

## THE BRI, NON-INTERFERENCE, AND DEMOCRACY

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**Abstract:** *China's Belt and Road Initiative ("BRI") has been the object of much speculation and even alarmism in some quarters. On the one hand, it seems to embody Xi Jinping's "Win-Win" diplomacy and the aspiration of China to play a positive role on the world stage; on the other hand, some have raised fears of debt traps and other negative consequences for participating countries. This article considers the effect of the development program on democracy in participating countries. China generally takes non-interference rhetoric seriously, and has not engaged in the extensive democracy-undermining programs of Russia and other authoritarians. But the BRI complicates China's relationships with recipient countries and changes domestic politics therein, whether as a matter of conscious strategy or not. This article explains the mechanisms whereby domestic democratic processes may be hindered or potentially even enhanced through the BRI. It also considers China's recent moves to utilize extraterritorial jurisdiction as a further point of leverage, suggesting that the BRI will have a political impact as well as its economic one.*

**Key words:** *China, Belt and Road, democracy, international law, non-interference.*

### INTRODUCTION

As China has become more powerful on the world stage, the nature of the country's approach to international law has been subject to a good deal of speculation. Some describe it as "complex and ambivalent";<sup>1</sup> some see it as driven by deep opposition to liberalism;<sup>2</sup> some see it as embodying "exceptionalism";<sup>3</sup> yet others see it engaging multilateral

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<sup>1</sup> Bing Ling, *China's Attitude to the International Legal Order in the Xi Era: The Case of South China Sea Arbitration*, JAPANESE INST. OF AFFS. (2018).

<sup>2</sup> See Nadege Rolland, *China's Vision for a New World Order*, 83 NAT'L BUREAU ASIAN RES. SPECIAL REP. 2, 6 (2020).

<sup>3</sup> CONGYAN CAI, *THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY* 12 (Andrew Hurrell et al. eds., 2019).

institutions at a time when the United States is abdicating its role.<sup>4</sup>

These questions have become more urgent with the emergence of the Belt and Road Initiative (“BRI”), China’s massive foreign policy project launched in 2013. As part of Xi Jinping’s plan for “the great rejuvenation of the Chinese nation,”<sup>5</sup> the scale of the BRI is astounding—multiple trillions of dollars, a thirty-year implementation plan, and a goal of economic integration of Eurasia, much of Africa, Oceania, and even Latin America. Indeed, it has been described as “perhaps the most ambitious grand strategy undertaken by a single nation-state in modern times.”<sup>6</sup> The Belt refers to a land corridor reaching through central Asia to Europe; the Road refers to a “Maritime Silk Road” reaching through the Indian Ocean to the Mediterranean, and southeast from China toward Indonesia and Australia.

The BRI combines a massive infrastructure investment program with new financing infrastructure to facilitate the export of China’s surpluses in investible capital and in productive capacity. To date, BRI reaches over seventy participant countries encompassing about half of the world’s population. It has been described as China’s version of the Marshall Plan (but without the military obligations), in that it wields soft power and economic development as tools for accumulating diplomatic and political clout.<sup>7</sup> It has also led to new legal experimentalism, as China has established an international commercial court, with a branch in Xi’an and another in Shenzhen to handle international commercial

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<sup>4</sup> See Melanie Hart & Blaine Johnson, *Mapping China’s Global Governance Ambitions*, 2019 CTR. FOR AM. PROGRESS ¶ 9.

<sup>5</sup> *China’s Long March to National Rejuvenation*, FIN. TIMES (Sept. 29, 2019), <https://www.ft.com/content/d45119de-e11f-11e9-b112-9624ec9edc59>.

<sup>6</sup> David Ignatius, *China Has a Plan to Rule the World*, WASH. POST (Nov. 28, 2017), [https://www.washingtonpost.com/opinions/china-has-a-plan-to-rule-the-world/2017/11/28/214299aa-d472-11e7-a986-d0a9770d9a3e\\_story.html](https://www.washingtonpost.com/opinions/china-has-a-plan-to-rule-the-world/2017/11/28/214299aa-d472-11e7-a986-d0a9770d9a3e_story.html).

<sup>7</sup> See Jane Perlez & Yufan Huang, *Behind China’s \$1 Trillion Plan to Shake Up the Economic Order*, N.Y. TIMES (May 13, 2017), <https://www.nytimes.com/2017/05/13/business/china-railway-one-belt-one-road-1-trillion-plan.html>.

disputes.<sup>8</sup> It is likely that there will be a wide range of dispute resolution options within the Belt and Road framework, allowing experimentation and learning, as well as copying from the experience of legal hubs.<sup>9</sup> The institutional developments may be as important as the money; and even if BRI investment fades (as it seems to be doing as this writing) the modes of interacting will remain.

The BRI has been portrayed by the Trump administration as debt-trap diplomacy; yet it has been welcomed by many partner countries as a useful source of capital, expertise and infrastructure. While a full evaluation of the various claims is beyond the scope of this article, I focus on one aspect in particular: the likely effects of the BRI—and likeminded Chinese initiatives—on global democracy, from a legal perspective. The argument is that as a matter of international relations and domestic constitutional law, more engagement will draw China into the domestic politics of recipient countries. This in turn requires softening China's traditionally Westphalian position on international law. Although China generally takes non-interference rhetoric seriously and has not been as blatant as Russia in its extensive democracy-undermining programs of Russia,<sup>10</sup> the BRI is likely to force a revisiting of this position, whether as a matter of conscious strategy or not.

The article begins by reviewing China's general approach to international law, which has to a large extent been characterized by fitting into existing structures and norms. It then notes an increasingly prominent and aggressive role in the Xi Jinping era. The next section briefly describes the BRI, and goes on to speculate on the implications for constitutional orders of member countries. China is now deploying new legal tools that are inconsistent with traditional Westphalian

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<sup>8</sup> Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L L. 225, 290 (2020); Matthew S. Erie, *Chinese Law and Development*, 62 HARV. INT'L L.J. 51 (2021).

<sup>9</sup> Erie, *Chinese Law and Development*, at 65–66.

<sup>10</sup> Christopher Walker, *The New Containment: Undermining Democracy*, 178 WORLD AFFS. 42, 43 (2015) (describing the Chinese government's nuanced approach toward countering democracy).

conservatism, and it can be expected to use these in the BRI. The final section concludes.

