


## ARTICLE

# *Making Infrastructure ‘Visible’ in Environmental Law: The Belt and Road Initiative and Climate Change Friction*

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First published online 30 October 2020

### Abstract

Infrastructure is often viewed through global and promotional lenses, particularly its role in creating market connectivity. However, infrastructure is heavily dependent on and constitutive of local spaces, where ‘frictions’, or disputes, emerge. Drawing on the Belt and Road Initiative (BRI) as a case study, we examine in detail two cases of BRI-related climate change litigation – one in Pakistan, and one in Kenya – that shed light on the frictions arising from what is deemed the most significant transnational infrastructure project of our time. In doing so, this study demonstrates how infrastructure can be made more visible in environmental law and how environmental law itself provides an important mechanism for stabilizing friction in the places where infrastructure is located.

**Keywords:** Transnational infrastructure, Belt and Road Initiative, Market connectivity, Climate change litigation

## 1. INTRODUCTION

Infrastructure holds a central place in the undertaking of the practising environmental lawyer, yet it seldom captures the imagination of the environmental law scholar.<sup>1</sup> One reason, as proposed by Gupta, is that infrastructure ‘disappear[s] from consciousness’

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We are grateful to Elizabeth Fisher and the anonymous *TEL* reviewers for their constructive feedback. All errors remain our own.

<sup>1</sup> This is not to say that environmental law scholars have entirely neglected the subject: see, e.g., A. Boute, *Energy Security Along the New Silk Road: Energy and Geopolitics in Central Asia* (Cambridge University Press, 2019); E. Fisher, ‘Law and Energy Transitions: Wind Turbines and Planning Law in the UK’ (2018) 38(3) *Oxford Journal of Legal Studies*, pp. 528–56; L. Natarajan et al., ‘Participatory Planning and Major Infrastructure: Experiences in REI and NSIP Regulation’ (2019) 90(2) *Town Planning Review*, pp. 117–38.

in the sense that it is ‘often seen as solid, immovable objects’.<sup>2</sup> The fact that infrastructure is conceived as concerning the *built*<sup>3</sup> as opposed to the *living* environment – which has been the focus of environmental law scholarship<sup>4</sup> – may go some way towards explaining the limited attention given to this subject matter. Infrastructure, however, has substantial environmental impact. This is evidenced, for example, by the environmental assessments that such projects require,<sup>5</sup> and questions of legal liability,<sup>6</sup> including the breach of environmental rights<sup>7</sup> to which they may give rise.<sup>8</sup>

Infrastructure holds a central role in modern life by creating markets that help to connect and support societies and economies.<sup>9</sup> It is unsurprising, therefore, that infrastructure is often framed in promotional, as well as global, terms where it is seen as enhancing connectivity between countries.<sup>10</sup> Yet, upon closer inspection, infrastructure sites are heavily dependent on and constitutive of local and geographical contexts<sup>11</sup> where ‘frictions’,<sup>12</sup> or disputes, emerge. We examine some of these frictions in this article with the aim of making infrastructure more visible in environmental law. As Fisher points out, environmental law scholars ‘are always thinking about, and writing about, place’,<sup>13</sup> and so examining infrastructure through an environmental law framework

<sup>2</sup> A. Gupta, ‘The Future in Ruins: Thoughts on the Temporality of Infrastructure’, in N. Anand, A. Gupta & H. Appel (eds), *The Promise of Infrastructure* (Duke University Press, 2018), pp. 62–79, at 74.

<sup>3</sup> K. Easterling, *Extrastatecraft: The Power of Infrastructure Space* (Verso, 2014).

<sup>4</sup> We recognize that the ambit of environmental law is vast and captures a broad range of environmental problems: see E. Fisher, *A Very Short Introduction to Environmental Law* (Oxford University Press, 2017).

<sup>5</sup> In the context of building high-speed rail, see, e.g., *R (on the application of HS2 Action Alliance Ltd) v. Secretary of State for Transport & Anor* [2014] UKSC 3.

<sup>6</sup> See, e.g., *The Bodo Community & Ors v. The Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973. The case concerns compensation for injury and losses suffered to the plaintiffs’ health, livelihoods, and land arising from oil spills linked to the construction and the operation of oil pipelines in Nigeria.

<sup>7</sup> See, e.g., *Wheeler v. Director de la Procuraduría General Del Estado de Loja*, Juicio No. 11121-0010. A provincial court in Ecuador found that the local government’s roadworks were in breach of the right of Pachamama (rights of nature) protected by the Constitution.

<sup>8</sup> This is not to argue that infrastructure is antithetical to environmental interests, as reflected in the conceptualization of ‘green infrastructure’. Deciding the extent to which a project is ‘green’ and what this precisely entails may, however, be tricky to determine: see, e.g., C. Wolmar, ‘What’s the Point of HS2?’ (2014) 36(8) *London Review of Books*, pp. 3–7.

<sup>9</sup> In the words of Wolmar, ‘America ... was made by the railroads’: C. Wolmar, *The Great Railroad Revolution: The History of Trains in America* (Public Affairs, 2013). More broadly, see The World Bank, *World Development Report 1994: Infrastructure for Development* (Oxford University Press, 1994).

<sup>10</sup> See, e.g., Organisation for Economic Co-operation and Development (OECD), ‘Enhancing Connectivity through Transport Infrastructure: The Role of Official Development Finance and Private Investment’, 31 Aug. 2018, available at: <http://www.oecd.org/publications/enhancing-connectivity-through-transport-infrastructure-9789264304505-en.htm>; B.N. Bhattacharyay, M. Kawai & R.M. Nag (eds), *Infrastructure for Asian Connectivity* (Edward Elgar, 2012).

<sup>11</sup> H. Appel, N. Anand & A. Gupta, ‘Temporality, Politics, and the Promise of Infrastructure’, in Anand, Gupta & Appel, n. 2 above, pp. 1–40, at 14.

<sup>12</sup> Here we draw inspiration from A. Lowenhaupt Tsing, *Friction: An Ethnography of Global Connection* (Princeton University Press, 2005).

<sup>13</sup> E. Fisher, “‘Strangers in Their Own Land: Anger and Mourning on the American Right’ by Arlie Russell Hochschild, and “‘The Mushroom at the End of the World: On the Possibility of Life in Capitalist Ruins’” by Anna Lowenhaupt Tsing” (2017) 29(2) *Journal of Environmental Law*, pp. 383–7, at 387.

highlights the necessity of conceiving of infrastructure in terms of particular places and local communities. What is more, by zooming in on frictions that occur in the local spaces where infrastructure is built, we show the legal mechanism by which such disputes can be resolved. Courts play a key role in offering the parties involved a platform to voice their concerns, and in providing authoritative statements on the relevance of the legal issue in a way that grants permanence in settling the dispute. This shows the significance of both the judiciary and environmental law in the stabilizing efforts. As our case study, we examine frictions that have become manifest in climate change-related disputes arising from Belt and Road Initiative (BRI) projects in Kenya<sup>14</sup> and Pakistan.<sup>15</sup>

The BRI, officially announced by Chinese President Xi Jinping in 2013,<sup>16</sup> has been hailed as the infrastructure project of the century.<sup>17</sup> As of October 2019 China had signed 197 BRI-related cooperation agreements with 137 countries and 30 international organizations.<sup>18</sup> Many of these are relatively poor, developing countries. Some commentators have described the undertaking as Beijing's attempt to 'reclaim global centrality, with the hardware of its worldwide trade stretching across Asia, Africa, and Europe, all of it ultimately flowing back to the People's Republic (of China)'.<sup>19</sup> From this perspective, BRI infrastructure projects seek to 'unlock foreign markets'<sup>20</sup> for Chinese companies. On the other hand, the Chinese leadership has emphasized the opportunities for promoting regional and global market connectivity through the BRI, which would benefit many developing countries that currently lack the capabilities to build major infrastructure projects on their own.<sup>21</sup>

The significance of the BRI as one of the largest and most ambitious infrastructure projects in history makes it a critical case study for testing our propositions. A notable feature is its fluidity, which makes it, in Frankopan's estimation, 'a moving target, loosely defined and ever expanding'.<sup>22</sup> Its precise geography and scope are difficult

<sup>14</sup> *Save Lamu & Ors v. National Environmental Management Authority and Amu Power Co. Ltd*, National Environmental Tribunal, NET 196 of 2016, Decision of 26 July 2019 (Kenya).

