeed, it aims to take leadership roles in them as well as within UN economic law-related institutions. Chinese nationals head four UN specialized agencies, while no other country leads more than one, and a Chinese national was a leading

- 5 Nadege Rolland, *China's Eurasian Century? Political and Strategic Implications of the Belt and Road Initiative* (Washington, DC: National Bureau of Asian Research, 2017) 181 (giving examples of Mongolia, Norway, and South Korea. Relatedly, China's domestic infrastructure building was not only 'a tool to stimulate growth in times of financial and economic crises but also . . . a way to consolidate the central government's control over the country's remote frontiers.').
- 6 John Williamson, 'Is the "Beijing Consensus" Now Dominant?', *Asia Policy* (2012). Matt Ferchen, 'Whose China Model is it Anyway? The Contentious Search for Consensus,' 20 (2) *Review of International Political Economy* 390 (2013), at 420.
- 7 Joshua Cooper Ramo coined the term in 2004. Joshua Cooper Ramo: "The Beijing Consensus: Notes on the New Physics of Chinese Power." London: Foreign Policy Centre, 2004.
- 8 "Xi Jinping Chuxi Zhongguo Gongchandang yu Shijie Zhengdang Gaoceng Duihuahui Kaimushi bing Fabiao Zhuzhi Jianghua" ("Xi Jinping Attended the Opening Ceremony of the Dialogue between China Communist Party and World Political Parties and Delivered the Keynote Speech"), 1 December 2017, Xinhua News, [http://www.xinhuanet.com/politics/2017-12/01/c\\_1122045499.htm](http://www.xinhuanet.com/politics/2017-12/01/c_1122045499.htm).
- 9 Xi Jinping, "Guanyu Jianchi he Fazhan Zhongguo Tesie Shehui Zhuyi de Jige Wenti" ("Several Issues on Adhering to and Developing Socialism with Chinese Characteristics"), in Qjushi, 31 March 2019, [http://www.xinhuanet.com/2019-03/31/c\\_1124307481.htm](http://www.xinhuanet.com/2019-03/31/c_1124307481.htm).

**Table 1.** Comparison of Washington Consensus and Beijing Consensus

	Washington consensus	Beijing consensus
Political system	Liberal democracy	Authoritarian government
Economic development model	Laissez-faire market economy with little government intervention, such as industrial policy	Industrial policy with heavy state intervention; state-owned firms for critical sectors
Trade and investment policies	Open economy with little restriction on foreign trade and investment	Limited opening with many express or de facto restrictions on foreign trade and investment
Foreign policy	Promotion of liberal, democratic, market ideals	Non-interference, sovereignty, and self-determination
Doctrinal rigidity	Rigid regarding legal prescriptions	Non-prescriptive ideologically; experiment through trial and error

Source: The authors' own compilation.<sup>10</sup>

candidate to head the World Intellectual Property Organization.<sup>11</sup> Nonetheless, China's model represents a different one than the liberal, multilateral, law-centered model built by the United States and Europe after World War II and expanded and solidified after the Cold War. Unlike the US and European models, China's is based not on transplants from its domestic laws but rather on development policies grounded in infrastructure and innovation, supported by memoranda of understanding, contracts, and treaties. Moreover, China's model, led by an authoritarian state, is less transparent and thus more attractive to authoritarian regimes. Formal law and formal dispute settlement play reduced roles and are displaced by soft law (set forth in memoranda of understanding) and informal state-to-state and private negotiation to resolve disputes. The approach

10 This compilation builds from our own observations as well as works in the broader literature such as Peterson Institute for International Economics, 'Interview Transcript with John Williamson,' *Beijing Consensus Versus Washington Consensus?*, 2 November 2010; Yasheng Huang, 'Debating China's Economic Growth: The Beijing Consensus or The Washington Consensus,' 24 (2) *Academy of Management Perspectives* 31 (2010), at 47; Yang Yao, 'Beijing Consensus Or Washington Consensus: What Explains China's Economic Success?,' *Development Outreach World Bank* (2011); Keun Lee, Mansoo Jee and Jong-Hak Eun, 'Assessing China's Economic Catch-Up at the Firm Level and Beyond: Washington Consensus, East Asian Consensus and the Beijing Model,' 18 (5) *Industry and Innovation* 487 (2011), at 507; Randall Peerenboom, 'China and the Middle-Income Trap: Toward a Post Washington, Post Beijing Consensus,' 27 (5) *The Pacific Review* 651 (2014), at 673.

11 Chinese nationals lead the Food and Agricultural Organization (FAO), the International Telecommunications Union (ITU), the UN Industrial Development Organization (UNIDO), and the International Civil Aviation Organization (ICAO). Michael McCaul, 'The United States Can't Cede the U.N. to China,' *Foreign Policy*, 24 September 2019. The U.S. organized a campaign to block China's candidate to lead WIPO. Nick Cumming-Bruce, 'U.S.-Backed Candidate for Global Tech Post Beats China's Nominee,' *New York Times*, 4 March 2020.

has parallels to what contract law scholars theorize as ‘relational contracts’ under which the ongoing relationship is more important for the contracting parties than formal legal commitments.<sup>12</sup> They do so in the shadow of China’s increased economic clout and thus of power asymmetries. As Tom Ginsburg writes, it is a legal order grounded more in ‘coordination’ (of policy and commercial relations) than in ‘commitment’ (in terms of legal rights).<sup>13</sup>

Two complementary theoretical ways of viewing China’s initiatives are in terms of ‘layering’ and ‘ecologies’ of transnational legal ordering. The concept of ‘layering’ captures how new structures are built on previous ones as part of institutional change.<sup>14</sup> China’s initiatives do not create a new, comprehensive, alternative model of economic law. They rather layer on top of existing international trade, investment, and development finance institutions. The concept of ‘ecologies’ captures how actors interact, coexist, cooperate, and compete in complex processes within and between institutions that shape institutional development over time.<sup>15</sup> As Susan Block-Lieb and Terence Halliday write, ‘global lawmaking should not begin with an IO [international organization] as the unit of analysis, but with the sea in which it swims.’<sup>16</sup> China’s initiatives dynamically form part of a complex ecology of international economic institutions that coexist, complement, cooperate, and compete to shape norms and normative ties. They complement existing international institutions in which China aims to play a leading role while building parallel Chinese-led institutions that interact with existing ones.

In this way, China’s approach to economic order can be viewed as both linked to the status quo while also (at least potentially) offering a revisionist model.<sup>17</sup> China projects itself as a keen supporter of the WTO and the multilateral system and, in this sense, as a status quo power. In parallel, however, China aims to end U.S. and European dominance in the WTO, while building institutions and transnational economic ties that collectively can be viewed as revisionist of the existing order in a broader ecological sense. In the process, China’s initiatives provide it with options (or hedges) that facilitate ongoing economic order, supported by law, if the multilateral system continues to erode or even implode. China thus reserves the option of going either way, whether to be a status quo or a revisionist power.<sup>18</sup>

China has labeled its foreign policy a vision of ‘a community of shared future for mankind’, which President Xi Jinping first announced at the 70th Session of the UN

12 Stewart Macaulay, ‘Non-Contractual Relations in Business: A Preliminary Study,’ 28 *American Sociological Review* 55 (1963); Ian Macneil, *The Relational Theory of Contract: Selected Works of Ian Macneil* (London: Sweet & Maxwell, 2001).

13 Ginsburg, above n 4, at 260.

14 Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States and Japan* (2004), at 35 (‘layering . . . involves the grafting of new elements onto an otherwise stable institutional framework’); Jeroen van der Heijden, ‘Institutional Layering: A Review of the Use of the Concept,’ 31 (9) *Politics* (2011).

15 Susan Block-Lieb and Terence Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (Cambridge: Cambridge University Press, 2017).

16 Lieb and Halliday, *Global Lawmakers*, 31.

17 Jacques deLisle, ‘China’s Rise, the U.S., and the WTO: Perspectives from International Relations Theory,’ 2018 *Illinois Law Review Online* 57 (2018).

18 We thank Jacques deLisle for this point.

General Assembly in 2015<sup>19</sup> and then reiterated at the United Nations Office at Geneva in 2017.<sup>20</sup> These pronouncements offer little new in substance, as they emphasize mutual respect and inclusive development, which repeats the position China has taken since its announcement of the Five Principles of Peaceful Co-existence in the 1950s. In parallel, however, there is an internal Chinese literature viewing a Sino-centric order as a modern analogue to the traditional conception of Chinese Tianxia, or 'All Under Heaven' world system, which has China at the center.<sup>21</sup> For some, calls for deference toward China at the center of the region recall China's historical 'tributary system' as well as Japan's efforts to create a 'Greater East Asia Co-Prosperty Sphere' in the run-up to World War II.<sup>22</sup>

Instead of building from official Chinese discourse about its foreign economic policy, we develop, from a range of sources, our own construction of how these disparate Chinese initiatives fit together to form a decentralized Sino-centric order that complements, competes with, and reorients the existing international economic law order. What we are describing is not a neatly coherent, centralized order that reflects a new Chinese theoretical model for global governance. Much of China's approach for economic law order is fragmentary. Its signature Belt and Road Initiative is an amalgam of multitudinous projects. What we aim to capture is the incremental evolution of a Chinese economic order comprised of a web of agreements under the Belt and Road Initiative, supported by bilateral trade and investment agreements, which, in turn, are linked to China's indigenous innovation policy with its transnational ambitions.