## I. FROM SKEPTICISM TO ENGAGEMENT: CHINA AND INTERNATIONAL LAW

China would be well within its rights to be skeptical of modern Westphalian international law as anything other than an instrument of Western colonialism. International law was used to dismantle Chinese territory during the Opium Wars; it justified “Unequal Treaties” which reversed the traditional hierarchy by positing white Europeans as the civilized ones; it led to seizures of territory after the 1895 defeat by Japan.<sup>11</sup> The League of Nations, which rejected the Japanese proposal for a resolution on racial equality, delivered German concessions in Shandong to Japan rather than returning them to Chinese sovereignty; and in the post-revolutionary era, the People’s Republic was kept out of the United Nations until 1971.<sup>12</sup>

Yet despite this bitter history, China’s engagement with international law during the period of the People’s Republic has generally been characterized by pragmatism and evolution. Its conceptual frameworks have followed internal ideological developments, gradually shifting from concepts of struggle in the 1950s to notions of a “peaceful rise” and harmonious society in the Hu Jintao period. Its history of engagement with the third world suggest a basically Westphalian (or as some of us have put it, “Eastphalian”) approach.<sup>13</sup> The Five Principles of Peaceful Coexistence, as

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<sup>11</sup> TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* 127–30 (2013); ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1842-1933*, at 86–88 (2014); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870-1960*, at 103 (2002).

<sup>12</sup> Phil C. W. Chan, *China’s Approaches to International Law Since the Opium War*, 27 LEIDEN J. INT’L L. 859, 861 (2014).

<sup>13</sup> Sung Won Kim, *Eastphalia Revisited: The Potential Contribution of Eastphalia to Post-Westphalian Possibilities*, 33 PAC. FOCUS 434 (2018); see David P. Fidler, *Eastphalia Emerging*, 17 IND. J. GLOB. LEGAL STUD. 1, 2 (2010). My own contributions to this discussion were: Tom Ginsburg, *Eastphalia and East Asian Regionalism*, 44 U.C. DAVIS L. REV. 859 (2010); Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOB. LEGAL STUD. 27 (2010).

first articulated in 1954 and reiterated at the Bandung Summit on Afro-Asian Solidarity in 1955 were: (1) mutual respect for territorial integrity and sovereignty; (2) mutual non-aggression; (3) mutual noninterference in internal affairs; (4) equality and mutual benefit; and (5) peaceful coexistence.<sup>14</sup> And for much of its history the PRC genuinely observed these provisions, despite some border conflicts with India and Vietnam. A good example is its relations with Mongolia, which has been democratic since 1990. China has at times leaned on Mongolia, but has been quite tolerant of its political system. More broadly China has not fought an interstate war since the border conflict with Vietnam in 1979. The one exception to this generally tolerant attitude has been Taiwan, but that is of course a special case, since it is seen as a part of the “sacred territory” of China.<sup>15</sup>

Since Xi Jinping took office in 2012, China’s has played an increasingly active role on the global stage. China is eager to emphasize its role as a rule-abiding global player, with no intention to seek expansion or hegemony; its prosperity is inextricably connected to that of the world. Xi’s term “win-win” has received great emphasis. First introduced in the “Proposals for the 11th Five-Year Plan on National Economy and Social Development” passed in the Fifth Plenary Session of the Sixteenth CPC Central Committee, the concept has evolved and is now a major component of China’s outward facing posture. As Xi put it, “[O]nly through win-win cooperation can we make big and sustainable achievements that are beneficial to all. . . . [T]he interests of others must be accommodated while pursuing one’s own interests and

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<sup>14</sup> See generally BANDUNG, GLOBAL HISTORY AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES (Luis Eslava, Michael Fakhri & Vashuki Nesiha eds., 2017).

<sup>15</sup> 中华人民共和国宪法 [CONSTITUTION] Mar. 5, 1978, pmbl. (China). The preamble states that “Taiwan is part of the sacred territory of the People’s Republic of China. It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.” 1978 Constitution of The People’s Republic of China, USC US-China Institute.

common development must be promoted when seeking one's own development."<sup>16</sup>

Chinese diplomats have skillfully sought to embed these concepts within international law, for example through the resolution presented at the UN Human Rights Council in Geneva in 2018, entitled "Promoting the International Human Rights Cause through Win-Win Cooperation." It is a good example of China's rhetorical enthusiasm in calling for cooperation and dialogue, rather than focusing on "actual human rights violations or accountability."<sup>17</sup> China is promoting these concepts in its increasingly assertive role in international organizations, especially at the United Nations, where it is embedding its ideas into resolutions and initiatives.<sup>18</sup> At the time of this writing, Chinese nationals head four UN agencies, as opposed to one headed by an American.

All this suggests that China may not be setting out to build an alternative model to the Western international law scheme.<sup>19</sup> China's rise is to some extent limited by the constraints imposed by the international legal and economic order, embodying structural constraints imposed on rising countries, in which developed countries wish to preserve their economic gains and power. China does not simply wish to replace the underlying structure of international society, such as the WTO, investment law, and the protection of intellectual property. Instead, it seems to be setting up a structure in which

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<sup>16</sup> Xi Jinping, Keynote Speech at the Boao Forum for Asia Annual Conference 2015: Towards a Community of Common Destiny and A New Future for Asia (Mar. 28, 2015), in XINHUANET, [http://www.xinhuanet.com/english/2015-03/29/c\\_134106145.htm](http://www.xinhuanet.com/english/2015-03/29/c_134106145.htm).

<sup>17</sup> John Fisher, *China's 'Win-Win' Resolution is Anything But*, HUMAN RIGHTS WATCH (Mar. 5, 2018, 1:00 AM), <https://www.hrw.org/news/2018/03/05/chinas-win-win-resolution-anything>. In calling for cooperation and dialogue, President Xi Jinping has also introduced UN Resolutions that incorporate the concept of a "community with shared future for mankind." UN Economic and Social Council, Resolution adopted by the Economic and Social Council on 8 June 2017, ¶ 41, U.N. Doc. E/RES/2017/11 (Aug. 8, 2017); UN Security Council, Res. 2344(2017), pmbl. U.N. Doc. S/RES/2344 (2017) (Mar. 17, 2017).

<sup>18</sup> *A New Battleground*, THE ECONOMIST (Dec. 7, 2019), <https://www.economist.com/china/2019/12/07/in-the-un-china-uses-threats-and-cajolery-to-promote-its-worldview>.

<sup>19</sup> Gregory Shaffer & Henry S. Gao, *A New Chinese Economic Order?* 23 J. INT'L ECON. L. 607, 632 (2020).

China can thrive, with strategic depth through the Eurasian continent, but also has alternatives to a Western-dominated world. The model is one of sedimentation, with a new layer of Chinese ideas, rhetoric, and institutions resting on top of the existing international order.<sup>20</sup> This involves repurposing existing concepts to better fit China's interests.<sup>21</sup> The approach is experimental and incremental, in keeping with Deng Xiaoping's famous aphorism "cross the river by feeling the stones."<sup>22</sup>

As it has assumed an increasingly prominent role, some believe that China has become "increasingly flexible towards the Westphalian norms of state sovereignty and non-intervention."<sup>23</sup> China is also more prepared to redefine its interests and accept costs, except in matters related to human rights, humanitarian intervention and self-determination, which could threaten domestic regime stability.<sup>24</sup>

China has become a major promoter of what I have called "authoritarian international law": norms and institutions that specifically enhance authoritarianism at home and abroad.<sup>25</sup> Such norms might facilitate cooperation across borders to repress regime opponents, enhancing the security of authoritarian rule. They might discourage freedoms of expression and association. They might also facilitate the dilution of democratic institutions and norms through practices and rhetoric that undermine them. China's specific version has been defensive—unlike Russia, it has not sought to actively undermine democratic governance in neighboring

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<sup>20</sup> G. John Ikenberry & Darren J. Lim, *China's Emerging Institutional Statecraft: The Asian Infrastructure Investment Bank and the Prospects for Counter-Hegemony*, PROJECT ON INT'L ORDER AND STRATEGY AT BROOKINGS (2017), at 2.

