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# Chinese Law and Development: Implications for US Rule of Law Program

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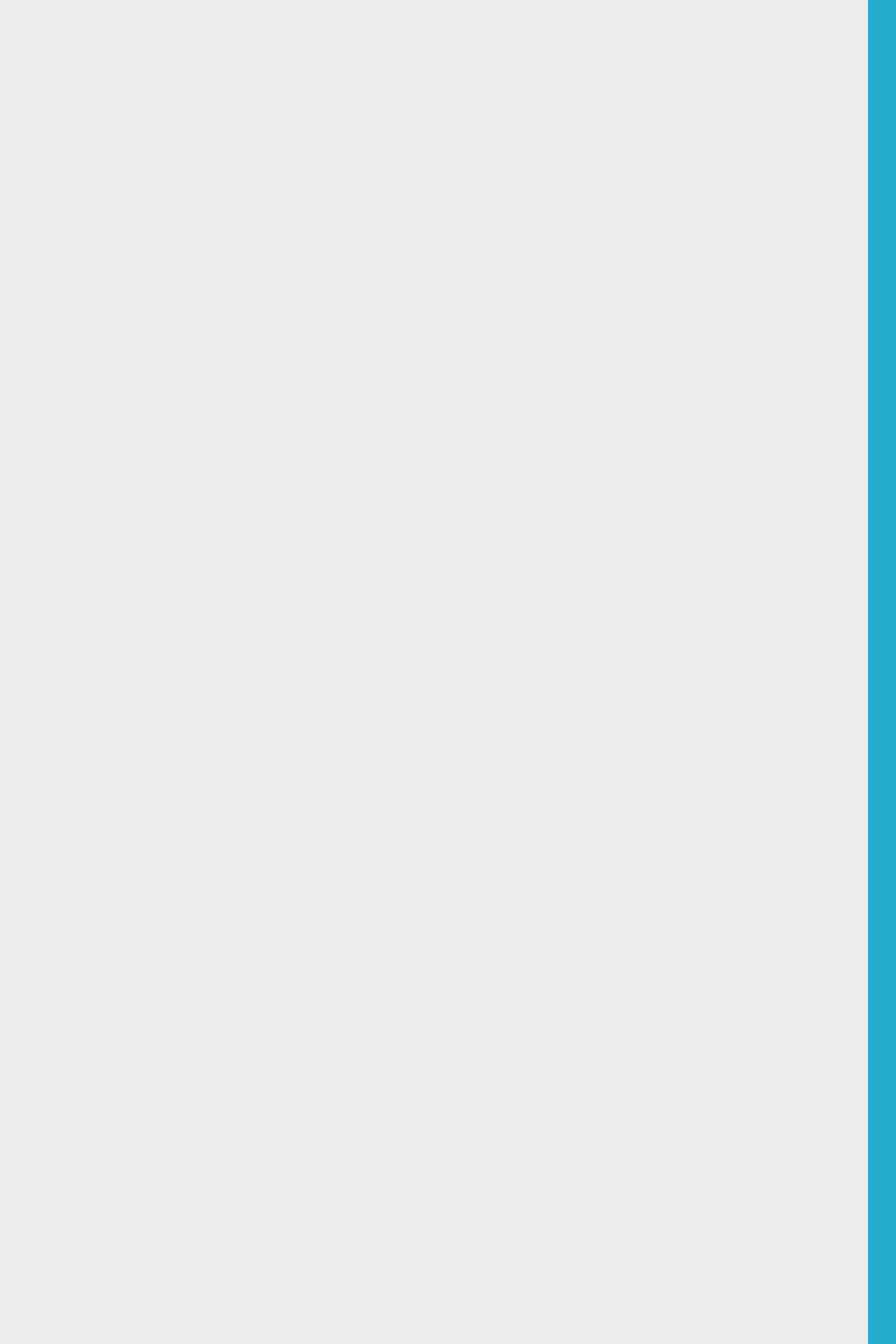

a long-term challenge to US interests.  e US needs to “ally shore” not just other G7 states but also emerging economies within multilateral organizations and international law bodies.

 e US needs to improve its record of access to justice and quality of rule of law at home to avoid charges of hypocrisy. As part of this, state and federal legislatures must reject out-of-hand laws which discriminate against Chinese in the US, for example, in terms of their right to purchase real estate. Such discriminatory laws signi cantly erode the rule of law in the US.  e US can only engage in rule of law promotion abroad when it has su ciently addressed such instances of injustice on its own soil.

 e US needs to stimulate innovation both within would-be partner states and also domestically. As to the former, a greater focus on building communities on the ground that can help communicate local needs is critical. Problem-based approaches should supersede mere technical programming. One dimension of the problem-based approach is being more actively part of local knowledge production about China’s footprint in-country. As to the latter (domestic innovation), members of the legal industry in the US have not yet su ciently tapped the deep symbolic capital of US legal institutions to build connections with partner states, for example, through dispute resolution networks. In short, the US can