Philip Jessup theorized the combination of private international law, public international law, and 'other law' addressing transnational problems as 'transnational law.'<sup>23</sup> China's approach combines these tools pragmatically and strategically. Yet, when viewed in combination, China's initiatives involve more than transnational problem-solving through law. They aim to create order, a transnational economic order supported by law, with China at the hub.<sup>24</sup> As we will see, China's approach does not

- 19 Working Together to Forge a New Partnership of Win-win Cooperation and Create a Community of Shared Future for Mankind, Statement by H.E. Xi Jinping, President of the People's Republic of China, At the General Debate of the 70th Session of the UN General Assembly, New York, 28 September 2015, available at [https://gadebate.un.org/sites/default/files/gastatements/70/70\\_ZH\\_en.pdf](https://gadebate.un.org/sites/default/files/gastatements/70/70_ZH_en.pdf).
- 20 Work Together to Build a Community of Shared Future for Mankind, Speech by H.E. Xi Jinping, United Nations Office at Geneva, Geneva, 18 January 2017, available at <http://iq.chineseembassy.org/eng/zygx/t1432869.htm>.
- 21 Nadège Rolland, "China's Vision for a New World Order," *NBR Special Report #83* (National Bureau of Economic Research, Jan. 2020), 30–34, 50–51 (citing a range of contemporary Chinese thinkers).
- 22 Chinese leftists deploy this rhetoric to critique liberal democratic values and the institution of judicial review in support of authoritarianism. Sebastian Veg, 'The Rise of China's Statist Intellectuals: Law, Sovereignty, and "Repoliticization,"' *The China Journal* (2019). Interestingly, this vision resonates with the increased popularity among leftist intellectuals in China of the Nazi legal theorist Carl Schmitt, including Schmitt's concept of the *Großraum* ('great space') as a regional order. Ryan Mitchell, 'The Decision for Order: Chinese Receptions of Carl Schmitt Since 1929,' *8 Journal of Law and International Affairs* 1 (2020).
- 23 Philip Jessup, *Transnational Law* (1956) (defining 'transnational law' in functional terms as 'all law which regulates actions or events that transcend national frontiers', which includes public international law, private international law, and 'other rules which do not wholly fit into such standard categories').
- 24 Compare Jessup's analysis with that of Terence Halliday and Gregory Shaffer on 'transnational legal orders'. Terence Halliday and Gregory Shaffer, *Transnational Legal Orders* (2015); and Gregory Shaffer and Carlos



involve deep integration of norms (thus differing from the Western liberal model), but nonetheless aims at a type of transnational order that penetrates states through creating close ties with government and private sector leaders.

## II. EXPORTING THE CHINESE DEVELOPMENT MODEL ABROAD: FINANCING INFRASTRUCTURE

### A. Belt and road initiative

First proposed by President Xi Jinping in 2013, the Belt and Road Initiative (BRI) ambitiously aims to develop new markets, enhance the security of China's access to resources, and facilitate the internationalization of the Renminbi (China's currency) while building new institutions and governance mechanisms.<sup>25</sup> It is predominantly a private international law model based on contract and contract dispute resolution that paradoxically is state-led.<sup>26</sup> Formally, the BRI's objectives are to build five types of links among countries lying along BRI industrial corridors: (i) to enhance 'policy coordination'; (ii) to improve infrastructure 'connectivity'; (iii) to reinforce 'unimpeded trade'; (iv) to move forward with 'financial integration'; and (v) to create 'people-to-people bonds'.<sup>27</sup> In this way, China can create a network of 'strategic partnerships' grounded in economic ties that enhance regional and global economic integration, increase economic reliance on China, and further Chinese influence.<sup>28</sup> Some of these projects facilitate China's projection of military strength, by providing the Chinese navy with access to deep water ports and, through them, protect trade routes to and from China.<sup>29</sup> More generally, China aims to project soft (and 'smart') power through such financing, which is not subject to the conditionalities imposed by the West.<sup>30</sup>

The BRI comprises the land-based Silk Road Economic Belt, which links China with Europe through Central and Western Asia, and the sea-based 21st Century Maritime

Coye, 'From International Law to Jessup's Transnational Law; from Transnational Law to Transnational Legal Orders,' in *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (2020).

- 25 The BRI, in part, was a strategic response to the Obama administration's 'pivot to Asia' in order to protect its interests in the region. Rolland, *China's Eurasian Century?* 114–119. Julien Chaisse and Mitsuo Matsushita, 'China's 'Belt and Road Initiative: Mapping the World Trade Normative and Strategic Implications,' 52 (1) *Journal of World Trade* 163 (2018). In the process, China aims to be a leader in the development of a central bank digital currency while proceeding cautiously. Chen Jia, "China Promotes Global Digital Fiat Currency Standardization," *China Daily* (8 December 2018).
- 26 Interestingly, Chinese state-owned enterprises appear to use better drafted, international-style contracts than Chinese private companies. Matthew Erie, 'Chinese Law and Development,' *Harvard International Law Journal* (forthcoming 2020), 60.
- 27 National Development and Reform Commission, 'Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China,' *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road* (State Council, 2015).
- 28 Joshua Meltzer, 'China's One Belt One Road Initiative: A View from the United States,' *Brookings Report*, 19 June 2017.
- 29 Francisco Jose Leandro, 'The OBOR Global Geopolitical Drive: The Chinese Access Security Strategy,' in Julien Chaisse and Jędrzej Gorski (eds), *The Belt and Road Initiative: Law Economics and Politics* (Leiden: Brill Nijhoff, 2018) 90 (citing the teachings of U.S. Rear Admiral Alfred Thayer Mahan, Leandro writes, 'a global maritime trade network will naturally develop an immense sea power').
- 30 Compare Axel Dreher, 'IMF and Economic Growth: The Effects of Programs, Loans, and Compliance with Conditionality,' 34 (5) *World Development* 769 (2006), at 788; Randall W. Stone, 'The Scope of IMF Conditionality,' 62 (4) *International Organization* 589 (2008), at 620.

Silk Road, which connects China with Southeast Asian countries, Africa, and Europe. The initiative covers around 65 countries in three continents, with a total population of around 4.4 billion, or 63% of the world population.<sup>31</sup> These countries account for 29% of global GDP and 23.4% of global merchandise and service exports. The project often has been compared with the post-WWII Marshall Plan by the United States, adopted as a response to a growing Cold War with the Soviet Union, but the BRI dwarfs it in size. The Marshall Plan provided only US \$13 billion to six European countries, which is equal to US \$150 billion today.<sup>32</sup> In contrast, the estimated price tag for the BRI is at least 1 trillion (and potentially many trillion) US dollars.<sup>33</sup> Given the lack of transparency, it is impossible to know the exact figure, but it appears large and looming. As Matthew Erie writes, although there is a certain amount of Chinese campaign-style boosterism to the BRI, the US and EU response to the BRI of creating their own 'policy imitations' shows recognition of its impact.<sup>34</sup>

China is building the BRI through packages of bilateral arrangements and agreements. They involve customs clearance, investment promotion and facilitation, trade and investment treaties, dispute resolution mechanisms, visa agreements, memoranda on standardization, special economic zones, special tax regimes, academic and student exchanges, and so forth.<sup>35</sup> Each economic corridor in the BRI adopts a different package, subject to local negotiations and adaptation to different socioeconomic conditions, but the modalities are similar.<sup>36</sup>

This building of infrastructure facilitates trade, investment, and migration that have complementary effects. Chinese individuals migrate to BRI countries and become entrepreneurs, forming a networked Chinese diaspora around the world that further facilitates trade and investment with China. To give one example, analysts estimate that about a million Chinese have 'ventured to Africa over the past two decades to seek their fortunes.'<sup>37</sup> As a forerunner of these processes, the town of Prato, Italy, the center of the Italian textile industry, became dominated by Chinese entrepreneurs and workers

31 China has not officially confirmed the number of BRI countries or the criteria for identifying them, but these 65 countries (including China) are commonly acknowledged to be BRI countries. Lutz-Christian Wolff, 'China's 'Belt and Road' Initiative—An Introduction', in Lutz-Christian Wolff and Chao Xi (eds), *Legal Dimensions of China's Belt and Road Initiative* (Hong Kong: Wolters Kluwer, 2016) 8. In March 2019, Italy signed an MOU on the joint construction of the BRI with China, becoming the first G7 country to do so. Xinhua, China, 'Italy Sign BRI MoU to Advance Connectivity,' 25 March 2019.

32 Gwynn Guilford, 'Don't Be Fooled by China's Grand Plan to Rule the World,' *Quartz*, 1 December 2017.

33 Jonathan Hillman, 'How Big is China's Belt and Road?,' *Center for Strategic and International Studies*, 3 April 2018. The projected BRI and the Marshall Plan, however, are more comparable in size in terms of the percentage of China's and the United States' GDPs at the respective times.

34 The United States established a new International Development Finance Corporation in 2019. Erie, *Chinese Law and Development* [11, 40].

35 Silk Rhodes, 'Why China is Lavishing Money on Foreign Students,' *Economist*, 26 January 2019, 36 ('numbers of foreign students grew fourfold in 2004–2016; student numbers from BRI-related countries expanded eightfold,' rising to 61% of those on Chinese government scholarships). On university exchanges, Rolland, *China's Eurasian Century?* 64–66.

36 Francisco Jose Leandro, 'The OBOR Global Geopolitical Drive: The Chinese Access Security Strategy,' in Julien Chaisse and Jędrzej Gorski (eds), *The Belt and Road Initiative: Law Economics and Politics* (Leiden: Brill Nijhoff, 2018) 88. On different economic corridors, see Rolland, *China's Eurasian Century?* 72–85.

37 Emily Feng and David Piling, 'The Other Side of Chinese Investment in Africa,' *Financial Times*, 26 March 2019.

making apparel with the 'made in Italy' label for global markets.<sup>38</sup> In 2019, Italy joined the BRI pursuant to a memorandum of understanding with China in the hope that Chinese state-owned entities can help develop Italian ports, further facilitating such processes.<sup>39</sup>

The BRI is not just about hard infrastructure, but also about electronic commerce, facilitating trade of Chinese products. Alibaba Cloud is growing faster than Amazon outside of their home markets, and it benefits from its dominance of China's internal market, which is the largest e-commerce market in the world. Hoping to leverage BRI-spurred economic growth and ensuing consumer demand into a 'One Belt, One Road, One Cloud' future,<sup>40</sup> Alibaba has been aggressively promoting its Electronic World Trade Platform (eWTP) concept.<sup>41</sup> It launched its 'Enabling E-commerce' initiative along with the WTO and the World Economic Forum in late 2017.<sup>42</sup> Through Alibaba, China is once more not only coordinating with but also layering upon the work of existing international public and private institutions, such as the WTO and WEF.

In parallel, China is developing free trade zones in the Chinese interior and in BRI countries so that Chinese firms may expand their global trade and production networks.<sup>43</sup> Within BRI countries, China worked with its state-owned companies to finance and build huge industrial parks in new 'economic and trade cooperation zones'. By January 2019, China announced that it had built 82 such zones within BRI countries with total investment of 29 billion USD.<sup>44</sup> By building key infrastructure like roads and ports, and helping to revamp customs processes in these countries, these projects help achieve key BRI objectives, such as facilities connectivity and increased trade.

