

# China's Belt and Road Initiative is Reshaping Human Rights Norms

## ABSTRACT

*Since its birth in 2015, the Belt and Road Initiative has garnered significant attention for its benefits and its detriments. Much of the current scholarship in this area is focused on particular pieces of the Belt and Road Initiative, with few in legal scholarship considering the impact of the relationship between China's growing soft power and its effect on international law and international institutions. Every state has the right to pursue power and influence, but this Note specifically examines how China's methods of obtaining this power and influence—specifically through the Belt and Road Initiative and related actions within United Nations' organs—are detrimental to human rights. This Note offers a novel analysis of resolutions passed in the UN Human Rights Council and the UN Security Council to shed light on emerging soft law foundations that could justify future extreme acts, before examining steps that states should take to address China's actions.*

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## I. INTRODUCTION

A small business owner, Alexis, wants to build a flower shop storefront on a small piece of land she inherited from her parents. Having run her shop out of her home for a couple of years, Alexis is now ready to take the next step. She wants to take her business to the next level, but she does not have enough money. So, what does Alexis do? She would likely apply for a loan from a bank, offering the clean deed of the land as collateral to secure the loan. This means that if Alexis does not repay the bank the money she has borrowed (plus interest) on schedule and thus defaults, then the bank can repossess the land.<sup>1</sup>

Collateralized loans are far from a novel concept. One of the oldest forms of secured money lending, via pawnbroker, dates back as far as ancient China.<sup>2</sup> The concept of a collateralized loan is easily scalable. Collateralized loans currently exist around the world, protecting many lenders' abilities to take on large amounts of risk. Countries can also acquire debt by taking loans from each other.<sup>3</sup> However, the piper must always receive his due.

A common path to modernization involving economic relief is one country taking a monetary loan from another, more stable and developed country.<sup>4</sup> Under the US Marshall Plan after World War II, the United States gave monetary grants, food, and infrastructural aid to western European countries in order to boost political stability and postwar economic recovery.<sup>5</sup> Perhaps the most noteworthy modern

1. See, e.g., Kimberly Cousino, *Investment Banks Versus Commercial Banks*, in 3 ECONOMICS: THE DEFINITIVE ENCYCLOPEDIA FROM THEORY TO PRACTICE: MICROECONOMICS 232–33 (David A. Dieterle ed., 2017) (describing how banks secure loans using collateral).

2. Zhou Liming, Yao Shujie, Wang Jinmin & Ou Jinghua, *China's Pawnbroking Industry and the Puzzle of Losses during the 2008–2009 Global Financial Crisis*, 15 CHINA INT'L J. 128, 129–30 (2017) (citing Q. LIU, THE HISTORY OF CHINA'S PAWN-BROKING SYSTEM (1995) (Chinese)) (discussing the pawnbroking industry in China).

3. See, e.g., Jonathan Law, *External Debt (Foreign Debt)*, in A DICTIONARY OF FINANCE AND BANKING (6th ed. 2018) (defining external or foreign debt as “[t]he commitments of one government to other governments, banks, or to other financial institutions abroad.”).

4. See Melvyn P. Leffler, *Divide and Invest: Why the Marshall Plan Worked*, 97 FOREIGN AFF. 170, 170 (2018) (giving an overview of the Marshall Plan). A notable difference between the United States' Marshall Plan and China's Belt and Road Initiative is that the Marshall Plan did not require countries to pay back the aid they were given.

5. See, e.g., Marshall Auerback, *China's Belt and Road Initiative: a Marshall Plan in Reverse*, ALTERNET (Dec. 4, 2018), <https://www.alternet.org/2018/12/chinas-belt-and-road-initiative-marshall-plan-reverse> [<https://perma.cc/E4SX-7PCM>] (archived July 19, 2020) (giving an overview of the Belt and Road Initiative and comparing it to the

example of this pattern is the Belt and Road Initiative (BRI). The BRI<sup>6</sup> is the People's Republic of China's endeavor to create a modern-day version of the historic Silk Road by connecting countries across Eurasia and Africa to promote economic ties and development.<sup>7</sup> The stage was set by two of President Xi Jinping's speeches. In 2013, President Xi Jinping proposed the concept of an economic version of the Silk Road "[t]o forge closer economic ties, deepen cooperation and expand development space in the Eurasian region."<sup>8</sup> Less than a month later, Xi Jinping laid the groundwork for a maritime Silk Road when addressing Indonesia's parliament regarding Chinese–Indonesian relations and the success of joint maritime projects like the Surabaya–Madura Bridge.<sup>9</sup>

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Marshall Plan). Although the Marshall Plan has been heavily criticized for its use of policy entrepreneurship to promote democratic underpinnings, the United States' actions are often acknowledged to have provided essential support for western Europe's recuperation. *E.g.*, SAM O'BRIEN, *Questioning the Marshall Plan in the Buildup to the Cold War*, U. N.H. INQUIRY J. (Jennifer Lee ed., 2014), <https://www.unh.edu/inquiryjournal/spring-2014/questioning-marshall-plan-buildup-cold-war> [<https://perma.cc/F5T4-LEXZ>] (archived July 19, 2020) ("Whatever conclusions are drawn, it is impossible to overlook the fact that the aid provided by the Marshall Plan rescued Europe from the edge of the abyss."); Leffler, *supra* note 4, at 170-74 (discussing the goals of the Marshall Plan); Daniel W. Drezner, *This Time is Different*, FOREIGN AFF. (Apr. 16, 2019), <https://www.foreignaffairs.com/articles/2019-04-16/time-different> [<https://perma.cc/HZ99-M7MV>] (archived July 19, 2020) ("Democracy was spreading, liberating masses of people from tyranny. . . . The United States could take a great deal of credit for these gains, because the liberal order it nurtured and expanded had laid the foundations for decades of relative peace and prosperity.").

6. *E.g.*, Xie Tao, *Is China's 'Belt and Road' a Strategy?*, DIPLOMAT (Dec. 16, 2015), <https://thediplomat.com/2015/12/is-chinas-belt-and-road-a-strategy/> [<https://perma.cc/3SMD-MG5Y>] (archived July 19, 2020) (describing the BRI).

7. The initiative is referred to as "Belt and Road" because of the intentions to (1) use Central Asia to connect Chinese trade and production to Europe (the "belt") and (2) expand Chinese maritime trade throughout Southeast Asia, Africa, and Europe (the "road"). See *The Belt and Road Initiative Backgrounder*, INST. SEC. & DEV. POL'Y 1 (2016), <http://isdpeu.org/content/uploads/2016/10/2016-The-Belt-and-Road-Initiative.pdf> [<https://perma.cc/YD93-HYQF>] (archived July 19, 2020). The adoption of the Belt and Road Initiative is an interesting turn of events as it represents China's partial acknowledgement of the political value and foreign policy pieces of its soft power. See Fareed Zakaria, *Why America Shouldn't Panic About Its Latest Challenger*, 99 FOREIGN AFF. 52, 60 (2020) ("Under Xi, China's foreign policy has . . . [broken] with the country's erstwhile passivity on the global stage, captured by the former Chinese leader Deng Xiaoping's adage 'Hide your strength, bide your time.'"); Joseph S. Nye, *What Are the Limits of China's Soft Power?*, WORLD ECON. F. (July 10, 2015), <https://www.weforum.org/agenda/2015/07/what-are-the-limits-of-chinas-soft-power/> [<https://perma.cc/NG5Y-X6JB>] (archived July 19, 2020) (describing how the growth of Chinese soft power is limited by China's emphasis on nationalism and censorship of society).

8. Xi Jinping, President, People's Republic of China, Speech at Nazarbayev University in Kazakhstan (Sept. 7, 2013).

9. Xi Jinping, President, People's Republic of China, Remarks at APEC Summit in Indonesia (Oct. 2, 2013).

Over the years, Xi Jinping's vision has come to life via China's national policy and events in foreign affairs, laying the groundwork for these new silk roads through a collection of projects. Countries typically use BRI loans to fund an array of infrastructure projects, ranging from railways to energy development. From 2013 to mid-2018, Oxford Economics reported that the total number of BRI projects in the Association of Southeast Asian Nations member countries alone were worth over \$739.65 billion USD.<sup>10</sup> Since the BRI has been active in Africa, the number of loans from China to African countries tripled between 2012 and 2019.<sup>11</sup> As of May 2019, the BRI has made inroads into South America as China has signed BRI memoranda of understanding (MOUs)<sup>12</sup> with seven countries in the region, including Venezuela, Guyana, Suriname, Ecuador, Bolivia, Uruguay, and Chile.<sup>13</sup>

On its face, the BRI appears to be a very neighborly exercise of policy entrepreneurship.<sup>14</sup> However, not everything is what it seems. Within the last couple of years, China's systematic project has garnered negative attention for exercising "debt-trap diplomacy" through its BRI projects in Africa.<sup>15</sup> Simply summarized, debt-trap

10. Jinny Yan, *The Belt and Road Initiative in Southeast Asia, Appendix 1, in CHINA'S BELT AND ROAD INITIATIVE (BRI) AND SOUTHEAST ASIA 1*, 8 (2018), <http://www.lse.ac.uk/ideas/Assets/Documents/reports/LSE-IDEAS-China-SEA-BRI.pdf> [<https://perma.cc/PNZ8-MY6D>] (archived July 19, 2020). The countries considered include (in descending order of number of projects) Indonesia, Vietnam, Cambodia, Malaysia, Singapore, Laos, Brunei, Myanmar, Thailand, and the Philippines.

11. Arwa Damon & Brent Swails, *China and the United States Face Off in Djibouti as the World Powers Fight for Influence in Africa*, CNN (May 27, 2019, 12:46 AM), <https://www.cnn.com/2019/05/26/africa/china-belt-road-initiative-djibouti-intl/index.html> [<https://perma.cc/K7EY-M36L>] (archived July 19, 2020).

12. The phrase "Memorandum of Understanding" is simply one of many terms used for an agreement made between parties, who in this case are state governments. "Memorandum of Understanding" has been used by many different States and corporations. See, e.g., Memorandum of Understanding on the Creation of the Joint BRICS Website, July 10, 2015, MINISTRY FOREIGN AFF. RUSS. [https://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/1557373](https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/1557373) [<https://perma.cc/22B8-XPDB>] (archived July 19, 2020); Memorandum of Understanding on Enhancing Cooperation in Preventing and Combating Crime, Austl.-U.S., Nov. 16, 2011, U.S. DEP'T ST. [https://obamawhitehouse.archives.gov/sites/default/files/MOU\\_US\\_Australia.pdf](https://obamawhitehouse.archives.gov/sites/default/files/MOU_US_Australia.pdf) [<https://perma.cc/Z2XY-YLBF>] (archived July 19, 2020).

13. See Chris Devonshire-Ellis, *China's Belt & Road Initiative and South America*, SILK ROAD BRIEFING FROM DEZAN SHIRA & ASSOC. (May 29, 2019), <https://www.silkroadbriefing.com/news/2019/05/29/chinas-belt-road-initiative-south-america/> [<https://perma.cc/VCS8-4WFC>] (archived July 19, 2020).

14. Policy entrepreneurship as a concept is largely undefined, though there is a basic shared understanding that it involves promotion of policy to effect change. See David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 300–03 (2008) (exploring the definition of policy entrepreneurship and its many glosses).

15. See, e.g., Marie Adele Carrai, *China's Malleable Sovereignty Along the Belt and Road Initiative: The Case of the 99-Year Chinese Lease of Hambantota Port*, 51

diplomacy is an exercise of power in which a more economically powerful country convinces a less powerful country to accept long-term detrimental investment deals (that seem great in the short-term) and then leverages the imbalance of power to “either acquire the project altogether or to acquire political leverage in that country.”<sup>16</sup> That African countries would be willing to sign on to the BRI with a full understanding of the potential consequences was, and remains, unsurprising. In the case of Djibouti and the Addis Ababa–Djibouti Railway, French and US officials have chided Djibouti for its growing reliance on Chinese help, when the fact of the matter was simply that Djibouti was in need of money and China was willing to lend it.<sup>17</sup> When Djibouti defaulted on its Chinese loan, China happily collected on its ninety-nine-year lease to build a Chinese military support base on Djiboutian soil, seizing at this opportunity to join the world’s other

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N.Y.U. J. INT’L L. & POL. 1061, 1075–86 (2019) (explaining and criticizing China’s use of “debt-trap diplomacy” in the Hambantota Port).

16. K. T. Ganeshalingam, *China’s Larger Geopolitical Strategy of the Hambantota Port Project of Sri Lanka*, 6 INT’L MULTIDISCIPLINARY RES. J. 2, 42–51 (2016).

17. See Damon & Swails, *supra* note 11 (discussing China’s activities in Djibouti); Diane Desierto, *China’s ‘One Belt, One Road’ Initiative: Can a Bilaterally-Negotiated ‘Globalization 2.0’ Internalize Human Rights, Labor, and Environmental Standards?*, EJIL: TALK! BLOG EUR. J. INT’L L. (May 16, 2017), <https://www.ejiltalk.org/chinas-one-belt-one-road-initiative-can-a-bilaterally-negotiated-globalization-2-0-internalize-human-rights-labor-and-environmental-standards/> [https://perma.cc/V87F-WCSP] (archived July 19, 2020) (“[T]he lack of other truly competitive sources of foreign financing is what ultimately reinforces China’s monopolistic advantage over foreign-financing of infrastructure and connectivity projects.”); Nizar Manek, *Djibouti Needed Help, China Had Money, and Now the U.S. and France Are Worried*, BLOOMBERG (Apr. 5, 2019, 11:01 PM), <https://www.bloomberg.com/news/features/2019-04-06/djibouti-needed-help-china-had-money-and-now-the-u-s-and-france-are-worried> [https://perma.cc/T3DZ-EU5M] (archived July 19, 2020) (describing the geopolitical tension stemming from China’s lending to Djibouti); Todd Moss, *Missing in Africa*, FOREIGN AFF. (Oct. 2, 2012), <https://www.foreignaffairs.com/articles/africa/2012-10-02/missing-africa> [https://perma.cc/RC46-GM2H] (archived July 19, 2020) (“[I]nstead of lecturing African countries to beware, the administration should reflect upon why China seems to be so attractive to the region as it gains self-confidence. Today’s Africa does not want charity. It seeks more investment and a measure of respect. China-bashing might be good political theater, but it makes for ineffective policy.”). Furthermore, countries like the United States and France are no stranger to investing in Africa—according to UNCTAD’s *World Investment Report 2019*, France and the United States were among the top five countries contributing to foreign direct investment in Africa in 2017. U.N. Conference on Trade and Development, *World Investment Report 2019*, UNCTAD/WIR/2019 (June 12, 2019) [hereinafter UNCTAD Report 2019]. Notably, however, the Brookings Institute reported that China’s massive investment in Africa accounted for 14 percent of sub-Saharan Africa’s total debt stock, with the volume of Chinese loans to Kenya measuring six times larger than those from its second-largest creditor, France. Wenjie Chen & Roger Nord, *China and Africa: Crouching Lion, Retreating Dragon?*, in FORESIGHT AFRICA: TOP PRIORITIES FOR THE CONTINENT IN 2018 102 (Brookings Inst. 2018).

military powers in asserting control over a strategic region.<sup>18</sup> Djibouti is only one country on the list of African nations that many believe have fallen victim to the BRI's predatory lending narrative.<sup>19</sup>

The focus on this particular impact of the BRI, however, is too narrow. Despite growing general concern about the implications of China developing its soft power influence around the globe,<sup>20</sup> there is little academic scholarship examining the impacts of issues outside of the BRI investment agreements' effects on arbitration and economic relations. This Note seeks to grow this area of literature by evaluating some of the available avenues for the international community to address China's direct and indirect actions concerning the BRI.

Although no single action represents a significant threat to international peace and security, each action is a drop in a bucket that may not appear alarming until the bucket is almost full. China's actions taken through and in support of the BRI are small steps taken in the lengthy process of creating customary international human rights law by establishing consistent state practices and laying the foundations for a culture more accepting of China's view of economic influence.<sup>21</sup> In the future, if these actions are successful, China would have an even stronger anchoring tool in its toolbox to justify further and deeper extensions of its power around the globe.

Much like the narrower example of the Marshall Plan, an important caveat for these events is that this general practice—the use of economic development programs to expand a state's global influence—is not a new concept. Foreign affairs paradigms in trade policy and the pursuit of hegemonic stability have appeared several times throughout international history.<sup>22</sup> In the twentieth century, the

18. See Damon & Swails, *supra* note 11 (discussing China's economic activity in Djibouti); Manek, *supra* note 17 (same).

19. See, e.g., LLOYD THRALL, CHINA'S EXPANDING AFRICAN RELATIONS: IMPLICATIONS FOR U.S. NATIONAL SECURITY 36–37 (2015) (mentioning several African nations that have developed close ties with China in recent history); Pearl Risberg, *The Give-and-Take of BRI in Africa*, 17 NEW PERSP. FOREIGN POL'Y 43, 43–44 (2019); Damon & Swails, *supra* note 11; Ronak Gopaldas, *Lessons from Sri Lanka on China's 'debt-trap diplomacy'*, INST. FOR SEC. STUD., <https://issafrica.org/amp/iss-today/lessons-from-sri-lanka-on-chinas-debt-trap-diplomacy> (last visited Feb. 17, 2020) [<https://perma.cc/ZJ93-CQ56>] (archived July 19, 2020) (noting that China has 39 African countries listed on the official BRI website, and that lending from the Chinese government makes up 20% of African governments' foreign debt).

20. See Damon & Swails, *supra* note 11 (acknowledging the potential implications for China's soft power from its dealings in Djibouti).

