

## B. Article 3

**“Peaches and Plums do not Speak, but they are so Attractive that a Path is Formed Below the trees” [桃李不言，下自成蹊]: China’s Belt and Road Initiative and the United Nations Guiding Principles for Business and Human Rights**

**Remarks Delivered at the 8th United Nations Forum for Business and Human Rights, 26 November 2019**

**Larry Catá Backer**

### **I1. Introduction**

The UN Working Group on Business and Human Rights organized a session for the 8<sup>th</sup> U.N. Forum entitled *Building sustainable infrastructure: Lessons from the Belt and Road Initiative and other similar multi-state initiatives*.<sup>1</sup> It was chaired by Surya Deva, a Member, UN Working Group on Business and Human Rights. Session participants include Mohamed Athman (Save Lamu); Larry Catá Backer (Penn State University); Flora Sapio (Università degli Studi di Napoli “L’Orientale”); and Wawa Wang (Sustainable Energy). The Session took place Tuesday 26 November 2020. We hope to see many of you there. The Session Concept Note<sup>2</sup>

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<sup>1</sup> Information about the Session available at the U.N. 8<sup>th</sup> Forum website, <https://2019unforumbhr.sched.com/event/U9Ei>.

<sup>2</sup> See Background Note, <https://2019unforumbhr.sched.com/event/U9Ei>. It provided in relevant part:

Effective implementation of the UNGPs in the context of the infrastructure development underway across all regions has the potential to make a significant positive contribution to the

What follows is the text of the Remarks delivered by Larry Catá Backer for the Coalition for Peace and Ethics. The remarks are entitled: “Peaches and Plums do not Speak, but they are so Attractive that a Path is Formed Below the trees” [桃李不言，下自成蹊]: China’s Belt and Road Initiative and the United Nations Guiding Principles for Business and Human Rights. As its title suggests, the remarks consider the points of necessary convergence between the emerging and robust system of global trade being developed by China through its Belt and Road Initiative and the normative framework of the UN Guiding Principle. The suggestion is made that points of convergence as well as challenges to both systems for the necessary task of building a win-win common future. The Remarks, which follow, have been slightly edited and lightly footnoted.

## 2. Remarks

Distinguished members of governments, of the Office of the High Commissioner for Human Rights, and of public international organizations; Esteemed members of the UN Working Group for Business and Human Rights; Valued representatives of economic enterprises, and of non-governmental organizations whose respective service to the world order is acknowledged with deep appreciation; Colleagues from academic institutions worldwide; Ladies and Gentlemen; Dear Friends:

At the opening ceremony of the Belt and Road Forum for International Cooperation, held in Beijing May 2017, Chinese President Xi Jinping described China’s Belt and Road Initiative and the international community’s subsequent support and involvement with a most astute reference to the well-known

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realization of the SDGs. . . . The UNGPs provide a robust framework for both host and home States as well as all involved businesses enterprises to manage these concerns in consultation with affected stakeholders. . . . Infrastructure development is a key component of the Belt and Road Initiative (BRI). Other similar multi-state mega infrastructure development initiatives are emerging. The recently announced Blue Dot Network is a case in point. The session aims to explore lessons from – and for – these multi-state mega infrastructure development initiatives, and to identify what implementing the UNGPs would imply in practical terms for infrastructure projects under these initiatives.

Chinese saying: “peaches and plums do not speak, but they are so attractive that a path is created below the trees” [桃李不言，下自成蹊].<sup>3</sup> President Xi might have meant to suggest that there is no need to argue about the abstract merits of BRI; rather China’s positive role in developing this new era global trade framework will naturally lead other states to participate. And, indeed, since 2013 the world has been eager to construct a path to China as a new global trading center and has enthusiastically tasted the peaches and plums in China’s orchard. Yet President Xi was wise enough in using that ancient expression to note that it speaks not merely to peaches but also to plums, that is to the combination of good moral merits and character. It is the combination of peaches and plums that together produce an orchard rich enough to draw and sustain the world.

