

## Working Paper:

# Challenging China to Make Good Project Governance a Centerpiece of the Belt and Road Initiative<sup>1</sup>

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China marked in August 2018 the fifth anniversary of Chinese Communist General Secretary Xi Jinping's ambitious Belt and Road Initiative (**BRI**) with claims that its \$60 billion worth of infrastructure and other projects are powering economic development across Asia, Europe, Africa and Latin America.<sup>2</sup> Foreign Minister Wang Yi called it the "largest platform for international cooperation and the most popular public good in the world."<sup>3</sup> The BRI project, first announced by Xi in the Fall of 2013,<sup>4</sup> seeks to join China with countries and peoples around the world to construct a Silk Road Economic Belt and 21<sup>st</sup>-Century Maritime Silk Road initially connecting over 70 countries.<sup>5</sup>

China's overall plan announced in 2015<sup>6</sup> envisioned that BRI will provide "win-win" benefits, filling a pressing need in participating countries for infrastructure; fostering policy, trade, financial and people-to-people connectivity across Asia, Europe and Africa and their adjacent seas; and affording China greater opportunities to export industrial overcapacity, furnish technical and labor services, and project "soft power,"<sup>7</sup> as it seeks to promote its vision of a global "community with a shared future for mankind."<sup>8</sup> As of July 2018, China reported more

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<sup>1</sup> This Working Paper is based on a draft paper prepared in July 2018 for a conference in Beijing, and has been somewhat updated as of the end of December 2018 with respect to relevant legal and other developments relating to the Belt and Road Initiative.

<sup>2</sup> "Xi pledges to bring benefits to people through Belt and Road Initiative," *Xinhua*, August 28, 2018, at: [http://www.xinhuanet.com/english/2018-08/28/c\\_137423397.htm](http://www.xinhuanet.com/english/2018-08/28/c_137423397.htm).

<sup>3</sup> "Wang Yi, "Stronger Legal Cooperation for Sound and Steady Development of the Belt and Road Initiative," July 3, 2018, at: [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1573636.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1573636.shtml).

<sup>4</sup> "Chronology of China's Belt and Road Initiative," March 28, 2015, at: [http://english.gov.cn/news/top\\_news/2015/04/20/content\\_281475092566326.htm](http://english.gov.cn/news/top_news/2015/04/20/content_281475092566326.htm).

<sup>5</sup> The precise number of what might be termed "BRI countries" is not clear. The China State Information Center's BRI website lists some 76 countries, including India, as of July 11, 2018, at: [https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat\\_id=10076](https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10076); James Kyngé of the Financial Times puts the number at 78 as of August 2018, *see*, James Kyngé, "China's Belt and Road projects drive overseas debt fears," August 7, 2018, at: [https://www.ft.com/content/e7a08b54-9554-11e8-b747-fb1e803ee64e?mc\\_cid=1be724dd13&mc\\_eid=4f18c05255](https://www.ft.com/content/e7a08b54-9554-11e8-b747-fb1e803ee64e?mc_cid=1be724dd13&mc_eid=4f18c05255); and the Hong Kong Trade and Development Council lists 75 on its website at: <https://beltandroad.hktdc.com/en/country-profiles>.

<sup>6</sup> "Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road," March 28, 2015, at: [http://en.ndrc.gov.cn/newsrelease/201503/t20150330\\_669367.html](http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html).

<sup>7</sup> "Promote soft power to boost the construction of the "Belt and Road" [提升软力量助推 "一带一路" 建设], December 9, 2016, at: <http://silkroad.news.cn/2016/1209/32237.shtml>.

<sup>8</sup> Xi Jinping, "Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era," Report to the Nineteenth National Congress of the Chinese Communist Party," *China Daily*, October 18, 2017, at:

than 100 countries and international organizations had signed Belt and Road cooperation documents, extending the initiative's scope from the Eurasian continent to Africa, Latin America and the Caribbean, and the South Pacific region,<sup>9</sup> while trade in goods with BRI countries and regions totaled more than US\$5 trillion and foreign direct investment to these destinations hit \$70 billion during 2013-17,<sup>10</sup> creating over 200,000 local jobs.

Yet, in spite of its accomplishments, BRI's implementation to date has also raised international concern about the potential for China's infrastructure diplomacy, much of which is targeted at lower income countries plagued by corruption and instability, to undermine global norms of governance. One study calculated that about 270 of 1,814 BRI projects undertaken since 2013 – roughly representing 32 percent of total project value -- were in trouble over unsustainable debt, labor policies, performance delays and national security concerns.<sup>11</sup> Such concerns, as well as press reports of local environmental and fiscal opposition<sup>12</sup> and corruption<sup>13</sup> contribute to the impression that the BRI is in need of better governance mechanisms, including higher environmental and social standards<sup>14</sup> and greater transparency and local engagement.<sup>15</sup>

China's leaders vow to promote economic globalization that is “more open, inclusive, balanced and beneficial to all” and that adheres to “the principle of achieving shared growth through discussion and collaboration in engaging in global governance.”<sup>16</sup> Xi Jinping, President and General Secretary of the Chinese Communist Party (CCP), is developing a new concept of global governance that features the “principle of extensive consultation, joint contribution and shared benefits” between and among nation states under a “norm of equality for all in terms of

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[http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content\\_34115212.htm](http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content_34115212.htm). See, also, “Joint Communique of the Leaders Roundtable of the Belt and Road Forum for International Cooperation,” May 16, 2017, at: [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1462012.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1462012.shtml).

<sup>9</sup> “Factbox: Belt and Road Initiative in five years,” Xinhua, August 26, 2018, at: [http://www.xinhuanet.com/english/2018-08/26/c\\_137420914.htm](http://www.xinhuanet.com/english/2018-08/26/c_137420914.htm).

<sup>10</sup> Chu Daye, “B&R kindles confidence, inspiration around world,” *Global Times*, August 26, 2018, at: <http://www.globaltimes.cn/content/1117134.shtml>.

<sup>11</sup> Kynge, “China's Belt and Road projects drive overseas debt fears,” *supra* note 5.

<sup>12</sup> See, e.g., “China faces resistance to a cherished theme of its foreign policy,” *The Economist*, May 4, 2017, at: [http://www.economist.com/news/china/21721678-silk-routes-are-not-always-appealing-they-sound-china-faces-resistance-cherished-](http://www.economist.com/news/china/21721678-silk-routes-are-not-always-appealing-they-sound-china-faces-resistance-cherished-theme?fsrc=scn/fb/te/bl/ed/thebeltandroadexpresschinafacesresistancetoacherishedthemeofitsforeignpolicy)

[theme?fsrc=scn/fb/te/bl/ed/thebeltandroadexpresschinafacesresistancetoacherishedthemeofitsforeignpolicy](http://www.economist.com/news/china/21721678-silk-routes-are-not-always-appealing-they-sound-china-faces-resistance-cherished-theme?fsrc=scn/fb/te/bl/ed/thebeltandroadexpresschinafacesresistancetoacherishedthemeofitsforeignpolicy).

<sup>13</sup> Stefania Palma, “Malaysia suspends \$22bn China-backed projects,” *Financial Times*, July 4, 2018, at: <https://www.ft.com/content/409942a4-7f80-11e8-bc55-50daf11b720d>.

<sup>14</sup> Basten Gokkon, “Environmentalists Are Raising Concerns Over China's Belt and Road Initiative,” *Pacific Standard*, July 18, 2018, at: <https://psmag.com/environment/environmental-concerns-over-chinese-infrastructure-projects>.

<sup>15</sup> See, e.g., International Crisis Group, *China-Pakistan Economic Corridor: Opportunities and Risks*, June 29, 2018, at: <https://www.crisisgroup.org/asia/south-asia/pakistan/297-china-pakistan-economic-corridor-opportunities-and-risks>; and in Chinese at: <https://www.crisisgroup.org/zh-hans/asia/south-asia/pakistan/297-china-pakistan-economic-corridor-opportunities-and-risks>: “Many of these problems stem from opaque policy formulation, and the failure to heed regional and local concerns. [The China-Pakistan Economic Corridor's] Long-Term Plan (2017-2030) was formulated by the centre with little input from local leaders, business or civil society actors. It was not disclosed until December 2017 – and then only in broad strokes – after the rollout of some major elements had already begun.”

<sup>16</sup> Zhong Shan, Minister of Commerce, “An Open China and a Win-Win World -- On the Release of the White Paper ‘China and the World Trade Organization,’” *Xinhua*, July 2, 2018, at: [http://www.xinhuanet.com/english/2018-07/02/c\\_137296686.htm](http://www.xinhuanet.com/english/2018-07/02/c_137296686.htm).

sovereignty, rights, opportunities and rules.”<sup>17</sup> His “community of a shared future for mankind” concept, frequently hailed by Chinese commentators as an element of the new global governance model in connection with BRI, was incorporated for the first time into a United Nations resolution in February 2017<sup>18</sup> and added to the Chinese state Constitution in March 2018.

