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A "Silk Road" for Capital: Trade Policy and Foreign Investment Laws of China's Neighbors

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Abstract: This article presents a comparative study of the foreign investment laws and treaties of two of China's neighbors, Pakistan and Mongolia. As China moves forward in implementing a "One Belt, One Road" policy of major investments in trans-national infrastructure projects, leaders of neighboring countries including the two discussed here have demonstrated eagerness for its plans. The laws governing foreign trade and investment in each jurisdiction may be crucial to the success of Chinese investment efforts. The article discusses the evolution of both Pakistan's and Mongolia's laws and policies–Pakistan, as an enthusiastic partner and linchpin in China's "Belt," and Mongolia, as a resource economy that has, at times, struggled to draw the line on overwhelming Chinese influence. When examined, the laws and treaties of each nation show both reflections of and reactions to China's grand ambitions.

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I. INTRODUCTION

The collaborative atmosphere of "globalization" in the 1990s, signified by the creation of the World Trade Organization (WTO) and the concomitant explosion of multilateral free trade agreements (FTAs), seems to have come to an end with the breakdown of Doha Round talks earlier in this decade.[1] Since the breakdown of these talks, collaboration has turned to competition as major economic powers each negotiate separate, competing agreements to create trade cartels that might influence future multilateral trade negotiations. In the United States, this approach was evident in the negotiation of the Trans-Pacific Partnership (TPP) with Pacific Rim nations (notably, not China) and talks with the European Union to create a Transatlantic Trade and Investment Pact (TTIP).[2] Were these treaties to come into effect, their potential would be to create a massive international trade network, anchored in U.S. markets, with the ability to influence the future of globalization. Yet the new U.S. President's denunciation of these deals as "horrible" and his apparent preference for protectionism may spell the end of American hegemony on trade policy.[3] This, in turn, allows other large state actors, chiefly China, to utilize their own influence and craft a distinct approach to building trade networks.[4] The purpose of this note is to analyze China's approach to international trade and investment deals, using its trade relationships with two of its neighbors as a case study, in the hopes that such analysis will provide a useful lens with which to look at future efforts in this arena. This will be followed by a look at the pushback that can occur when Chinese efforts are viewed as a naked grab at power, as has been the case in western China and in Mongolia. In this instance, it is important to note that Mongolia has grappled with the need to create a foreign investment policy of which the Chinese cannot take advantage.

The current course of events leaves ample room for China, and not the U.S., to become the dominant trading power in Asia and set a new tone for the next stage of global trade talks. Yet China's grand vision of investment in massive infrastructure upgrades across Eurasia through the "Silk Road Economic Belt," just half of an enormous "One Belt, One Road" foreign investment strategy to link European, Asian and African resources and

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1 David Kleimann & Joe Guinan, THE DOHA ROUND: AN OBITUARY (Global Governance Programme, 2011).

2 Randi Brown, *TPP? TTIP? Key Trade Deal Terms Explained*, BROOKINGS INSTITUTION (May 20, 2015), https://www.brookings.edu/blog/brookings-now/2015/05/20/tpp-ttip-key-trade-deal-terms-explained/.

3 Vicki Needham, *Trump Vows to Overhaul 'Horrible' Trade Deals*, THE HILL (July 21, 2016), http://thehill.com/policy/finance/288812-trump-vow-to-overhaul-us-trade-policy.

4 Brooke Wylie, *Donald Trump: China Exploiting US Isolationist Agenda to Gain Power in Asia, Experts Say*, ABC NEWS (June 10, 2017); *see also* Jethro Mullen & Charles Riley, *China and Europe are Moving Forward Without Trump*, CNN MONEY (June 1, 2017), money.cnn.com/2017/05/31/news/economy/china-europe-eu-trump-us-trade/index.html.

markets and formalized at a 2017 summit, will involve negotiating across a highly varied foreign investment landscape and implicate a host of competing international interests.[5] [6]

It is thus sensible that China would place the highest priority on a trade route that only requires dealing with one country, long a friendly one, that could connect China to the Indian Ocean. That nation is Pakistan, and much has been written on the heralded CPEC, the beautiful melody in the "symphony" of the Silk Road plan.[7] One other reason is that Pakistan's investment rules and treaties with China make the country much more attractive and secure a place to invest than many of China's neighbors that have only recently transitioned to market economies.

One such neighbor is Mongolia, which, despite a long historical association with China (interrupted only by 20th century Soviet domination), has not embraced Chinese investment quite so readily.[8] It has instead pursued a diversified portfolio of foreign investors through a "third neighbor" policy, which itself has been undercut by the government's lashing out against investors perceived to be under Chinese influence.[9] Having endured a steep recession owed in large part to the subsequent dearth of foreign investment, Mongolia is now another target of Chinese economic expansionism through the proposed China-Mongolia-Russia Economic Corridor, yet its legal infrastructure is far less prepared than Pakistan's for such a plan.[10]

The aim of this paper is to survey Pakistan and Mongolia's differing positions in this network and look at the broader legal and economic forces driving these differences. Hopefully, this will serve to illustrate the variety of regulatory regimes China must confront if it is to realize its "Silk Road" vision.

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[5] The other half of OBOR is a "Maritime Silk Road," a series of port upgrades that will facilitate increased shipping to southeast Asia, the Middle East, and Africa. Tian Jinchen, *One Belt and One Road: Connecting China and the World*, McKINSEY (July 2016), http://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/one-belt-and-one-road-connecting-china-and-the-world.

[6] AP, *Chinese President Xi Hosts Belt and Road Forum*, SOUTH CHINA MORNING POST (May 15, 2017), https://www.scmp.com/video/china/2094362/chinese-president-xi-hosts-belt-and-road-forum.

[7] Ahmad Gouri, *Towards Greater Integration? Legal and Policy Directions of Chinese Investments in Pakistan on the Advent of the Silk Road Economic Belt*, 4 CHIN J COMP LAW 36, 45 (2016).

[8] Gregor Grossman, *One Belt, One Road and the Sino-Mongolian Relationship*, ASIENHAUS (April 9, 2017), https://www.asienhaus.de/uploads/tx_news/2017_April-9_Mongolei UA_sec_01.pdf.

[9] *Country Profiles: Mongolia*, OEC, http://atlas.media.mit.edu/en/profile/country/mng/.

[10] Reuters, *China, Russia, Mongolia Sign Economic Corridor Plan*, XINHUA (June 24, 2016), http://www.scmp.com/news/china/diplomacy-defence/article/1980597/china-russia-mongolia-sign-economic-corridor-plan.

II. CHINESE TRADE POLICY

China's emergence onto the stage of international trade was a relatively recent occurrence. Only after the death of doctrinaire Communist leader Mao Zedong did more liberal voices in the nation's government, led by Deng Xiaoping, authorize limited capitalist development and other reforms.[11] The handovers of Hong Kong and Macau in 1997 and 1999, respectively, gave China a substantial degree of control over two major developed market economies as its "Special Administrative Regions." China concluded its first FTAs with these two entities in 2003. Soon after it pursued free trade with several other substantial developing (and, since 2008, developed) market economies.[12] One such economy is Pakistan, which concluded a free trade agreement with China in 2003 and has since made several bilateral amendments to strengthen the countries' trade relationship.[13] This culminated in the announcement of the China-Pakistan Economic Corridor (CPEC) plan, the discussion of which is a central feature of this note.