<sup>21</sup> See, e.g., Maria Adele Carrai, SOVEREIGNTY IN CHINA: A GENEALOGY OF A CONCEPT SINCE 1840 214 (2019).

<sup>22</sup> Bernard Z. Keo, *Crossing the River by Feeling the Stones: Deng Xiaoping and the Making of Modern China*, 25 EDUC. ABOUT ASIA 33 (2020).

<sup>23</sup> Yin He, *China's Changing Policy on UN Peacekeeping Operations*, INST. FOR SEC. AND DEV. POL'Y 69 (2007).

<sup>24</sup> Ann Kent, *China's International Socialization: The Role of International Organizations*, 8 GLOB. GOVERNANCE 343, 358 (2002).

<sup>25</sup> Tom Ginsburg, *Authoritarian International Law?* 114 AM. J. INT'L L. 221 (2020); see generally Tom Ginsburg, *How Authoritarians Use International Law*, 31 J. DEMOCRACY 44 (2020).

countries. Instead, it has focused primarily on domestic Chinese interests, seeking to ensure that regime opponents are not able to get leverage abroad.

## II. ONE BELT, ONE AUTHORITARIAN ROAD?

Let us now turn to the BRI and how it might play a role in extending authoritarianism. To be sure, this is neither an explicit nor implicit goal of China or the program. China's policy of non-interference implies indifference toward regime type among its partners. Yet as this section will argue, there is a kind of hydraulic tendency toward concentration of power within BRI partner states.

Before turning to the effect on democracy, we describe three structural features of the Chinese approach that distinguish the BRI and provide China with this leverage: bilateralism, soft law, and the permeability of the public-private boundary.

### *A. Bilateralism*

First consider bilateralism. As a model of integration, the BRI can be contrasted with the general model of multilateralism that has characterized much of the postwar order.<sup>26</sup> This involved a good deal of institution-building, with formal international organizations that brought many countries together. In contrast, the BRI will involve “policy coordination” among a network of countries, with China at its center. While there is a multilateral Belt and Road Forum for International Cooperation, this is not an international organization but rather a conference of heads of state, with thirty-seven attending the event in 2019, no doubt one of the

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<sup>26</sup> See generally Steven Weber, *Shaping the Postwar Balance of Power: Multilateralism in NATO*, 46 INT'L ORG. 633 (1992); Miles Kahler, *Multilateralism with Small and Large Numbers*, 46 INT'L ORG. 681 (1992); STEWART PATRICK, *THE BEST LAID PLANS: THE ORIGINS OF AMERICAN MULTILATERALISM AND THE DAWN OF THE COLD WAR* (2009).



biggest such gatherings outside of the United Nations.<sup>27</sup> There may be some formal international instruments that emerge in the multilateral forum, but the more routine activity is communication and coordination on shared goals. Joint statements are the main output. This establishment of a common discourse, and a ceremonial focus, will not be the locus of actual negotiations.

Similarly, China founded a new grouping in 2012 called the 17+1, which consists of seventeen Eastern European countries and Greece along with China, as well as the China-Latin America Forum in 2014. So far, these vehicles seem to be mainly talk shops, designed to allow for Chinese articulation of its preferred rhetoric. And yet their structure indicates that under the rhetoric of sovereign equality that has long characterized China's international relations, there is a decided inequality in substance—there is little doubt which party is the “plus one.” These groupings are characterized by high level summits, recalling ancient tastes for ritualized interactions.

Instead, the real action is not in the centralized structure but in the hub-and-spokes network. Bilateral government-to-government exchange will be the mode of interaction, and will allow China to bring its full weight to bear on every interaction. One country, one approach (一国一策, or “Yīguó yīcè”), will be the mode. The relevant units will be states, and executives in particular. Rather than having a transnational organization that directly interacts with citizens, the BRI will likely reinforce states and executives within their own legal orders. As the Chinese Government outlined in its “Vision and Actions” document (which provides the basic principles of cooperation for government cooperation under the BRI), the first principle is “Compliance with the purposes and principles of the United Nations Charter, and in particular

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<sup>27</sup> Shannon Tiezzi, *Who Is (and Who Isn't) Attending China's 2nd Belt and Road Forum?*, DIPLOMAT (Apr. 27, 2019), <https://thediplomat.com/2019/04/who-is-and-who-isnt-attending-chinas-2nd-belt-and-road-forum/>.

the Five Principles of Peaceful Co-existence.”<sup>28</sup> This is sovereignty-reinforcing international law.

Bilateralism, however, is not inconsistent with engagement with other multilateral fora. China has become adept at influencing extant multilateral institutions to advance its interests. For example, in ASEAN, China has successfully influenced the government of Hun Sen in Cambodia, which opposed and blocked a collective statement tabled by Vietnam and the Philippines in the South China Sea dispute. Already, Greece and Hungary have been pushing Chinese positions in the European Union. In 2016, these countries sought to avoid a reference to China in the EU statement on the International Tribunal for the Law of the Sea arbitration in the South China Sea, and a year later Hungary blocked a joint EU statement on the alleged torture of detained lawyers in China.<sup>29</sup> In 2017, for the first time, the EU did not enter a joint statement regarding Chinese human rights abuses at the UN Human Rights Council, as Greece objected. In this way, the norm of sovereign equality in regional organizations can help to derail some joint action against Chinese interests.

### B. *Soft Law*

The BRI features a strong rhetorical emphasis on law, but the legal component is soft. Chinese approaches to international law are characterized by ambiguity and an emphasis on flexibility in the service of sovereignty.<sup>30</sup> Neither the Chinese Constitution nor the Law on Legislation is particularly clear

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<sup>28</sup> Nat'l Dev. and Reform Comm'n, *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road*, MINISTRY OF FOREIGN AFF. & MINISTRY OF COM. OF CHINA (Mar. 28, 2015), [https://reconasia-production.s3.amazonaws.com/media/filer\\_public/e0/22/e0228017-7463-46fc-9094-0465a6f1ca23/vision\\_and\\_actions\\_on\\_jointly\\_building\\_silk\\_road\\_economic\\_belt\\_and\\_21st-century\\_maritime\\_silk\\_road.pdf](https://reconasia-production.s3.amazonaws.com/media/filer_public/e0/22/e0228017-7463-46fc-9094-0465a6f1ca23/vision_and_actions_on_jointly_building_silk_road_economic_belt_and_21st-century_maritime_silk_road.pdf).