These initiatives benefit from legal infrastructure in terms of soft law agreements, contracts, and dispute settlement mechanisms, although that infrastructure is more flexible than Western models.<sup>45</sup> Companies typically conduct BRI projects under the umbrella of a memorandum of understanding between China and the receiving country, complemented by public and private contracts.<sup>46</sup> The projects focus on

38 Sylvia Smith, 'The Italian Fashion Capital Being Led by the Chinese,' *BBC*, 12 February 2013.

39 Stuart Lau, 'Italy may be ready to open up four ports to Chinese investment under "Belt and Road Initiative",' *South China Morning Post*, 19 March 2019; Jason Horowitz, 'A Forgotten Italian Port Could Become a Chinese Gateway to Europe,' *New York Times*, 18 March 2019.

40 Parag Khanna, *The Future is Asian: Commerce, Conflict, and Culture in the 21<sup>st</sup> Century* (New York: Simon & Schuster, 2019).

41 Henry Gao, 'Digital or Trade? The Contrasting Approaches of China and US to Digital Trade,' 21 (2) *Journal of International Economic Law* 308 (2018), at 310.

42 WTO, 'WTO, World Economic Forum and eWTP Launch Joint Public-Private Dialogue to Open Up E-commerce for Small Business,' 13 December 2017.

43 Justin Yifu Lin, '"One Belt and One Road" and Free Trade Zones: China's New Opening-Up Initiatives,' 10 (4) *Frontiers of Economics in China* 585 (2015).

44 Ministry of Commerce Press Office, *2018 nian Shangwu Gongzuo Nianzhong Zongshu zhi san: Yidai Yulu Jingmao Hezuo Chengxiao Xianzhu (2018 Year-end Summary for Commerce Works, No. 3: Significant Achievements in Belt Road Initiative Economic and Trade Cooperation)*, 27 December 2018.

45 Erie, Chinese Law and Development [12] (citing a workshop in Shanghai where a U.K. lawyer advocated that China use its leverage to impose 'a standard agreement' for Chinese loans, while Chinese lawyers retorted that China prefers dialogue under the principle of 'non-intervention').

46 Maria Adele Carrai, 'It is Not the End of History: The Financing Institutions of the Belt and Road Initiative and the Bretton Woods System,' in Julien Chaisse and Jędrzej Górski (eds), *The Belt and Road Initiative* (Leiden: Brill Nijhoff, 2018).

infrastructure-building, including roads, rail, ports, airports, pipelines, power plants, and telecommunications. They catalyze different forms of public-private partnerships between the state, state-owned enterprises, and private companies.<sup>47</sup> The intertwined nature of large private enterprises and the Chinese party and state facilitate these partnerships.<sup>48</sup> Chinese firms, financed by loans from state-owned banks, such as the China Development Bank and the Export-Import Bank of China, undertake the projects.<sup>49</sup> Chinese state-owned and private firms are well-positioned to engage in BRI projects because they are supported by state subsidies—including export credits provided below OECD-prescribed minimum rates<sup>50</sup>—and they coordinate with state authorities to obtain government procurement contracts. Analysts estimate that around 89% of the contractors of BRI projects funded by Chinese banks have been Chinese companies.<sup>51</sup>

Critically, China exports Chinese standards through the BRI, challenging US and European dominance in standard-setting. Standards can be viewed as a form of soft law that fall within what Jessup called ‘other law’ in his concept of transnational law because they do not clearly fall within the categories of private or public international law. It is an area that legal scholars often ignore because the standards often are not legally binding (formally), although they may be directly incorporated through contracts, and they can have major impacts in practice.<sup>52</sup> China has established national standards that it requires manufacturers and service providers to use when entering China’s market. In turn, Chinese companies use these standards when exporting goods and services abroad.<sup>53</sup> Given the size of China’s market, China can use domestic standard setting to provide a competitive advantage for Chinese companies in its internal market. And given the number of infrastructure projects abroad that China finances, China is

47 Carrai, above n 46.

48 As Milhaupt and Zheng write, ‘the boundary between state and private ownership of enterprise is often blurred in contemporary China.’ Curtis Milhaupt and Wentong Zheng, ‘Beyond Ownership: State Capitalism and the Chinese Firm,’ 103 *Georgetown Law Journal* 665 (2015), at 671. The large private companies themselves are required to include a Communist party committee to ensure good relations with authorities. Mark Wu, ‘The China Inc. Challenge to Global Trade Governance,’ 57 *Harvard International Law Journal* 282 (2016), at 284.

49 Most of the financing is provided by Chinese banks. Until mid-2018, official data shows that Chinese banks together loaned more than 200 billion dollars to BRI projects. See Zhao Meng, ‘Zhongguo Yinghangye Leiji xiang “Yidai Yilu” Fafang Daikuan Chao 2000 Yi Meiyuan’ (‘Chinese Banks Issued Loans totaling over 200 billion USD’), *China Financial News*, 27 April 2018. China is now the world’s largest creditor, surpassing the IMF and World Bank. Sebastian Horn, Carmen Reinhart, and Christoph Trebesch, ‘China’s Overseas Lending,’ *KIEL Working Paper* 5 (No. 2332, June 2019).

50 Kristen Hopewell, *Class of Powers: US-China Rivalry in Global Trade Governance* (2020).

51 ‘Gateway to the Globe,’ *Economist*, 28 July 2018, 15.

52 Telephone interviews with practicing lawyers and in-house counsel at a major Chinese state-owned enterprise and a major Chinese private enterprise, 20, 23, 27, and 30 March 2020. Erie, in contrast, categorizes ‘standards’ as a ‘nonlaw’ mechanism, but, in doing so, he notes Chinese legislation on standards and the chapter on ‘legal liability’ in that law as well as the fact that BRI loans and contracts at times address the use of Chinese standards, which has given rise to litigation. Moreover, China first established its standard setting body as part of its accession to the WTO, again illustrating the links with law. Erie, *Chinese Law and Development* [52–54]. Compare Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (2005).

53 Andrew Polk, ‘China Is Quietly Setting Global Standards,’ *Bloomberg*, 7 May 2018.

well-positioned to shape international and regional standards in practice, such as for infrastructure.

When Chinese firms like Huawei build telecommunication and other infrastructure projects in BRI countries, they use Chinese standards rather than other international ones. In this way, China can gradually shape the adoption of Chinese standards through practice in many regions in the world, establishing facts on the ground with increased market share.<sup>54</sup> As in-house counsel of a large Chinese state-owned enterprise told us, ‘even five or ten years ago it was impossible to accept the Chinese standard, but now it is different, and more and more countries will accept Chinese standards.’<sup>55</sup> Through network effects, the standards can become dominant over time. Some of these standards contain patented technology and intellectual property so that not only will Chinese companies have a first mover advantage, but they also can receive royalties under contracts, including from other companies that bid for BRI projects.<sup>56</sup>

Most worryingly for the United States, China appears to have the lead in developing 5G (fifth generation) wireless technology standards, where Huawei seeks dominance.<sup>57</sup> 5G technology could fundamentally change the economy as well as everyday life, unleashing new competition for technological leadership.<sup>58</sup> As an April 2019 report of the U.S. Defense Innovation Board warns, ‘[t]he country that owns 5G will own many of these innovations [such as for autonomous vehicles and the Internet of Things] and set the standards for the rest of the world.... That country is currently not likely to be the United States.’<sup>59</sup> China’s lead in this area implicates developments in critical fields such as artificial intelligence, robotics, and smart manufacturing—the so-called Internet of Things, involving sensors and data collection in an increasingly digitalized, data-driven global economy.<sup>60</sup> Chinese companies are becoming increasingly competitive in these areas, potentially giving Chinese innovators and vendors a critical advantage in multiple product fields.<sup>61</sup>

54 China attempted this strategy in the early 2000s when it announced that companies had to use its Wi-Fi standard called WAPI for products sold in China, but at the time it was in a weaker position. It backed down under pressure from the United States and Japan and a network of companies and Chinese exporters critical to global value chains. Han-Wei Liu, China standard time: The boundary of techno-nationalism in megaregionals, in Shin-yi Peng, Han-Wei Liu, and Ching-Fu Lin (eds.), *Governing Science and Technology under the International Economic Order* (2018), 114–138.

55 Telephone interview, 20 March 2020.

56 Peter Yu, ‘Building Intellectual Property Infrastructure Along China’s Belt and Road,’ 14 *University of Pennsylvania Asian Law Review* 275 (2019), at 325.

57 Alan Beattie notes that ‘Ren Zhengfei, the founder of Huawei, told the FT this month that it was seeking dominance in the internet of things sector, using China’s large manufacturing sector to develop chips and software for companies to connect factory floors to the internet.’ Alan Beattie, ‘How the US, EU and China Compete to Set Industry Standards,’ *Financial Times*, 23 July 2019.

58 5G wireless technology expands capacity, enhances the speed of information flows, reduces latency for near-real time communication, and transforms scalability for new services. Klint Finley, ‘The WIRED Guide to 5G,’ *Wired*, 18 December 2019.

59 Defense Innovation Board, *The 5G Ecosystem: Risks & Opportunities for DoD* (April 2019), 7.

60 Gregory Shaffer, ‘Trade Law in a Data-Driven Economy: A Call for Modesty and Resilience’ in Shin-yi Peng, Ching-Fu Lin and Thomas Streinz (eds.) *Reconfiguring International Economic Law in an AI Era* (forthcoming).

61 The U.S.-China Security Review Committee writes, ‘[Beijing’s] efforts may lock in Chinese preferences for standards in IoT and supporting infrastructure sooner rather than later, as nascent IoT and 5G standards exist

China is investing major resources in developing transnational standards through domestic and international bodies as a complement to its BRI initiatives. In 2018, China launched ‘China Standards 2035’, a strategic scheme overseen by a revamped agency—the Standards Administration of China—to encourage indigenous innovation under Chinese party-state guidance.<sup>62</sup> Internationally, China has dramatically increased its leadership positions in international standard-setting bodies across councils, technical management boards, technical committees, sub-committees, and working groups. It volunteers regularly to host standard meetings and provide secretariat services. The past president of the International Organization for Standardization (ISO) was Chinese (from 2015 to 2017) as is the new president of the International Electrotechnical Committee (IEC) (from 2020 to 2022). China could even create its own standard-setting body for Asia and BRI partner countries if it does not get its way in international standard-setting bodies—a strategy paralleling its development of new international development banks.