According to Michael Clarke, a litany of international and domestic considerations have driven the efforts of China to build influence in central Asia, and development is but one of these.[14] The region is open for Chinese influence, he says, due to a diminishing U.S. presence in Afghanistan and the U.S.'s concomitant abandonment of regional development efforts.[15] Meanwhile, China has also benefited from the weakness of the region's other major power, Russia. Russia's leadership had pushed the notion of a "Eurasian Economic Union" to facilitate trade between its eastern European and Central Asian spheres of influence, and before 2014 this showed signs of life. That year, the Ukrainian people overthrew the country's Russian-aligned government, to which President Putin responded with a thinly disguised invasion of the Crimea and eastern Ukraine.[16] The resulting economic sanctions to punish Russia have damaged Russia's economy, leading to economic collapse in the other would-be EAEU states.[17]

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[11] *Deng Xiaoping*, ENCYCLOPEDIA BRITTANICA, https://www.britannica.com/biography/Deng-Xiaoping (last visited February 4, 2017).

[12] *China FTA Network*, MINISTRY OF COMMERCE OF CHINA, http://fta.mofcom.gov.cn/english/.

[13] Guiguo Wang, *Current Developments: China's FTAs: Legal Characteristics and Implications*, 105 A.J.I.L. 493, 498 (2011).

[14] Michael Clarke, *Beijing's March West: Opportunities and Challenges for China's Eurasian Pivot*, *Orbis* 60 *FOREIGN POL'Y RES. INST.*, no. 2 *Orbis*, 2016, 296.

[15] *Id.* at 300.

[16] Casey Michel, *Even Vladimir Putin's Authoritarian Allies Are Fed Up with Russia's Crumbling Economy*, THE NEW REPUBLIC (January 18, 2015), https://newrepublic.com/article/120778/eurasian-economic-union-putins-geopolitical-project-already-failing.

[17] Clarke, *supra* note 18, at 302.

China's Motivations

This has made central and western Asia especially attractive to China, whose SREB plan envisions trade and investment in infrastructure and resource development along an east-west axis through western China and across Eurasia. Adhering to the convention that Chinese foreign policy is an extension of domestic policy priorities, the Chinese plan is in part a reaction to Beijing's own vulnerability in its western province of Xinjiang, which has been plagued by ethnic strife since 2008.[18] The SREB plan can be read as an attempt to boost the economy of Xinjiang and make it a hub of trade economically dependent on China.[19] This is evidenced in the CPEC plan, which relies on the Xinjiang city of Kashgar as such a hub.[20] However, it would be naïve to say that China seeks to incorporate Xinjiang for solely economic reasons. Over time, China's efforts in that province and Tibet have reached beyond the economic and into much-resented attempts at cultural influence.[21] An important consideration is that the SREB could backfire on this objective due to the greater connection to countries affected by terrorism (including Pakistan), as well as the possibility that regional nations will balance China's economic influence by making strategic political networks with other powers.[22]

According to Guiguo Wang's analysis of China's FTAs, there is a trend of growth in China's use of bilateral FTAs to fill the void in international trade cooperation left by the breakdown of Doha Round talks.[23] Wang traces the development of Chinese FTAs, from its agreements with its own "Special Administrative Regions" of Hong Kong and Macau in 2003 (the same year Pakistan and China concluded their first "Preferential Trade Agreement.")[24] A rule through which Wang analyzes China's FTA development and foreign policy generally is that it is an extension of the state's domestic policy, and trade with Pakistan became important to connect the restive province of Xinjiang to China's economy and the outside world.[25]

Pakistan was one of first countries to get a bilateral trade agreement

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[18] Usaid Siddiqui, *The Ethnic Roots of China's Uighur Crisis*, AL JAZEERA AMERICA (July 21, 2015) http://america.aljazeera.com/opinions/2015/7/the-ethnic-roots-of-chinas-uighur-crisis.html.

[19] Clarke, *supra* note 18, at 307.

[20] Christine R. Guluzian, *Making Inroads: China's New Silk Road Initiative*, 37 CATO J. 135, 143 (2017); *see also* Su-Mei Ooi and Kate Trinkle, *China's New Silk Road and its Impact on Xinjiang*, THE DIPLOMAT (March 5, 2015), thediplomat.com/2015/03/chinas-new-silk-road-and-its-impact-on-xinjiang.

[21] *Id.*

[22] *Id.* at 305.

[23] Wang, *supra* note 17, at 500.

[24] *Id.*

[25] Clarke, *supra* note 18, at 298.

with China, and in 2008 China and Pakistan amended their FTA, a combination of five smaller agreements, to promote bilateral investment.[26] Wang traces four stages in the evolution of trade relations: first, the 2003 agreement for preferential tariffs towards each other's exports, followed by an "Early Harvest" program providing for more tariff elimination.[27] This led the way to the 2008 amendments and a 2009 agreement on trade and services, making the China-Pakistan FTA the most thorough Chinese bilateral FTA as of Wang's publication.[28]

China's pattern of FTA negotiation involves tailoring each agreement individually, and there is no template used (though all of its FTAs require the signatories to recognize each other's "market economy" status.)[29] Although China carries substantial economic leverage into each FTA negotiation, it has had to make concessions of its own to maintain trade relations with its desired partners, including curtailing the use of agricultural subsidies.[30] Whether the rise of the SREB will allow more direct Chinese influence over other countries is an open question.

China also does not opt for rigid dispute settlement provisions, instead relying on conflict avoidance through negotiation.[31] However, more recently, China has made a pivot to accepting investor-state dispute settlement through arbitration, qualified by a statute of limitations, administrative review, and the supremacy of treaty law over domestic regulations.[32]

Guiguo Wang notes the priorities of China in concluding FTAs are geopolitics, resource supply, and domestic economic needs.[33] He also identifies some unique problems that China faces, influencing its approach.[34] Wang provides a survey of China's agreements as examples for each of his claims. The China-Pakistan agreement, he says, fulfills FTAs' "primary purpose" of economic development, the elimination of trade barriers, and succeeds in promoting bilateral trade, making it a relatively adequate standard by which to judge other Chinese FTAs. [35]

China's trade policy also involves long-term strategic objectives, particularly in regard to winnowing inefficient sectors of the economy and securing an energy supply, which is a critical aspect of the CPEC agreement as China consumes a considerable quantity of oil and nonrenewable fuels.[36]

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[26] Wang, supra note 17, at 512.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*at 502. Agriculture is a primary industry of both Pakistan and Mongolia.
[31] Wang, *supra* note 17, at 502.
[32] *Id.* at 510.
[33] *Id.* at 504.
[34] *Id.* at 515.
[35] *Id.*
[36] Josephine Mason, *China's CNPC Forecasts Record Oil Demand, Warns on Product*

China has also aggressively pursued trade with the oil-rich Central Asian bloc of the former U.S.S.R. through the same mechanism of offering preferential trade treatment in exchange for direct foreign investment.[37]

Geopolitical considerations also influence the patterns of Chinese trade efforts. While, according to Wang, China's economy is not the dominant force in East Asia due to the influence of the U.S. and Tiger economies (Singapore, Taiwan, Hong Kong and South Korea), FTAs expand its influence while at the same time giving nations that distrust China a reason not to.[38]

China faces additional challenges in reforming the international free trade regime. In the Sino-Pakistani trade relationship, limited bad faith continues as Pakistan continues to illegally avoid Chinese tariffs.[39] China, for its part, quietly inserted a provision into the FTA requiring Pakistan to give preferential treatment to goods for Hong Kong, even though that state was not party to the agreement.[40] Examples like these give some credence to the international view of China as a somewhat cunning and manipulative trade power.[41]

Wang predicts China will continue to use FTAs to influence the rules of world trade and pursue its strategic interests, perhaps against the will of "first world" nations.[42] China has been inhibited in its pursuit of FTAs with several countries due to their distrust of Chinese motives, although the sudden reversals in U.S. trade policy spurred by the inauguration of President Donald J. Trump may change this dynamic.[43]

The Chinese trade policy, as stated above, may get a boost from the apparent fall of the Trans-Pacific Partnership (TPP).

