

Chapter 7

A New Chinese Economic Law Order?

By Gregory Shaffer and Henry Gao

China is incrementally developing a new, decentralized model of trade governance through a web of finance, trade, and investment initiatives involving memorandum of understandings, contracts, and trade and investment treaties. In this way, China could create a vast, Sino-centric, regional order in which the Chinese state plays a nodal role. This model mirrors China's internal development strategy. It starts with the financing of infrastructure as part of China's Belt and Road Initiative, involving telecommunications networks, roads, airports, and ports, which Chinese companies build 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. China then complements this form of regional economic integration with a web of bilateral investment and free trade agreements that assure preferential access for Chinese goods, services, and capital. At the same time, it massively subsidizes technological innovation to reduce reliance on Western technology, while encouraging Chinese state-owned and private companies to acquire advanced technology abroad and while luring Chinese scientists who study abroad to return to China. It implements these initiatives gradually to learn from trial and error, analogous to the country's internal, infrastructure-led, pragmatic, development model, reflected in the popular adage attributed to Deng Xiaoping — “crossing the river by feeling the stones.”¹ But now, Chinese state-owned and private enterprises are internationalized and integrated within Sino-centric global production chains.

While the WTO was highly successful in its first decade as a multilateral trade organization, it began to face difficulties in its second one. Unhappy with the slow progress in the Doha Round, major WTO members such as the United States turned to bilateral and regional free trade agreements. China proactively responded. For example, China's 10th Five Year Plan (2001-2005), issued just before China's WTO accession, stated that the country will “actively participate in the multilateral trading system and international and regional economic cooperation,” implying equal weight given to the WTO and other free trade agreements.² The 11th Five Year Plan (2006-2010), in contrast, provided that China shall “actively participate in international and regional economic cooperation,”³ quietly dropping the multilateral trading system from the phrase. When

¹ Ezra F. Vogel, *Deng Xiaoping and the Transformation of China 2* (Cambridge: Harvard University Press, 2011), 2.

² *The Tenth Five Year Plan of National Economy and Social Development (Guomin Jingji he Shehui Fazhan Dishige Wunian Jihua Gangyao)*, Mar. 15, 2001, 4th Plenary Session of the 9th People's Congress, Beijing: People's Daily, <http://www.people.com.cn/GB/shizheng/16/20010318/419582.html>.

³ *The Eleventh Five Year Plan of National Economy and Social Development (Guomin Jingji he Shehui Fazhan Dishiyige Wunian Jihua Gangyao)*, Mar. 14, 2006, 4th Plenary Session of the 10th People's Congress, Beijing: Chinese Government Network, http://www.gov.cn/gongbao/content/2006/content_268766.htm.

President Hu gave his plenary speech at the 17th Party Congress a year later, he further elevated the importance of free trade agreements into a key national strategy.⁴ 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 finance-trade-investment model.⁵

The U.S.-led transnational trade legal order, with the WTO at its pinnacle, was incredibly successful in transforming and engaging Brazil, India, and China (chapters 4-6). But now the WTO is just a bigger meatball in a spaghetti bowl of trade agreements. Now China is slowly, incrementally building a hybrid model for trade as part of a broader, highly competitive ecology of trade governance. China’s model is built on infrastructure and private law contract and dispute settlement, one where development finance and public law treaties serve as catalysts and complements. It is not a completely new model. It has its forebearers with those of former colonial empires that built ports, railroads, roads, and bridges abroad to extract natural resources and create new markets for their manufactured products. But it is a different model 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. And it is an important one that reflects a potential turn to rival trade blocs in a new, economically contested Cold War.

In this chapter, we first examine China’s export of its infrastructure-based development model (Part A) before turning to its development of a complementary web of free trade and investment agreements (Part B), and its indigenous innovation policy (Part C), as part of the broader evolving ecology of transnational trade legal orders (Part D).

A. Exporting the Chinese Development Model Abroad: Financing Infrastructure

In contrast to the traditional model of development through free enterprises in the West, 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 markets and a non-interventionist state. Several Chinese initiatives illustrate China’s approach,

⁴ Hu Jintao, “Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society in all: Report to the Seventeenth National Congress of the Communist Party of China on Oct. 15, 2007,” *Xinhua News Agency*, Oct. 25, 2007, <http://www.china.org.cn/english/congress/229611.htm>. Interestingly, the official English translation by Xinhua erroneously translates it as a “a strategy of free trade zones”, while according to the original Chinese version, it should have been “a strategy of free trade areas”.

⁵ 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, http://www.gov.cn/zhengce/content/2015-12/17/content_10424.htm.

especially the Belt and Road Initiative and the Asian Infrastructure Investment Bank and New Development Bank. Through them, China aims to develop new markets for Chinese products, which markets are governed through a combination of private contract and treaties, backed by new dispute settlement mechanisms. They spur economic integration that create new ties with Beijing, providing Beijing with greater leverage politically.⁶ In law and development circles, this model is based on what is referenced as a “Beijing consensus” or “Beijing model,” constituting a rival to the so-called neoliberal “Washington consensus.”⁷

Comparison of Washington Consensus and Beijing Consensus

	Washington Consensus	Beijing Consensus
Political system	Liberal democracy	Authoritarian government
Economic development model	Laissez-faire market economy with little government intervention	Dominance of state-owned firms, industrial policy with heavy state intervention
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 and self-determination
Doctrinal rigidity	Rigid	Ideologically neutral and flexible, experimentation through trial and error

Source: The authors’ own compilation.⁸

1. Belt and Road Initiative

⁶ Nadege Rolland, *China’s Eurasian Century? Political and Strategic Implications of the Belt and Road Initiative* (Washington, DC: National Bureau of Asian Research, 2017), 181 (giving examples of Mongolia, Norway, and South Korea. Relatedly, China’s domestic infrastructure building was not only “a tool to stimulate growth in times of financial and economic crises but also ... a way to consolidate the central government’s control over the country’s remote frontiers.”)

⁷ John Williamson, “Is the “Beijing Consensus” Now Dominant?,” *Asia Policy* (2012): 1; Stefan Halper, *The Beijing Consensus: Legitimizing Authoritarianism in Our Time* (New York: Basic Books, 2012).

⁸ This compilation builds from our own observations as well as the following works in the broader literature: Peterson Institute for International Economics, “Interview Transcript with John Williamson,” *Beijing Consensus Versus Washington Consensus?*, Nov. 2, 2010, <https://piie.com/publications/interviews/pp20101102williamson.pdf>; Yasheng Huang, “Debating China’s Economic Growth: The Beijing Consensus or The Washington Consensus,” *Academy of Management Perspectives* 24, no. 2 (2010): 31–47, <https://doi-org.libproxy.smu.edu.sg/10.5465/AMP.2010.51827774>; Yang Yao, “Beijing Consensus Or Washington Consensus: What Explains China’s Economic Success?,” *Development Outreach World Bank* (2011), <https://openknowledge.worldbank.org/handle/10986/6098>; 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.

First proposed by President Xi Jinping in 2013, the Belt and Road Initiative (BRI) is an ambitious Chinese program 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.⁹ 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."¹⁰ In the process, the BRI serves to promote greater economic reliance on China through regional and global economic integration and thus enhance Chinese influence and leverage.¹¹ Some of these projects facilitate China's projection of military strength, such as through providing the Chinese navy with access to deep water ports.¹²

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 sixty-five countries in three continents,¹³ having a total population of 4.4 billion, or sixty-three percent of the world population. These countries account for 29% of global GDP and 23.4% of global merchandise and services exports. The project has often been compared with the post-WWII Marshall Plan by the United States, but the BRI dwarfs it in size. The Marshall Plan provided only U.S. \$13 billion to six European countries, which is equal to U.S. \$150 billion today.¹⁴ In contrast,

⁹ Julian Chaise 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.

¹⁰ 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, http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html.

¹¹ Joshua Meltzer, "China's One Belt One Road Initiative: A View from the United States," *Brookings Report*, June 19, 2017.

¹² Francisco Jose Leandro, "The OBOR Global Geopolitical Drive: The Chinese Access Security Strategy," in *The Belt and Road Initiative: Law Economics and Politics*, ed. 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.").