At the same time, one of the ancient thirty-six stratagems reminds us, in its section on enemy dealing strategies, that one should be prepared to “sacrifice the plum tree to preserve the peach tree.”<sup>4</sup> Here the garden of peaches and plums takes on a different character—both are necessary but now distinct and complementary, and where both are attacked it may be necessary to sacrifice one to preserve the garden. And yet, while the peaches survive, the garden itself becomes far poorer, and the path built to it may ultimately be abandoned.

And that insight nicely describes the essence of my task here today: For in the global garden of productive interaction, it is possible to suggest that the peach orchard of the Chinese Belt and Road is made infinitely more productive, and the path beaten to its precincts made substantially more sustainable, where the peach trees of the Chinese Belt and Road Initiative are planted firmly and resolutely beside the great plums trees of the United Nations Guiding Principles for Human Rights. Sacrificing plums to preserve peaches may be a useful stratagem in some instances, but it will threaten the success of a garden dependent on both.

To that end I take as inspiration President Xi’s reference, made during the course of his speech at the 2nd Belt and Road Forum

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<sup>3</sup> Xi Jinping, “Full text of President Xi’s speech at opening of Belt and Road forum,” Xinhua News Agency (14 May 2017) available [http://www.xinhuanet.com/english/2017-05/14/c\\_136282982.htm](http://www.xinhuanet.com/english/2017-05/14/c_136282982.htm).

<sup>4</sup> Thirty Six Stratagems available (in English) [https://military.wikia.org/wiki/Thirty\\_Six\\_Stratagems](https://military.wikia.org/wiki/Thirty_Six_Stratagems).

for International Cooperation in April 2019, to the Chinese saying: “The ceaseless inflow of rivers makes the ocean deep.” In that context he noted that “were such inflow to be cut, the ocean, however big, would eventually dry up.”<sup>5</sup> We can only agree. The rivers of international trade flowing into China are fed by the great sources of its international normative and human rights structures. Were these cut off, there would be little left to feed an ocean with many inlets and no outlets.

In this global garden of peaches and plums let us first consider our peach tree—the Belt and Road Initiative.

BRI represents the framework through which China and its vanguard, the Chinese Communist Party, rationalizes its trade, security, cultural, and political policies. That rationalization seeks a framework for the seamless and coherent connection between China’s internal and external relations. It serves both as the outward expression of the core of the Basic Line of the Chinese Communist Party as the leadership collective of the nation, as well as the current manifestation of that Basic Line as the principles of the “New Era” theory developed by the current leadership core of the Chinese State and its Communist Party collective, which along with the elements of the United Front, represents the collective of the Chinese nation.

That representation extends beyond economics to politics, culture, and societal cohesion. It represents the outward expression of the Twelve Core Socialist Values and its implementation through the five principles of Peaceful Coexistence: mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other’s internal affairs, equality and mutual benefit, and peaceful coexistence. To understand the BRI, it is first necessary to understand the central role of Marxism in the construction of Chinese political-economy.

It is then necessary, as Xi Jinping stated in a speech given at the fifth collective study of the 19th Central Political Bureau on April 23, 2018, to situate Marxism with Chinese characteristics at the core of China’s global collective leadership. This is a moral-political,

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<sup>5</sup> “Xi Jinping Chairs and Addresses the Leaders’ Roundtable of the Second Belt and Road Forum for International Cooperation (BRF)” 2nd Belt and Road Forum for International Cooperation (28 April 2019) available <http://www.beltandroadforum.org/english/n100/2019/0429/c22-1392.html>.

as well as an economic project. As President Xi also noted: The Communist Manifesto, with Chinese characteristics, “pointed out that communism is not a narrow regional movement, the proletariat. To achieve complete liberation, it is necessary to liberate all mankind and call on the proletarians of the world to unite. This provides a scientific and theoretical basis for Marxist parties to embrace the world, benefit mankind, and jointly create a better world.”