The critically endangered trade agreement would have involved Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam in significantly enhanced trade with the U.S. Yet the agreement would require ratification by both the U.S. and Japan to go into effect, and the Trump administration's official withdrawal from the

Glut, Reuters (Jan. 12, 2017), http://www.reuters.com/article/us-china-oil-cnpc-demand-idUSKBN14W0WK (last visited Feb. 19, 2018).

37 Wang, *supra* note 17, at 520.

38 *Id.*

39 Wang, *supra* note 17, at 514.

40 *Id.*

41 *See also* the new U.S. administration's position on Chinese currency manipulation. Joseph Adinolgi, *Trump may soon label China a currency manipulator, Deutsche Bank says*, Market Watch (Feb. 8, 2017), http://www.marketwatch.com/story/trump-may-soon-label-china-a-currency-manipulator-deutsche-bank-says-2017-02-07.

42 Wang, *supra* note 17, at 514.

43 Ali Wyne, *Does China Need More Friends in Asia?*, The National Interest (Mar. 20, 2016), http://nationalinterest.org/feature/chinas-next-move-build-alliances-15550.

deal has extinguished the prospect of American entry.[44] Ironically, the treaty's framework could allow China to step in to replace the U.S.[45]

Opposition to expanded free trade in the U.S. came not solely from Trump, but from all across the political spectrum. The pill that citizens of many signatory nations found hardest to swallow was the treaty's Article 9 Investor-State Dispute Settlement (ISDS) provisions, which would potentially endanger public policy in each nation on a large scale due to the multilateral nature of the treaty and the widening of ISDS's scope over time.[46] It did not help that Article 25.5 of the agreement set out substantial regulatory procedural requirements, and exceptions to both articles were nearly meaningless.[47]

China's western strategy embodied in the SREB plan is all the timelier due to U.S. leaving Afghanistan, the collapse of Russia's economy and influence, and China's need to hold down Xinjiang. In the best-case scenario for China, it and Russia could share unchallenged dominion over the region, but several hurdles, not the least of which is Russia's demonstrated bad faith, exist that could hinder this vision.[48]

Despite the relative decline of U.S. and Russian (EAEU) influence, the Chinese will not be able to come into the region without controversies of their own, and the strictly-business orientation of the SREB plan deprives China of the ability to exercise strategic influence.[49] Mere economic ties, strengthened by infrastructural upgrades, would still be strategically significant for China, as the SREB would direct international trade through the frontier provinces of Xinjiang and Tibet and give China a secure supply of oil and gas.[50] Clarke also notes a particular risk with this approach: as China has coupled economic development efforts with thinly veiled cultural imperialism, CPEC infrastructure could provide a route for extremists from elsewhere in Asia to infiltrate and supply separatists in its outlying provinces.[51]

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[44] Sarah Kimmorley, *The Massive TPP Trade Deal is Dead After Obama Takes it Off the Table*, Business Insider Australia (Nov. 14, 2016) http://www.cnn.com/2017/01/23/politics/trans-pacific-partnership-trade-deal-withdrawal-trumps-first-executive-action-monday-sources-say/.

[45] *See, e.g.,* Allen Cone, *Australia's Prime Minister Suggests China Could Replace U.S. in TPP*, UPI (Jan. 24, 2017), https://www.upi.com/top_news/world-news/2017/01/24/australias-prime-minister-suggests-china-could-replace-us-in-tpp/1561485267612/.

[46] Steven Seidenberg, "Trans-Pacific Partnership Raises Question: How Should Governments and Corporations Resolve Disputes?", ABA Journal (Nov. 2016), http://www.abajournal.com/magazine/article/trans_pacific_partnership_dispute_resolution (last visited February 28, 2018).

[47] *Id.*

[48] Clarke, *supra* note 18, at 309.

[49] *Id.*

[50] *Id.* at 302.

[51] *Id.*

For the purpose of SREB "readiness," Asia's nations can be divided into four main, albeit loose, groups.[52] The first is comprised of smaller, less internationally significant powers, a category into which Mongolia would likely fall.[53] Countries that have territorial disputes against China, most notably India, are the second group, with "sub-regional powers," who command local but not large-scale influence, in the third.[54] Finally, the fourth and most critical group, are the "pivot states" which have a history of good relations with China and achieve a certain threshold of national power.[55] Pakistan, which has received the most significant early benefits of SREB policy, is part of this last group.[56]

III. PAKISTAN'S BACKGROUND AND THE CPEC

Since its independence and separation from India in 1947, Pakistan has sought to counter the influence of its much larger neighbor through a combination of strategic alliances and military might. Chief among the nation's international benefactors have been the United States, to which Pakistan was an important ally in both the Cold War and the more recent campaigns in the Middle East, and China, which has sought to bolster Pakistan as a counterweight to India.[57] One of the most significant cooperative efforts with the latter nation was the design and completion of the impressive Karakoram Highway in the 1960s over the Himalayas that separate them.[58] Yet development in Pakistan has always faced the challenge of internal and external conflict. Pakistan has always given great importance to the maintenance of a strong military, yet few nations that invest so heavily in military might can escape the armed forces' influence on civil and international politics. Since its independence, Pakistan has experienced several periods of authoritarian military rule, most recently with the government of General Pervez Musharraf, whose ouster in 2009 sparked remarkable political instability.[59] The current civilian government under Nawaz Sharif, however, has

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[52] Xue Li and Xu Yanzhou, *How China Can Perfect its 'Silk Road' Strategy: The Challenges Facing China's Silk Road Strategy and How to Overcome Them*, THE DIPLOMAT (Apr. 9, 2015), http://thediplomat.com/2015/04/how-china-can-perfect-its-silk-road-strategy/.

[53] Despite its large territory, Mongolia is landlocked and sparsely populated.

[54] Li & Yanzhou, *supra* note 68.

[55] *Id.*

[56] Gouri *supra* note 7, at 40.

[57] Donald Johnson, *India-Pakistan Relations: A 50-Year History*, ASIA SOCIETY, http://asiasociety.org/education/india-pakistan-relations-50-year-history.

[58] Adam Hodge, *Karakoram Highway: China's Treacherous Pakistani Corridor*, THE DIPLOMAT (July 30, 2013), http://thediplomat.com/2013/07/karakoram-highway-chinas-treacherous-pakistani-corridor/.

