

Chapter 7

A New Chinese Economic Law Order?

by Gregory Shaffer and Henry Gao

Building from its success in taking on the United States and Europe in the WTO, China followed the United States and European Union in turning to bilateral and plurilateral trade and investment agreements. Yet, it did so with a new vision of placing itself at the center of the transnational legal ordering of trade, finance, and investment in Asia and beyond. Through webs of finance, trade, and investment initiatives involving memoranda of understanding, contracts, and trade and investment treaties, China is incrementally developing a new, decentralized model of economic governance.¹ This model 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 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.

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.² 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

¹ The model is decentralized in that it does not deploy an international organization, while at the same time it is Sino-centric. We use the term "model" in terms of patterns. In this way, we contrast China's approach to what was termed the "Washington consensus."

² Put simply, private international law addresses agreement by cross-border commercial contract, while public international law addresses agreement by treaty.

transnational in scope. Here too China builds from and repurposes Western legal models. In complement, China develops relations with local political and economic elites where it can leverage the draw of its lending, foreign aid, and huge internal market for their exports.

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.”³ 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 as the hub.⁴ 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.

One of the central takeaways from this chapter is that the U.S.-launched trade war will not — contra President Trump — “be easy to win.”⁵ China has developed close economic ties with countries around the world such that by 2018 it was the largest importer for twice as many countries as the United States.⁶ It has thus diversified its trade so that it is less subject to U.S. leverage, and other countries will have little economic interest in significantly decoupling from China. While the United States may press a few countries not to use or rely on certain high-tech Chinese products on security grounds (such as Huawei's 5G telecommunications infrastructure), these countries will be tempted to develop ways to do so if Chinese companies' products are superior and better bargains; otherwise, their economies will be prejudiced because of the adverse effects on those relying on such technology. At the same time, some countries may enhance safeguards to reduce strategic vulnerabilities that could arise from over reliance on products from China, as the European Union has signaled.

In this chapter, we first lay theoretical ground for understanding China's approach (Section I). We then examine China's export of a state-led, infrastructure-based development model (using private international law tools) (Section II), complemented by its construction of a web of free trade and investment agreements (using public international law components) (Section III), together with an indigenous innovation policy (grounded in domestic law with a transnational ambition) (Section 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 (Section V).

³ Ezra F. Vogel, *Deng Xiaoping and the Transformation of China* (Cambridge: Harvard University Press, 2011), 2.

⁴ 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 (Apr. 2010) (answering positively).

⁵ Ana Swanson, “Trump Calls Trade Wars ‘Good’ and ‘Easy to Win,’” *New York Times*, March 2, 2018.

⁶ Cent. Intelligence Agency, “Imports - Partners,” *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/fields/403.html> (last visited September 23, 2019); Cent. Intelligence Agency, “Exports - Partners,” *The World Factbook* (61 vs 30).

I. Mimicking while Repurposing; The Evolving Ecology of Transnational Legal Ordering

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.⁷ China is developing new institutions and structures that build from and interact with existing ones as part of transnational legal ordering, 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 less demanding in terms of domestic social regulation and the use of judicialized dispute settlement.

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 U.S.-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

⁷ Compare Ivan Krastev and Stephen Holmes, *The Light That Failed: Why the West is Losing the Fight for Democracy* (New York: Pegasus Books 2020) (on China's successful form of borrowing); Elkins et al., "The Content of Authoritarian Constitutions," in *Constitutions in Authoritarian Regimes*, eds. Tom Ginsburg and Alberto Simpser (Cambridge: Cambridge University Press, 2014), 141 (on mimicking and repurposing constitutions); and Tom Ginsburg, "Authoritarian International Law," *American Journal of International Law*, 114: 221-260 (April 2020). This dynamic parallels the concept of "selective adaptation" that scholars used earlier to address China's internal law reforms, but it also differs because of these Chinese initiatives' external dimension. Pitman B. Potter, "Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices," *Washington University Global Studies Law Review* 2: 119-150 (2003). In part, China is mimicking and repurposing because it has been reluctant to engage in new lawmaking, and because it is not in the position to create a wholly new international economic law regime.

and treaties, backed by new dispute resolution mechanisms. They spur economic integration that creates new ties with Beijing, providing Beijing with greater leverage politically.⁸

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 7.1.⁹ Western analysts originally coined the term, but the Chinese government then adopted it under a new name, the “China Model.”¹⁰ The government initially was cautious and emphasized that China would not export its model or ask other countries to replicate it.¹¹ Yet, as China gained confidence, President Xi Jinping predicted that the Chinese Model would have increasing influence around the world.¹²

These models are archetypes and involve ideological contestation within countries, including within China. With Xi’s consolidation of power and the U.S. frontal challenge to China, however, these two models have gained greater salience.

Table 7.1. Comparison of Washington Consensus and Beijing Consensus¹³

	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

⁸ Nadège 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).

⁹ John Williamson, “Is the “Beijing Consensus” Now Dominant?,” *Asia Policy* (2012); Matt Ferchen, “Whose China Model is it Anyway? The Contentious Search for Consensus,” *Review of International Political Economy* 20, no. 2 (2013): 390-420.

¹⁰ 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; Maurits Elen, Interview: Joshua Cooper Ramo, *The Diplomat*, August 10, 2016.

¹¹ “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.

¹² 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 Qiushi, 31 March 2019, http://www.xinhuanet.com/2019-03/31/c_1124307481.htm.

¹³ 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?*, Nov. 2, 2010; Yasheng Huang, “Debating China’s Economic Growth: The Beijing Consensus or The Washington Consensus,” *Academy of Management Perspectives* 24, no. 2 (2010): 31–47; 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,” *Industry and Innovation* 18, no. 5 (2011): 487-507; Randall Peerenboom, “China and the Middle-Income Trap: Toward a Post Washington, Post Beijing Consensus,” *The Pacific Review* 27, no. 5 (2014): 651-673.

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 in terms of rights	Non-prescriptive ideologically; experiment through trial and error

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 greater leadership roles in them, as well as within United Nations economic law institutions. Chinese nationals head four UN specialized agencies, while no other country leads more than one, and a Chinese national was a leading candidate to head the World Intellectual Property Organization.¹⁴ 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 U.S. 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. As a former member of the Ministry of Commerce told us, China is well-positioned since it “is in the middle between the West and developing countries” and it can point to its own “gradual learning and legal experimentation.”¹⁵ 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 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.¹⁶ 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).¹⁷

¹⁴ 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*, Sept. 24, 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*, March 4, 2020.

¹⁵ Telephone interview, March 22, 2020.

¹⁶ Stewart Macaulay, “Non-Contractual Relations in Business: A Preliminary Study,” *American Sociological Review* 28: 55 (1963); Ian Macneil, *The Relational Theory of Contract: Selected Works of Ian Macneil* (London: Sweet & Maxwell, 2001).

¹⁷ Ginsburg, “Authoritarian International Law.”

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.¹⁸ 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.¹⁹ 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."²⁰ 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, just as is the case with U.S., European, Brazilian, and Indian trade and investment initiatives.

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.²¹ 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.²²

China has labelled 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 General Assembly in 2015,²³ and then reiterated at the United Nations Office at Geneva in 2017.²⁴ 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 with India of the

¹⁸ Jeroen van der Heijden, "Institutional Layering: A Review of the Use of the Concept," *Politics* 31, no. 9 (2011); Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States and Japan* (2004), at 35.

¹⁹ Susan Block-Lieb and Terence Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (Cambridge: Cambridge University Press, 2017); Gregory Shaffer and Mark Pollack, "Hard vs Soft Law; Alternatives, Complements, and Antagonists in International Governance," *Minnesota Law Review* 94 (2010): 706.

²⁰ Lieb and Halliday, *Global Lawmakers*, at 31.

²¹ Jacques deLisle, "China's Rise, the U.S., and the WTO: Perspectives from International Relations Theory," 2018 *Illinois Law Review Online* 57 (2018).

²² We thank Jacques deLisle for this point.

²³ 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.

²⁴ 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>.

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.²⁵ 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,²⁶ together with the U.S. Monroe Doctrine applied to Latin America and the Caribbean.²⁷

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 can 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 webs 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.”²⁸ 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.²⁹ As we will see, China’s approach does not involve deep integration of norms (thus differing from the Western liberal model), but nonetheless aims at a type of transnational order, supported by law, that permeates states through creating close ties with government and business leaders.

²⁵ 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).

²⁶ David Kang, *East Asia Before the West: Five Centuries of Trade and Tribute* (Columbia University Press: New York City, 2010), 3 (the tribute system continued until the Opium War and the onslaught of Western colonialism, with China “clearly the dominant military, cultural, and economic power in the system”). Chinese leftists deploy rhetoric regarding China’s history 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).

²⁷ “John Bolton and the Monroe Doctrine,” *The Economist*, May 19, 2019.

²⁸ 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”).

²⁹ 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 Coxe, “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).

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.³⁰ It is predominantly a private international law model based on contract and contract dispute resolution that paradoxically is state-led.³¹ Formally, the BRI's objectives are to build five types of links among countries lying along BRI industrial corridors: (1) To enhance "policy coordination"; (2) To improve infrastructure "connectivity"; (3) To reinforce "unimpeded trade; (4) To move forward with "financial integration"; and (5) To create "people-to people bonds."³² 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.³³ Some of these projects facilitate China's projection of military strength, including by providing the Chinese navy with access to deep water ports and, through them, protect trade routes to and from China.³⁴ More generally, China aims to project soft (and thus "smart") power through such financing (backed by contract), which is not subject to the conditionalities imposed by the West.³⁵ Many countries

³⁰ Julian Chaisse and Mitsuo Matsushita, "China's 'Belt and Road Initiative: Mapping the World Trade Normative and Strategic Implications,'" *Journal of World Trade* 52, no. 1 (2018):163. It also enables China to diversify its investment of its foreign exchange reserves away from low-yield U.S. government bonds. Tom Miller, *China's Asian Dream: Empire Building Along the New Silk Road* (London: Zed Books, 2017), 32. 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* (Dec. 8, 2018). However, BRI contracts generally use the U.S. dollar for payment because of its stability and liquidity. Telephone interviews with internal and external counsel for Chinese state-owned enterprises. March 20, 23, 27, and 30, 2020.

³¹ Interestingly, Chinese state-owned enterprises appear to use better drafted, international-style contracts than Chinese private companies. Mathew Erie, "Chinese Law and Development," *Harvard International Law Journal* (forthcoming 2020), [60].

³² 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.

³³ Joshua Meltzer, "China's One Belt One Road Initiative: A View from the United States," *Brookings Report*, June 19, 2017.

³⁴ Francisco Jose Leandro, "The OBOR Global Geopolitical Drive: The Chinese Access Security Strategy," in *The Belt and Road Initiative: Law Economics and Politics*, eds. Julien Chaisse and Jędrzej Gorski (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"); Bruno Macaes, *Belt and Road: A Chinese World Order* (2019), 72; "The best offence is a good defence," *The Economist*, Sept. 28 2019, 81.

³⁵ Compare Axel Dreher, "IMF and Economic Growth: The Effects of Programs, Loans, and Compliance with Conditionality." *World Development* 34, no. 5 (May 1, 2006): 769–88; Erica R. Gould, "Money Talks: Supplementary Financiers and International Monetary Fund Conditionality." *International Organization* 57, no. 3 (Summer 2003): 551–86; Randall W. Stone, "The Scope of IMF Conditionality." *International Organization* 62, no. 4 (Fall 2008): 589–620.

viewed such exercise of power, at least for a time, as subtler than that of the United States, which difference became even more salient under the Trump administration's "America First" policies.³⁶

Internally, the BRI is very much a project associated with President Xi.³⁷ It is coordinated by a steering group, which is chaired by a Vice Premier and housed in the National Development and Reform Commission (NDRC), which is central to China's industrial policy and strategy. The NDRC and China's Ministry of Foreign Affairs and Ministry of Commerce officially co-lead the BRI and are the core mobilization bodies at the central level. This structure implies that trade with the BRI countries is now part of the broader foreign policy framework of China and coordinated by overall state planning. In parallel, provincial bodies help mobilize the BRI, as part of the core strategy with the BRI is to bolster economic growth in China's poorer regions, such as in the west and southwest, including Xinjiang.³⁸ China's state-owned enterprises are central to carrying out the initiative, particularly for the building of infrastructure.