These are all laudable principles, but they involve largely state-to-state relations. They fail to expressly address a critical factor for the success of major infrastructure projects wherever located: the support of impacted local communities. The Chinese party-state has itself come to recognize the importance of local engagement in its own ambitious development programs at home.<sup>19</sup> Indeed, Xi reiterated in his speech celebrating 40 years of Reform and Opening in December 2018 that the CCP is committed to “practicing scientific, democratic, and law-based governance” under a “people-oriented approach.”<sup>20</sup> He emphasized that, when “considering and introducing a policy, we must first and foremost ensure the backing, approval and endorsement of the people,” and respect the “wishes the people express, the best practices they create, the rights they are entitled to and the role they play.” To date, China’s leaders do not seem to have fully recognized that applying these same people-oriented principles in BRI and other overseas activities could help China ensure more successful projects to benefit the people in host countries while better realizing China’s economic, strategic and reputational goals.

Infrastructure investment is complex, and poor governance is a major reason why infrastructure projects often fail to meet their timeframe, budget, and service delivery objectives.<sup>21</sup> China itself, like many other countries, has experienced such complexities as it builds out major infrastructure projects at home. Good infrastructure governance must involve collaboration with not only government and business, but with the affected public as well. Strong public opposition arising from the failure to consult local residents and provide them with timely information has led to suspension and even cancellation of many major infrastructure projects in China, including power plants, chemical plants, roads and garbage treatment facilities.<sup>22</sup>

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<sup>17</sup> “Spotlight: How China's diplomatic approach is creating a more inclusive world,” *Xinhua*, August 30, 2017, at: [http://news.xinhuanet.com/english/2017-08/30/c\\_136568929.htm](http://news.xinhuanet.com/english/2017-08/30/c_136568929.htm).

<sup>18</sup> Xiang Bo, “China Keywords: Community with Shared Future for Mankind,” *Xinhua*, January 24, 2018, at: [http://www.xinhuanet.com/english/2018-01/24/c\\_136921370.htm](http://www.xinhuanet.com/english/2018-01/24/c_136921370.htm).

<sup>19</sup> Jamie P. Horsley, “Will engaging China promote good governance?,” *Brookings Institution*, January 2017, at: <https://www.brookings.edu/research/will-engaging-china-promote-good-governance>.

<sup>20</sup> “Highlights of Xi's speech at a conference celebrating 40 years of reform, opening-up,” *Xinhua*, December 18, 2018, at: <http://www.chinadaily.com.cn/a/201812/18/WS5c1854a7a3107d4c3a001612.html>. Xi mentioned BRI twice in this speech, including reaffirming that China should preserve with “building a ‘Belt and Road’” and working “with all parties to build a new platform for international cooperation,” adding “new impetus to the common development of the world.”

<sup>21</sup> Organization for Economic Co-operation and Development (OECD), “Getting Infrastructure Right: The Ten Key Governance Challenges and Policy Options,” March 20, 2017, at: <https://www.oecd.org/gov/getting-infrastructure-right.pdf>; and the full report, OECD, “Getting Infrastructure Right: A Framework for Better Governance,” March 20, 2017, at: [https://read.oecd-ilibrary.org/governance/getting-infrastructure-right\\_9789264272453-en#page1](https://read.oecd-ilibrary.org/governance/getting-infrastructure-right_9789264272453-en#page1).

<sup>22</sup> See, e.g., Li You, “Locals Fired Up Over China’s Largest Waste Incinerator,” *Sixth Tone*, June 8, 2017, at: <https://www.sixthtone.com/news/1000219/locals-fired-up-over-chinas-largest-waste-incinerator>; Elizabeth Economy, “China's New Governing Style: Crisis Management,” *The Atlantic*, May 20, 2013, at: <http://www.theatlantic.com/china/archive/2013/05/chinas-new-governing-style-crisis-management/276034>.

Cross-border infrastructure projects under the BRI framework are even more challenging than purely domestic ventures. They additionally involve diverse political, economic and social factors, regulatory regimes, and unfamiliar on-the-ground circumstances that impact decision-making and implementation. The involvement of foreign financing, foreign companies and foreign investment makes the typical infrastructure governance challenges even more complicated. In addition to *global governance* issues involving state-to-state interaction under a wide-ranging, government-backed and financed program like BRI, ensuring *domestic good governance* in project recipient countries is also critical. This includes taking into account environmental and social impacts and the concerns and interests of the local populations affected by planned projects. As China has experienced, where adequate information and consultation opportunities are not afforded early in the planning process, local opposition can stall or derail the best-intended of projects.<sup>23</sup>

This paper focusses on certain regulatory elements of “good project governance” to achieve positive, sustainable results that China has been developing at home and might usefully promote in the projects it finances and develops abroad, especially in the absence of appropriate local standards. These consist of (1) *openness* to participation by local and foreign companies in project procurement and development; (2) *transparency* throughout the project life, including information disclosure relating to project financing, siting, tendering and procurement processes, anticipated fiscal, environmental, social and other impacts, project contracts and project implementation; and (3) *public participation through local consultation* with impacted communities – as well as host governments -- from the earliest stage of project planning through the environmental impact assessment process, construction and operation.

#### Development of more transparent and participatory Chinese decision-making procedures

China’s decision-making model has gradually been incorporating concepts of more collaborative governance. CCP leadership remains paramount, with government playing a guiding role, but market players and society increasingly are expected also to participate in various ways and sectors, including in environmental protection, food safety and social governance generally. Moreover, Chinese leaders have been introducing new governance mechanisms largely under the rubric of “open government” for over two decades. This open government project emphasizes transparent, participatory, service-oriented and accountable government.<sup>24</sup> A nationwide information access statute adopted in 2007 requires the Chinese government at all levels proactively to disclose a broad range of information and gives the public the right to request government-held information, as well as to sue the government over non-disclosure.<sup>25</sup> Environmental, licensing, budget, financial, major construction project, government procurement and contracts, and other relevant information must be disclosed by different levels of government.

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<sup>23</sup> See, e.g., He Huifeng, “The ‘Belt and Road’ projects China doesn’t want anyone talking about,” *South China Morning Post*, August 8, 2017, at: <https://www.scmp.com/news/china/economy/article/2099973/belt-and-road-projects-china-doesnt-want-anyone-talking-about>.

<sup>24</sup> Jamie P. Horsley, “China Promotes Open Government as it Seeks to Reinvent Its Governance Model,” *Freedominfo.org*, February 22, 2016, at: [https://law.yale.edu/system/files/china-law-documents/2016\\_horsley\\_china\\_promotes\\_open\\_government.pdf](https://law.yale.edu/system/files/china-law-documents/2016_horsley_china_promotes_open_government.pdf).

<sup>25</sup> Jamie P. Horsley, “China’s FOIA Turns Eight,” *Freedominfo.org*, April 28, 2016, at: <http://www.freedominfo.org/2016/04/chinas-foia-turns-eight/>.

Legally prescribed channels for public participation in government affairs are also being established and deepened over time. Statutory requirements for publishing draft laws and regulations for public comment, including by foreign businesses, have been strengthened recently.<sup>26</sup> China's central government is also finalizing a regulation to establish national statutory procedures for what is called "major administrative decision-making," which includes major policies and government decisions on major projects. Those procedures, which have been piloted through local regulations for over ten years, require transparency and public participation in major project decisions.<sup>27</sup>

These laws and initiatives, supplemented by more detailed requirements for open governance in specific sectors -- including the environment<sup>28</sup> and major construction projects<sup>29</sup> -- are gradually changing the attitudes and behavior of Chinese state actors and relevant project companies, as well as public expectations. Employing these developing practices from home in Chinese projects abroad would not only help ensure sustainable projects with local support but, also help bolster China's soft power. For example, a Singaporean observer of China's BRI approach in Southeast Asia observed that Chinese officials and project developers on occasion fail to make "efforts to solve locals' worries about environmental protection and the impact of these projects on local society, culture and even religion in practice," and may attempt to keep information concerning controversial projects secret from impacted populations,"<sup>30</sup> thereby exacerbating various problems.

### Development of overseas project governance standards

China's overseas business activities of course pre-date BRI. In 1999, China embarked on its "Going Out" strategy, which encouraged its enterprises to invest abroad, exploit foreign resources with local partners, contract for international engineering projects and export labor

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<sup>26</sup> Jamie P. Horsley, "China Implements More Participatory Rulemaking Under Communist Party," March 15, 2018, at: <https://www.theregreview.org/2018/03/15/horsley-china-implements-participatory-rulemaking/>.

<sup>27</sup> Horsley (2017), *supra* note 19. See, Provisional Regulations on Major Administrative Decision Procedures (Draft for solicitation of comments), issued by the State Council for public comment June 9, 2017, English translation at: <https://www.chinalawtranslate.com/%E9%87%8D%E5%A4%A7%E8%A1%8C%E6%94%BF%E5%86%B3%E7%AD%96%E7%A8%8B%E5%BA%8F%E6%9A%82%E8%A1%8C%E6%9D%A1%E4%BE%8B-%EF%BC%88%E5%BE%81%E6%B1%82%E6%84%8F%E8%A7%81%E7%A8%BF%EF%BC%89/?lang=en>.