For transnational dispute settlement, BRI contracts generally provide for arbitration to be held in hubs outside of China, such as Singapore for contracts in Asia and London and Paris for contracts in Africa and South America.<sup>63</sup> In 2018, it established the China International Commercial Court, which has two branches based in Shenzhen and Xi’an.<sup>64</sup> It reflects once more a form of mimicking while repurposing a Western legal model, that of the Commercial Court in London—which Singapore had earlier adopted in 2013 with the Singapore International Commercial Court. However, in the case of the new Chinese court, unlike in Singapore, the regulations require that judges be ‘able to use at the same time Chinese and English as their work languages’. Moreover, in practice, unlike in Singapore, China has appointed exclusively Chinese judges to the court,<sup>65</sup> who are assisted by an advisory Expert Committee with predominately non-Chinese experts, thus repurposing the model with Chinese characteristics. By the end of 2018, the China International Commercial Court announced that it had accepted a variety of cases involving foreign companies and Chinese companies.<sup>66</sup> These developments

in a fragmented and complex standards-setting environment.’ John Chen et al., ‘China’s Internet of Things,’ *Research Report Prepared on Behalf of the U.S.-China Economic and Security Review Commission*, October 2018, 1.

62 Bjorn Fagerstern and Tim Ruhlig, ‘China’s Standard Power and Its Geographic Implications for Europe,’ *Swedish Institute of International Affairs*, February 2019. The People’s Daily reported, citing President Xi, ‘Whoever sets the standard has the right to speak: whoever holds the standard has the commanding heights.’ Tian Shihong, ‘Kaichuang Woguo Biaozhunhua Shiye Xin Jumian’ (‘Create a new situation in China’s standardization cause’), *People’s Daily*, <http://theory.people.com.cn/n1/2016/0906/c40531-28693273.html> (visited 6 September 2016) (also noting the importance of combatting protectionism through standards).

63 Telephone interviews with SOE in-house legal counsel, 30 March 2020; former internal lawyer with Huawei, 23 March 2020; and external counsel for three major Beijing law firms, March 20 and 27.

64 China International Commercial Court, ‘About China International Commercial Court,’ *Supreme People’s Court of the People’s Republic of China*, <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (visited 28 June 2018). See also, Matthew Erie, ‘The China International Commercial Court: Prospects for Dispute Resolution for the “Belt and Road Initiative,”’ 22 (11) *ASIL Insights* (2018). Both branches are under the guidance of the Fourth Civil Division of the Supreme People’s Court.

65 China International Commercial Court, ‘Judges,’ *Supreme People’s Court of the People’s Republic of China* (Erie: China International Commercial Court).

66 China International Commercial Court, ‘The International Commercial Court of the Supreme Court has Accepted a Number of International Commercial Dispute Cases,’ *Supreme People’s Court of the People’s*

form part of an ongoing shift toward Asia as a center for transnational dispute settlement (whether through arbitration or special international commercial courts),<sup>67</sup> with China aiming to play a more important role.

The BRI's exact size and scope is unclear given China's lack of transparency. There are risks that come with such lack of transparency. China already must manage the risk of domestic credit crises resulting from state banks' extension of low-interest loans to state-owned enterprises, the terms and accounting for which are opaque.<sup>68</sup> By exporting this domestic, state-led, private-law development model to countries governed by unstable and corrupt regimes, China raises new debt exposure not only for the recipient countries but for China itself. Backlash against Chinese debt obligations has intensified in recipient countries, especially following leadership changes (such as in Malaysia, Pakistan, and Sri Lanka). Criticism of Chinese 'debt-trap diplomacy' is rising, even though China has shown flexibility in renegotiating loans, more so than Western hedge funds that buy distressed debt.<sup>69</sup> Nonetheless, if projects foreclose and credit collapses, President Xi's 'China Dream,' externalized as part of the country's 'Go Out' strategy, risks becoming a nightmare.<sup>70</sup>

### **B. Asian infrastructure investment bank and new development bank**

Throughout the 2000s, the United States blocked any increase in China's shareholding and voting rights in the World Bank and International Monetary Fund that would reflect China's growing importance in the global economy.<sup>71</sup> Because of its frustration, and to help finance regional infrastructure more broadly, China officially proposed the creation of the Asian Infrastructure Investment Bank (AIIB) in 2013. The fact that it proposed both the AIIB and the BRI in 2013 suggests a coordinated strategy of China to enhance its influence regionally and globally. China signed a memorandum of understanding in Beijing to create the AIIB in 2014, and AIIB operations started in 2016. The United States opposed the bank's creation and unsuccessfully lobbied countries not to join it. However, in a diplomatic triumph for China and defeat for the United States, the AIIB grew to 100 members by 2019, including all major developed countries other than the United States and Japan.<sup>72</sup>

*Republic of China.* So far, it remains more symbolic than used. Telephone interviews with practicing lawyers and in-house counsel at a major Chinese state-owned enterprise and a major Chinese private enterprise, 20, 23, 27, and 30 March 2020.

67 Matthew S. Erie, 'Legal Hubs, The Emergent Landscape of International Commercial Dispute Resolution,' *Virginia Journal of International Law* (2020).

68 Victor Shih, 'Financial Instability in China: Possible Pathways and their Likelihood,' *Merics China Monitor* (20 October 2017).

69 Compare 'Remarks by Vice President Pence on the Administration's Policy Toward China,' *Foreign Policy*, 4 October 2018, with Agatha Kratz et al., 'New Data on the Debt Trap Question,' *Rhodium Group*, 29 April 2019, and Chas Freeman, 'On Hostile Coexistence with China,' *Remarks to the Freeman Spogli Institute*, 3 May 2019.

70 Greer, 'One Belt, One Road, One Big Mistake.'

71 Martin A. Weiss, 'Asian Infrastructure Investment Bank (AIIB),' *Congressional Research Service*, 7-5700, 3 February 2017.

72 The United Kingdom, for example, resisted US entreaties, negotiated in secret with China, and gave the Obama administration 24 hours' notice before joining the AIIB.

While the AIIB started as a Chinese initiative and China is the largest shareholder with around a 27% voting share, China has tried to play down its influence as the membership of the AIIB expanded to include major Western countries. The Chinese government has made clear that the projects funded by the AIIB will not be limited to countries in the BRI. However, most of the approved projects have been in BRI countries, as the BRI is already vast and expanding.<sup>73</sup> To alleviate governance concerns, China has tried to assure that the AIIB follows ‘best practices’ (i.e. those of the Western-controlled multilateral development banks), and the AIIB’s lending practices to date confirm this policy. For example, the AIIB largely borrows its safeguards and operating procedures from other multilateral development banks, and most of its initial projects have been co-financed with them.<sup>74</sup> China wishes to develop a reputation as a responsible leader of a multilateral development bank, and it knows that civil society will scrutinize the bank’s operations.

Nonetheless, the AIIB is controlled by China, has permanent headquarters in Beijing, and is run by a Chinese president. Its first president, Mr. Jin Liqun, previously served as chairman of China’s first joint venture bank and chairman of the Supervisory Board of China’s sovereign wealth fund.<sup>75</sup> Indeed, the AIIB is under greater de facto day-to-day control of China than the World Bank of the United States. Unlike the World Bank, the AIIB’s directors are based in their home countries, not at bank headquarters, and they are required to meet only every 3 months. Although all AIIB projects through 2018 were approved by the board, the bank’s Accountability Framework Regulation permits delegation of project approval to the bank’s President as of 1 January 2019. The AIIB’s President and staff in Beijing thus potentially can exercise greater autonomy.<sup>76</sup>

The AIIB represents another form of mimicking while repurposing a Western model—the Bretton Woods development finance model. Just as the World Bank has served to advance US policy goals, the AIIB should advance China’s. However, the mechanisms will be different. The United States used the World Bank and International Monetary Fund to require legal reforms in line with American style capitalism. They did so through leverage provided under structural adjustment programs and through IMF surveillance policies that include Reports on the Observance of Standards and Codes (known as ROSCs) regarding good institutional practices.<sup>77</sup> Over time, the Bretton

73 The largest borrower from the AIIB has been India, which China views as part of the BRI, even though no formal MOU has been signed. Xinhua, Which Are the Countries on the BRI? [Yidai Yilu Yanxian Guojia Douyou Xaxie?], available at <https://www.imsilkroad.com/news/p/76186.html> (visited 25 October 2019); Krzysztof Iwanek, Fully Invested: India Remains the China-led AIIB’s Biggest Borrower, <https://thediplomat.com/2019/09/fully-invested-india-remains-the-china-led-aiibs-biggest-borrower/> (visited 6 September 2019).

74 The AIIB emphasizes that ‘our core principles are openness, transparency, independence and accountability and our mode of operation is “Lean, Clean and Green.”’ AIIB, ‘Our Founding Principles,’ *Asian Infrastructure Investment Bank*, <https://www.aiib.org/en/about-aiib/index.html>.

75 Weiss, above n 71, at 7–5700.

76 Daniel C.K. Chow, ‘Why China Established the Asia Infrastructure Bank,’ 49 *Vanderbilt Journal of Transnational Law* 1255 (2016).

77 Chow, ‘Why China Established,’ 1277–1279 (including privatization; deregulation; private property rights, intellectual property rights; tax reform; and market-determined interest and exchange rates).



Woods institutions reduced their focus on funding basic infrastructure and rather emphasized creating a legal framework that would help attract private investment.<sup>78</sup>

In contrast, the main reason for the AIIB's establishment is to finance infrastructure projects in the region, thus including countries covered by the BRI. This lending, in turn, helps develop new export markets for Chinese products. Beijing can use the AIIB to finance infrastructure that can be built by Chinese state-owned enterprises and private companies using Chinese standards. Even if companies from third countries win the contracts, the infrastructure facilitates the trade of Chinese products, such that the lent money can come full circle. Although the AIIB will not require legal reforms and will be governed under the principle of 'non-interference', it offers further means to integrate economies into China's economic sphere. It helps foster ties with interest groups in regional neighbors, enhances China's place in global governance, and develops China's reputation as a responsible steward of economic globalization and development policy. The AIIB, in complement to the BRI, conveys China's soft power, providing a symbol of Chinese leadership in regional governance.<sup>79</sup>

China has complemented the AIIB with the creation of the New Development Bank (formerly called the BRICS Development Bank), which is headquartered in Shanghai. The New Development Bank has a capital of \$100 billion, and its shares are equally divided between the five BRICS countries (Brazil, Russia, India, China, and South Africa), who have equal voting rights in selecting its projects. In addition, China has many other channels to finance overseas infrastructure projects, such as through China's state-owned banks, which have provided the vast bulk of its development lending.