[59] Jane Perlez & Salman Masood, *Pakistan Ministers Are Called Before the Courts*, N.Y. Times (Dec. 18, 2009), http://www.nytimes.com/2009/12/19/world/asia/19pstan.html?rref=collection%2Ftimestopic%2FMusharraf%2C%20Pervez&action=click&contentCollection

evidently held onto power well enough to encourage renewed Chinese efforts at economic union.[60]

The announcement of the China-Pakistan Economic Corridor earlier in this decade signals a new era for China's relationship with Pakistan and may well serve as a template for future Chinese investment pacts with other nations in South and Central Asia. The root purpose of such a pact is the attractiveness of Pakistan's ports on the Arabian Sea (which, after all, was a main motivator in the Karakoram Highway's construction).[61] Indeed, one of the most important aspects of the plan is the expansion of the port of Gwadar and an overland rail connection to this port from China.[62] However, the scope of the CPEC as planned goes much further, essentially amounting to an agreement to use Chinese money and loans to bind the two nations' economies on terms favorable to the Chinese.[63] Projects that fall under the plan's framework include upgrades both to the Gwadar port and surrounding area; energy infrastructure; transportation infrastructure (including roads, railways, and improvements in Pakistani cities); "Investment and Industrial Cooperation" (including through SEZ planning), and "other areas of interest mutually agreed upon."[64]

The CPEC agreement is paralleled by another Chinese plan to facilitate trade and infrastructural development with India, Bangladesh, and Myanmar.[65] Another regional power that may soon join this trade network is the long-closed market of the Islamic Republic of Iran, which has indicated an interest in joining the CPEC agreement.[66] In fact, development plans for the port of Gwadar include pipelines to transport natural gas and oil from Iran.[67] The pending lift of international sanctions on Iran will undoubtedly

=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=51 &pgtype=collection.

60 Islamic Republic of Pakistan, *Prime Minister's Office*, pmo.gov.pk (last visited Feb. 7, 2017).

61 *See* Asif Qureshi, *China/Pakistan Economic Corridor: A Critical National and International Law Policy Based Perspective*, 14(4) CHIN. J. INTL. L. 777(2015) [hereinafter "Qureshi"].

62 *CPEC*, PAKISTAN BOARD OF INVESTMENT (BOI), http://boi.gov.pk/InfoCenter/CPEC .aspx (last visited Feb. 7, 2017).http://boi.gov.pk/InfoCenter/CPEC.aspx.

63 Nasir Jamal, *The Cost of CPEC*, DAWN (Mar. 12, 2017), https://www.dawn.com/ news/1320028.

64 *Id*.

65 Rupak Bhattacharjee, *Bangladesh, China, India and Myanmar Corridor: Ushering in a New Era of Interconnectedness*, INDIAN DEFENCE REVIEW (Sept. 18, 2016), http://www.indiandefencereview.com/spotlights/bangladesh-china-india-and-myanmar-economic-corridor-ushering-a-new-era-of-interconnectedness/.

66 Syed Sammer Abbas, *Iran Wants to be Part of CPEC, Says Rouhani*, DAWN (Sept. 22, 2016), http://www.dawn.com/news/1285404.

67 Engr Hussain Ahmad Siddiqui, *CPEC Projects: Status, Cost and Benefits*, DAWN (July 23, 2015,), http://www.dawn.com/news/1194014.

affect the integrated market economy of South Asia in a manner beyond the scope of this article.

The first phase of CPEC includes an "Early Harvest" round of projects financed at a 1.6% interest rate, and will feature an all-new road and accompanying railway to Gwadar to replace the somewhat dangerous Karakoram Highway.[68] China is not the only foreign power contributing to the corridor, either; Pakistan's erstwhile colonizer, the United Kingdom, has provided grants for road construction to complement the main CPEC spine.[69]

Under the agreement, Gwadar will be a free trade area to be modeled on China's Special Economic Zones (SEZs); the port itself will be leased (on a 43-year term) to China, and tax breaks will benefit Chinese investors in its construction.[70] The energy projects will be completed by private companies and financed by the Chinese Ex-Im Bank.[71] Controversy continues to exist over secrecy regarding financial aspects of the deal.[72] The CPEC differs from other "economic corridors" of the SREB in that it is simply a bilateral deal and does not involve multi-party consultation that both the Bangladesh-China-India-Myanmar and China-Russia-Mongolia corridors will require. With a relatively one-sided relationship between the two countries, it perhaps makes sense that secrecy and rushed planning are concerns.

Qureshi presents a "framework" of the legal issues, beyond trade relations, that confront the CPEC. China has presented the "One Belt, One Road" initiative as a "new model of international cooperation and global governance," which reflects the contemporary broadening of the goals of free trade and national development from simply an economic matter to a "holistic" strengthening of society.[73] The CPEC agreement will have to meet this standard to be seen as part of China's "new model" for trade relationships. Beyond this, it must benefit all of Pakistan to be legal by that country's standards since the Pakistani constitution mandates that civil projects equitably distribute benefits.[74] Qureshi notes that this would be the most likely basis for a legal challenge to the project from within Pakistan. Meanwhile, the specifics of the CPEC plan beyond stated intentions have been kept obscure from the public, as most of the China-Pakistan negotiations are conducted through publicly unavailable Memoranda of Under-

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[68] *CPEC Projects*, PAKISTAN BOI, http://boi.gov.pk/InfoCenter/CPEC.aspx (last visited Feb. 7, 2017).

[69] Shahbaz Rana, *UK to Partner in CPEC, Provide $121.6 Million Grant*, THE EXPRESS TRIBUNE (Sept. 1, 2015), https://tribune.com.pk/story/948870/uk-to-partner-in-cpec-provide-121-6-million-grant/.

[70] Qureshi, *supra* note 77, at 790.

[71] *Id.*

[72] *Id.*

[73] Qureshi, *supra* note 77, at 782.

[74] *Id.*

standing.[75] What does come about may be subject to scrutiny from the International Monetary Fund, as Pakistan's efforts to fund the project and commit to China-friendly fiscal policy may implicate its extended fund arrangement with that organization.[76]

Qureshi asserts that the Pakistani public has a right to greater information about the project if it would bind Pakistan's fate to China, and that the lack of transparency in matters including corridor alignment to be a significant flaw.[77] (Editor's note: since Qureshi's article, the Chinese and Pakistani governments have revealed a CPEC "Master Plan.")[78] The plan may create a foreign-owned chunk of land across the length of the country, and its economic effects have already distorted competition for homegrown business, Qureshi acknowledges that the sheer size of China's investment in Pakistan discourages rational discourse about its impacts.[79]

Security is an issue of its own. Although the spine of the corridor was moved away from the dangerous Western borderlands of Pakistan by government initiative, it must still traverse Pakistan's restive province of Balochistan to reach Gwadar, a fact that has brought no small amount of risk to construction.[80] A security issue of a different dimension lies in the fact that the corridor is to pass through the disputed territory of Kashmir, which is one of many aspects of the project, besides its inherent nature of strengthening Pakistan, that has earned objection from India.[81] The aggressive posture of India under its nationalist Prime Minister have led some to question China and Pakistan's ability to secure the corridor while avoiding international conflict, especially as China has continued to cultivate enmity from India by taking Pakistan's side at the United Nations and blocking India's membership of the Nuclear Supplier Group.[82] However, Pakistan has shown a strong commitment to protecting ongoing construction, and international tension has not stopped China from pledging the $46 billion of investments and loans.[83] (Editor's Note: since 2016, this number has been revised up-

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[75] *Id.*

[76] *Id.* at 783.