<sup>28</sup> See, e.g., Measures on Open Environmental Information (for Trial Implementation), adopted February 8, 2007, English translation at: [https://law.yale.edu/system/files/area/center/china/document/sepa\\_measures\\_on\\_open\\_environmental\\_information\\_trial.pdf](https://law.yale.edu/system/files/area/center/china/document/sepa_measures_on_open_environmental_information_trial.pdf); Measures on Public Participation in Environmental Protection, July 13, 2015, English translation at:

<https://www.chinalawtranslate.com/%E7%8E%AF%E5%A2%83%E4%BF%9D%E6%8A%A4%E5%85%AC%E4%BC%97%E5%8F%82%E4%B8%8E%E5%8A%9E%E6%B3%95/?lang=en>; and Measures on Public Participation in Environmental Impact Assessments [环境影响评价公众参与办法], effective January 1, 2019, at: [http://www.mee.gov.cn/gkml/sthjbgw/sthjbl/201808/t20180803\\_447662.htm](http://www.mee.gov.cn/gkml/sthjbgw/sthjbl/201808/t20180803_447662.htm)

<sup>29</sup> Opinions of the State Council General Office on Advancing Public Disclosure of Government Information in the Field of Approval and Implementation of Major Construction Projects [国务院办公厅关于推进重大建设项目批准和实施领域政府信息公开的意见], December 4, 2017, at: [http://www.gov.cn/zhengce/content/2017-12/15/content\\_5247349.htm](http://www.gov.cn/zhengce/content/2017-12/15/content_5247349.htm).

<sup>30</sup> See, e.g., He Huifeng, "The 'Belt and Road' projects China doesn't want anyone talking about," *South China Morning Post*, August 8, 2017, at: <http://www.scmp.com/news/china/economy/article/2099973/belt-and-road-projects-china-doesnt-want-anyone-talking-about>.

services.<sup>31</sup> China's government authorities began crafting rules and policies to direct and manage these endeavors.<sup>32</sup> As projects proliferated and problems arose overseas, China's central government agencies, led by the National Development and Reform Commission (NDRC), Ministry of Commerce (MOFCOM), Ministry of Finance (MOF), Ministry of Foreign Affairs (MFA) and the People's Bank of China (PBOC), began calling for increasingly higher standards in the conduct of both state-owned and private Chinese enterprises in overseas financing, project contracting and investment. More recent measures, including some sector-specific regulations, expressly apply to BRI projects. China lacks an overarching law governing overseas commercial and foreign assistance activity, which continues to be regulated through the interplay of policy and legally-enforceable regulations. General principles developing over time include attention to financial, environmental, social, integrity and other risk factors; the advisability of utilizing Chinese and host country legal, tax, accounting and other professional consultants; and compliance with both Chinese and local laws and regulations, as well as with international treaties and conventions and industry best practices, especially where relevant local legal requirements are underdeveloped.

A mid-2017 national guideline issued by NDRC, MOFCOM, PBOC and MFA (**2017 Overseas Investment Opinions**) aimed to put outbound investment on a more sustainable, orderly and low-risk basis,<sup>33</sup> noting that increased overseas investment, led by BRI, brings not only "golden opportunities," but also a series of risks and challenges that may lead to low returns on investment and weak profitability. It encouraged investment that drives advanced production capacity and superior quality equipment and technology standards. At the same time, it sought to restrict certain projects, including those that do not conform to environmental protection, energy consumption and security requirements of destination countries. The guideline called on both state-owned enterprises (SOEs) and private companies to consider the national conditions and actual demands in investment destinations, cooperate with local governments and enterprises for mutual benefits, create satisfactory economic and social benefits, and conduct safety risk analysis for all overseas projects. The Opinions also require Chinese companies operating overseas to comply with local host country, Chinese domestic and international laws, regulations and policies. NDRC regulations on approving and recording overseas investment that took effect March 1, 2018 similarly call on overseas Chinese investors to do business in good faith, avoid any act of unfair competition, respect local public order and good morals, fulfill their necessary

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<sup>31</sup> Zhu Rongji, "Report on the Outline of the Tenth Five-Year Plan for National Economic and Social Development (2001)," March 5, 2001, at: [http://www.gov.cn/english/official/2005-07/29/content\\_18334.htm](http://www.gov.cn/english/official/2005-07/29/content_18334.htm). See, also, State Council Strategy to Better Implement the Going Out Strategy [更好地实施“走出去”战略], March 15, 2006, at: [http://www.gov.cn/node\\_11140/2006-03/15/content\\_227686.htm](http://www.gov.cn/node_11140/2006-03/15/content_227686.htm).

<sup>32</sup> See, e.g., State Council Regulations on Administering Foreign Contracting Projects [对外承包工程管理条例], July 21, 2008, at: <http://www.mofcom.gov.cn/article/swfg/swfgbi/201101/20110107352097.shtml>; and State Council Foreign Labor Cooperation Regulations [对外劳务合作管理条例], June 4, 2012, at: [http://www.gov.cn/zwgk/2012-06/11/content\\_2157905.htm](http://www.gov.cn/zwgk/2012-06/11/content_2157905.htm);

<sup>33</sup> Notice of the State Council General Office Forwarding the Guiding Opinions of the National Development and Reform Commission, Ministry of Commerce, People's Bank of China and Ministry of Foreign Affairs on Further Guiding and Regulating the Overseas Investment Direction [国务院办公厅转发 国家发展改革委、商务部、人民银行、外交部关于进一步引导和规范境外投资方向指导意见], August 4, 2017, at: [http://www.gov.cn/zhengce/content/2017-08/18/content\\_5218665.htm](http://www.gov.cn/zhengce/content/2017-08/18/content_5218665.htm).

social responsibilities, pay attention to protecting the ecological environment, and create a good image of Chinese investors.<sup>34</sup>

Reflecting an increased emphasis on corporate compliance to avoid corruption and curb risk in high-risk developing countries along the Belt and Road,<sup>35</sup> another recent multi-agency government guideline issued by the NDRC, MFA, MOFCOM and PBOC in December 2018 calls for fostering a culture of compliance by all Chinese enterprises operating overseas -- whether through investments or contracted projects -- with Chinese and local law, relevant international treaties, internal rules and self-disciplinary regulations, codes of professional ethics and other applicable codes of conduct.<sup>36</sup> This comprehensive compliance guidance complements separate trial guidelines applicable specifically to SOEs, to help ensure their business operations at home and overseas better comply with local, Chinese national and international laws, regulations and circumstances.<sup>37</sup>

Legally enforceable regulations on overseas activities began to address environmental and social risk considerations, which are increasingly important to project decision-making within China as well, as early as 2008. That year, the State Council adopted national regulations on contracting foreign projects that required Chinese contractors to protect the local environment, as well as respect local customs and habits and promote local economic and social development.<sup>38</sup> Ministry of Commerce rules on overseas investment issued in 2014 require both state-owned and private enterprises similarly to respect local customs and culture, honor social responsibilities and do a good job of environmental and labor protection.<sup>39</sup>

In 2013, MOFCOM together with the then Ministry of Environmental Protection issued policy guidance on environmental protection work by foreign investment and cooperation enterprises, including those engaged in contracting foreign projects, encouraging enterprise to obey local laws of the host country on environmental protection, disclosing environmental information and engaging in dialogue with impacted communities and social groups concerning

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<sup>34</sup> NDRC Measures on the Administration of Enterprise Overseas Investment [企业境外投资管理办法], issued December 26, 2017, effective March 1, 2018, at:

<http://wzs.ndrc.gov.cn/zcfg/201712/W020171226342441416695.pdf> .

<sup>35</sup> Wu Wei and Zhu Yuanyuan, "Participating in the Belt and Road Initiative, Protected from Overseas Compliance Risks," July 14, 2017 at: <https://www.chinalawinsight.com/2017/07/articles/dispute-resolution/participating-in-the-belt-and-road-initiative-protected-from-overseas-compliance-risks/#more-11748>.

<sup>36</sup> National Development and Reform Commission, Ministry of Foreign Affairs, Ministry of Commerce, People's Bank of China, State-owned Assets Supervision and Administration Commission, State Administration of Foreign Exchange, and All-China Federation of Industry and Commerce, Guidelines for Enterprise Compliance Management of Overseas Operations [企业海外经营合规管理指引], December 26, 2018, at: [http://www.ndrc.gov.cn/gzdt/201812/t20181229\\_924456.html](http://www.ndrc.gov.cn/gzdt/201812/t20181229_924456.html).

<sup>37</sup> Latham & Walkins, "China's SASAC Releases Guidance on Compliance Management for Central Stated-Owned Enterprises," December 16, 2018, at: <https://www.lw.com/thoughtLeadership/China-SASAC-Guidance-Compliance-Management-Central-SOEs>.