Within this broader foundational outlook, BRI is meant to be the manifestation of outbound cooperation in a number of key areas. These areas have included, since 2015: policy coordination, facilities connectivity, integrated transport infrastructure construction, connectivity in energy infrastructure, communication infrastructure, investment and trade cooperation, enhanced customs cooperation, and mutual recognition and coordination of standard setting, the development of a united front in the context of developing policy within the global trade community, coordinated trade innovation, investment facilitation, cooperation in agriculture, forestry and animal husbandry, and in the exploration of coal, oil, gas, metal minerals and other conventional energy sources; as well as emerging renewable sources.<sup>6</sup>

With this in mind it is possible to turn to the legal, security, cultural, and infrastructure development aspects of the formation of BRI.

The legal and operational characteristics of BRI are then easy to describe.

As a legal construct, BRI can be understood as the aggregation of an increasing number of bi-lateral and multi-lateral trade, friendship, and cooperation agreements between foreign states and China. BRI does not yet embrace such formal arrangements between foreign states without China at the center. These formal arrangements are meant to make it possible to manifest and work toward the fulfillment of the key aspirational policies of BRI: “They should promote policy coordination, facilities

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<sup>6</sup> Belt and Road Cooperation: For a Better World: Report on the Finding and Recommendations from the First Meeting of the Advisory Council of the Belt and Road Forum for International Cooperation (10 April 2019) available [https://www.fmprc.gov.cn/web/wjbxw\\_673019/W020190424305940595582.pdf](https://www.fmprc.gov.cn/web/wjbxw_673019/W020190424305940595582.pdf).

connectivity, unimpeded trade, financial integration and people-to-people bonds as their five major goals.”<sup>7</sup>

At the same time, these formal instruments are augmented by a growing set of informal mechanisms. Prominent among them are Memoranda of Understanding among China and her BRI partners. Lamentably, most are not transparent. These contain, it is mostly surmised, a set of more specific country to country framework arrangements for the operationalization of BRI principles within a more specific context.

Internally, BRI is overseen in China by the Leading Group for advancing the Development of One Belt One Road, formed in 2014. Its steering committee reports directly into the State Council of the People's Republic of China. Externally, China's BRI partners have under the leadership of China, undertaken a set of informal structures aimed at coordination. Beyond that, little is known, though each individual state, in their relations with China, is free to undertake its own approach to the internationalization of BRI within their national territory.

As a set of security arrangements, BRI is connected to the Shanghai Cooperation Organization. But the Shanghai Cooperation Organization is merely meant to be one of many mechanisms that enhance multilateral cooperation. These entities tend to layer the policies, principles and objectives more broadly conceived in BRI but targeted to the specific context for which they were created.

As a mechanism for bringing people closer together, BRI is also understood to be the framework within which China and her partners develop closer ties. It is understood to fall within several distinct categories.

*The first* includes people to people exchanges with the objective of enhancing BRI economic and political cooperation. These have included since 2015 “cultural and academic exchanges, personnel exchanges and cooperation, media cooperation, youth and women exchanges and volunteer services, so as to

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<sup>7</sup> “Vision and Actions on Jointly Building Silk Road Economic Belt and 21<sup>st</sup> Century Maritime Silk Road, In *China's Belt and Road Initiatives: Economic Geography Reformation* 157-170, 164 (Wei Liu, ed., Springer, 2018).

win public support for deepening bilateral and multilateral cooperation.”<sup>8</sup>

*The second* includes a series of measures designed to enhance intra-BRI tourism

*The third* includes scientific and technical cooperation. These include the development of joint research centers. It also includes integration of programs in aid of economic development, including entrepreneurship and the like.

*The fourth* includes broad array of mechanisms for enhanced political communication. The objects of these projects include political parties, legislative bodies sister city programs and the like.