These Chinese-led development banks provide developing countries with new sources of finance, ones that are linked with Beijing instead of Washington, and that funding comes without political conditions to adopt neoliberal policies. In the process, these banks' operation creates leverage that can enhance China's role in the Bretton Woods institutions. The US Congress' approval to increase China's voting rights in the IMF and World Bank came only after the AIIB's formation. The AIIB works with the World Bank, and so it currently operates as a complement within the existing international economic order—a form of institutional layering in the order's evolving ecology. The AIIB is quite useful to China in the context of the trade war, for it conveys a reputation of China as a responsible global leader. Outside the United States and Japan, the rest of the world has embraced this Beijing-based institutional development.

### III. DEVELOPING A WEB OF FREE TRADE AND INVESTMENT AGREEMENTS

#### A. Free trade agreements

To complement these initiatives as part of its development and geoeconomic strategy, China is creating a web of trade and investment agreements that grant it preferential access to foreign markets. This public international law component once more forms

78 Weiss, above n 71, at 7–5700.

79 India, for example, has expressed great wariness of the Belt and Road Initiative, but it is the largest recipient of AIIB-financed projects. Enda Curran, 'The AIIB: China's World Bank,' *Bloomberg*, 6 August 2018.

part of the evolving ecology of the international trade and investment legal orders. It borrows from Western models but is tailored to advance China's interests. At the 18th Party Congress in 2012, President Hu emphasized that the 'implementation of the FTA [free trade agreement] strategy shall be further accelerated'. In response, the State Council issued several Opinions on Accelerating the Implementation of the FTA Strategy in 2015, which laid out a comprehensive blueprint for China's trade agreement strategy.<sup>80</sup> As of June 2020, China had signed free trade agreements with 13 countries, including South Korea and Australia in 2015.<sup>81</sup> In addition, it had launched trade negotiations with seven others<sup>82</sup> as well as a trilateral agreement with South Korea and Japan. In 2002, it concluded its first free trade agreement with the 10-member Association of Southeast Asian Nations (ASEAN), and in 2003, it formalized Closer Economic Partnership Arrangements with Hong Kong and Macau.<sup>83</sup> It aimed to expand these agreements through negotiating a Regional Comprehensive Economic Partnership that would comprise 15 Asian countries, of which China already had a free trade agreement with all but Japan. Overall, China envisages over 50 free trade agreements as part of its implementation of the BRI.<sup>84</sup> These agreements bolster China's status as a hub for global and regional value chains.

China (at least initially) negotiated these agreements incrementally by starting with an agreement on trade in goods and then expanding it to cover services after commitments on goods are substantially implemented.<sup>85</sup> It has complemented these agreements with an investment agreement that facilitates further economic integration. For example, the China-ASEAN Agreement on Trade in Goods entered into force in 2005, while the Agreement on Trade in Services became effective in 2008. Then, in 2009, the two parties signed an Agreement on Investment. Similarly, China signed its agreement on trade in services with Pakistan 4 years after the parties signed their agreement on trade in goods. Developed countries, however, can press China to enter agreements for goods and services simultaneously, which is one reason China's negotiation with Australia took 10 years to complete.

These free trade agreements are narrow in scope compared to those of the United States, European Union, and Japan. In line with China's policy emphasis on non-interference in internal regulatory affairs and respect for sovereignty, the agreements do

80 State Council, 'Several Opinions on the Acceleration of the Implementation of the FTA Strategy (Guowuyuan guanyu Jiakuai Shishi Ziyoumaoyiqu Zhanlue de Ruogan Yijian),' *Guofa* (2015) No. 69, Beijing: Chinese Government Network.

81 China has agreements with Chile (November 2005), Pakistan (November 2006), New Zealand (April 2008), Singapore (October 2008), Peru (April 2009), Costa Rica (April 2010), Iceland (April 2013), Switzerland (July 2013), South Korea (June 2015), Australia (June 2015), Georgia (May 2017), Maldives (December 2017), and Mauritius (October 2019).

82 China launched negotiations with the Gulf Cooperation Council (April 2005), Norway (September 2008), Sri Lanka (September 2014), Israel (March 2016), Mauritius (December 2017), Moldova (March 2018), and Panama (July 2018).

83 In turn, Hong Kong concluded a free trade and investment agreements with ASEAN in November 2017, providing further bridges between them.

84 Carrai, Carrai, above n 46.

85 Henry Gao, 'Selected Issues in TPP Negotiations and Implications for China,' in Jiexiang Hu and Matthias Vanhullebusch (eds), *Regional Cooperation and Free Trade Agreements in Asia* (Leiden: Brill Academic Publishers, 2014) 77–98.

not require new rules for regulatory issues, such as labor and environmental protection, or competition policy. China prefers to address these issues, if demanded by trading partners, in standalone side agreements or memorandums of understanding.<sup>86</sup>

China has used these free trade agreements to establish new rules and precedents regarding its treatment as a market economy.<sup>87</sup> This treatment is important for antidumping calculations, where the United States and European Union use constructed data from other markets to determine if Chinese products are being sold at less than fair value, resulting in higher antidumping tariffs imposed on Chinese products. China has insisted on the recognition of its market economy status as a precondition for virtually every free trade agreement that it has signed. However, even though 81 countries have formally recognized China as a market economy, the United States, European Union, and Japan have refused to grant it this status, based on their interpretations of the relevant WTO Agreements and China's Accession Protocol.<sup>88</sup>

The biggest among China's planned trade agreements is the Regional Comprehensive Economic Partnership (RCEP), a proposed mega agreement between ASEAN, Australia, China, Japan, New Zealand, and South Korea that China hoped to conclude in 2020 (after India dropped out in November 2019). The parties launched negotiations in November 2012 to cover trade in goods and services, investment, and intellectual property protection. When India was a member, these countries accounted for almost half of the world's population, around 32% of global GDP in nominal terms, almost 40% of global GDP in purchasing power parity terms, and about 30% of global merchandise trade.<sup>89</sup> Although India's withdrawal diminishes the agreement's geographic scope, it could facilitate conclusion of a more ambitious agreement. Even without India, the RCEP has the potential to become one of the most important free trade agreements in the world. The Obama administration's pivot to Asia and its driving the negotiation of a TransPacific Partnership that excluded China accelerated RCEP negotiations.

The RCEP and China's bilateral trade agreements offer a paradigm that is more sensitive to national sovereignty than US agreements. They leave more room for policy space, including through provisions providing for special and differential treatment and other flexibility mechanisms.<sup>90</sup> For many development economists, such an approach is better because it is more flexible for development policy.<sup>91</sup> Although other analysts stress the need for binding commitments on behind-the-border issues to facilitate

86 Henry Gao, 'China's Evolving Approach to Environmental and Labour Provisions in Regional Trade Agreements,' *ICTSD Blog*, 25 August 2017.

87 Henry S. Gao, 'China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?,' in Carolyn Deere-Birkbeck (ed.), *Making Global Trade Governance Work for Development* (Cambridge: Cambridge University Press, 2011) 153–180.

88 Gao, above n 85, 97–98.

89 IMF DataMapper, World Economic Outlook (October 2019), GDP, current prices; IMF DataMapper, World Economic Outlook (October 2019), GDP based on PPP, share of world; WTO Data Portal, Merchandise exports by product group and destination—annual (Million US dollar) (2018).

90 RCEP, 'Joint Leaders' Statement on the Regional Comprehensive Economic Partnership,' *Vientiane: Lao PDR*, [http://asean.org/storage/2016/09/56-RCEP\\_Joint-Leaders-Statement\\_8-September-2016.pdf](http://asean.org/storage/2016/09/56-RCEP_Joint-Leaders-Statement_8-September-2016.pdf) (visited 8 September 2016).

91 Dani Rodrik, *Straight Talk on Trade*, (Princeton: Princeton University Press, 2017).

global supply chains,<sup>92</sup> these supply chains already have flourished among RCEP countries. They have done so even though the utilization rate by business of preferential tariff rates in Asian free trade agreements has been low.<sup>93</sup>

### B. Network of bilateral investment treaties

China complements its trade agreements with an even broader network of bilateral investment treaties. In total, China has signed 145 bilateral investment treaties, with 110 in force.<sup>94</sup> That is more than any other country except Germany. Its partners include all major economies in the world except the United States. In 2008, the United States and China commenced negotiation of an investment treaty, but it was put on hold because of rising geoeconomic tensions between them. Chinese investment agreements incrementally build from Western models, such as through acceptance of investor-state dispute settlement, but it is developing them pragmatically and is including ‘soft law’ alternatives for dispute resolution, such as mediation, in light of its preferences.

China has significantly changed its approach to bilateral investment treaties over the past three decades. When China first signed investment agreements, it was an importer of foreign direct investment and was correspondingly wary of making extensive investment commitments backed by international dispute settlement. China’s joining the WTO in 2001 almost immediately had a huge impact on incoming investment into China, as multinational firms increasingly used China for their global supply chains. However, it was only around 2005 that China’s outbound investment began to take off, soaring particularly in the wake of the global financial crisis of 2007–2008. Correspondingly, China’s investment agreements became more protective of outbound investors.

In the late 1990s, there were signs that China’s view on investment treaties was changing in light of the prospects of increased outbound Chinese investment. The 1998 investment treaty with Barbados heralded a new Chinese approach that granted foreign investors access to investor-state arbitration under the International Convention for the Settlement of Investment Disputes (ICSID).<sup>95</sup> Since around 2008, a new generation of Chinese bilateral investment treaties emerged with two new features. First, they included a national treatment obligation pursuant to which the state cannot favor domestic enterprises, subject to exceptions for only existing measures.<sup>96</sup> Second, the

92 Richard Baldwin, ‘21<sup>st</sup> Century Regionalism: Filling the Gap Between 21<sup>st</sup> Century Trade and 20<sup>th</sup> Century Trade Rules,’ *World Trade Organization: Economic Research and Statistics Division*, 23 May 2011.

93 Just more than 30% of ASEAN-China trade purportedly used preferential rates under the ASEAN-China free trade agreement. Pasha Hsieh, ‘Against Populist Isolationism: New Asian Regionalism and Global South Powers in International Economic Law,’ 51 (3) *Cornell International Law Journal* (2018).

94 UNCTAD, ‘China: Bilateral Investment Treaties (BITs), Investment Policy Hub,’ *Investment Policy Hub*, <https://investmentpolicyhub.unctad.org/IIA/CountryBits/42> (figure as of 29 January 2019).