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 Silk Road, which connects China with Southeast Asian countries, Africa, and Europe. The initiative covers at least sixty-five countries in three continents, with a total population of around 4.4 billion, or sixty-three percent of the world population.³⁹ These countries account for 29% of global GDP and 23.4% of global merchandise and services 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,⁴⁰ but the BRI dwarfs it in size, and now represents a Chinese response to its growing Cold War with the United States. The Marshall Plan provided only U.S. \$13 billion to six European countries, which is equal to U.S. \$150 billion today.⁴¹ In contrast, the estimated price tag for the BRI is at least one trillion (and potentially many trillion) U.S. dollars.⁴² Given the lack of transparency, it is impossible to know the exact figure, but it appears large and looming. As Mathew Erie writes, although there is a certain amount of Chinese campaign-style boosterism to

³⁶ Compare, for example, China's "win-win" slogan with "America First." Kristen Hopewell, *Clash of Powers: US-China Rivalry in Global Trade Governance* (Cambridge: Cambridge University Press, 2020).

³⁷ Baogang He, "The Domestic Politics of the Belt and Road Initiative and its Implications," *Journal of Contemporary China*, 28:116 (2019), 180-195. 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.

³⁸ He, "The Domestic Politics;" Rolland, *China's Eurasian Century*, 181 (China's 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").

³⁹ China has not officially confirmed the number of BRI countries or the criteria for identifying them, but at least 65 countries (including China) are commonly acknowledged to be BRI countries. Lutz-Christian Wolff, China's "Belt and Road" Initiative – An Introduction, in *Legal Dimensions of China's Belt and Road Initiative*, eds. Lutz-Christian Wolff & Chao Xi (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," Mar. 25, 2019.

⁴⁰ Benn Steil, *The Marshall Plan: Dawn of the Cold War* (Oxford: Oxford University Press, 2018).

⁴¹ Gwynn Guilford, "Don't Be Fooled by China's Grand Plan to Rule the World," *Quartz*, Dec. 1, 2017.

⁴² Jonathan Hillman, "How Big is China's Belt and Road?," *Center for Strategic and International Studies*, Apr. 3, 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.

the BRI, the U.S. and E.U. response to the BRI of creating their own “policy imitations” suggests that they recognize its impact.⁴³

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.⁴⁴ Each economic corridor in the BRI adopts a different package, subject to local negotiations and adaptation to different geopolitical conditions, but the modalities are similar.⁴⁵

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.”⁴⁶ 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 making apparel with the “made in Italy” label for global markets.⁴⁷ 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 transnational processes.⁴⁸

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, Alibaba has been aggressively promoting its Electronic World Trade Platform (eWTP) concept.⁴⁹ It launched its ‘Enabling E-commerce’ initiative along with the WTO and the World Economic Forum (WEF) in late 2017.⁵⁰ 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.

⁴³ Erie, Chinese Law and Development, [11, 40]. For example, the United States established a new International Development Finance Corporation in 2019.

⁴⁴ Silk Rhodes, “Why China is Lavishing Money on Foreign Students,” *Economist*, Jan. 26, 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.

⁴⁵ Leandro, “The OBOR Global Geopolitical Drive,” 88. On different economic corridors, Rolland, *China’s Eurasian Century?*, 72-85.

⁴⁶ Emily Feng and David Piling, “The Other Side of Chinese Investment in Africa,” *Financial Times*, Mar. 26, 2019.

⁴⁷ Sylvia Smith, “The Italian Fashion Capital Being Led by the Chinese,” *BBC*, Feb. 12, 2013.

⁴⁸ Stuart Lau, “Italy may be ready to open up four ports to Chinese investment under ‘Belt and Road Initiative,’” *South China Morning Post*, March 19, 2019; Jason Horowitz, “A Forgotten Italian Port Could Become a Chinese Gateway to Europe,” *New York Times*, March 18, 2019.

⁴⁹ Parag Khanna, *The Future is Asian: Commerce, Conflict, and Culture in the 21st Century* (New York: Simon & Schuster, 2019), 189; Henry Gao, “Digital or Trade? The Contrasting Approaches of China and US to Digital Trade,” *Journal of International Economic Law* 21, no. 2 (2018): 308-310.

⁵⁰ WTO, “WTO, World Economic Forum and eWTP Launch Joint Public-Private Dialogue to Open Up E-commerce for Small Business,” Dec. 13, 2017.

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.⁵¹ Within China, the country established new pilot free trade zones in 2017 in Chongqing, Henan, Hubei, Shaanxi, and Sichuan. They are different from the first batch of Chinese free trade zones, especially the one in the Pudong district of Shanghai, which experimented with trade and investment liberalization and reducing government red tape. These early free trade zones served as laboratories and “test beds for domestic economic reforms” to pioneer market liberalization in order to attract foreign and domestic investment, integrate into global value chains, and enhance export-led growth.⁵² The Shanghai free trade zone was the first to apply a “negative list” approach to investment approvals so that all investments are automatically permitted, except in sectors explicitly restricted. These zones facilitated technology transfer to Chinese industry through emulation, spillovers, and, for some, theft, in turn spurring competition and internal Chinese R&D spending.⁵³ This legal experimentation illustrates how transnational legal ordering processes within China helped integrate its economy with the global economy

In contrast, these new free trade zones are strategically selected to develop the poorer Western provinces and to link them with BRI countries, which in turn develop free trade zones linked to China.⁵⁴ For example, the ones in Chongqing and Sichuan serve as key nodes in the China-Europe Railway Express, which reaches into Europe; while the one in Shaanxi is crucial in linking China with central Asian states.⁵⁵ Within BRI countries, China worked with its state-owned companies to finance and build huge industrial parks in new “economic and trade cooperation zones.” Chinese lawyers have advised on the drafting of other country’s laws for “special economic zones,” building from China’s experience.⁵⁶ As a Chinese lawyer from a major Beijing law firm told us, “we did research how China did it, starting with Shenzhen at the end of the 1970s.... For all of those major economic zones, we showed how it evolved from symbolic regulation to a practical set of rules to help investors make investments. From this research, we can help tell our counterparts what lessons China learned.”⁵⁷ By January 2019, China announced that it had built eighty-two such zones within BRI countries with total investment of US\$ 29

⁵¹ Justin Yifu Lin, “‘One Belt and One Road’ and Free Trade Zones: China’s New Opening-Up Initiatives,” *Frontiers of Economics in China* 10, no. 4 (2015): 585.

⁵² Barry Naughton, *The Chinese Economy: Adaptation and Growth* (Cambridge: MIT Press, 2018), 427.

⁵³ For example, the largest sector for U.S. investment was information and communications technology companies. *Ibid.*, 435.

⁵⁴ These duty-free zones provide for zero percent tariffs and eased customs administration, and thus different treatment compared to the rest of the country. They thus aim to attract investment to take advantage of lower input costs. Tom Miller, *China’s Asian Dream: Empire Building Along the Silk Road* (London: Zed Books, 2017); National Development and Reform Commission, *Vision and Actions*.

⁵⁵ Chongqing and Chengdu, the capital of Sichuan Province, has more trains than all other Chinese cities with China-Europe Railway Express. See Zhang Zhi, “China-Europe Railway Express Sped Up: Several Cities Rushed to launch, Chongqing, Chengdu, Xi’an are in the Top Three [Zhonggou Banlie Jiasupao: Duodi Qiangkai, Chongqing Chengdu Xi’an Weilie Qiansanjia],” *China Times*, Aug. 2 2019, <https://finance.sina.com.cn/roll/2019-08-02/doc-ihytcerm8069823.shtml>

⁵⁶ Telephone interview, Chinese senior partner at major law firm, March 20, 2020; Erie, Chinese Law and Development, [62] (citing 2019 interview with Vietnamese lawyer regarding Chinese assistance with Vietnam’s law).

⁵⁷ Telephone interview, March 20, 2020.

billion.⁵⁸ 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 resolution mechanisms, although that infrastructure is more flexible than Western models.⁵⁹ 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.⁶⁰ The projects focus on infrastructure-building, including roads, rail, ports, airports, pipelines, electrical power plants, and telecommunications. They catalyze different forms of public-private partnerships between the state, state-owned enterprises, and private companies. The intertwined nature of large private enterprises and the Chinese party and state facilitate these partnerships.⁶¹ 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.⁶² By 2017, China's Xinhua News Agency noted that state-owned enterprises at the central level (as opposed to the provincial level) alone had already participated in more than 1,700 BRI projects.⁶³ 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 rates⁶⁴ — and they coordinate with state authorities to obtain government procurement

⁵⁸ Ministry of Commerce Press Office, *2018 nian Shangwu Gongzuo Nianzhong Zongshu zhi san: Yidai Yilu Jingmao Hezuo Chengxiao Xianzhu (2018 Year-end Summary for Commerce Works, No. 3: Significant Achievements in Belt Road Initiative Economic and Trade Cooperation)*, Dec. 27, 2018.

⁵⁹ 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”).

⁶⁰ 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 *The Belt and Road Initiative*, eds. Julien Chaisse and Jędrzej Górski (Leiden: Brill Nijhoff, 2018).

⁶¹ As Milhaupt and Zheng write, “the boundary between state and private ownership of enterprise is often blurred in contemporary China.” Curtis Milhaupt & Wentong Zheng, “Beyond Ownership: State Capitalism and the Chinese Firm,” *Georgetown Law Journal* 103 (2015): 665, 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,” *Harvard International Law Journal* 57 (2016): 282-284.

⁶² Most of the financing is provided by Chinese banks. China created a Silk Road Fund in 2014 under the central bank, the People's Bank of China. 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).

⁶³ Xinhua, “Zhongyang Qiye Jiji Canyu ‘Yidai Yilu’ Jianshe, Shezu chao 1700 ge Xiangmu (Central SOEs Actively Participating in BRI Construction, Involved in over 1700 Projects),” *Xinhua News Agency*, Dec. 23, 2017. The numbers should be read with some scepticism given that companies may label BRI projects to signal loyalty to President XI given that this is his favoured policy initiative. Tanner Greer, “One Belt, One Road, One Big Mistake,” *Foreign Policy*, Dec. 6, 2018.

⁶⁴ China is by far the world's largest provider of export credits, which it extends through China Eximbank, China Development Bank, and Sinosure. It uses these export credits to support BRI infrastructure projects, including for the priority sectors in its advanced manufacturing initiatives, such as the advanced information and communications technology of Huawei and rail transport around the world. In the process, China is undermining the OECD Arrangement on Officially Supported Export Credits, a U.S. initiative created in 1978 to discipline countries' provision of export credit. Hopewell, *Clash of Powers*, chapters 4 and 5.

contracts. Analysts estimate that around eighty-nine percent of the contractors of BRI projects funded by Chinese banks have been Chinese companies.⁶⁵

Private Chinese external and in-house lawyers play major roles in BRI contracts. State-owned enterprises have created large in-house legal departments consisting of dozens of lawyers, with lawyers also in their many foreign affiliates. Some of these lawyers trained in the United States. The founder of the legal department of the huge outbound Chinese construction company China Machinery Engineering Corporation, for example, graduated from Harvard Law School.⁶⁶ These in-house lawyers work with outside Chinese law firms, international law firms, and local law firms in BRI countries to do due diligence, draft memoranda of understanding, and write and negotiate engineering, procurement, and construction contracts, and operation and management agreements, as well as joint ventures and corporate organizational documents for special purpose vehicles. These contracts are of an “international” nature, and counsels build them from models that they have used in the past.⁶⁷

Critically, China exports Chinese *standards* through the BRI, challenging U.S. 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 are not clearly captured within the categories of private and 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 (such as in an annex), and they can have major regulatory impacts in practice.⁶⁸ 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.⁶⁹ 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 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 Western ones, and they want to internationalize them. In this way, the Chinese can gradually shape the adoption of Chinese standards through practice in many regions in the world, establishing facts on the ground with

⁶⁵ “Gateway to the Globe,” *Economist*, July 28, 2018, 15.