*Finally*, and most importantly, BRI serves as the conceptual framework around which the core objective of enhancing regional connectivity and development may be furthered. It consists of a series of evolving mechanisms for developing and financing infrastructure projects. But infrastructure projects are merely to be understood as the necessary first stage of the larger project of bringing like-minded groups of states together by solving the world’s infrastructure gap. The elimination of those gaps forms the heart of the infrastructure-centered development of what are popularly called the Silk Roads from and through China. These include the Land Silk Road connecting China through Asia to Europe; the Maritime Silk Road that connects states along ancient sea routes between Asia, Africa and Europe—along with the Americas. An ice silk road anticipated over the North Pole region, and perhaps even a space and internet road also may be included within the BRI’s goals.

These projects, then, serve as the physical manifestation of the Silk Road envisioned by President Xi publicly since 2013. They are manifested by a series of development and financing arrangements between China and its BRI partners. But such activity is also internationalized within the Asia Investment and Infrastructure Bank (AIIB). The initial focus has been infrastructure investment, education, construction materials, railway and highway, automobile, real estate, power grid, and

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<sup>8</sup> Ibid.

iron and steel. Some already estimate that total Belt and Road Initiative projects are among the largest infrastructure and investment projects in history.

And now we add the plum trees.

Just as the BRI has been intended to help bridge a critical infrastructure gap, the U.N. Guiding Principles for Business and Human Rights represents a concrete and globally embraced effort to bridge an equally important gap—a governance gap between national and international regulatory structures, between public and private law systems; and within increasingly unified chains of production and supply that themselves manifest the global regulatory silk roads.

The UN Guiding Principles are well known enough to spare me the need for more careful description. However, it is worth remembering a number of key points.

*First*, the UN Guiding Principles were endorsed unanimously in 2011. That endorsement included China and the United States. It must be acknowledged that the UN Guiding Principles are not strictly speaking international law, nor have their principles been mandated under international law mechanisms, nor, indeed, have they been involuntarily transposed into the domestic legal orders of states. All the same, the UN Guiding Principles themselves were consciously crafted, and thus endorsed, to reflect the key operational doctrines essential and universally embraced for framing issues of duty, responsibility and obligation of all actors touched by economic activity.

*Second*, the UN Guiding Principles have developed two principal framing strategies for the key actors in economic activities—states and economic organizations.

With respect to states, the UN Guiding Principles reaffirm the essence of State sovereignty within the global order. States acknowledge their already existing duties to protect human rights within the letter and spirit of their own engagement in international law and norms.

With respect to enterprises, including instrumentalities of state engaged in economic activities, the UN Guiding Principles described a private law based and coordinated system of



responsibility unified both by a core set of norms, the International Bill of Human Rights and certain ILO Conventions, as well as by the mechanisms of human rights due diligence. These apply with equal vigor to all enterprises anywhere in the world and are either tied to or restricted by the choices made in the construction of the domestic legal orders of the states in which they may operate.

With respect to individuals, the UN Guiding Principles have taken a great step toward the development of a global system of liability for harm designed to protect individuals and vulnerable communities from the effects of economic activity. This harm principle is framed in the Western language of human rights but of its essence is aligned strongly with Marxist principles of the fundamental obligation of the vanguard party in asserting its leadership role.

*Third*, as a consequence, it is useful to understand the UN Guiding Principles as the first truly global Belt and Road Initiative. Its silk road is paved with the principles developed by the community of nations in its multilateral organizations reflecting their mutually advantageous vision of win-win cooperation. It is paved with the blood and sacrifice of the global working class, with respect to whom both free market and Marxist political systems have long recognized obligations.

*Fourth*, the UN Guiding Principles have developed a set of key markers that are implicitly embedded into the principles of BRI, whose development ought to be welcomed in the spirit of BRI win-win cooperation and respect for the five principles of Peaceful Coexistence. In this context it is important to underline that the relationship between the substantive norms of BRI and the UN Guiding Principles are not constructed as a one-way street. It is as important for the Guiding Principles to embed within its interpretive scope the important cultural and moral framework of socialist values, as it is for BRI frameworks to be sensitive to the role of the UNGP in the legal and economic organization of its partners. For China and BRI, it is error to conceive of the UN Guiding Principles as a species of “unequal treaties.” At the same time, it is error for those who have responsibility for the UNGP to view them as a means of for excuse for forcing the transformation of Marxist Leninist political-economic systems and their forms of governance.