21. See Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1000 (2012) (“[C]odification allows states to specify more precisely what customary international law requires, thereby facilitating deeper cooperation and avoiding costly disputes over vague legal rules.”). For an explanation of customary international law, see discussion *infra* Part III.B and accompanying notes.

22. See, e.g., JENNIFER M. HARRIS & ROBERT D. BLACKWILL, WAR BY OTHER MEANS: GEOECONOMICS AND STATECRAFT (2016) (exploring the use of economic instruments, including those involving trade, as a vehicle for achieving geopolitical

United States promoted the General Agreement on Trade and Tariffs (GATT), and thus in a broad sense, promoted geopolitical objectives.<sup>23</sup> Objectively, China's actions appear to seek the same greater goal. What is troubling about China's execution of this strategy, however, are the negative effects rippling out of China's chosen methods for pursuing its own vision of the world.

Part II of this Note discusses the official policies of the BRI based on policy documents and documents published from the Belt and Road Forums hosted by China. This Part will also address the BRI's effects on international human rights, international security, access to justice, and the environment. This Note will not address economic concerns outside of the functional usage of debt-trap diplomacy as an instrument of a country's soft power influence, and this Note construes security concerns broadly in reference to protection of nations and peoples. Part III proceeds by examining how China is leveraging its position as a member of the UN Human Rights Council and as a permanent member of the UN Security Council to support actions under and surrounding the BRI's win-win cooperation framework and China's greater vision of increased global influence. This Part then highlights the reasons why the lack of a unified negative international response to China's actions is concerning. Finally, Part IV assesses ways in which other countries can respond to China's efforts to grow its hegemonic power and influence, as well as the challenges associated with each. Specifically, this Note looks at ways for countries to respond through their foreign affairs policies and as members of the UN.

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goals); Patrick O'Brien & Geoffrey A. Pigman, *Free trade, British hegemony and the international economic order in the nineteenth century*, 18 REV. INT'L STUD. 89, 95–97 (1992) (explaining how the liberalization of Britain's foreign trade policy in the nineteenth century was the catalyst for the world economy's hegemonic stability in the period that followed); see also G. John Ikenberry, *Getting Hegemony Right*, 63 NAT'L INT. 17 (2001) (examining US hegemony and what factors or actions may contribute to its increasing or decreasing).

23. Agreements, including those in trade, can be used to promote geopolitical objectives. See, e.g., Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 597–99 (2019). As Professors Meyer and Sitaraman explain,

Trade is also a tool for advancing geopolitical goals; trade agreements can be used to benefit allies, reward countries who follow American leadership, or sanction those who pursue actions opposed to US foreign policy objectives. Finally, trade agreements are a way for the United States to exercise international leadership; agreements can set the “rules of the road” for countries around the globe to follow.

*Id.* (internal footnotes omitted). However, the GATT functioned very differently from the Marshall Plan and the Belt and Road Initiative in that it used market access to promote geopolitical objectives, rather than development aid. Thus, this example simply highlights a higher level of similarity between the three policies as forms of geoeconomics.

## II. WELCOME TO THE BELT AND ROAD

The BRI evolved significantly over the past few years. The international community originally referred to the BRI as “One Belt, One Road,” based on the English translation of the initiative’s Chinese name “Yi Dai, Yi Lu.”<sup>24</sup> In 2015, the Chinese government released guidance that standardized the initiative’s name to its current name, “Belt and Road Initiative.”<sup>25</sup> The 2015 action plan focused on the goal of increasing global connectivity.<sup>26</sup> The Chinese government averred that the slow recovery of the global economy from the 2008–09 recession evidenced the need for China to promote the original Silk Road’s spirit of “peace and cooperation, openness and inclusiveness, [and] mutual learning and mutual benefit.”<sup>27</sup> This idea is consistent throughout many of the documents published by the government on the BRI. Though not all stakeholders in BRI projects will be Chinese, a basic assumption of the entire BRI policy is that public and private Chinese corporations will play a central role in the planning and implementation of these projects.<sup>28</sup> Such is a logical component of an entrepreneurial policy. But China went a step further and even founded its own international financial institution, the Asian Infrastructure Investment Bank, to better support development efforts in other states.<sup>29</sup> This Note examines whether the BRI is actually the

24. *E.g.*, *The Belt and Road Initiative Backgrounder*, *supra* note 7.

25. *E.g.*, Tao, *supra* note 6.

26. See State Council of the People’s Republic of China, *Full text: Action Plan on the Belt and Road Initiative*, ENGLISH.GOV.CN (Mar. 30, 2015, 7:31 PM), [http://english.www.gov.cn/archive/publications/2015/03/30/content\\_281475080249035.htm](http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm) [<https://perma.cc/RQ3S-D9S9>] (archived July 19, 2020).

27. *See id.*

28. Patrick M. Norton, *Challenges for Arbitration in Asia*, 13 U. PA. ASIAN L. REV. 72, 77–78 (2018).

29. Jane Perlez, *China Creates a World Bank of Its Own, and the U.S. Balks*, N.Y. TIMES (Dec. 4, 2015), <https://www.nytimes.com/2015/12/05/business/international/china-creates-an-asian-bank-as-the-us-stands-aloof.html> [<https://perma.cc/9RWH-BHRC>] (archived July 19, 2020) (“The United States worries that China will use the bank to set the global economic agenda on its own terms, forgoing the environmental protections, human rights, anticorruption measures and other governance standards long promoted by its Western counterparts. American officials point to China’s existing record of loans to unstable governments, construction deals for unnecessary infrastructure, and villagers abruptly uprooted with little compensation.”); accord David Dollar, *Opinion, The AIIB and the ‘One Belt, One Road’*, BROOKINGS, <https://www.brookings.edu/opinions/the-aiib-and-the-one-belt-one-road/> (last visited Aug. 23, 2020) [<https://perma.cc/HP6T-FUPD>] (archived Aug. 23, 2020) (“Some of the impetus for China to launch the new Asian Infrastructure Investment Bank was Beijing’s concern that the governance structure of existing International Financial Institutions (IFIs) was evolving too slowly.”); Elliot Wilson, *Asia: Could Covid-19 be the making of AIIB?*, EUROMONEY (Apr. 22, 2020), <https://www.euromoney.com/article/b119lyrb8ztsqc/asia-could-covid-19-be-the-making-of-the-aiib> [<https://perma.cc/78CS-6KA4>] (archived July 19, 2020) (“The idea was to create a bank that would help Asian countries but also boost global connectivity and



embodiment of neighborly spirit or if it is instead a guise for expanding Chinese influence and gaining strategic advantages.<sup>30</sup>

### A. *The Mechanics of the Belt and Road*

The development and execution of BRI partnerships is very methodical. These partnerships often begin through a process of diplomatic visits followed by written agreements.<sup>31</sup> After China and the loan-receiving country have decided to undergo a BRI project, they sign a memorandum of understanding (MOU).<sup>32</sup> Notably, the Chinese government does not have a published, official list of all countries with which it has signed MOUs.<sup>33</sup> All published versions of MOUs found in the course of researching for this Note were obtained through the websites of the other signing government or on third-party sites.<sup>34</sup> After an MOU is signed, the countries get to work.

trade. . . . 'It was set up as a multilateral for infrastructure financing,' he says. 'It is not a development bank in the strict sense of the word.'")

30. See Peter K. Yu, *Building Intellectual Property Infrastructure Along China's Belt and Road*, 14 U. PA. ASIAN L. REV. 275, 323 ("[C]ommentators remain divided over the BRI's overall benefits, potential drawbacks, and future impacts."); Zakaria, *supra* note 7, at 63 ("China hardly qualifies as a mortal danger to [the U.S.'s] imperfect order.").

31. For example, President Xi Jinping's visits to Senegal and Portugal led to quick announcements of a new partnership under the BRI. See Deng Xiaoci, *China, Senegal Sign Belt and Road Cooperation Document*, GLOBAL TIMES (July 22, 2018), <http://www.globaltimes.cn/content/1111845.shtml> [https://perma.cc/D2HU-75JU] (archived July 19, 2020); Liu Zhen, *Portugal signs agreement with China on Belt and Road Initiative*, SOUTH CHINA MORNING POST (Dec. 5, 2018), <https://www.scmp.com/news/china/diplomacy/article/2176560/portugal-wavers-xi-jinping-presses-europe-belt-and-road> [https://perma.cc/T27P-NAV5] (archived July 19, 2020).

32. E.g., *Cooperation agreements and MOUs under the Belt and Road Initiative*, BELT & ROAD INITIATIVE, <https://www.beltroad-initiative.com/memorandum-of-understanding-belt-and-road-initiative/> (last visited Sept. 20, 2019) [https://perma.cc/ACR6-TE2W] (archived July 20, 2020).

33. See *id.* ("There is no official list or comprehensive compilation on which countries or organizations already have signed BRI-MoUs with China.")

34. See Memorandum of Understanding on Cooperation Within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Initiative, China-Vic., Austl., Oct. 8, 2018, <https://www.vic.gov.au/sites/default/files/2019-02/Belt-and-Road-Initiative-MOU.pdf> [https://perma.cc/R2ZL-LAEF] (archived July 20, 2020) [hereinafter China-Australia MOU]; Memorandum of Understanding on Cooperation Within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative, Bosn. & Herz.-China, May 14, 2017, [http://www.mvteo.gov.ba/attachments/en\\_bh---pr-china-mou-silk-road-economic-belt.pdf](http://www.mvteo.gov.ba/attachments/en_bh---pr-china-mou-silk-road-economic-belt.pdf) [https://perma.cc/KS2G-LKX3] (archived July 20, 2020) [hereinafter China-Bosnia and Herzegovina MOU]; Joint Statement to Develop Cooperation in Third-Party Markets, Can.-China, Sept. 24, 2016, 23-24, [https://ccbc.com/wp-content/uploads/2018/11/CCBC\\_Belt-and-Road.pdf](https://ccbc.com/wp-content/uploads/2018/11/CCBC_Belt-and-Road.pdf) [https://perma.cc/6G4M-VYR5] (archived July 20, 2020) [hereinafter China-Canada MOU]; Memorandum of Understanding on Cooperation Within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative, China-Cook Islands, July 23, 2018, [http://www.mfem.gov.ck/images/Development/Cook\\_Islands-](http://www.mfem.gov.ck/images/Development/Cook_Islands-)

Latvia, the first Baltic state to sign on to the BRI,<sup>35</sup> signed an MOU containing language that the “MOU does not constitute legally binding obligations for the two Participants. It is only an expression of their common will to jointly advance the Belt and Road Initiative.”<sup>36</sup> Such language is common among BRI MOUs.<sup>37</sup> Though this language disclaims that the MOUs are not legally binding, some clauses contain language referencing other bilateral and multilateral agreements that are legally binding, invoking secondary legal obligations. For example, the China–Latvia MOU includes a clause stating that “[t]he two Participants will make full use of existing bilateral treaties and intergovernmental mechanisms to jointly promote the Belt and Road Initiative, explore new opportunities for bilateral cooperation, and coordinate on major issues concerning bilateral cooperation.”<sup>38</sup> But is such a clause actionable? The inclusion of both seemingly binding and nonbinding language ultimately raises two concerns related to actionability: first, whether MOUs are treaties under the Vienna Convention on the Law of Treaties (VCLT), and second, the function of the invoked secondary legal obligations.

The first concern spurred by the conflicting language is whether an MOU is a treaty within the meaning of the VCLT. The drafters of

PRC\_Belt\_and\_Road\_MOU\_signed\_12\_November\_2018.pdf [https://perma.cc/T54Z-EXB3] (archived July 20, 2020) [hereinafter China-Cook Islands MOU]; Plán bilaterální spolupráce mezi vládou České republiky a vládou Čínské lidové republiky v rámci iniciativy Pásmo a Stezka [Plan for bilateral cooperation between the Government of the Czech Republic and the Government of the People's Republic of China within the Framework of the Silk Road initiative], Czech-China, Nov. 5, 2016, <https://www.vlada.cz/assets/media-centrum/aktualne/Plan-bilateralni-spoluprace-mezivladou-Ceske-republiky-a-vladou-Cinske-lidove-republiky-v-ramci-iniciativy-Pasmo-a-Steзка.pdf> [https://perma.cc/JL5E-CZJH] (archived July 20, 2020) (in Czech) [hereinafter China-Czech Republic MOU]; Memorandum of Understanding on Cooperation Within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative, China-It, Mar. 2019, [http://www.governo.it/sites/governo.it/files/Memorandum\\_Italia-Cina\\_EN.pdf](http://www.governo.it/sites/governo.it/files/Memorandum_Italia-Cina_EN.pdf) [https://perma.cc/H9Q7-AGFZ] (archived July 20, 2020) [hereinafter China-Italy MOU]; Memorandum of Understanding on Cooperation Within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative, China-Lat., Nov. 2016, [http://tap.mk.gov.lv/doc/2016\\_11/AM\\_MoU\\_EN\\_20161024.2386.docx](http://tap.mk.gov.lv/doc/2016_11/AM_MoU_EN_20161024.2386.docx) [https://perma.cc/KV6K-S4ZN] (archived July 20, 2020) [hereinafter China–Latvia MOU].

35. See Hu Yongqui & Wang Qing Yun, *Latvia Becomes First to Link with Belt and Road Initiative in Baltic Sea Area*, CHINA DAILY EUR. (Apr. 11, 2016, 10:39 PM), [http://europe.chinadaily.com.cn/china/2016-11/04/content\\_27280715.htm](http://europe.chinadaily.com.cn/china/2016-11/04/content_27280715.htm) [https://perma.cc/5S5P-AMEM] (archived July 20, 2020).

36. See China–Latvia MOU, *supra* note 34, pt. V.

37. See Chris Devonshire-Ellis, *Vassal States? Understanding China's Belt and Road MoU*, SILK ROAD BRIEFING FROM DEVAN SHIRA & ASSOC. (Feb. 8, 2018), <https://www.silkroadbriefing.com/news/2018/02/08/vassal-states-understanding-chinas-belt-road-mou/> [https://perma.cc/WE34-F6GZ] (archived July 20, 2020) (explaining some commonalities between China's MOUs with other countries).

38. See China–Latvia MOU, *supra* note 34, pt. IV.

the VCLT did not include the creation of binding obligations in the actual definition of “treaty,”<sup>39</sup> however, a separate provision states that “[e]very treaty in force is binding upon the parties.”<sup>40</sup> Under the VCLT, parties to a treaty also have an obligation to maintain the object and purpose of their agreements.<sup>41</sup> Thus, whether an MOU is a treaty within the scope of the VCLT is significant to whether the VCLT is a potential mechanism for enforcing MOU obligations, despite its own nonbinding disclaimer.

The second concern is the nature of the secondary legal obligations created through MOUs. The broad wording of the China–Latvia MOU demonstrates this well—the document itself does not explain what making “full use” of existing treaties and mechanisms to promote the BRI and other bilateral cooperation looks like.<sup>42</sup> This attempt to create secondary obligations ultimately makes it more difficult to discern what actions state parties are obligated to take. If parties do not understand what their obligations are, there is a risk that a party will unknowingly breach the agreement and thereby subject themselves to some sort of punishment. The underlying assumption here, however, is that such a breach would be actionable to bring about the punishment.

Actionability concerns hold an extra nuance here because an agreement’s enforceability influences how contract partners view their own obligations under the agreement.<sup>43</sup> If one partner thinks that the penalties for breaching the contract will not be enforced, the incentives to uphold its obligations decrease. Because of the grey area of enforceability, China is able to exercise indirect influence over its partners by saying that MOUs are nonbinding while simultaneously attaching them to other legally binding agreements through the quotation of existing and legally binding bilateral investment treaties

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39. Vienna Convention on the Law of Treaties art. 1(a), Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679.

40. *See id.* art. 26.

41. The VCLT’s consistent reference in several provisions to the maintenance of a treaty’s original object and purpose support that it is an important element of consideration when analysing treaty obligations. *See id.* arts. 18–20, 31, 33, 41, 58. This concept is mirrored in other conventions as well. *See, e.g.*, Vienna Convention on Succession of States in respect of Treaties arts. 15, 17–19, 27, 30–37, Nov. 6, 1996, 1946 U.N.T.S. 3, 17 I.L.M. 1488.

42. *See* China–Latvia MOU, *supra* note 34, pt. IV.

43. International contracting parties’ views of their own obligations can shift based on what consequences they will face if the agreement’s terms are violated. Unlike in the domestic context, the international contracts realm maintains very different consequences for contractual violations. Professors Guzman and Meyer explain that “[m]oney damages are rarely paid from one party to the other in response to a violation. In fact, violations are often not compensated through any direct mechanism. In those instances where some compensation exists, it is almost never a zero-sum transfer comparable to money damages.” Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, J. LEGAL ANALYSIS, 171, 192–93 (2010).

and other trade agreements.<sup>44</sup> Such interpretative methods thus demonstrate China's desire to exercise influence over its partners indirectly.<sup>45</sup>

International law practitioner Chris Devonshire-Ellis<sup>46</sup> examined several MOUs signed between China and BRI partners. His study identified that clauses regarding implied support for both Chinese-owned and Chinese government-funded bodies show that where provisions favor a single country's unilateral preference, such provisions tend to benefit China and Chinese institutions rather than the other party signatory.<sup>47</sup> It is natural and unsurprising that a country would want to negotiate more favorable terms for itself in an international agreement. The magnitude of the result of these China-friendly provisions, however, seems alarming. As referenced in the Introduction and expounded upon in the following Part, China has managed to obtain formidable collateral (like a ninety-nine-year lease to build a military base) from its partners, while other loans, such as those for resource-development infrastructure, have been tied to rights for a share of resource production.<sup>48</sup> China is not alone in its infrastructural- and resource-investment efforts in African countries;<sup>49</sup> it is the extent of these agreements that is cause for concern. For example, the loans for resource-development projects are often resource-backed loans, meaning the loan is guaranteed by, and repayment includes, a share of the resource production.<sup>50</sup> Furthermore, such loans typically include agreements to contract all

44. See Devonshire-Ellis, *supra* note 37.

45. See *id.*

46. See *Chris Devonshire-Ellis*, DEZAN SHIRA & ASSOC., <https://www.dezshira.com/personnel/chris-devonshire-ellis.html> (last visited Feb. 19, 2020) [<https://perma.cc/AR35-2HDU>] (archived July 20, 2020) (producing Mr. Devonshire-Ellis's biography).