<sup>38</sup> Art. 4, State Council Regulations on Administering Foreign Contracting Projects [对外承包工程管理条例], July 21, 2008, at:

<http://www.mofcom.gov.cn/article/swfg/swfgbi/201101/20110107352097.shtml>.

<sup>39</sup> Art. 20, Ministry of Commerce, Measures for the Administration of Overseas Investment [境外投资管理办法], September 6, 2014, at: <http://www.mofcom.gov.cn/article/b/c/201409/20140900723361.shtml>.

social responsibility and environmental impacts.<sup>40</sup> MOFCOM followed up with a strengthened directive in 2015 calling for overseas enterprises to enhance environmental protection, communication with local governments, communities and NGOs to learn their concerns and adopting international or multilateral agency standards for environmental protection in the absence of relevant local law, backed with a threat to punish non-compliance with host country environmental protection laws.<sup>41</sup>

A code of conduct for overseas investments by private enterprises issued by NDRC, MOFCOM and PBOC in December 2017, which reportedly has the same framework as an unpublished code that applies to SOEs,<sup>42</sup> emphasized fulfilling social responsibilities including information disclosure and communicating with the public, prohibited bribing officials and unfair competition, and specifically required Chinese enterprises to conduct an environmental impact assessment, as well as take environmental protection measures conducive to the host country's ecological development. In the absence of local legal requirements to do so, Chinese enterprises are to observe standards of international organizations and multilateral institutions instead.<sup>43</sup>

Environmental and social concerns were also a focus of “green credit” guidelines issued in 2012 by China's bank regulator.<sup>44</sup> These required both policy and commercial banks to identify and control environmental and social risks, defined as possible harm and relevant risks to the environment and society in the construction, production and business operations they financed, and issues related to energy consumption, pollution, land, health, safety, resettlement of people, ecological protection and climate change. Banks were also required to strengthen environmental and social risk management for overseas projects; ensure they abide by laws and regulations on environmental protection, land, health and safety of the country or region where the project is located; and make public commitments also to ensure they follow appropriate international practices and norms. Individual banking institutions have made related green development and green finance commitments of their own.<sup>45</sup>

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<sup>40</sup> Ministry of Commerce and Ministry of Environmental Protection, Guidelines for Environmental Protection in Foreign Investment and Cooperation (“**MOFCOM-MEP Overseas Environmental Protection Guidance**”), February 18, 2013, at: <http://english.mofcom.gov.cn/article/policyrelease/bbb/201303/20130300043226.shtml>.

<sup>41</sup> Ministry of Commerce General Office, Notice on the Further Enhancement of Environmental Protection Work of Foreign Investment and Cooperation Enterprises [ 商务部办公厅关于进一步做好对外投资合作企业环境保护工作的通知], April 13, 2015, at: <http://www.mofcom.gov.cn/article/fgsjk/201709/20170902650553.shtml>.

<sup>42</sup> See, e.g., Sara Hsu, “China Tightens Overseas Investment to Reduce Risk,” *Forbes*, December 22, 2017, at: <https://www.forbes.com/sites/sarahsu/2017/12/22/china-tightens-overseas-investment-to-reduce-risks/#5b627a86772c>.

<sup>43</sup> National Development and Reform Commission, Ministry of Commerce, and People's Bank of China, et al, Code of Conduct for Overseas Investment Operations by Private Enterprises (国家发展改革委、商务部、人民银行等关于发布《民营企业境外投资经营行为规范》的通知), December 6, 2017, Chapter V, at: <http://www.mofcom.gov.cn/article/ijyl/k/201712/20171202686698.shtml>. The same overall framework reportedly applies to state-owned or “central” enterprises regulated by the State-owned Asset Supervision and Administration Commission under an unpublished code of conduct. Wang Yanfei, “SOE foreign investment risk curbed,” *China Daily*, December 29, 2017, at: <http://www.chinadaily.com.cn/a/201712/19/WS5a383e86a3108bc8c67357f8.html>.

<sup>44</sup> China Banking Regulatory Commission, Green Credit Guidelines, February 12, 2012, English translation at: <http://www.cbrc.gov.cn/EngdocView.do?docID=3CE646AB629B46B9B533B1D8D9FF8C4A>.

<sup>45</sup> See, e.g., China Development Bank's Core Values, including Green Growth and compliance with the United Nations Global Compact, at: <http://www.cdb.com.cn/English/qywh/khjzg/>.



BRI-specific policies on promoting a “Green Belt and Road” published in May 2017 buttress the earlier guidance by calling for strengthening environmental protection and jointly building a “green silk road” through green, low-carbon and circular development, with cooperation featuring government guidance, enterprise responsibility and civil society participation.<sup>46</sup> The Green B&R Guidance urges businesses to “observe international regulations on economy and law, and the laws, regulations, policies and standards of the host countries on eco-environment protection,” while attaching “great importance to the appeals of the local residents on environment protection.”<sup>47</sup> That Guidance further promises that China will support environmental NGOs to build partnerships for advancing environmental protection in BRI countries; formulate environmental protection standards and codes for infrastructure construction in such sectors as green transport, green building and clean energy; develop green financial systems; disclose and share environmental information; and include environmental protection requirements into China’s free trade agreements. Referencing the 2013 MOFCOM-MEP Overseas Environmental Protection Guidance,<sup>48</sup> it encourages voluntary “green” corporate behavior and envisions government formulation of related regulations to guide companies to honor environmental and social responsibilities, and industry association development of codes of conduct for overseas environmental behavior.

The current overall approach to China’s expectations of its companies operating overseas is summarized in an official 2018 White Paper on China and the World Trade Organization, which states: “China encourages its enterprises to abide by local laws, fulfill corporate social responsibilities and observe business principles and international practices when they do business in host countries and conduct outward investment cooperation. China will continue to promote the sustainable, reasonable, orderly and sound development of outward investment, and effectively prevent risks of all kinds.”<sup>49</sup>

#### Enforcing overseas legal and governance requirements

Many of the official documents regulating Chinese overseas investment do not impose legally enforceable obligations. However, Chinese companies may suffer consequences in a variety of ways for their overseas activities. They and their responsible officers face potential debarment for engaging in corruption and fraud from multi-national development bank financing for BRI projects.<sup>50</sup> Domestically, NDRC rules on recording and reporting overseas investment provide that, if an investor engages in unfair competition or “disturbs the overseas investment market order,” the investor may be ordered to suspend or cease the relevant project and correct the problem, and the project may be terminated if the project is deemed to injure China’s national interests or security.<sup>51</sup> However, the NDRC measures are administrative, and there is no

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<sup>46</sup> “Guidance on Promoting Green Belt and Road,” May 8, 2017 at: <https://eng.yidaiyilu.gov.cn/zchj/qwfb/12479.htm> (“**Green B&R Guidance**”); and “The Belt and Road Ecological and Environmental Cooperation Plan,” May 14, 2017, at: <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13392.htm>.

<sup>47</sup> Green B&R Guidance, *supra* note 46.

<sup>48</sup> *Supra* note 40.

<sup>49</sup> State Council Information Office, “China and the World Trade Organization,” *Xinhua*, June 28, 2018, at: [http://www.xinhuanet.com/english/2018-06/28/c\\_137286993.htm](http://www.xinhuanet.com/english/2018-06/28/c_137286993.htm).

<sup>50</sup> Wu Wei and Zhu Yuanyuan, *supra* note 35.

<sup>51</sup> NDRC Measures, *supra* note 34, Arts 55 and 56.

suggestion that overseas partners or impacted communities have standing to sue Chinese companies in China based on these measures.

Following a call in the 2017 Overseas Investment Opinions to establish an inter-agency “blacklist” to track and punish overseas investment activity that violates relevant regulations,<sup>52</sup> NDRC and 28 state and CCP bodies published a memorandum of cooperation (MOU) to jointly punish “seriously dishonest” entities in the field of foreign economic cooperation. These entities, which include those involved in overseas investment and foreign contracting, finance and trade under the BRI, are to be entered into a blacklist under China’s evolving social credit system.<sup>53</sup> Under this MOU, participating Chinese authorities agree to impose penalties when Chinese companies engage in acts that violate specified provisions of relevant laws or regulations of China or the host country, international conventions, or United Nations resolutions, or disrupt the order of foreign economic cooperation and cause a seriously adverse impact on BRI implementation, damage the reputation and interests of China, or otherwise give rise to particularly serious and extremely adverse impacts. Consequences can include debarment from participating in domestic and overseas projects, as well as negative impacts on financing, government procurement, public-private partnership and other corporate and professional aspects.

China is also undertaking to provide commercial dispute resolution services targeted at BRI projects. In addition to developing relevant Chinese legal talent,<sup>54</sup> the Supreme People’s Court of China has established specialized divisions -- called international commercial courts in official English media -- in Xi’an and Shenzhen specifically to mediate, arbitrate and handle major cross-border litigation relating to the growing number of BRI and other international commercial disputes.<sup>55</sup> Investor-state and state-state investment and trade disputes relating to BRI projects will continue to be handled pursuant to relevant bilateral and multilateral treaties and instruments.