<sup>15</sup> *Ali v. Federation of Pakistan* (2016), petition available at: <http://climatecasechart.com/non-us-case/ali-v-federation-of-pakistan-2/?cn-reloaded=1> (pending before the Supreme Court of Pakistan).

<sup>16</sup> State Council of the People's Republic of China (PRC), 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road', 30 Mar. 2015, available at: <https://eng.yidaiyilu.gov.cn/qwyw/qwfb/1084.htm>. For an overview of the initial speeches, delivered by President Xi Jinping, proposing the creation of the BRI, see M. Dunford & W. Liu, 'Chinese Perspectives on the Belt and Road Initiative' (2019) 12(1) *Cambridge Journal of Regions, Economy and Society*, pp. 145–67, at 148.

<sup>17</sup> 'China's Belt-and-Road Plans Are To Be Welcomed – And Worried About', *The Economist*, 26 July 2018, available at: <https://www.economist.com/leaders/2018/07/26/chinas-belt-and-road-plans-are-to-be-welcomed-and-worried-about>.

<sup>18</sup> See Belt and Road Portal, 'A Glance at Countries that Have Signed BRI Documents with China', available at: [https://www.yidaiyilu.gov.cn/info/iList.jsp?tm\\_id=126&cat\\_id=10122&info\\_id=77298](https://www.yidaiyilu.gov.cn/info/iList.jsp?tm_id=126&cat_id=10122&info_id=77298) (in Chinese).

<sup>19</sup> W. Doig, *High-Speed Empire: Chinese Expansion and the Future of Southeast Asia* (Columbia Global Reports, 2018), p. 16.

<sup>20</sup> J. Holslag, 'How China's New Silk Road Threatens European Trade' (2017) 52(1) *The International Spectator*, pp. 46–60, at 53.

<sup>21</sup> J. Xi, 'Work Together to Build the Silk Road Economic Belt and the 21st Century Maritime Silk Road', Speech at the Opening Ceremony of the Belt and Road Forum for International Cooperation, Beijing (China), 14 May 2017, available at: [http://www.xinhuanet.com/english/2017-05/16/c\\_136287878.htm](http://www.xinhuanet.com/english/2017-05/16/c_136287878.htm).

<sup>22</sup> P. Frankopan, *The New Silk Roads: The Present and Future of the World* (Bloomsbury, 2018), p. 95. E.g., as of June 2017, the Arctic is explicitly incorporated into the BRI, and in the following year

to circumscribe. Moreover, both Beijing (China) and BRI countries have asserted their commitment to promoting ‘green and low-carbon infrastructure construction and operation management, taking into full account the impact of climate change on [BRI] construction’.<sup>23</sup> We contrast the BRI’s aspirations of enhancing global market connectivity and promoting ‘green development’ with the legal realities of infrastructure in the local contexts of BRI countries.

This article is structured as follows. In Section 2 we examine the prevalent narrative that infrastructure promotes global market connectivity. This narrative overlooks the frictions that emerge in the locality in which the infrastructure operates. We then examine, in Section 3, the BRI’s rhetoric of global connectivity and green development. In Section 4 we juxtapose the BRI’s aspirations to connectivity with legal frictions that have emerged in local host communities. Here, we focus on two cases of climate change-related disputes arising from BRI projects and brought before local courts in Pakistan and Kenya. This is followed, in Section 5, by an analysis of the implications of frictions that occur outside the legal system, such as public protests and demonstrations. We conclude that the law provides an important mechanism for stabilizing such friction.

It is necessary to note several caveats in our article. Firstly, although the article focuses on climate change-related disputes, it should be noted that BRI projects have given rise to other types of friction. For instance, the serious impact that BRI projects will have on biodiversity has drawn considerable attention, as have public procurement concerns.<sup>24</sup> Secondly, we would need interdisciplinary studies of particular geographical places and the impact of BRI projects on communities to capture what is happening on the ground.<sup>25</sup> Such an undertaking, which would involve fieldwork, is outside the scope of our current study. Thirdly, some have queried which court or institution could and should settle legal disputes that arise in relation to the BRI.<sup>26</sup> International investment law continues to be a key forum for hearing environmental claims,<sup>27</sup> although its suitability for settling such disputes is widely debated.<sup>28</sup> Moreover, new

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China invited several members of the Community of Latin American and Caribbean States (CELAC) to participate in BRI projects: see Dunford & Liu, n. 16 above.

<sup>23</sup> State Council of the PRC, n. 16 above.

<sup>24</sup> See, e.g., A. Hughes, ‘Understanding and Minimising Environmental Impacts of the Belt and Road’ (2019) 33(4) *Conservation Biology*, pp. 883–94; and T. Ghossein, B. Hoekman & A. Shingal, *Public Procurement in the Belt and Road Initiative* (The International Bank for Reconstruction and Development/The World Bank, 2018), available at: <http://documents.worldbank.org/curated/en/143241544213097139/pdf/132786-MTI-Discussion-Paper-10-Final.pdf>.

<sup>25</sup> T. Sternberg, A. Ahearn & F. McConnell, ‘Central Asia “Characteristics” on China’s New Silk Road: The Role of Landscape and the Politics of Infrastructure’ (2017) 6(3) *Land*, pp. 1–16, at 13.

<sup>26</sup> B. Love, ‘China Belt and Road Disputes Set to Fuel Mediation’s Global Rise’, *Financial Times*, 14 Aug. 2019, available at: <https://www.ft.com/content/71288fe2-9e6f-11e9-9c06-a4640c9feebb>.

<sup>27</sup> J. Harrison, ‘Significant International Environmental Law Cases: 2018–2019’ (2019) 31(3) *Journal of Environment Law*, pp. 547–57. See also J. Paine, ‘Failure to Take Reasonable Environmental Measures as a Breach of Investment Treaty?’ (2017) 18(1) *Journal of World Investment & Trade*, pp. 745–54.

<sup>28</sup> See, e.g., D. Behn & M. Langford, ‘Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration’ (2017) 18(1) *Journal of World Investment & Trade*, pp. 14–61; J. Sullivan & V. Kirsey, ‘Environmental Policies: A Shield or a Sword in Investment Arbitration?’ (2017) 18(1) *Journal of World Investment & Trade*, pp. 100–30.

institutions for resolving BRI-related disputes are emerging,<sup>29</sup> though it remains to be seen whether environmental disputes will be brought before these institutions. These are all important questions that are left for future investigation.