47. See Devonshire-Ellis, *supra* note 37.

48. See THRALL, *supra* note 19, at 41–42 (discussing loans with rights to resources as collateral); Damon & Swails, *supra* note 11 (noting that Sri Lanka gave China a 99-year lease to the Hambantota Port after Sri Lanka defaulted on its loan); Manek, *supra* note 17.

49. According to UNCTAD's World Investment Report 2019: Special Economic Zones, the top five countries contributing to foreign direct investment in Africa in 2017 were France, the Netherlands, the United States, the United Kingdom, and China. See UNCTAD Report 2019, *supra* note 17, at 34 (displaying data on foreign investor economies in Africa).

50. See THRALL, *supra* note 19, at 41–42 (giving an overview of resource-backed loans and how China uses them); Brahma Chellaney, *China's Debt-Trap Diplomacy*, PROJECT SYNDICATE (Jan. 23, 2017), <https://www.project-syndicate.org/commentary/china-one-belt-one-road-loans-debt-by-brahma-chellaney-2017-01> [<https://perma.cc/YP2L-YWRK>] (archived July 20, 2020) (“[T]he projects that China is supporting are often intended. . .to facilitate Chinese access to natural resources, or to open the market for its low-cost and shoddy export goods. In many cases, China even sends its own construction workers, minimizing the number of local jobs that are created.”).

or part of the project with Chinese firms and to use Chinese firms to source materials and labor.<sup>51</sup>

The typical result of China's MOU structure is an asymmetric legal relationship between one politically and economically weak nation and a more dominant one. Such a relationship leads to the negative effects discussed in the following Part.

### B. *The (Negative) Effects of the Belt and Road Initiative*

The BRI leaves quite a wake in its path. Though the BRI has been successful in many of its infrastructural projects, these projects have high costs extending past just the economic ones. This Part gives a brief overview of areas of concern resulting from some of China's partnerships under the banner of the BRI, including human rights abuses, international security threats, potentially obstructed access to justice, and detrimental environmental impacts.

#### 1. Human Rights Abuses

A significant concern arising out of the BRI is the exportation of human rights abuses. One of the clearest examples is in Xinjiang, Kazakhstan. Since the 2013 announcement that laid the groundwork for the BRI, the Xinjiang authorities have been implementing "reeducation" programs and anti-Islamic programming targeted against minority groups like Xinjiang's Turkic-speaking Muslims, the Uighurs, with support from the Chinese government.<sup>52</sup> Xinjiang is a key element for the BRI because it historically served as a point of entry to Eurasia.<sup>53</sup> Some experts like Sean Roberts suggest that Xinjiang's geopolitical position is a strong motive for China to seek and maintain control in the region.<sup>54</sup> As Roberts explains:

The intention to make Xinjiang a central part of BRI created a new urgency in the CCP to prevent further Uighur dissent in the region. In many ways, what we

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51. See THRALL, *supra* note 19, at 41–42.

52. See Hilary Hurd, *China's Human Rights Abuses Against Uighurs in Xinjiang*, LAWFARE (Oct. 9, 2018), <https://www.lawfareblog.com/chinas-human-rights-abuses-against-uighurs-xinjiang#> [<https://perma.cc/92TZ-KREK>] (archived July 20, 2020).

53. *E.g.*, Shabir Hashmi, *Xinjiang at the heart of Belt, Road*, CHINA DAILY (Sept. 2, 2019), <http://global.chinadaily.com.cn/a/201909/02/WS5d6c84d0a310cf3e355692ce.html> [<https://perma.cc/GUR3-DQTA>] (archived July 20, 2020) ("Historically, Xinjiang has been the center of economic activities and the hub of connectivity between China, Afghanistan, India, Kazakhstan, Kyrgyzstan, Russia and Pakistan. In the past, 80 percent of Chinese trade was done through Xinjiang.")

54. Asim Kashgarian & Rikar Hussein, *China's Plan in Xinjiang Seen as Key Factor in Uighur Crackdown*, VOICE AM. (Dec. 22, 2019), <https://www.voanews.com/extremism-watch/chinas-plan-xinjiang-seen-key-factor-uighur-crackdown> [<https://perma.cc/Z48H-URAS>] (archived July 20, 2020).

are seeing today is an attempt to entirely eliminate any possible Uighur dissent to the transformation of their homeland that the BRI will inevitably facilitate.<sup>55</sup>

Leaked Chinese government documents, satellite images, and former detainees are evidence that these camps exist and continue to violate Uighur citizens' human rights, despite many Chinese officials maintaining that these camps are just schools to "combat 'terrorism and religious extremism'" and "fake news."<sup>56</sup> But technology's role with regard to Uighur imprisonment does not start and end there. In July 2020, researchers at a mobile security firm found that Chinese efforts to hack and track Uighurs extended back to 2013.<sup>57</sup> "The timeline suggests the hacking campaign was an early cornerstone in China's Uighur surveillance efforts that would later extend to collecting blood samples, voice prints, facial scans, and other personal data to transform Xinjiang into a virtual police state."<sup>58</sup>

China is not the only country seeking to use technology to control people. China has also been selling its surveillance technology to Belt and Road partners who are using—and abusing—these systems.<sup>59</sup> But China is not just providing other countries with technology; it is also promoting digital authoritarianism by educating governments on how to monitor and influence their people.<sup>60</sup> A 2018 study on digital authoritarianism found that at least eighteen countries (including BRI partners like Rwanda and Venezuela) were reportedly using Chinese-made surveillance systems and at least thirty-eight countries had

55. *Id.*

56. John Sudworth, *China's Hidden Camps*, BBC, [https://www.bbc.co.uk/news/resources/idx-sh/China\\_hidden\\_camps](https://www.bbc.co.uk/news/resources/idx-sh/China_hidden_camps) (last visited May 30, 2020) [<https://perma.cc/S9XD-4UL5>] (archived July 20, 2020); Ivan Watson & Ben Westcott, *China's Xinjiang's Camps: Leaked Chinese Government Records Reveal Detailed Surveillance Reports on Uyghur Families and Beijing's Justification for Mass Detentions*, CNN (Feb. 2020), <https://www.cnn.com/interactive/2020/02/asia/xinjiang-china-karakax-document-intl-hnk/> [<https://perma.cc/PW25-S7HS>] (archived July 20, 2020).

57. See Paul Mozur & Nicole Perlroth, *China's Software Stalked Uighurs Earlier and More Widely, Researchers Learn*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/technology/china-ughurs-hackers-malware-hackers-smartphones.html> [<https://perma.cc/X2HL-6WT5>] (archived July 20, 2020).

58. *Id.* The Chinese government's desire to track and control Uighurs is highlighted by the fact that the malware was not limited to targeting those who stayed in China, but also those who chose to flee. See *id.*

59. Paul Mozur, Jonah M. Kessel & Melissa Chan, *Made in China, Exported to the World: The Surveillance State*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/technology/ecuador-surveillance-cameras-police-government.html> [<https://perma.cc/V8LB-H4A5>] (archived July 20, 2020).

60. As Shahbaz explains, "Digital authoritarianism is being promoted as a way for governments to control their citizens through technology, inverting the concept of the internet as an engine of human liberation." ADRIAN SHAHBAZ, *THE RISE OF DIGITAL AUTHORITARIANISM* 2 (Tyler Roylance ed., 2018), [https://freedomhouse.org/sites/default/files/10192018\\_FINAL\\_FOTN\\_2018.pdf](https://freedomhouse.org/sites/default/files/10192018_FINAL_FOTN_2018.pdf) [<https://perma.cc/6464-HAFS>] (archived July 20, 2020).

telecom infrastructure installed by Chinese companies.<sup>61</sup> Furthermore, at least thirty-six countries have received instruction on topics supporting the Chinese vision of media, including censorship recharacterized as public opinion guidance.<sup>62</sup> There is a significant lack of transparency in the content of these training seminars, but the effects have been very public. One year after Vietnamese officials received training on cybersecurity from China in April 2017, Vietnam introduced its own cybersecurity law that closely mirrored that of China.<sup>63</sup> Moreover, “[i]ncreased activity by Chinese companies and officials in Africa similarly preceded the passage of restrictive cybercrime and media laws in Uganda and Tanzania over the past year.”<sup>64</sup> By selling this technology and educating other nations on its own practices, China is reinforcing and spreading the ability for governments to perpetrate human rights abuses in the technological age.

China is currently party to many international conventions on human rights, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, ratified by China in 1980); the International Convention on the Elimination of All Forms of Racial Discrimination (ratified by China in 1981); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, ratified by China in 1988); the International Covenant on Civil and Political Rights (ICCPR, signed in 1967 but still not ratified by China); and the International Covenant on Economic, Social and Cultural Rights (ICESCR, ratified by China in 2001).<sup>65</sup>

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61. *Id.* at 9–10. Note that while not all of the firms assisting these nations are state-owned enterprises, private Chinese firms are still “beholden to the government and its strategic goals.” *Id.* Part of the significance of Chinese company involvement in the telecom infrastructure of other countries is that “[a]s more of the world’s critical telecommunications infrastructure is built by China, global data may become more accessible to Chinese intelligence agencies.” *Id.* at 11.

62. *Id.* at 9; *see also* Mozur, Kessel & Chan, *supra* note 59 (describing “public opinion guidance” as a euphemism for censorship). Consider also that creating such relationships with technology has allowed China to further grow its BRI influence—China and Myanmar were not BRI partners at the time of Shahbaz’s survey, but the countries finally inked some BRI agreements earlier this year. *See* John Reed, *China and Myanmar Sign Off on Belt and Road Projects*, FIN. TIMES (Jan. 18, 2020), <https://www.ft.com/content/a5265114-39d1-11ea-a01a-bae547046735> [https://perma.cc/B9JQ-LK5J] (archived Sept. 28, 2020).

63. SHAHBAZ, *supra* note 60, at 9.

64. *Id.*

65. *See* Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]. It is also interesting to

Supporting such detention and reeducation programs, while spreading authoritarian principles, likely violates those international agreements.<sup>66</sup> Some scholars, like Margaret Lewis, argue that the international community needs to expressly renounce China's human rights violations and protect the integrity of human rights agreements; Lewis specifically calls for China to remove its signature from the ICCPR.<sup>67</sup> This particular view may raise the concerns that such actions would isolate China further and that a response from the UN Human Rights Council would serve as a better deterrent. As later discussed in Part III of this Note, such a response is highly unlikely given China's position on the council.<sup>68</sup>

Furthermore, as BRI projects are implemented, adequate analysis of the impact of these projects on human rights issues is lacking.<sup>69</sup> Human Rights Watch suggests that the Chinese government enables meaningful consultations with groups affected by BRI projects to allow them to express their concerns openly and safely.<sup>70</sup> Both the lack of disclosure of projects' anticipated social and environmental impacts and the lack of consultation with affected communities "are inconsistent with basic obligations of states under international human rights law."<sup>71</sup> Human rights issues connected to BRI projects have also arisen and yet been ignored in Pakistan, Myanmar, and Sri Lanka.<sup>72</sup>

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note that of the examples of Memorandums of Understanding found in the process of researching for this Note (Latvia, Italy, Australia, Cook Islands, Czech Republic, Canada, and Bosnia and Herzegovina), none have made references to any of these human rights treaties, let alone affirming future support for protection of human rights in future projects. See China-Australia MOU, *supra* note 34; China-Bosnia and Herzegovina MOU, *supra* note 34; China-Canada MOU, *supra* note 34; China-Cook Islands MOU, *supra* note 34; China-Czech Republic MOU, *supra* note 34; China-Italy MOU, *supra* note 34; China-Latvia MOU, *supra* note 34.

66. See Hurd, *supra* note 52 (discussing China's human rights abuses and their relation to international human rights law).

67. Margaret K. Lewis, *Why China Should Unsign the International Covenant on Civil and Political Rights*, 53 VAND. J. TRANSNAT'L L. 131, 132 (2020); see also Annie Hsu, *Should China Unsign the the International Covenant on Civil and Political Rights?*, PENN ARTS & SCI. CTR. FOR STUD. CONTEMP. CHINA (Sept. 30, 2019), <https://cscs.sas.upenn.edu/node/3578> [<https://perma.cc/H2KZ-ESUW>] (archived July 20, 2020) (discussing Professor Lewis's argument that China should unsign the ICCPR).

68. See discussion *infra* Part III.A.1 and accompanying notes.

69. China: 'Belt and Road' Projects Should Respect Rights, HUM. RTS. WATCH (Apr. 21, 2019, 8:00 PM), <https://www.hrw.org/news/2019/04/21/china-belt-and-road-projects-should-respect-rights> [hereinafter China: "Belt and Road" Projects].

70. *Id.*

71. *Id.*

72. See, e.g., *id.* (discussing some of the human rights concerns arising from China's BRI activities in these countries).



## 2. International Security Threats

The United States' international security concerns are ever-increasing as Russia and China work to expand their unilateral influence around the world through military advancements and relationship building.<sup>73</sup> Over the last three decades, Africa has become one of the fastest-growing regions of the world.<sup>74</sup> But this growth has been neither easy nor consistent. Strong but volatile economic growth has failed to translate into either effective alleviation of poverty or progressive decreases in the rate of vulnerable employment.<sup>75</sup> This has rendered African nations susceptible, some argue, to debt-trap diplomacy.<sup>76</sup> Part I of this Note introduced the example from Djibouti. In 2017, China opened its first overseas military base in the Republic of Djibouti with a ninety-nine-year lease after Djibouti defaulted on its loan.<sup>77</sup> The significance of this port is underscored by Djibouti's

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73. See, e.g., Linus Unah, *Is the US Making Moves to Counter Chinese and Russian Influence in Africa?*, TRT WORLD (Jan. 10, 2019), <https://www.trtworld.com/magazine/is-the-us-making-moves-to-counter-chinese-and-russian-influence-in-africa-23242> [<https://perma.cc/L9CR-T3U4>] (archived July 20, 2020). For information on the international arms sales portion of the Belt and Road Initiative, see James Daniel, *China's One Belt, One Road Initiative and Its International Arms Sales*, Sept.–Oct. 2019 MIL. REV. 96.

74. See generally AFRICAN UNION COMM'N OF THE ORG. FOR ECON. CO-OPERATION AND DEV., *AFRICA'S DEVELOPMENT AND DYNAMICS: GROWTH, JOBS AND INEQUALITIES* (2018) (reporting research on economic development across the African Union).

75. See *id.* at 34–35. The International Labour Organization defines workers in vulnerable employment “as the sum of own-account workers and contributing family workers. They are less likely to have formal work arrangements, and are therefore more likely to lack decent working conditions, adequate social security and ‘voice’ through effective representation by trade unions and similar organizations. Vulnerable employment is often characterized by inadequate earnings, low productivity and difficult conditions of work that undermine workers’ fundamental rights.” Int'l Labour Org. [ILO], *Vulnerable Employment and Poverty on the Rise, Interview with ILO Chief of Employment Trends Unit*, (Jan. 26, 2010), [https://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS\\_120470/lang-en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_120470/lang-en/index.htm) [permalink].

76. See Chellaney, *supra* note 50 (“[T]he projects that China is supporting are often intended not to support the local economy, but to facilitate Chinese access to natural resources, or to open the market for its low-cost and shoddy export goods. In many cases, China even sends its own construction workers, minimizing the number of local jobs that are created.”). Compare Mark Green, *China's Debt Diplomacy*, FOREIGN POL'Y (Apr. 25, 2019), <https://foreignpolicy.com/2019/04/25/chinas-debt-diplomacy/> [<https://perma.cc/PU6E-NZHB>] (archived July 20, 2020) (describing how China's practices have derailed developing nations' progress towards sustainable financial management), with Ben Doherty, *Experts Dispel Claims of China Debt-Trap Diplomacy in Pacific but Risks Remain*, GUARDIAN (Oct. 20, 2019), <https://www.theguardian.com/world/2019/oct/21/chinese-loans-expose-pacific-islands-to-risk-of-unsustainable-debt-report-finds> [<https://perma.cc/WHU2-25XV>] (archived Aug. 23, 2020) (“China has not engaged in deliberate “debt-trap diplomacy” in the Pacific, [though] the burgeoning scale of China's lending, and institutional weakness within Pacific states, pose clear risks for small states being overwhelmed by debt. . .”).

77. Damon & Swails, *supra* note 11; see also *supra* notes 15–20 and accompanying text.

geographic location and the fact that the port is only fifteen minutes away from an American base.<sup>78</sup> Djibouti is not only host to the United States and China, but also Spain, France, Japan, Italy, and soon Saudi Arabia.<sup>79</sup> International security, however, is not limited to military matters.