¹³ China has not officially confirmed the number of BRI countries or the criteria for identifying them, but these 65 countries (including China) are commonly acknowledged to be BRI countries. Lutz-Christian Wolff, China's "Belt and Road" Initiative – An Introduction, in Lutz-Christian Wolff & Chao Xi (eds.), *Legal Dimensions of China's Belt and Road Initiative*, Wolters Kluwer Hong Kong, 2016, at 8. The geographical distribution of the 64 countries other than China is as follows: South-East Asia: 11, South Asia: 7, Central and Western Asia: 11, Middle East and Africa: 15, Central and Eastern Europe: 20. Lutz-Christian Wolff, 2017, "From a 'Small Phrase with Big Ambitions' to a Powerful Driver of Contract Law Unification? China's Belt and Road Initiative and the CIS," *Journal of Contract Law*, 34(1): 50–69, 53.

¹⁴ Gwynn Guilford, "Don't Be Fooled by China's Grand Plan to Rule the World," *Quartz*, Dec. 1, 2017.

the estimated price tag for the BRI is between one to eight trillion U.S. dollars,¹⁵ which is between six to fifty times larger.

China is building the BRI from what can be viewed as a package of arrangements and agreements. They involve customs clearance, investment promotion and facilitation, trade and investment treaties, dispute settlement mechanisms, visa agreements, memorandums on standardization, special economic zones, special tax regimes, academic and student exchanges, and so forth.¹⁶ Each economic corridor in the BRI adopts a different package, subject to local negotiations and adaptation to different geoeconomic conditions, but the modalities are similar.¹⁷

In parallel to the BRI, China has developed free trade zones in the Chinese interior and in BRI countries so that Chinese firms may expand their global trade and production networks.¹⁸ 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 (to shift the role of government from micro-management of the economy to the regulation of market failures). These early free trade zones served as laboratories and “test beds for domestic economic reforms” to pioneer market liberalization, attracting both foreign and domestic investment.¹⁹ For example, 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.²⁰

In contrast, these new free trade zones are strategically selected not only to develop the poorer Western provinces, but also to link China's Western regions with BRI countries, which in turn develop free trade zones linked to China.²¹ For example, the ones in Chongqing and Sichuan serve as key nodes in the China-Europe Railway Express, which reaches all the way into Europe; while the one in Shaanxi is crucial in linking China with central Asian states. Within BRI countries,

¹⁵ Jonathan Hillman, “How Big is China’s Belt and Road?,” *Center for Strategic and International Studies*, Apr. 3, 2018.

¹⁶ 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).

¹⁷ Francisco Jose Leandro, “The OBOR Global Geopolitical Drive: The Chinese Access Security Strategy,” in *The Belt and Road Initiative: Law Economics and Politics*, ed. Julien Chaisse and Jędrzej Gorski (Leiden: Brill Nijhoff, 2018), 88. On different economic corridors, see Rolland, *China’s Eurasian Century?*, 72-85. On university exchanges, *Ibid.*, 64-66.

¹⁸ 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.

¹⁹ Barry Naughton, *The Chinese Economy: Adaptation and Growth* (Cambridge: MIT Press, 2018), 427.

²⁰ For example, the largest sector for U.S. investment was information and communications technology companies. *Ibid.*, 435.

²¹ National Development and Reform Commission, *Vision and Actions*. 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.

China worked with its state-owned companies to finance and build huge Chinese-built commercial facilities and industrial parks in new “economic and trade cooperation zones.” By January 2019, China announced that it had built eighty-two such zones within BRI countries with total investment of 29 billion USD.²² By building key infrastructure like roads and ports, and helping to revamp customs processes in these countries, these projects help to achieve two of the BRI’s five stated objectives—facilities connectivity and unimpeded trade between BRI countries and China.

BRI projects are often conducted under the umbrella of a Memorandum of Understanding between China and the receiving country as China creates a network of “strategic partnerships” grounded in economic ties.²³ The projects are governed by contract, which, in turn, are nested (or in the future are to be nested) within bilateral investment and trade treaties. They focus on infrastructure-building, including roads, rail, ports, airports, pipelines, and telecommunications. They catalyze different forms of public-private partnerships between the state, state-owned enterprises, and private companies.²⁴ Chinese firms, financed by loans from state-owned banks, such as the China Development Bank and the Export-Import Bank of China, and new Chinese-led international development banks, such as the Asian Infrastructure Investment Bank, regularly undertake the projects.²⁵ 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.²⁶ Chinese state-owned and private firms are well-positioned to engage in BRI projects because they are supported by state subsidies and they coordinate with state authorities to obtain government procurement contracts. It is estimated that around 89% of the contractors of BRI projects funded by Chinese banks have been Chinese companies.²⁷

²² 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, <http://www.mofcom.gov.cn/article/ae/ai/201812/20181202820669.shtml>.

²³ 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*, ed. Julien Chaisse and Jędrzej Górski (Leiden: Brill Nijhoff, 2018). As noted by Wolff, as of June 2016, about 30 of the BRI countries have signed MOUs with China. Wolff, Introduction 14-19.

²⁴ Carrai, *It is Not the End of History*. 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.

²⁵ Most of the financing is provided by Chinese banks. Until mid-2018, official data shows that Chinese banks together loaned more than 200 billion dollars to BRI projects. See Zhao Meng, “Zhongguo Yinghangye Leiji xiang ‘Yidai Yilu’ Fafang Daikuan Chao 2000 Yi Meiyuan (Chinese Banks Issued Loans totaling over 200 billion USD),” *China Financial News*, Apr. 27, 2018, <https://www.yidaiyilu.gov.cn/xwzx/gnxw/54181.htm>. At the same time, loans from AIIB totaled only 5.3 billion dollars. See Xinhua News Agency, “Yatouhang yi Pizhun Touzi ‘Yidaiyilu’ Xiangmu chao 53 Yi Meiyuan (AIIB have Approved 5.3 Billion USD loans to BRI Projects),” *Xinhua*, July 7, 2018, <http://www.mofcom.gov.cn/article/i/jyl/e/201807/20180702763503.shtml>. China created a Silk Road Fund in 2014 under the central bank, the People’s Bank of China.

²⁶ 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, http://www.gov.cn/xinwen/2017-12/23/content_5249784.htm. 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.

²⁷ “Gateway to the Globe,” *Economist*, July 28, 2018, 15.

For dispute settlement, BRI contracts initially provided for arbitration to be held in hubs in Asia, such as Hong Kong or Singapore, as well as Shenzhen and Shanghai, but in 2018 China began to try to consolidate BRI-related dispute settlement in a new international commercial court in China. In June 2018, it established the China International Commercial Court under the Supreme People's Court. Formally it is regarded as a division of the Supreme People's Court and, as such, its decisions are final and not subject to appeal. This international commercial court has two branches based in Shenzhen and Xi'an.²⁸ It reflects the localization of 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,²⁹ assisted by an advisory Expert Committee with predominately non-Chinese experts. On Dec 29, 2018, the China International Commercial Court announced that it had accepted a variety of cases involving foreign companies and Chinese companies.³⁰

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),³¹ with China aiming to play a more central 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 will be pressure on the China International Commercial Court to be highly professional like the London and Singapore models if it is to succeed, just as is the case with China's new development banks that borrow from Bretton Woods models, as assessed below. 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.

Through the BRI, China also exports Chinese standards, challenging U.S. and European dominance in standard-setting. Chinese firms undertake many of the projects. When Chinese firms like Huawei build telecommunication networks and other infrastructure projects in BRI countries,

²⁸ China International Commercial Court, “About China International Commercial Court,” *Supreme People's Court of the People's Republic of China*, June 28, 2018, <http://cicc.court.gov.cn/html/1/219/193/195/index.html>. See also, 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.

²⁹ China International Commercial Court, “Judges,” *Supreme People's Court of the People's Republic of China*, <http://cicc.court.gov.cn/html/1/219/193/196/index.html>. Erie, “China International Commercial Court.”

³⁰ 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*, <http://cicc.court.gov.cn/html/1/218/149/192/1150.html>.

³¹ The Hong Kong International Arbitration Centre and Singapore International Arbitration Centre have aggressively advertised their respective services for the BRI, including through going on road shows. They have been the most successful international arbitration houses in attracting BRI deals through 2018. Mathew S. Erie, “Legal Hubs, The Emergent Landscape of International Commercial Dispute Resolution,” *University of Oxford* (draft on file).

they use Chinese standards rather than other international ones. In this way, China could gradually shape the adoption of Chinese standards through practice in many regions in the world. One major example is the development of new 5G (fifth generation) wireless infrastructure standards, which, in turn, will implicate developments in critical fields such as artificial intelligence, robotics, and smart manufacturing—the so-called internet of things. This could give Chinese innovators and vendors a critical advantage in multiple product fields.