<sup>29</sup> Frederick Kempe, *China's Europe Strategy Atlantic Council*, CNBC (Dec. 8, 2018), <https://www.cnbc.com/2018/12/07/chinas-real-endgame-in-the-trade-war-runs-through-europe.html>.

<sup>30</sup> Bjorn Ahl, *China's New Global Presence and Its Position Toward International Law: Obeying, Using or Shaping?*, in LEGAL DIMENSIONS OF CHINA'S BELT AND ROAD INITIATIVE 481, 492–93 (Lutz Christian Wolff, Chao Xi & Jenny Chan eds., 2016).

on the status of treaties vis-à-vis domestic law.<sup>31</sup> Both courts and commentators have adopted different approaches at different times with regard to the status of treaties and obligations.<sup>32</sup> This rather naturally leads to an emphasis on relatively vague obligations at the international level. As Wang Jiangyu notes, the BRI memoranda of understanding between China and the Philippines, specifically states that it “does not create legally binding obligations for the Participants. It is an expression of their common aspiration to cooperate on the Belt and Road Initiative.” Wang argues that this approach will serve to alleviate the concerns of the participating nations, ensuring their formal sovereignty.<sup>33</sup> Several other Memoranda of Understanding have been produced, each containing similar general terms, but also reflecting different language depending on local circumstances.<sup>34</sup>

In terms of the form of international agreements, the key common denominators are dispute settlement through friendly consultation and limited duration of agreements. For example, the China-Philippines Memorandum of Understanding is four years; that for New Zealand is five years.<sup>35</sup> Scholars have analyzed duration of agreements with the assumption that unlimited duration indicates greater willingness to cooperate.<sup>36</sup> But the logic of soft law reverses this. Whereas with hard law, duration indicates greater commitment, for soft law, short duration indicates iteration. Limited duration allows ritualized and ceremonial renegotiation and renewal every few years, a completely different logic. The agreement provides an occasion for expressions of mutual interest, as well as opportunities to discuss parts of the relationship that are not working as planned. Like a “relational contract,” the agreement itself is

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<sup>31</sup> Cai, *supra* note 3.

<sup>32</sup> *Id.*

<sup>33</sup> Wang Jiangyu, *China's Governance Approach to the Belt and Road Initiative (BRI): Partnership, Relations and Law* 6 (NUS Law Working Paper 2019/005, 2019).

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Id.*

<sup>36</sup> BARBARA KOREMENOS, *THE CONTINENT OF INTERNATIONAL LAW* 109 (2009).

not designed to commit so much as to memorialize a relationship and provide a framework for interaction.

The emphasis on sovereignty and mutual benefit represents continuity in China's approach to international law going back to Bandung.<sup>37</sup> China sought regular meetings going forward and a standing organ, perhaps because it was excluded from the United Nations at the time. But these meetings were largely vehicles for executive cooperation rather than formalization of institutional arrangements or binding commitments among countries. Because it is not domestically enforceable, international soft law marks an internal shift of power *within* constitutional orders to the executive, and away from legislatures, which do not have to ratify such agreements, and courts, which do not have to scrutinize them.

### C. *Relaxing the Public-Private Divide*

The BRI and China's system of state capitalism provides great flexibility to structure transactions across the public-private divide. State contract, investment from sovereign wealth funds, or private contracts with state-owned enterprises ("SOEs") can easily substitute for the formal treaty as an instrument of international cooperation. Authoritarian capitalism allows China to slip back and forth across roles depending on the urgency and importance of the issue. It also makes it fairly easy to influence particular foreign leaders, whose political networks can partner with Chinese state-owned-enterprises on various ventures, whether officially under the BRI or not.

SOEs have a private form but respond, when needed to direction from the party-state. Some scholars also emphasize that in certain cases, particularly associated with the BRI, the Chinese government is essentially delegating

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<sup>37</sup> See, e.g., Yifeng Chen, *Bandung, China, and the Making of World Order in East Asia*, in *BANDUNG, GLOBAL HISTORY AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES* 177, 182–83 (Luis Eslava et al. eds., 2017).

governmental functions to SOEs.<sup>38</sup> Furthermore, many of the BRI countries also rely heavily on SOEs for the kind of large infrastructure projects that are contemplated. These arrangements mean that one could easily envision SOEs appealing to the government for diplomatic help to get out of specific problems that arise with partner states, rather than relying on either treaty or contract. As with other aspects of international law, we see a pragmatic, flexible approach, that preserves state autonomy to deal with different situations differently.<sup>39</sup>

### III. MECHANISMS OF DEMOCRATIC EROSION

Our focus is on whether and how BRI will affect the domestic governance of recipient countries. Most obviously, a host of developing countries have been lured to BRI by the promise of massive infrastructure improvements and the associated economic windfall. However, this investment (furnished by China's dedicated investment banks) often comes in the form of loans rather than grants, and many of the recipient countries lack strong economic governance structures, creating opportunities for corruption. Furthermore, having lent money to secure projects, China naturally becomes implicated in the domestic politics of the recipients, creating potential for backlash.

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<sup>38</sup> Li Qingming (李庆明), *Lun Zhongguo Guoyou Qiye zai Meiguo Minshi Susong zhong de Guojia Huomian* (论中国国有企业在美国民事诉讼中的国家豁免) [*On the Immunity of Chinese SOEs in Civil Lawsuits in the US*], *JIANGXI SHEHUI KEXUE* (江西社会科学) [JIANGXI SOC. SCIS.] (2018).

<sup>39</sup> One institution in which traditional immunity has been realized is the Asian Infrastructure Investment Bank, whose founding Agreement adopts the doctrine of restrictive immunity.

See generally, Mo Shijian & Chen Shi (莫世健和陈石), *AIB Xieding xia Guojia Huomian Yuanze yu Zhongguofa de Chongtu yu Xietiao*, *Zhongguo Shehui Kexuewang* (AIB协定下国家豁免原则与中国法的冲突与协调-中国社会科学网) [*The Doctrine of Sovereign Immunity Under AIB and Its Conflict with Chinese National Laws*], *ZHONGGUO SHEHUI KEXUEYUAN* (中国社会科学院) [CHINESE ACAD. SOC. SCIS.] (Nov. 3, 2016, 9:38 AM), [http://law.cssn.cn/fx\\_gjfx/201611/t20161103\\_3262646.shtml](http://law.cssn.cn/fx_gjfx/201611/t20161103_3262646.shtml).