⁶⁶ CMEC references itself as a “window to the world” company. Telephone interview with in-house legal counsel, March 30, 2020.

⁶⁷ Telephone interviews with practicing lawyers and in-house counsel at a major Chinese state-owned enterprise and a major Chinese private enterprise, March 20, 23, 27, and 30, 2020.

⁶⁸ Ibid. 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* (Oxford: Hart Publishing, 2005).

⁶⁹ Andrew Polk, “China Is Quietly Setting Global Standards,” *Bloomberg*, May 7, 2018.

increased market share.⁷⁰ As in-house counsel of a large Chinese state-owned enterprise told us regarding a contract for building a rail system in South America, the client initially wanted the company to follow Spanish/European standards, but when it became aware of the quality of Chinese rail standards, it “accepted them.” The Chinese lawyer’s experience was that “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.”⁷¹ 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.⁷²

Most worryingly for the United States, China appears to have the lead in developing 5G (fifth generation) wireless technology standards, where Huawei seeks dominance.⁷³ 5G technology could fundamentally change the economy as well as everyday life, unleashing new competition for technological leadership.⁷⁴ 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.”⁷⁵ 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.⁷⁶ Chinese companies are becoming increasingly competitive in these areas, potentially giving Chinese innovators and vendors a critical advantage in multiple product fields.⁷⁷

⁷⁰ China also 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 *Governing Science and Technology under the International Economic Order*, Shin-yi Peng, Han-Wei Liu and Ching-Fu Lin 114-138 (2018).

⁷¹ Telephone interview, March 20, 2020.

⁷² Peter Yu, “Building Intellectual Property Infrastructure Along China’s Belt and Road,” *University of Pennsylvania Asian Law Review* 14 (2019): 275-325.

⁷³ 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*, July 23, 2019.

⁷⁴ 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*, Dec. 18, 2019.

⁷⁵ Defense Innovation Board, *The 5G Ecosystem: Risks & Opportunities for DoD* (Apr. 2019), 7.

⁷⁶ Gregory Shaffer, “Trade Law in a Data-Driven Economy: A Call for Modesty and Resilience,” in *Reconfiguring International Economic Law in an AI Era*, Shin-yi Peng, Ching-Fu Lin and Thomas Streinz, eds. (Cambridge: Cambridge University Press, 2021).

⁷⁷ 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 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*, Oct. 2018, 1.

For China, standard setting is another part of “the strategic game among big powers... over system design and rule making.”⁷⁸ 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.⁷⁹ Its aim is to set standards in emerging, cutting-edge industries. 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 standards meetings and provide secretariat services. The past president of the International Standardization Organization (ISO) (from 2015-2017) was Chinese as is the current president of the International Electrotechnical Committee (IEC) (from 2020-2022). To give one example of its international engagement, China and Chinese companies are working to shape UN facial recognition standards in the International Telecommunication Union.⁸⁰ 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.⁸¹ In 2018, China established the China International Commercial Court under the Supreme People's Court as a new place for BRI-related dispute settlement, although foreign contracting parties generally do not agree to dispute settlement within China so that the court so far remains largely symbolic.⁸² Formally the new international commercial court is regarded as a division of the Supreme People's Court and, as such, its decisions are final and not subject to appeal. This court has two branches based in Shenzhen and

⁷⁸ Emily de La Bruyere and Nathan Picarsic, “China’s next plan to dominate international tech standards,” *TC*, April 11, 2020.

⁷⁹ Bjorn Fagerstern and Tim Ruhlig, “China’s Standard Power and Its Geographic Implications for Europe,” *Swedish Institute of International Affairs*, Feb. 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*, Sept. 6, 2016, <http://theory.people.com.cn/n1/2016/0906/c40531-28693273.html> (also noting the importance of combatting protectionism through standards).

⁸⁰ Anna Gross and Madhumita Murgia, “Chinese tech groups shaping UN facial recognition standards,” *Financial Times* (Dec. 1, 2019) (noting that “China’s influence in drafting and setting the standards at the UN has grown”).

⁸¹ Telephone interviews with SOE in-house legal counsel, March 30, 2020; former internal lawyer with Huawei, March 23, 2020; and external counsel for three major Beijing law firms, March 20 and March 27. These interviewees all noted that Hong Kong is less frequently used because it is increasingly viewed as a part of China. The governing law is either local law or the law of a neutral third country, at times linked to the country’s colonial heritage. Parties use mediation more for technical disputes, which involves engineers. If the dispute is not resolved, then arbitration is most common. Interview with in-house legal counsel in major state-owned enterprise, March 30, 2020.

⁸² Telephone interviews with practicing lawyers and in-house counsel at a major Chinese state-owned enterprise and a major Chinese private enterprise, March 20, 23, 27, and 30, 2020. One lawyer noted that the court can be used for enforcement of foreign judgments and arbitral awards. Interview, March 23, 2020.

Xi'an.⁸³ 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,⁸⁴ 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 and Chinese companies.⁸⁵

These developments form part of an ongoing shift toward Asia as a center for transnational dispute settlement (whether through arbitration or special international commercial courts),⁸⁶ with China aiming to play a more important role. These new Chinese and Asian institutions, together with Asian professional networks using them, compete to offer services for transnational dispute resolution that, in the process, they will shape over time. There thus will be pressure on the China International Commercial Court to be highly professional like the London and Singapore models if it is to succeed. Ultimately, the China International Commercial Court’s use will depend on parties’ bargaining power, the court’s reputation for expertise and impartiality, and the relationship of the host country with China.

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.⁸⁷ 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.⁸⁸ 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.⁸⁹

⁸³ Mathew Erie, “The China International Commercial Court: Prospects for Dispute Resolution for the ‘Belt and Road Initiative,’” *ASIL Insights* 22, no. 11 (2018). Both branches are under the guidance of the Fourth Civil Division of the Supreme People’s Court.

⁸⁴ China International Commercial Court, “Judges,” *Supreme People’s Court of the People’s Republic of China*. Erie, “China International Commercial Court.”

⁸⁵ 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 Republic of China*.

⁸⁶ Mathew S. Erie, “Legal Hubs, The Emergent Landscape of International Commercial Dispute Resolution,” *Virginia Journal of International Law* 60: 225 (2020).

⁸⁷ Victor Shih, “Financial Instability in China: Possible Pathways and their Likelihood,” *Merics China Monitor* (Oct. 20, 2017).

⁸⁸ Compare “Remarks by Vice President Pence on the Administration’s Policy Toward China,” *Foreign Policy*, Oct. 4, 2018; Agatha Kratz et al., “New Data on the Debt Trap Question,” *Rhodium Group*, Apr. 29, 2019; Chas Freeman, “On Hostile Coexistence with China,” *Remarks to the Freeman Spogli Institute*, May 3, 2019.

⁸⁹ Greer, “One Belt, One Road, One Big Mistake.”

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.⁹⁰ 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 suggest a coordinated strategy to enhance Chinese 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 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.⁹¹

While the AIIB started as a Chinese initiative and China is the largest shareholder with around a twenty-seven percent 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.⁹² 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. The AIIB emphasizes that "our core principles are openness, transparency, independence and accountability and our mode of operation is 'Lean, Clean and Green.'" ⁹³ 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.⁹⁴ 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 three months.

⁹⁰ Martin A. Weiss, "Asian Infrastructure Investment Bank (AIIB)," *Congressional Research Service*, 7-5700, Feb. 3, 2017.

⁹¹ The United Kingdom, for example, resisted U.S. entreaties, negotiated in secret with China, and gave the Obama administration 24-hours' notice before joining the AIIB.

⁹² 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 Naxie?], 25 October 2019, available at <https://www.imsilkroad.com/news/p/76186.html>; Krzysztof Iwanek, "Fully Invested: India Remains the China-led AIIB's Biggest Borrower," *The Diplomat*, 6 September 2019.

⁹³ AIIB, "Our Founding Principles," *Asian Infrastructure Investment Bank*, <https://www.aiib.org/en/about-aiib/index.html>.

⁹⁴ Weiss, "AIIB."

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. The AIIB's President and staff in Beijing thus potentially can exercise greater autonomy.⁹⁵

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 U.S. 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 on Standards and Codes (known as ROSCs) regarding good institutional practices.⁹⁶ Over time, the Bretton Woods institutions reduced their focus on funding basic infrastructure and rather emphasized creating a legal framework that would help attract private investment.

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, enhance China's place in global governance, and develop 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.⁹⁷

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.

⁹⁵ Daniel C.K. Chow, "Why China Established the Asia Infrastructure Bank," *Vanderbilt Journal of Transnational Law* 49 (2016): 1255.

⁹⁶ Although the World Bank did not apply substantive policy conditions for assistance in its early days, this changed first with the structural adjustment policies of the 1980s and then with the turn to governance policies in the 1990s. Devesh Kapur, John Lewis, and Richard Webb, eds., *The World Bank: Its first half century* (Brookings Institution: Washington, D.C., 1997). Chow, "Why China Established," 1277-1279 (on World Bank conditions regarding privatization; deregulation; private property rights, intellectual property rights; tax reform; and market-determined interest and exchange rates); Weiss, "AIIB," 4.

⁹⁷ For this reason India has expressed great wariness of the Belt and Road Initiative, even though it is the largest recipient of AIIB-financed projects. Enda Curran, "The AIIB: China's World Bank," *Bloomberg*, Aug. 6, 2018.

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 U.S. 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 broader 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 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. Unlike the U.S. model for free trade agreements and bilateral investment treaties where the United States insists on using a common U.S. template to address behind-the-border issues, Chinese free trade agreements do not aim to change internal governance systems.

China turned to such agreements around a decade after it joined the WTO. 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 in complement to its broader private law-oriented finance-trade-investment model under the BRI.⁹⁸ As of June 2020, China had signed free trade agreements with thirteen countries, including South Korea and Australia in 2015.⁹⁹ In addition, it had launched trade negotiations with six others,¹⁰⁰ as well as a trilateral agreement with South Korea and Japan. In 2002, it concluded its first free trade agreement with the ten-member Association of Southeast Asian Nations (ASEAN), and in 2003, it formalized Closer Economic

⁹⁸ 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.

⁹⁹ 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).

¹⁰⁰ It had launched negotiations with the Gulf Cooperation Council (April 2005), Norway (September 2008), Sri Lanka (September 2014), Israel (March 2016), Moldova (March 2018), and Panama (July 2018).

Partnership Arrangements with Hong Kong, and Macau.¹⁰¹ It aimed to expand these agreements through negotiating a Regional Comprehensive Economic Partnership that would comprise fifteen Asian countries, of which China already had a free trade agreement with all but Japan. Overall, China envisages over fifty free trade agreements as part of its implementation of the BRI.¹⁰² 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.¹⁰³ 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 four 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 ten years to complete.¹⁰⁴

These free trade agreements are narrower 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 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 Memoranda of Understanding.¹⁰⁵

China nonetheless has used these free trade agreements to establish rules and precedents regarding its treatment as a market economy.¹⁰⁶ 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 eighty-one 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.

¹⁰¹ In turn, Hong Kong concluded a free trade and investment agreements with ASEAN in November 2017, providing further bridges between them.

¹⁰² Carrai, *It is Not the End of History*.

¹⁰³ Henry Gao, "Selected Issues in TPP Negotiations and Implications for China," in *Regional Cooperation and Free Trade Agreements in Asia*, eds. Jiexiang Hu and Matthias Vanhullebusch (Leiden: Brill Academic Publishers, 2014), 77-98.

¹⁰⁴ These agreements can contain provisions designed to advance particular Chinese sectors, such as services commitments in the agreements with Australia and New Zealand relating to Chinese cooks and tour guides.

¹⁰⁵ Henry Gao, "China's Evolving Approach to Environmental and Labour Provisions in Regional Trade Agreements," *ICTSD Blog*, Aug. 25, 2017.

¹⁰⁶ Henry S. Gao, "China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?," in *Making Global Trade Governance Work for Development*, ed. Carolyn Deere-Birkbeck (Cambridge: Cambridge University Press, 2011): 153-180.