[77] *Id.*; Gouri, *supra* note 7, at 47.

[78] Khurram Husain, *Exclusive: CPEC Master Plan Revealed*, DAWN (June 21, 2017), https://www.dawn.com/news/1333101.

[79] Gouri, *supra* note 7, at 47.

[80] PTI, *China May Talk to Pakistan About Terror Affecting CPEC*, INDIA EXPRESS (Sept. 19, 2016), http://indianexpress.com/article/world/world-news/china-may-talk-to-pakistan-about-terror-affecting-cpec-3039519/.

[81] PTI, *PM Modi Raises India's Concern Over CPEC Which Runs Through PoK*, INDIAN EXPRESS (Sept. 4, 2016), http://indianexpress.com/article/india/india-news-india/prime-minister-narendra-modi-raises-indias-concern-over-cpec-which-runs-through-pok-3013260/.

[82] Panos Mourdoukoutas, *China Should Either Make Peace with India or Forget About CPEC*, FORBES (Nov. 16, 2016), http://www.forbes.com/sites/panosmourdoukoutas/2016/11/16/china-should-either-make-peace-with-india-or-forget-about-cpec/#b58689b22ee5.

[83] *The $46 Billion Tie That Binds China and Pakistan*, STRATFOR (May 6, 2016),

ward to $57 billion).[84]

Pakistani Trade Law

Pakistan's main pieces of legislation concerning foreign investment are the Foreign Private Investment Act (FPIA) of 1976 and the investor-friendly Protection of Economic Reforms Act (PERA) of 1992.[85] Through these laws Pakistan has sought to promote an environment friendly to foreign investment in spite of political instability since FPIA's adaptation.[86]

The more fundamental FPIA applies to all "foreign private investment" and provides rules on calculating compensation in cases of expropriation, while PERA prevents entirely the state expropriation of any privatized interest.[87] FPIA provides for due process, the protection of agreements between foreign investors or creditors and anyone in Pakistan if the government moves to acquire related investments in the public interest, and the equal national treatment of foreign, national investors for tax purposes.[88] Further, it specifies that any law or regulation more stringent to protect foreign investments will override FPIA, which PERA did in some cases when it came into force.[89] However, despite the due process requirements and judicial review provisions of both laws, few investors have brought claims under either to Pakistani courts, likely due to persistent corruption.[90]

Unlike subsequent investment and trade agreements between Pakistan and China, the FPIA does not separate its definitions of investor and investment. Its substitute term for "investor" is "foreign capital," which is defined as "an investment made by a foreigner in an 'industrial undertaking' in Pakistan"—whether it be in the form of foreign exchange, imported machinery/equipment, or in any other form the federal government "may ap-

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https://www.stratfor.com/analysis/46-billion-tie-binds-china-and-pakistan; Nasir Jamal, *The Cost of CPEC*, DAWN (March 12, 2017), https://www.dawn.com/news/1320028.

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85 Gouri, *supra* note 7, at 40.

86 *See* "Mohammad Zia-ul-Haq," Encyclopedia Brittanica, https://www.britannica.com/biography/Mohammad-Zia-ul-Haq.

87 Foreign Private Investment Act of 1976 and Protection of Economic Reforms Act of 1992, boi.gov.pk.

88 *Id.*

89 "Provided that nothing in this Act shall be in derogation of any facilities or protection specifically sanctioned by the Federal Government to foreign private investment in the case of particular industrial undertaking or a class of industrial undertakings or such facilities or protection as may be available to foreign private investment under a bilateral investment treaty." Article 1, FOREIGN PRIVATE INVESTMENT (PROMOTION AND PROTECTION) ACT 1976. http://www.punjabcode.punjab.gov.pk/public/dr/FOREIGN%20PRIVATE%20INVESTMENT%201976.doc.pdf

90 Gouri, *supra* note 7, at 54.

prove for the purpose."[91]

The law defines "foreign private investment" as "investment in foreign capital by a person who is not a citizen of Pakistan or who, being a citizen of Pakistan, is also the citizen of any other country or by a company incorporated outside Pakistan. Notably, does not include investment by a foreign government or agency of a foreign government," and it clearly protects investments, not investors, making it not entirely harmonious with the bilateral investment treaty (BIT)'s and FTA's treatments of the subjects.[92]

The China-Pakistan BIT and FTA do not mention "[f]ull protection and security" for each country's investments in the other, which could be significant as several aspects of CPEC cross dangerous parts of Pakistan.[93] While this may be a minor difference, such protection is provided for in the Pakistan-Japan BIT, the language of which mentions an obligation to provide "constant protection and security."[94]

Companies from China, not corrupt foreign governments, control money under the CPEC agreement, but these companies also then have the ability to pay off foreign rulers, as China has no equivalent of the U.S.'s FCPA.[95]

Gouri argues China and Pakistan need collective strategy to mend fences with India, contrary to other assertions that China should seek to heal relations with India on its own.[96] He also criticizes the CPEC for not guaranteeing a "fair distribution of benefits," which could leave Pakistan in the position of Latin American countries where strong economic growth has not benefited society in total, but he does not offer a way to achieve this, nor does he offer strategy on implementing fair labor standards in the SEZs.[97]

Furthermore, Chinese corruption remains an elephant in the room despite social responsibility provisions in the CPEC agreement.[98]

IV. MONGOLIA'S ROLE AND HISTORY

Mongolia's history, well before the current age of global capitalism, has been colored by rivalry with its larger southern neighbor, China. It only

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[91] Pakistan's Foreign Private Investments Act, http://boi.gov.pk/UploadedDocs/Downloads/InvestementActs.pdf.

[92] Gouri, *supra* note 7, at 62.

[93] Qureshi at 782.

[94] *Japan-Pakistan BIT*, at Japan BITs, INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/IIA/CountryBits/105.

[95] Gouri, *supra* note 7, at 65.

[96] *Id.*

[97] *Id.*

[98] *China Corruption Report*, GAN BUSINESS ANTI-CORRUPTION PORTAL, http://www.business-anti-corruption.com/country-profiles/china (last visited Feb.18, 2018).

achieved its current political independence from China in the early part of the last century through becoming a satellite of Soviet Russia, and since the overthrow of its communist regime in 1990, the nation's government has sought to diversify its economy and guarantee its people an adequate standard of living despite greatly increased poverty.[99] Mongolia's economy entered a new era at the turn of this century with the opening of copper and gold mines in the bountiful Oyu Tolgoi, but the discovery of vast natural resources has forced the government to toe a fine line between encouraging the influx of foreign capital and attempting to distribute some of that capital to the nation's people.[100] Jennifer Lander has traced the back-and-forth of investment policy between achieving these two objectives since the 1990s, identifying several concrete shifts in the law whose substance will be discussed further later in this paper but which will be summarized here for the reader's reference.[101]

In the neoliberal spirit of the 1990s, Mongolia's 1997 Minerals Law offered openness and reliability to foreign investors, including through the guarantee of investor-state "stability agreements" to insulate investments made at a given point in time from later changes in investment and tax law.[102] While this encouraged substantial investment in the Oyu Tolgoi, the lingering inability of Mongolia to use foreign capital to alleviate poverty among its people, and concerns that the nation's economy would fall into the "trap" of resource dependence, triggered changes in the law from 2006 on that altered the status of international business there.[103] A 2006 law sought to give the Mongolian government a stake in the operation of the mines, but serious issues arose from the government's need to provide equity for this stake without going into debt.[104] The collapse in the mineral market in 2012 and fears of China stepping into the mineral business there led to the passage that year of the controversial, highly restrictive Strategic Entities Foreign Investment Law (SEFIL).[105] This law attracted heavy criticism before its passage and led to a collapse in international investment before being replaced in late 2013. The state has continued since 2013 to encourage foreign investment again while asserting political autonomy in

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[99] *About Mongolia*, UNITED NATIONS DEVELOPMENT PROGRAM, http://www.mn.undp.org/content/mongolia/en/home/countryinfo.html (last visited Feb.18,2018).