## 2. BETWEEN GLOBAL MARKET CONNECTIVITY AND LOCAL COMMUNITIES

Infrastructure consists of a variety of networks used to provide services and facilitate communication and connections that are essential for the operation of societies and enterprises.<sup>30</sup> Despite the variety in their physical structures, infrastructure is generally understood to contribute to the creation of markets, especially at the global scale. Indeed, according to a common understanding of infrastructure, it facilitates ‘the flow of goods, people, or ideas and allow[s] for their exchange over space’.<sup>31</sup> In establishing this circulation, infrastructure acts not only as job generator<sup>32</sup> but also as a mechanism of integration for peoples and economies.<sup>33</sup> Consider the ancient Silk Road, on which the BRI draws for its symbolism. When Ferdinand von Richthofen spoke of the Silk Road, it was to note:

[T]he ways in which people, cultures, and continents were woven together – and in doing so help us better understand the way that religions and languages spread in the past, showing how ideas about food, fashion and art disseminated, competed and borrowed from each other.<sup>34</sup>

In a similar way, markets have been described as promoting global connectivity by breaking down ‘oppressive barriers among cultures, races, languages, and nations’.<sup>35</sup> Such a portrayal of markets partly explains why they were thought to be the obvious cornerstone of globalization in the 1980s–90s, which included the endorsement of ‘international free trade and the outlawing of protected or public domestic economies’.<sup>36</sup> Similarly, infrastructure has been seen as providing ‘the conditions for the

<sup>29</sup> E.g., in 2018 the Supreme People’s Court of China established two new International Commercial Courts in Shenzhen and Xi’an with a stated goal of dealing with commercial disputes arising from the BRI (none of the disputes brought to these courts to date have raised environmental issues): China International Commercial Court, ‘A Brief Introduction of China International Commercial Court’, 28 June 2018, available at: <http://cicc.court.gov.cn/html/1/219/193/195/index.html>.

<sup>30</sup> The notion of ‘infrastructure’ tends to refer to networks of utilities, communication and transport: see A. Rogers, N. Castree & R. Kitchin, *A Dictionary of Human Geography* (Oxford University Press, 2013).

<sup>31</sup> B. Larkin, ‘The Politics and Poetics of Infrastructure’ (2013) 42 *Annual Review of Anthropology*, pp. 327–43, at 328.

<sup>32</sup> H. Markel, ‘Infrastructure’ (2017) 95(1) *The Milbank Quarterly*, pp. 5–10, at 5.

<sup>33</sup> An example is the internal market of the European Union (EU), which is made possible through shared transport infrastructure, in line with Art. 4 of the Treaty on the Functioning of the European Union (TFEU), and which helps further integration, as outlined in Art. 1 of the Treaty on European Union (TEU): TFEU and TEU, Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009 [2012] OJ C 326/47, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF>.

<sup>34</sup> Frankopan, n. 22 above, pp. 2–3.

<sup>35</sup> A.L. Tsing, ‘The Global Situation’ (2000) 15(3) *Cultural Anthropology*, pp. 327–60, at 337.

<sup>36</sup> *Ibid.*

emergence of another order'.<sup>37</sup> In the 'coming together of engineering expertise, political will and economic ambition', infrastructure is often considered a 'modern ambition ... deeply influenced by processes of neo-liberalization'.<sup>38</sup>

At the same time, infrastructure exists as 'state space'.<sup>39</sup> Anthropologists Harvey and Knox use that term to capture how physical infrastructure that is planned, executed, and owned by the state '[brings] that state into being, creating and recreating its territorial form and enacting its paradigms of ownership and control'.<sup>40</sup> This is highly visible in the Chinese context of infrastructure development and financing, both at the domestic level and in the case of the BRI. Since the 1990s, China has seen unprecedented levels of investment in infrastructure at various levels of government and the building of such infrastructure at an astonishing scale and pace, radically transforming many of China's urban and rural landscapes. Targeted infrastructure development in public–private projects is heavily deployed in the Chinese state's fiscal stimulus programmes to spur economic growth and as a poverty reduction strategy.<sup>41</sup> The concept of 'state space' is also reflected in the BRI infrastructure landscape, as Chinese state-owned and state-controlled companies and banks make up the bulk of infrastructure investments and contract projects to date.<sup>42</sup> Some have pointed to the Chinese state's strategic influence on the activities and operating environments of Chinese firms abroad, including the exercise of legal and regulatory powers.<sup>43</sup>

This illustrates that infrastructure raises questions about the role of the state in supporting market connectivity. Yet, the law – the creation and enforcement of which is inextricably connected with the state – tends to be invisible in debates concerning such questions. One reason may be that infrastructure in many instances is discussed in promotional and global terms, rather than as a legal reality. As described by Reeves, infrastructure creates sites of 'popular imagination and anticipation storing within them'.<sup>44</sup> On this view, infrastructure reflects a political *vision*, an open-ended process where ideas about the future are assembled into narratives.<sup>45</sup> These storylines hold together competing and diverging opinions, producing 'a generalized sense of

<sup>37</sup> K. Hetherington, 'Surveying the Future Perfect: Anthropology, Development and the Promise of Infrastructure', in P. Harvey, C. Jensen & A. Morita (eds), *Infrastructures and Social Complexity: A Companion* (Routledge, 2016), pp. 40–9.

<sup>38</sup> P. Harvey & H. Knox, 'The Enchantments of Infrastructure' (2012) 7(4) *Mobilities*, pp. 521–36, at 523.

<sup>39</sup> As argued in P. Harvey & H. Knox, *Roads: An Anthropology of Infrastructure and Expertise* (Cornell University Press, 2015).

<sup>40</sup> *Ibid.*, p. 186.

<sup>41</sup> See W. Zou et al., 'Transport Infrastructure, Growth, and Poverty Alleviation: Empirical Analysis of China' (2008) 9(2) *Annals of Economics and Finance*, pp. 345–71.

<sup>42</sup> W. Gang, 'SOEs Lead Infrastructure Push in 1,700 "Belt and Road" Projects', *Caixin*, 10 May 2017, available at: <https://www.caixinglobal.com/2017-05-10/soes-lead-infrastructure-push-in-1700-belt-and-road-projects-101088332.html>; J. Suokas, 'Chinese State Enterprises Undertake Over 3,100 Belt and Road Projects', *GB Times*, 31 Oct. 2018, available at: <https://gbtimes.com/chinese-state-enterprises-undertake-over-3100-belt-and-road-projects>.

<sup>43</sup> M. Zou, 'China and the Belt and Road Initiative: Transnational Labour Law under State Capitalism 4.0' (2019) 113 *AJIL Unbound*, pp. 418–23.

<sup>44</sup> M. Reeves, 'Infrastructural Hope: Anticipating "Independent Roads" and Territorial Integrity in Southern Kyrgyzstan' (2017) 82(4) *Ethnos*, pp. 711–37, at 712.

<sup>45</sup> Gupta, n. 2 above.

social good to which the majority of people subscribe'.<sup>46</sup> In fact, infrastructure is portrayed in such a way as to 'enchant'<sup>47</sup> people, and promote visions of certain promised transformations, such as economic and social development, or international cooperation. This point is especially salient when examining the rhetoric surrounding the BRI, as reflected in Chinese President Xi Jinping's statement at the first high-level BRI Forum on International Cooperation in 2017: 'Infrastructure connectivity is the foundation of development through [international] cooperation'.<sup>48</sup>

These aspirations nevertheless depend for their realization on extensive social organization. As Fligstein explains, all types of infrastructure have transformed the economy through their connectivity capabilities. He further points out that none of the dynamism associated with infrastructure is possible without the deep involvement of the private sector actors which 'operate against an extensive backdrop of common understandings, rules, and laws'.<sup>49</sup> The question is not, then, whether such market structures should be governed, 'but ... *how* they should be governed'.<sup>50</sup> We argue that law has an important role to play in addressing this question of 'how' with regard to the construction, organization, and operation of infrastructure.