The story of the Hambantota Port in Sri Lanka illustrates the promise and the peril, as well as the myriad reactions to the BRI. Under the regime of Mahendra Rajapaksa, for example, Chinese investment into Sri Lanka expanded dramatically, much of which was directed to infrastructure reconstruction in the aftermath of the Sri Lankan civil war. Hambantota, the home district of the Rajapaksa family, was the site of a major port investment, financed primarily by China's Export-Import Bank with minority participation from the Sri Lanka Ports Authority.<sup>40</sup> The Port sits within a few miles of the world's busiest maritime lane. When Rajapaksa lost power in an electoral upset in 2015, the new government concluded an agreement in which its loans were restructured in exchange for a ninety-nine-year lease to a joint venture controlled by CMPort, the Chinese state-owned enterprise that was managing the Port. China's official news agency tweeted that this was "another milestone on the path of the Belt and Road."<sup>41</sup> However, the Sri Lankan reaction was much more skeptical, and the next government sought to reverse the lease.<sup>42</sup> The arrangement was viewed with similar suspicion in other countries, and led the government to turn to Japan and India for investment in a competing port.<sup>43</sup> Ironically, the term of ninety-nine years was the same duration of time used by Western colonial powers in leasing Kowloon and other parts of Chinese territory seized during the Opium Wars.<sup>44</sup>

The story also indicates the relationship between the BRI and domestic democracy. China can use its loans, grants

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<sup>40</sup> Marie Adele Carrai, *China's Malleable Sovereignty along the Belt and Road Initiative: The Case of the 99-Year Chinese Lease of Hambantota Port*, 51 N.Y.U. J. INT'L L. & POL. 1061, 1071–72 (2019).

<sup>41</sup> BRUNO MACAES, BELT AND ROAD: A CHINESE WORLD ORDER 47 (2018).

<sup>42</sup> Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html>; Anusha Ondaatjie & Asantha Srimanne, *Sri Lanka Leased Hambantota Port to China for 99 yrs. Now It Wants It Back*. [sic], BUS. STANDARD (Nov. 30, 2019).

<sup>43</sup> *Sri Lanka Revives Port Deal with India, Japan Amid Concerns*, AL JAZEERA (Jan 14, 2021), <https://www.aljazeera.com/news/2021/1/14/sri-lanka-revives-port-deal-with-india-japan-amid-china-concerns>; see generally Abdur Rehman Shah, *China's Belt and Road Initiative: The Way to the Modern Silk Road and the Perils of Overdependence*, 59 ASIAN SURV. 407 (2019).

<sup>44</sup> Carrai, *supra* note 40, at 1076.

and investments to support regimes that are friendlier to its type of governance. China's support for Mahendra Rajapaksa, a putative authoritarian who sought to bend the political system to his will, grew in parallel to western criticism of his human rights record. Payments from the port construction flowed through Rajapaksa's 2015 election campaign, and China's ambassador lobbied Sri Lankan voters to vote for Rajapaksa.<sup>45</sup> In turn, Rajapaksa agreed to seemingly unsustainable loan terms that grew worse with subsequent requests; China is currently the country's biggest creditor, and Sri Lanka's overall debt burden is over eighty percent of government revenues. Critically, Sri Lankan democracy has suffered under the Rajapaksa's rule.

China's open campaigning for the politician behind Sri Lanka's democratic backsliding was followed by similar behavior in the Maldives, where it supported then-president Abdulla Yameen in his unsuccessful 2018 re-election bid. Yameen had taken office five years earlier, defeating the country's first democratically elected president Mohamed Nasheed. Thereafter the country received a surge of Chinese investment, including a major bridge linking two islands in the capital, but also found itself deeply indebted. When Yameen lost the election, he was found to have millions of dollars in illegal assets, while the country's debts were unsustainable.<sup>46</sup>

To be sure, the Hambantota port and the Maldives bridge are only two of many thousands of aid and lending projects undertaken by China. The lease arrangement in Sri Lanka seems in fact to be an outlier, and in many cases, China has been generous in forgiving or restructuring debt. According to Hurley, Morris, and Portelance, "[I]n countries suffering debt distress, the Chinese government provided debt relief in an ad hoc, case by case manner. It has generally refrained from participating in multilateral approaches to debt relief, though it does participate in debt relief discussions at

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<sup>45</sup> Maria Abi-Habib, *supra* note 42.

<sup>46</sup> Simon Mundy and Kathrin Hille, *The Maldives counts the Costs of its Debts to China*, FIN. TIMES (Feb. 10, 2019), <https://www.ft.com/content/c8da1c8a-2a19-11e9-88a4-c32129756dd8>.

the international financial institutions and engages informally with IMF staff on individual country cases.”<sup>47</sup> The Chinese approach of bilateralism and one-off negotiations differs from that of other major creditors, which generally coordinate in a multilateral approach. Because multilateral debt negotiations involve the sharing of information among multiple governments, they are necessarily more transparent to the outside world: the more governments involved, the more likely that one has a regime requiring publicity of international arrangements. But China can work bilaterally and in secret, with little publicly available information on BRI project finance.<sup>48</sup>

There is also a constitutional dimension to the impact of the BRI on recipient countries. For partner countries, bilateralism and soft law mean that national executives will assume more power than other branches or levels of government. Unlike treaties, which typically require legislative approval as a constitutional matter, there is no requirement that state contracts or sovereign borrowing receive scrutiny. Finally, the investment in significant dispute resolution infrastructure within China may mean that national judiciaries play a minor role in implementing and enforcing relevant rules.

As a by-product, China will sometimes reinforce the personal interests of corrupt chief executives, extending authoritarianism. Malaysian Prime Minister Najib Razak, for example, agreed to a \$20 billion rail line and pipeline funded by China; he later lost office after it was revealed that he had taken hundreds of millions of dollars. His successor, Mahathir Mohamad, promptly cancelled the Chinese projects.<sup>49</sup> The fact is that it is not hard to buy the governments of small countries,

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<sup>47</sup> John Hurley, Scott Morris & Gailyn Portelance, *Explaining the Debt Implications of the Belt and Road Initiative from a Policy Perspective*, CTR. FOR GLOB. DEV. POL’Y PAPER 121, March 2018, at 19.

<sup>48</sup> Diane Desierto, *The Complexities of Democracy, Development and Human Rights in China’s Belt and Road Initiative*, 35 CONN J. INT’L L. 299, 327 (2020).

<sup>49</sup> *Malaysia’s Mahathir Cancels China-Backed Rail, Pipeline Projects*, REUTERS (Aug. 21, 2018, 1:20 AM), <https://www.reuters.com/article/us-china-malaysia/malaysias-mahathir-cancels-china-backed-rail-pipeline-projects-idUSKCN1L60DQ>.



even EU member states, with tied promises of investment. Thus, the BRI may undermine domestic accountability, as China seeks partners that can provide the stable environment necessary for economic growth.