*Fifth*, the necessary alignments between the BRI and UN Guiding Principles are easy to identify. These extend beyond the First Pillar principles applicable to states. Let me highlight a few:

- Guiding Principle 4 (the State-Business Nexus) provides a strong foundation for developing the moral and normative framework for the operation of BRI state owned enterprises especially when they engage in economic activity outside of their home state;
- Guiding Principle 4 also serves as the foundation for incorporating appropriately framed human rights obligations of states into the working style of the great financial institutions that help drive BRI, including but not limited to the AIIB;
- Guiding Principle 6 (Public Commercial Transactions) serves as a foundation for the transposition of UN Guiding Principles sensibilities in developing relationships of integrity between the State and its enterprises. In this way China might demonstrate the way that its advanced elements of core socialist principles are compatible with the Guiding Principles. In consciously leading by doing, China can both embrace the UN Guiding Principles but help shape its meaning.
- Guiding Principle 7 (Conflict Zones) may serve as an essential template for enhancing rights based BRI activities in conflict areas. These exist within the overland and maritime Silk Roads. Again, this is an area in which BRI can by fusing its approach with the UN GP principles, can lead in the further development of both.
- Guiding Principle 8 (Ensuring Policy Coherence) can serve as the foundation for BRI development by ensuring that its core principles conform internally to the great Chinese principles and obligations to protect from harm and at the same time respect the rights based structure of such harm protections within the systems of most of its BRI partners. As the Commentary to Principle 8 suggests, “To achieve the appropriate balance, States need to take a broad approach to managing the business and human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence.”

- And perhaps most importantly, Guiding Principle 10 which reminds states, including BRI states, that “when acting as members of multilateral institutions that deal with business related issues, they should ensure the embedding of the great principles of the UNGP throughout the scope of the work of those institutions. There is no better place to affirm the close connection between the principles of BRI and UNGP than through the elaboration of UNGP sensitive BRI policy, and practice. As Principle 10(c) instructs: states should draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.” BRI provides a great opportunity for capacity building of the conjunction of human rights principles with Chinese characteristics alongside those embraced in the UNGP, respectful of the sensitivities of all BRI states within BRI production chains.

Beyond these, BRI serves as an excellent workshop for the development of socialist human rights due diligence systems. These might combine the core socialist values developed by a Chinese core with the collective premises of due diligence and its sensitivities derived from the Guiding Principles’ 2<sup>nd</sup> Pillar.

There is much more, of course. But even this small listing provides substantial evidence of the rich possibilities when the Chinese peach tree is grown alongside the UN Guiding Principles plums.

*Sixth*, these alignments between BRI and the UN Guiding Principles present for China and the BRI community the same challenges that the BRI presents for non-BRI trading and cooperation systems. And yet, the challenges are made easier to meet through a process of contextual embedding. This involves the translation of the UN Guiding Principles into the language of the political principles of adhering states and its firm and resolute adoption both by BRI states and by those enterprises operating within it.

*Seventh*, it is then possible to conceive of a Marxist-Leninist context for the elaboration of the principles of the UN Guiding Principles. It is also possible to align the effects and practices in

ways that make such transition compatible with the application by the global community of states and enterprises as a whole. For China, the project might well start with the alignment of BRI with the principles already announced by the Central Committee of the Communist Party of China in October 2019 in its *Outline of the Implementation of the Construction of the Moral Citizen in the New Era*.<sup>9</sup>

*Eighth*, the opportunity to carefully and consciously align BRI with the UN Guiding principles presents China and the BRI community the opportunity to lead by example. The natural connection between the high principles of BRI and the framing principles of the UNGP can produce a model for multi-lateral activity that substantially advances the great objectives of both. Together, each is stronger than apart.