There are risks that come with the BRI. China already must manage the risk of credit crises stemming from its domestic development model in which state banks extend low-interest loans to state-owned enterprises. By exporting this development model to countries governed by unstable and corrupt regimes, China raises new credit challenges, not only for the recipient countries, but for China itself. 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.³²

2. Asian Infrastructure Investment Bank and New Development Bank

To help finance BRI projects and regional infrastructure more broadly, China officially proposed the creation of the Asian Infrastructure Investment Bank (AIIB) in 2013, which was launched in Beijing a year later, indicating that the BRI and AIIB are a coordinated strategy for China to exercise greater influence regionally and globally. The United States opposed its creation and unsuccessfully lobbied countries not to join it. However, in a diplomatic triumph for China and defeat for the United States, the AIIB had eighty-seven members, including all major developed countries other than the United States and Japan, by 2019.³³ The main reason for its establishment is to finance infrastructure projects in the region, especially in those countries covered by the BRI, thereby, in turn, assisting the development of China’s vast and relatively undeveloped Western provinces and creating new export markets for Chinese products. It also reflects China’s dissatisfaction with the existing multilateral development banks, in which the United States has exercised its veto power to block China from acquiring greater shareholding and voting rights that reflect its importance in the global economy.³⁴

While the AIIB started as a Chinese initiative and China is the largest shareholder with around a 27% voting share, China has tried to play down its influence as the membership of the AIIB expanded to include major Western countries. The Chinese government has made clear that the projects funded by the AIIB will not be limited to countries in the BRI, although the BRI is already vast and expanding. In any case, most of the approved projects have been in BRI countries. To alleviate governance concerns, China has tried to assure that the AIIB follows best practices, and the AIIB’s lending practices to date confirm this policy. For example, the AIIB largely borrows

³² Greer, “One belt, One Road, One Big Mistake.”

³³ 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.

³⁴ Martin A. Weiss, “Asian Infrastructure Investment Bank (AIIB),” *Congressional Research Service*, 7-5700, Feb. 3, 2017.

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 “[o]ur core principles are openness, transparency, independence and accountability and our mode of operation is ‘Lean, Clean and Green.’”³⁵ 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, Mr. Jin Liqun, who previously served as chairman of China’s first joint venture bank and chairman of the Supervisory Board of China’s sovereign wealth fund.³⁶ 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 country directors are based in their home countries, not at bank headquarters, and they only meet every three months. Although all AIIB projects through 2018 were approved by the board, the bank’s Accountability Framework Regulation permits delegation of project approval to the bank’s President as of January 1, 2019. Thus, the AIIB’s President and staff in Beijing exercise greater autonomy, and they are subject to ultimate de facto control of the Chinese Communist party.³⁷

Just as the World Bank has served to advance U.S. policy goals, the AIIB will 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—known as the Washington consensus. 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.³⁸ 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.³⁹

In contrast, Beijing will use the AIIB to finance infrastructure that can be built by Chinese state-owned enterprises and private companies using Chinese standards. This will facilitate the trade of Chinese products, such that the lent money can come full circle. Although AIIB loans currently are in U.S. dollars, they may eventually be made in Renminbi, further promoting China’s currency as an international currency and potentially diminishing U.S. monetary power over time. In sum, although the AIIB will not require legal reforms and will be governed under the principle of “non-interference,” it will offer non-legal means to integrate economies into China’s economic sphere. It will 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

³⁵ AIIB, “Our Founding Principles,” *Asian Infrastructure Investment Bank*, <https://www.aiib.org/en/about-aiib/index.html>.

³⁶ Weiss, “AIIB.”

³⁷ Daniel C.K. Chow, “Why China Established the Asia Infrastructure Bank,” *Vanderbilt Journal of Transnational Law* 49 (2016): 1255.

³⁸ Chow, “Why China Established,” 1277-1279 (including privatization; deregulation; private property rights, intellectual property rights; tax reform; and market-determined interest and exchange rates); Joseph Stiglitz, *Globalization and its Discontents* (New York, W.W. Norton & Company, 2002) (critiquing these policies).

³⁹ Weiss, “AIIB,” 4.

and development policy. In this way, the AIIB, in complement to the BRI, conveys a form of soft power.⁴⁰

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.

Along with the AIIB, the New Development Bank can be viewed as a rival to the U.S.-led Bretton Woods system, partially formed in response to the U.S. blockage of an increase in China's voting shares and participatory rights in the IMF and World Bank to reflect China's role in the global economy. These Chinese-led development banks provide developing countries with new sources of finance, ones that are linked with Beijing instead of Washington, and without political conditions to adopt neoliberal policies. In the process, the operation of these banks creates leverage that can enhance China's role in the Bretton Woods institutions. This is illustrated by the U.S. Congress' delayed agreement to increase China's voting rights in the IMF and World Bank only after the AIIB was formed as a rival institution.

B. Developing a Web of Free Trade and Investment Agreements

1. Free Trade Agreements

To complement these initiatives as part of its development and geoeconomic strategy, China is creating a web of trade and investment agreements that grant it preferential access to foreign markets. As of January 2019, China had signed free trade agreements with twelve countries, including South Korea and Australia in 2015.⁴¹ In addition, it had launched trade negotiations with seven others,⁴² 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 Partnership Arrangements with Hong Kong, and Macau.⁴³ By 2019, it was expanding these agreements through negotiating a Regional Comprehensive Economic Partnership that would comprise sixteen Asian countries, of

⁴⁰ India, for example, has expressed great wariness of the Belt and Road Initiative, but it is the largest recipient of AIIB-financed projects. Enda Curran, "The AIIB: China's World Bank," *Bloomberg*, Aug. 6, 2018.

⁴¹ 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), and Maldives (December 2017).

⁴² As of December 2018, it had launched negotiations with the Gulf Cooperation Council (April 2005), Norway (September 2008), Sri Lanka (September 2014), Israel (March 2016), Mauritius (December 2017), Moldova (March 2018), and Panama (July 2018).

⁴³ In turn, Hong Kong concluded a free trade and investment agreements with ASEAN in November 2017, providing further bridges between them.

which China already had a free trade agreement with thirteen. Overall, it envisages over fifty free trade agreements as part of its implementation of the BRI.⁴⁴ These agreements bolster China's status as a hub for global and regional value chains.

In practice, China often negotiates 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.⁴⁵ It frequently complements 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, in its agreement with Pakistan, the agreement on trade in services was only signed in February 2009, four years after the signing of a free trade agreement for goods. When negotiating with developed countries, however, China can be pressed to enter agreements for goods and services simultaneously. One reason that China's negotiation with Australia took ten years to complete was because Australia insisted on dealing with services liberalization simultaneously.

These agreements generally are narrow in scope compared to those of the United States, European Union, and Japan. In line with China's policy emphasis on non-interference in internal regulatory affairs and respect for sovereignty, the agreements do not require new rules for regulatory issues, such as labor and environmental protection, or competition policy. China has preferred to address these issues, if demanded by trading partners, in standalone side agreements or Memorandums of Understanding.⁴⁶

These agreements' most important impact on behind-the-border issues is not formally legal, but rather in their promise to facilitate the adoption of Chinese standards through trade. China has established national standards that it requires manufacturers and service providers to use when entering China's market and that, in turn, Chinese companies use when exporting goods and services abroad.⁴⁷ Given the size of China's market, it can use domestic standards 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, including for telecommunications and other infrastructure. To the extent that Chinese products are required to comply with Chinese standards, and these products are protected by patents, copyrights, or trademarks, then foreigners may have to pay royalties to Chinese companies.

⁴⁴ Carrai, *It is Not the End of History*.

⁴⁵ Henry Gao, "Selected Issues in TPP Negotiations and Implications for China," in *Regional Cooperation and Free Trade Agreements in Asia*, ed. Jiayang Hu and Matthias Vanhullebusch (Leiden: Brill Academic Publishers, 2014), 77-98.

⁴⁶ Henry Gao, "China's Evolving Approach to Environmental and Labour Provisions in Regional Trade Agreements," *ICTSD Blog*, Aug. 25, 2017, <https://www.ictsd.org/opinion/china-3>.

⁴⁷ Andrew Polk, "China Is Quietly Setting Global Standards," *Bloomberg*, May 7, 2018, <https://www.bloomberg.com/opinion/articles/2018-05-06/china-is-quietly-setting-global-standards>.