95 Axel Berger, ‘China’s New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making,’ in *The Politics of International Economic Law: The Next Four Years*, American Society of International Law International Economic Law Interest Group (ASIL IELIG) 2008 Biennial Conference (Washington, DC: ASIL IELIG, 14–15 November 2008) 10.

96 China’s agreement with Mexico provides an example. United Nations Conference on Trade and Development, *China-Mexico Bilateral Investment Treaty*, 2008, Article 3, available at <https://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/938>.

new agreements expanded the scope of ICSID investor-state arbitration to cover all investment disputes.<sup>97</sup>

These changes reflect China's shift from being the world's largest destination of foreign direct investment—it surpassed the United States in 2003, 2 years after joining the World Trade Organization<sup>98</sup>—to becoming one of the world's major capital exporting nations. In 1999, China launched its 'Going Global' (or 'Go Out') policy, where it encouraged Chinese firms to invest abroad.<sup>99</sup> The results were impressive. Whereas China was the world's top destination for foreign direct investment between 1990 and 2015, by the end of that period, it also had become one of the world's primary foreign investors. In 2001, outward Chinese foreign direct investment constituted only 15% of China's inbound investment. By 2016, Chinese outward foreign direct investment substantially surpassed it, although it plunged in 2018 and 2019 because of rising trade tensions, enhanced US and European investment scrutiny of Chinese acquisitions on national security grounds, and new Chinese restrictions on outbound capital.<sup>100</sup>

China's investment strategy takes two dominant forms. As part of China's Go Out policy, the government encouraged and subsidized Chinese state-owned and private enterprises to acquire advanced technology through acquisitions of companies in the United States, Europe, and other developed countries. In parallel, it encouraged such companies to invest in developing countries as part of the BRI and outside of it, particularly in infrastructure and resource extraction projects. The first type of investment involves corporate acquisitions and the second greenfield foreign direct investment. The total value of outbound Chinese investment became greater in developed countries given the cost of major acquisitions, although Chinese investment in the United States plummeted after the US launch of the trade war. For example, China National Chemical Corp bought the Swiss-based Syngenta for US\$43 billion in 2017 (the largest acquisition to date), which is critical for China's ambitions in agricultural biotechnology.<sup>101</sup>

China's investment in BRI countries nonetheless continued to grow, increasing Chinese demands for investment protection.<sup>102</sup> In 2017, Chinese firms signed 7217 new project contracts in BRI countries, with a total contract volume of US\$144.3

97 United Nations Conference on Trade and Development, *China-Germany Bilateral Investment Treaty*, 2003, Article 9, available at <https://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/905>.

98 Sandra Poncet, *Inward and Outward FDI in China* (2007), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.473.5100&rep=rep1&type=pdf>.

99 Barry Naughton, *The Chinese Economy*, 2nd ed. (Cambridge, MA: MIT Press, 2007) at 446.

100 United Nations Conference on Trade and Development, *World Investment Report 2016* (ranking China first for inward FDI between 1990–2015, and noting China reaching parity by 2014); *Ibid.*, at 439; Khanna, *The Future is Asian* 164 (noting 90% drop of Chinese investment in the U.S. in 2018).

101 United States Trade Representative, *Section 301 Report*, 24 August 2018, 126, available at <https://ustr.gov/sites/default/files/enforcement/301Investigations/0824USTR.pdf>.

102 In 2018, actual BRI investment amounted to US\$15.64 billion, which accounted for 13% of China's total overseas direct investment. Department of Foreign Investment, 'From January to December 2018, My Investment Cooperation with Countries Along the Belt and Road Initiative,' *Ministry of Commerce of the People's Republic of China*, 22 January 2019, <http://hzs.mofcom.gov.cn/article/date/201901/20190102829086.shtml>. This compares with US\$14.53 billion, accounting for 8.5% of China's total overseas direct investment in 2016.

billion, constituting 54.4% of its total foreign project contracts.<sup>103</sup> Since many BRI countries pose high political and economic risks, China and Chinese companies need to find ways to protect their investments, including through bilateral investment treaties, which complement commercial arbitration and other mechanisms.<sup>104</sup>

By 2018, China was viewed as a ‘status quo’ country favorable to the existing global investment law regime, as opposed to a ‘transformational’ one proposing new models, as in the case of Brazil and (to a lesser extent) India.<sup>105</sup> From their international trade law experience, Chinese trade specialists believe that China should look favorably on an appellate process for investor-state dispute settlement. As one interviewee working with the government observed, China has often fared better challenging US import relief measures before the WTO Appellate Body than before ad hoc panels, and it takes note that the United States has never lost before ad hoc panels in investor-state dispute settlement under NAFTA and other treaties (where there is no appellate mechanism).<sup>106</sup> Within the United Nations working group in UNCITRAL assessing the reform of the investment law regime, China has stressed that the inconsistency and incorrectness of arbitral decisions ‘were problems in the system and that the existing mechanisms of review (annulment and judicial review) were inadequate.’<sup>107</sup> On these grounds it supports consideration of ‘a permanent appellate mechanism as a reform proposal.’<sup>108</sup> In sum, China found that the investment protection models developed in the West suited it for protecting its own outbound investments and expressed support for their further judicialization. Nonetheless, China’s investment agreements are still more respectful of state sovereignty than US and European ones, and China is likely to rely much more on soft forms of dispute resolution in practice given its aim to build cooperative, cross-border ties.

#### IV. CHINA’S INNOVATION STRATEGIES AND ITS TURN TO INTELLECTUAL PROPERTY: THE INDIGENIZATION OF A WESTERN TRANSPLANT

Although China’s intellectual property laws developed from transplants from the West, it adapted them into a national asset that is critical for its development model and global ambitions. As in the United States, the private sector, seeking economic rents through

103 Business Administration in Kazakh, ‘China’s Investment Cooperation with Countries Along the “Belt and Road” in 2017,’ *Ministry of Commerce of the People’s Republic of China*, <http://www.mofcom.gov.cn/article/i/jyj/e/201803/20180302717955.shtml> (visited 5 March 2018).

104 Senior Chinese officials, such as former MOFCOM Vice Minister Wei Jianguo, suggested that China expedite the signing of BIT with BRI countries in 2015. Interview, ‘Former Deputy Minister of the Ministry of Commerce: One Belt,’ *21<sup>st</sup> Century Business Herald*, 31 March 2015, <http://finance.sina.com.cn/china/20150331/015921847760.shtml>.

105 Fabio Morosini and Michelle Rattón Sanchez Badin, ‘Reconceptualizing Investment Law from the Global South,’ in Fabio Morosini and Michelle Rattón Sanchez Badin (eds), *Reconceptualizing Investment Law from the Global South* (Cambridge: Cambridge University Press, 2017) 35.

106 Interviews with a lawyer in a major Chinese law firm working with the government, 23 July 2016 and 20 March 2020. In other words, China appears more amenable to a court-like process for investment disputes than does the United States.

107 Anthea Roberts, ‘UNCITRAL and ISDS Reforms: Moving to Reform Options . . . The Politics,’ *EJIL: Talk!*, 8 November 2018.

108 Anthea Roberts and Taylor St. John, ‘UNCITRAL and ISDS: Chinese Proposal’ *EJIL: Talk!*, 5 August 2019.

the monopoly power intellectual property provides, helps drive intellectual property protection. Yet government technocrats are in much greater control of intellectual property policy in China than in the United States, and their focus is on innovation and economic development. Since the mid-1990s, China has actively used industrial policy to promote the development of high-tech and other key industries.<sup>109</sup> To avoid dependency on Western firms and subjection to leverage from the United States, China launched initiatives to encourage indigenous innovation, or what it called ‘independent intellectual property’.<sup>110</sup> The government wished to shift the country’s logo from ‘made in China’ to ‘created in China.’ It particularly wished to become dominant in cutting-edge technology.

The development of a strong intellectual property rights regime is an important component of China’s innovation initiatives. In February 2006, the State Council issued ‘The National Medium- and Long-Term Plan for the Development of Science and Technology (2006–2020)’, which stressed the need to build ‘innovative capacity’ to become ‘an economic power’. To encourage ‘indigenous innovation’, the Plan stressed the need to ‘further perfect the nation’s IPR system and create an agreeable legal environment that respects and protects IPR, increase public awareness of IPR, uplift the nation’s IPR management level, enhance IPR protection, and crack down on various IPR piracy activities according to law’.<sup>111</sup>

In line with the Plan, patent filings soared in China. In the 1997–2011 period, patent filings in China increased by 3245%. In 2016, China’s patent applications continued to increase by an annual rate of 18.7%.<sup>112</sup> In 2019, China for the first time surpassed the United States as the top source of international patent applications filed through the Patent Cooperation Treaty, a rise of over 200-fold in just 20 years.<sup>113</sup> Huawei Technologies remained the world’s leading filer of international patent applications for the third consecutive year, and three other Chinese companies were in the top 10.<sup>114</sup> Among educational institutions, four Chinese universities appeared in the top 10 filers in 2019, while there were none prior to 2018. Although the bulk of Chinese patents

109 Sebastian Heilmann and Lea Shih, ‘The Rise of Industrial Policy in China, 1978–2012,’ *Harvard-Yenching Institute Working Paper Series* (2013), [https://www.harvard-yenching.org/sites/harvard-yenching.org/files/featurefiles/Sebastian%20Heilmann%20and%20Lea%20Shih\\_The%20Rise%20of%20Industrial%20Policy%20in%20China%201978-2012.pdf](https://www.harvard-yenching.org/sites/harvard-yenching.org/files/featurefiles/Sebastian%20Heilmann%20and%20Lea%20Shih_The%20Rise%20of%20Industrial%20Policy%20in%20China%201978-2012.pdf); Jean-Christophe Defraigne, ‘China’s Industrial Policy,’ *Europe China Research and Advice Network (ECRAN)* (2014).

110 State Council, *Outline of the National Intellectual Property Strategy* (2008), stressing the concept of *zizhu zhishi chanquan*, which can be translated as ‘independent intellectual property’; Peter Yu, ‘When the Chinese Intellectual Property System Hits,’ 35 *Queen Mary Journal of Intellectual Property* 8 (2018).

111 The full text is available at [https://www.itu.int/en/ITU-D/Cybersecurity/Documents/National\\_Strategies\\_Repository/China\\_2006.pdf](https://www.itu.int/en/ITU-D/Cybersecurity/Documents/National_Strategies_Repository/China_2006.pdf) ([‘d]espite the size of economy, our country is not yet an economic power primarily because of our weak innovative capacity’).