These new international commercial courts will, when appropriate, utilize China’s existing international arbitration and mediation institutions, as well as a new Committee of

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<sup>52</sup> *Supra* note 33. See, also, MOFCOM, etc., Interim Measures on Bad Credit Records in Foreign Investment Cooperation and Foreign Trade [对外投资合作和对外贸易领域不良信用记录试行办法], July 5, 2013, at: <http://hzs.mofcom.gov.cn/article/zcfb/f/201309/20130900309355.shtml>.

<sup>53</sup> Notice of the National Development and Reform Commission, People's Bank of China, Ministry of Commerce and Other Departments on Issuing the Memorandum of Cooperation on Joint Punishment of Seriously Dishonest Entities in the Foreign Economic Cooperation Field [国家发展改革委、人民银行、商务部等关于印发《关于对外经济合作领域严重失信主体开展联合惩戒的合作备忘录》的通知], October 31, 2017, at: [http://wzs.ndrc.gov.cn/zcfg/201711/t20171124\\_867713.html](http://wzs.ndrc.gov.cn/zcfg/201711/t20171124_867713.html); see, also, Guiding Opinions of NDRC, PBOC, MOFCOM and Other Departments on Strengthening Development of a Credit System in the Foreign Economic Cooperation Field [国家发展改革委、人民银行、商务部等关于加强对外经济合作领域信用体系建设的指导意见], October 31, 2017, at: <http://www.mofcom.gov.cn/article/b/bf/201801/20180102701152.shtml>.

<sup>54</sup> Ministry of Justice, Ministry of Foreign Affairs, Ministry of Commerce and Legislative Affairs Office of the State Council Opinions on Developing the Foreign-related Legal Service Industry [司法部、外交部、商务部、国务院法制办公室印发《关于发展涉外法律服务业的意见》], December 30, 2016, at: [http://www.moj.gov.cn/index/content/2017-01/09/content\\_6946567.htm](http://www.moj.gov.cn/index/content/2017-01/09/content_6946567.htm).

<sup>55</sup> China International Commercial Court English-language website, at: <http://cicc.court.gov.cn/html/1/219/index.html>; English translation of model BRI cases as well, at: <http://cicc.court.gov.cn/html/1/219/199/201/index.html>.

International Business Experts<sup>56</sup> that will aid judges in ascertaining applicable foreign law and may mediate cases where the parties agree.<sup>57</sup> China is a pioneer in establishing the world's first internet courts,<sup>58</sup> and the international commercial court rules provide for online filings and hearings, indicating the new courts plan eventually also to utilize the internet for BRI dispute resolution services, which would make their services more accessible for far-flung litigants.

China's attention to the resolution of BRI-related disputes makes sense, given that disputes are already arising in these complex, multi-jurisdictional projects,<sup>59</sup> including in states that may not yet have developed legal systems. Adjudication in China may also make it easier to enforce judgments against Chinese counterparties. However, China has not entered into many agreements for mutual enforcement of civil judgments,<sup>60</sup> so enforcing Chinese judgments overseas might be problematic.<sup>61</sup> In addition, although an initial batch of Chinese arbitral and mediation institutions were named in December 2018,<sup>62</sup> it is not clear whether established foreign arbitral institutions, many of which are also gearing up to handle BRI disputes,<sup>63</sup> will be able to qualify to handle arbitrations for cases brought in China's new international commercial

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<sup>56</sup>Supreme People's Court Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For trial implementation), adopted November 21, 2018, English translation at: <http://cicc.court.gov.cn/html/1/219/208/210/1146.html>.

<sup>57</sup> See, Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Courts, effective as of July 1, 2018, English translation at: <http://cicc.court.gov.cn/html/1/219/199/201/817.html>.

<sup>58</sup> Cao Yin, "World's first internet court goes online in Hangzhou," *China Daily*, August 18, 2017, at: [http://www.chinadaily.com.cn/china/2017-08/18/content\\_30770108.htm](http://www.chinadaily.com.cn/china/2017-08/18/content_30770108.htm). Two more internet courts have been established in Beijing and Guangzhou. See, Sara Xia, "China's Internet Courts are Spreading; Online Dispute Resolution is Working," *China Law Blog*, December 23, 2018, at: [https://www.chinalawblog.com/2018/12/chinas-internet-courts-are-spreading-online-dispute-resolution-is-working.html?utm\\_source=Dan+Harris+-+China+Law+Blog&utm\\_campaign=c325f90ec0-RSS\\_EMAIL\\_CAMPAIGN&utm\\_medium=email&utm\\_term=0\\_39bc6c6bdc-c325f90ec0-73433337](https://www.chinalawblog.com/2018/12/chinas-internet-courts-are-spreading-online-dispute-resolution-is-working.html?utm_source=Dan+Harris+-+China+Law+Blog&utm_campaign=c325f90ec0-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_39bc6c6bdc-c325f90ec0-73433337).

<sup>59</sup>Cao Yin, "Courts handling 'a boom' of Belt and Road cases," *China Daily*, March 15, 2017, at: [http://www.chinadaily.com.cn/china/2017twosession/2017-03/15/content\\_28559326.htm](http://www.chinadaily.com.cn/china/2017twosession/2017-03/15/content_28559326.htm); see, also, Susan Finder, "Supreme People's Court & foreign-related disputes," *Supreme People's Court Monitor*, March 11, 2017, at: <https://supremepeoplescourtmonitor.com/2017/03/11/supreme-peoples-court-foreign-related-disputes/>.

<sup>60</sup>China had entered as of September 2018 into 20 Sino-foreign treaties on judicial assistance in civil and commercial matters, covering only a small number of the BRI countries and regions and, while it also signed the Convention on Choice of Court Agreements in September 2017, it has not ratified it as of the end of 2018. See, Zihao Zhou, Nathan Harpainter, & Yuan Emily Cao, Survey Results: Rules on China's International Commercial Courts, 3 *China Law Connect* 21 (Dec. 2018), also available at Stanford Law School China Guiding Cases Project, Dec. 2018, <http://cgc.law.stanford.edu/commentaries/clc-3-201812-26-zhou-harpainter-cao>, text accompanying notes 24 and 25.

<sup>61</sup> Baker McKenzie Fen Xun, "Client Alert: SPC Launches International Commercial Courts in Shenzhen and Xi'an," July 2018, at: [https://www.bakermckenzie.com/-/media/files/insight/publications/2018/07/al\\_china\\_splaunchesinternationalcommercialcourts\\_july2018.pdf?la=en](https://www.bakermckenzie.com/-/media/files/insight/publications/2018/07/al_china_splaunchesinternationalcommercialcourts_july2018.pdf?la=en).

<sup>62</sup> Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the "One-stop" Diversified International Commercial Dispute Resolution Mechanism, December 5, 2018, at: <http://cicc.court.gov.cn/html/1/219/208/210/1144.html>.

<sup>63</sup> Jue Jun Lu, "Dispute Resolution along the Belt and Road: What does the future hold?," August 8, 2018, at: <http://www.blplaw.com/expert-legal-insights/articles/dispute-resolution-along-the-belt-and-road-what-does-the-future-hold>.

courts.<sup>64</sup> Having access to non-Chinese ADR institutions might help enhance the credibility of those courts.

In addition, although the CCP body that approved the international commercial court initiative<sup>65</sup> called for “equal protection of the rights of both Chinese and foreign parties to create a stable, fair and transparent law-based business environment,”<sup>66</sup> some observers raise a concern that courts and ADR institutions based in China under CCP leadership might not always be able to decide disputes independently.<sup>67</sup> Yet another concern is that China may pressure recipient countries to agree to submit to the jurisdiction of the international commercial courts and to the application of Chinese law, as was reportedly the case with a controversial loan agreement involving Kenya.<sup>68</sup>

Due to the many considerations relating to bringing cross-border litigation, the Chinese government’s decision to fund a “Belt and Road Legal Cooperation Research and Training Program” to boost judicial, as well as law enforcement, anti-corruption and other, cooperation,<sup>69</sup> might usefully consider capacity-building programs to provide judicial and legal training and related services in BRI countries and regionally, in case overseas parties prefer to have their disputes resolved in or nearer their home jurisdictions.

The foregoing discussion of China’s evolving and increasingly comprehensive regulatory approach to overseas economic activity and behaviors of Chinese enterprises indicates that, in addition to fiscal, legal, security, diplomatic, and other considerations, China clearly is cognizant of the need from both a reputational and practical perspective for its companies to act appropriately and be perceived to be “good corporate citizens” when they operate overseas, including under the BRI umbrella. Moreover, Chinese companies are reportedly stepping up their game, hiring and training local labor forces and contractors in many cases and taking the concerns of local NGOs more seriously in certain other cases.<sup>70</sup> Reportedly, 85% of employees at Chinese SOE branches overseas are local hires, while in many companies they account for

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<sup>64</sup> Wei Sun, “International Commercial Court in China: Innovations, Misunderstandings and Clarifications,” *Kluwer Arbitration Blog*, July 14, 2018, at: <http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications/#comment-79257>.