## Introduction

In the years following the 2008 world  nancial crisis, China became the largest trading country, one of the largest outbound investors, and the largest aid donor in the world.  ese trends accelerated with the launch of the decade-old "Belt and Road Initiative" (BRI), a program to create "connectivity" between the Chinese economy and those of partner states mainly in low-income and middle-income countries throughout the world through infrastructure and energy projects. Along with its increasing economic footprint throughout the world and especially in developing states, and despite its conventional reluctance to engage in the domestic a airs of host states and its own economic slow-down, China is becoming a player in the "law and development" industry. Most broadly, law and development refers to policy prescriptions for legal reform to facilitate economic growth. While it is still early days for China's emerging role as a home state for law and development and China's approach varies in important ways from traditional Anglo-American donors, this trend is likely to continue and has implications for US rule of law programs.

 e People's Republic of China (PRC or China) is, at least rhetorically, committed to reforming global governance.[1] In recent years, the PRC has launched the China Development Initiative, China Security Initiative, and China Civilization Initiative, which have built on relationships established through the BRI, and which promote China's norms through existing and new multilateral e orts. Bilaterally, along with China's capital export, China's in uence in recipient countries has grown considerably, and will likely continue to do so given recent diplomatic overtures and the push for "Chinese-

is report, funded by the Carnegie Corporation of New York, focuses on a subset of a broader project, the “China, Law and Development” (CLD) project, based at the University of Oxford. A multi-disciplinary and international team of researchers with a background in law and social sciences have examined the role of law in China’s global development.[3] is includes two levels of analysis: international and transnational law as well as the internal legal orders of host states that rely on Chinese capital. Started in 2019, the CLD project has collected empirical data from host states throughout the world, mainly low-income and middle-income states, as well as from the People’s Republic of China (PRC or China). As part of this larger project, this report identi es the key ndings to date as pertains to legal development assistance, including China’s approach to bilateral development assistance as well as providing a typology of how Chinese parties are engaging with di erent areas of international law. e report also provides a set of policy responses for US rule of law programs.

## The Backg.

not legal development assistance, which is an important distinction from the US experience.

ere are two main reasons to help explain why China has been an “infrastructure  rst, law second” donor. First, the PRC has valorized the principle of non-interference in its foreign policy and perceives non-interference to be the bedrock norm of international law.[13] China’s position re ects its own experience of “semi-colonialism” during the late Qing dynasty when Western powers imposed extraterritorial jurisdiction on parts of south-eastern China  (w)11.1 (. F)16.4 (i)-1ar0(o)-1(u)14.1 .2 (i)-15.2 (n)0.8 (a)20.2 (’)5

assistance[17] but also the extent to which China may “nudge” international law norms, practices, and principles towards its own interests.[18] e two levels are related as international investment law frameworks, for example, can shape bilateral investment. As for the latter category of international law, international economic law, including trade and investment, has been the primary focus, although we view these issues as intrinsically related to questions of public international law, including human rights.

As a subset of the larger CLD project, research questions pertinent to this report include:

1. Is there a strategy of legal development that China promotes overseas?

2. What are the speci c methods or mechanisms used to support China’s version of legality abroad?

3. How do host states respond to such e orts?

4. What are the e ects—intentional or otherwise—of Chinese projects in recipient states?

5. How do institutional actors seek to change di erent areas of international law?

6. What are the lessons that non-Chinese stakeholders (e.g., host states and American proponents of rule of law) need to know?

To address these questions, the CLD research team has conducted long-term qualitative  eldwork in a number of countries, both host and home states. In the following section, I describe the methodology and data before discussing the preliminary  ndings.

## Methodology and Data

 e CLD research team has been conducting research since 2019.  e COVID-19 pandemic negatively a ected both the method and object of the

study. First, the research design focused on qualitative data to develop comparative case studies. This research design was, in turn, predicated on long-term immersive fieldwork and international travel. Visa bans and travel restrictions thus curtailed our ability to do research and delayed much of the fieldwork. Second, as the economic relationships are first and foremost, with law a trailing consideration, the project has been dependent on the amounts of capital export over the course of the last several years, and the amounts were likely affected over the course of the pandemic.