Developments on the Digital Silk Road underscore further concerns regarding the BRI as a threat to political freedom.<sup>80</sup> The Digital Silk Road is a subproject of the BRI, focusing specifically on building internet infrastructure.<sup>81</sup> June Teufel Dreyer, a Senior Fellow in the Asia Program at the Foreign Policy Research Institute, raised concerns about the partnership between Venezuelan President Nicolas Maduro's government with Chinese telecommunications company ZTE to develop a *carnet de la patria* system.<sup>82</sup> Such a system would create a national database tracking citizens' payments for medicine, pensions, and food.<sup>83</sup> That ZTE is a state-owned enterprise means that the Chinese government implicitly approves of President Maduro's surveillance of the Venezuelan people. This technology, Dreyer puts forth, is an infringement of privacy and will "enable the government to keep track of dissidents and quash dissenting views."<sup>84</sup> Thus, the security issues extending from Belt and Road projects are particularly relevant for both states and individuals.

Others point out that these types of developments may give China the leverage to push countries towards more authoritarian political systems.<sup>85</sup> Tin Hinane El Kadi, Associate Fellow at Chatham House,

78. See Damon & Swails, *supra* note 11.

79. See Manek, *supra* note 17 ("China is hardly the only country with a military presence in Djibouti. The U.S. Africa Command is headquartered at Camp Lemonnier, a naval expeditionary facility that's the only permanent American base in Africa. The Japanese, Italians, and Spanish are also here. The Saudis are planning a base. France has had a foothold since at least 1894; what is now Djibouti was French Somaliland, a colony, until 1977.")

80. See Stewart M. Patrick & Ashley Feng, *Belt and Router: China Aims for Tighter Internet Controls with Digital Silk Road*, COUNCIL ON FOREIGN REL.: INTERNATIONALIST (July 2, 2018), <https://www.cfr.org/blog/belt-and-router-china-aims-tighter-internet-controls-digital-silk-road> [<https://perma.cc/EEE8-4RTM>] (archived July 20, 2020) (discussing the implications of China's plans for the "Digital Silk Road").

81. See Hong Shen, *Building a Digital Silk Road? Situating the Internet in China's Belt and Road Initiative*, 12 INT'L J. COMM. 2683, 2683–2684 (2018); Patrick & Feng, *supra* note 80.

82. June Teufel Dreyer, *The Belt, The Road, and Latin America*, FOREIGN POLY RES. INST. (Jan. 16, 2019), <https://www.fpri.org/article/2019/01/the-belt-the-road-and-latin-america/> [<https://perma.cc/HWM5-ABUC>] (archived July 20, 2020).

83. *Id.*

84. *Id.*

85. See Chris Conrad, *China's Belt and Road Initiative: Boon for Growth or Threat to Civil Liberties?*, INDEP. BLOG (July 18, 2019, 5:13 PM), <https://blog.independent.org/2019/07/18/chinas-belt-and-road-initiative-boon-for-growth-or-threat-to-civil-liberties/> [<https://perma.cc/FR7D-64XK>] (archived July 20, 2020).

points out that these developing relationships and technologies lend themselves well to China's growing ability to shape the world of cyberspace governance.<sup>86</sup> Similar to the discussion of surveillance technology in the previous subpart on human rights abuses, the fact that more and more governments are now looking to China for guidance on how to grow is concerning.<sup>87</sup> "If democracies fail to advance their own principles and interests with equal determination, digital authoritarianism will become an inescapable reality almost by default."<sup>88</sup>

Considering the UN passed the UN Charter to protect international peace and security,<sup>89</sup> the security issues stemming from China's actions in BRI partner countries should be garnering a strong response from the international community. Part III.B explores this issue further.

### 3. Potentially Obstructed Access to Justice

Access to justice through adjudication of BRI-related disputes is a growing cause of concern for the international community. Due to the disputes naturally arising from such a large undertaking, China established the Chinese International Commercial Courts (CICC) in Xian and Shenzhen.<sup>90</sup> The CICC is an outgrowth of the Chinese court system; therefore, unlike other international courts, the current collection of judges are all Chinese nationals serving as judges of the Supreme People's Court of China.<sup>91</sup> Generally speaking, jurisdiction can be conferred in agreements; for example, the agreement terms regarding the construction of the Montenegro highway to connect the Adriatic coast to Montenegro's landlocked neighbor Serbia indicate that any legal issues arising under the project fall within the

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86. Tin Hinane El Kadi, *The Promise and Peril of the Digital Silk Road*, CHATHAM HOUSE (June 6, 2019), <https://www.chathamhouse.org/expert/comment/promise-and-peril-digital-silk-road> [https://perma.cc/7J2U-Z8DA] (archived July 20, 2020). The Xian court will handle cases relating to the land "Belt" while the Shenzhen court will handle disputes arising along the maritime "Road." See Jonathan E. Hillman & Matthew P. Goodman, *All Rise? Belt and Road Court is in Session*, CTR. FOR STRATEGIC & INT'L STUD. (July 26, 2018), <https://www.csis.org/analysis/all-rise-belt-and-road-court-session> [https://perma.cc/Q2YT-95GA] (archived July 20, 2020).

87. See *supra* notes 59–63 and accompanying text.

88. SHAHBAZ, *supra* note 60, at 11.

89. U.N. Charter art. 1, ¶ 1 ("The Purposes of the United Nations are: To maintain international peace and security . . .").

90. See Nicholas Lingard, John Choong, Robert Kirkness, Kate Apostolova & Xin Liu, *China Establishes International Commercial Courts to Handle Belt and Road Initiative Disputes*, FRESHFIELDS BRUCKHAUS DERINGER, LLP, *reposted on OXFORD BUS. L. BLOG* (Aug. 17, 2018), <https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/china-establishes-international-commercial-courts-handle-belt-and> [https://perma.cc/PEC4-8D2X] (archived July 20, 2020).

91. See *id.* (describing the main functions and features of the CICC).

jurisdiction of these Chinese arbitration courts.<sup>92</sup> However, the CICC has several prerequisites to accept cases.<sup>93</sup>

Furthermore, proceedings must be conducted in Mandarin and parties to a dispute may only be represented by Chinese-qualified lawyers.<sup>94</sup> In a survey of legal professionals, judges, and academics following the announcement of the CICC, many expressed concerns regarding the need for clear-cut procedural rules, uncertainty regarding the functionality of a one-stop dispute-resolution mechanism, and the finality of mediated settlements and arbitral awards.<sup>95</sup> With the first batch of cases received, speculation continues regarding whether the CICC can gain international legitimacy and provide special value for parties.<sup>96</sup>

Overall, however, these concerns for a specifically Chinese/BRI court system are similar to those raised when considering the difficulties arising under arbitration as an alternative form of dispute resolution. When examining avenues for dispute resolution, one may

92. See, e.g., Noah Barkin & Aleksandar Vasovic, *Chinese 'Highway to Nowhere' Haunts Montenegro*, REUTERS (July 16, 2018), <https://www.reuters.com/article/us-china-silkroad-europe-montenegro-insi/chinese-highway-to-nowhere-haunts-montenegro-idUSKBN1K60QX> [<https://perma.cc/8VTA-GFCU>] (archived July 20, 2020).

93. According to the court's documents, such prerequisites include:

(1) First instance international commercial cases in which the parties have chosen the jurisdiction of the Supreme People's Court according to Article 34 of the Civil Procedure Law, with an amount in dispute of at least 300,000,000 Chinese yuan;

(2) First instance international commercial cases which are subject to the jurisdiction of the higher people's courts who nonetheless consider that the cases should be tried by the Supreme People's Court for which permission has been obtained;

(3) First instance international commercial cases that have a nationwide significant impact;

(4) Cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards according to Article 14 of these Provisions; and

(5) Other international commercial cases that the Supreme People's Court considers appropriate to be tried by the International Commercial Court.

Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court art. 2 (June 27, 2018), <http://cicc.court.gov.cn/html/1/219/199/201/817.html> [<https://perma.cc/733J-XGQR>] (archived July 20, 2020). Note also that as of January 11, 2020, CNY 300 million converts to over USD 43.3 million.

94. See Lingard, Choong, Kirkness, Apostolova & Liu, *supra* note 90.

95. See Zihao Zhou, Nathan Harpainter & Yuan Emily Cao, *Survey Results: Rules on China's International Commercial Court*, 3 CHINA L. CONNECT 21, 23–25.

96. See Matthew S. Erie, *Update on the China International Commercial Court*, OPINIOJURIS (May 13, 2019), <http://opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court> [<https://perma.cc/JHB4-CK96>] (archived July 20, 2020) (“Among seasoned lawyers in China, there is scepticism towards the CICC as to whether it can gain international legitimacy and also provide dispute resolution services that are otherwise unmet by existing options for international commercial arbitration.”).

think of arbitration as a strong alternative to going to the courts. In considering challenges for arbitration of BRI-related disputes, Patrick Norton identified that neutral venues and administering institutions for arbitrations are crucial to combat the doubts inherent in the use of regular Chinese court systems.<sup>97</sup> Such neutrality is vital for proper resolution of these disputes as “[b]y definition . . . Chinese venues and Chinese arbitral institutions will not be ‘neutral’ for BRI-related disputes.”<sup>98</sup> Others may argue, however, that Chinese venues and arbitral institutions would be appropriate given that the BRI projects are generally funded by Chinese institutions.<sup>99</sup> Given that the Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre have risen to a certain level of prominence in the international arbitral community, either could be selected for their global proximity over other leading arbitral institutions.<sup>100</sup> Notably, however, the leading institutions have increased their Asian presence because of the increasing number of cases in the region,<sup>101</sup> so the argument over Chinese venues and institutions being the most appropriate may be moot. Taking into account that China has been moving towards a less restrictive reciprocity system for foreign judgment recognition and enforcement,<sup>102</sup> the CICC may not offer as much value as proponents anticipate. However, the value of the CICC remains to be seen as the first few cases proceed.

#### 4. Detrimental Environmental Impacts

Another rights-based issue rarely touched on is the BRI's environmental effect outside of the energy context.<sup>103</sup> While China's recent efforts to lead the way towards renewable energy have been well-lauded,<sup>104</sup> the dangers of ecological damage have been ignored.

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97. Norton, *supra* note 28, at 93.

98. *Id.*

99. *Id.*

100. Such institutions include the London Court of International Arbitration (“LCIA”), International Chamber of Commerce (“ICC”) and the International Center for Dispute Resolution (“ICDR”). *Id.* at 73–74.

101. *Id.* at 91–92.

102. See Jie Huang, *Enforcing Foreign Monetary Judgments in China: Breakthroughs, Challenges, and Solutions in the Context of “One Belt One Road”*, 51 GEO. WASH. INT'L L. REV. 105, 105–06 (2019).

103. See John Mathews & Hao Tan, *China's New Silk Road: Is It Black or Green?*, ENERGYPOST.EU (Apr. 24, 2017), <https://energypost.eu/chinas-new-silk-road-will-it-contribute-to-export-of-the-black-fossil-fueled-economy/> [<https://perma.cc/2FRZ-FT9K>] (archived July 20, 2020).

104. See, e.g., Christopher Mahoney, Note, *The Geopolitical Implications of the United States of America's Withdrawal from the Paris Agreement*, 2 CARDOZO J. INT'L & COMP. L. 282, 308–15 (2018); Daniel Araya, *China's Belt and Road Initiative Is Poised To Transform the Clean Energy Industry*, BROOKINGS INST. (Nov. 27, 2018),

Analysis by the WWF (formerly known as the World Wildlife Fund) found that BRI corridors had significant overlap with environmentally sensitive areas.<sup>105</sup> Although the WWF's analysis is from 2017,<sup>106</sup> further expansion of the BRI into Africa and South America increases the likelihood that the number of sensitive environments in BRI corridors is much higher today.

China signed a Memorandum of Understanding with the UN Development Program (UNDP) in September 2016, pledging to operate in accordance with the Sustainable Development Goals.<sup>107</sup> However, whether China has paid close attention to environmental reports, in general, is questionable. Consider the Coca Codo Sinclair Dam in Ecuador, which was built near an active volcano that geologists say could destroy the dam.<sup>108</sup> Although the dam is currently still standing, it is a concern that a Chinese diplomat admitted that the dam was built near the volcano because the officials in charge "didn't give sufficient

<https://www.brookings.edu/blog/techtank/2018/11/27/chinas-belt-and-road-initiative-is-poised-to-transform-the-clean-energy-industry/> [<https://perma.cc/9VYH-72QJ>] (archived July 20, 2020) (describing the BRI's potential to greatly expand China's use of clean energy).

105. *WWF and Greening the Belt and Road*, WWF H.K., (Nov. 2, 2017), <https://www.wwf.org.hk/en/?19680/Feature-Story-WWF-and-Greening-the-Belt-and-Road-Initiative> [<https://perma.cc/KUR6-EAFJ>] (archived July 20, 2020) [hereinafter *WWF and Greening the Belt and Road*]. The Belt and Road corridors are geographic areas targeted for economic development. See Hans-Peter Brunner, *What is Economic Corridor Development and What Can It Achieve in Asia's Subregions?* 1 (Asian Dev. Bank, Working Paper No. 117, 2013). There are six land-based corridors: the New Eurasian Land Bridge, the China–Pakistan Economic Corridor, the China–Mongolia–Russia Economic Corridor, the Bangladesh–China–India–Myanmar Economic Corridor, the China–Indochina Peninsula Economic Corridor, and the China–Central Asia–West Asia Economic Corridor. *BELT AND ROAD ECONOMICS: OPPORTUNITIES AND RISKS OF TRANSPORT CORRIDORS*, World Bank Grp., 3 (2019), <https://openknowledge.worldbank.org/bitstream/handle/10986/31878/9781464813924.pdf> [<https://perma.cc/8SQ4-YC2D>] (archived July 20, 2020).

106. See *WWF and Greening the Belt and Road*, *supra* note 105.

107. See *UNDP and China to Cooperate on Belt and Road Initiative*, U.N. DEV. PROGRAMME (Sept. 19, 2016), <https://www.undp.org/content/undp/en/home/presscenter/pressreleases/2016/09/19/undp-and-china-to-cooperate-on-belt-and-road-initiative.html> [<https://perma.cc/3RBD-HHYD>] (archived July 20, 2020) (reporting the signing of the MOU).

108. Out of eight hydroelectric projects in Ecuador by 2018, Chinese institutions financed six, including Coca Codo. María C. Vallejo, Betty Espinosa, Francisco Venes, Víctor López & Susana Anda, *Evading sustainable development standards: Case studies on hydroelectric projects in Ecuador 2* (B.U. Glob. Dev. Pol'y Ctr., Working Paper 019, 2018). Although the work on this project began before the formal announcement of the Belt and Road Initiative, the project ultimately came under the BRI umbrella. See DANIEL KLIMAN, RUSH DOSHI, KRISTINE LEE & ZACK COOPER, *GRADING CHINA'S BELT AND ROAD* 7–8, 10 (2019), [https://www.wita.org/wp-content/uploads/2019/04/CNASReport\\_ChinaBeltandRoad\\_final.pdf](https://www.wita.org/wp-content/uploads/2019/04/CNASReport_ChinaBeltandRoad_final.pdf) [<https://perma.cc/GGF5-RJTR>] (archived July 20, 2020) (referring to the Coca Codo Dam project as part of the Belt and Road Initiative).

attention to the environmental reporting.”<sup>109</sup> The project proceeded despite early opposition from community leaders,<sup>110</sup> warnings from several Ecuadoran officials, and an independent report by a Mexican government agency in 2010 indicating a high level of risk and the need for a new study to assess the surrounding circumstances.<sup>111</sup> Furthermore, because of inadequate safety measures throughout the course of the project, one hundred people died, one million people were ultimately displaced, and forests were destroyed.<sup>112</sup>

Because of the damage inflicted in Ecuador, one may wonder if greater attention was given to significant environmental concerns in later projects like those in Pakistan and Myanmar. In Pakistan, the answer to that question is a resounding “no” with respect to the East Bay Expressway project.<sup>113</sup> Despite assurances from Pakistani Prime Minister Imran Khan regarding inclusive consideration coupled with significant local protest, the highway project proceeded without addressing local fishermen’s concerns on the lack of transparency and without any form of impact analysis on locals’ livelihoods.<sup>114</sup> When project leaders actively choose to ignore the environmental impacts of the BRI projects, the consequences can affect both the environment and local residents. Part III.B briefly explores the international legal implications of ignoring local peoples and the potential environmental impacts of infrastructure projects.

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109. Nicholas Casey & Clifford Krauss, *It Doesn't Matter if Ecuador Can't Afford This Dam. China Still Gets Paid.*, N.Y. TIMES (Dec. 24, 2018), <https://www.nytimes.com/2018/12/24/world/americas/ecuador-china-dam.html> [<https://perma.cc/B4LN-48Q3>] (archived July 20, 2020).

110. Max Nathanson, *Damming or Damning the Amazon: Assessing Ecuador / China Cooperation*, MONGABAY (Nov. 22, 2017), <https://news.mongabay.com/2017/11/damming-or-damning-the-amazon-assessing-ecuador-china-cooperation/> [<https://perma.cc/LJB3-NZDG>] (archived July 20, 2020) (“[L]ocal communities surrounding the CCS construction site were opposed to it during the planning period, but were too small to challenge the power of the Correa Administration, which approved the environmental impact assessment for the CELEC Coca Codo Sinclair project through its Environment Ministry. ‘It would have been David versus Goliath,’ said the leader.”).