Moreover, the aspect of global interconnectivity is commonly viewed in isolation from the local. As Tsing puts it, 'globalist thinkers imagine the local as the stopping point of global circulations. It is the place where global flows are consumed, incorporated, and resisted'.<sup>51</sup> Anthropologists and social scientists have long called for understanding infrastructure as 'analytically consequential', which means that rather than constituting 'monolithic blocs', large-scale infrastructure projects are 'achievements *that remain fragile*'.<sup>52</sup> The effects of any infrastructure depend on the local communities through which they run. This means that irrespective of its global market connectivity and political vision, infrastructure is heavily dependent on and constitutive of local geographical contexts.<sup>53</sup> What is more, 'global' and 'local' aspects do not always coexist in harmony. Rather, infrastructure can be viewed as 'a terrain of power and contestation'<sup>54</sup> where questions concerning how and by whom decisions are made, and how resources are to be allocated are debated continuously, in a specific location where international, national, and local regimes apply.<sup>55</sup>

<sup>46</sup> Harvey & Knox, n. 38 above, p. 522.

<sup>47</sup> *Ibid.*, p. 521.

<sup>48</sup> Xi, n. 21 above.

<sup>49</sup> N. Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Society* (Princeton University Press, 2001), p. 3.

<sup>50</sup> S. Vogel, *Marketcraft: How Governments Make Markets Work* (Oxford University Press, 2018), p. 1 (emphasis in original).

<sup>51</sup> Tsing, n. 35 above, p. 338.

<sup>52</sup> P. Harvey, C. Jensen & A. Morita, 'Introduction: Infrastructural Complications', in Harvey, Jensen & Morita, n. 37 above, pp. 1–22, at 11 (emphasis in original).

<sup>53</sup> Appel, Anand & Gupta, n. 11 above, p. 14.

<sup>54</sup> *Ibid.*, p. 2.

<sup>55</sup> D. Dalakoglou & P. Harvey, 'Roads and Anthropology: Ethnographic Perspectives on Space, Time and (Im)Mobility' (2012) 7(4) *Mobilities*, pp. 459–65, at 460.

The global and promotional rhetoric of infrastructure, particularly concerning the creation of market connectivity, has led to friction taking place in the local context being overlooked. Our approach in this article is to inquire into legal frictions that emerge in the particular places where a piece of infrastructure operates. Such frictions can manifest in many different forms.<sup>56</sup> In this study we focus on climate change-related disputes that have arisen in relation to the BRI infrastructure projects in Pakistan and Kenya. These disputes have played out before the highest-level judiciary and the Environmental Tribunal in those countries. The significance of environmental law in this context is to provide a forum where such disputes are vocalized and eventually stabilized through adjudication.<sup>57</sup> This stands in contrast to frictions that develop outside the legal system<sup>58</sup> and manifest, for example, in various forms of protest. Before exploring these incidents in detail, we first turn to examine the political framing of the BRI as infrastructure that promotes global market connectivity, as well as ‘green development’.

### 3. THE BRI: INFRASTRUCTURE ‘PROJECT OF THE CENTURY’

When it comes to ‘visions’ of infrastructure creating global market connectivity, the BRI presents us with an opportune case study. It is the largest global infrastructure plan under way, with multi-trillion dollars of investments and loans in the construction of high-speed train lines, bridges, highways, ports, and pipelines across an overland ‘Silk Road Economic Belt’, and a ‘21<sup>st</sup> Century Maritime Silk Road’.<sup>59</sup> The original BRI policy document, issued by the State Council in March 2015, envisaged six major land corridors connecting China with the world.<sup>60</sup> Despite the designation of these official corridors, the BRI can be better described as ‘not a series of corridors and nodes but an open, multi-scalar spatial system’,<sup>61</sup> which underlines its dynamic and ever-changing nature.

Promoting global connectivity is central to the BRI narrative. This is accentuated in the 2015 BRI policy document which outlined five major BRI themes, centred around connectivity.<sup>62</sup> To start with, countries under the BRI are set to promote policy coordination through a range of intergovernmental bilateral and multilateral mechanisms. Secondly, infrastructure and connectivity through transport, energy, and communication are identified as a ‘priority area for implementing the [Belt and Road] Initiative’.<sup>63</sup> More precisely, the document urges BRI countries to ‘jointly push forward the construction of international trunk passageways, and form an infrastructure network connecting all sub-

<sup>56</sup> N. 24 above.

<sup>57</sup> On the point of how courts can stabilize legal disputes see E. Fisher, E. Scotford & E. Barritt, ‘The Legally Disruptive Nature of Climate Change’ (2017) 80(3) *The Modern Law Review*, pp. 173–201.

<sup>58</sup> Disputes of both a formal and informal character in, e.g., studies on geology: see, e.g., A. Barry, *Material Politics: Disputes Along the Pipeline* (Wiley Blackwell, 2013), p. 134.

<sup>59</sup> State Council of the PRC, n. 16 above.

<sup>60</sup> These include a new Eurasian Land Bridge, China-Mongolia-Russia Corridor, China-Central Asia-West Asia Corridor, China-Indochina Peninsula Corridor, China-Pakistan Corridor, and Bangladesh-China-India-Myanmar Corridor: *ibid.*

<sup>61</sup> Dunford & Liu, n. 16 above, p. 152.

<sup>62</sup> State Council of the PRC, n. 16 above.

<sup>63</sup> *Ibid.*



regions in Asia, and between Asia, Europe and Africa step by step'.<sup>64</sup> Thirdly, investment and trade are to be facilitated through improved market access, and the elimination of barriers to investment and trade. In a similar vein, and fourthly, the document calls for deepened financial integration in implementing the BRI, for example, by establishing new Chinese-supported multilateral institutions, such as the Asian Infrastructure Investment Bank (AIIB).<sup>65</sup> Finally, the document envisages greater people-to-people connectivity through, for example, cultural exchanges, education, and tourism.

Moving beyond China, the global market connectivity theme of BRI infrastructure projects is visible in the countries in which these projects are taking place. The East Coast Rail Link, one of Malaysia's largest rail projects to date, is an exemplary BRI infrastructure project seeking to create a 'growth corridor' across three relatively underdeveloped eastern states by way of a 640 kilometre railway, connecting these states with the more affluent west coast of Malaysia. The \$20 billion megaproject is being built and financed by Chinese state-owned companies as part of a joint venture with Malaysia Rail Link (also a state-owned company). The project has been thought of as deepening trade and economic cooperation between China and Malaysia, resulting in more bilateral ties.<sup>66</sup> In Malaysia, the project is portrayed as a crucial component of 'bridging the development gap' between different parts of the country, bolstering economic growth, creating new jobs for local vendors and contractors, and providing a 'platform for knowledge sharing and technology transfer'.<sup>67</sup> The vision of the BRI and its rhetoric of connectivity reflect the globalist, promotional lenses through which infrastructure is presented.

Importantly, the BRI also employs a narrative of 'green development'. When describing the infrastructure connectivity dimension of the BRI, the aforementioned 2015 policy document adds that 'efforts should be made to promote green and low-carbon infrastructure construction and operation management, taking into full account the impact of climate change on the construction'.<sup>68</sup>

This green story about the BRI has become more pronounced in recent years. According to another official text, BRI projects should promote green and low-carbon infrastructure, ecological conservation, protection of biodiversity, and consider the climate change impacts.<sup>69</sup> More generally, the BRI's 'vision of green development'<sup>70</sup> is

<sup>64</sup> Ibid.

<sup>65</sup> For an overview, see Asian Infrastructure Investment Bank (AIIB), 'Introduction: Who We Are', available at: <https://www.aiib.org/en/about-aiib/index.html>.

<sup>66</sup> This is not to overlook that the BRI project has also been criticized for potentially saddling Malaysia with unsustainable debt: see J. Sipalan, 'China, Malaysia, Restart Massive "Belt and Road" Project after Hiccups', *Reuters*, 25 July 2019, available at: <https://www.reuters.com/article/us-china-silkroad-malaysia/china-malaysia-restart-massive-belt-and-road-project-after-hiccups-idUSKCN1UK0DG>.