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 (after India dropped out in November 2019).¹⁰⁷ 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.¹⁰⁸ 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 Trans-Pacific Partnership that excluded China accelerated RCEP negotiations.

Although many Western commentators assume that China drives RCEP negotiations, in practice, it has assumed a low profile. Formally, the RCEP's Guiding Principles and Objectives explicitly state that "negotiations for the RCEP will recognize ASEAN Centrality in the emerging regional economic architecture," a point on which ASEAN insisted. Given ASEAN's historical and current problems with China, it is not surprising that ASEAN would like to be recognized as taking the lead. However, ASEAN is a weak regional institution with no uniform agenda. Thus, the "ASEAN Centrality" principle makes it difficult to conduct negotiations, much less conclude them. Moreover, even if China wished to drive and dominate the negotiations, it has to contend with Japan (the world's third largest economy), followed by South Korea and Australia, as significant countervailing economic powers. Thus, the principle of ASEAN Centrality represents a compromise.

In addition, there is significant rivalry among RCEP members. The relation between South Korea and Japan is charged with longstanding conflict, going back to Japan's annexation of South Korea in the first half of the 20th century. The two have been negotiating a free trade agreement for almost fourteen years with no conclusion in sight.¹⁰⁹ China has conflicts with many RCEP members regarding its claims in the South China Sea.¹¹⁰ If countries find bilateral talks challenging, there is little reason to believe that they will conclude a more ambitious regional agreement. Adding to the problem is the wide disparity of the parties' development levels, which has impeded agreement on a common approach to negotiations.

Due to these challenges, expectations regarding an ambitious RCEP remain low. Because some of the parties are concerned about liberalizing services and investment, and about imposing new requirements on intellectual property and competition policy, these areas likely will involve

¹⁰⁷ Regional Comprehensive Economic Partnership, *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Partnership*.

¹⁰⁸ 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).

¹⁰⁹ Asia Regional Integration Center, *Japan-Republic of Korea Free Trade Agreement (JKFTA)*, 2003.

¹¹⁰ It also shared a militarized and disputed border with one RCEP party (India), although India dropped out of the RCEP in 2019 because of concerns over China's trade dominance.

few major new commitments, although intellectual property protection should be largely resonant with emerging international norms.¹¹¹ Significant coverage of behind-the-border regulatory issues regarding labor rights and environmental protection generally appears unlikely. If addressed, provisions will likely be couched in soft, best-endeavor language, and might be excluded from dispute settlement, consistent with the “ASEAN way.”¹¹² The agreement could even permit discriminatory treatment among its members, since this approach may be the only way the parties can address each other’s “various sensitivities and interests.”¹¹³

In sum, the RCEP and China’s bilateral trade agreements offer a paradigm that is more sensitive to national sovereignty than U.S. agreements. They leave more room for policy space, including through provisions providing for special and differential treatment and other flexibility mechanisms. For many development economists, such an approach is better because it is more flexible for development policy, including industrial policy.¹¹⁴ Although other analysts stress the need for binding commitments on behind-the-border issues to facilitate global supply chains,¹¹⁵ 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.¹¹⁶

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.¹¹⁷ 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 geopolitical tensions between them. Chinese investment agreements incrementally build from Western models, such as through acceptance of investor-state dispute settlement, but China is developing them pragmatically and is including “soft law” alternatives for dispute resolution, such as mediation.

¹¹¹ As Peter Yu notes, many of the parties to the RCEP are also parties to the TPP (Australia, Japan, New Zealand, and almost half of ASEAN), and China increasingly has viewed benefits from intellectual property protection, such that norms are converging in Asia. Peter Yu, “TPP, RCEP and the Future of Copyright Normsetting in the Asia-Pacific,” in *Making Copyright Work for the Asian Pacific? Juxtaposing Harmonisation with Flexibility*, eds. Susan Corbett and Jessica Lai (Canberra: ANU Press, 2017). The intellectual property chapters in China’s free trade agreements are growing in scope, from no mention in China’s 2008 agreement with Singapore to over 3,000 words in China’s 2013 agreement with Switzerland. Yu, “Building Intellectual Property Infrastructure Along China’s Belt and Road,” 281.

¹¹² Banyan, “Getting in the Way,” *Economist*, May 17, 2014.

¹¹³ RCEP, “Joint Leaders’ Statement on the Regional Comprehensive Economic Partnership,” *Vientiane: Lao PDR*, Sept. 8, 2016.

¹¹⁴ Rodrik, *Straight Talk on Trade*.

¹¹⁵ Richard Baldwin, “21st Century Regionalism: Filling the Gap Between 21st Century Trade and 20th Century Trade Rules,” *World Trade Organization: Economic Research and Statistics Division*, May 23, 2011.

¹¹⁶ 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,” *Cornell International Law Journal* 51, no. 3 (2018).

¹¹⁷ UNCTAD, “China: Bilateral Investment Treaties (BITs), Investment Policy Hub,” *Investment Policy Hub* (figures as of Jan. 23, 2020).

China's investment treaty negotiations with the European Union and United States, in turn, are linked to internal Chinese reform initiatives. As one interviewee noted, "it is not by chance that in July 2013, the United States and China jointly announced that they would agree to negotiate" an investment treaty that covers all sectors, unless specifically excluded, and in the following month, China's State Council announced the approval of investments on such basis in a free trade zone in Shanghai as a "trial."¹¹⁸

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. As Figure 7.1 shows, 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.

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).¹¹⁹ 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 existing measures.¹²⁰ Second, the new agreements expanded the scope of ICSID investor-state arbitration to cover all investment disputes.¹²¹

These changes reflect China's shift from being the world's largest destination of foreign direct investment — it surpassed the United States in 2003, two years after joining the World Trade Organization¹²² — 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.¹²³ The results were impressive. Whereas China was the world's top destination for foreign direct investment between 1990-2015, 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 fifteen percent of China's inbound investment. By 2016, Chinese outward foreign direct investment substantially surpassed it, although it plunged starting in 2018 — especially in the United States — because of rising trade tensions, enhanced U.S. and European investment scrutiny

¹¹⁸ Telephone interview, March 20, 2020.

¹¹⁹ Axel Berger, "The Politics of China's Investment Treaty-Making Program," in *The Politics of International Economic Law*, Tomer Broude, Marc L. Busch and Amelia Porges, eds. (Cambridge: Cambridge University Press, 2011).

¹²⁰ China's agreement with Mexico provides an example. UNCTAD, *China-Mexico Bilateral Investment Treaty*, 2008, Article 3.

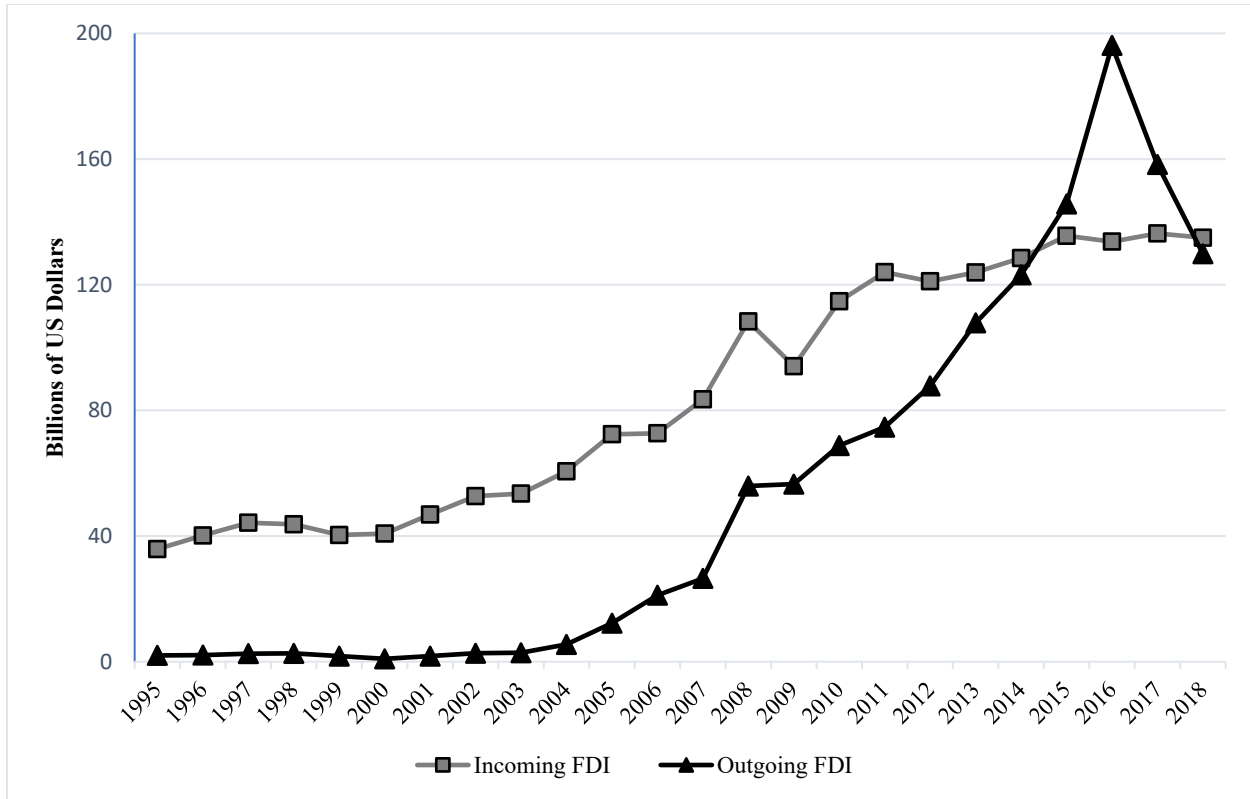
¹²¹ UNCTAD, *China-Germany Bilateral Investment Treaty*, 2003, Article 9.

¹²² Sandra Poncet, *Inward and Outward FDI in China* (2007), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.473.5100&rep=rep1&type=pdf>.

¹²³ Naughton, *The Chinese Economy: Adaptation and Growth*, 446.

of Chinese acquisitions on national security grounds, and new Chinese restrictions on outbound capital, followed by the COVID-19 pandemic.¹²⁴

Figure 7.1. China's incoming and outgoing FDI¹²⁵



China's investment strategy takes two dominant forms. As part of China's Go Out policy, the government encouraged 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, including as part of the BRI, particularly in infrastructure and resource extraction projects. The first type of investment largely 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 plummeted in the United States after the U.S.-launched trade war. For example, China National Chemical Corp bought the Swiss-

¹²⁴ UNCTAD, *World Investment Report 2016* (ranking China first for inward FDI between 1990-2015, and noting China reaching parity by 2014); Khanna, *The Future is Asian* 164 (noting 90% drop of Chinese investment in the U.S. in 2018).

¹²⁵ Sources: Incoming FDI: MOFCOM Report on Foreign Investment in China (2017-18), UNCTAD World Investment Report (2008, 2002, 2000); China News; Outgoing FDI: MOFCOM Report on Development of China's Outbound Investment (2018); UNCTAD World Investment Report (2002, 2000).

based Syngenta for US\$43 billion in 2017 (the largest acquisition to date), which is critical for China's ambitions in agricultural biotechnology.¹²⁶

China's investment in BRI countries nonetheless continued to grow, increasing Chinese demands for investment protection. In 2017, Chinese firms signed 7,217 new project contracts in BRI countries, with a total contract volume of US\$144.3 billion, constituting 54.4% of its total foreign project contracts.¹²⁷ 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.¹²⁸

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 mixed extent) India.¹²⁹ From their international trade law experience, some Chinese trade specialists believe that China should look favorably on an appellate process for investor-state dispute settlement. As one of our interviewees working with the government observed, China has often fared better challenging U.S. 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).¹³⁰ 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."¹³¹ On these grounds it supports consideration of "a permanent appellate mechanism as a reform proposal."¹³² 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 U.S. and European ones, and China is likely to rely much more on soft forms of dispute resolution in practice, such as pre-arbitration consultation and mediation, given its aim to build cooperative, cross-border ties.¹³³

¹²⁶ United States Trade Representative, *Section 301 Report*, Aug. 24, 2018, 126.