111. Casey & Krauss, *supra* note 109 (“Despite the advice, Luciano Cepeda, the dam’s former general manager, said top Ecuadorean officials pressed ahead anyway because “a new study would have taken several years” and they didn’t want to slow down.”). Anticipated environmental effects of the project according to an independent analysis of the dam’s environmental impact assessment included “deforestation; improper waste removal impacting domestic water supplies; changes in subterranean runoff; fluctuations in water flows, sediment levels, and flood patterns; and threats to flora and fauna in the surrounding Cayambe-Coca National Park and Sumaco Natural Reserve.” Nathanson, *supra* note 110.

112. Casey & Krauss, *supra* note 109.

113. See, e.g., China: “Belt and Road” Projects, *supra* note 69.

114. See *id.*

### III. THE POWER OF WORDS AND THE REACTIONS OF THE INTERNATIONAL COMMUNITY

Since the beginning of the BRI, the business world has been alight with enthusiasm for new investment opportunities.<sup>115</sup> Conversely, many legal scholars and news reporters have focused on the “evils” of China’s increased global participation, but much of their attention is misplaced. Concerns about the direct impacts of predatory agreements and the general increase in human rights violations are valid, but they are only one part of the greater picture of the growing Chinese soft power.

If others refuse to address the unfettered growth of China’s influence throughout the world, the current negative effects of the BRI discussed in the previous Part will likely increase in magnitude and scope. This Part of the Note offers a unique in-depth analysis of resolutions and consequences that remain largely ignored by the international community. Specifically, this Part explores how increased participation in international human rights dialogue and advocacy for particular language—what may seem like ancillary actions to the BRI—contribute to maintaining and increasing China’s global influence. This Part then discusses why the current lack of a strong, unified global response to adequately address the threats posed by China’s actions is troubling.

#### A. China’s Actions at the Human Rights Council and Security Council

##### 1. United Nations Human Rights Council

China’s increasing participation in the international human rights dialogue has garnered interest from both advocates and critics of China. Advocates may argue that this is a good sign for China, signaling to the international community that China understands other states’ concerns and that it is working to join the international agenda of promoting human rights.<sup>116</sup> Critics answer that instead of

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115. See, e.g., *Repaving the Ancient Silk Routes*, PWC GROWTH MKTS. CTR., (2017), <https://www.pwc.com/gx/en/growth-markets-centre/assets/pdf/pwc-gmc-repaving-the-ancient-silk-routes-web-full.pdf> [https://perma.cc/87VX-A8P9] (archived July 20, 2020) (discussing the BRI and its potential economic impact on business); Jonathan Bench, *How Your Company Can Benefit from China’s Belt and Road Initiative, Part 1*, CHINA L. BLOG (Sept. 10, 2019), <https://www.chinalawblog.com/2019/09/how-your-company-can-benefit-from-chinas-belt-and-road-initiative-part-1.html> [https://perma.cc/3KMC-5E9L] (archived July 20, 2020) (assessing business strategies based on the implications of the BRI).

116. See International Law Programme Roundtable, *Exploring Public International Law Issues with Chinese Scholars – Part 4*, CHATHAM HOUSE (June 2–3, 2018), <https://www.chathamhouse.org/sites/default/files/publications/research/2018-06-02-Roundtable4-summary.pdf> [https://perma.cc/FK68-UHCE] (archived July 20, 2020).



altering its own policies to promote human rights, China is working to alter the international community's perceptions and definitions of human rights in order to give itself more leeway for its policies.<sup>117</sup> Either way, both sides seem to agree that China has a significant ability to affect international human rights, whether positively or negatively.

Throughout the past few years, concerns<sup>118</sup> regarding how China would use its increasingly active role on the then-UN Commission on Human Rights and later the UN Human Rights Council<sup>119</sup> have materialized.<sup>120</sup> One of the most prominent concerns was that China would leverage its position to encourage other states to emulate its own human rights practices.<sup>121</sup> China's actions at the Human Rights

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For further optimism regarding expected benefits from the Belt and Road Initiative, see Peter Cai, *Understanding China's Belt and Road Initiative*, LOWY INST. FOR INT'L POL'Y (Mar. 2017) <https://www.lowyinstitute.org/publications/understanding-belt-and-road-initiative> [<https://perma.cc/5QRH-S5S6>] (archived July 20, 2020).

117. See generally Ted Piccone, *China's Long Game on Human Rights at the United Nations*, FOREIGN POL'Y AT BROOKINGS INST. (Sept. 2018), [https://www.brookings.edu/wp-content/uploads/2018/09/FP\\_20181009\\_china\\_human\\_rights.pdf](https://www.brookings.edu/wp-content/uploads/2018/09/FP_20181009_china_human_rights.pdf)

[<https://perma.cc/DWM7-BDE3>] (archived July 20, 2020) (exploring China's growing role on the U.N. Human Rights Council and how this role had led to some States muting their criticism of China's prior actions).

118. See *id.* at 5–6; Miloon Kothari, *China's Trojan Horse Human Rights Resolution*, DIPLOMAT (Mar. 22, 2018), <https://thediplomat.com/2018/03/chinas-trojan-horse-human-rights-resolution/> [<https://perma.cc/4B4N-JNDR>] (archived July 20, 2020) (expressing skepticism about China's intentions to honor human rights resolutions); Sui-Lee Wee & Stephanie Nebehay, *At U.N., China uses intimidation tactics to silence its critics*, REUTERS (Oct. 6, 2015), <https://www.reuters.com/investigates/special-report/china-softpower-rights/> [<https://perma.cc/99A3-96EP>] (archived July 20, 2020) (discussing China's attempts to intimidate other countries in order to suppress individuals who would speak out about its human rights record).

119. From 1946-2006, the Commission on Human Rights served as the United Nation's governing body for human rights. In 2006, the United Nations General Assembly voted to replace the Commission with the current governing body, the Human Rights Council. See G.A. Res. 60/251 (Mar. 15, 2006); Press Release, General Assembly, General Assembly Establishes New Human Rights Council by Vote of 170 in Favour to 4 Against, With 3 Abstentions, U.N. Press Release GA/10449 (Mar. 15, 2006).

120. For a case study of Chinese interventions at the United Nations hindering actions that would promote human rights in China and in other Member States, see *The Costs of International Advocacy*, HUM. RTS. WATCH (Sept. 5, 2017), <https://www.hrw.org/report/2017/09/05/costs-international-advocacy/chinas-interference-united-nations-human-rights> [<https://perma.cc/Z7L9-K68P>] (archived July 20, 2020).

121. See, e.g., Lindsay Maizland, *Is China Undermining Human Rights at the United Nations?*, COUNCIL ON FOREIGN REL. (July 9, 2019), <https://www.cfr.org/in-brief/china-undermining-human-rights-united-nations> [<https://perma.cc/2QUY-LW48>] (archived July 20, 2020); Ryan Mitchell, *Was the UN Human Rights Council Wrong to Back China's "Shared Future" Resolution?*, EJIL: TALK! BLOG OF THE EUR. J. OF INT'L L. (Apr. 10, 2018), <https://www.ejiltalk.org/was-the-un-human-rights-council-wrong-to-back-chinas-shared-future-resolution/> [<https://perma.cc/9U8X-6FYN>] (archived July 20, 2020) ("There has also been considerable criticism [of the March 23, 2018 Human Rights

Council since 2016 indicate that such concerns are significant. A handful of these actions include attempting to delegitimize human rights defenders through the proposal of an amendment to a human rights resolution,<sup>122</sup> weakening state obligations to cooperate with UN Human Rights Council mechanisms,<sup>123</sup> and sponsoring resolutions promoting development<sup>124</sup> and state security<sup>125</sup> over human rights. Of particular relevance to this Note are China's actions to promote development and state security to the detriment of human rights.

In March 2018, the Human Rights Council adopted the resolution entitled "Promoting mutually beneficial cooperation in the field of human rights."<sup>126</sup> The language of the resolution provides support for BRI programs in two ways: (1) by reaffirming the right to development in those realms that we value most: human, civil, political, economic, social and cultural rights<sup>127</sup> and (2) by emphasizing the need for technical assistance<sup>128</sup> and capacity building<sup>129</sup> to promote cooperation

Council resolution] by legal experts and political officials in the West, who have argued that China's resolution is an attempt to indirectly excuse its own rights lapses or to dilute the idea of international monitoring.").

122. Human Rights Council Amend. 31/L.47, U.N. Doc. A/HRC/31/L.47 (Mar. 22, 2016) (recording a failed amendment to replace "human rights defenders" with "individuals, groups and organs of society engaged in promotion and protection of human rights" and "important activities" to "lawful activities").

123. Human Rights Council Amend. 35/L.51, U.N. Doc. A/HRC/36/L.51 (Sept. 26, 2017) (recording a successful amendment removing the affirmation encouraging States to "prevent, investigate and ensure accountability for acts of intimidation or reprisal" against those who choose to cooperate with U.N. human rights procedures).

124. Human Rights Council Res. 35/L.33/Rev.1, U.N. Doc. A/HRC/35/L.33/Rev.1 (June 20, 2017) (recording a successful solo-sponsored resolution underscoring state-to-state cooperation in the context of sustainable and inclusive development).

125. Human Rights Council Res. 37/23, U.N. Doc. A/HRC/37/23 (Mar. 23, 2018) ("Promoting mutually beneficial cooperation in the field of human rights").

126. *Id.*; see, e.g., Kothari, *supra* note 118 (reporting the adoption of the resolution).

127. H.R.C. Res. 37/23, *supra* note 125, ¶ 6.

128. Technical assistance itself is not a novel concept. See Book Note, *Les Aspects Juridiques de l'Assistance Technique dans le Cadre des Nations Unies et des Institutions Spécialisées* [Legal Aspects of Technical Assistance in the Framework of the United Nations and Specialized Institutions], 71 HARV. L. REV. 1190, 1190 (1958) (footnote omitted) ("Novel as the concept of technical assistance is sometimes thought to be, it has figured in international law at least since the eighteenth century. Each nation, wrote Vattel in 1757, 'should contribute to . . . [other states'] advancement according to its ability and their need of its help.'). The basis for the United Nations' authority in technical assistance stems from Resolution 222 (IX) of the Economic and Social Council. Economic and Social Council Res. 222 (IX) (Aug. 15, 1949). The United Nations Office of the High Commissioner for Human Rights explains that technical assistance can take various forms, including "expert advisory services, training courses, workshops and seminars, fellowships, grants, provision of information and documentation, and assessment of domestic human right's needs." U.N. Office of the High Commissioner for Human Rights, *Technical Cooperation*, <https://www.ohchr.org/EN/Countries/Pages/TechnicalCooperationIndex.aspx> (last visited Feb. 21, 2020) [<https://perma.cc/W4NH-G2BV>] (archived July 18, 2020).

129. The United Nations Development Programme distinguishes between different types of capacity as well as the difference between capacity building and

in human rights.<sup>130</sup> The drafting of the resolution thus serves to reiterate the connection between the right to development and human rights. At the same time, the resolution conveniently lays some foundation for the supplanting of the importance of human rights to eventually cast technical ability and capacity building as an *a priori* requirement. This would ultimately allow China to demand, or at least hold hostage, future human rights resolutions that do not allow or require capacity building.

The right to development<sup>131</sup> is an important cornerstone of the Chinese strategy.<sup>132</sup> The right to development was established after the UN General Assembly adopted the Declaration on the Right to Development to address underdevelopment.<sup>133</sup> The Chinese government's December 2016 white paper articulated its own view of the right to development, highlighting it as "a unity of individual and collective human rights."<sup>134</sup> The statement emphasizes that the right to development is essential to human society and requires equal access to development opportunities and development benefits.<sup>135</sup> Isolated as a policy position of China, this concept seems important yet harmless. When this concept is viewed in connection with the emphasis on the right to development in the Human Rights Council resolution,

capacity development. UNITED NATIONS DEVELOPMENT PROGRAMME, CAPACITY DEVELOPMENT: A UNDP PRIMER 54 (2009). The UNDP defines capacity building as "[a] process that supports only the initial stages of building or creating capacities and assumes that there are no existing capacities to start from. *See id.* Also note that the indicator for measuring progress on Sustainable Development Goal 17.9 to enhance international support for capacity-building is "Dollar value of financial and technical assistance (including through North-South, South-South and triangular cooperation) committed to developing countries." U.N. Secretary-General, *Sustainable Development Goal 17*, <https://sustainabledevelopment.un.org/sdg17> (last visited Feb. 24, 2020) [<https://perma.cc/W85U-Z64R>] (archived Aug. 23, 2020).

130. *See* H.R.C. Res. 37/23, *supra* note 125, ¶¶ 9, 10, 11, 16, 19 (discussing the desire and need for cooperation to promote human rights).

131. The right to development is defined by the Declaration on the Right to Development. G.A. Res. 41/128, art. 1, ¶ 1 (Dec. 4, 1986) ("The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.").

132. For more on China's work regarding the right to development, see generally Li Erping & Yao Yunsong, *The Contribution of the Belt and Road Initiative to the Global Right to Development*, in *THE RIGHT TO DEVELOPMENT: SUSTAINABLE DEVELOPMENT AND THE PRACTICE OF GOOD GOVERNANCE* (Wei Zhang ed., 2019) (exploring the right to development in the context of the Belt and Road Initiative).

133. G.A. Res. 41/128, *supra* note 131, ¶¶ 1–16 (discussing the purposes and rationale behind the right to development).

134. STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, FULL TEXT: THE RIGHT TO DEVELOPMENT: CHINA'S PHILOSOPHY, PRACTICE AND CONTRIBUTION (Dec. 1, 2016), [http://english.www.gov.cn/archive/white\\_paper/2016/12/01/content\\_281475505407672.htm](http://english.www.gov.cn/archive/white_paper/2016/12/01/content_281475505407672.htm) [<https://perma.cc/R2GM-DDTW>] (archived July 18, 2020) (no pagination).

135. *Id.*

however, the articulation of a right to development warrants more concern. By using this reaffirming language in the resolution, China fortified its justifications for the BRI, bolstering the perceived importance of the program.

Further troubling are the footholds created for technical cooperation and capacity building in the resolution. The resolution places significant emphasis on these features, interlinking them with the successful promotion of mutually beneficial cooperation to promote and protect human rights.<sup>136</sup> The resolution's request for the Human Rights Council Advisory Committee to study the role of technical assistance and capacity building<sup>137</sup> is another tool for these footholds. This study is currently ongoing. Of the fourteen published state responses to the Advisory Committee's open call for comments, about half of the responses supported the promotion of mutually beneficial cooperation (also termed as "win-win cooperation"), while the other half explicitly denounced its use due to a lack of foundation and support in international human rights law.<sup>138</sup> China's submission explicitly heralds the benefits of technical assistance and capacity building in promoting human rights through win-win cooperation.<sup>139</sup> China is deeply invested in a positive report on these tactics in order to provide another layer of justification for the BRI.

Not only do these inclusions reaffirm the right to development, but they create further links between human rights and security. Canada's submission to the Advisory Committee focuses on the links between mutually beneficial cooperation and win-win cooperation, paying special attention to three illustrative instances of the use of the phrases by different Chinese agents to emphasize the phrases' ties to economic development, peace and security, and human rights.<sup>140</sup>

136. H.R.C. Res. 37/23, *supra* note 125, ¶¶ 9, 10, 11, 16, 19.

137. *Id.* ¶ 19.

138. All of the published State responses are available at <https://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/TheRoleTechnicalAssistance.aspx> (last visited Aug. 23, 2020) [<https://perma.cc/2WMB-PDRN>] (archived July 18, 2020). The State responses explicitly discouraging use of the phrase "mutually beneficial cooperation" include Australia, Canada, Germany/France (joint submission), Japan, New Zealand, the Netherlands, and the United Kingdom. In contrast, the State responses encouraging win-win cooperation appear to be China, Côte d'Ivoire, Kuwait, Morocco, Mauritius, the Philippines, and Russia.

139. THE PEOPLE'S REPUBLIC OF CHINA, REPLY TO THE QUESTIONNAIRE OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE ON THE ROLE OF TECHNICAL ASSISTANCE AND CAPACITY BUILDING IN FOSTERING MUTUALLY BENEFICIAL COOPERATION 3–5 (2018), [https://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/TechnicalAssistance/China\\_English.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/TechnicalAssistance/China_English.pdf) [<https://perma.cc/Z9XT-25XX>] (archived Aug. 2, 2020).

140. See CANADA REPLY TO THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE ON THE ROLE OF TECHNICAL ASSISTANCE AND CAPACITY BUILDING IN FOSTERING MUTUALLY BENEFICIAL COOPERATION 1–2 (2018), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/TechnicalAssistance/CANADA.docx>.

Although promoting economic development is important, win-win cooperation for capacity building and technical assistance should not be prioritized over international cooperation that promotes human rights in line with the UN Charter.<sup>141</sup> The danger of this link is explored in further detail in the following Part on China's actions as a permanent member of the UN Security Council,<sup>142</sup> but the gist is that by characterizing the right to development as an essential human right and linking its protection to technical assistance and capacity building, China has created links between development and security that it can rely upon to justify its actions under the BRI.

Two less obvious but still notable aspects of the resolution are the language-reaffirming human rights treaties<sup>143</sup> and the emphasis of the Universal Periodic Review's role.<sup>144</sup> The relevant language seems hypocritical when examined in the context of Chinese sponsorship, given that China has been heavily criticized for its own human rights abuses.<sup>145</sup> China has adopted both declarations<sup>146</sup> and signed both

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141. See *id.* at 3 (discussing the cooperation framework the U.N. charter established).

142. See discussion *infra* Part III.A.2 and accompanying notes.

143. H.R.C. Res. 37/23, *supra* note 125, ¶ 1 ("Reaffirming the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action, and recalling all relevant international human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights").