<sup>67</sup> T. Ying, 'SME Bank Sets Aside RM1b for Local ECRL Contractors', *National Strait Times*, 18 Nov. 2019, available at: <https://www.nst.com.my/news/nation/2019/11/539857/sme-bank-sets-aside-rm1b-local-ecrl-contractors>.

<sup>68</sup> State Council of the PRC, n. 16 above.

<sup>69</sup> Office of the Leading Group for Promoting the Belt and Road Initiative, 'The Belt and Road Initiative Progress, Contributions and Prospects', 22 Apr. 2019, available at: <https://eng.yidaiyilu.gov.cn/zchj/qwfb/86739.htm>.

<sup>70</sup> Belt and Road Portal, 'The Belt and Road Ecological and Environmental Cooperation Plan', May 2017, available at: <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13392.htm>.

portrayed as an opportunity for China and the BRI countries ‘to grow differently, to go on a clean way’.<sup>71</sup>

China has clearly sought to incorporate environmentally sustainable strategies and objectives in a range of official policy documents and guidelines relating to the BRI, but these commitments are typically framed in general, abstract terms. For instance, a key BRI policy document, issued by the Chinese Ministry of Environmental Protection, emphasizes the ‘need to share the ecological civilization philosophy and achieve sustainable development’, to promote participation in ‘global environmental governance’ and the ‘green development concept’, and to ‘serve and forge communities of shared interests, common responsibility and common destiny’ by, for example, preventing and curbing environmental pollution and ecological damage.<sup>72</sup> Moreover, Beijing has linked the narrative of a green BRI to its implementation of international environmental treaties, including the Paris Agreement<sup>73</sup> and the United Nations (UN) 2030 Agenda for Sustainable Development.<sup>74</sup>

The green aspirations of the BRI are evidenced also in the promotion of policy coordination on environmental protection between China and other BRI countries. For example, China has signed a Memorandum of Understanding with the UN Environment Programme (UNEP) on ‘greening the BRI’, as well as cooperation agreements on ecological conservation with over 30 countries.<sup>75</sup> Beijing has also formed ‘open, inclusive and voluntary’ international networks, such as the Belt and Road International Green Development Coalition, which seeks to bring together ‘the environmental expertise of all [relevant] partners to ensure that the Belt and Road brings long-term green and sustainable development to all concerned countries’.<sup>76</sup> The Coalition offers a platform for policy dialogue, information exchange, and facilitation of cooperation between 100 international and Chinese partner institutions, including environment ministries, UN agencies, research institutes, and non-governmental organizations to achieve these goals. Along similar lines, the aforementioned 2015 policy document stresses the importance of building ‘international green industrial cooperation platforms’ in order to secure green technology transfers and exchanges, as well as creating a platform of green supply chains for the BRI.<sup>77</sup>

The narrative of a green BRI is similarly found in the so-called ‘green financing’ that this infrastructure project has received. For example, the Ministry of Environmental

<sup>71</sup> W. Yuan, ‘China’s Green Growth in Tandem with Dynamically Innovative Vision: LSE Economist’, *People’s Daily Overseas New Media*, 26 Mar. 2019, available at: <http://en.people.cn/n3/2019/0326/c90000-9560644.html>.

<sup>72</sup> Belt and Road Portal, ‘Guidance on Promoting a Green BRI’, 8 May 2017, available at: <https://eng.yidaiyilu.gov.cn/zchj/qwfb/12479.htm>.

<sup>73</sup> Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php) (Paris Agreement).

<sup>74</sup> UN General Assembly, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ (21 Oct. 2015), UN Doc. A/RES/70/1, available at: <https://www.refworld.org/docid/57b6e3e44.html>.

<sup>75</sup> Office of the Leading Group for Promoting the BRI, n. 69 above.

<sup>76</sup> UNEP, ‘The Belt and Road Initiative International Green Development Coalition (BRIGC)’, available at: <https://www.unenvironment.org/regions/asia-and-pacific/regional-initiatives/belt-and-road-initiative-international-green>.

<sup>77</sup> Office of the Leading Group for Promoting the BRI, n. 69 above.

Protection and several quasi-official financial bodies have emphasized the importance of environmental risk management initiatives for China's overseas investments, which are thought to help:

Chinese financial institutions and enterprises ... significantly accelerate progress towards key sustainability goals, such as the 'greening' of the Belt and Road Initiative, the fulfilment of the 2030 Agenda for Sustainable Development and the Paris Agreement on climate change, and the implementation of the 'Guidelines for Establishing the Green Financial System' enacted by the seven state ministries.<sup>78</sup>

Despite these aspirations, practices on the ground have raised concerns about the substantial environmental risks and environmental problems with BRI projects. These include lax standards of environmental protection in relation to environmental impact assessment (EIA) with regard to pollution and biodiversity, as well as a lack of transparency.<sup>79</sup> What is more, environmental problems at the local level have led to the cancellation or suspension of some BRI projects, such as the Myitsone Dam in Myanmar.<sup>80</sup>

It is climate change – a global environmental problem widely seen as 'the single most important issue we face' today<sup>81</sup> – that has the potential to create large-scale local friction under the BRI, as we explore in more detail in the next section. According to BRI policy documents, China 'should carry out cooperation in energy conservation and emissions reduction, and jointly respond to climate change'.<sup>82</sup> However, a recent review of data on bank loans and cross-border investments by the Silk Road Fund and Chinese enterprises revealed that most Chinese energy and transportation investments and projects financed in BRI countries were tied to carbon-intensive sectors, such as coal power.<sup>83</sup> This raises obvious worries about the BRI and its alignment with low-carbon priorities of the host countries' nationally determined contributions (NDCs) committed to under the Paris Agreement.<sup>84</sup> Another study provides some similarly concerning figures:

<sup>78</sup> Green Finance Committee (GFC) of China Society for Finance and Banking, Investment Association of China (IAC), China Banking Association (CBA), Asset Management Association of China (AMAC), Insurance Asset Management Association of China (IAMAC), China Trustee Association (CTA), and Foreign Economic Cooperation Office (FECO) of Ministry of Environment Protection, 'Environmental Risk Management Initiative for China's Overseas Investment', 5 Sept. 2017, available at: <http://www.greenfinance.org.cn/displaynews.php?id=1472>.

<sup>79</sup> D. Russel & B. Berger, *Navigating the Belt and Road Initiative* (Asia Society Policy Institute, 2019), p. 13.

<sup>80</sup> T. Fawthrop, 'Myanmar's Myitsone Dam Dilemma', *The Diplomat*, 11 Mar. 2019, available at: <https://thediplomat.com/2019/03/myanmars-myitsone-dam-dilemma>.

<sup>81</sup> UN Secretary-General António Guterres, 'Secretary-General's Remarks at Opening Ceremony of UN Climate Change Conference COP25', 2 Dec. 2019, available at: <https://www.un.org/sg/en/content/sg/statement/2019-12-02/secretary-generals-remarks-opening-ceremony-of-un-climate-change-conference-cop25-delivered>.

<sup>82</sup> Office of the Leading Group for Promoting the BRI, n. 69 above.

<sup>83</sup> L. Zhou et al., 'Moving the Green Belt and Road: From Words to Action', World Resource Institute, Nov. 2018, available at: <https://www.wri.org/publication/moving-green-belt-and-road-initiative-from-words-to-actions>.

<sup>84</sup> As described in R. Bodle & S. Oberthür, 'Legal Form of the Paris Agreement and Nature of its Obligations', in D. Klein et al. (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press, 2017), pp. 91–106, at 93.