*And ninth*, my last and perhaps most important point. The development of BRI is at a crucial stage of development. It finds itself at the point where its expression of scientific Marxist universalism, as Xi Jinping noted, as a “theoretical basis for Marxist parties to embrace the world, benefit mankind, and jointly create a better world”<sup>10</sup> must be aligned with the Enlightenment rational scientific development of law expressed in international human rights instruments. That alignment is essential where BRI operates in the world and in the territories of others. This presents an important opportunity for China to practice its high ideals proactively in its development of Marxist universalism compatible with the deeply held norms of the people with which it interacts. And that alignment will come willingly or not. Cases such as *Chandler v Cape plc*<sup>11</sup> and

<sup>9</sup> 中共中央 国务院印发 《新时代公民道德建设实施纲要》新华社 available [http://www.gov.cn/zhengce/2019-10/27/content\\_5445556.htm](http://www.gov.cn/zhengce/2019-10/27/content_5445556.htm).

<sup>10</sup> 习近平 学习马克思主义基本理论是共产党人的必修课 [Xi Jinping: “Learning the basic theory of Marxism is a compulsory course for communists”] available [http://www.qstheory.cn/dukan/qs/2019-11/15/c\\_1125234267.htm?fbclid=IwAR0F4WCJ\\_60bjJOJ5yr714I9B7yZlgvtPUSxwjIBjZWtj0vwgpkKgXs3xd0M](http://www.qstheory.cn/dukan/qs/2019-11/15/c_1125234267.htm?fbclid=IwAR0F4WCJ_60bjJOJ5yr714I9B7yZlgvtPUSxwjIBjZWtj0vwgpkKgXs3xd0M); discussed in Larry Catá Backer, Xi, “Learning the basic theory of Marxism is a compulsory course for communists,” Law at the End of the Day (23 November 2019) available <https://lcbackerblog.blogspot.com/2019/11/xi-jinping-learning-basic-theory-of.html#more>.

<sup>11</sup> *Chandler v Cape Plc* [2012] EWCA Civ 525 (25 April 2012) available <https://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html>.

*Lungowe v Vedanta Resources plc*<sup>12</sup> already suggest the emerging framework through which the activities of BRI enterprises might well be reached, eventually perhaps into the Chinese heartland. The better strategy might be to cultivate these within BRI rather than to be engulfed by them, or worse, to try to root them out through oppositional political action.

Dear Friends

China is leading the way in advancing a set of the normative principles of respect, cooperation, win-win result and sustainability through which to engage in activities of global concern. The 2018 Chinese BRI related Statement on China's Arctic Policy<sup>13</sup>, issued January 2018 nicely frames them in terms of respect:

Respect should be reciprocal. It means all States should abide by international treaties . . . as well as general international law. They should respect the sovereignty, sovereign rights, and jurisdiction enjoyed by the Arctic States in this region, respect the tradition and culture of the indigenous peoples, as well as respect the rights and freedom of non-Arctic States to carry out activities in this region in accordance with the law, and respect the overall interests of the international community in the Arctic.

These principles of respect, cooperation, win-win result and sustainability are also at the heart of the UN Guiding Principles.

Like the peach and plum trees in our global garden, BRI and UNGP must be planted together, grow together, and lean on each other to ensure that the global community will find them so attractive, in a sustained and sustainable state of reciprocal and respectful win-win cooperation, that they will together help form the path beneath these trees. To that end it is necessary both to avoid the stratagem of sacrificing the plum to save the peach, and to be mindful that such sacrifice might well cut the ocean from the many streams from which it feeds. It is in that

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<sup>12</sup> *Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20 (10 April 2019) available <https://www.bailii.org/uk/cases/UKSC/2019/20.html>.

<sup>13</sup> Information Office of the State Council of the People's Republic of China, China's Arctic Policy (26 January 2018) available <https://eng.yidaiyilu.gov.cn/zchj/qwfb/46076.htm>.

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spirit that both BRI and the UNGP will grow together to forge the sort of socialist win-win respectful alternative to which President Xi, and the friends of the UNGP, have both embraced.

Thank you.