<sup>65</sup> Guo Liqin, “[Exclusive] China Plans International Commercial Courts for Belt and Road Dispute Resolution,” *Yicai Global*, January 25, 2018, at: <https://www.yicai.com/news/exclusive-china-plans-international-commercial-courts-belt-and-road-dispute-resolution>.

<sup>66</sup> PTI, “China to establish international courts to deal with BRI cases,” *New Indian Express*, January 26, 2018, at: <http://www.newindianexpress.com/world/2018/jan/26/china-to-establish-international-courts-to-deal-with-bri-cases-1763772.html>.

<sup>67</sup> See, e.g., Nyshka Chandran, “China’s plans for creating new international courts are raising fears of bias,” *CNBC*, February 1, 2018, at: <https://www.cnbc.com/2018/02/01/china-to-create-international-courts-for-belt-and-road-disputes.html>; “New Courts for the Belt and Road Initiative,” *OboEurope*, February 6, 2018, at: <http://www.oboreurope.com/en/bri-courts/>; and CICC Survey Results, supra note 51, text accompanying note 27.

<sup>68</sup> Edwin Okoth, “SGR pact with China a risk to Kenyan sovereignty, assets,” January 13, 2019, at: <https://www.nation.co.ke/news/Hidden-traps-in-SGR-deal-with-China/1056-4932764-ebw46r/index.html>.

<sup>69</sup> Wang Yi, supra note 3.

<sup>70</sup> “China faces resistance to a cherished theme of its foreign policy,” *The Economist*, May 4, 2017, at: <http://www.economist.com/news/china/21721678-silk-routes-are-not-always-appealing-they-sound-china-faces-resistance-cherished-theme?fsrc=scn/fb/te/bl/ed/thebeltandroadexpresschinafacesresistancetoacherishedthemeofitsforeignpolicy>.

over 90%.<sup>71</sup> Nonetheless, while much regulatory progress in addressing the various aspects of good economic and infrastructure governance has been made, China could promote further improvements on its BRI approach in several respects discussed below.

### Open Government Procurement

China has developed a sophisticated government procurement and competitive tender system, under which it makes such contracts publicly available, for its domestic purposes. Open and competitive government procurement can help minimize the opportunity for corruption and ensure better, more cost-effective projects. However, China's system gives preference to domestic companies and goods, and is not always open to competition from China-domiciled foreign-invested enterprises let alone foreign companies,<sup>72</sup> although the draft Foreign Investment Law released for public comment by the National People's Congress Standing Committee in December 2018 would guarantee fair participation and equal treatment in government procurement activities with respect to non-Chinese enterprises.<sup>73</sup>

On the international stage, Chinese Vice Foreign Minister Kong Xuanyou stated on July 3, 2018 at the BRI forum on international legal cooperation, that "all eligible enterprises, regardless of their background, can be involved in building the Belt and Road."<sup>74</sup> Nonetheless, while BRI-specific data on government procurement is difficult to compile, a 2018 study for the International Bank of Reconstruction and Development found that Chinese companies account for the majority of BRI procurement.<sup>75</sup> Other research similarly indicates that roughly 60- 80% of overseas projects funded by Chinese state banks have been awarded to Chinese companies<sup>76</sup> and that, according to research conducted by the Center for Strategic and International Studies, nearly 89% of contracts for China-funded transport infrastructure projects in 34 Asian and European countries (not all BRI-related) were awarded to Chinese contractors.<sup>77</sup> In April 2018, ambassadors to China from 27 of the 28 European Union member states (excluding Hungary) reportedly issued a paper criticizing the BRI that called for openness to non-Chinese companies

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<sup>71</sup>Wang Yajie, "国资委揭秘央企 "一带一路" 最新成绩单 利润总额超千亿," October 30, 2018, at: <http://www.eeo.com.cn/2018/1030/339981.shtml>.

<sup>72</sup> American business regularly complains about their inability to participate on equal footing with domestic competitors when bidding for government procurement contracts in China and urging China to accede to the WTO GPA. AmCham China, "2017 AmCham China White Paper: American Business in China," at: <file:///U:/US-China/2017%20AmCham%20White%20Paper.pdf>.

<sup>73</sup> Foreign Investment Law of the People's Republic of China (Draft) [中华人民共和国外商投资法 (草案)], December 26, 2018, at: <https://www.chinalawtranslate.com/%E4%B8%AD%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%9B%BD%E5%A4%96%E5%95%86%E6%8A%95%E8%B5%84%E6%B3%95%E5%BC%88%E8%8D%89%E6%A1%88%E5%BC%89/?lang=en>.

<sup>74</sup> Xu Wei, "China will work to ensure Belt, Road transparent," *China Daily*, July 4, 2018 at: [http://english.gov.cn/news/video/2018/07/04/content\\_281476208578419.htm](http://english.gov.cn/news/video/2018/07/04/content_281476208578419.htm).

<sup>75</sup> Tanis Ghossein, Bernard Hoekman and Anirudh Shingal, "Public Procurement in the Belt and Road Initiative, World Bank Group, December 2018, at: <http://documents.worldbank.org/curated/en/143241544213097139/Public-Procurement-in-the-Belt-and-Road-Initiative>.

<sup>76</sup>Chris Devonshire-Ellis, "EU Ambassadors, China Policy Advisors' Myopia Misses the Point of Belt and Road," *Silk Road Briefing*, April 25, 2018 at: <https://www.silkroadbriefing.com/news/2018/04/25/eu-ambassadors-china-policy-advisors-myopia-misses-point-belt-road>.

<sup>77</sup> James Kynge, "Chinese contractors grab lion's share of Silk Road projects," *Financial Times*, January 24, 2018, at: <https://www.ft.com/content/76b1be0c-0113-11e8-9650-9c0ad2d7c5b5>.

in public procurement, as well as adherence to principles of transparency and high environmental and social standards for BRI projects.<sup>78</sup>

In his speech to the Bo'ao Forum for Asia in April 2018, Xi Jinping promised that China will “accelerate the process of joining” the WTO Agreement on Government Procurement (GPA),<sup>79</sup> which establishes rules for open, fair and transparent international competition.<sup>80</sup> Such a move would provide greater confidence to host countries and non-Chinese companies, especially those from recipient countries, that they can compete on a level playing field for BRI-related government procurement contracts funded by the Chinese government and its policy banks. Prior to joining the GPA, China might take the initiative to open bidding to all qualified companies, making such tenders available (in at least English as well as Chinese) on a centralized, open digital platform. Providing more funding through multi-lateral development banks including the AIIB, which follow internationally recognized procedures for procurement, would be another way to enhance confidence in the openness and inclusiveness of BRI projects.<sup>81</sup>

### Transparency

Although the Chinese government insists that BRI is a transparent initiative,<sup>82</sup> one analyst has observed that it may well be “the best-known, least-understood foreign policy effort underway,” with little reliable information about how it is unfolding overall.<sup>83</sup> Many commentators cite the need for more information on China’s international lending generally,<sup>84</sup> as well as procedures for getting information, bidding on projects, accessing Chinese financing and project implementation for BRI projects more specifically. According to one study, while Chinese leaders have confirmed that foreign firms are welcome to participate in BRI projects, “China has yet to provide exact information on which foreign firms have so far directly benefited from the Chinese development program” and who is eligible for investment, and on what terms, under the \$40 billion Silk Road Fund that was set up in 2014.<sup>85</sup> At the first international gathering in Beijing to promote BRI in May 2017, EU officials reportedly refused to sign a joint

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<sup>78</sup> Dana Heide, Till Hoppe, Stephan Scheuer and Klaus Stratmann, “EU ambassadors band together against Silk Road,” *Handelsblatt Global*, April 17, 2018, at: <https://global.handelsblatt.com/politics/eu-ambassadors-beijing-china-silk-road-912258>.

<sup>79</sup> Xi Jinping, “Openness for Greater Prosperity, Innovation for a Better Future,” *China Daily*, April 10, 2018, at: [http://www.chinadaily.com.cn/a/201804/10/WS5acc515ca3105cdef6517425\\_1.html](http://www.chinadaily.com.cn/a/201804/10/WS5acc515ca3105cdef6517425_1.html)

<sup>80</sup> Agreement on Government Procurement, at: [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm).

<sup>81</sup> See, e.g., the AIIB Procurement Policy, January 2016, at: [https://www.aiib.org/en/policies-strategies/download/procurement-policy/policy\\_procurement.pdf](https://www.aiib.org/en/policies-strategies/download/procurement-policy/policy_procurement.pdf).

<sup>82</sup> Xu Wei, *supra* note 74.

<sup>83</sup> Jonathan E. Hillman, “China’s Belt and Road Initiative: Five Years Later,” *CSIS*, January 25, 2018, at: <https://www.csis.org/analysis/chinas-belt-and-road-initiative-five-years-later-0>.