By the end of 2016, China had been involved in 240 coal-fired power projects in 25 of the 65 countries along the Belt and Road ... At present, 52 of these projects are in the pipeline (planned or signed projects) ... accounting for 12.66% of coal-fired power projects in the pipeline globally; 54 projects are under construction ... accounting for 17.59% of coal-fired power plants under construction globally; 114 projects are in operation ... accounting for 4.48% of the coal-fired plants in operation globally.<sup>85</sup>

Some critics have even accused China of exporting its surplus of coal-related equipment and technology ‘to countries desperate for industry’ with the risk of ‘locking countries that currently have little to no coal capacity to coal dependency’.<sup>86</sup> Others have sought to justify such projects by referring to the ‘poverty relief benefits’ associated with improving energy access in poorer BRI host countries, where ‘coal is simply the cheapest available source of power’.<sup>87</sup> These still uncertain impacts of the BRI on global carbon emissions will, inevitably, be a focus of future studies on climate change.<sup>88</sup>

The crucial upshot of the discussion so far is that the prevailing narratives of the BRI promote global connectivity, market creation and economic development through infrastructure, all with a green ‘twist’. The lack of attention to issues of locality, especially those such as climate change with the potential to generate major frictions, is nevertheless noteworthy. We examine in the next section how such frictions can be made visible and – more importantly – stabilized, through environmental law.

#### 4. MAKING INFRASTRUCTURE VISIBLE: CLIMATE CHANGE FRICTION AND STABILIZATION

Climate change is an archetypal transnational environmental problem, and in legal terms, as Fisher, Scotford and Barritt explain, it is ‘disruptive’ in at least two ways.<sup>89</sup> Firstly, it has spurred the development of myriad new legal regimes at multiple governance levels, resulting in a fragmented legal and regulatory architecture.<sup>90</sup> It is also disruptive of adjudication in numerous ways, including:

when courts are required to determine whether or not to decide a dispute; when the issues presented fit awkwardly into existing and well-honed grooves of legal reasoning; and when there are legal disputes about the nature and operation of bespoke climate change regimes. In all such cases, climate change requires lawyers and scholars to reconcile any legal

<sup>85</sup> R. Peng, L. Chang & Z. Liwen, ‘China’s Involvement in Coal-fired Power Projects Along the Belt and Road’, Global Environmental Institute, May 2017, p. 1.

<sup>86</sup> D. Ullman, ‘When Coal Comes to Paradise’, *Foreign Policy*, 9 June 2019, available at: <https://foreignpolicy.com/2019/06/09/when-coal-came-to-paradise-china-coal-kenya-lamu-pollution-africa-chinese-industry-bri>.

<sup>87</sup> F. Hao, ‘China’s Belt and Road Initiative Still Pushing Coal’, *China Dialogue*, 12 May 2017, available at: <https://www.chinadialogue.net/article/show/single/en/9785-China-s-Belt-and-Road-Initiative-still-pushing-coal>.

<sup>88</sup> M. Han et al., ‘Tracking Embodied Carbon Flows in the Belt and Road Regions’ (2018) 28(9) *Journal of Geographical Science*, pp. 1263–74, at 1265.

<sup>89</sup> Fisher, Scotford & Barritt, n. 57 above.

<sup>90</sup> E. Scotford & S. Minas, ‘Probing the Hidden Depths of Climate Law: Analysing National Climate Change Legislation’ (2019) 28(1) *Review of European, Comparative & International Environmental Law*, pp. 67–81.

disruption with the fundamental role that adjudication plays in maintaining the *stability* of the legal orders.<sup>91</sup>

Climate change raises hard questions about the scope of adjudication, and it demands robust legal reasoning. What is more, court judgments can act as authoritative statements on the relevance of a legal matter, as well as provide permanence and authority to climate change-related disputes.<sup>92</sup> Adjudication can thus help to *stabilize* such conflicts. This is partly why environmental law scholars have been ‘obsessed’ with climate change litigation.<sup>93</sup>

We share this obsession to some extent in the sense that we see the judiciary as a ‘critical forum’<sup>94</sup> in which climate change, as a legal conflict, can be voiced, settled and thereby stabilized. It should be noted – though it is less relevant to our study – that climate change litigation can be the trigger point for mobilizing the enactment of laws to address climate change and thereby redress institutional failure.<sup>95</sup> Our current focus, however, is on judiciaries insisting on the enforcement of environmental laws already in place, which is the case for climate change cases in developing countries.<sup>96</sup> Examining infrastructure by focusing on the specific applicable environmental legal provisions, we underline the need to view infrastructure in terms of locality. In scholarship on climate change law and climate change litigation, multi-level perspectives are often given,<sup>97</sup> which aligns with our view that infrastructure – which is often spoken about in terms of markets and global connectivity – must also be conceived in terms of the particular place and the local communities. Environmental law, in this way, makes infrastructure fully visible.

Examining climate change-specific frictions arising from the BRI is particularly interesting, as it provides a testing ground for the ‘green’ promises expressed in relation to the development of the BRI. China has traditionally been a reluctant player in international climate change negotiations.<sup>98</sup> Given historical factors and the fact that the country has long been used as an outsource point for carbon emissions, China has benefited from the principle of common but differentiated responsibilities that underpinned the international climate change framework.<sup>99</sup> China’s position has since

<sup>91</sup> Fisher, Scotford & Barritt, n. 57 above, pp. 174–5 (emphasis added).

<sup>92</sup> Ibid.

<sup>93</sup> E. Fisher, ‘Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to *Massachusetts v EPA*’ (2013) 35(3) *Law and Policy*, pp. 236–60.

<sup>94</sup> H. Osofsky, ‘The Continuing Importance of Climate Change Litigation’ (2010) 1(1) *Climate Law*, pp. 3–29.

<sup>95</sup> As discussed in S. Bogojević, ‘EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture’ (2013) 35(3) *Law & Policy*, pp. 184–207.

<sup>96</sup> J. Setzer & L. Benjamin, ‘Climate Litigation in the Global South: Constraints and Innovation’ (2019) 9(1) *Transnational Environmental Law*, pp. 77–101, at 79. See also J. Peel & J. Lin, ‘Transnational Climate Litigation: The Contribution of the Global South’ (2019) 113(4) *American Journal of International Law*, pp. 679–726, at 714–6.

<sup>97</sup> See, e.g., Scotford & Minas, n. 90 above; Osofsky n. 94 above; Peel & Lin, n. 96 above.

<sup>98</sup> Particularly in terms of committing to emissions targets under the Kyoto Protocol: see D. Bodansky, J. Brunnée & L. Rajamani, *International Climate Change Law* (Oxford University Press, 2017), p. 168.

<sup>99</sup> A.L. Wang, ‘Regulating Domestic Carbon Outsourcing: The Case of China and Climate Change’ (2014) 61 *UCLA Law Review* 2018, pp. 2019–66, at 2038–9.

changed with the shift in approach at the international level. The international approach has moved from the top-down emissions reduction commitments – namely, the steps initially taken under the umbrella of the UN Framework Convention on Climate Change (UNFCCC)<sup>100</sup> – to the current bottom-up approach under the Paris Agreement.<sup>101</sup>

In line with the Paris Agreement, China has adopted a national climate action plan. While it remains the world's largest emitter of greenhouse gases (GHGs),<sup>102</sup> China's NDC includes:

- achieving the peak of carbon dioxide (CO<sub>2</sub>) emissions by around 2030, and making the greatest possible effort to achieve the peak early;
- lowering CO<sub>2</sub> emissions per unit of gross domestic product by 60% to 6% compared with 2005 levels;
- increasing the share of non-fossil fuels in primary energy consumption to around 20%; and
- increasing the forest stock volume by around 4.5 billion cubic metres compared with 2005 levels.<sup>103</sup>

To achieve some of these goals, China in 2017 launched the world's largest carbon-trading scheme covering 1,700 coal- and natural gas-based power-generating companies.<sup>104</sup>

It is worth noting that the BRI passes through countries almost all of which have either signed or acceded to the Paris Agreement.<sup>105</sup> Given the risks that we highlighted earlier, the extent to which the BRI may spark climate change-related conflicts is an open question.<sup>106</sup> It is also important to keep in mind that not all BRI countries have a judiciary open to the type of climate change litigation seen in, for example, the United States and Australia, where government policies and institutional failures can

<sup>100</sup> New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int>.