Moreover, China has used these free trade agreements to establish new rules and precedents regarding its treatment as a market economy.⁴⁸ 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.⁴⁹

The biggest among China's planned trade agreements is the Regional Comprehensive Economic Partnership (RCEP), a proposed mega agreement between ASEAN, Australia, China, India, Japan, New Zealand, and South Korea. The parties launched negotiations in November 2012 to cover trade in goods and services, investment, and intellectual property protection. Together, these countries account for almost half of the world's population, almost 30% of global GDP, and about 40% of global trade. Thus, the RCEP has the potential to become one of the most important (if not the most important) free trade agreements in the world. The Obama administration's pivot to Asia and its driving the negotiation of a TransPacific Partnership that excluded China accelerated RCEP negotiations.

According to the Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership, the parties aim to "achieve a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement among the ASEAN Member States and ASEAN's FTA Partners."⁵⁰ This ambitious plan, however, was soon upended when the parties missed the original deadline of 2015. Because of a lack of leadership and geoeconomic rivalry among the parties, it is unlikely that any ambitious agreement will be concluded soon.

Although many Western commentators have assumed that China drives RCEP negotiations, this is not the case. In practice, China has assumed a low profile. Formally, the RCEP's Guiding Principles and Objectives explicitly state that "[n]egotiations 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

⁴⁸ 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. These agreements also contain some China-specific 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.

⁴⁹ Henry Gao, "Selected Issues in TPP Negotiations and Implications for China," in *Regional Cooperation and Free Trade Agreements in Asia*, ed. Jiexiang Hu and Matthias Vanhullebusch (Leiden: Brill Academic Publishers, 2014), 77-98.

⁵⁰ Regional Comprehensive Economic Partnership, *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Partnership*, <http://asean.org/storage/2012/05/RCEP-Guiding-Principles-public-copy.pdf>.

dominate the negotiations, it would have to contend with Japan and India (the world's third and soon-to-be fifth largest economies), 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 geoeconomic 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.⁵¹ China and India, in turn, share a militarized and disputed border triggering periodic standoffs that could turn violent. They have not even launched bilateral talks, even though they jointly commissioned a feasibility report more than ten years ago from a task force that found a free trade agreement to be in their mutual interest.⁵² If countries find bilateral talks challenging, there is little reason to believe that they will conclude an 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 the RCEP remain low. India insists that tariff elimination cannot exceed 80% of goods so that a substantial portion of product areas would remain restricted.⁵³ 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 few major new commitments, although intellectual property protection should be largely resonant with emerging international norms.⁵⁴ 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."⁵⁵ The agreement could even permit discriminatory treatment among its members, since this may be the only way the parties can address each other's "various sensitivities and interests."⁵⁶

⁵¹ Asia Regional Integration Center, *Japan-Republic of Korea Free Trade Agreement (JKFTA)*, 2003, <https://aric.adb.org/fta/japan-republic-of-korea-free-trade-agreement>.

⁵² China FTA Network, *China-India Regional Trade Arrangement Joint Feasibility Study*, 2006, <http://fta.mofcom.gov.cn/topic/enindia.shtml>.

⁵³ Amiti Sen, "RCEP Hanoi Talks: India Not Willing to Go Beyond 80% Tariff Elimination in Goods," *The Hindu Business Line*, May 23, 2017, <http://www.thehindubusinessline.com/economy/rcep-hanoi-talks-india-not-willing-to-go-beyond-80-tariff-elimination-in-goods/article9710892.ece>.

⁵⁴ 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); China and India have seen benefits from intellectual property protection, and 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*, ed. Susan Corbett and Jessica Lai (Canberra: ANU Press, 2017).

⁵⁵ Banyan, "Getting in the Way," *Economist*, May 17, 2014, <https://www.economist.com/asia/2014/05/17/getting-in-the-way>.

⁵⁶ RCEP, *Joint Leaders' Statement on the Regional Comprehensive Economic Partnership*, Sept. 8, 2016, Vientiane: Lao PDR, http://asean.org/storage/2016/09/56-RCEP_Joint-Leaders-Statement_8-September-2016.pdf.

In sum, as a paradigm, the RCEP will be more sensitive to national sovereignty than U.S. agreements. It thus will 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.⁵⁷ Although others stress the need for binding commitments on behind-the-border issues to facilitate global supply chains,⁵⁸ 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. For example, just more than 30% of ASEAN-China trade reportedly used preferential rates under the ASEAN-China free trade agreement.⁵⁹

2. 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.⁶⁰ 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 has been put on hold because of rising geoeconomic tensions between them.

China has significantly changed its approach to bilateral investment treaties over the past three decades.⁶¹ 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. In the late 1990s, China's position began to change as Chinese firms invested overseas. 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).⁶² In the past decade, 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 only for existing measures (for example, in the 2008 China-

⁵⁷ Rodrik, *Straight Talk on Trade*.

⁵⁸ 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.

⁵⁹ Pasha Hsieh, "Against Populist Isolationism: New Asian Regionalism and Global South Powers in International Economic Law," *Cornell International Law Journal* 51, no. 3 (2018).

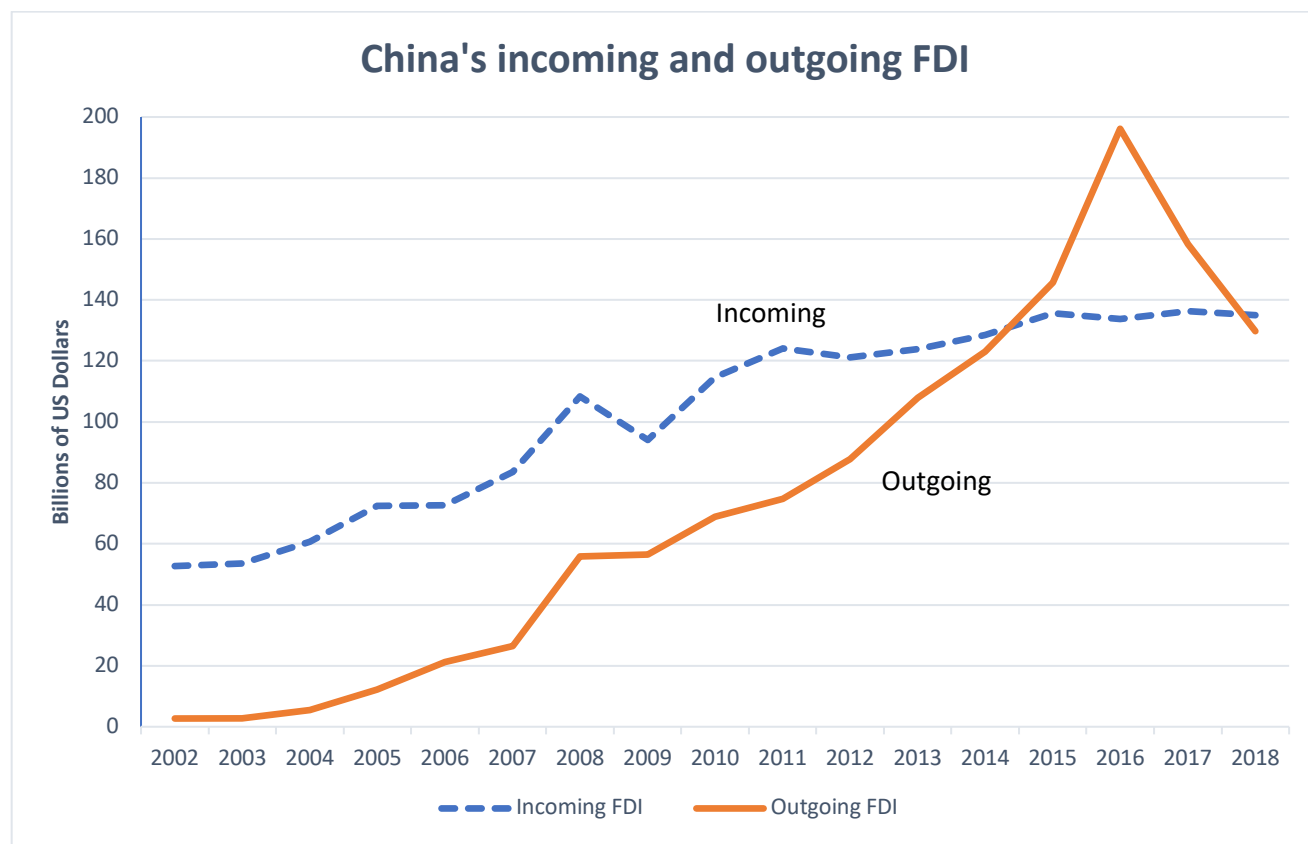
⁶⁰ UNCTAD, "China: Bilateral Investment Treaties (BITs), Investment Policy Hub," *Investment Policy Hub*, <https://investmentpolicyhub.unctad.org/IIA/CountryBits/42> (figure as of Jan. 29, 2019).