[100] Byambajav Dalaibuyan, *The story of the discovery of Oyu Tolgoi*, MONGOLIA FOCUS (Feb. 5, 2018), http://blogs.ubc.ca/mongolia/2016/oyu-tolgoi-discovery/.

[101] Jennifer Lander, *A Critical Reflection on Oyu Tolgoi and the Risk of a Resource Trap in Mongolia: Troubling the 'Resource Nationalism' Frame*, LAW, SOC. JUST. AND GLOB. DEV. J., 2013, Vol. 18(2), http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2013_2/2013_2_lander/.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

the face of China's growing economic "soft power," including through symbolic gestures to thwart China's political principles.[106] Mongolia's situation may well be instructive for other Central and South Asian nations courting Chinese investment, and Mongolia did not even reach the crisis point that it did through selling too much to China; it *had consciously* attempted to balance the sources of foreign investment to avoid Chinese or Russian domination yet still found itself at the whim of greater global market forces.

Corruption in the Mongolian government has also served to tarnish the country's international image and attractiveness to investors, and Mongolia has been unable to address significantly worsening economic inequality since 1990.[107]

Although China and Mongolia conduct a significant amount of trade, they do not have a free trade agreement in place; a proposed FTA in 2010 went nowhere.[108] The decline of the Mongolian economy in recent years has perhaps contributed to its failure to conclude more FTAs (despite succeeding in doing so with Japan), and though South Korea has notably opened negotiations, Mongolia has remained under Chinese economic domination.[109] Mongolia's debt load is also much greater than the size of its GDP, and an IMF bailout has not lessened its economic vulnerability.[110] As of mid-2016 Mongolia's economic dependence was as strong as ever: upwards of 80% of Mongolia's export value goes to China, and a third of its imports come from there; by a well-regarded estimation three-quarters of Mongolia's economy is dependent on China.[111]

SEFIL restricted foreign entities, state-owned or private, from owning more than half of the stock in any company dealing in a "strategic entity," and such "strategic entities" could include any economic sector that Mongo-

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[106] *See e.g.* Reuters, *China Says It Hopes Mongolia Learned Lesson After Dalai Lama Visit,* SOUTH CHINA MORNING POST (Jan. 25, 2017), http://www.scmp.com/news/china/diplomacy-defence/article/2065082/china-says-hopes-mongolia-learned-lesson-after-dalai.

[107] Nyamosor Tuya and Jeffrey Reeves, *PacNet #82 - For Mongolia, Two Symbolic Steps in the Wrong Direction*, CENTER FOR INTERNATIONAL AND STRATEGIC STUDIES (Dec. 6, 2012), https://www.csis.org/analysis/pacnet-82r-response-pacnet-82-mongolia-two-symbolic-steps-wrong-direction

[108] Zhou Yan, *Free trade pact with Mongolia on the* cards, CHINA DAILY (May 12, 2010) http://www.chinadaily.com.cn/business/2010-05/12/content_9838829.htm.

[109] Jung Suk-Yee, *S. Korea, Mongolia Agree to Pursue EPA*" BUS. KOREA (Jul. 18, 2016), http://www.businesskorea.co.kr/english/news/politics/15254-korea-mongolia-free-trade-s-korea-mongolia-agree-pursue-epa.

[110] Sharad K. Soni, *Mongolia's New President is Mongolia First and China Last*, EAST ASIA FORUM (Aug. 11, 2017), http://www.eastasiaforum.org/2017/08/11/mongolias-new-president-is-mongolia-first-and-china-last/.

[111] Bochen Han, "The Trouble With China-Mongolia Relations," THE DIPLOMAT, http://thediplomat.com/2015/11/the-trouble-with-china-mongolia-relations/.

lia's government decreed.[112] An exception to this rule for mineral prospecting and exploration did nothing to redeem the law to investors, as it simply meant that companies would have to divest shares as soon as they passed the exploration stage of the mining process.[113] The backlash among, and consequent withdrawal of, many foreign investors from Mongolia led a desperate government to impose exit bans on some, further undermining investor confidence and the country's international standing at large, and the manner in which Mongolia's government failed to issue regulations that might have helped investors navigate its requirements certainly did not help matters.[114] The law was widely criticized an example of "resource nationalism," a larger trend of statist intervention against investor control in many natural resource-dependent economies.[115]

Mongolia, like Pakistan, is part of the SREB vision, being enmeshed in a "China-Mongolia-Russia economic corridor" declared by President Chinese Xi Jinping in 2014.[116] An agreement between the three countries in June 2016 formalized the plan, which already stands to gain significant clout due to China's impending admission to the United Nations' TIR (International Road Transport) customs program for international trucking (TIR-licensed trucks will be able to pass through the countries with just one customs inspection.)[117] However, the much greater territory that trade must traverse to reach outside markets, coupled with Mongolian ambivalence about Chinese influence and Russia's economic weakness, means that strategic corridors like CPEC remain a higher priority.

Mongolia's 1997 Minerals Law was a major incentive to foreign investment through the use of stability agreements detailed above, but in 2006 the national government acted to protect the "strategically important" Oyu Tolgoi mines by authorizing itself to have up to a 34% stake in the mines through individualized agreements with investors.[118] The country also authorized a "windfall profits" tax that it later attempted to use against a for-

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[112] Leslie Hook, "Mongolia's New Investment Law: Deterrent or Clarification?," FIN. TIMES (May 18, 2012), http://blogs.ft.com/beyond-brics/2012/05/18/mongolias-new-investment-law-deterrent-or-clarification/.

[113] The Law on the Regulation of Foreign Investment in Entities Operating in Strategic Sectors, at MONGOLIA MINING JOURNAL, http://en.mongolianminingjournal.com/content/33226.shtml.

[114] Ashley Lee, "Investors Hope for Clarity on Mongolia Foreign Investment Law," INT'L FIN. L. REV. (May 2013) at 14.

[115] John P. Williams, Global Trends and Tribulations in Mining Regulation, 30 JERL 391, 406 (2012).

[116] Peter Bittner, "China, Russia, Mongolia Sign Long-Awaited Economic Partnership Agreement," THE DIPLOMAT (June 28, 2016), http://thediplomat.com/2016/06/china-russia-mongolia-sign-long-awaited-economic-partnership-agreement/.