For example, whereas the official statistics from the PRC Ministry of Commerce indicate that Chinese overseas direct investment (ODI) remained constant over the course of the pandemic, non-Chinese scholars have suggested that Chinese ODI dropped by some 60 percent.[19] According to both the World Bank and the United Nations Conference on Trade and Development, China's trade exports increased over the course of the pandemic while its imports slightly declined.[20] Chinese aid is notoriously difficult to track given that it is considered a state secret and thus figures are not made public. While the pandemic certainly rerouted central and provincial budgetary expenditures toward disease mitigation and recovery, China remains a major economy. Beijing's recent diplomatic overtures in the Middle East, Latin America, and Central Asia all suggest that China's relationships with emerging markets in the Global South will continue to grow in the post-pandemic period.

To collect data on how law may be playing a role in China's overseas development projects, the CLD research team, comprised of interdisciplinary scholars working at the intersection of law and the social sciences, conducted empirical data in China and in host states on the processes and effects of China's growing footprint in international law and the law of host states. Research produced by the CLD research team is available on the CLD website https://cld.web.ox.ac.uk/ and has been published in a number of academic and policy-relevant outputs.[21] Drawing from long-term qualitative fieldwork in a number of countries, this report summarizes some of those findings with respect to both what China is doing; the report further suggests how the US may respond. With this description of the research design, the next section turns to some of the preliminary findings.

# Investment Risk Mitigation

version of CAJAC's institutional rules borrowed extensively from those of the Shenzhen Court of International Arbitration.[28] In each instance, transnational networks led to legal or institutional change in the recipient state. While some of these new institutions, like CAJAC, are often more about signalling collaboration than functional competence, they should not be dismissed prematurely and may grow in the future.

## Chinese Views on International Law

China's and its host states' networked method to introducing legal change is reflected, in part, in China's approach to international law. International law, especially international economic law (i.e., trade and investment) provide frameworks for China's overseas development projects. For instance, China has entered into more bilateral investment treaties (BITs) than any other country except for Germany. The PRC has also entered into a large number of free trade agreements (FTAs), including the Regional Comprehensive Economic Partnership (RCEP), the largest free trade agreement in the world. For the most part, scholars have viewed China's adoption of these instruments as no different from any other state.[29] Indeed, in some regards, China acts like (developed) home or donor states.[30]

This may be true, for the most part, in terms of China's approach to international economic law, but once the top layer of international investment agree-

In terms of international economic law, which again, is the main area of law involved in China's integration into the world economy, China has for the most part been a supporter of the status quo. China's ascension to the WTO in 2001 came at a significant cost as the "WTO-plus obligations" were exacting and heavy, much more so than was the case for other members.[31] Yet China accepted them and gained proficiency in the relevant rules over the last two decades.[32] It is clear that the US takes issue with some of China's interpretation and application of those rules, especially in terms of the lightning rod issues of subsidies and anti-dumping.

The CDEHR has gained traction in the UNHRC. For example, on May 28, 2021, the UNHRC held a virtual seminar on "The Contribution of Development to the Enjoyment of All Human Rights" that featured speeches by not only the Permanent Representative of the PRC to the UN and Chinese intellectuals, but also the UN High Commissioner of Human Rights, representatives from Brazil and Pakistan, and Jeffrey Sachs of Columbia University. Along these lines, China has supported five regional seminars in developing countries to further popularize the concept of CDEHR. While it cannot be said that the CDEHR has gained a consensus support in the UNHRC or that it is shaping domestic law in host states, it does demonstrate the gradual change that Chinese delegates can bring to create alternative ideas in public international law.

Another third category is the "frontier" (qiányán) areas of law where China is informing international law norms and practices given that the areas of law are either relatively new or unsettled. Unlike certain areas of law like the law of war where the norms are long established, the twenty-first century has introduced increasingly complex problems relating to technology, artificial intelligence, environmental crisis, outer space, and global terrorist networks that require appropriate international law responses. China is leading the way in some of these emerging areas. One example is data governance. China is developing a regime of data governance laws that is in many ways more sophisticated than many other developed economies.[35] This regime includes not

## Accidental Empire

One of the chief insights that has come out of the study of "Global China" in recent years is contrary to the narrative of Beijing's "long game." In fact, much of what happens is ad hoc, unplanned, and unpredictable.[38] Diverse actors have their own interests and agendas, and, while they may seek to promote these within the broad outlines of a Beijing initiative, (e.g., BRI, "Chinese-style modernization," or "foreign-related 'rule of law'"), they may also try to nudge those outlines themselves, carve out their own projects, and even compete against each other. This is very much the story of Western empires that expanded often not necessarily through top-down well-planned strategies but rather through exigencies of extending rule over domains where home state entities were based and whose interests were endangered in some way or another.[39] Related to this, actors can have inadvertent effects in host states. The main reason for this is that Chinese businesses bring capital, resources, technology, labor, managerial know-how, and other forms of organizational expertise. These may have unintended effects on local state systems and those systems may respond in ways that are not always knowable ex ante. In short, there is a grey space between intentional and unintended effects.