112 World Intellectual Property Organization, *World Intellectual Property Indicators 2016*, 5, [http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_941\\_2016.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2016.pdf).

113 World Intellectual Property Organization, ‘China Becomes Top Filer of International Patents in 2019 Amid Robust Growth for WIPO’s IP Servicers, Treaties and Finances,’ 7 April 2020, [https://www.wipo.int/pressroom/en/articles/2020/article\\_0005.html](https://www.wipo.int/pressroom/en/articles/2020/article_0005.html).

114 *Ibid*; Peter Yu, ‘Building Intellectual Property Infrastructure Along China’s Belt and Road,’ 14 *University of Pennsylvania Asian Law Review* 275 (2019), at 325; Peter Yu, ‘The Rise of China in the International Intellectual Property Regime,’ in Zeng Ka (ed.), *Handbook on the International Political Economy of China* (Cheltenham: Edward Elgar Publishing, 2018).

remain weak, there is a concerted effort to enhance quality and strengthen protection, as reflected in increases in patent litigation and royalty flows to China.<sup>115</sup>

China's development of intellectual property protection now forms part of its strategy to make China a global leader in innovation. Changes in China's 5-year plans over time reflect China's shift in emphasis in its development strategy. Innovation rose from a relatively marginal focus in the 10th Five-Year Plan in 2001 when China joined the WTO to a dominant focus in its 13th Five-Year Plan in 2016.<sup>116</sup> In 2015, China launched its 'Made in China 2025' policy to upgrade the Chinese industry, which posed a new threat to Western technological dominance.<sup>117</sup> It did so through a combination of massively subsidizing domestic innovation, supporting acquisition of foreign forms and technology, and obtaining foreign technology through other means, from scouring open source materials to outright theft.<sup>118</sup>

Building from Germany's 'Industry 4.0' project and US industry's 'Industrial Internet' initiatives, the Made in China 2025 plan aims to link big data, automated analytic tools, and wireless sensor networks with industrial equipment for 'smart manufacturing'. The plan listed 10 priority sectors—advanced information and communications technology; advanced automated machine tools and robotics; aerospace and aeronautics; high-tech shipping; rail transport; new energy vehicles; power equipment; agricultural machinery; new materials; and advanced medical devices and pharmaceuticals. These industries form part of what is envisaged as a fourth industrial revolution, which builds from digitalization, cloud computing, and other new technologies that are critical for efficiency, quality control, and product responsiveness. China's ability to collect data on its 1.4 billion citizens offers it a strategic advantage.

The plan set targets for China to become 'self-sufficient' by raising the domestic content of core components and materials from below 20% in 2018 to 40% by 2020 and 70% by 2025.<sup>119</sup> It represents a new form of import substitution policies (grounded in

115 Richard McGregor, *The Party: The Secret World of China's Communist Rulers* (New York: HarperCollins, 2010) 26–27, 72; Lily H. Fang, Josh Lerner and Chaopeng Wu, 'Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China,' 30 (7) *The Review of Financial Studies* 2448 (2017), at 2450 ('[E]ven among the most prolific Chinese patent filers, 81% do not have U.S. filings, and over 90% do not have Japanese or European filings.').

116 Thomas, *Assessing Intellectual Property Compliance*, 158 (noting mentions rising from 26 in its tenth 5-year plan for 2001–2005; 31 in its 11<sup>th</sup> five-year plan; 49 in its 12<sup>th</sup> five-year plan; and 71 in its 13<sup>th</sup> five-year plan for 2016–2020).

117 *Notice on Issuing 'Made in China' 2025*, State Council, Gua Fa [2–15] No. 28, 8 May 2015. Jost Wubbekke et al., 'Made in China 2025: The Making of a High-tech Superpower and Consequences for Industrial Countries,' *Merics* 2 (2016).

118 Andrew B. Kennedy and Darren J. Lim, "The Innovation Imperative: Technology and US-China Rivalry in the Twenty-First Century," *International Affairs* 94: 553 (2018) (categorizing in terms of "making," "transacting," and "taking").

119 According to a survey by the Chinese Ministry of Industry and Information Technology (MIIT) in 2018 covering 30 large firms and 130 critical basic materials, China lacks 32% of the key materials and relies on imports for another 52% of the materials. See People's Network, 'Deputy Minister of the Ministry of Industry and Information Technology: 32% of the 130 Key Basic Materials are Still Blank in China [Gongxinbu Fubuzhang: 130 duozhong Guanjian Jichu Cailiao Zhong, 32% zai Zhongguo reng Kongbai],' *The Paper*, 17 July 2018, [https://www.thepaper.cn/newsDetail\\_forward\\_2271086](https://www.thepaper.cn/newsDetail_forward_2271086).



local content targets) but with the further aim of China obtaining a ‘world-leading’ position by 2049.<sup>120</sup> This symbolically important date coincides with the 100th anniversary of the Chinese communist revolution. The policy complements the BRI, which is to be ‘a high-tech road’ using Chinese technology.<sup>121</sup>

These policies entail long-term strategic planning, public goal setting, public-private coordination and mobilization, and massive state funding at the central and local levels through low-interest loans, capital injections, and other subsidies. To move up the value chain of production, China subsidizes high-tech sectors through new funding mechanisms such as the Advanced Manufacturing Fund and the National Integrated Circuit Fund.<sup>122</sup> It uses government procurement and licensing procedures to favor Chinese companies and facilitate Chinese ‘absorption and re-innovation’ of foreign technology in support of Chinese self-sufficiency and economic dominance in these sectors.<sup>123</sup> It encourages private and state-owned companies to invest in foreign countries, and it financially supports their external acquisitions, so that they gain access to advanced technology, such as for the next generation of semiconductors.<sup>124</sup> In addition to direct acquisitions, China supports investment abroad in industrial parks and joint laboratories for research and development and seeks to hire talent away from foreign companies.<sup>125</sup> In parallel, the government supports and encourages investment in high-tech startups, both in China and abroad, often linked to universities.<sup>126</sup> By 2018, the number of Chinese startups valued at over \$1 billion, known as ‘unicorns’, was roughly the same as in the United States, and China could soon surpass it.<sup>127</sup> The government aims to stimulate policy innovation through experimentation at the central, provincial, and local levels, including through pilot projects.<sup>128</sup> In the process, it has significantly closed the gap with the United States in terms of royalty flows. While US companies received approximately 26.8 times the royalties of Chinese companies in 1998, the difference narrowed to just 1.8 times in 2017.<sup>129</sup>

120 Office of the United States Trade Representative, ‘Findings of the Investigation into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974,’ *Office of the United States Trade Representative*, 22 March 2018, 16 (hereinafter ‘USTR Section 301 Report’).

121 Wang Yiwei, *The Belt and Road Initiative: What Will China Offer the World in its Rise* (Beijing: New World Press, 2016) 12.

122 Wubbekke, above n 117, at 7.

123 Ibid. Office of the United States Trade Representative, ‘USTR Section 301 Report,’ 30.

124 Josh Horwitz, ‘Why the Semiconductor is Suddenly at the Heart of US-China Tech Tensions,’ *Quartz*, 24 July 2018.

125 Office of the United States Trade Representative, ‘USTR Section 301 Report,’ 79, 143, 181.

126 Office of the United States Trade Representative, ‘USTR Section 301 Report,’ 143. Lee et al., ‘China’s Economic Catch-Up,’ 494 (‘the direct involvement of academic institutions in industrial business is called “forward engineering”’).

127 The Economist, ‘The Geography of Technology,’ *Economist*, 1 September 2018, 22. Given the incentives for companies to claim they are technology-related in order to obtain subsidies, it is difficult to determine the number or these that are high-tech startups.

128 Wubbekke, above n 117, at 23–24.

129 The World Bank, ‘Charges for the Use of Intellectual Property, Payments (BoP, Current US\$)—China, United States,’ *World Bank DataBank*, available at <https://data.worldbank.org/indicator/BM.GSR.ROYL.CD?locations=CN-US>.

China's practices spurred a severe response from the United States as well as defensive reactions in other advanced economies that will shape the future of the economic law order. In March 2018, the Office of the United States Trade Representative issued a 182-page Section 301 report that accused China and Chinese companies of appropriating US technology and intellectual property.<sup>130</sup> In parallel, Europe and other advanced economies heightened review and restrictions on Chinese acquisition of high-tech companies and their technology.<sup>131</sup> The United States joined forces with the European Union and Japan to form a common front against Chinese practices that favored Chinese state-owned and private companies, including regarding technology licensing and transfers.<sup>132</sup> Under pressure from the United States and others, the Chinese government and media stopped referencing the plan under the 'Made in China 2025' moniker. But China's ambitions to shift toward a high-tech, high productivity economy through public-private coordination continue.<sup>133</sup>

Western concerns are not just economic. They are also strategic, since some of this technology has military uses that could threaten U.S. Supremacy. Were China to get the upper hand in core network technologies like 5G, it would access not only valuable data, but also be able to breach the integrity of networks that are central to modern economies. Similarly, were China to control the cobalt industry, which is required for most modern electronics, then "entire industries could come under the control of a rival geopolitical power."<sup>134</sup> These technologies and materials implicate economic supremacy and national security. The United States, in response, turned to shielding its technology through a combination of investment controls, export controls, prosecutions, and other sanctions, intended to stifle China's rise.<sup>135</sup>

Pursuant to the Section 301 investigation, the United States raised tariffs on \$50 billion of Chinese imports in two tranches in July and August 2018 and then another \$200 billion in September and threatened to cover all Chinese imports. Going further, the United States issued an arrest warrant for Huawei Technologies' chief financial officer Meng Wanzhou, the daughter of the company's founder, who was apprehended in December 2018 while she was changing flights in Canada, for dodging US sanctions against Iran and for the theft of technology.<sup>136</sup> A US ban on the sale of parts and software to the Chinese telecommunications giant ZTE in April 2018 on national security

130 above, n. 120.

131 Nikkei, 'Chinese M&A Deals Face Wall as US and Europe Guard Tech,' *Nikkei*, 19 June 2018, <https://asia.nikkei.com/Politics/International-Relations/Chinese-M-A-deals-face-wall-as-US-and-Europe-guard-tech>.

132 USTR, *Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union*, 25 September 2018, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-trilateral>.

133 See Chu Daye, 'China Won't Sway From Upgrading: Dispute US Concerns over "Made in China 2025" Plan: Experts,' *Global Times*, 13 December 2018.