[117] *Id.*

[118] Williams, *supra* note 135, at 398.

eign corporation in a possible violation of a double-taxation treaty.[119] While some raised red flags (Williams), the country still had a stable investment framework and saw a significant investment boom until 2011's drop in copper prices hit.[120][121]

Fiscal stability and integrated budget laws limited the government's ability to finance its own equity stake in the Oyu Tolgoi mines following a 2006 investment agreement, and a sudden collapse in revenue led to a large public debt that has dogged Mongolia ever since.[122] It was in this environment that Mongolia introduced SEFIL as a stronger attempt to more equitably distribute the benefits of its mining industry, but the strict provisions of the law combined with erratic government actions to enforce it led to a massive withdrawal of investments and a continuing fear of state protectionism. [123]

Decline and Return of Investment?

According to the U.S. Department of State, foreign investment in Mongolia peaked at the height of the country's resource boom in 2011, and has fallen 85% since.[124] Although the contemporary drop in mining profits was partly to blame, the country's populist policy course was a much bigger investment disincentive.[125]

Since the country's regime change in 2014, there has been a somewhat more optimistic outlook, as the new government has moved to restore foreign investment and open new mines.[126]

The country's new Prime Minister has stated that the country's deals with trading and investment partners are back on track, but it is unclear whether or not this rhetoric applies to non-mining investments. The rule of law remains weak, as Mongolia has retained authority to imprison foreign investors or bar them from leaving the country.[127]

Although the current government supports new FDI and has promised to honor international arbitration judgments, it has yet to demonstrate this friendliness in a significant capacity, and the previous government's use of exit bans and lawsuits against withdrawing investors have led to skepticism

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[119] *Id.*

[120] *Id.* at 404.

[121] *Id.*

[122] Lander, *supra* note 114, at 10.

[123] *Id.*

[124] U.S. DEP'T OF STATE, "2015 Investment Climate Statement-Mongolia," http://www.state.gov/e/eb/rls/othr/ics/2015/241667.htm.

[125] *Id.*

[126] Mongolian Investment Law of 2013, https://www.mofa.gov.mn/new/images/banners/regulation/investmentlaw.pdf.

[127] *Supra* note 140, U.S. State Dept. on Mongolia.

of the state's commitment to international trading norms.[128]

The Investment Law (IL) of 2013 sets forth legal rights and obligations of investors, stabilizes the tax environment, and establishes concrete powers and responsibilities of the central government.[129] Foreign and domestic investors are, once again, distinguished only by residence and not the stricter standard of nationality, and both can invest in anything that the law itself (as opposed to government decree) does not specifically restrict.[130]

Lander is careful to state that there is not an inherently negative relation between the rule of law and investment regulation, and a recalibration since the neoliberal 1990s was a sensible policy, not in itself an example of irrational resource nationalism.[131] In her view, the new Investment Law of 2013 represents an attempt to strike a balance between the competing considerations of investor confidence and broad public benefit.[132] The law restricts government involvement, provides national treatment to foreign investors, stabilizes tax rates, and provides new incentives for investments while significantly reducing government approval procedures.[133] Eligible projects under the law, for example, can receive tax stabilization certificates that guarantee favorable treatment for 27 years, although their limited transferability may present problems down the road.[134] Further cause for optimism is seen in the stated purpose of the agency in charge of foreign investment, which is mandated to promote the value-added production so often missing from natural resource economies.[135]

John P. Williams saw Mongolia's post-2006 investment restrictions, culminating in SEFIL, as part of a resource-nationalist trend but did not see particular cause for alarm in its provisions.[136] Together with contemporary Kazakh and Indonesian mining legislation, he saw a justified motivation in concerns over Chinese control, but his analysis of the law largely ignored the chaos of its implementation on the ground.[137] According to Williams,

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[128] "Mongolia's New Investment Law a Good Start, but More Reforms Needed," OXFORD BUS. GROUP (2015), https://www.oxfordbusinessgroup.com/analysis/mongolias-new-investment-law-good-start-more-reforms-needed.

[129] "Mongolia Revises Its Regulatory Framework for Foreign and Domestic Investment," HOGAN LOVELLS, http://www.hoganlovells.com/files/Uploads/Documents/13.11.01_F_Mongolia_revises_its_regulatory_framework_for_foreign_and_domestic_investment_October_2013.pdf (last visited March 23, 3017).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] "Invest Mongolia Agency," THE DIPLOMAT, http://thediplomat.com/tag/invest-mongolia-agency/; Williams, *supra* note 135, at 401-03.

[136] Williams, "Global Trends and Tribulations in Mining Regulation," at 401.

[137] Williams, *supra* note 135, at 402.

statist mining policy is a natural shift from the privatization frenzy of the 1980s and 1990s, before which most mines in the developing world were state-owned.[138] In Mongolia, Williams wrote, the 1997 investment statute, with its first-come, first-serve policy towards mining claims and the stabilization certificate concept, was part of the 1980s-90s neoliberal legal trend that the 2006 adjustment abruptly curtailed.[139] From 2006 on, government regulations as described above gave the state the power to avail itself of equity in the mines by decree.[140] Like Lander, he did not see this as a reactionary policy, instead noting that it was made partly as an attempt to recover, through investors, substantial funds that Mongolia had paid to the Soviet Union for mineral exploration before 1991.[141] However, the government's hostility to investment, manifested through erratic suspensions of title, culminated in the 2012 law that promulgated a wide array of government approval requirements, including mandatory approval of acquisition by any foreign investors of 33% or more of any resource deemed "strategic," mandatory government approval of any acquisition or operations by foreign SOEs; and a parliamentary vote requirement if the value of transaction for over 49% of shares of a company exceeds U.S. $76 Million.[142]

The law also placed taxes on all transactions and allowed the national government to place local content procurement regulations applying to all mining companies in Mongolia.[143]

Yet, contrary to almost all analytical scholarship on the issue, Williams predicted that none of the government's investment policy would be harmful.[144] He cited as evidence the continued successful floating of shares and bonds on the Hong Kong Stock Exchange by companies with mining properties in Mongolia, perhaps ignoring a diverse investment portfolio of those companies.[145] Additionally, he viewed the continued planned status of two of the world's largest mining projects in Mongolia and the country's 17% economic growth in 2010 (before the bust) as evidence of a fundamental economic soundness that was later shown to be illusory.[146] Mongolia, in fact, at a glance appears to have done much worse in regard to foreign investment than the other Asian countries included in Williams's analysis, for

[138] *Id.* at 394-95.
[139] *Id.* at 402
[140] *Id.* at 401.
[141] *Id.*.
[142] *Id.* at 402.
[143] *Id.*
[144] *Id.* at 402–403.
[145] *Id.* at 402.
[146] *Id.* at 403; Enda Curran, Michael Kohn and James Mayger, "The Land of Genghis Khan is Having an Epic Economic Meltdown," BLOOMBERG NEWS (Aug. 18, 2016), https://www.bloomberg.com/news/articles/2016-08-18/lessons-from-the-epic-economic-meltdown-on-the-border-of-china.

which he presented gloomier outlooks.[147]

The loathed SEFIL was replaced after little over a year by the 2013 Investment Law, which, crucially, declared set "strategic sectors" instead of relying on executive decree to determine them.[148] The 2013 law's identified sectors are minerals, communication and finance; government approval requirements for foreign state-owned enterprises (SOE) are limited to those investing in over 33% of an entity, and an executive agency, not Parliament, gives approval.[149]