⁶¹ Axel Berger, "The Politics of China's Investment Treaty-making Programme," in *The Politics of International Economic Law*, ed. Tomer Broude, Marc L. Busch and Amelia Porges (Cambridge: Cambridge University Press, 2011), 162-185.

⁶² Axel Berger, "China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making," in *The Politics of International Economic Law: The Next Four Years*, American Society of International Law International Economic Law Interest Group (ASIL IELIG) 2008 Biennial Conference (Washington, D.C.: ASIL IELIG, Nov. 14-15, 2008), 10, https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf.

Mexico investment treaty).⁶³ Second, the new agreements expand the scope of ICSID investor-state arbitration to cover all investment disputes.⁶⁴

These changes reflect China’s shift from being the world’s largest destination of foreign direct investment 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.⁶⁵ 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 15% of China’s inbound investment. By 2016, Chinese outward foreign direct investment substantially surpassed it.⁶⁶



⁶³ United Nations Conference on Trade and Development, *China-Mexico Bilateral Investment Treaty*, 2008, Article 3, <https://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/938>.

⁶⁴ United Nations Conference on Trade and Development, *China-Germany Bilateral Investment Treaty*, 2003, Article 9, <https://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/905>.

⁶⁵ Naughton, *The Chinese Economy: Adaptation and Growth*, 446.

⁶⁶ United Nations Conference on Trade and Development, *World Investment Report 2016* (ranking china first for inward FDI between 1990-2015, and noting China reaching parity by 2014); *Ibid.*, at 439.

Note: Sources: Incoming: MOFCOM Report on Foreign Investment in China (2017-18), UNCTAD World Investment Report (2008), and China News; Outgoing: MOFCOM Report on Development of China's Outbound Investment (2018) and Xinhua News.⁶⁷

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 as part of the BRI and outside of it, particularly in infrastructure and resource extraction projects. The first type of investment involves corporate acquisitions and the second greenfield foreign direct investment. The total value of outbound Chinese investment is greater in developed countries given the cost of major acquisitions. For example, China's largest acquisition to date was by China National Chemical Corp of the Swiss-based Syngenta for US\$43 billion in 2017, which is critical for its ambitions in agricultural biotechnology.⁶⁸

China's investment in BRI countries has continued to grow, increasing Chinese demands for investment protection. In 2016, it amounted to US\$14.53 billion, which accounted for 8.5% of its total overseas direct investment.⁶⁹ This grew to US\$15.64 billion in 2018, which accounted for 13% of its total overseas direct investment.⁷⁰ 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.⁷¹ Since many BRI countries pose high political and economic risks, there is increasing need for China and Chinese companies to find ways to protect their

⁶⁷ For the incoming FDI data for 2018, see China News, "2018 Nian Zhongguo Xishou Waizi Po Jilu, Zhuanjia: Jimian Youwang Jixu Zengzhang (China's Incoming FDI in 2018 Broke the Record, an Expert Expecting a Continuous Increase this Year)," *China News Service*, Jan. 15, 2019, <http://www.chinanews.com/cj/2019/01-15/8729352.shtml>; for 2017, see MOFCOM, *Report on Foreign Investment in China*, 2018, 16, <http://images.mofcom.gov.cn/wzs/201810/20181009090547996.pdf>; for 2016 to 2008, see MOFCOM, *Report on Foreign Investment in China*, 2017, 14, <http://images.mofcom.gov.cn/wzs/201804/20180416161221341.pdf>; for 2007 to 2002, see UNCTAD, *World Investment Report*, 2008, 2, https://unctad.org/ch/docs/wir2008overview_ch.pdf. For the outgoing FDI data for 2018, see Xinhua News, "2018 Nian Woguo Duiwai Touzi 1298.3 Yi Meiyuan, Baochi Pingwen Jiankang Fazhan (China's Outbound Investment in 2018 Reached US\$129.83 Billion, Maintaining Stable and Healthy Development)," *Xinhua News Agency*, Jan. 16, 2019, http://www.gov.cn/xinwen/2019-01/16/content_5358398.htm; for 2017 to 2002, see MOFCOM, *Report on Development of China's Outbound Investment*, 2018, 4 <http://images.investgo.cn/eWebEditorFile/20190131152440717.pdf>.

⁶⁸ United States Trade Representative, *Section 301 Report*, Aug. 24, 2018, 126, <https://ustr.gov/sites/default/files/enforcement/301Investigations/0824USTR.pdf>.

⁶⁹ Business Administration in Kazakh, "China's Investment Cooperation with Countries Along the 'Belt and Road' in 2017," *Ministry of Commerce of the People's Republic of China*, Mar. 5, 2018, <http://www.mofcom.gov.cn/article/i/jyj/e/201803/20180302717955.shtml>.

⁷⁰ Department of Foreign Investment, "From January to December 2018, My Investment Cooperation with Countries Along the Belt and Road Initiative," *Ministry of Commerce of the People's Republic of China*, Jan. 22, 2019, <http://hzs.mofcom.gov.cn/article/date/201901/20190102829086.shtml>.

⁷¹ Business Administration in Kazakh, "China's Investment Cooperation with Countries Along the 'Belt and Road' in 2017," *Ministry of Commerce of the People's Republic of China*, Mar. 5, 2018, <http://www.mofcom.gov.cn/article/i/jyj/e/201803/20180302717955.shtml>.

investments, including through bilateral investment treaties.⁷² By 2018, China was viewed as a “status quo” country favorable to the existing global investment law regime, as opposed to a transformational one proposing new models, as in the case of Brazil and (to a lesser extent) India.⁷³ From their international trade law experience, some Chinese trade specialists believe that China could look favorably on an appellate process for investor-state dispute settlement. As one interviewee noted, in NAFTA investor-state dispute settlement, the United States has never lost before ad hoc arbitral panels, and China has often fared better challenging U.S. import relief measures before the Appellate Body than before ad hoc panels.⁷⁴ In sum, China found that the investment protection models developed in the West suited it for protecting its own outbound investments.

C. The Transnational Legal Order for Intellectual Property Rights and China’s Innovation Strategies: the Indigenization of a Western Transplant

1. The Transnational Legal Ordering of Intellectual Property, a Western Transplant

Intellectual property is a legal construct that raises controversy within and among countries. Economists stress its utilitarian function in promoting innovation, while noting that too stringent grants of intellectual property rights can facilitate monopoly power that impedes it. Moreover, the balance between innovation-inducing and innovation-impeding property rights is a function of development and sectoral context. Countries with advanced economies generally prefer greater provision of intellectual property rights than those that are less developed. Some economic sectors need monopoly rights for larger periods more than others to invest in innovation. Private interests, in contrast, do not take a utilitarian, social welfare view, but rather aim to use “rights” to maximize profits regardless of the positive or negative impact on innovation and social welfare.

In the late 1980s and 1990s, the private sector in the United States and Europe pressed their governments to adopt and enforce new, more protective intellectual property laws nationally and internationally.⁷⁵ When China joined the WTO in 2001, it agreed to stringent intellectual property commitments across all areas of intellectual property, coupled with commitments to civil and criminal enforcement. This involved an immense legislative effort, involving legal transplants

⁷² This is the suggestion of senior Chinese officials. For example, former MOFCOM Vice Minister Wei Jianguo suggested China to expedite the signing of BIT with BRI countries in 2015, see 21st Century Business Herald, “Former Deputy Minister of the Ministry of Commerce: One Belt,” *Sina Finance*, Mar. 31, 2015, <http://finance.sina.com.cn/china/20150331/015921847760.shtml>.

⁷³ Fabio Morosini and Michelle Rattton Sanchez Badin, “Reconceptualizing Investment Law from the Global South,” in *Reconceptualizing Investment Law from the Global South*, ed. Fabio Morosini and Michelle Rattton Sanchez Badin (Cambridge: Cambridge University Press, 2017), 35.

⁷⁴ In short, China appears more amenable to a court-like process for investment disputes than does the United States. Interview #27.