<sup>101</sup> O. Gippner, 'The 2°C Target: A European Norm Enters the International Stage: Following the Process to Adoption in China' (2016) 16 *International Environmental Agreements: Politics, Law and Economics*, pp. 49–65.

<sup>102</sup> More precisely, accounting for 27% of global CO<sub>2</sub> emissions in 2018: see Climate Action Tracker, 'China', 2 Dec. 2019, available at: <https://climateactiontracker.org/countries/china>.

<sup>103</sup> Xinhua, 'Enhanced Actions on Climate Change: China's Intended Nationally Determined Contributions', *china.org.cn*, 30 June 2015, available at: [http://www.china.org.cn/environment/2015-06/30/content\\_35950951.htm](http://www.china.org.cn/environment/2015-06/30/content_35950951.htm).

<sup>104</sup> Associated Press, 'China Launches World's Biggest Carbon-Trading Scheme in Fight against Climate Change', *South China Morning Post*, 20 Dec 2017, available at: <https://www.scmp.com/news/china/policies-politics/article/2125016/china-launches-worlds-biggest-carbon-trading-scheme>.

<sup>105</sup> As the governments of 195 countries unanimously adopted the Paris Agreement in 2015, most BRI countries will also be committed to NDCs under the Paris Agreement.

<sup>106</sup> Concerns about the impact that BRI investments may have on NDC commitments under the BRI, however, are real: see M. Jun & S. Zadek, 'Decarbonizing the Belt and Road: A Green Finance Roadmap', *ClimateWorks Foundation*, 4 Sept. 2019, available at: <https://www.climateworks.org/report/decarbonizing-the-belt-and-road>; Reuters, 'Chinese Belt and Road Plan "May Result in 2.7C Warming"', *Climate Change News*, 2 Sept. 2019, available at: <https://www.climatechangenews.com/2019/09/02/chinese-belt-road-plan-may-result-2-7c-warming>.

be judicially challenged,<sup>107</sup> or in Kenya and possibly Pakistan, where the courts are enforcing environmental laws in a robust way. As Zhao, Lyu and Wang have argued, courts in ‘an authoritarian country with a civil law tradition’ (such as China)<sup>108</sup> play a ‘seemingly insignificant’ role in legitimizing the concern for climate change and, as such, they enjoy limited power in pushing for collective climate action. Similar observations have been made regarding the Russian judiciary.<sup>109</sup> Furthermore, climate-specific laws and regulations in BRI countries are currently either scarce or inadequately enforced.<sup>110</sup>

Legal culture and context therefore matter. The cases explored in the next section are examples of jurisdictions where BRI-related climate change litigation is possible as a result of the existence of strong environmental laws and courts that have both the power and the will to insist on their enforcement. These two conditions are key – though not necessarily exclusive – in reconciling the global and market-focused discourses with issues of locality, both of which are central to the realities of infrastructure, as discussed here.

#### 4.1. *BRI and Climate Change Friction*

In investigating climate change-related frictions that have arisen under the BRI, we zoom in on two cases. The first is *Lamu*, which was decided by the Kenyan National Environmental Tribunal on 26 June 2019. The second case, *Ali v. Pakistan*, is pending before the Supreme Court of Pakistan at the time of writing. Admittedly, reliance on a small number of cases, in selected jurisdictions, offers a limited picture of disputes to which infrastructure, and specifically the BRI, give rise. Indeed, our study provides a snapshot as opposed to an exhaustive account of climate change-related friction linked to the BRI. Nonetheless, this narrow focus is a useful entry point for investigating how global market aspirations (often connected with infrastructure) and local concerns can be voiced, settled and thereby stabilized by mechanisms provided by environmental law.

#### 4.2. *Climate Friction Illustrated: The Cases of Lamu and Ali*

The legal challenge in *Lamu* is directed at the EIA underpinning the plan to construct Kenya’s first coal-fired power plant station. The development is earmarked as a \$2 billion BRI project funded by China,<sup>111</sup> and forms part of the Lamu Port-South

<sup>107</sup> J. Peel & H. Osofsky, ‘Climate Change Litigation’s Regulatory Pathways: A Comparative Analysis of the United States and Australia’ (2013) 35(1) *Law & Policy*, pp. 150–83.

<sup>108</sup> Y. Zhao, S. Lyu & Z. Wang, ‘Prospects for Climate Change Litigation in China’ (2019) 8(2) *Transnational Environmental Law*, pp. 349–77, at 349 and 353.

<sup>109</sup> Y. Yamineva, ‘Opportunities for Climate Litigation in Russia: The Impossibility of the Possible’, in F. Sindico & M. Mbengue (eds), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer, 2020).

<sup>110</sup> S. Zadek, ‘The Critical Frontier: Reducing Emissions from China’s Belt and Road’, *Brookings*, 25 Apr. 2019, available at: <https://www.brookings.edu/blog/future-development/2019/04/25/the-critical-frontier-reducing-emissions-from-chinas-belt-and-road>.

<sup>111</sup> T. Wilson, C. Shepherd & D. Magomere, ‘Kenyan Court Blocks China-Backed Power Plant on Environment Grounds’, *Financial Times*, 27 June 2019, available at: <https://www.ft.com/content/9313068e-98dc-11e9-8cfb-30c211dcd229>.

Sudan-Ethiopian Transport Corridor, which aims to connect inland coal mining, undertaken by Chinese companies, and the port in Lamu.<sup>112</sup> Together, the constructions are part of the long-term blueprint for the country, entitled ‘Kenya Vision 2030’, which aims to create ‘a globally competitive and prosperous country with a high quality of life by 2030’.<sup>113</sup> The idea is that the coal-fired power plant alone is likely to ‘increase revenue and investment in the country ... enhance availability of markets for local products and increase tax revenue’.<sup>114</sup>

In the second case, *Ali v. Pakistan*, coal-field development and the construction of multiple coal-fired power plants, forming part of a China-Pakistan Economic Corridor (CPEC), are being challenged before the Supreme Court of Pakistan. The CPEC is considered ‘by far the largest and most ambitious part of the BRI’,<sup>115</sup> and is built with the vision to ‘improve the lives of people of Pakistan and China by ... promoting bilateral connectivity, construction ... trade, logistics and people to people contact for regional connectivity’<sup>116</sup> through a portfolio of energy and transport infrastructure projects with an aggregate estimated value of \$62 billion. In many ways, the CPEC is the ‘bellwether’ for this broader global initiative.<sup>117</sup> However, many of the attendant projects, if realized, will drive Pakistan towards increasing reliance on coal for electricity. The Pakistani government itself has estimated that the share of coal in the country’s power generation mix will rise from approximately 3% in June 2017 to approximately 20% in June 2025.<sup>118</sup>

The large number of coal-fired power plants under the CPEC list of priority energy projects has resulted from the combination of ‘pull’ and ‘push’ signals from Pakistan and China respectively.<sup>119</sup> The ‘pull’ from Pakistan relates to its long-standing desire to exploit its vast coal reserves and expand the share of domestic coal in its power generation mix, as well as to provide an affordable solution to ongoing power shortages, which the former Sharif administration promised to end. On the ‘push’ side from China, Beijing needed to alleviate its over-capacity in some industries, such as coal power generation equipment, which largely resulted from domestic policies to decrease the role of coal and increase the role of renewables in China’s new power generation

<sup>112</sup> Ullman, n. 86 above.