The law still provides regulatory oversight for foreign investment, as it requires that all foreign entities must be registered as "entity with foreign investment" (EFI) or as a "representative office" to conduct activity in Mongolia. These categories are distinguished by the definition of an EFI as a business, incorporated in Mongolia, at least 25% owned by foreign investor with a minimum contribution of $100,000, while a representative office can only essentially be an outpost of a foreign company that is not authorized to take in revenue from business activity.[150] Yet a private individual under the new law could buy full ownership of a Mongolian company without needing to receive government approval.[151]

The agency created to monitor foreign investment is delegated broad power under the law to oversee its implementation, issue tax stabilization certificates to investors, make determinations about investments by foreign SOEs, and help investors in planning investments while protecting their interests.[152] (Author's note: It is unclear whether this last purpose is at conflict with government or public interest.) However, in a nod to the continued wariness of Chinese influence and tax dodging, the agency must, if approving a foreign SOE's investment, consider whether investment conflicts with national security interests, adversely impacts government revenue, or constrains competition.[153] The agency's viability would appear to hinge on whether the agency sinks to the level of corruption other Mongolian government bodies have.[154]

The signals from Mongolia's government have been mixed, as populist former wrestler Khaltmaa Battulga won the 2017 presidential election by running on anti-China rhetoric and resource nationalism.[155] At almost the

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[147] *See* Lander, *supra* note 114.

[148] *Id.* at 13–14; Revised Securities Market Law of 2013 (Mong.) (http://mse.mn/uploads/laws/27aba6dbc709e17d808f9abe4b9a40511f70dfdb.pdf).

[149] *Id.* at 13.

[150] *Id.*

[151] Hogan Lovells, *supra* n. 145.

[152] 2013 Law.

[153] Hogan Lovells, *supra* n. 145.

[154] See U.S. State Department on Mongolia, *supra* n. 140.

[155] Sharad K. Soni, *Mongolia's New President is Mongolia First and China Last*, EAST ASIA FORUM (August 11, 2017), http://www.eastasiaforum.org/2017/08/11/mongolias-

same time of his election, China imposed sudden new border crossing restrictions to the effect of choking off Mongolian coal and copper exports and causing a 120-kilometer truck backup.[156] Whether or not China intended this as a measure of intimidation, it certainly underscored the persistent anxiety in Mongolia's politics of overdependence on China. Battulga's declared intention to foster new trade connections with Russia may too depend on Chinese investment in the CRM corridor, investment for which China is not shy to impose conditions.[157]

Mongolia's case, for all its qualifying factors, is an instructive example of the hardships that can result for both sides when a nation open to foreign investment restricts it out of fear of outside control.

Contrasts with Pakistan

Foreign-owned property under CPEC (commercial or industrial) is safe from government acquisition, a stark contrast with Mongolia's pre-2014 system.[158] Pakistan's PERA already forbids the taking of privatized property.[159] For the purposes of dispute resolution, arbitration has priority over judiciary methods in the China-Pakistan BIT.[160] This is not the case with the China-Mongolia agreement, which is relevant, as the judiciary is inherently less reliable in an international context.[161]

Objective statements can determine what gets protected under a BIT. The China-Mongolia BIT's objectives are to foster the development of economic cooperation between the countries, [162] a much less inclusive provision than that in the China-Pakistan BIT, whose purpose is "to encourage,

new-president-is-mongolia-first-and-china-last/.

156 Chintushig Boldsukh, "President Kh.Battulga and Mongolia-China Relations," UB POST (Sept. 12, 2017), http://theubpost.mn/2017/09/12/president-kh-battulga-and-mongolia-china-relations.

157 Chintushig Boldsukh, "Chinese State Media Says China Can Help Mongolia Under One Condition," UB POST (Feb. 9, 2017), http://theubpost.mn/2017/02/09/chinese-state-media-says-china-can-help-mongolia-under-one-condition/.

158 Gouri, *supra* note 7, at 17; *see* "Asia-Pacific: Mongolia: Investment Darling No More," 32 Int'l Fin. L. Rev. 6 (March 2013).

159 Protection of Economic Reforms Act (PERA), http://www.na.gov.pk/uploads/documents/1334289655_675.pdf.

160 China-Pakistan BIT, Feb. 12,1989, at Investment Policy Hub, http://investmentpolicyhub.unctad.org/IIA/country/160/treaty/952.

161 Agreement Between the Government of the Mongolian People's Republic and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, China-Mongolia (Aug. 25, 1991), UNCTAD I.I.A. No. 623, http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/940 (hereinafter "China-Mongolia BIT"). *See also* Mongolia Corruption Report, GAN BUSINESS ANTI-CORRUPTION PORTAL, https://www.business-anti-corruption.com/country-profiles/mongolia (last visited Feb. 18, 2018).

162 China-Mongolia BIT.

protect and create favourable conditions for investments by investors" going between states, a much more inclusive statement.[163]

The China-Mongolia BIT gives separate definitions for Mongolian and Chinese investors. For Mongolian investors are defined as "[n]atural persons who have nationality of [Mongolia]" or "[e]conomic entities incorporated or constituted in accordance with the laws of [Mongolia] provided that they are competent under those laws to make investment in the territory of the other contracting state." Chinese investors are "[n]atural persons who have nationality of the people's republic of China" or "[e]conomic entities established in accordance with the laws of the People's republic of china and domiciled in the territory [thereof]." The China-Pakistan BIT does this as well, and Gouri criticizes the structure as a possible source of confusion, especially since the FTA makes no such distinction.[164]

Differing definitions of investors between countries are a common trait of BITs between China-Pakistan and China-Mongolia, and could reflect a lesser degree of mutual understanding regarding each other's corporate legal regimes.[165]

In the future, we may expect to see bilateral agreements between regional nations and China to follow one of either two paths—becoming more uniform on Chinese terms or becoming even more specifically tailored to each country's needs. Given the comprehensive nature of Chinese plans, one may see initial endeavors with greater carve-outs for national idiosyncrasies give way to structured agreements between multiple parties, but to discuss this possibility is to indulge in speculation.

V. CONCLUSION

Although the legal regimes it must confront are varied and sometimes unpredictable, the evacuation of other competing powers in Asia has left China in a very favorable position to use its "soft power" to grow its economic influence out over the continent. Other countries welcome Chinese investment, although the degree to which they are willing to accommodate the unavoidable accompanying expansion of influence varies. Pakistan, by keeping an open door to foreign investment and staying friendly with China, is the first in line to reap the rewards of this vision, but will also be an example to other Asian states of what the consequences of massive Chinese investment are. Mongolia has not followed this route due to wariness over China's current domination of its economy, yet China has shown its willingness to handle different states on a case-by-case basis in FTA and economic corridor negotiations. The example of Mongolia remains instructive in showing that inviting foreign investment is a one-way street to economic

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[163] China-Pakistan BIT.
[164] Gouri, *supra* note 7, at 25.
[165] *Id.* at 24-25; China-Pakistan BIT.

growth which a country can start down easily and have a hard time turning around. An attempt to seriously restrict its use can carry drastic consequences for a country's economy. The differences between the legal postures of these states towards Chinese investments are readily visible, both in their own domestic law governing foreign investments and in their international agreements with the Chinese government. Yet, as mentioned before, China has demonstrated a determination to overcome the differing political and legal postures of each country in its plan, and if it succeeds, it may well reap the rewards of unparalleled influence when world trade leaders negotiate again.