⁷⁵ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000); Peter K. Yu, “Trips and its Discontents,” *Marquette Intellectual Property Law Review* 10 (2006): 369 (discussing the various narratives explaining the origins of the TRIPS Agreement).

from the West.⁷⁶ Yet, by 2018, after China made innovation backed by intellectual property a core part of its development strategy, the United States became increasingly concerned with Chinese rivalry in a race for technological dominance. Some of the U.S. complaint was about theft, and some of it was about China's licensing practices that discriminated against U.S. companies or used the leverage of granting access to China's huge market to obtain "voluntary" transfers of intellectual property (such as source code) to Chinese joint venture and contractual partners. The United States also complained about China's requirements for the localization of data, such that the Chinese government and companies could more easily access and steal it. But part of the U.S. concern is simply about China's promise of becoming a global leader in cutting-edge technologies, ones where China, in turn, would claim intellectual property protection. This transformational story forms a key part of China's trade and investment strategy that will shape the ecology of the global trading system.

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.⁷⁷ Shortly afterwards, China then enacted new patent, copyright, and trademark laws between 1982-1984, and acceded to the Paris Convention for the Protection of Industrial Property in 1984. 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. This helped spur China's adoption of its 1990 copyright law.⁷⁸ 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.⁷⁹ 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 (TRIPS Agreement), complemented by further commitments in its Working Party Report as part of its accession to the WTO, which included fifty-five paragraphs on intellectual property.⁸⁰ This marked a tectonic shift in China's intellectual property rights regime, and it ushered in new domestic institutional development.⁸¹ At this time, transnational legal ordering was top down for China, as China was

⁷⁶ 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").

⁷⁷ 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.

⁷⁸ *Ibid.*, 140-141.

⁷⁹ *Ibid.*, 142.

⁸⁰ World Trade Organization, *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, Oct. 1, 2001, paras. 251-305. [check if bans use of parallel imports]

⁸¹ Andrea Wechsler, "China's WTO Accession Revisited: Achievements and Challenges in Chinese Intellectual Property Law Reform," in *European Yearbook of International Economic Law*, ed. Christoph Herrmann, Markus Krajewski and Jörg Philipp (London: Springer Nature, 2012), 125. TRIPS sets forth minimum intellectual property standards for WTO members in seven areas, respectively addressed in TRIPS Part II, sections 1-7: copyright;

pressed to adopt Western legal norms. Although China was in the process of becoming a manufacturer of the world, the technology came from abroad and the royalties flowed there.

Countries are best positioned to resist what they view as impositions by foreign powers at the enforcement stage.⁸² Although the TRIPS Agreement is intended to ensure the protection and enforcement of intellectual property rights, it also provides for certain exceptions.⁸³ China took advantage of flexibilities and ambiguities in the TRIPS Agreement to defend its interests,⁸⁴ as well as by turning a blind eye to infringements, in part because of a lack of administrative capacity, especially at the local level. China's enforcement challenges were not just strategic, but also resulted from a lack of capacity of public officials and institutions.⁸⁵ In China's decentralized setting, local officials could ignore laws enacted at the Center, or apply them in inconsistent and ineffective ways.⁸⁶

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.⁸⁷ In 2007, the United States brought a WTO complaint against China for failing to comply with its commitments under the TRIPS Agreement and its Accession Protocol. China invested significant resources in defending the case, whose outcomes was largely a draw.⁸⁸

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 initiatives. Over time, Chinese stakeholders pressed for the

trademarks; geographical indications; industrial designs; patents; layout designs of integrated circuits; and trade secrets.

⁸² Peter K. Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century," *American University Law Review* 50, no. 1 (2000): 131, 133-134.

⁸³ Gregory Shaffer and Susan Shell, "Transnational Legal Ordering and Access to Medicines," *Legal Studies Research Paper Series No. 2015-65*, in *Patent Law in Global Perspective*, ed. Ruth L Okedji and Margo A. Bagley (Oxford: Oxford Univ. Press, 2014), 8 (noting that developing countries may benefit in particular from "the right of parallel importation; the right to grant compulsory licenses; and 'Bolar' exceptions for generic drug companies to prepare a drug under patent for marketing authorization once the patent expires.")

⁸⁴ Peter K. Yu, "TRIPS and its Achilles' Heel," *Journal of Intellectual Property Law* 18 (2010-2011): 479, 495-96; Peter K. Yu, "Enforcement, Enforcement, What Enforcement?," *Lecture* (April 14, 2011), *IDEA* 52 (2012): 239, 262-264.

⁸⁵ Julia Ya Qin, "The Impact of WTO Accession on China's Legal System: Trade, Investment and Beyond," *Wayne State University Law School Legal Studies Research Paper Series No. 07-15* (2007): 21.

⁸⁶ 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)

⁸⁷ Yu, "From Pirates to Partners," 2.

⁸⁸ 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 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.

enforcement of new laws through new institutions, and the government made intellectual property protection part of its indigenous innovation strategy. China invested significant resources in developing new institutions for intellectual property protection, including specialized judges and courts. Individuals invested in new careers, including as attorneys, patent and trademark agents, patent examiners, and agency and judicial officials.⁸⁹ Chinese companies increasingly hired and worked with these professionals. As domestic constituencies embraced intellectual property protection and became rights holders, they engaged in information campaigns and enforcement.⁹⁰ 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.

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 was increasingly used over time.⁹¹ Although the United States criticized China's criminal laws for lacking sufficient power to deter violations,⁹² China expanded the list of criminal intellectual property offences and granted more enforcement powers to criminal courts.⁹³ Administrative agencies were to enforce intellectual property rights at the local level, while courts played an increasing role, including through enforcing criminal penalties and allowing litigants to protect their rights against infringements by actors operating outside of local jurisdictions.⁹⁴

These changes involved considerable institutional developments. China's State Intellectual Property Office (SIPO) is now considered to be "in the top tier of patent offices that will dominate the emerging system of global patent administration."⁹⁵ The number of patent inspectors in SIPO rose from 2,700 to 9,000 between 2007 and 2016.⁹⁶ China is now the largest issuer of patents in

⁸⁹ 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 Activists," in *The New Legal Realism*, vol. 2, ed. Heinz Klug and Sally Engle Merry, (Cambridge: Cambridge University Press, 2016), 181. Patent agencies share their revenues with local patent bureaus-p188- check if still the case?-p188

⁹⁰ Thomas, *Assessing Intellectual Property Compliance*, 139.

⁹¹ *Ibid.*, 91.

⁹² Jacob Holland, "Intellectual Property Rights in China: Patents and Economic Development," *Nnamdi Azikiwe University Journal of International Law*, 8, no. 1 (2017).

⁹³ Thomas, *Assessing Intellectual Property Compliance*, 146.

⁹⁴ *Ibid.*, 188, footnote 316 (citing to Susan Finder, "The Protection of Intellectual Property Rights Through the Courts," in *Chinese Intellectual Property Law and Practice*, ed. Mark A. Cohen et al. (Alphen aan den Rijn: Kluwer Law International, 1999), 165, 255.)

⁹⁵ Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* (Cambridge: Cambridge University Press, 2010), 233.

⁹⁶ Gregory Shaffer, "How the World Trade Organization Shapes Regulatory Governance," *Regulation & Governance* 9, no. 1 (2015). Regarding similar processes in India, see Gregory Shaffer, James Nedumpara, and Aseema Sinha, "State Transformation and the Role of Lawyers: The WTO, India, and Transnational Legal Ordering," *Law & Society Review* 49, no. 3 (2015): 595; State Intellectual Property Office of the P.R.C., *Annual Report*, 43, 2016, at <http://www.sipo.gov.cn/gk/ndbg/2016/201705/P020170505541250020396.pdf>.

the world, surpassing the United States.⁹⁷ In 2017, it ranked second in terms of international patent applications and third in terms of international trademark registrations.⁹⁸

At the judicial level, China created specialized intellectual property divisions within courts and, in 2014, specialist intellectual property courts in Beijing, Shanghai, and Guangzhou.⁹⁹ These courts have directly applied the TRIPS Agreement in dozens of private disputes.¹⁰⁰ In 2015 alone, these specialist courts concluded 9,872 cases.¹⁰¹ In 2018, China decided to establish a specialized intellectual property court of appeal at the national level in order to foster uniform jurisprudence in intellectual property law.¹⁰² Housed in the Supreme People's Court and headed by its Vice-President, the new court will hear all appeals against patent-related decisions from lower courts from January 1 2019.¹⁰³ In three years, it is expected that appeals on other intellectual property cases, such as copyright and trade secrets, also will be made to the new court.¹⁰⁴ 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 2017.¹⁰⁵

At the level of international negotiations, China has been a status quo country on intellectual property issues.¹⁰⁶ It has not actively contested the international intellectual property regime, unlike Brazil and India. Unlike Brazil and India, it has not issued (or threatened to issue) a compulsory patent license, such as for essential medicines. And is the only BRICS country to agree to prohibit parallel imports of products that can be used to evade intellectual property protection. 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.