Another effect on democracy is that BRI will also provide opportunities to test and to export technologies of repression. China's domestic regime relies on sophisticated technical tools to control public space, and these may be useful for authoritarian partners. One such technology is facial recognition software, used to monitor its own population, and to suppress minorities in Xinjiang.<sup>50</sup> In 2018, a Guangzhou company signed a strategic partnership with Zimbabwe, which will allow the development of face recognition technology in the country.<sup>51</sup> This will provide gains for Zimbabwe in terms of security, but also involves the transfer of massive amounts of data on Zimbabwe's citizens to a Chinese company, which in turn will benefit by being able to advance over competitor firms in this critical field for artificial intelligence.<sup>52</sup> In Ethiopia, likely prior to the advent of Belt and Road, Human Rights Watch reported that China's ZTE Corporation sold technology and provided training that allowed the government to monitor mobile phones and Internet activity.<sup>53</sup> Chinese tech giant Huawei partnered with the government of Kenya to construct "safe cities" that leverage thousands of surveillance cameras feeding data into a public security cloud.<sup>54</sup> This

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<sup>50</sup> Alfred Ng, *How China Uses Facial Recognition to Control Human Behavior*, CNET (Aug. 11, 2020, 5:00 AM), <https://www.cnet.com/news/in-china-facial-recognition-public-shaming-and-control-go-hand-in-hand/>.

<sup>51</sup> Lynsey Chutel, *China is Exporting Facial Recognition Software to Africa, Expanding its Vast Database*, QUARTZ AFRICA (May 25, 2018), <https://qz.com/africa/1287675/china-is-exporting-facial-recognition-to-africa-ensuring-ai-dominance-through-diversity/>.

<sup>52</sup> *Id.*

<sup>53</sup> Sophie Richardson, *China: Quashing Criticism at Home and Abroad*, HUMAN RIGHTS WATCH (May 27, 2014); Maya Wang, *China's Dystopian Push to Revolutionize Surveillance*, WASH. POST (Aug. 18, 2017, 10:09 AM), <https://www.washingtonpost.com/news/democracy-post/wp/2017/08/18/chinas-dystopian-push-to-revolutionize-surveillance/>.

<sup>54</sup> *Safe Cities: Using Smart Tech for Public Security*, BBC FUTURE, <http://www.bbc.com/future/bespoke/specials/connected-world/government.html>.

suggests that the “New Digital Silk Road” may involve the export of enhanced repressive capacity.<sup>55</sup>

In short, China’s massive BRI will have a tendency to erode democracies through its association with corruption, its lack of transparency, and its need for stable partners who can keep promises. China’s negotiations in debt reduction give the country tremendous leverage over individual leaders and countries. As detailed in this section, there is ample evidence that China is willing to use this leverage.

#### IV. PLAYING WITH EXTRATERRITORIALITY

Beyond these indirect tools, China is also willing to ensure its domestic interests are protected. Whatever the Westphalian virtues promoted by China on the international plane, they are incomplete as an account of its likely international legal behavior as it assumes a greater role in the world in years to come. Instead, we see an increasingly assertive Chinese regime willing to deploy the tools of power. A central one of these tools is extraterritoriality.

On July 1, 2020, China’s National People’s Congress (“NPC”) passed the National Security Law (“NSL”) for the Hong Kong Special Administrative Region (“SAR”).<sup>56</sup> The primary goal of the NSL is to facilitate the prosecution of a set of new crimes with loose definitions, including “undermining an election”<sup>57</sup> in Hong Kong, and “provoking by unlawful means hatred among Hong Kong residents” toward the government.<sup>58</sup> The statute criminalizes advocacy or action toward secession, subversion, terrorism or collusion with foreign powers, and applies to people even outside Hong Kong. It empowers the police and prosecutors to be very

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<sup>55</sup> See Richard Fontaine & Daniel Kliman, *On China’s New Silk Road, Democracy Pays a Toll*, FOREIGN POL’Y (May 16, 2018, 10:10 AM), <https://foreignpolicy.com/2018/05/16/on-chinas-new-silk-road-democracy-pays-a-toll/>.

<sup>56</sup> English translation of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, XINHUANET [hereinafter National Security Law].

<sup>57</sup> *Id.* at art. 29(3)..

<sup>58</sup> *Id.* at art. 29(5).

aggressive, and has been applied against dissident lawmakers as well as media tycoon Jimmy Lai.<sup>59</sup>

This statute reflected Beijing's frustration with the inability of the Hong Kong governments to resolve local debates over the territory's future. The previous years since 1997 witnessed a series of battles—in the courts, at the ballot box, and in the streets—in which local citizens sought greater voice in local affairs. In 2014, these initiatives exploded in the so-called “Umbrella Movement,” and protests have continued episodically since then. Some, such as noted democracy advocate Joshua Wong, demanded self-determination and democracy.<sup>60</sup> Other protestors were concerned with “rice bowl” (economic) issues, such as the exorbitant cost of housing in the territory, with prices allegedly driven up by people moving from the mainland. Major demonstrations erupted in 2019 over a proposed Extradition Law that would have allowed suspects to be extradited to China to stand trial.<sup>61</sup>

The local government tried a mix of cooptation and repression, but such strategies failed to assuage the concerns. With the world preoccupied with the coronavirus pandemic in early 2020, China forcefully reasserted control under the NSL. That it chose to do so using law, rather than brute force, reflects important shifts in Chinese governance in recent years. As Taisu Zhang and I have argued, China has increasingly turned to the law as a tool of governance.<sup>62</sup> Xi's own speeches are peppered with references to law and legality, and upholding the Chinese constitution has taken on new rhetorical importance after the 2018 amendments that cemented Xi's

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<sup>59</sup> See Brian Wong, *National Security Law: Jimmy Lai to Stay Behind Bars as Hong Kong Top Court Rules Previous Judge Failed to Properly Interpret Tough New Threshold for Bail*, SOUTH CHINA MORNING POST (Feb. 9, 2021, 10:05 AM), <https://www.scmp.com/news/hong-kong/law-and-crime/article/3121079/national-security-law-jimmy-lai-stay-behind-bars-hong>.

<sup>60</sup> *Who Is Joshua Wong?*, REUTERS (Dec. 2, 2020), <https://www.reuters.com/article/us-hongkong-security-wong-factbox/factbox-who-is-joshua-wong-the-hong-kong-activist-jailed-for-a-2019-protest-idUSKBN28C0TW>.

<sup>61</sup> The bill was actually prompted by a case involving a Hong Kong citizen who committed a murder in Taiwan but could not be extradited there.

<sup>62</sup> See Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 306, 321 (2019).

ability to stay in office after his current term expires in 2023.<sup>63</sup> This marked a rhetorical shift from the earlier era under Hu Jintao, in which law was seen as overly rigid and in need of popular input.<sup>64</sup> Hu had championed courts' listening to public opinion, and emphasized mediation.<sup>65</sup> Under Xi, there has been significant and genuine institutional investment in China's courts and legal system, both of which improved in quality and capacity. Of course, that legal infrastructure is subordinate to the central place of the Party in China's system of governance. But given the vast expansion of the Chinese economy and state, there are many transactions in which the law governs, free of interference.