<sup>84</sup> See, e.g., David Dollar, “Is China’s Development Finance a Challenge to the International Order?,” November 9, 2017, at: <https://www.brookings.edu/research/is-chinas-development-finance-a-challenge-to-the-international-order/>; see, also, Carmen M. Reinhart, “Exposing China’s Overseas Lending,” Project Syndicate, October 31, 2018, at: <https://www.project-syndicate.org/commentary/china-opaque-foreign-development-loans-by-carmen-reinhart-2018-10>.

<sup>85</sup> Dana Heide, et al, *supra* note 78.

declaration with the Chinese government, because it did not guarantee international standards of transparency and “equal opportunities for all investors in transport infrastructure.”<sup>86</sup>

Transparency will also be important to the success of China’s new foreign aid agency, the China International Development Cooperation Agency (**CIDCA**), which reportedly will manage at least some BRI-related project funding.<sup>87</sup> China has provided little information concerning its foreign aid to date,<sup>88</sup> and observers have called for more transparency so that countries and other aid agencies can better understand how China manages its aid portfolio, how and where the money is spent, and what the primary motivations are, in part to help them develop and adjust their own programs. A draft rule on administering foreign aid issued for public comment by CIDCA in November 2018 unfortunately fails to require any level of transparency, other than potentially publishing fines imposed on Chinese project implementing parties.<sup>89</sup> Expanding on earlier measures issued by MOFCOM, it adds as one of foreign aid’s purposes promoting joint implementation of the Belt and Road strategy and constructing a community of common destiny,” one of Xi Jinping’s signature concepts associated with BRI (Art. 4). The draft rule would amend the existing rules to provide that projects can be carried out cooperatively by Chinese and recipient country parties or independently by recipient country parties alone, as well as by Chinese parties alone, which under the MOFCOM rule was presented as the normal arrangement.<sup>90</sup> China’s traditional tied aid approach, like its policy bank financing, has also drawn international criticism for employing Chinese companies, labor and experts on its funded projects rather than developing domestic capacity in recipient countries.<sup>91</sup>

China has improved government transparency domestically through implementing its decade-old Regulations on Open Government Information and related policies, including special environmental information disclosure requirements that also require certain corporate disclosures.<sup>92</sup> Relevant authorities have also established domestic investment project,<sup>93</sup> public-private partnership (**PPP**),<sup>94</sup> online recording of overseas investment project<sup>95</sup> and other useful

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<sup>86</sup> *Id.*

<sup>87</sup> Lisa Cornish, “China’s new aid agency: What we know,” *Devex*, April 20, 2018, at: <https://www.devex.com/news/china-s-new-aid-agency-what-we-know-92553>.

<sup>88</sup> Jenny Lei Ravelo, “DevExplains: Chinese aid,” *Devex*, August 17, 2017, at: <https://www.devex.com/news/devexplains-chinese-aid-90841>.

<sup>89</sup> “CIDCA issues Measures for the Administration of Foreign Aid draft,” ChinaAidBlog, November 20, 2018, at: <http://china-aid-blog.com/2018/11/20/cidca-issues-measures-for-the-administration-of-foreign-aid-draft/>

<sup>90</sup> Ministry of Commerce Measures for the Administration of Foreign Aid (for Trial Implementation) [对外援助管理办法（试行）], Art. 23, November 15, 2014, at: <http://www.mofcom.gov.cn/article/b/c/201411/20141100799438.shtml>.

<sup>91</sup> *Id.*

<sup>92</sup> Measures on Open Environmental Information (for Trial Implementation), *supra* note 28.

<sup>93</sup> National investment project online approval and regulation platform [全国投资项目在线审批监管平台], at: <http://www.tzxm.gov.cn/>; national online major construction project database

<sup>94</sup> The PPP Comprehensive Information Platform System in Chinese [PPP 综合信息平台系统] is at: <http://www.cpppc.org:8082/>, with a separate accessible project database and map, expert database, and institutional database. *See, also*, Ministry of Finance, Interim Measures for the Administration of Information Disclosure for Public-Private Partnership Integrated Information Platform, February 9, 2017, at: <http://www.cpppc.org/en/Guidelines/4642.jhtml>.

<sup>95</sup> Online Recordation Administration of Overseas Investment Projects Nationwide [全国境外投资项目备案管理网络系统], at: <http://jwzt.ndrc.gov.cn/jwzt-ex/index.action>, which requires log in to access.

information disclosure platforms. Moreover, the Chinese government has promoted the principle of information disclosure throughout the whole lifecycle of domestic investment and PPP projects, including of related reports and evaluations. However, a 2017 State Council guideline on information disclosure of approvals and implementation of major construction projects that directly and significantly impact economic and social development expressly *excludes* overseas investment and foreign aid projects from its requirements.<sup>96</sup> Hopefully, that exclusion can be revisited.

In the case of BRI projects, there does not appear to be any comparable centralized and comprehensive database. BRI-related portals in Chinese, English and several other languages provide some general information and (in Chinese) aggregate data, but have little detailed data and reporting on specific projects and their implementation.<sup>97</sup> No official BRI service center, similar to the one for PPP projects,<sup>98</sup> appears to exist. MOFCOM does have a Chinese language “Going Out” Public Service Platform<sup>99</sup> that reported nearly 51,500 enterprises or institutions recorded and as of July 3, 2018, and also hosts a webpage dedicated to general information about BRI projects, including quarterly statistics.<sup>100</sup> Another English language MOFCOM website hosts a searchable Investment Project Information Database on inward and outward investments as well as investment intentions, but to date it does not appear to identify BRI projects.<sup>101</sup> The Xinhua Silk Road Information Service provides a collection of Chinese projects,<sup>102</sup> which includes information on the recipient country, sector, and relevant dates, but the English version of the website’s Chinese company inquiry database<sup>103</sup> is intended to help foreign investors conduct credit investigations of Chinese companies’ basic information, not information about their overseas projects. Non-Chinese research organizations and think tanks have established a variety of databases tracking Chinese outward investment, some of which focus on BRI.<sup>104</sup> However, these databases also have to rely on incomplete information bolstered by assumptions.

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<sup>96</sup>Opinions of the State Council General Office on Advancing Public Disclosure of Government Information in the Field of Approval and Implementation of Major Construction Projects [国务院办公厅关于推进重大建设项目批准和实施领域政府信息公开的意见], December 4, 2017, at: [http://www.gov.cn/zhengce/content/2017-12/15/content\\_5247349.htm](http://www.gov.cn/zhengce/content/2017-12/15/content_5247349.htm).

<sup>97</sup> An official government BRI portal is at: <https://www.yidaiyilu.gov.cn>, with links to English, <https://eng.yidaiyilu.gov.cn>; French, Russian, Spanish, and Arabic language websites.

<sup>98</sup> China Public Private Public Partnerships Center, English website at: <http://www.cpppc.org/en/index.jhtml>.

<sup>99</sup> “‘走出去’公共服务平台,” at: <http://fec.mofcom.gov.cn>.

<sup>100</sup> Statistics for the first quarter 2018 reveal that from January to April 2018, Chinese enterprises invested a total of US\$4.67 billion in non-financial direct investment in 53 BRI countries, an increase of 17.3% over the same period of last year, accounting for 13.1% of the total amount, mainly to Singapore, Laos, Malaysia, Vietnam, Indonesia, Pakistan, Thailand and Myanmar. In terms of foreign contracted projects, Chinese enterprises newly signed 1,010 contracts for foreign contracted projects in BRI countries, which amounted to US\$ 28.83 billion, accounting for 47% of the newly signed contracts for foreign contracted projects in China during the same period, down 9.5% year-on-year. The turnover was US\$24.2 billion, accounting for 54% of the total period, an increase of 27.7%. <http://fec.mofcom.gov.cn/article/fwtydl>.

<sup>101</sup> MOFCOM Investment Project Information Database, [http://project.mofcom.gov.cn/1800000091\\_10000108\\_8.html](http://project.mofcom.gov.cn/1800000091_10000108_8.html).

<sup>102</sup>Xinhua Silk Road [新华丝路], at:

[http://app.silkroad.news.cn/?app=system&controller=iframe&action=project\\_index](http://app.silkroad.news.cn/?app=system&controller=iframe&action=project_index)

<sup>103</sup>Xinhua Silk Road, at: <http://en.silkroad.news.cn/app/credit/SiteController/actionIndex>, homepage at: <http://en.silkroad.news.cn/>.

<sup>104</sup> See, e.g., American Enterprise Institute, China Global Investment Tracker, at: <http://www.aei.org/china-global-investment-tracker> (the most comprehensive data set covering China’s global investment and construction, which



Chinese authorities have recently strengthened reporting requirements for both major overseas investment and foreign contracting projects, in order to more effectively prevent risks, guide the healthy and orderly development of outbound economic activity, and promote successful implementation of the BRI.<sup>105</sup> MOFCOM is to be responsible for centralized compilation of the information on overseas investments and maintaining an online platform for reporting required information and statistical data. Chinese authorities have also reportedly started working to compile better information on how many overseas deals have already been done and with what countries, as well as their financial terms.<sup>106</sup>

As China strives to reduce local debt and financial risks at home, and as some overseas projects stall in the face of mounting debt and local concerns,<sup>107</sup> it makes sense for China to get a better handle on its widespread and multi-faceted BRI project portfolio, not only to ensure that projects are effective and profitable, but that they do not end up undermining China's diplomatic and strategic goals for BRI as well. Given that the public tends to focus on negative media reporting, greater transparency regarding BRI projects and related data might also help China counter some of the adverse publicity and speculation surrounding BRI.