144. *Id.* ¶¶ 12, 17 ("Recognizing also the role of the universal periodic review in, inter alia, promoting the universality, interdependence, indivisibility and interrelatedness of all human rights, establishing a cooperative mechanism based on objective and reliable information and on interactive dialogue, and ensuring universal coverage and equal treatment of all States in contributing to the promotion and protection of human rights and mutually beneficial cooperation...Emphasizes the importance of the universal periodic review as a mechanism based on cooperation and constructive dialogue with the objective of, inter alia, improving the situation of human rights on the ground and promoting the fulfilment of the human rights obligations and commitments undertaken by States, and calls upon all States and relevant stakeholders to participate constructively in it"). The Universal Periodic Review (UPR) is the process by which the UPR Working Group of the Human Rights Council reviews each Member State's human rights records, addresses their human rights violations, and offers recommendations on how Member States can more effectively handle human rights challenges. See *Basic Facts About the UPR*, U.N. HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx> (last visited Jan. 20, 2020) [<https://perma.cc/DA73-BVCD>] (archived July 18, 2020).

145. See, e.g., Wee & Nebehay, *supra* note 118 (reporting on China's use of intimidation tactics against dissidents). On human rights abuses related to the Belt and Road Initiative, see discussion *supra* Part II.B.1. and accompanying notes.

146. The two declarations referenced are the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action. The Universal Declaration of Human Rights reaffirms fundamental freedoms agreed upon by the United Nations General Assembly. G.A. Res. 217A (III) (Dec. 10, 1948). The 1993 Vienna Declaration and Programme of Action-World Conference on Human Rights stressed that all human rights and fundamental freedoms are "universal, indivisible and interdependent and interrelated" while considering that "[d]emocracy, development and respect for human

treaties reaffirmed in the resolution.<sup>147</sup> However, of the two treaties, China has ratified the International Covenant on Economic, Social and Cultural Rights<sup>148</sup> with reservations, but has still yet to ratify the International Covenant on Civil and Political Rights.<sup>149</sup> The emphasis on the role of the Universal Periodic Review is initially surprising because Chinese delegates have dodged questions regarding incidents of human rights abuses,<sup>150</sup> and China has low action rates on a majority of recommendations arising from its reviews.<sup>151</sup> Some

rights and fundamental freedoms are interdependent and mutually reinforcing.” See World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶¶ 5, 8, U.N. Doc. A/CONF.157/24 (June 25, 1993).

147. The resolution specifically reaffirms the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. See H.R.C. Res. 37/23, *supra* note 125, ¶ 1.

148. ICESCR, *supra* note 65.

149. ICCPR, *supra* note 65. For more on China’s human rights policies and actions related to the ICCPR, see Lewis, *supra* note 67.

150. See Yu-Jie Chen, *China’s Challenge to the International Human Rights Regime*, 51 N.Y.U. J. INT’L L. & POL. 1179, 1189–90 (2019). Chen explains:

The government delegation, for instance, often resorts to formalism when answering human rights treaty bodies. Usually citing laws and regulations while avoiding any discussion of practice and concrete cases, Chinese diplomats continue to eschew meaningful exchanges about the PRC’s human rights record. Beijing also uses discrediting tactics, such as attacking the credibility of interested civil society groups, in some cases harassing treaty body experts and U.N. officials and accusing them of being politically biased, and liberal democracies of engaging in “double standards.” China further works with countries in the Like-Minded Group (a group of developing countries that tends to vote as a bloc) to undermine the ability of the U.N. human rights mechanisms. The members of the Like-Minded Group often share China’s interests in avoiding international human rights scrutiny by diminishing the strength of the international human rights institutions. China and Russia, for example, led many countries in the Group to present proposals that would limit the independence of the treaty bodies and increase state oversight of the system in what was supposed to be a treaty body strengthening process.

*Id.* (internal footnotes omitted).

151. See, e.g., Junxiang Mao & Xi Sheng, *Strength of Review and Scale of Response: A Quantitative Analysis of Human Rights Council Universal Periodic Review on China*, 23 BUFF. HUM. RTS. L. REV. 1, 37–38 (2016–2017) (“[T]he rate of implemented recommendations for China is lower than that of the international community. . .”). China has also been very particular about which recommendations it chooses to accept or reject. Mao & Sheng further explain:

[I]f a recommendation includes a slightly more precise requirement than another on the same subject, even though the content of the two are roughly the same, China may reject the former and accept the latter. For instance, China accepted the recommendation “Take steps to an early ratification of the ICCPR” by Czech Republic while refusing the recommendation “Move

scholars advocating for the Chinese perspective argue that participation in and cooperation with the Universal Periodic Review system is sufficient to promote human rights because China is not obligated to respond to or change any of its own policies.<sup>152</sup> China's disregard for the recommendations proffered by the very mechanism it has verbally supported appear hypocritical at best. The desire to promote respect for sovereignty is admirable; however, to do so in a way that undermines the promotion of fundamental rights under the guise of supporting widespread respect for such rights taints this approach.

Overall, all of these little pieces support China's view that human rights issues should ultimately be handled at the domestic level. This view is mirrored clearly in the following Part exploring China's actions on an even larger and more powerful platform: the UN Security Council.

## 2. United Nations Security Council

Reexamining the broader implications of China's increased role in shaping international human rights should include an analysis of China's related actions as a member of the UN Security Council. China has leveraged its position as a permanent member of the Security Council to stall votes on important resolutions when other council members have disagreed with the inclusion of language friendly to China's BRI development endeavors.<sup>153</sup> The glaring concern for such actions is that they feed into the greater agenda of conflating security and development in a way that threatens the hierarchical necessity of security over development.

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towards ratification of the ICCPR in the near future" by Norway. China responds to recommendations "according to its economic and social development." When recommendations require concrete actions and do not accommodate China's basic public policy and actual circumstances, China will explicitly reject them. Examples include recommendations to abolish the death penalty, to accept the individual complaint procedure, to invite State Parties to investigate, or to extend standing invitations to special procedures.

*See id.* at 38 (internal footnotes omitted).

152. The Universal Periodic Review defers to States' sovereignty as "states have considerable freedom to accept or reject recommendations and whether to implement them." *See id.* at 39.

153. *See China and US Clash over 'Belt and Road' Link to UN Afghanistan Mission*, SOUTH CHINA MORNING POST (Sept. 17, 2019), <https://www.scmp.com/print/news/china/diplomacy/article/3027596/china-and-us-clash-over-belt-and-road-credit-un-security> [<https://perma.cc/R2P7-DHMX>] (archived July 18, 2020) [hereinafter China-US UNAMA Clash] ("This is the second time in six months that the resolution to keep the UN political mission in Afghanistan operating has become embroiled in controversy over belt and road language.").

The recent events surrounding the UN Assistance Mission in Afghanistan (UNAMA) mandate highlight China's growing influence on the Security Council.<sup>154</sup> In September of 2019, the Security Council passed a resolution to extend UNAMA's mandate for another year.<sup>155</sup> Disagreements over wording led to the resolution passing less than fourteen hours before the previous mandate expired.<sup>156</sup> The significant delay occurred because countries raised new concerns regarding the inclusion of language welcoming and encouraging regional economic cooperation in Afghanistan.<sup>157</sup> Language of such nature, however, had already been included in the prior three mandates.<sup>158</sup> In March of 2019, only a six-month renewal was passed as debate over the language's relevancy ensued.<sup>159</sup>

[T]he US government opposed China's demand "that the resolution highlight its Belt and Road Initiative, despite its tenuous ties to Afghanistan and known problems with corruption, debt distress, environmental damage, and lack of transparency" . . . [while China's deputy ambassador] said belt and road was "conducive to Afghanistan's reconstruction and economic development."<sup>160</sup>

A notable concern among Security Council members after the September 2019 mandate was passed was that the resolution was not more substantive.<sup>161</sup> In the course of their comments, the representatives from the United States, Belgium, and the United Kingdom explicitly reemphasized their concern that the economic

154. The UNAMA mandate supports Afghanistan in ensuring credibility and transparency with its upcoming presidential election and strengthen the capacity-building of the Afghan security forces, among other inter-Afghan peace developments. See U.N. SCOR, 74th Sess., 8620th meeting at 3, 6 U.N. Doc. S/PV.8620 (Sept. 17, 2019) [hereinafter UNAMA 2019 Meeting Minutes].

155. S.C. Res. 2489 (Sept. 17, 2019) [hereinafter UNAMA 2019 Resolution]; UNAMA 2019 Meeting Minutes, *supra* note 154, at 2.

156. Comments from Permanent Representative of Indonesia Dian Djani and Deputy Permanent Representative of Poland Mariusz Lewicki most explicitly demonstrate this frustration. See UNAMA 2019 Meeting Minutes, *supra* note 154, at 3, 7–8.

157. See China-US UNAMA Clash, *supra* note 153 (explaining the conflicts that led to the resolution's delay). Compare UNAMA 2019 Resolution, *supra* note 155, with S.C. Res. 2405 (Mar. 8, 2018) (including several instances of encouragement for economic development), and S.C. Res. 2344 (Mar. 17, 2017) (same), and S.C. Res. 2274 (Mar. 15, 2016) (same).

158. See UNAMA 2019 Resolution, *supra* note 155; S.C. Res. 2405 (Mar. 8, 2018); S.C. Res. 2344 (Mar. 17, 2017) (same); S.C. Res. 2274 (Mar. 15, 2016); see also China-US UNAMA Clash, *supra* note 153.

159. See China-US UNAMA Clash, *supra* note 153.

160. *Id.*

161. See UNAMA 2019 Meeting Minutes, *supra* note 154, at 4, 5, 6, 7. Consider, however, that this is in sharp contrast to Chinese Ambassador Zhang Jun's comments "that now is not the time to adopt a comprehensive resolution." See *id.* at 6.



development language was unnecessary.<sup>162</sup> Permanent Representative Pecsteen de Buytswerve of Belgium specifically noted his disappointment that a stronger resolution was not passed based on “an issue not pertaining to the mandate.”<sup>163</sup> The significance of the passing of a weaker mandate was illustrated by Ambassador Karen Pierce of the United Kingdom, who pointed out that “part of the text is, frankly, not comprehensible in the English language” and therefore “paragraphs of the resolution lack the clarity that UNAMA needs and requests in order to deliver its mandate at such a difficult time.”<sup>164</sup> Not a single member of the Security Council disputed that the UNAMA mandate was necessary. However, the delayed timing and diminished power of the mandate represent the external security risks imposed on other states as collateral damage from China’s pursuits.

Not only was the extreme delay in passing the UNAMA mandate a concern regarding UNAMA’s ability to execute its mission, but it also signals how strongly China is fighting to entrench development language in security issues. When China fights for the inclusion of such language, it is able to use these Security Council resolutions to build stronger ties between security and development.<sup>165</sup> These are similar to concerns raised in the previous Part about China’s inclusion of technical assistance and capacity building in a Human Rights Council resolution.<sup>166</sup> The implications of this are slow but long-lasting.

China’s efforts seek to not only link security and development, but to conflate security with development. As China embeds these connections in the fabric of UN operations, a foundation is laid for China to further justify the BRI and answer critiques with this “evidence” of the legal permissibility and importance of the massive infrastructure program for global development. Ambassador Zhang Jun, the representative for China at the UNAMA vote, emphasized “that helping the Afghan economy is vital to achieving lasting peace and stability in that country.”<sup>167</sup> Ambassador Zhang also responded to the thinly-veiled critiques of the United States, Belgium, and the United Kingdom by stating that a failure to recognize the importance of promoting Afghanistan’s regional cooperation and connectivity

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162. *See id.* at 4, 5, 7 (discussing the best language to include regarding economic development).

163. *Id.* at 5.

164. *See id.* at 7.

165. *See id.* at 6 (“In order to maintain security and stability in that country, we must resolve security concerns. The unity of the Security Council must be maintained, and, to that end, we must respect the past consensus that we achieved. It must be stressed that helping the Afghan economy is vital to achieving lasting peace and stability in the country. That is what the Afghan people want, and no country has the right to deprive them of a better life.”).

166. *See* discussion *supra* Part III.A and accompanying notes.

167. UNAMA 2019 Meeting Minutes, *supra* note 154, at 6.

would be “an utter distortion of the UNAMA mandate.”<sup>168</sup> Broadly put, UNAMA’s mandate is to “provide[] political good offices in Afghanistan; work[] with and support[] the government; support[] the process of peace and reconciliation; monitor[] and promote[] human rights and the protection of civilians in armed conflict; promote[] good governance; and encourage[] regional cooperation.”<sup>169</sup> Although regional cooperation and connectivity would contribute to strengthening the Afghani economy, Ambassador’s Zhang’s argument frames bolstering the country’s economy as a prerequisite for peace and security. In this way, the concepts can be conflated. While there is no question that a stable economy is necessary for any country, the establishment of such explicit textual links between security and development in binding documents from a highly respected governing body represents the risk of easy conflation of these distinct normative goals in the future.

### B. *The Impacts of the Lack of a Strong, Unified International Response*

Few states have taken notice and criticized China’s Belt and Road behaviors. Although various countries have criticized some of China’s actions at the intergovernmental organization level,<sup>170</sup> the lack of meaningful negative response only spurs China on and, in some ways, extends implicit approval of China’s actions. Under the *Lotus* principle that states may act in ways not prohibited by international law,<sup>171</sup>

168. *Id.*

169. *Mandate*, U.N. ASSISTANCE MISSION AFG., <https://unama.unmissions.org/mandate> (last visited May 27, 2020) [<https://perma.cc/5UGX-AX4G>] (archived July 18, 2020).

170. *Cf.* UNAMA 2019 Meeting Minutes, *supra* note 154, at 4, 5, 7 (recording some of these criticisms).

171. In the widely cited and debated *Lotus* case, the Permanent Court of International Justice articulated that states have wide discretion in their own territories and are only limited by prohibitions in international law. *S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶ 46–47 (Sept. 7). As the Court explained in its analysis of France’s alleged exclusive territorial jurisdiction over the collision between a French ship and Turkish collier,

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States ... In these circumstances all that can be required of a State is that it should not overstep the

China's self-promoting MOUs brook no legal issues. But the ensuing effects of the MOUs that violate international law do.<sup>172</sup> Here, the situation of the Uighurs and the lack of attention to environmental impact assessments are illustrative of China violating established norms of treaty and customary environmental law. China is able to leverage other states' silence to these violations as implicit approval, thereby laying the foundation for the creation of more permissive customary law.

China's support of the treatment of the Uighurs likely violates human rights treaties, including the ICCPR. But China is only a signatory to the ICCPR,<sup>173</sup> and thus is arguably not bound by it. Regardless of whether China is specifically bound by the ICCPR, China's support of Uighur detention and reeducation can influence international treaty norms. Among other provisions, the ICCPR obligates states to respect and ensure the rights of individuals on their territory and within their jurisdiction,<sup>174</sup> as well as to protect individuals' rights to freedom of thought and religion<sup>175</sup> and to not be arbitrarily detained.<sup>176</sup> Although China is not obligated to protect these rights under the ICCPR, China's status as an ICCPR signatory creates an obligation under the Article 18 of the Vienna Convention on the Law of Treaties (VCLT) "to refrain from acts which would defeat the object and purpose of [the] treaty."<sup>177</sup> Because mistreatment of the Uighurs as described here would surely defeat the purposes of the ICCPR, China's actions surely constitute a violation of VCLT Article 18 obligations. Thus, China's support of Uighur mistreatment<sup>178</sup> is a

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limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.

*Id.*

172. *See id.*

173. ICCPR, *supra* note 65, at 260.

174. *Id.* art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure all individuals within their territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . .").

175. *Id.* arts. 18 ("right to freedom of thought, conscience and religion"), 27 (stating the right of religious minorities to practice in their own communities).

176. *Id.* art. 9 (detailing covered individuals' "right to liberty and security of person").

177. *See* Vienna Convention on the Law of Treaties, *supra* note 39, art. 18. Although elements of the treaty like Article 18 were fairly progressive at the time of the treaty's introduction, the VCLT is accepted in large part as reflecting customary international law today. Oliver Dörr, *Article 18: Obligation Not to Defeat the Object and Purpose of a Treaty Prior to its Entry Into Force*, in VIENNA CONVENTION ON THE LAW OF TREATIES, para. 5 (Oliver Dörr & Kirsten Schmalenbach eds., 2012); *accord* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III, Introductory Note (AM. LAW INST. 1987) (quoting S. EXEC. DOC. L., 92d Cong., 1st Sess., at 1 (1971)) (letter from U.S. Department of State acknowledging that "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.").

178. *E.g.*, Watson & Westcott, *supra* note 56.

failure to observe its interim obligation under the VCLT and thus undermines international treaty norms.

Disregard of environmental protection in BRI projects undermines environmental law norms requiring environmental impact assessments (EIAs) and consultation of locals. In *Pulp Mills*, the International Court of Justice (ICJ) recognized the use of EIAs as customary international practice when the project “may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”<sup>179</sup> About a decade after *Pulp Mills*, Tseming Yang argues that the duty to conduct an EIA on projects affecting resources and the environment is a binding global norm of public international law by surveying EIA legislation worldwide and analyzing the practice as a “general principle of law recognized by civilized nations” consistent with the ICJ Statute.<sup>180</sup> Yang’s survey found that at least 183 of the 197 jurisdictions surveyed recognize the duty to use EIAs.<sup>181</sup> The duty to conduct an EIA encompasses other subsidiary norms, including government transparency and engagement of the public.<sup>182</sup> Thus, the Ecuadorian government’s lack of transparency, accountability, and public engagement in the Coca

179. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 135, ¶ 204 (Apr. 20). The Court has previously recognized a State’s duty to protect and respect the environment. *E.g.*, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8) (recognizing a State’s customary law obligation “to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control . . .”).