¹²⁷ Business Administration in Kazakhstan, "China's Investment Cooperation with Countries Along the 'Belt and Road' in 2017," *Ministry of Commerce of the People's Republic of China*, Mar. 5, 2018, <http://www.mofcom.gov.cn/article/i/jyjl/e/201803/20180302717955.shtml>.

¹²⁸ Senior Chinese officials, such as former MOFCOM Vice Minister Wei Jianguo, suggested that China expedite the signing of BITs with BRI countries in 2015. Interview, "Former Deputy Minister of the Ministry of Commerce: One Belt," *21st Century Business Herald*, Mar. 31, 2015, <http://finance.sina.com.cn/china/20150331/015921847760.shtml>.

¹²⁹ Fabio Morosini and Michelle Rattton Sanchez Badin, "Reconceptualizing Investment Law from the Global South," in *Reconceptualizing Investment Law from the Global South*, eds. Fabio Morosini and Michelle Rattton Sanchez Badin (Cambridge: Cambridge University Press, 2017), 35; Congyan Cai, "Balanced Investment Treaties and the BRICS," *AJIL Unbound*, 112: 217-222 (2018) (China having more "balanced" approach than other BRICS).

¹³⁰ Interviews with a lawyer in a major Chinese law firm working with the government, July 23, 2016 and March 20, 2020.

¹³¹ Anthea Roberts, "UNCITRAL and ISDS Reforms: Moving to Reform Options ... The Politics," *EJIL: Talk!*, Nov. 8, 2018.

¹³² Anthea Roberts and Taylor St. John, "UNCITRAL and ISDS: Chinese Proposal" *EJIL: Talk!*, Aug. 5, 2019.

¹³³ *Ibid.*

IV. The Transnational Legal Order for Intellectual Property Rights and China's Innovation Strategies

As part of its strategy to expand trade and investment through the BRI, the government also has massively supported Chinese technological development. China already deemed it risky to rely on Western technologies before the United States launched a trade war, and it has been encouraging indigenous innovation through government subsidies complemented by enhanced intellectual property protection. Yet unlike the United States and European Union, China is not an evangelist pressing countries to change their intellectual property laws and practices. Rather, China has gradually and pragmatically enhanced its own internal intellectual property system by adopting and repurposing Western models with the aim of becoming a world leader in developing new technologies. These technologies will be critical for the BRI, including through standards used for infrastructure projects, which in turn create corridors for exporting Chinese manufactured products that use advanced technologies such as robotics and artificial intelligence. This section first addresses China's long and contentious relationship with the United States over intellectual property and its internal development of intellectual property laws and institutions. It then assesses China's strategic plan to develop indigenous technology, reduce dependence on the West, and become a world technological power at the cutting edge of the next industrial revolution.

A. From a Western Transplant to Indigenous Innovation

China's relationship to intellectual property law is intricately linked to its relationship with the United States. In 1979, China entered into a bilateral agreement with the United States regarding intellectual property protection in the context of their trade relations, following which China joined the World Intellectual Property Organization (in 1980), enacted new patent, copyright, and trademark laws (between 1982-1984), and acceded to the Paris Convention for the Protection of Industrial Property (in 1984).¹³⁴ The United States continued its pressure on China to recognize U.S. intellectual property, placing the country on its "Priority Watch List" for allegedly unfair trade practices, and threatening sanctions, which helped spur China's adoption of its 1990 copyright law. China took further steps to avoid sanctions by signing a Memorandum of Understanding Between China and the United States on the Protection of Intellectual Property in 1992, which catalyzed further amendments to Chinese laws and regulations.¹³⁵ Most notably, as part of its accession to the WTO in 2001, China agreed to the WTO Agreement on Trade Related Aspects of Intellectual Property Rights, complemented by further commitments in its Working Party Report, which included fifty-five paragraphs on intellectual property.¹³⁶ This marked a tectonic shift in China's intellectual property rights regime, and it ushered in new domestic

¹³⁴ Peter K. Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century," *American University Law* 50, no. 1 (2000): 131, 136.

¹³⁵ *Ibid.*, 140-142.

¹³⁶ World Trade Organization, *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, Oct. 1, 2001, paras. 251-305.

institutional development.¹³⁷ At this time, transnational legal ordering was top down for China, as China was pressed to adopt Western legal norms.¹³⁸ Although China was in the process of becoming a manufacturer of the world, the technology came from abroad and the royalties flowed there.

After China joined the WTO, the United States pressured China to comply with its new WTO commitments. U.S. private associations, such as the Business Software Alliance working with International Data Corporation, found that China had a piracy rate of ninety percent in the mid-2000s.¹³⁹ In 2007, the United States brought a WTO complaint against China for failing to comply with its commitments under the TRIPS agreement and the Accession Protocol. China invested significant resources in defending the case, whose outcomes was largely a draw.¹⁴⁰

Countries are best positioned to resist what they view as impositions by foreign powers at the enforcement stage. Although the TRIPS agreement provides for protection and enforcement of intellectual property rights, it also contains ambiguities and exceptions. China took advantage of them to defend its interests, while also turning a blind eye to infringements, in part because it lacked administrative capacity at the local level, but mainly because it had less interest in enforcement given its other priorities.¹⁴¹

The TRIPS agreement, combined with China's Accession Protocol to the WTO, nonetheless had major implications in China, as it created new opportunities for transnational legal ordering that catalyzed stakeholders in China, including the government and private actors, triggering top-down and bottom-up processes. Developments in China were not simply foreign "transplants." From a top-down vantage, the government has been trying to create its own domestic "indigenous innovation" policies, to the consternation of the United States and Europe. It invested significant resources in developing new intellectual property institutions to support such innovation, including specialized judges and courts for intellectual property disputes. From a bottom-up perspective, Chinese individuals invested in new careers, including as attorneys, patent and trademark agents, patent examiners, and bureaucratic agency and judicial officials.¹⁴² Chinese

¹³⁷ Andrea Wechsler, "China's WTO Accession Revisited: Achievements and Challenges in Chinese Intellectual Property Law Reform," in *European Yearbook of International Economic Law*, eds. Christoph Herrmann, Markus Krajewski and Jörg Philipp (London: Springer Nature, 2012), 125.

¹³⁸ William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, (Stanford: Stanford University Press, 1995), 30-55 (on transplants and how the Chinese "learned the law at gunpoint").

¹³⁹ Yu, "From Pirates to Partners," 2.

¹⁴⁰ In 2009, the panel found China did not properly dispose of goods seized by customs and that it improperly denied copyright protection to works that had yet to be authorized for publication or dissemination. These were matters that were of minor importance and China forthwith revised its copyright law to comply with the decision. China was victorious on the two more important issues, its threshold for criminalization of IP infringement and its disposal of infringing goods through means other than auctions. Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, Mar. 20, 2009, DSR 2009:V, 2097.

¹⁴¹ Peter K. Yu, "TRIPS and its Achilles' Heel," *Journal of Intellectual Property Law* 18 (2010-2011): 479, 495-496; Kenneth Guang-Lih Huang, Xuesong Geng, and Heli Wang, "Institutional Regime Shift in Intellectual Property Rights and Innovation Strategies of Firms in China," *Organization Science* 28, no. 2 (2017): 355, 358. Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China* (London: Palgrave Macmillan, 2017).

¹⁴² A separate profession of patent agents and trademark agents developed which is in competition with IP lawyers for business. Sida Liu, "The Changing Role of Lawyers in China: State Bureaucrats, Market Brokers, and Political

companies hired and worked with these individuals. In parallel, domestic constituencies that embraced intellectual property protection and became rights holders engaged in information campaigns and enforcement actions.¹⁴³ They worked to shape public awareness and attitudes towards intellectual property, including among new generations of Chinese. As the Chinese became wealthier, consumers became more interested in consumer protection, such as against trademark fraud. WTO law supported this dynamic development of transnational legal ordering over the governance of intellectual property that shaped state institutions and professions in China, which, in turn, interacted with new constituent demands.

Remedies for violations of intellectual property rights were initially weak in China. Over time, China enhanced them, including because of pressure from domestic stakeholders. In 2000 and 2001, China amended its patent, copyright, and trademark laws to provide for injunctive relief for the first time, which parties increasingly used.¹⁴⁴ Although the United States criticized China's criminal laws for lacking sufficient power to deter violations, China expanded the list of criminal intellectual property offences and granted more enforcement powers to criminal courts.¹⁴⁵ At the local level, administrative agencies were to enforce intellectual property rights, but courts also played an increasing role through criminal penalties and by allowing litigants to protect their rights against infringements by actors operating outside of local jurisdictions.¹⁴⁶ As part of the so-called "phase 1" U.S.-China Economic and Trade Agreement of January 2020, China agreed to further increase enforcement together with penalties "as an interim step" through applying them "at or near the statutory maximum," followed by new legislation that will increase civil and criminal law penalties, complemented by new commitments to lower the threshold for criminal enforcement.¹⁴⁷

These changes required considerable institutional development. Analysts now consider China's State Intellectual Property Office (SIPO) to be "in the top tier of patent offices that will dominate the emerging system of global patent administration."¹⁴⁸ The number of patent examiners in SIPO soared from around 400 in 1996¹⁴⁹ to around 5,000 in 2009¹⁵⁰ to over 11,400 in 2017.¹⁵¹ China is now the largest issuer of patents in the world, surpassing the United States.¹⁵²

Activists," in *The New Legal Realism*, vol. 2, eds. Heinz Klug and Sally Engle Merry, (Cambridge: Cambridge University Press, 2016), 181.

¹⁴³ Thomas, *Assessing Intellectual Property Compliance*, 139.

¹⁴⁴ *Ibid.*, 91.

¹⁴⁵ *Ibid.*, 146.

¹⁴⁶ Susan Finder, "The Protection of Intellectual Property Rights Through the Courts," in *Chinese Intellectual Property Law and Practice*, eds. Mark A. Cohen et al. (Alphen aan den Rijn: Kluwer Law International, 1999), 165, 255.

¹⁴⁷ Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China, signed on Jan. 15, 2020. Article 1.22 addresses enforcement, article 1.27 addresses interim and subsequent steps regarding penalties, and article 1.7 addresses the threshold for criminal enforcement.

¹⁴⁸ Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* (Cambridge: Cambridge University Press, 2010), 233.

¹⁴⁹ Sha Shu, "Jiedu Zhongguo Zhuanli Shenchayuan (Decoding Chinese Patent Examiners)," *China Intellectual Property*, no. 9, <http://www.chinaipmagazine.com/journal-show.asp?665.html>.

¹⁵⁰ "Guojia Zhishi Chanquanju Zhongguo Zhuanli Shenchayuan Naxie Shier (The Stuff on Patent Examiners at SIPO)," *China IP News*, June 13, 2010, <http://ip.people.com.cn/GB/11872843.html>.

¹⁵¹ State Intellectual Property Office of the P.R.C., *Annual Report*, 43, 2016, <http://www.sipo.gov.cn/gk/ndbg/2016/201705/P020170505541250020396.pdf>.

¹⁵² World Intellectual Property Organization, "Who Filed the Most PCT Patent Applications in 2017?"

In 2017, it ranked second in terms of international patent applications and third in terms of international trademark registrations.¹⁵³ The bulk of these patents are weak utility and design patents (as opposed to invention patents) filed in response to university, career, and other state-driven incentives, and are soon abandoned to avoid filing fees.¹⁵⁴ Yet, although China is still playing catch-up, its ambitions are grand.