The Hong Kong NSL was unusual in many ways: it was constitutionally atypical (though legal); vague in its content; and extensive in its assertion of jurisdiction. We discuss each feature briefly. Although Article 23 of the Hong Kong Basic Law required that national security legislation be passed by the Hong Kong SAR itself, the Basic Law is actually a statute of the PRC. The NPC can amend that law or pass legislation that overrides it. In the Chinese constitutional

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<sup>63</sup> See *Guanyu Xianfa, Xi Jinping zhe 10 ju Hua Fa Ren Shenxing* [On the Constitution, These 10 Lines in Xi Jinping's Speeches Inspire Deep Reflection], XINHUA NET (Mar. 12, 2018), [http://www.xinhuanet.com/politics/2018-03/12/c\\_1122527222.htm](http://www.xinhuanet.com/politics/2018-03/12/c_1122527222.htm) (identifying ten important statements on the Constitution derived from four of Xi's speeches); Xi Jinping, *Zai Shoudu Gejie Jinian Xianxing Xianfa Gongbu Shishi 30 Zhounian Dahui Shang de Jianghua* [Speech in the Capital Commemorating the 30th Anniversary of the Promulgation and Implementation of the 1982 Constitution], XINHUA NET (Dec. 4, 2012), [http://news.xinhuanet.com/politics/2012-12/04/c\\_113907206.htm](http://news.xinhuanet.com/politics/2012-12/04/c_113907206.htm); Xi Jinping, *Wei hu Xianfa Quanwei, Tuijin Xianzheng Fazhan* [Protect the Constitution's Authority, Promote the Development of Constitutionalism], 2013(1) JIGOU YU XINGZHENG [INSTITUTIONS AND ADMINISTRATION] 1, <http://www.cqvip.com/qk/71320x/2013001/74718890504849514849484850.html>; Xi Jinping, *Keshou Xianfa Yuanze, Hongyang Xianfa Jingshen, Luxing Xianfa Shiming* [Obey the Constitution's Principles, Enhance the Constitution's Spirit, Realize the Constitution's Destiny], 2012(24) RENMIN JIANCHA [THE PEOPLE'S PROCURATORATE] 1, <http://www.cqvip.com/qk/81238x/201224/44414056.html>. The total speech count is a rough number derived from searching for articles authored by 习近平 (Xi Jinping) in Google Scholar, using the keyword 宪法 (constitution).

<sup>64</sup> Zhang & Ginsburg, *supra* note 62, at 289–90 (discussing Carl Minzner, END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE (2018)).

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

system, the Standing Committee of the NPC is also the final interpreter of the Constitution, so there was little forum to challenge the new law in terms of its constitutionality. The statute is thus formally legal, but exceptional in its mode of adoption.

Vagueness was an issue too. Of course, vagueness and ambiguity are hardly rare in Chinese statutory drafting, but atypical in legalistic Hong Kong. The NSL definition of terrorist activities includes conventional violent actions, but also the vague catchall “other dangerous activities which seriously jeopardize public health, safety or security.”<sup>66</sup> Most directly, the law targets anyone guilty of working toward secession,<sup>67</sup> which as the last Chapter documented has been a central Chinese goal in its engagement with regional organizations.

Perhaps the most important feature of the NSL was its jurisdictional coverage, which included extraterritorial reach. Specifically, Article 38 extends jurisdiction over the designated crimes to those outside Hong Kong, of any nationality. It reads: “This Law shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region.”<sup>68</sup> This means that anyone, anywhere in the world, could potentially be arrested or indicted in Hong Kong if he or she violates its vague terms. If the person is abroad in one of the twenty democracies with which Hong Kong has extradition treaties, Hong Kong’s government could seek the return of the suspect to Hong Kong to stand trial. China has extradition treaties with over fifty additional countries, and regularly seeks extradition of dissidents, so the law will send a chill to Beijing’s critics everywhere.

It did not take long for the Hong Kong government to utilize these new tools. In late July, it issued an arrest warrant for an American national, Samuel Chu, who runs a pro-

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<sup>66</sup> National Security Law, *supra* note 57, at art. 24(5).

<sup>67</sup> *Id.* at art. 20.

<sup>68</sup> *Id.* at art 38.

democracy group in Washington, D.C.<sup>69</sup> Five other overseas activists were targeted as well.<sup>70</sup> Perhaps in anticipation of this development, several countries had suspended their extradition treaties with Hong Kong, including Germany, the United Kingdom, and Australia.<sup>71</sup>

Our concern is not with what some have described as “the end of Hong Kong” as an autonomous entity, twenty-three years after the British handover.<sup>72</sup> That was perhaps inevitable, even if it occurred twenty-seven years before the planned expiration of China’s promise to maintain a “One Country, Two Systems”—a concept established by Deng Xiaoping during the negotiations with the UK over Hong Kong. After all, Hong Kong is unquestionably Chinese territory. Instead, the NSL reflects a coming full circle of China’s position on international law. For nearly a century, China was subject to a regime in which Western powers claimed extraterritorial rights over its own nationals and over parts of Chinese territory in which they had concessions. The system lasted well into the League of Nations period.<sup>73</sup> From the Chinese viewpoint during this time, extraterritoriality meant one thing, and one thing only: the raw exertion of power. That China’s government is now in a position to utilize the very same tool that it suffered under is unsurprising, but reminds us of the importance of interests and power.

Extraterritoriality invites conflict. The exercise of extraterritorial jurisdiction over activity that occurs on other states’ sovereign territory means that individuals are subject to multiple legal regimes, which may demand and allow different

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<sup>69</sup> Helen Regan & Angus Watson, *Hong Kong Issues Arrest Warrants for Six Overseas Democracy Activists Including US Citizen*, *State Media Reports*, CNN (Aug. 1, 2020, 4:04 AM), <https://www.cnn.com/2020/08/01/china/hong-kong-activists-arrest-warrant-intl-hnk/index.html>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Eryk Bagshaw, *The End of the Hong Kong the World Knew*, SYDNEY MORNING HERALD (June 30, 2020, 5:23 PM), <https://www.smh.com.au/world/asia/the-end-of-the-hong-kong-we-knew-20200630-p557ma.html>.

<sup>73</sup> Conference on the Limitation of Armament, Washington, Nov. 12, 1921–Feb. 6, 1922, *Resolutions Regarding Extraterritoriality in China*, (U.S. Government Printing Office, 1922), [starting page], 1642; Senate documents 124 and 125, 67th Congress, 2d session.

things. Under the NSL, Hong Kong's arrest warrant for Chu means that his ability to exercise free speech in the United States is threatened. Of course, Chu could avoid violating Chinese and Hong Kong law simply by exercising his freedom *not* to call for secession. But in other instances, extraterritorial application of the law might place individuals in the position of violating one country's law by complying with another.