180. Tseming Yang, *The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law*, 70 HASTINGS L.J. 525, 527, 558 (2019) (citing Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031, 1055, 33 U.N.T.S. 993).

181. *Id.* Professor Yang’s survey considered legislation from “the 193 member states of the United Nations, the European Union, the Holy See, Palestine, and Taiwan.” *Id.* at 527 n.1.

182. *Id.* at 529 (“While conceptually simple, the EIA norm is thus an umbrella principle that embodies a number of more specific duties. These subsidiary norms include the requirement to generate particular types of impact information, actual consideration of such information by the decision-maker, governmental transparency and accountability, and engagement of the public.”). “According to most interpretations of the principle, precautionary decisions are those that prevent damage to health or ecosystems in the face of uncertainty, stimulate the development of more health-protective technologies and activities, and place greater responsibility on proponents of potentially damaging activities.” See WHO Secretariat for the Fourth Ministerial Conference on Environment and Health, *Dealing with Uncertainty – How Can the Precautionary Principle Help Protect the Future of Our Children?* ¶ 10, (WHO, Working Paper No. EUR/04/5046267/11, 2004). Although the *Pulp Mills* majority did not recognize the precautionary principle as custom, Judge Trindade argued in his separate opinion that the precautionary principle was in fact a general principle of law and “[i]n so far as the environment is concerned, the emergence of the precautionary principle brought about the requirement to undertake complete environmental impact assessments, and the obligations of notification and of sharing information with the local population (and, in extreme cases, even with the international community).” *Pulp Mills*, 2010 I.C.J. 135 ¶ 71 (separate opinion by Trindade, J.).

Codo Dam project seems to violate such norms.<sup>183</sup> But these issues are not just attributable to Ecuador—Ecuadorian officials reported that labor and safety regulations were ignored at the instruction of Chinese officials,<sup>184</sup> and former Ecuadorian Vice President Jorge Glas Espinel was later investigated for accepting Chinese bribes to overlook problems with the dam.<sup>185</sup> China's ability to affect environmental law norms reaches beyond its own borders.

China's violations of treaty and environmental norms are still yet smaller pieces of the greater picture. By not responding to the effects of China's BRI projects, the international community is implicitly approving China's actions to ultimately reshape the right of development. By increasing its influence and ability to influence other states under the BRI, China is laying the foundation to strengthen future claims that the right to development is a broad, essential human right inextricably linked to security. The following analysis explores two views, forming customary international law and hardening soft law, by which China's actions contribute to this new approach.

Implicit approval of China's actions should be avoided in order to stymie the development of customary international law supporting developmental actions as an essential element of security. Customary international law is a hard, binding source of international law comprised of widespread state practice and *opinio juris*.<sup>186</sup> The concept of widespread state practice does not require that all states perform the practice, though participation in the formation of custom is equal among all nations.<sup>187</sup> While the creation of customary international law does not require a minimum passage of time, the passage of time

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183. See discussion *supra* Part II.B.4 and accompanying notes.

184. Nathanson, *supra* note 110.

185. Chris Kraul, *Ecuador Faces a Huge Budget Deficit Because of Loans It Received from China*, L.A. TIMES (Dec. 10, 2018), <https://www.latimes.com/world/la-fg-ecuador-loans-china-20181210-story.html> [<https://perma.cc/94HU-KUK4>] (archived July 18, 2020). In 2017, Espinel was convicted on a corruption charge related to another infrastructure project. Reuters, *Ecuador's Vice President Sentenced to 6 Years in Corruption Case*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/world/americas/ecuadors-vice-president-sentenced-to-6-years-in-corruption-case.html> [<https://perma.cc/H4H3-33X8>] (archived July 18, 2020).

186. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060; NOORA ARAJARVI, *THE CHANGING NATURE OF CUSTOMARY INTERNATIONAL LAW: METHODS OF INTERPRETING THE CONCEPT OF CUSTOM IN INTERNATIONAL CRIMINAL TRIBUNALS 1* (2014) (giving an overview of art. 38(1)(b)).

187. See MICHAEL BYERS, *CUSTOM, POWER, AND THE POWER OF RULES* 75 (1999) (“[A]ll States, from the weakest to the most powerful, have an equal entitlement to participate in the process of customary international law.”); MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES* 62 (2d ed. 1997) (“All States participate as equals in the formative process of customary law . . .”).

may serve as evidence that the practice is sustained and repeated.<sup>188</sup> *Opinio juris* means that the examined practice is undertaken with a sense of legal obligation.<sup>189</sup> Unlike such hard law, soft law is a residual category of “things that fall short of [hard] international law.”<sup>190</sup> Use of soft law instruments and reliance on customary international law has been increasing, and Laurence R. Helfer and Ingrid B. Wuerth explain that the use of custom is likely to arise in particular situations “where powerful states (or groups of like-minded [sic] countries) advance new rules that respond to emerging global problems or seek to overcome distributional differences by promoting rules with compelling normative content.”<sup>191</sup>

To say that China’s actions at the UN Human Rights Council and UN Security Council promoting mutually beneficial cooperation have solidified the expectation for win-win cooperation as currently representing customary international law would be a gross overstatement.

But by pushing to incorporate win-win cooperation into UN Human Rights Council and UN Security Council documents and resolutions,<sup>192</sup> China creates a stronger foothold for arguments that development-related win-win practices can serve as *opinio juris* supporting the intertwined nature of development to human rights and security. Although resolutions passed in the various organs of the UN are the result of diplomatic compromises, the examples analyzed in the previous Part demonstrate that such footholds are already being created in customary international law.<sup>193</sup> Consider examples of expansions of these footholds. Developing on the UNAMA

188. See André da Rocha Ferreira, Cristieli Carvalho, Fernanda Graeff Machry & Pedro Barreto Vianna Rigon, *Foundation and Evidence of Customary International Law*, 1 UFRGS MODEL U.N. J. 182, 189–90 (2013).

189. See B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT’L L. 1, 2–3 (2018) (citing Int’l Law Comm’n, Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee, UN Doc. A/CN.4/L.872 at 3 (2016)). For examples of forms of evidence of accepted state practice and *opinio juris* in the Draft Conclusions, see *id.* at 2–3, 3 n.7, 11 (citing Int’l Law Comm’n, Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee, UN Doc. A/CN.4/L.872 at 2–3 (2016)).

190. Guzman & Meyer, *supra* note 43, at 172; see also Dinah L. Shelton, *Soft Law*, in HANDBOOK OF INTERNATIONAL LAW 3 (2008) (“Soft law is a type of social rather than legal norm. While there is no accepted definition of ‘soft law,’ it usually refers to any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior.”).

191. Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT’L L. 563, 609 (2016) (exploring States’ choices to use soft law instruments to examine the role of customary international law in contemporary international lawmaking).

192. See discussion *supra* Part III.A.

193. See *id.*

discussions,<sup>194</sup> China could act to block humanitarian-relief efforts to an unstable region because the lack of development-related language would represent an incomplete aid package. China's push for the protection of human rights to remain a sovereign prerogative could one day justify its treatment of the Uighurs as merely an exercise of state discretion over its people or characterizing the "reeducation schools" as a development effort.<sup>195</sup>

Furthermore, countries should be concerned about what a China-dominated UN will mean for them. For the United States, a China-dominated UN means a "steady erosion of U.S. values and interests in matters that range from nonproliferation to sustainable development."<sup>196</sup> This parallels other concerns regarding the spread of human rights abuses through digital authoritarianism,<sup>197</sup> raising the expectation that human rights abuses would be more frequent with a China-dominated UN. Thus, the prospect of a China-dominated UN is even more concerning given China's current position on the UN Human Rights Council and UN Security Council.<sup>198</sup>

Customary international law brings some flexibility into the international legal system "by allowing the emergence of some rules without the consent of some states and by allowing other rules to change over the objections of some states."<sup>199</sup> Thus, simple objections by states cannot prevent the formation of customary international law. However, by objecting to China's methods, countries convert their implicit approval into explicit disapproval and aid the process of destabilizing the customary international law foundations being laid. These concerns also arise when examined with a soft law lens. The international community should be concerned about China's soft law regime of BRI MOUs and the potential for its conversion to hard law. The concept of *hard law versus soft law* is a controversial one,<sup>200</sup> but its application warrants consideration for this issue.

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194. See discussion *supra* Part III.A.2.

195. See discussion *supra* Part II.B.1; Part III.B.1 and accompanying notes.

196. Kristine Lee, *Coming Soon to the United Nations: Chinese Leadership and Authoritarian Values*, FOREIGN AFF. (Sept. 16, 2019), <https://www.foreignaffairs.com/articles/china/2019-09-16/coming-soon-united-nations-chinese-leadership-and-authoritarian-values> [https://perma.cc/AN38-J2W3] (archived July 18, 2020). See also Drezner, *supra* note 5 ("The American foundations undergirding the liberal international order are in grave danger, and it is no longer possible to take the pillars of that order for granted.").

197. See discussion *supra* Part II.B.1 and accompanying notes.

198. See discussion *supra* Part III.A.

199. Andrew T. Guzman & Jerome Hsiang, *Some Ways that Theories on Customary International Law Fails: A Reply to Laszlo Glutman*, 25 EUR. J. INT'L L. 553, 557 (2014).

200. See Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 712–15 (2010) (discussing the debated definitions of hard law and soft law and the relevance of these concepts).

The definitions of hard law and soft law are unsettled, though a commonly used distinction is that of binding and nonbinding, respectively.<sup>201</sup> One view of this area of law is that hard law and soft law instruments can be used as complements, with states strategically using each to advance their policy objectives.<sup>202</sup> Some scholars argue that states may use soft law instruments to establish “non-binding standards that can eventually harden into binding rules once uncertainties are reduced and a higher degree of consensus ensues.”<sup>203</sup> That “soft law regimes can be ‘hardened’ through their links to other regimes”<sup>204</sup> seems to accurately describe the events analyzed in this Note. The language and effects of the BRI MOUs, as well as China’s push for inclusion of particular phrases in UN Human Rights Council and UN Security Council resolutions, are creating links between China’s policy goals and international peace, security, and human rights.<sup>205</sup> By couching its goals in pursuit of promoting development, China is creating a soft law regime that could eventually harden into hard law without obvious opportunities for objection from other countries.<sup>206</sup>

The ultimate effect of the creation of customary international law or hard law supporting China’s particular policy efforts may seem far-off. However, that unappetizing future is not an inevitability. Short of somehow convincing China to withdraw from its strategies, there is no single practical solution to stop China from growing its soft power through the BRI and as a member of intergovernmental organizations. Thus, the following Part offers some suggestions for steps countries can take, which, if taken together, can help discourage China’s power-growing practices, promote human rights, and encourage other states to take actions expressing their own disapproval.

#### IV. WAYS TO MOVE FORWARD

The first question to address when considering solutions is tone: Should states be acting reactively or proactively? The answer is both. China’s current actions through the BRI and as a member of the

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201. *Id.* at 706, 712 & n.5.

202. *Id.* at 725 (“[S]tates sometimes prefer hard law and sometimes prefer soft law to advance their joint policy aims.”).

203. See David Trubek, Patrick Cottrell & Mark Nance, “Soft Law,” “Hard Law,” and *European Integration: Toward a Theory of Hybridity*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 89 (Gráinne de Búrca & Joanne Scott eds., 2006).

204. See Shaffer & Pollack, *supra* note 199, at 710.

205. See discussion *supra* Part III.A and accompanying notes.

206. For further analysis regarding the flexibility offered by the use of soft law instruments, see Heng Wang, *China’s Approach to the Belt and Road Initiative: Scope, Character, and Sustainability*, 22 *J. INT’L ECON. L.* 29 (2019).



Human Rights Council and UN Security Council require countries to act responsibly. In order to prevent an undesirable expansion of China's influence, countries should also be looking to invest time, money, and energy into their responsive actions to make them prophylactic as well. By working to curb unfair and unjust practices now, countries can help to prevent China from gaining overly expansive power in the coming decades.

This Note does not propose a panacea. To take large, extreme actions would be to use a hammer rather than a scalpel for a delicate surgery. Just as China is using a wide range of actions to grow its soft power, there is no single solution for how countries should act outside of an extremely broad goal of working collectively to combat China's expansive efforts. Instead, this Note focuses on providing a set of actions that, if taken together, would substantially affect the most immediate effects of the BRI while addressing the associated meta-concerns.

Specifically, this Note suggests that more members of the international community increasingly engage and invest in developing nations, encourage experts to analyze binding and nonbinding international agreements and release guidelines on how the agreements should be constructed, and continue to vocalize dissent at the UN and with existing UN organizations that have forged partnerships with China with regard to the BRI to push for creation and execution of commitments from China on protecting human rights and the environment.

#### *A. Increase Engagement and Investment in Developing Nations*

One of the clearest ways in which countries can become involved is by increasing their engagement with and investment in developing nations. Lack of participation from the regular players means the door is open for other countries to fill the role.<sup>207</sup> As seen through history and now in the mechanics of the BRI, policy entrepreneurship can be a powerful tool.<sup>208</sup> Large countries like the United States, who have

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<sup>207.</sup> See *supra* notes 15–20 and accompanying text. See also Moss, *supra* note 17 (“[I]nstead of lecturing African countries to beware, the administration should reflect upon why China seems to be so attractive to the region as it gains self-confidence. Today’s Africa does not want charity. It seeks more investment and a measure of respect. China-bashing might be good political theater, but it makes for ineffective policy.”).

<sup>208.</sup> See discussion *supra* Part II; see also Sarah E. Mendelson, *How U.S. Officials Can Craft Innovative Human Rights Policy: Reflections on Navigating the Bureaucratic Landscape*, FOREIGN AFF. (July 13, 2017), <https://www.foreignaffairs.com/articles/2017-07-13/how-us-officials-can-craft-innovative-human-rights-policy> [<https://perma.cc/8YY3-8KG3>] (archived July 18, 2020) (“. . . U.S. officials can create innovative policies [under the Trump administration]. The way to do so is to take the massive amounts of information and issues that one is exposed to on a daily basis, recognize opportunities to advance one’s agenda, and gain the support of champions within and outside government

already been vocal about their disapproval of China's practices at the intergovernmental level, can support their own efforts by increasing engagement and investment in the developing states targeted by China's BRI.

The Trump administration's early efforts to quash longstanding foreign aid policies passed by Democratic and Republican administrations and slash federal development organizations' budgets did not last long.<sup>209</sup> In late 2018, the Trump administration made an about-face<sup>210</sup> and signed the Better Utilization of Investments Leading to Development (BUILD) Act<sup>211</sup> in an effort to respond to the BRI and the actions of the Asian Infrastructure Investment Bank (AIIB).<sup>212</sup> The BUILD Act was a bipartisan effort signed in 2018 that consolidated the Overseas Private Investment Corporation and USAID's Development Credit Authority into the International Development Finance Corporation (IDFC).<sup>213</sup> The IDFC was given a \$60 billion USD budget to focus the United States' foreign investment efforts, increase transparency in the multilateral development investment space, and temper Chinese economic influence.<sup>214</sup> Bipartisan support for the BUILD Act in a time of deep political division in the United States

to implement and amplify the ideas. New ideas can stick if the leadership and the organizational culture encourage policy entrepreneurship.”)

209. See Glenn Thrush, *Trump Embraces Foreign Aid to Counter China's Global Influence*, N.Y. TIMES (Oct. 14, 2018), <https://www.nytimes.com/2018/10/14/world/asia/donald-trump-foreign-aid-bill.html> [<https://perma.cc/558P-FNSU>] (archived July 18, 2020).

210. See *id.*

211. Better Utilization of Investments Leading to Development Act, S. 2463, 115th Cong. (2018).

212. See generally Daniel F. Runde, Romina Bandura & Owen Murphy, *Strategic Directions for the United States International Development Finance Corporation (DFC)*, CTR. FOR STRATEGIC & INT'L STUDS. (Sept. 24, 2019), [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/190923\\_RundeBanduraMurphy\\_USDFC\\_WEB.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/190923_RundeBanduraMurphy_USDFC_WEB.pdf) [<https://perma.cc/N7LR-V7JQ>] (archived Aug. 23, 2020) (examining the mandate and vision for the DFC and offering recommendations on how the DFC should proceed to support development and national security efforts); Matthew S. Erie, *Indo-Pacific Legal Infrastructure: A Chinese Perspective*, 113 AM. SOC'Y INT'L L. PROC. 374 (2019) (writings from a panel convened to discuss ways in which the Belt and Road Initiative offers novel approaches to international economic law); Perlez, *supra* note 29.

213. See, e.g., John Campbell, *President Trump Embraces Foreign Aid After Trying to Gut It*, COUNCIL ON FOREIGN REL. (Oct. 16, 2018), <https://www.cfr.org/blog/president-trump-embraces-foreign-aid-after-trying-gut-it> [<https://perma.cc/W3WV-9ZR8>] (archived July 18, 2020) (describing the effects of the BUILD Act).

214. See, e.g., *id.* (noting the IDFC's budget and directives); *U.S. International Development Finance Corporation*, U.S. EMBASSY HAITI, <https://ht.usembassy.gov/business/u-s-international-development-finance-corporation-dfc/> (last visited Feb. 7, 2020) [<https://perma.cc/ZVX5-R5MY>] (archived July 18, 2020) (explaining the functions and activities of the IDFC). An interesting aspect of the IDFC's page on the U.S. Embassy in Haiti's website is the bottom section of the page explaining how the DFC's offerings differ from those offered by China.

highlights that any actions taken in furtherance of these objectives must not themselves be political, that successfully hindering China's growing influence will require this same bipartisan effort.