At the judicial level, China created specialized intellectual property divisions within courts and, in 2014, specialized intellectual property courts in Beijing, Shanghai, and Guangzhou.¹⁵⁵ These courts have directly applied the TRIPS agreement in dozens of private disputes.¹⁵⁶ In 2015 alone, these specialized courts concluded 9,872 cases.¹⁵⁷ In 2018, China created new tribunals for defined technology-related intellectual property matters in ten provinces and two additional cities around the country, while stripping some Chinese courts of jurisdiction over these matters.¹⁵⁸ It also established a specialized intellectual property court of appeal at the national level to foster uniform jurisprudence in intellectual property law.¹⁵⁹ Housed in the Supreme People's Court and headed by one of its Vice-Presidents, the new court has heard all appeals against patent-related decisions from lower courts from January 1, 2019.¹⁶⁰ It is expected that appeals on other intellectual property cases, such as copyright and trade secrets, also will be made to the new court.¹⁶¹ Paradoxically, China “has emerged as the world's most litigious country in the intellectual property area,” with 16,010 new patent cases, 37,946 new trademark cases, and 137,267 new copyright cases reportedly filed in 2017, as captured in Figure 7.2.¹⁶²

Figure 7.2. Intellectual Property Cases in Chinese Courts¹⁶³

¹⁵³ “Who Filed the Most Madrid Trademark Applications in 2017?,” *World Intellectual Property Organization*, http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_madrid_2017.pdf; “Who Filed the Most PCT Patent Applications in 2017?,” *World Intellectual Property Organization*, https://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_pct_2017.pdf.

¹⁵⁴ Lulu Yilun Chen, “China Claims More Patents Than Any Other Country—Most Are Worthless,” *Bloomberg*, Sept. 26, 2018 (noting China's three categories of patents).

¹⁵⁵ Thomas, *Assessing Intellectual Property Compliance*, 143 (on specialized courts).

¹⁵⁶ See Congyan Cai, “International Law in Chinese Courts during the Rise of China,” *American Journal of International Law* 110 (2016): 269, 286-287.

¹⁵⁷ Thomas, *Assessing Intellectual Property Compliance*, 144.

¹⁵⁸ Covington, *Establishing 15 IP Tribunals Nationwide, Chinese Courts Further Concentrate Jurisdiction over IP Matters*, Mar. 15, 2018.

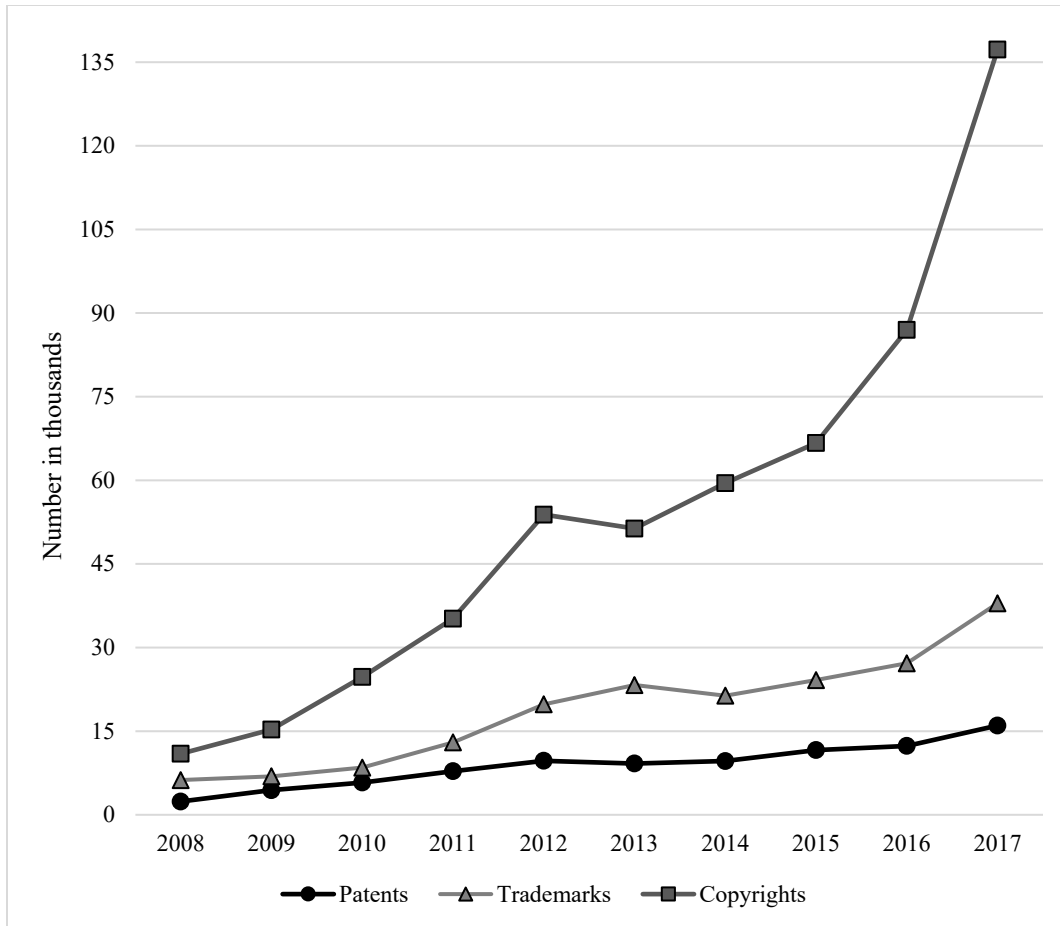
¹⁵⁹ People's Court News Media Corporation, “The Supreme People's Court Issued the ‘Regulations on Certain Issues of the Intellectual Property Tribunal,’” *Supreme People's Court*, Dec. 28, 2018, <http://www.court.gov.cn/zixun-xiangqing-137461.html>.

¹⁶⁰ The Beijing News, “The Supreme Law Intellectual Property Court Unveiled the Relevant Cases in Accordance with the Law,” *Tencent*, Jan. 1, 2019, <https://new.qq.com/omn/20190101/20190101A0FHFB.html>.

¹⁶¹ Guo Liqin, “SPC establishes IP Court, Paving the Road for a Uniform National Appeal Court,” *Yicai*, Oct. 23, 2018 <https://www.yicai.com/news/100045081.html>.

¹⁶² Supreme People's Court of the People's Republic of China, *The Status of Judicial Protection of Intellectual Property Rights in Chinese Courts* (2017) 2 (2018); Yu, “Building Intellectual Property Infrastructure Along China's Belt and Road,” 313.

¹⁶³ Sources: The Supreme People's Court of China: Intellectual Property Protection by Chinese Courts (2010-2014, 2016), State Intellectual Property Office of China: Intellectual Property Rights Protection in China (2015, 2017), and People's Court Daily [Renmin Fayuan Bao].



In international negotiations, China has been a status quo country on intellectual property issues.¹⁶⁴ Unlike Brazil and India, it has not actively contested the international intellectual property regime, and it has not issued (or threatened to issue) a compulsory patent license, such as for essential medicines. It also is the only BRICS country to agree to prohibit parallel imports of products that businesses can use to evade intellectual property protection. In this sense, China has largely mimicked and built upon Western laws and institutions. However, China repurposed them as part of its broader international goals. China now seeks to be a technological leader, such as in biotechnology, harnessing its large market and huge public and private investment in research and development as part of its indigenous innovation policies. It has worked with the World Intellectual Property Organization to support the enhancement of intellectual property protection abroad through its Belt and Road Initiative.¹⁶⁵

B. The China’s Challenge: Indigenous Innovation Policies

¹⁶⁴ Omar Serrano, “China and India’s Insertion in the Intellectual Property Rights Regime: Sustaining or Disrupting the Rules?,” *New Political Economy* 21, no. 4 (2016): 343-364.

¹⁶⁵ China National Intellectual Property Administration, “The 2018 High-Level Conference on IP for Countries along Belt and Road highlights Inclusiveness, Development, Cooperation, Mutual Benefit” (2018), at <http://english.sipo.gov.cn/news/officialinformation/1131332.htm>.

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 the monopoly power that 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.¹⁶⁶ 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."¹⁶⁷ 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 U.S.-launched trade war increased its urgency.

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."¹⁶⁸

In line with the Plan, patent filings soared in China (Figure 7.3). In the 1997-2011 period, patent filings in China increased by 3,245 percent. 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 twenty years.¹⁶⁹ 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 ten.¹⁷⁰ Among educational institutions, four Chinese universities appeared in the top ten filers in 2019, while there were none prior to 2018. Although the bulk of Chinese patents remain weak (for the reasons noted earlier), there is a concerted effort

¹⁶⁶ Sebastian Heilmann and Lea Shih, "The Rise of Industrial Policy in China, 1978-2012," *Harvard-Yenching Institute Working Paper Series* (2013); Jean-Christophe Defraigne, "China's Industrial Policy," *Europe China Research and Advice Network (ECRAN)* (2014).

¹⁶⁷ 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).

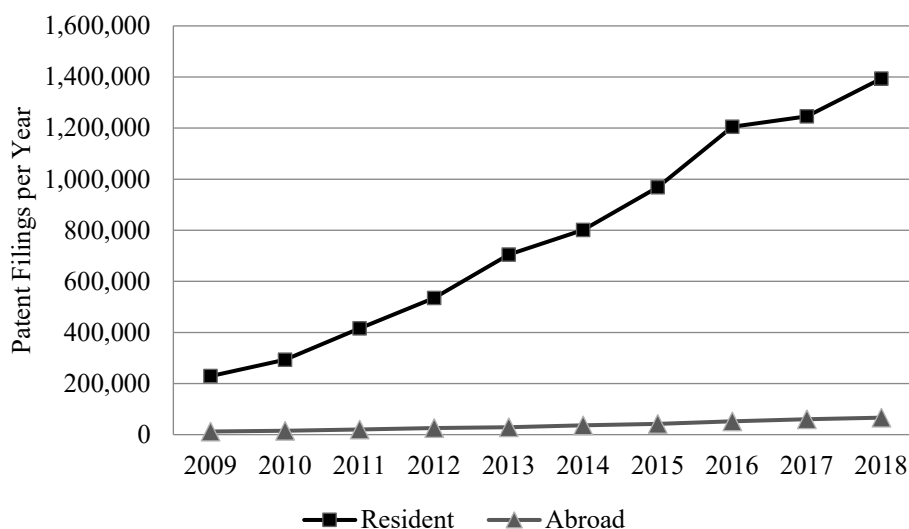
¹⁶⁸ The full text is available at https://www.itu.int/en/ITU-D/Cybersecurity/Documents/National_Strategies_Repository/China_2006.pdf ("[d]espite the size of economy, our country is not yet an economic power primarily because of our weak innovative capacity").

¹⁶⁹ World Intellectual Property Organization, "China Becomes Top Filer of International Patents in 2019 Amid Robust Growth for WIPO's IP Services, Treaties and Finances, April 7, 2020.

¹⁷⁰ Ibid; Peter Yu, "Building Intellectual Property Infrastructure Along China's Belt and Road", *University of Pennsylvania Asian Law Review* 14 (2019): 275-325.

to enhance quality and strengthen protection, as reflected in increases in patent litigation (Figure 7.2) and royalty flows to China (Figure 7.4).¹⁷¹

Figure 7.3. Patent Filings by China¹⁷²



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 five-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 2016.¹⁷³ In 2015, China launched its “Made in China 2025” policy to upgrade Chinese industry, which posed a new threat to Western technological dominance.¹⁷⁴ It did so through a combination of massively subsidizing domestic innovation, supporting acquisition of foreign firms and technology, and obtaining foreign technology through other means, from scouring open source materials to outright theft.¹⁷⁵

¹⁷¹ Richard McGregor, *The Party: The Secret World of China’s Communist Rulers* (New York: HaperCollins, 2010), 26-27, 72; Lily H. Fang, Josh Lerner and Chaopeng Wu, “Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China,” *The Review of Financial Studies* 30, no. 7 (2017): 2448, 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.”).

¹⁷² Source: WIPO, “Statistical Country Profiles: China,” https://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=CN.

¹⁷³ Thomas, *Assessing Intellectual Property Compliance*, 158 (noting mentions rising from 26 in its tenth 5-year plan for 2001-2005; 31 in its 11th five-year plan; 49 in its 12th five-year plan; and 71 in its 13th five-year plan for 2016-2020).

¹⁷⁴ *Notice on Issuing “Made in China” 2025*, State Council, Gua Fa [2-15] No. 28, May 8, 2015. Jost Wubbekke et al., “Made in China 2025: The Making of a High-tech Superpower and Consequences for Industrial Countries,” *Merics*, no. 2 (2016).

¹⁷⁵ 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”).