⁹⁷ World Intellectual Property Organization, "Who Filed the Most PCT Patent Applications in 2017?"

⁹⁸ "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.

⁹⁹ Thomas, *Assessing Intellectual Property Compliance*, 143 (on specialized courts).

¹⁰⁰ See Congyan Cai, "International Law in Chinese Courts during the Rise of China," *American Journal of International Law* 110 (2016): 269, 286-287.

¹⁰¹ Thomas, *Assessing Intellectual Property Compliance*, 144.

¹⁰² 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>.

¹⁰³ 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>.

¹⁰⁴ 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>.

¹⁰⁵ 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), <https://chinaipr2.files.wordpress.com/2018/06/2017e799bde79aace4b9a6-2018041.docx>; Peter Yu, "Building Intellectual Property Infrastructure Along China's Belt and Road," *University of Pennsylvania Asian Law Review* 14 (Forthcoming 2019), 8.

¹⁰⁶ 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.

2. Intellectual Property and China's Indigenous Innovation Policies

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. As in the United States, the private sector seeking economic rents through the monopoly power intellectual property provides, helps drive intellectual property protection. Yet government technocrats are in 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 began to make active use of industrial policy to promote the development of high-tech and other key industries.¹⁰⁷ To avoid being held dependent on Western firms and subject to leverage from the United States, China launched initiatives to encourage indigenous innovation, or what it referenced as "independent intellectual property."¹⁰⁸ The country wished to shift its logo from "made in China" to "created in China," and to become dominant in cutting-edge technology.

The development of an intellectual property rights regime is a major 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 develop "innovative capacity" to become "an economic power."¹⁰⁹ To enhance China's innovative capacity, the Plan set guiding principles for "indigenous innovation, leapfrogging in priority fields, enabling development, and leading the future." 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."

In line with the Plan, patent filings soared in China. In the 1997-2011 period, patent filings in China increased by 3,245 percent.¹¹⁰ In 2016, China's patent applications continued to increase by an annual rate of 18.7 percent.¹¹¹ Patent filings originating from China totaled 1,010,406 in

¹⁰⁷ Sebastian Heilmann and Lea Shih, "The Rise of Industrial Policy in China, 1978-2012," *Harvard-Yenching Institute Working Paper Series* (2013): https://www.harvard-yenching.org/sites/harvard-yenching.org/files/featurefiles/Sebastian%20Heilmann%20and%20Lea%20Shih_The%20Rise%20of%20Industrial%20Policy%20in%20China%201978-2012.pdf. Jean-Christophe Defraigne, "China's Industrial Policy," *Europe China Research and Advice Network (ECRAN)* (2014).

¹⁰⁸ 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).

¹⁰⁹ 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").

¹¹⁰ Gregory Shaffer and Carlos Coye, "From International Law to Jessup's Transnational Law," in *Transnational Law to Transnational Legal Orders*, ed. Terence C. Halliday and Gregory Shaffer (Cambridge: Cambridge University Press, 2017).

¹¹¹ World Intellectual Property Organization, *World Intellectual Property Indicators 2016*, 5, http://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2016.pdf.

2016, far outpacing the United States which, at 526,296, ranked second for patent filings by origin.¹¹² In terms of international patent applications filed through the Patent Cooperation Treaty, only the United States exceeded China in 2017.¹¹³ In terms of applicants, Huawei Technologies and ZTE Corporation became the world's first and second leading filers of international patent applications.¹¹⁴ While many Chinese patents are weak, the sheer number of patent filings in China is impressive, and there is a concerted effort to enhance quality and strengthen protection.¹¹⁵

China's development of intellectual property protection now forms part of its strategy to make China a global leader in innovation. The shift in emphasis in China's development strategy is reflected in its five-year plans, where innovation rose over time 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 2016.¹¹⁶ In 2015, China launched its "Made in China 2025" policy to upgrade Chinese industry.¹¹⁷

Similar to 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 technology and telecommunications; advanced automated machine tools, robotics and artificial intelligence; aerospace and aeronautical equipment; maritime and high-tech shipping; modern rail transport equipment; new-energy vehicles; power equipment; agricultural equipment; new materials; and advanced medical products 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 critical for technological inputs and final production. China's ability to collect data on its one 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 to 40% by 2020 and 70% by 2025. It represents a new form of import substitution policies (grounded in local content targets), but with the further aim for China

¹¹² Ibid., 39.

¹¹³ World Intellectual Property Organization, "Who Filed the Most PCT Patent Applications in 2017?"

¹¹⁴ Peter Yu, "The Rise of China in the International Intellectual Property Regime," in *Handbook on the International Political Economy of China*, ed. Zeng Ka (Cheltenham: Edward Elgar Publishing, 2018).

¹¹⁵ 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.").

¹¹⁶ 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).

¹¹⁷ 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).

to obtain a “world-leading” position by 2049.¹¹⁸ This symbolically important date coincides with the one hundredth anniversary of the Chinese communist revolution. The policy is to complement the BRI, which is to be “a high-tech road” using Chinese technology.¹¹⁹

These policies are based on 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. The government subsidizes these sectors through new funding mechanisms such as the Advanced Manufacturing Fund and the National Integrated Circuit Fund.¹²⁰ 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.¹²¹ It encourages private and state-owned companies to invest in foreign countries, and financially supports their external acquisitions, so that they gain access to advanced technology, such as for the next generation of semiconductors.¹²² In addition to direct acquisitions, China has supported investment abroad in industrial parks and joint laboratories for research and development, and has sought to hire talent away from foreign companies.¹²³ In parallel, the government supports and encourages investment in high-tech startups, both in China and abroad, often linked to universities.¹²⁴ By 2018, the number of Chinese startups valued at over \$1 billion, otherwise known as “unicorns,” was roughly the same as in the United States, and China could soon surpass it.¹²⁵ The government aims to stimulate policy innovation through experimentation at the central, provincial, and local levels, including through pilot projects.¹²⁶ In sum, the Middle Kingdom wished to avoid the middle-income trap and move up the value chain. To do so, it massively supported investment in developing and acquiring advanced technologies.

China’s practices spurred a severe response from the United States, as well as defensive reactions in other advanced economies. 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.”¹²⁷ In March 2018, the Office of the United States Trade Representative

¹¹⁸ 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, <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF> [USTR Section 301 Report], 16.

¹¹⁹ Wang Yiwei, *The Belt and Road Initiative: What Will China Offer the World in its Rise* (Beijing: New World Press, 2016), 12.

¹²⁰ Wubbekke, “Made in China 2025,” 7.

¹²¹ *Ibid.* USTR Section 301 Report, 30.

¹²² Josh Horwitz, “Why the Semiconductor is Suddenly at the Heart of US-China Tech Tensions,” *Quartz*, July 24, 2018.

¹²³ USTR Section 301 Report, 79, 143, 181.

¹²⁴ 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’”).

¹²⁵ *The Economist*, “The Geography of Technology,” *Economist*, Sept. 1, 2018, 22.

¹²⁶ Wubbekke, “Made in China 2025,” 23-24.

¹²⁷ James McGregor, *China’s Drive for ‘Indigenous Innovation’: A Web of Industrial Policies* (Washington, DC: U.S. Chamber of Commerce, 2010), 4.

issued a 182-page Section 301 report that accused China and Chinese companies of appropriating U.S. technology and intellectual property.¹²⁸ The Section 301 report notes that China's ambitious "Made in China 2025" project aims to make China a global leader in strategic advanced technology industries, some of which have military uses and could threaten U.S. supremacy.¹²⁹ For example, were China to control the cobalt industry, which is required for most modern electronics, then "entire industries could come under the control of a rival geopolitical power."¹³⁰ 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 through which government intelligence is leveraged 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.¹³¹ 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.¹³² Under pressure from the United States and others, the Chinese government and media stopped referencing the plan by the "Made in China 2025" moniker. But China's ambitions to shift toward a high-tech, high productivity economy through public-private coordination continue.¹³³

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 new WTO complaint against China's discriminatory technology licensing requirements, which facilitates the

¹²⁸ USTR Section 301 Report.