### Transparency and Public Engagement

Greater transparency regarding BRI projects and their implementation would also help address additional concerns regarding the environmental and social sustainability of BRI projects, which directly implicates local populations. As an OECD study concluded, "Infrastructure impacts communities - without well managed consultation, good projects may falter." In contrast, well-executed consultation processes can enhance the legitimacy of the project within the community and foster a sense of shared ownership.<sup>108</sup>

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are documented both separately and together, including 2,900 large transactions across energy, transportation, real estate, and other industries, as well as 250 troubled transactions, as of mid-July 2018); AidData – A Research Lab at William & Mary, at: <https://www.aiddata.org> (extensive information on individual project, but no BRI filter); CSIS, ReconnectingAsia, at: <https://reconnectingasia.csis.org> (interactive map, open-source database of over 2,200 transportation projects, and expert analysis); and MERICS Belt and Road Tracker, <https://www.merics.org/en/bri-tracker>.

<sup>105</sup> MOFCOM, etc., Interim Measures for the Reporting of Outbound Investments Subject to Record-filing or Approval [对外投资投资备案（核准）报告暂行办法], January 2018, at: <http://images.mofcom.gov.cn/hzs/201801/20180125100235813.pdf>; and Notice of the General Office of the Ministry of Commerce on Effectively Conducting the Recordation of Foreign Contracted Projects [商务部办公厅关于做好对外承包工程项目备案管理的通知], November 13, 2017, at: <http://www.mofcom.gov.cn/article/i/jyj/k/201712/20171202679466.shtml>.

<sup>106</sup> Keith Bradsher, "China Taps the Brakes on Its Global Push for Influence," *New York Times*, June 29, 2018, at: <https://www.nytimes.com/2018/06/29/business/china-belt-and-road-slows.html>.

<sup>107</sup> Yuichi Nitta and Thurein Hla Htway, "Myanmar will ask China to downsize project, minister says," *Nikkei Asian Review*, July 4, 2018, at: <https://asia.nikkei.com/Politics/Myanmar-will-ask-China-to-downsize-project-minister-says>; Farhan Bokhari and Kiran Stacey, "Pakistan seeks more loans from China to avert currency crisis," *Financial Times*, July 5, 2018, at: <https://www.ft.com/content/1256ceaa-802c-11e8-bc55-50daf11b720d>, and Adnan Aamir, "China's Belt and Road plans dismay Pakistan's poorest province," *Financial Times*, June 14, 2018, at: <https://www.ft.com/content/c4b78fe0-5399-11e8-84f4-43d65af59d43>.

<sup>108</sup> OECD, "Getting Infrastructure Right: The Ten Key Governance Challenges and Policy Options," 2016, at: <https://www.oecd.org/gov/getting-infrastructure-right.pdf>

Chinese financing of, investment in and construction of BRI projects should, to the extent practicable, go beyond technical adherence to local requirements and instead strive to ensure that high standards for engaging affected local communities in consultations and disclosing relevant information continuously throughout the life of projects are implemented. Timely disclosure of project disclosure can help ensure that local concerns are being properly addressed and public support is maintained. Chinese companies are subject to transparency and public participation requirements at home, including in connection with compiling environmental impact assessments and other environmental matters relating to major projects. It is in their and their projects' interests to adhere, at a minimum, to those basic domestic standards in their overseas business as well.

To be sure, Chinese policies are beginning to emphasize a higher standard for overseas corporate behavior, including compilation of environmental impact assessment and considering social impacts as well. The code of conduct for private enterprises operating overseas<sup>109</sup> calls on companies to adapt to the overseas social environment, respect cultural traditions and strengthen communication with local trade unions, media, religious and ethnic groups and NGOs, as well as to publicly release regular reports on their corporate social responsibility and sustainable development performance. Similarly, SOEs are encouraged to adhere in their overseas investments to the principle of mutual benefit, strengthen their relationships with media, business and communities, as well as governments, where they are operating, and actively carry out their corporate social responsibility.<sup>110</sup> However, policies and regulations relating to overseas business activities fail to mention, let alone emphasize, the importance and benefits of local engagement.

With reference to international standards of public engagement that might be applied, the Environmental and Social Framework of the China-initiated Asia Infrastructure Investment Bank (AIIB),<sup>111</sup> which some observers criticize as being overly streamlined as compared to stricter World Bank and other standards, does stress many relevant principles that might be incorporated into a BRI framework document. For example, it encourages partnership not only with governments, multilateral development banks and bilateral development organizations, but also with the private sector and civil society, in devising innovative ways to meet Asia's infrastructure challenges. Required environmental and social project assessments must include stakeholder identification and consultation at the earliest "scoping" stage. Additional requirements for public consultation, information disclosure and establishing grievance mechanisms would help ensure the sustainability of BRI projects.

China's leadership in requiring good governance best practices such as open and competitive procurement, transparency and public engagement in its BRI programs and projects would also help persuade other countries that China's desire to contribute to global governance does not mean overturning but rather upholding and even improving global governance and international good governance practices. Such leadership could include, specifically, adopting

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<sup>109</sup> *Supra*, note 43.

<sup>110</sup> State-owned Asset Supervision and Administration Commission, Measures for the Supervision and Administration of Overseas Investments by Central Enterprises [中央企业境外投资监督管理办法], January 7, 2017, at: <http://www.sasac.gov.cn/n2588035/n2588320/n2588335/c4258448/content.html>.

<sup>111</sup> AIIB, Environmental and Social Framework, January 2016, at: <https://www.aiib.org/en/policies-strategies/download/environment-framework/20160226043633542.pdf>.

and enforcing a requirement to make government procurement for BRI projects transparent and open to qualified companies from around the world, bolstered by China's adherence to the WTO Agreement on Government Procurement; establishing a centralized BRI platform for compiling and publishing statistical data and information on BRI projects, including on bid solicitations, participants, value, status and progress; and incorporating appropriate and effective transparency and local public consultation mechanisms as a requirement for the financing, development and implementation of all BRI projects. The corrosive effects of BRI project-related corruption might be reduced through strengthening and enforcing China's criminalization of overseas bribery<sup>112</sup> along the lines of the U.S. Foreign Corrupt Practices Act or adherence to the OECD anti-bribery convention,<sup>113</sup> to bolster the general commitments China has already undertaken pursuant to the United Nations Convention Against Corruption,<sup>114</sup> which it ratified in 2006.

The BRI has evolved into the signature foreign policy program to carry forward Xi Jinping's vision for China's enhanced leadership role in global governance. The CCP even enshrined BRI in the party constitution when it was revised in October 2017, reinforcing the political importance of the BRI.<sup>115</sup> This elevation creates additional pressure for China to achieve sustainability of BRI projects and activities around the world.

China is well-positioned to draw on its own rich domestic developmental and regulatory experience, as well as international and multilateral standards, practices and conventions, to make BRI projects more truly transparent and inclusive. Establishing clear and specific requirements for open and competitive project procurement, greater transparency concerning BRI and its far-flung projects, and effective engagement with local communities to better address their concerns would go a long way toward building mutual trust along with physical infrastructure, and help result in better outcomes. Such good governance improvements can help ensure that the BRI will genuinely contribute to, rather than complicate, China's drive to achieve common development, connectivity and prosperity, while at the same time advance better global and local governance, thus also enhancing China's reputational influence. This would truly be a "win-win" situation for all.

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<sup>112</sup> See Global Legal Insights overview of China's "Bribery and Corruption 2019" at: <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/china> (China amended Article 164 of the Criminal Law in 2011 to include providing money or property to foreign officials or officers of public international organizations in order to derive improper commercial benefits). *See, also*, Bertram Lang, "Engaging China in the fight against transnational bribery: "Operation Skynet" as a new opportunity for OECD countries," 2017 at: <https://www.oecd.org/cleangovbiz/Integrity-Forum-2017-Lang-China-transnational-bribery.pdf>.

<sup>113</sup> Organization for Economic Cooperation and Development, Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, at: <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

<sup>114</sup> <https://www.unodc.org/unodc/en/treaties/CAC/>.

<sup>115</sup> Brenda Goh and John Ruwitch, "Pressure on as Xi's 'Belt and Road' enshrined in Chinese party charter," *Reuters*, October 27, 2017, at: <https://www.reuters.com/article/us-china-congress-silkroad/pressure-on-as-xis-belt-and-road-enshrined-in-chinese-party-charter-idUSKBN1CT1IW?il=0>.