Building from Germany's "Industry 4.0" project and U.S. 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." It listed ten 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 twenty percent in 2018 to forty percent by 2020 and seventy percent by 2025.¹⁷⁶ It represents a new form of import substitution policies (grounded in local content targets), but with the further aim for China to obtain a "world-leading" position by 2049.¹⁷⁷ This symbolically important date coincides with the one hundredth anniversary of the Chinese communist revolution. The policy complements the BRI, which is to be "a high-tech road" using Chinese technology.¹⁷⁸

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.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹ In addition to direct acquisitions, China supports investment abroad in industrial parks and joint laboratories

¹⁷⁶ According to a survey by the Chinese Ministry of Industry and Information Technology 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. 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*, July 17, 2018, https://www.thepaper.cn/newsDetail_forward_2271086.

¹⁷⁷ 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*, Mar. 22, 2018, 16.

¹⁷⁸ Wang Yiwei, *The Belt and Road Initiative: What Will China Offer the World in its Rise* (Beijing: New World Press, 2016), 12.

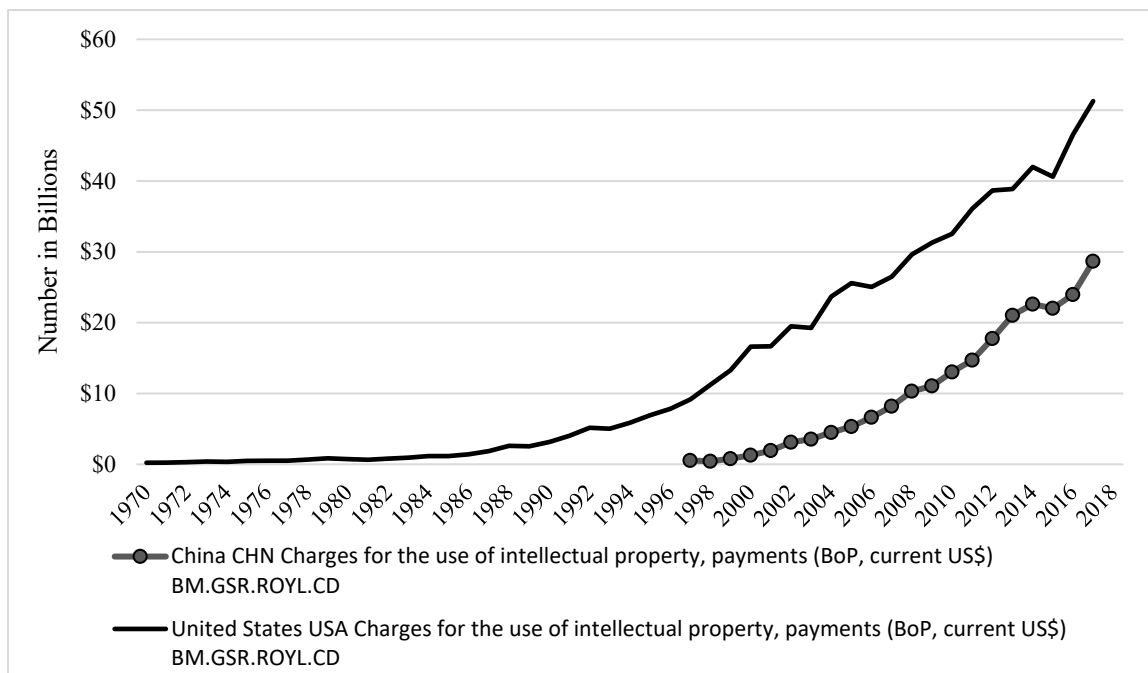
¹⁷⁹ Wubbekke, "Made in China 2025," 7.

¹⁸⁰ Office of the USTR, "Section 301 Report," 30.

¹⁸¹ Josh Horwitz, "Why the Semiconductor is Suddenly at the Heart of US-China Tech Tensions," *Quartz*, July 24, 2018.

for research and development, and seeks to hire talent away from foreign companies.¹⁸² In parallel, the government supports and encourages investment in high-tech startups, both in China and abroad, often linked to universities.¹⁸³ 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.¹⁸⁴ The government aims to stimulate policy innovation through experimentation at the central, provincial, and local levels, including through pilot projects.¹⁸⁵ In sum, the Middle Kingdom wants to avoid the middle-income trap and move up the value chain of production.¹⁸⁶ To do so, it massively supports investment in developing and acquiring advanced technologies. As depicted in Figure 7.4, China has significantly closed the gap with the United States in terms of royalty flows. While U.S. companies received approximately 26.8 times the royalties of Chinese companies in 1998, the difference narrowed to just 1.8 times in 2017.

Figure 7.4. Royalty Flows Over Time: U.S. v. China¹⁸⁷



¹⁸² Office of the USTR, “Section 301 Report,” 79, 143, 181.

¹⁸³ Office of the 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’”).

¹⁸⁴ The Economist, “The Geography of Technology,” *Economist*, Sept. 1, 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.

¹⁸⁵ Wubbekke, “Made in China 2025,” 23-24.

¹⁸⁶ The controversial term “Middle Kingdom [Zhongguo]” has been used by China as a self-reference since the Zhou Dynasty three thousand years ago. Literally it means “the country at the centre [of the world],” and it reflects China’s pride as the chosen country. See Wang Erh-min, “The Origin of the Name “Zhongguo” and its Modern Interpretation [Zhongguo Mingcheng Suyuyan jiqi Jindai Quanshi],” in *Studies on History of Modern Chinese Thoughts [Zhongguo Jindai Sixiangshi Lun]*, ed. Wang Erh-min (Taipei: Huashi Publishing, 1977), 441-480.

¹⁸⁷ The World Bank, “Charges for the Use of Intellectual Property, Payments (BoP, Current US\$) – China, United States,” *World Bank DataBank*, <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 international economic law order. Already the 2006 Plan for indigenous innovation was controversial, with some observers calling it a "blueprint for technology theft on a scale the world has never seen before."¹⁸⁸ 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 U.S. technology and intellectual property.¹⁸⁹ The Section 301 report recognized that China's ambitious "Made in China 2025" project aims to make China a global leader in strategic advanced technology industries. The United States raised four main accusations against China. First, it accused China of using investment authorizations and joint ventures to force U.S. companies to transfer their technology to Chinese companies as a condition for gaining access to China's market. Second, and relatedly, it accused China of using its complex, multi-tiered administrative licensing regimes to force de facto technology transfer, thereby discriminating against U.S. firms in favor of local ones. Third, it challenged state support of acquisitions of U.S. technology from U.S. companies as unreasonable and a threat to U.S. technological leadership. Fourth, it accused China's People's Liberation Army and Chinese companies of cyber theft of sensitive commercial information, including by leveraging government intelligence for commercial gain. In each case, it highlighted the central role of not only the Chinese state but also the Chinese Communist Party which is the ultimate power within the state.

In parallel, Europe and other advanced economies heightened review and restrictions on Chinese acquisition of high-tech companies and their technology.¹⁹⁰ 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.¹⁹¹ 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.

Western concerns are not just economic. They are also strategic, including because some of this technology has military uses that could threaten U.S. supremacy.¹⁹² Were China to get the upper hand in core network technologies like 5G, it would access not only valuable data, but also be better positioned 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,

¹⁸⁸ James McGregor, *China's Drive for 'Indigenous Innovation': A Web of Industrial Policies* (Washington, DC: U.S. Chamber of Commerce, 2010), 4.

¹⁸⁹ Office of the USTR, "Section 301 Report."

¹⁹⁰ Nikkei, "Chinese M&A Deals Face Wall as US and Europe Guard Tech," *Nikkei*, June 19, 2018 (referencing tightened national regulations and an E.U. framework for screening foreign direct investment in E.U. members, which entered into force in 2019).

¹⁹¹ USTR, *Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union*, Sept 25, 2018.

¹⁹² The Made in China 2025 plan promotes "the "two-way transfer between military and civilian technologies." Anthea Roberts et al., "Goeconomics: The Chinese Strategy of Technological Advancement and Cybersecurity," *Lawfare*, Dec. 3, 2018.

then “entire industries could come under the control of a rival geopolitical power.”¹⁹³ 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.¹⁹⁴

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, then another \$200 billion in September, and threatened to cover all Chinese imports. In parallel, the United States filed a WTO complaint against China’s discriminatory technology licensing requirements, which facilitates the transfer of foreign technology to their Chinese joint-venture partners.¹⁹⁵ 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 U.S. sanctions against Iran and for the theft of technology.¹⁹⁶ Then, in August 2020, the administration announced it would ban the use of popular Chinese apps such as TikTok and WeChat.¹⁹⁷ These actions were shots across the bow to counter China’s ambitions.

Once more, U.S. threats could induce Chinese reforms to crack down on cyber theft, remove discriminatory aspects of its technology licensing regime, and eliminate provisions that the United States claims entail “forced technology transfers” to a joint venture partner as part of investment approvals — what others call “trading market for technology.”¹⁹⁸ For example, China’s new Foreign Investment Law enacted in 2019 contained provisions that prohibit forced technology transfer, provide better intellectual property protection for foreign investors, and grant pre-establishment rights for investors. The 2020 U.S.-China Economic and Trade Agreement formalized these changes as treaty commitments, together with other provisions that China had already codified regarding trade secrets and others that it was contemplating but had yet to enact.¹⁹⁹ Yet, what matters will not be formal law — which is subject to interpretation in implementation or malign neglect — but actual practice. The “phase 1” deal called for greater enforcement, but as Figure 7.2 shows, trends in China already move in this direction, and, in any case, statistics on “number of enforcement actions” can be easy to game.²⁰⁰

¹⁹³ James McBride, “Is ‘Made in China 2025’ a Threat to Global Trade,” *Council on Foreign Relations*, Aug. 2, 2018.

¹⁹⁴ 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”).

¹⁹⁵ *China – Certain Measures Concerning the Protection of Intellectual Property Rights, Request for Consultations by the United States*, IP/D/38; WT/DS542/1, Mar. 26, 2018.

¹⁹⁶ Kate Conger, “Huawei Executive Took Part in Sanctions Fraud, Prosecutors Say,” *New York Times*, Dec. 7, 2018.

¹⁹⁷ James Palmer, “Why Is the United States Effectively Banning WeChat and TikTok?,” *Foreign Policy*, Aug. 7, 2020.

¹⁹⁸ The concept of “forced technology transfer” is contentious because companies agree to it as part of their investment into China. They could forego investing if they found the arrangement to be contrary to company interests. Daniel Gros, “Are China’s Trade Practices Really Unfair?,” *Project Syndicate*, Dec. 5, 2018; Lee et al., “China’s Economic Catch-Up,” 493.

¹⁹⁹ Chapter 1 of the agreement addresses “Intellectual Property,” and Chapter 2 “Technology Transfer.”

²⁰⁰ Mark Cohen, the first IP attaché at the U.S. embassy in Beijing, concludes, “The situation was predictable: late-term administrations may... be tempted to condone campaign-style IP enforcement, which can generate impressive

China remains far behind the United States, Europe, and Japan in technology. To the extent that Made in China 2025 is only a top-down project based on quantitative targets and campaigns leading to inefficient spending and accrued debt, and does not harness bottom-up forces, it could lead to overcapacity and increased credit risks to the Chinese economy. Thus, in the end, it may not compete successfully with the more bottom-up, dynamic capitalist system of Silicon Valley and the West. But in that case, one might ask, why not let the two systems compete instead of imposing a U.S. “market economy” model on China?

The underlying tensions and conflict now appear destined to continue, especially given the dual use and critical network aspects of many leading technologies. They are “geoeconomic” in nature in that economic and political security concerns and rivalry become salient.²⁰¹ The U.S. ban on the sale of parts and software to the Chinese telecommunications giant ZTE in April 2018 on national security grounds, which all but shut down the company, and the U.S. placement of Huawei and other Chinese companies on the Entity List for export controls in 2019 and 2020, 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, for China, the threats make clear its need to develop its innovation policy so that its companies no longer depend on foreign technology.

V. 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, as Chapter 6 showed. As China grew economically more powerful, it gained confidence in its own pragmatic economic model, and it recursively began to challenge the U.S.-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.