In a global market, action that occurs in one state affects another, and the United States was a pioneer in such application of law outside its own borders. Beginning with antitrust statutes, American officials and judges interpreted their own laws to extend jurisdiction to the territory of other countries, so long as the actions in question had territorial effects in the U.S. market. Europe followed suit, as did China.<sup>74</sup> Today, navigating multiple antitrust regimes is a routine challenge for large companies.<sup>75</sup>

What distinguishes the NSL is its frontal challenge to the freedom of speech, a central element of democratic governance. The vague set of violations in the NSL suggests a foray into a new set of tools to intimidate critics of Beijing's policies. It is not hard to imagine a whole series of such laws in the future. Imagine a law requiring Huawei's German subsidiary to report certain user communications to the government in Beijing; or criminalizing meetings with the Dalai Lama in any part of the world; or requiring PRC students in Western universities to report back on subversive comments from colleagues or professors; or criminalizing expressions of support for Taiwan's Democratic Progressive Party, which once flirted with demanding Taiwanese independence. China's turn to extraterritorial law looks much darker if one imagines these scenarios. And they are not far-fetched. The BRI will provide opportunities for this kind of

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<sup>74</sup> See, e.g., Anti-Monopoly Law, art. 2, *translated in* WIPO Lex ("This Law is applicable to conducts outside the territory of the People's Republic of China if they eliminate or have restrictive effects on competition on the domestic market of the PRC.").

<sup>75</sup> ANU BRADFORD, THE BRUSSELS EFFECT 99–101 (2020) (noting how EU and U.S. antitrust approaches diverge).

experimentation because of China's great leverage over its partners.

The BRI will extend opportunities for extraterritorial application of law because of expanded leverage to countries that are debtors, recipients of investment, and trading partners. While rich countries like Japan, the United States, and Norway can resist pressure to enforce Chinese laws, one cannot expect Kyrgyzstan or Albania to do so. But at the same time, unlike authoritarian systems in prior eras, China does not seek to export its particular model. Indeed, there is no "Chinese model" in the sense that other countries can replicate its system; rather, that expression seems to stand for authoritarian capitalism. China's record is clear in that it is willing to tolerate and work with democratic governments, even on its doorstep. What it is unlikely to tolerate are challenges to its self-defined interests.

## V. BACKLASH?

To be sure, economic leverage breeds local resentments, and there is some possibility that heavy-handed Chinese interference will lead to backlash. This is what occurred in the Maldives in 2018.<sup>76</sup> In 2019, Beijing sought to undermine Taiwanese president Tsai Ing-wen in her reelection bid; such efforts, however, produced a backlash that helped to ensure her victory.<sup>77</sup> China's influence-buying efforts also extend to the West. In Australia, PRC-linked political donations and other influence activities have been at the center of multiple scandals.<sup>78</sup> But this has provoked challenges and criticism. Bilateral relations have soured, and China issued a list of

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<sup>76</sup> See *More Belt and Road Backlash*, WALL ST. J. (Sept. 24, 2018, 7:45 PM), <https://www.wsj.com/articles/more-belt-and-road-backlash-1537832714>.

<sup>77</sup> See Steven Lee Myers & Chris Horton, *In Blow to Beijing, Taiwan Re-elects Tsai Ing-wen as President*, N.Y. TIMES (Jan. 11, 2020), <https://www.nytimes.com/2020/01/11/world/asia/taiwan-election-china.html>.

<sup>78</sup> See John Fitzgerald, *China in Xi's "New Era": Overstepping Down Under*, 29 J. DEMOCRACY 59, 63–64 (2018); see also Shaoquett Moselmane, *Australian Lawmaker's Office Raided amid China Probe*, BBC NEWS (June 26, 2020), <https://www.bbc.com/news/world-australia-53188553>.



fourteen non-negotiable demands.<sup>79</sup> In short, the future is uncertain and the hydraulic forces we have identified that tend to undercut good governance and democracy in China's partner countries might lead it to adopt softer strategies, or could provoke a new "cold war" with the United States serving as a counterweight. We can only identify the forces at work rather than the outcome of their interaction. Elsewhere, I speculate on different scenarios, organized around U.S.-China relations, that will shape the environment for other states.<sup>80</sup>

### CONCLUSION

China's challenge is not directed towards the system of territorially-defined nation states, nor is it challenging the UN or the Security Council as it is currently constituted. Furthermore, there is scant evidence that China seeks to actively undermine democracies in its neighborhood or elsewhere,<sup>81</sup> nor is it actively seeking to export autocracy. China's arms sales, development aid and diplomatic support do not correlate with autocratic longevity.<sup>82</sup> And while its arms sales are negatively correlated with democracy, so are arms sales by the United States.<sup>83</sup>

Instead, China's BRI will have a subtle and incidental effect on domestic democracy. In implementing BRI projects, China inevitably becomes entwined in domestic politics of

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<sup>79</sup> Jonathan Kearsley, et al., 'If You Make China the Enemy, China Will Be the Enemy': Beijing's Fresh Threat to Australia, SYDNEY MORNING HERALD (Nov. 18, 2020, 6:10 PM), <https://www.smh.com.au/world/asia/if-you-make-china-the-enemy-china-will-be-the-enemy-beijing-s-fresh-threat-to-australia-20201118-p56fq.html>.

<sup>80</sup> Tom Ginsburg, *The Future of Liberal Democracy in the International Legal Order*, in EVOLUTION OR REVOLUTION? CHANGE IN THE INTERNATIONAL LEGAL ORDER (David Sloss ed., forthcoming 2021).

<sup>81</sup> See Dingding Chen & Katrin Kinzelbach, *Democracy Promotion and China: Blocker or Bystander?* 22 DEMOCRATIZATION 400, 401 (2015) (China indifferent to democracy in Myanmar).

<sup>82</sup> Julia Bader, *China, Autocratic Patron? An Empirical Investigation of China as a Factor in Autocratic Survival*, 59 INT'L STUD. Q. 23, 23 (2015).

<sup>83</sup> See Indra De Soysa & Paul Midford, *Enter the Dragon! An Empirical Analysis of Chinese Versus US Arms Transfers to Autocrats and Violators of Human Rights, 1989–2006*, 56 INT'L STUD. Q. 843, 848–50 (2012) (demonstrating that Chinese arms sales were associated with slightly higher levels of democracy than were U.S. arms sales, for both a global sample and for Africa only).

partner countries. It will favor particular leaders and disfavor others, utilizing nominally private entities to enrich those it values. It will not push for transparency, but instead will be able to use a wide variety of tools, both private and public, to advance its interests. It will export technologies of repression. And there will be little pressure from the Chinese side to protect human rights, democratic governance or the rule of law.

One of the core ideas of liberal theory, the need to look under the hood of nation states to understand the domestic interests at stake, will make less sense in a China-dominated world which will, in many ways, bring back the state. Within national constitutional orders, executives will be the leaders who Beijing talks to. Like the world of nineteenth-century espousal, states will mediate the interests of individuals and interest groups. And global civil society may matter less than ever. The trends toward “good governance” regimes, pushed by Western institutions and civil society, have little utility for an authoritarian trying to consolidate control. As China extends its economic reach by cooperating with dominant executives, it may reciprocally reinforce the spread of authoritarianism.

