

TOPIC: EXPLOITATIVE BELT & ROAD CONTRACTS

BOTTOM LINE

- Contracts associated with the People's Republic of China's (PRC) Belt and Road Initiative (BRI) contain exploitative provisions, including overly-broad, at-will default clauses for "actions adverse to the PRC."ⁱ
- The violation of these clauses trigger remedies for the PRC to seize the borrower-nation's public infrastructure, national resources, territory, and/or Gross Domestic Product (GDP) revenue unrelated to the loan project.
- Customary international law, international norms, and contract codes worldwide recognize the principle that an "unconscionable" contract is unenforceable when coercion, exploitation, duress, undue influence, or other circumstances result in a contract that overwhelmingly favors one party over the other.
- Article 2(7) of the United Nations (UN) Charter and the principle of "non-intervention" requires nations to refrain from interfering in the domestic or internal matters of another nation.
- BRI contracts typically contain a range of problematic terms and conditions that merit scrutiny for compliance with the legal principles of unconscionability and non-intervention.
- Examples include: 1) prohibitions against disclosing debt details to borrower-nation citizens, public interest groups, and international organizations; 2) prohibitions against seeking debt relief or advisory guidance from relief agencies, international organizations, or other governments; 3) requirements that all disputes be resolved by Chinese courts, with a prohibition against involving non-Chinese mediators, lawyers, or arbitrators and; 4) requirements that high percentages of the borrower-nation's GDP be deposited as collateral in Chinese-controlled bank accounts, as opposed to neutral third-party escrow accounts.



WHY THIS MATTERS

- As the world's leading region in trade, a **free and open Indo-Pacific is vital for global security and economics.**
- **Increased scrutiny of BRI contracts helps promote transparency** and mitigate risk of manipulation or influence over sovereign decisions and key infrastructure (e.g., ports, railways, and power grids).
- **Unconscionable terms and conditions** cause financial distress and threaten sovereignty and territorial integrity, especially for developing countries.
- **The PRC has used BRI terms and conditions to acquire military access** in the Indo-Pacific region and abroad, including at Ream Naval Base in Cambodia and Hambantota Port in Sri Lanka.ⁱⁱ



- Reporting indicates **that BRI-related debt is used to coerce support** from individual political leaders for military installations and logistics hubs that enable the People's Liberation Army (PLA) to project power and influence.ⁱⁱⁱ
- In December 2023, **PLA warships were observed at Ream Naval Base**, prompting the U.S. State Department to raise "serious concerns" regarding the PRC's plans to expand exclusive control over parts of the base.^{iv}
- Despite promises to support green and low-carbon energy in developing countries, BRI projects reportedly resort to harmful pollutants (e.g., coal-fired power) to cut costs.^v

DETAILED DISCUSSION



- **BRI-Related Debt.** In 2013, President Xi Jinping proclaimed BRI a centerpiece of his foreign policy and a means of expanding the PRC's leadership in global affairs.^{vi} In October 2023, the PRC hosted a 10-year BRI summit. As of August 2023, 155 nations have signed more than 2000 BRI-related debt contracts worth upwards of USD \$1.5 trillion.^{vii} **The PRC is now the world's largest official creditor**, surpassing the World Bank, International Monetary Fund (IMF), and Organization for Economic Cooperation and Development (OECD) creditors combined.^{viii} 50 developing countries with PRC loans went from owing less than 1% of their GDP in debt in 2005 to more than 15% in 2017. A dozen countries owed more than 20% of their GDP and many are at high risk of default.^{ix}
- **The PRC claims that contracts are freely entered and mutually agreed upon, but has refused to disclose contract terms and conditions** for a decade, asserting "the principle of transparency should apply to north-south cooperation, but...it should not be seen as a standard for south-south cooperation (referencing the developed world as north and the developing world as south)."^x OECD has repeatedly requested BRI-related credit data from the PRC without success.^{xi} **A majority of BRI-related debt falls on developing and least-developed countries;** however, there is little transparency or public disclosure of the terms and conditions of BRI loans.^{xii} The PRC rejects calls by international organizations and relief agencies for data and demands secrecy from borrowers.
- **Sovereignty and Non-Intervention.** Under Article 2(7) of the UN Charter and the principle of non-intervention,



nations may not intervene in the domestic or internal matters of another nation. **U.S. law affirms the principle of non-intervention as an integral part of U.S. policy** through the ratification of the Charters of the United Nations and the Organization of American States (OAS), as well as other international agreements that expressly incorporate non-intervention as a basis for international cooperation.^{xiii}

- **Unconscionability and Customary International Law.** Under customary international law and contract codes worldwide, **a contract may be unenforceable when terms are so extremely imbalanced that they take away any meaningful bargaining power from one of the parties.** Many modern legal regimes refer to this principle as "unconscionability"; however, the same

concept appears throughout legal systems worldwide, including the PRC, under different names (e.g. vitiating factors, illegality, validity, etc.^{xiv}). A contract can be "unconscionable" during the course of performance when the underlying terms and conditions rise to a level of **coercion, duress, undue influence**, or circumstances that overwhelmingly favor one party over the other.^{xv} The remedies for unconscionable contracts may include voiding the entire contract, voiding the unconscionable terms, modification, or compensation to the affected party.