Although China officially recognizes the importance of the WTO, and occasionally even holds itself out as the champion of the multilateral trading system,²⁰² China has been quietly expanding its network of strategic partnerships and bilateral agreements behind the scene (just as have the United States and European Union), 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. It is unlike the U.S. and European

enforcement statistics but have limited deterrence or long-term sustainability.” Mark Cohen, “The Phase 1 IP Agreement: Its Fans and Discontents,” *China IPR*, Jan. 21, 2020.

²⁰¹ Roberts et al., “Toward a Geoeconomic Order.”

²⁰² President Xi’s Speech at the World Trade Forum, Davos, Switzerland, Jan. 17, 2017.

models that build regional and global rules and institutions based on legal templates and transplants of domestic laws.²⁰³ China's model builds from 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 the Belt and Road Initiative, facilitating some relocation of labor-intensive sectors abroad while Chinese industry moves up the value chain of production. It is a Chinese model that offers an alternative to U.S.-built and U.S.-dominated institutions. It builds from, and layers on, existing international economic law and institutions as part of the changing ecology of international economic governance involving increasing geoeconomic competition between China and the United States.

China is not abandoning institutions such as the WTO. Rather, it is positioning itself as their defender while combatting Western dominance within them, while 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 legal order for trade and investment. China and Chinese professionals now draw from the trade-related legal capacity and different dimensions of institutional change that they built and adapted for the WTO system (Chapter 6). In sum, China has both mastered the rules of the game in the WTO while building a new Sino-centric order in parallel. For China, it is not a question of either-or, but each at once.

As the WTO's authority declines, China's development of a new Sino-centric economic order assumes greater salience. Indeed, while analysts earlier found that the WTO constituted an indirect "amendment to the Chinese constitution," China directly incorporated the Belt and Road Initiative into the Constitution of the Communist Party of China in October 2017.²⁰⁴ The two Chinese constitutions are distinct, one for the state and one for the party, with the latter clearly becoming most important under President Xi. In each case, the analysis captures transnational links between domestic and international economic governance. With the former, the link involved a Western-driven international institution (the WTO) implicating internal Chinese governance. With the latter, the link involves internal Chinese governance implicating international legal ordering (the BRI). The shift in these links reflects the interaction of changes within China and the transnational legal ordering of trade and investment.

The Belt and Road Initiative represents an open architecture since any country can join it, in contrast to the U.S. 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.²⁰⁵ That was the model for the GATT and then the WTO with its

²⁰³ 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, which would be reflected in the trajectory of the European Union, Bela Balassa, *The Theory of Economic Integration: An Introduction* (London: Palgrave, 1963), 1-3.

²⁰⁴ Compare Tom Ginsburg, "The Judicialization of Administrative Governance: Causes, Consequences and Limits," in *Administrative Law and Governance in Asia*, ed. Tom Ginsburg and Albert H.Y. Chen, 10 (on the WTO and the Constitution of the People's Republic of China); and Macaes, *Belt and Road*, 41 (on the Belt and Road Initiative and the Constitution of the Communist Party of China).

²⁰⁵ 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).

“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 U.S. network of bilateral trade and investment agreements built on common U.S. templates, as well as the abandoned Trans-Pacific Partnership (TPP). 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 long epitomized the club model by requiring massive internal legal and institutional changes for countries to join it.

In contrast, under the Chinese model, international 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, but operating in the shadow of China’s economic and political clout.²⁰⁶ 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.”²⁰⁷ 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, coordinative governance model.

In complement to the Belt and Road Initiative, China has spent massively on innovation through a broad range of policies to support the development and acquisition of advanced technologies, including through enhanced intellectual property protection that once more builds from Western models for Chinese purposes. It is seeking to make a “great leap forward” to become a “manufacturing superpower” and an “internet superpower” through state-led and state-coordinated innovation policies. In this way, it can be at the forefront of a fourth industrial revolution that combines big data, automation, and new technologies critical for advanced manufacturing.

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 detects the rise of a new transnational order based on premises different from the traditional U.S.-centric Washington consensus. As for development assistance, the Chinese model (when using its own development

²⁰⁶ As a Beijing law professor told Shaffer, “the BRI is still a political initiative rather than a rule-based, rule-of-law one.” Telephone interview, March 22, 2020. On relational contracts, Macaulay, “Non-Contractual Relations;” Macneil, *The Relational Theory of Contract*.

²⁰⁷ 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.

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.²⁰⁸ The Chinese agreements also tend to avoid new issues, such as U.S.-sought 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 specifically listed). This policy change contrasts with the growing resistance to investor protection in developed countries, and it 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 formally can be viewed 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 U.S. and E.U. trade agreements and the conditionalities set forth in loans from U.S. and European-dominated Bretton Woods institutions. As a high-level WTO official states, “the U.S. also sold ideals, while China is only selling stuff; they are merchants, not missionaries.”²⁰⁹ This is not to say that the Western model was centered only on values as opposed to interests, since the United States and Europe always have pursued their interests. Nonetheless, under China’s model, there is no promulgation of particular values such as human rights and democracy, or of a particular role for government in the market.²¹⁰

However, China too is espousing values when it uses terms such as “mutual respect,” “win-win development,” and “harmony” as part of a “community of shared destiny,” as it aims to accommodate and shield authoritarian rule from internal and external critique.²¹¹ Its conditions require others to recognize China’s internal sovereignty, and, in particular, 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 Chinese internal policies. These agreements can serve, in

²⁰⁸ 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.

²⁰⁹ Interview, Geneva, July 5, 2017.

²¹⁰ 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*, Sept./Oct. 2017, 83-84 (contrasting China’s focus on “order”); Samm Sacks, “Beijing Wants to Rewrite the Rules of the Internet,” *The Atlantic*, June 18, 2018. Nadège Rolland presents a table contrasting the characterization of 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*, 180.

²¹¹ William Callahan, “China’s ‘Asia Dream’: The Belt Road Initiative and the new regional order,” *Asian Journal of Comparative Politics* 1: 226 (2016), 231-232.

parallel, to support authoritarian leaders to China's liking, who, in turn, defer to China. Authoritarian governments are 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 themselves with an edge in the data-driven economy. China is investing significantly to exercise greater discursive power in defining sovereigntist norms for the international system, especially to combat what it views as Western ideologies of liberal democracy and civil and political rights that the United States has deployed to uphold U.S. predominance "on the global stage" and to place the Chinese government on the defensive, both internationally and internally.²¹² China aims to "break the Western moral advantage" and to focus on "development rights," which implicitly takes account of its successful developmental model.²¹³

Nonetheless, despite expending significant resources on developing Confucius institutes and diffusing official views through the global media, including through free provision of the English language editions of the *China Daily*, the *Global Times*, and other publications, China is not winning the soft power game. China's hardline positions regarding the "South China Sea," Hong Kong, Xianjing, and other issues have triggered a decline of external public perceptions of China in other countries.²¹⁴ As regards deliberations in the WTO, in the words of a WTO insider, China can be "tone deaf."²¹⁵ It can go through the motions of consultations to search for "consensus," but there is no sense that it has "heard other parties." "One cannot just bring practices that work in Beijing to Geneva and be successful." The United States may be losing soft power under the Trump administration, but China has yet to harness it convincingly.

The question arises whether countries considered to be U.S. allies must choose between China and the United States in their economic relations. These policy choices will engage constituencies within countries in their own internal political struggles, which, in turn, will shape the future of the transnational legal order for trade. The United States is expending significant political, economic, and diplomatic capital to counter the Chinese-led economic order which it, at times, appears to view as an existential threat. In 2018, Vice President Pence gave a major speech on China, dubbed the equivalent of the Truman Doctrine on containment of the Soviet Union. Pence wished to rally allies to isolate and combat China's authoritarianism, mercantilism, and aggression, including its so-called "debt-trap diplomacy" and "Orwellian system premised on controlling every aspect of human life."²¹⁶ Secretary of State Michael Pompeo followed with what the administration billed as a "major China policy statement" on the China "threat" to the American "way of life" at the Nixon library in July 2020.²¹⁷ The United States renegotiated

²¹² Rolland, *China's Vision*, 26.

²¹³ *Ibid.*, 5-6, 35 (citing Li Ziguo).

²¹⁴ Laura Silver, Kat Devlin and Christine Huang, "People Around the Globe are Divided in their Opinions of China," *Pew Research Center*, Sept. 30, 2019.

²¹⁵ Interview, Geneva, June 29, 2017.

²¹⁶ The Hudson Institute, "Remarks by Vice President Pence on the Administration's Policy Toward China," *The White House*, Oct. 4, 2018.

²¹⁷ Michael Pompeo, "Communist China and the Free World's Future," U.S. Department of State, July 23, 2020.

NAFTA to include a provision permitting it to withdraw from the agreement if a partner pursues an agreement with a “non-market country,” which clearly targets China. The United States would like to extend this condition through agreements with others.²¹⁸

The United States might be more successful with its immediate neighbors, but even they do not view this provision as a significant constraint on expanding trade relations with China where tariff rates are already low. Moreover, U.S. allies in Asia, Latin America, and even Europe are pursuing free trade and investment agreements with China. Chile — arguably the U.S. top economic law ally in Latin America — already has a free trade and investment agreement with China. Greece, Italy, and Luxembourg have formally joined the BRI. Most countries continue to work with Huawei, despite considerable U.S. pressure, although there are signs of change in some OECD countries. The economies of U.S. allies in Asia, such as Australia, Singapore, and South Korea, depend on good relations with China. To quote conservative Prime Minister Scott Morrison, Australia aims to “maintain our unique relationships with the United States, our most important ally, and China, our comprehensive strategic partner, in good order, by rejecting the binary narrative of their strategic competition and instead valuing and nurturing the unconflicted benefit of our close association” with both.²¹⁹ While some in the United States will contend that countries working with both orders are “non-aligned” (recalling the rhetoric of an earlier era), third countries wish to retain a political alliance with the United States while not severing their economic ties with China.²²⁰ U.S. allies resent being pressed to choose and will strive to avoid doing so.

China’s 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, cross-regional, informal, rival Sino-centric economic order. For this reason, it is illusory to think that the U.S.-China trade war will “be easy to win.”²²¹ Although commentators suggest that the 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. The difficulty of this navigation is particularly apparent in the European Union, which, in 2020, labeled China both “a cooperation partner with whom the EU has closely aligned

²¹⁸ Office of the United States Trade Representative, *United States–Mexico–Canada Agreement*, Chapter 32, Article 10 (2018). Ironically, through the 2020 U.S.-China Economic and Trade Agreement, the United States was the first among the three countries to fall under this clause. China’s purchase commitments for agricultural, energy, and other products (in chapter 6 of the agreement) should favor U.S. over Canadian and Mexican producers, as might certain specific commitments China made (in chapter 3) to accept U.S. agricultural products under its sanitary and phytosanitary regulations.

²¹⁹ Prime Minister of Australia, *Speech – Lowy Lecture “In Our Interest”*, Oct. 3, 2019.

²²⁰ It is a “big ask” that would be very “painful,” in the words of Singapore Prime Minister Lee Hsien Loong. Choo Yun Ting, “Asian Countries Would Be Very Unhappy If They Have to Choose Between US and China: PM Lee Hsien Loong,” *The Straits Times*, Oct. 6, 2019.

²²¹ An American lawyer who worked for a large Chinese company told Shaffer that the American reaction to China “reminds me of the U.K. in the 1950s. The U.S. is still thinking we are the colonial power. We wish to go back. It is a nostalgic and nationalist reaction that won’t help us (the U.S.) maintain our competitiveness.” Telephone interview, March 23, 2020.

objectives ... and a systemic rival promoting alternative models of governance.”²²² Thus, if a new Cold War deepens, it will be quite different than that with the autarchic former Soviet Union. Such a scenario, nonetheless, could make an empty shell of the WTO-led multilateral trading system that the United States erected following the end of the (first) Cold War. The legal architecture for the global economy has shifted from a centralized legal order to a decentralized ecology of coexisting and competing transnational institutions.

²²² European Commission and HR/VP contribution to the European Council, *EU-China— A strategic outlook* (12 March 2019).