One area that highlights these questions is the special economic zones China is helping to establish in host states, and what the governing law is in those zones (SEZs). One narrative is that China applies its law extraterritorially to those zones to create jurisdictional carve-outs in challenging legal systems. While China has created such carve-outs in its own SEZs, China's SEZs in bordering Southeast Asian states and in Africa do not necessarily have the same form or function as these other ones. China clearly has much more control over SEZs in its own territory as well as Hong Kong where the PRC Central Government is indeed restructuring the legal system. It can design or experiment with applicable rules, accordingly, whether tax, customs, duties, labor, immigration, dispute resolution, and so on.

Co-establishing SEZs in other sovereign states is a different matter and requires a different sort of calculation. On the one hand, it does seem that Chinese companies and Chinese law may be given some level of preference in certain SEZs in some countries. To be more precise, preferences for Chinese companies in terms of the bidding process for major construction contracts, for example, may exist outside of SEZs in host states. This is the case, at least, for Pakistan.

bill does not expressly provide for the application of Chinese law but it does propose an International Commercial Dispute Resolution Centre that would use arbitration, e ectively ousting the jurisdiction of Sri Lankan courts. As discussed above, such dispute resolution mechanisms have been preferred by Chinese investors in the past, and the bill's provision opens the door to the use of Chinese law as governing law of arbitration pertaining to SEZ-related disputes. Yet, this possibility di ers from the blanket application of Chinese law in the Sri Lankan SEZ. Many SEZs likely endorse choice of law provisions which similarly opens the door to the application of Chinese law without explicitly providing for the sole use of PRC law. To summarize: while de jure (even so  law "formal") extraterritorial application of Chinese law may be happening in certain circumstances, o en Chinese law may de facto apply as a choice of law.

e question of intentionality, for example, who in the Sri Lankan example, pushed for the dispute resolution provision, and the role of Chinese investors, in particular, is hard to ascertain empirically.  ere is no question that Chinese authorities have deployed trade or economic coercion in some of its dealings with smaller states.[41] Host state initiatives to create carve-outs for Chinese parties may occur against these backdrops or may also occur under so er forms of in u ence and mutual desire to maintain the bilateral relationship. It is important to understand the di erence as more accurate diagnoses can lead to better policy responses on the part of host states and the United States.

## Conclusion

It is still the early stage of Chinese law and development, a multi-pronged and evolving set of relationships between Chinese law, on the one hand, and foreign and international law, on the other hand, in the context of China's global development initiatives. It is important not to overstate what China is doing. China is not transplanting its "rule of law" system overseas through industrial policy transplant and extraterritorial jurisdiction. Likewise, China is not dominating local judges by indoctrinating them into Xi Jinping Rule of Law  ought. What China is doing is creating transnational networks of legal professionals to support its commercial and geo-strategic interests abroad; and some of these networks lead to institutional or legislative change in those

host state destinations. Moreover, the PRC authorities are creating platforms within the PRC to deal with more foreign law and international law issues in the course of cross-border business, including development projects.

Beyond the level of bilateral legal interactions, Chinese experts are active in most all major international law organizations, especially those for trade and investment. Chinese delegates are active in the UNCTAD, UNCITRAL Working Groups, industrial and standard setting organizations like the ISO, and, of course, the UN system. While it is a slippery slope to conclude that every PRC national working in such a capacity is furthering the interests of the CCP, and such equations are discriminatory, the Party-State's interests can be furthered through such activities.

If one zooms out and assesses the likely long-term effects of China's growing footprint in global governance through international and local host state law, then one can see China having more of a say in certain areas of law. The emerging "frontier" areas where China either has a first-comer advantage (e.g., AI regulation, data law, space law, etc.) or has focused its material and military resources to reshape or pre-empt the law (e.g., maritime law), are particular areas of concern. It is through these areas where China will seek to further its commercial and geo-strategic interests. In so doing, China is acting as any major state, yet what differentiates China from predecessor is the role of the CCP and its intolerance for freedom of speech, movement, belief, and other values privileged by Western liberal states.

At the level of local law in partner states, Chinese law and legal and political institutions may gain traction as host states seek alternatives to liberal law and institutions that appear less attractive than they did, say, a decade ago. Assuming China continues its economic growth (and, as of the time of the writing of this report, this is an assumption to underscore), then low-income and middle-income states, especially those in Southeast Asia, but also those in Africa and Latin America, may gravitate towards Beijing's approach to law and development. In the long-term, there may be more mimicry of China's authoritarian law in such jurisdictions, yet localized for specific jurisdictions with their own political, economic, and cultural exigencies. There may be legal development, but also under-development, as some of the unintended effects of China's version of economic globalization may erode host state regulatory systems or whatever checks and balances are in place.

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