134 James McBride, "Is 'Made in China 2025' a Threat to Global Trade," *Council on Foreign Relations*, Aug. 2, 2018.

135 Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, "Toward a Geoeconomic Order in Trade and Investment," *Journal of International Economic Law* 655 (2019) (on "shielding" and "stifling").

136 Kate Conger, 'Huawei Executive Took Part in Sanctions Fraud, Prosecutors Say,' *New York Times*, 7 December 2018.

grounds, which all but shut down the company, and the US placement of Huawei and other Chinese companies on the Entity List for export controls in May 2019, which effectively can blacklist them, illustrate the risks to China of its technological lag. Following the direct intervention of President Trump, the ban was lifted after ZTE paid a US\$1 billion fine, and the United States has deployed the Entity List as a bargaining chip that can be modified or tailored to permit critical sales. Yet the threats make clear China's need to develop its innovation policy so that its companies no longer depend on Western technology.

## V. CONCLUSION: A CHANGING TRANSNATIONAL ECONOMIC LAW ORDER

When China joined the WTO in 2001, it was a recipient of legal norms largely designed by the United States that were incorporated into the world trading system. It became a diligent student of that system and gradually and increasingly engaged with it to defend its interests.<sup>137</sup> As China grew economically more powerful, it gained confidence in its own pragmatic economic model, and it began to challenge the US-led legal order with new initiatives. Domestically, it aimed to boost economic growth through state-led industrial policy, increasingly carried out by reorganized state-owned enterprises, as well as private companies linked more closely with the party and the state. Its ambitions became particularly evident in high-tech sectors where China's relentless pursuit of 'indigenous innovation' led it to enhance protection of intellectual property rights for its own ends while also raising allegations of coerced technology transfers and theft.

Although China officially recognizes the importance of the WTO, and occasionally even holds itself out as the champion of the multilateral trading system,<sup>138</sup> China has been quietly expanding its network of strategic partnerships and bilateral agreements behind the scene, which expands its options if the multilateral system collapses. Incrementally and pragmatically, it is developing a form of trade and economic law governance that puts state-led finance and state-subsidized infrastructure development, combined with domestic innovation policy, at the center. In the geoeconomic competition of the 21st century, it offers a rival model of economic integration and governance based not on legal templates and transplants of its domestic laws to build regional and global rules and institutions (the US and European models)<sup>139</sup> but rather one based on pragmatic, incremental development policy grounded in infrastructure development, innovation, and webs of memoranda of understanding, contracts, and treaties. China is exporting a developmental model through initiatives like the Belt and Road Initiative that offers an alternative to US-built and US-dominated institutions. China is not abandoning institutions such as the WTO. Rather, it is positioning itself as their

137 Gregory Shaffer and Henry Gao, 'China's Rise: How it Took on the U.S. at the WTO,' 1 *Illinois Law Review* 115 (2018).

138 President Xi's Speech at the World Trade Forum, Davos, Switzerland, 17 January 2017.

139 For a classic account of economic integration through law in terms of different states of integration from a free trade area to a customs union to a common market to an economic union, that would be reflected in the trajectory of the European Union, see Bela Balassa, *The Theory of Economic Integration: An Introduction* (London: Palgrave, 1963) 1–3.

defender while, combating Western dominance within them, and creating new options for itself and other countries by fashioning a network of infrastructure projects with supporting treaties and institutions that, in combination, are creating a Sino-centric transnational economic order. As the WTO's authority declines, China's development of a new Sino-centric economic order assumes greater salience.

The Belt and Road Initiative represents an open architecture since any country can join it, in contrast to the US and European club model. Under the club model, the United States and European Union aim to build new rules through excluding those outside of the club, only to invite them subsequently on their terms.<sup>140</sup> That was the model of the GATT and then the WTO with its 'single package' of agreements incorporating intellectual property and trade-in services. China joined the WTO and its covered agreements without having negotiated them and, in addition, had to make China-specific commitments. Similarly, it is the model for the US network of bilateral trade and investment agreements built on common US templates as well as the abandoned TransPacific Partnership. Were China to have joined the TPP, it would have had to agree to terms already in place and likely once more had to make additional commitments. The European Union epitomizes the club model by requiring massive internal legal and institutional changes for countries to join it.

In contrast, under the Chinese model, law plays more of a background and complementary ordering role involving 'soft' mechanisms of coordination through memoranda of understanding and informal state-to-state negotiation to resolve disputes, as in a 'relational contract' arrangement operating in the shadow of China's economic and political clout.<sup>141</sup> Under such an arrangement, the ongoing relationship is more important for the parties than the formal legal commitments so that the contract serves as a coordinating device that the parties can adjust and work around as new challenges arise in their commercial relationship. In this way, China hopes to build ties with political and economic leaders and 'shift the center of geopolitical gravity away from the U.S. and back to Eurasia.'<sup>142</sup> Under the Belt and Road Initiative and China's web of trade and investment treaties, China is largely mimicking and repurposing Western models of contract, commercial arbitration, investment protection, and trade liberalization while building on Western norms of intellectual property protection through patents, copyrights, and trademarks. However, the repurposed model is based not on a neoliberal one grounded in legal commitments as much as a state-led, pragmatic governance model.

Although China's free trade and investment agreements started as rather modest, innocuous deals, when these agreements are coupled with the development of the Belt and Road Initiative through state-backed loans, investments, and construction projects, one senses the rise of a new transnational order based on premises different from

140 Robert Keohane and Joseph Nye, 'Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy,' *John F. Kennedy School of Government Harvard University Faculty Research Working Papers Series* (2001).

141 Macaulay, above n 12.

142 Wang Yiwei, *The Belt and Road Initiative* (a book by a Chinese professor at Renmin University in Beijing that reflects views from China's leadership). Shambaugh views China as building a 'parallel global institutional architecture to the postwar Western order,' such as through the Asian Infrastructure Investment Bank based in Beijing. David Shambaugh, *China's Future* (Hoboken: John Wiley & Sons, 2016) 162–163.

the traditional US-centric Washington consensus. As for development assistance, the Chinese model (when using its own development banks) removes the stringent good-governance conditions attached to loans granted by international development banks. In the area of trade agreements, although China calls for the substantial reduction of trade barriers on goods, commitments on services tend to be rather shallow, while environmental protection and labor rights are left out.<sup>143</sup> The Chinese agreements also tend to avoid new issues, such as disciplines on state-owned enterprises and competition, or substantive rules governing the digital sphere (such as banning data localization requirements). As to investment, China has abandoned its earlier position of resisting investor-state arbitration and begun to grant more substantive rights to investors, such as pre-establishment rights and the use of ‘negative lists’ where investments in all sectors are permitted unless listed as restricted in the agreement. This policy change reflects China’s shifting position from a major recipient to among the world’s largest providers of outbound investment.

When it comes to values, the Chinese trade law model can be viewed (formally) as ‘value-free’ and ‘non-ideological’ since it purports to be non-intrusive in domestic economic governance—reflecting the Bandung principles of ‘non-interference’, ‘sovereignty’, and ‘self-determination’. It can thus be contrasted with the labor, human rights, and environmental prescriptions included in US and EU trade agreements and the conditionalities set forth in loans from US and European-dominated Bretton Woods institutions.<sup>144</sup> However, China too is espousing values phrased in terms of ‘mutual respect’, ‘win-win development’, and ‘harmony’ as part of a ‘community of shared destiny’, with deference toward China at the center.<sup>145</sup> China will use economic arrangements to pursue its interests, which are congruent with these values, including to extract political recognition of its ‘One-China’ policy and silence on the ‘three T’s’ (Taiwan, Tibet, and Tiananmen), repression of Muslims in Xianjing, and any other criticism of China’s internal policies.<sup>146</sup> These agreements can serve, moreover, to support authoritarian leaders to China’s liking. More generally, authoritarian governments will be keen to adopt Chinese practices to control the Internet and ensure public order, such as through data localization requirements, cybersecurity laws, and the adoption of Chinese surveillance and censoring technology. In exchange, they will permit Chinese companies to collect data on their citizens that the companies can use and market to provide a cutting edge in Chinese product development in the data-driven economy. This is not to say that the Western model was centered on values as opposed to interests, since the United States and Europe always have pursued their

143 China’s potential role in environmental governance is more a function of its goal to be a global leader in clean energy technologies rather than environmental law.

144 As a high-level WTO official states, ‘the U.S. also sold ideals, while China is only selling stuff; they are merchants, not missionaries.’ Interview, Geneva, 5 July 2017.

145 William Callahan, ‘China’s “Asia Dream”’: The Belt Road Initiative and the new regional order,’ 1 *Asian Journal of Comparative Politics* 226 (2016), at 231–232.

146 China’s hardline positions regarding the so-called South China Sea, Hong Kong, Xianjing, and Western criticism of other internal policies have triggered a decline of external public perceptions of China in many countries. Laura Silver, Kat Devlin and Christine Huang, ‘People Around the Globe are Divided in their Opinions of China,’ *Pew Research Center*, 30 September 2019.

interests. Nonetheless, under China's model, there is no promulgation of liberal values such as human rights and democracy, and the government plays a more central role in the market.<sup>147</sup>

China's model builds from, layers on, and repurposes existing international economic law and institutions as part of the changing ecology of international economic governance. Its hub and spokes system, combining private and public international law through loans, contract, and contract dispute resolution institutions, coupled with trade, and investment agreements, offers the potential of creating an expansive, regional, rival Sino-centric economic order. Although commentators suggest that the US-China trade war could split the world into competing trade blocs and a new geoeconomic variant of the Cold War, most countries will work to navigate the tensions between the United States and China so that they maintain strong economic ties with both.

147 Compare Samuel Huntington, *The Clash of Civilizations and the Remaking of the World Order* (New York: Touchstone, 1996) (the United States is 'a missionary nation,' proselytizing 'Western values'); Graham Allison, 'China vs. America: Managing the Next Clash of Civilizations,' *Foreign Affairs*, 83 2017, at 84 (contrasting China's focus on 'order'); Sam Sacks, 'Beijing Wants to Rewrite the Rules of the Internet,' *The Atlantic*, 18 June 2018. Nadege Rolland contrasts the Chinese model focused on development, value-free policies, sovereignty, internal uniformity, and state-led policy, to a Western model based on democracy, individualism, liberalism, external harmonization, and rules. Rolland, *China's Eurasian Century?* 130. In the Chinese model, China is clearly 'uncomfortable with the idea of democratization' that it rejects as 'Western values,' and more comfortable working with authoritarian leaders that demand non-interference in domestic affairs. *Ibid.*, at 180.