- **International Organizations and Treatment of Developing Countries.** Article X of the World Trade Organization's (WTO) General Agreement on Tariffs and Trade (GATT) addresses transparency and obligates members to open and predictable policies and practices to maintain a stable economic environment.^{xvi} The WTO requires members to grant special and differential treatment to developing and least-developed countries.^{xvii} Consistent with WTO obligations, the United States opposes debt-trap diplomacy and exploitative trade contracts.^{xviii}
- **BRI Terms and Conditions.** BRI agreements begin with non-binding MOUs that appear transparent and freely entered; however, subsequent lending agreements with state-owned, Chinese banks are not disclosed publicly

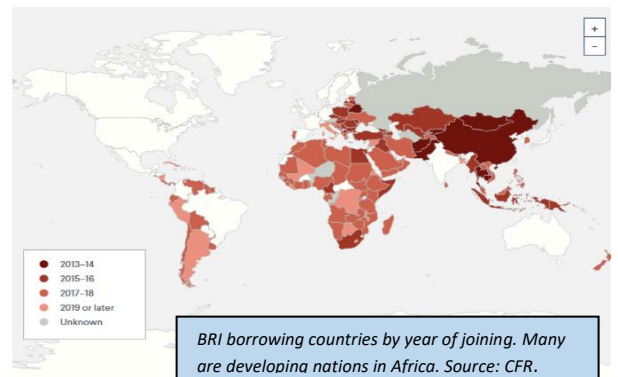
and contain terms and conditions that may be inconsistent with the legal principles of unconscionability and non-intervention, as well as WTO obligations. Examples of problematic terms and conditions include those that:

- **Prohibit borrowers from publishing or disclosing contract terms** or the existence of debt, including to their citizens, advisory groups, or intergovernmental organizations with global transparency oversight;^{xix}
- **Bar borrowers from restructuring debt or pursuing debt-relief** through the assistance of other nations, regional partnerships, or international agencies like the IMF, World Bank, Paris Club, or OECD;^{xx}
- **Prohibit dispute resolution outside the Chinese International Commercial Court (CICC)**, which forbids any non-Chinese lawyer or non-Chinese mediator from participating in arbitration/mediation proceedings;^{xxi}
- **Allow PRC creditors to accelerate terms** or demand immediate repayment for ill-defined reasons;^{xxii}
- **Require borrowers to deposit a percentage of their Government revenue**, including revenue entirely unrelated to the loan project, into PRC-designated banks, rather than a neutral third-party account^{xxiii} – these accounts are then used as collateral debt offsets—at will—with no cause for recourse;^{xxiv}
- **Authorize the PRC to declare default at-will** on a loan for any action that is “adverse to a PRC entity”;^{xxv}
- Upon default, **authorize the PRC to seize, assume control of, and use territory, public infrastructure, and property** (e.g., ports, energy, railways, subways) as collateral for default;^{xxvi}
- **Terminate diplomatic relations** as a result of default.^{xxvii}

PROPOSED COUNTER-LAWFARE APPROACH

This section offers suggested language for incorporation into communication strategies

- **BRI contracts are matter of public, international interest if the terms and conditions violate international law** and the borrowing nation’s sovereignty under Article 2(7) of the UN Charter.
- **BRI contracts merit scrutiny** for compliance with the legal principles of **unconscionability and non-intervention**.
- As a matter of international law, **BRI contracts may be unconscionable and therefore unenforceable** if terms and conditions are so imbalanced that they take away any meaningful bargaining power from the borrowing nation or leave the borrowing nation with no just remedy during performance on BRI projects.^{xxviii}
- Contract terms that authorize the creditor to seize and control territory, public infrastructure, and GDP **unreasonably interfere with the internal affairs** of the borrowing nation, especially in instances where the borrowing nation is a developing country with limited infrastructure and resources.
- Contracts that allow the lender to terminate, accelerate, or change terms at-will or under vague circumstances provide **no protection against acts that violate sovereignty** or interfere with the internal affairs of sovereign states.^{xxix}
- Contractual prohibitions on disclosure of public debt to citizens **removes transparency**, interferes with the political process, and eliminates informed decisions.^{xxx}
- **BRI contracts merit scrutiny for “debt traps”** that can be used to coerce developing countries; influence political decisions; seize assets; acquire military access; or compel support within international organizations such as the UN.
- Contracts that prohibit borrowing nations from disclosing terms of a debt or consulting with international debt-relief agencies and financial advisory organizations **violate WTO obligations related to transparency and preferential treatment for developing nations**.
- **Third-party involvement in contract disputes is customary** to prevent coercion, duress, conflicts of interest or undue influence, but BRI contracts typically compel dispute resolution in Chinese courts, by Chinese officials, within China, and under the control of the Chinese Government, rather than a neutral third party.
- **Possible remedies** for unconscionable contracts include voiding the entire contract, voiding unconscionable terms, modifying the contract, or pursuing compensation for damages.
- **USINDOPACOM works alongside the U.S. interagency and with allies and partners** to protect sovereignty, promote adherence to international law, and uphold the rules-based international order.