A major concern with this program is that China's financial power is massive, and aiding states that may be vulnerable to the negative effects of Belt and Road partnerships would insufficiently displace Chinese investment. In this case, increasing the investment amount would go a long way in achieving the goal of combatting China's enormous influence in this area. According to the UN Conference on Trade and Development, however, foreign direct investment worldwide has dramatically fallen over the past four years.<sup>215</sup> In fact, global foreign direct investment has fallen to its lowest level since 2010, and a reverse in course is not expected.<sup>216</sup> Thus, a challenge to the implementation of this step will be convincing governments to increase their investments in a time of decline, especially in light of the ongoing Covid-19 pandemic and its effect on national economies. However, it appears that the pandemic has given the AIIB an opportunity to broaden its role in the international community—in April 2020, the AIIB announced that it would “double the size of its Covid-19 Crisis Recovery Facility, set up to help member states battling the pandemic, to \$10 billion.”<sup>217</sup> One would hope that the concern for China's actions, as presented in this Note, would inspire these governments to change their policies and increase foreign direct investment into Belt and Road partner countries.

Furthermore, it must be noted that the goal of these efforts should not be to entirely displace Chinese investment, but rather to aid vulnerable states in gaining greater bargaining power to fight for fair terms, adequate human rights, and environmental protections in their dealings with China. As one scholar points out,

[d]irectly internalizing international economic, social, and cultural rights, international labor agreements, and international environmental agreements . . . into the long-term domestic regulatory frameworks governing One Belt, One Road projects is one way of redressing the bargaining imbalance for developing countries and ensuring mutual accountability for all global

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215. See UNCTAD Report 2019, *supra* note 17, at x–xi (indicating that global foreign direct investment had fallen over the three years leading up to this report); Paul Hannon, *Foreign Investment Falls to Near-Decade Low as Globalization Slows*, WALL ST. J. (Jan. 20, 2020), <https://www.wsj.com/articles/foreign-investment-falls-to-near-decade-low-as-globalization-slows-11579525200> [<https://perma.cc/6ELK-NHFH>] (archived July 18, 2020) (“New overseas investment by businesses around the world fell for the fourth-straight year in 2019 to its lowest level in almost a decade, pointing to a slowdown in globalization as the world-wide economy cooled.”).

216. Hannon, *supra* note 215 (“The 1% drop puts global FDI at its lowest level since 2010, when many businesses shelved plans as they assessed the impact of the financial crisis. The U.N. expects to see little change in the flows this year.”).

217. Wilson, *supra* note 29.

partners in China's push as a "responsible power" driving "Globalization 2.0" bilaterally through the One Belt, One Road initiative.<sup>218</sup>

Though most countries have some form of foreign-investment program, this proposal requires that governments not only work to increase these investments but also actively engage with the recipients to ensure that their interests, as well as our greater global interests, are protected. Thus, another concern with this approach is that investing states' interests may overtake the receiving states' interests. It will be crucial for investing states to keep their investments focused on developing receiving states' infrastructure and economies. Strengthening a receiving state's capabilities in this way will ultimately allow the state to accept less money from China or at least allocate them a stronger bargaining position when entering agreements with China. In this way, focusing more intently on these areas will serve the greater goal of lessening the impact of Chinese investments.

#### B. *Encourage the Development of Guidance*

Given the confusion and harm inflicted by the asymmetric terms of some BRI agreements, the UN Human Rights Council should pass a resolution that the Human Rights Council Advisory Committee analyze soft law instruments like the BRI MOUs through a human rights lens, and release guidelines and recommendations on how the agreements should be constructed. Guidelines on how such agreements should be drafted and executed would, at a minimum, educate states in or entering into BRI agreements with China. Such information would give these states some leverage in negotiating the terms of their MOUs by not only demonstrating that the international community cares about these types of agreements and how they affect contemporary international law but also creating concrete standards to which these states can direct the consideration of a judicial body during disputes regarding the construction or enforcement of the MOUs.

Setting aside the current political realities of this solution for a moment, the Human Rights Advisory Committee would be the appropriate body to conduct this research. The Committee was established to function as a think tank for the Human Rights Council and has the ability to research the Human Rights Council's recommendations.<sup>219</sup> The membership of the Human Rights Advisory

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218. Desierto, *supra* note 17.

219. See *Background Information on the Advisory Committee*, U.N. HUMAN RIGHTS COUNCIL, <https://www.ohchr.org/en/hrbodies/hrc/advisorycommittee/pages/aboutac.aspx>

Committee includes eighteen independent experts—five experts from Asia, five from Africa, three from Latin America and the Caribbean, two from Eastern Europe, and three from Western Europe and other areas—from varied backgrounds who could offer special insights on how various countries have been affected by their BRI partnerships.<sup>220</sup>

Practically speaking, however, the politics of the moment likely mean that such a resolution would not pass today. As a prominent member of the Human Rights Council, China would be able to either block the resolution or potentially reword it in a way that directs the Advisory Committee to study how instruments like the BRI MOUs promote states' abilities to protect human rights. This is derivative, in part, of the progressive commingling between the right to development and civil and political rights. Strong reaffirmation of the distinction between these two areas will be necessary to effectively curb China's cloaking of its human rights violations under the guise of development.<sup>221</sup>

Another possible body from which to seek expertise is the ICJ. As the principal legal organ of the UN, the ICJ can produce advisory opinions on legal issues<sup>222</sup> referred by certain organs<sup>223</sup> and agencies.<sup>224</sup> Unfortunately, much like the Human Rights Advisory

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(last visited Feb. 21, 2020) [<https://perma.cc/6V2C-TSRM>] (archived July 18, 2020); see also discussion *supra* Part III.A.1 and accompanying notes.

220. See *Background Information on the Advisory Committee*, *supra* note 219.

221. See discussion *supra* Part III.A.2 and accompanying notes regarding UNAMA.

222. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 52 (July 8) (determining, on referral from the United Nations General Assembly, after study of current customary and conventional international law that there was no law expressly authorizing or prohibiting the use or threat of use of nuclear weapons). Note also that the International Court of Justice's jurisdiction to administer advisory opinions, when requested by a duly authorized organ or agency, is broad. See Stefanie Pfahl, *Is the WTO the Only Way? Safeguarding Multilateral Environmental Agreements from International Trade Rules and Settling Trade and Environment Disputes Outside the WTO* 1, 12 ([https://www.wto.org/english/forums\\_e/ngo\\_e/posp66\\_greenpeace\\_wto\\_e.pdf](https://www.wto.org/english/forums_e/ngo_e/posp66_greenpeace_wto_e.pdf) (last visited Aug. 23, 2020) [<https://perma.cc/Y5JK-LLBC>] (archived Aug. 23, 2020).

223. See *id.* at 12 n.3 ("General Assembly, Security Council, Economic and Social Council, Trusteeship Council, Interim Committee of the General Assembly, Committee on Applications for Review of Administrative Tribunal Judgements.").

224. See *id.* at 12 n.4 ("International Labour Organisation (ILO), Food and Agriculture Organization of the United Nations (FAO), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO), International Bank for Reconstruction and Development (IBRD), International Finance Corporation (IFC), International Development Association (IDA), International Monetary Fund (IMF), International Civil Aviation Organization (ICAO), International Telecommunication Union (ITU), World Meteorological Organization (WMO), International Maritime Organization (IMO), World Intellectual Property Organization (WIPO), International Fund, for Agricultural Development (IFAD), United Nations Industrial Development Organization (UNIDO), International Atomic Energy Agency (IAEA).").

Committee, China may politically obscure access to the ICJ—China’s influence over many states in the General Assembly will likely allow the country to block resolutions for such a referral. Perhaps the International Monetary Fund could refer the matter to the ICJ. In the Agreement between the International Monetary Fund and the UN, the General Assembly authorized the International Monetary Fund to request advisory opinions from the ICJ “on any legal questions within the scope of the Fund’s activities.”<sup>225</sup> The International Monetary Fund’s mandate was most recently updated in 2012 to include issues of macroeconomics and the financial sector that affect global stability.<sup>226</sup> Although the International Monetary Fund has yet to exercise this power since its inception,<sup>227</sup> the ability to refer a question to the ICJ is still available.

Other expert bodies equipped to handle this issue are the World Trade Organization (WTO) and the International Law Commission (ILC). Nevertheless, there are different problems associated with these organizations. First, the WTO does not have jurisdiction over the Belt and Road MOUs,<sup>228</sup> the organization’s Dispute Settlement Body cannot give advisory opinions,<sup>229</sup> and the WTO is specifically geared

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225. Agreement Between the United Nations and the International Monetary Fund, art. VIII, Nov. 15, 1947, 16 U.N.T.S. 328. The full language of the provision reads as follows:

The General Assembly of the United Nations hereby authorizes the Fund to request advisory opinions of the International Court of Justice on any legal questions arising within the scope of the Fund’s activities other than questions relating to the relationship between the Fund and the United Nations or any specialized agency. Whenever the Fund shall request the Court for an advisory opinion, the Fund will inform the Economic and Social Council of the request.

*See id.*

226. *About the IMF*, INT’L MONETARY FUND, <https://www.imf.org/en/About> (last visited Feb. 10, 2020) [<https://perma.cc/43ML-BTYD>] (archived July 18, 2020).

227. As of February 2020, the World Trade Organization has still yet to submit a question to the International Court of Justice for an advisory opinion. *Cf.* MARINA FOLTEA, INTERNATIONAL ORGANIZATIONS IN WTO DISPUTE SETTLEMENT: HOW MUCH INSTITUTIONAL SENSITIVITY? 145 (2012) (citing JOSEPH GOLD, INTERPRETATION: THE IMF AND INTERNATIONAL LAW 241 (1996)) (explaining that until 2012, the World Trade Organization had not solicited any advisory opinions from the International Court of Justice).

228. *See* discussion *supra* Part II.B.3 and accompanying notes.

229. The Dispute Settlement Understanding, which guides how a WTO panel may adjudicate disputes, empowers a WTO panel to make findings that will assist the Dispute Settlement Body in resolving such disputes. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 3.7, 7, 11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401. Note that the United States has been vocal about how the Dispute Settlement Body’s power under the DSU does not allow it to issue advisory opinions on issues that are not essential for resolving a particular dispute. *See Statements by the United States at the Meeting of the WTO Dispute Settlement Body* 10–26 (Oct. 29, 2018), [https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB\\_Stmt\\_as-delivered.fin\\_rev\\_public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_Stmt_as-delivered.fin_rev_public.pdf) [<https://perma.cc/6KCA-FTTJ>] (archived Aug. 3, 2020).

towards trade agreements and promoting international trade generally.<sup>230</sup> Furthermore, the WTO has been silent on the Belt and Road MOUs. Second, the International Law Commission does not have the bandwidth to conduct this type of study and release a timely report. Although the Statute of the International Law Commission would permit the Commission to conduct such a study,<sup>231</sup> the ILC consists of only thirty-four members<sup>232</sup> and has a laundry list of current projects.<sup>233</sup> It is highly unlikely that the ILC could study and release a report on the Belt and Road MOUs, let alone the more general realm of soft law instruments, in the near future.

One more pertinent concern is whether China will follow such guidance, regardless of the issuing body. If China is not involved in the shaping of the guidelines in any way, there is a strong possibility that it will otherwise dismiss them as illegitimate—but allowing China the ability to influence this guidance is counterproductive to its purpose. There may not be a way to ensure China follows suit, but at least the study of these types of instruments and the creation of guidance would create a basis for other states to pursue actions against material breaches or enforcement of obligations.

### C. Continue to Vocally Oppose Objectionable Practices at the United Nations

Member states and human rights advocacy groups should partner to lobby existing UN organizations with BRI partnerships to push for the creation and execution of commitments from China on protecting human rights and the environment.

Many UN agencies have developed partnerships with China for the BRI. As of October 2018, twenty-five UN agencies have been involved with the BRI.<sup>234</sup> The extent of involvement is varied amongst the various agencies. Many have signed soft law instruments such as

230. See *Who We Are*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm) (last visited Feb. 15, 2020) [<https://perma.cc/F3DU-5W8K>] (archived July 18, 2020).

231. Statute of the International Law Commission, Nov. 21, 1947, U.N. Doc. A/519 (1947) [hereinafter ILC Statute].

232. *Id.* art. 2(a); see also *Membership*, INT'L L. COMM'N, <https://legal.un.org/ilc/ilemembe.shtml> (last visited Feb. 22, 2020) [<https://perma.cc/QUW7-3UZ4>] (archived July 18, 2020).

233. See *Current Status of the Work of the Commission and Forthcoming Deadlines*, INT'L L. COMM'N, <https://legal.un.org/ilc/status.shtml> (last visited Feb. 23, 2020) [<https://perma.cc/B2WB-QYYS>] (archived July 18, 2020).

234. *UN Agencies Belt and Road Initiative Involvement*, U.N. (Oct. 1, 2018), <http://wedocs.unep.org/bitstream/handle/20.500.11822/26318/UN%20Agencies%20BRI%20Involvement%2002%20%2801%20Oct%202018%29.pdf?sequence=17&isAllowed=y> [<https://perma.cc/ZM69-AFAG>] (archived Aug. 3, 2020).

MOUs,<sup>235</sup> Letters of Intent,<sup>236</sup> and Agreements of Cooperation<sup>237</sup> while others have offered direct support for certain BRI programs.<sup>238</sup> These organizations should leverage their partnerships to encourage these agencies to use their position to round out the pressure exerted on China. Unfortunately, this seems likely to be a losing battle—China’s already outsized influence may well prevent these actions from being effective.

Therefore, member states should continue to actively voice their concerns and disagreement with China on issues in both the UN Security Council and the UN Human Rights Council. This can look similar to the statements made by Permanent Representative de Buytswerve and Ambassador Pierce—because negotiations often occur behind closed doors, it was because of their public statements and other similar comments that some of this Note’s analysis was possible.<sup>239</sup> Voicing dissent is an important step to rejecting China’s methods for growing its soft power influence. Genuine concerns for this action include how such statements may affect a country’s relationship with China, thus risking the possibility of overt or covert retaliation in other areas of cooperation. Another concern is the potential loss of Chinese support in initiatives requiring China’s vote as a member of the Security and Human Rights Councils. Although voiced concerns may, at times, seem to fall on deaf ears, persistent rejection of China’s push for the inclusion of specific language in resolutions and especially in general state practice (as may be exhibited through the Human Rights Council Advisory Committee’s studies) can contribute to preventing, or

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235. UN agencies that have signed Memorandums of Understanding as of October 2018 include the United Nations Development Programme; the International Labour Organisation; the UN Habitat; and the International Development Law Organisation. *See id.*

236. UN agencies that have signed Letters of Intent as of October 2018 include the World Meteorological Organisation; the International Maritime Organisation; and the Universal Postal Union. *See id.*

237. UN agencies that have signed Agreements of Cooperation as of October 2018 include the United Nations Industrial Development Organisation; the International Telecommunication Union; the World Intellectual Property Organisation; and the International Civil Aviation Organisation. *See id.*

238. UN agencies that have offered support for the Belt and Road Initiative as of October 2018 include the International Monetary Fund; the World Bank Group; the Food and Agriculture Organisation; the International Organisation for Migration; the United Nations Economic Commission for Europe; the United Nations Economic and Social Commission for Western Asia; the United Nations Economic and Social Commission for Asia and the Pacific; the United Nations Educational, Scientific, and Cultural Organisation; the United Nations Framework Convention on Climate Change; the United Nations Children’s Fund; the United Nations Office for South-South Cooperation; the World Tourism Organisation; the World Food Programme; and the International Fund for Agricultural Development. *See id.*

239. *See* discussion *supra* Part III.A.2.



at least slowing, the crystallization of undesirable customary international law.<sup>240</sup>

## V. CONCLUSION

Throughout history, countries have relied upon each other for help—in times of war, in times of natural disasters, and even in times of cooperation to promote international peace. No single country would be what it is today without help from other countries. However, not all forms of help are alike. If one looks with a narrow scope, BRI partnerships have yielded great results for countries in improving their domestic infrastructure, global connectivity, and access to their own resources. But these successes do not exist in a vacuum, and each had its own measure of associated costs.

Recall Alexis from the hypothetical in the Introduction. An implicit assumption in that scenario is that the loan agreement between Alexis and the bank would include fair terms and consideration. This Note advocates that China's loan agreements with BRI partners be treated similarly, regardless of the agreements' proclaimed nonbinding nature. To accomplish this end, international cooperation is necessary.

It is time for more of the international community to step up and contribute to efforts to curb China's growing soft power by increasing engagement and investment with developing nations and encouraging an expert group to analyze binding and nonbinding international agreements and release guidelines on how the agreements should be constructed and handled differently. The international community should also work with UN agencies that have already forged partnerships supporting the BRI to push for strong Chinese commitments to protect human rights and the environment. Simultaneously, other states should continue to actively register concerns and dissents when China takes objectionable actions. While none of these actions are perfect, they are steps to reduce the negative impacts of the BRI while still allowing countries to benefit from its initiatives.

It is crucial that members of the international community act now to signal disapproval of China's methods for increasing its soft power and thereby hinder the development of customary international law approving of such methods. While every sovereign nation is within its rights to desire power, nations should not pursue such ends with means that violate the sovereign duty to protect human rights.

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240. See discussion *supra* Part III.B and accompanying notes.

“There is no crueller tyranny than that which is perpetrated under the shield of law and in the name of justice.”

— *Charles de Montesquieu*

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