¹²⁹ Ibid., at 14. Indeed, 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, <https://www.lawfareblog.com/geoeconomics-chinese-strategy-technological-advancement-and-cybersecurity>.

¹³⁰ James McBride, "Is 'Made in China 2025' a Threat to Global Trade," *Council on Foreign Relations*, Aug. 2, 2018.

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

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

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

transfer of foreign technology to their Chinese joint-venture partners.¹³⁴ 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.¹³⁵ These actions were shots across the bow to counter China's ambitions, as China's innovation and intellectual property policies trigger geoeconomic conflict with the United States. 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."¹³⁶ For example, China's draft Foreign Investment Law in 2019 contained provisions that prohibit forced technology transfer, provide better intellectual property protection for foreign investors, and grant pre-establishment rights for investors. Yet, even with these changes, the underlying geoeconomic tensions and conflict will likely remain.

China remains far behind the West in technology. To the extent that 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 suffer severe weaknesses, leading to subsidy gluts, overcapacity, and increased credit risks to the Chinese economy. Yet, China's industrial policies have also been sophisticated and successful. Moreover, the U.S. ban on the sale of parts and software to the Chinese telecommunications giant ZTE in April 2018, which all but shut down the company, illustrate the risks to China of its technological lag. Following the direct intervention of U.S. President Trump, the ban was lifted after ZTE paid a US\$1 billion fine. Yet, the threat made clear to China the need to develop its innovation policy so that its companies are no longer dependent on Western technology, such that Chinese products will not only be made but also created in China.

D. Conclusion: A Rival Transnational Legal 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 economic model, and it 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

¹³⁴ *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.

¹³⁵ Kate Conger, "Huawei Executive Took Part in Sanctions Fraud, Prosecutors Say," *New York Times*, Dec. 7, 2018, <https://www.nytimes.com/2018/12/07/technology/huawei-meng-wanzhou-fraud.html>. Update

¹³⁶ 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 ("trading market for technology").

carried out by reorganized state-owned enterprises. This became particularly evident in high-tech sectors where China's relentless pursuit of "indigenous innovation" led it to enhance protection of intellectual property rights for its own ends. These government measures, however, discriminated against foreign intellectual property rights holders, and raised allegations of outright theft, triggering a trade war with the United States.

Although China officially recognizes the importance of the WTO, and occasionally even holds itself out as the champion of the multilateral trading system,¹³⁷ China has been quietly expanding its network of strategic partnerships and bilateral agreements behind the scene. Incrementally and pragmatically, it is developing a new model for trade governance that puts finance and infrastructure development, combined with domestic innovation policy, at the center. In the geoeconomic competition of the 21st century, it offers a new model of trade integration and governance based not on legal templates and transplants of laws to build regional and global rules and institutions (the U.S. and European models),¹³⁸ but rather one based on experimental, pragmatic, incremental development policy grounded in infrastructure development, innovation, and webs of memoranda of understanding, contracts, and treaties. China is exporting its own developmental model through initiatives like the Belt and Road Initiative, facilitating some relocation of labor-intensive sectors abroad while Chinese industry moves up the value chain and develops preferential ties around the world. It is a Chinese model that offers a rival to U.S.-built and U.S.-dominated institutions, one that now forms part of the changing ecology of trade governance involving increasing geoeconomic competition between China and the United States. China is not abandoning these institutions, such as the WTO; rather, it is positioning itself as their defender. But at the same time, it is creating new options for itself by fashioning a network of infrastructure projects with supporting treaties that, in combination, are creating a Chinese-centric transnational legal order for trade. China now draws from the trade law-related legal capacity that it built to engage with the WTO system (chapter 6) for its new initiatives.

The Belt and Road Initiative represents an open architecture since any country can join it, in contrast to the U.S. club model. Under the club model, the United States aims to build new rules through excluding those outside of the club, only to invite them in subsequently on U.S. terms. That was the model of the U.S. network of bilateral trade agreements built on common templates, the abandoned TransPacific Partnership, and the WTO itself.¹³⁹ In contrast, the Belt and Road

¹³⁷ President Xi's speech at Davos.

¹³⁸ For a classic account of economic integration through law in terms of different states of integration from a free trade area to a customs union to a common market to an economic union, that would be reflected in the trajectory of the European Union, see Bela Balassa, *The Theory of Economic Integration: An Introduction* (London: Palgrave, 1963), 1-3. Nadege Rolland provides 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, however, China is clearly "uncomfortable with the idea of democratization" that it rejects as "Western values," and more comfortable forming a league of authoritarian leaders demanding non-interference in domestic affairs. *Ibid.*, at 180.

¹³⁹ 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).

Initiative is based on connectivity through combining finance of infrastructure, state and private contracts backed by specialized dispute settlement, investment treaties, and free trade agreements that center on customs facilitation and tariff reduction. Under the Belt and Road Initiative and China's web of treaties, China is largely using Western models of contract arbitration, investment protection, and trade liberalization, while building on Western norms of intellectual property protection through patents, copyrights, and trademarks. However, the model is based not on a neoliberal one grounded in legal norms as much as a state-led, pragmatic governance model in which law plays a background, ordering role.

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. 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 to be at the forefront of a fourth industrial revolution that combines big data, automation, and new technologies critical for advanced manufacturing.¹⁴⁰ In the process, it hopes to avoid the middle-income trap and become a "moderately wealthy" high-income country.

Through the Belt and Road Initiative, China aims to create new ties and shift the center of gravity of trade governance through actual practice where countries adopt Chinese standards by engaging Chinese companies for their infrastructure development. In this way, China hopes to "shift the center of geopolitical gravity away from the U.S. and back to Eurasia."¹⁴¹ China, in part, is building a "parallel global institutional architecture to the postwar Western order" such as through the Asian Infrastructure Investment Bank.¹⁴² More importantly, it is offering a very different model of trade governance where finance and infrastructure-led development, combined with state and private contract and Chinese investment in technology in advanced sectors giving rise to new (Chinese) technology standards, play the central role.

China's free trade agreements started as innocuous deals to boost trade. But when these agreements are coupled with the development of the Belt and Road Initiative through China-backed loans, investments, and construction projects, one senses the rise of a new transnational legal order based on premises different from the traditional U.S.-centric Washington consensus. When it comes to development assistance, the Chinese model removes the stringent good-governance conditions attached to loans granted by 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 environment protection and labor rights are left out. The Chinese agreements also tend to avoid new issues, such as disciplines on competition and state-owned enterprises, or substantive rules governing the digital sphere. When it comes to values, the Chinese model is value-free, especially when it comes to labor and other

¹⁴⁰ Wubbekke, "Made in China 2025," 16.

¹⁴¹ Yiwei, *The Belt and Road Initiative* (a book by a Chinese professor at Renmin University in Beijing that reflects views from China's leadership).

¹⁴² David Shambaugh, *China's Future* (Hoboken: John Wiley & Sons, 2016), 162-163.

human rights.¹⁴³ As to investment, China has abandoned its earlier position of resisting investor-state arbitration and begun to grant more substantive rights to investors, such as pre-establishment rights and the use of “negative lists” where investments in all sectors are permitted unless listed as restricted in the agreement. This policy change sharply contrasts with the growing resistance to investor protection in developed countries, and it reflects China’s shifting position from a major recipient to a major provider of foreign investment.

Over time, China appears to be creating a hub-and-spokes system of trade and investment agreements, with the ability to possibly combine them, formally or in practice, into a giant, regional, Sino-centric economic order. If this happens, the Chinese state-led finance-trade-investment model will rival the liberal, multilateral legal order that the United States long led, but of which it has since grown wary. This could split the world into competing trade blocs and a new geoeconomic variant of the Cold War. Such a scenario could make an empty shell of the multilateral trading system that the United States erected following the end of the (first) Cold War.

¹⁴³ This is not to say that the western model was centered on values as opposed to interests, since the United States and Europe always pursued their interests. Nonetheless, under China’s model, there is no promulgation of liberal values such as human rights and democracy, and the government plays a more central role in the market. Cf. Samuel Huntington, *The Clash of Civilizations and the Remaking of the World Order* (New York: Touchstone, 1996) (the United States is “a missionary nation,” proselytizing “Western values;” Graham Allison, “China vs America: Managing the Next Clash of Civilizations,” *Foreign Affairs* 83-84 (Sept./Oct. 2017) (contrasting China’s focus on “order”).