Note: Publicly available information for countries marked unknown is unclear or contradictory.
Source: Green Finance and Development Center, Green Belt and Road Initiative Center, Belt and Road Portal.

COUNCIL
FOREIGN
RELATION

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- ⁱ See Gelporn, Horn, Morris, Parks, and Trebesch, *How China Lends: A Rare Look into 100 Debt Contracts with Foreign Governments*, AIDDATA (2021) at 37.
- ⁱⁱ See Dasgupta, *China Using Sri Lanka's Indebtedness to Show Military Muscle*, VOA (2022). See also, Detsch, *US Looks to Check Chinese Advances at Cambodian Naval Base*, Foreign Policy (2022), available at <https://foreignpolicy.com/2022/12/05/us-china-cambodia-ream-naval-base/>.
- ⁱⁱⁱ *Id.*
- ^{iv} See *Warships Seen at China's Secretive Overseas Naval Base for the First Time*, Newsweek (December 2023), available at <https://www.newsweek.com/china-cambodia-raem-naval-base-ship-1850406>
- ^v See *Written Testimony of Geoffrey R. Pyatt "Assessing U.S. Efforts to Counter China's Coercive Belt and Road Diplomacy"*, U.S. Department of State (June, 2023), available at <https://www.state.gov/assessing-u-s-efforts-to-counter-chinas-coercive-belt-and-road-diplomacy/>
- ^{vi} See Smith, Stephen, *China's Major Country Diplomacy*, Oxford Academic, Foreign Policy Analysis (2021).
- ^{vii} *Id.*
- ^{viii} See *How Much Money Does the World Owe China?*, Harvard Business Review (2020), located at <https://hbr.org/2020/02/how-much-money-does-the-world-owe-china>.
- ^{ix} *Id.* See also *China's Belt and Road Initiative Heightens Debt Risks in Eight Countries, Points to Need for Better Lending Practices*, Center for Global Development (2018), located at <https://www.cgdev.org/article/chinas-belt-and-road-initiative-heightens-debt-risks-eight-countries-points-need-better>, claiming that as of 2018, 23 out of 68 participating BRI countries were at risk of "debt distress."
- ^x *Supra* note 1 at 11.
- ^{xi} *Id.*
- ^{xii} *Id.*
- ^{xiii} See *US Army Operational Handbook* (2022), Chapter 1, para I(B)(2).
- ^{xiv} See Onyekachi, *Vitiating Elements of Contract As A Source of Contractual Validity*, (2012), located at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156749.
- ^{xv} See Uniform Commercial Code of the United States, Section 2-302. See also *Unconscionable Contract: A Comparative Study*, Loyola of Los Angeles International and Comparative Law Review, Article 3, Volume 14 (1992), available at <https://safe.menlosecurity.com/doc/docview/viewer/docNC63536E62D11999f1e25fd13d9fd9a59431e7392c7ed6c78690cc54803e73786d0e3a031efbd>.
- ^{xvi} See Reinsch, *Transparency at the WTO*, Center for Strategic and International Studies, available at <https://www.csis.org/analysis/transparency-wto-why-does-transparency-matter-and-are-members-meeting-their-obligations>
- ^{xvii} See *WTO Developing Countries Overview*, World Trade Organization, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm
- ^{xviii} See *US Aims to Counter China's Influence in Global Institutions, Yellen Says*, Reuters (2023), located at <https://www.reuters.com/world/us-aims-counter-chinas-influence-global-institutions-yellen-says-2023-03-29/>.
- ^{xix} *Supra* note 1 at 4.
- ^{xx} *Supra* note 1.
- ^{xxi} See *Dispute Settlement With Chinese Characteristics: Assessing China's International Commercial Court*, U.S.-China Economic and Security Review Commission (2023), located at <https://www.uscc.gov/research/dispute-settlement-chinese-characteristics-assessing-chinas-international-commercial-court>
- ^{xxii} See Gelporn, Horn, Morris, Parks, and Trebesch, *How China Lends: A Rare Look into 100 Debt Contracts with Foreign Governments*, AIDDATA (2021).
- ^{xxiii} *Supra* note 1 at 6.
- ^{xxiv} *Id.*
- ^{xxv} *Id.*
- ^{xxvi} See *Zambia's Spiraling Debt Offers Glimpse into the Future of Chinese Loan Financing in Africa*, CNBC (2020), located at <https://www.cnbc.com/2020/01/14/zambias-spiraling-debt-and-the-future-of-chinese-loan-financing-in-africa.html>, detailing China's attempt to secure Zambian mining assets as collateral.
- ^{xxvii} *Supra* note 1.
- ^{xxviii} *Id.* at 4.
- ^{xxix} *Id.*
- ^{xxx} *Id.* at 6.