<sup>113</sup> ‘Kenya Vision 2030’, as outlined at: <http://vision2030.go.ke/about-vision-2030>. Also, as mentioned in *Lamu*, n. 14 above, para. 1.

<sup>114</sup> *Lamu*, *ibid.*, para. 96.

<sup>115</sup> J. Anderlini, H. Sender & F. Bokhari, ‘Pakistan Rethinks Its Role in Xi’s Belt and Road Plan’, *Financial Times*, 9 Sept. 2018, available at: <https://www.ft.com/content/d4a3e7f8-b282-11e8-99ca-68cf89602132>.

<sup>116</sup> China Pakistan Economic Corridor, ‘CPEC Vision and Mission’, available at: <http://cpec.gov.pk/vision-mission/3>.

<sup>117</sup> S. Toppa, ‘Why Young Pakistanis Are Learning Chinese’, *The Atlantic*, 14 Nov. 2018, available at: <https://www.theatlantic.com/international/archive/2018/11/pakistan-china-cooperation-cpec/568750>.

<sup>118</sup> National Electric Power Regulatory Authority, ‘State of Industry Report 2017’, p. 7, available at: <https://nepra.org.pk/publications/State%20of%20Industry%20Reports/State%20of%20industry%20report%202017.pdf>.

<sup>119</sup> E. Downs, ‘The China-Pakistan Economic Corridor Power Projects: Insights into Environmental and Debt Sustainability’, *Columbia Center on Global Energy Policy*, 3 Oct. 2019, p. 17, available at: [https://energypolicy.columbia.edu/sites/default/files/pictures/China-Pakistan\\_CGEP\\_Report\\_100219-2.pdf](https://energypolicy.columbia.edu/sites/default/files/pictures/China-Pakistan_CGEP_Report_100219-2.pdf).



capacity. Chinese companies in coal-related sectors were encouraged to find new markets abroad and Chinese state-owned financial institutions were urged to facilitate the export of such sectors overseas.<sup>120</sup>

In *Lamu*, a community-based organization ‘representing the interests and welfare of Lamu and whose membership [is] comprised of individuals and several community groups within Lamu’,<sup>121</sup> has challenged the BRI project. The applicant in *Ali v. Pakistan* is a seven-year-old individual:

who is deeply concerned for the millions of citizens who are presently being adversely impacted by a destabilized Climate system and catastrophic Climate Changes in Pakistan that are caused by the continual increase of greenhouse gas (‘GHG’) emissions, particularly Carbon Dioxide (‘CO<sub>2</sub>’) pollution from the burning of fossil fuels, and for the future generations who will have to endure the inherited Environment degraded by the choices made by current generations.<sup>122</sup>

Here, the applicant underlines that Pakistan ‘sits atop one of the world’s largest Coal reserves’<sup>123</sup> and that the planned BRI project, which demands utilization of those reserves, would exponentially increase Pakistani coal production and thereby its GHG emissions.<sup>124</sup> The applicant argues that:

[b]y choosing to develop Coal as an energy source instead of renewable, non-fossil fuel resources, the Respondents are ignoring the long-term adverse consequences they are bringing upon both current and future generations of Pakistanis, in violation of their Fundamental Rights.<sup>125</sup>

Additionally, the applicant claims that public trust is at risk and that Pakistan’s commitments under the Paris Agreement, particularly its NDC to ‘promote and support low-carbon, climate resilient development’<sup>126</sup> would be breached by the development of the set infrastructure.

The applicants in *Lamu* similarly base their claim on constitutional rights, which in the case of Kenyan constitutional law includes an obligation on the part of the state to establish a system of EIA.<sup>127</sup> The applicant contends that the EIA carried out lacked proper participation by the public,<sup>128</sup> and that the public is therefore in a position to demand that the construction of the coal-fired power plant be brought to a halt. *Lamu* is an excellent example of how infrastructure, irrespective of its global visions, is anchored in and can cause friction in the local communities in which it is situated.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Lamu*, n. 14 above, para. 3.

<sup>122</sup> *Ali v. Pakistan*, n. 15 above, para. 1.

<sup>123</sup> *Ibid.*, para. 22.

<sup>124</sup> *Ibid.*, para. 33.

<sup>125</sup> *Ibid.*, para. 31.

<sup>126</sup> *Ibid.*, para. 32.

<sup>127</sup> Constitution of Kenya (2010), Art. 69(1)(f), available at: <http://www.klrc.go.ke/index.php/constitution-of-kenya>.

<sup>128</sup> *Lamu*, n. 14 above, para. 4(g).

The benefit of legal adjudication is that it makes these frictions visible and is able to stabilize them. The judgment in *Lamu* demonstrates this in the following three ways.

Firstly, it sees the Tribunal debating whether the case falls within its jurisdiction, which is significant for establishing which type of dispute permits adjudication. Here, the Tribunal finds that it can review only ‘matters relating to EIA licenses’, leaving the assessment of the economic viability of the BRI project to ‘policy makers and the Energy Regulatory Commission’.<sup>129</sup>

The Tribunal then clarifies the role of adjudication in resolving disputes in the set context. It does so by defining the scope of justiciability for EIA processes, explaining that ‘contrary to popular belief the purpose of environmental audits is not to hinder development but to ensure [that] economic progress in a country takes into account environmental impacts of such proposed economic activity’.<sup>130</sup> On a similar note, the Tribunal asserts that it does not rule on ‘the wisdom [in identifying] coal energy as one source of possible energy source for [Kenya]’<sup>131</sup> but rather on whether the relevant EIA-specific processes have been correctly applied.

Thirdly, the Tribunal underscores the significance of local communities and their concerns to be heard in relation to development projects like the BRI. It explains that for the sake of efficiency ‘it is not a must that every person must support the project ... but it is vital that even the most feeble of voices be heard and views considered’.<sup>132</sup> In the case of *Lamu*, the national authority’s ‘complete disregard of the people of Lamu, and their views’ rendered the EIA ‘non-existent and in violation of the law’.<sup>133</sup> What is more, the Tribunal found that ‘Climate Change issues are pertinent in projects of this nature and due consideration and compliance with all laws relating to the same [are required]’.<sup>134</sup> As such, the national authorities are required to consider climate-related concerns, as well as the provisions of the Kenyan Climate Change Act 2016, and the impact of the BRI development project on Kenya’s commitment under the Paris Agreement – even if their ultimate effect was unknown at the time of approving the BRI-project.<sup>135</sup>

Ultimately, what these legal frictions show is that environmental law provides mechanisms through which disputes can be voiced and resolved. The significance of providing a platform for local communities to vocalize their concerns relating to development projects is emphasized in *Lamu*:

[P]ublic participation in an EIA Study process is the oxygen by which the EIA study and the report are given life. In the absence of public participation, the EIA study process is a still born and deprived of life, no matter how voluminous or impressive the presentation and literal content of the EIA may be.<sup>136</sup>

<sup>129</sup> Ibid., paras 12, 98.

<sup>130</sup> Ibid., para. 17.

<sup>131</sup> Ibid., para. 19.

<sup>132</sup> Ibid., para. 50.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid., para. 138.

<sup>135</sup> Ibid., paras 138, 151.

<sup>136</sup> Ibid., para. 73.

In *Lamu*, EIA serves as a mechanism by which local communities can hold authorities accountable. In the case of *Ali v. Pakistan*, the applicant seeks admissibility to the Supreme Court of Pakistan by relying on the doctrine of public trust, as well as fundamental rights which, the applicant argues, are violated by coal exploitation linked to BRI projects.<sup>137</sup> Although the latter case is still pending, the point here is that accountability mechanisms may take different forms in different jurisdictions; what matters is that environmental law is taken seriously.

## 5. DISRUPTIONS OUTSIDE THE LEGAL SYSTEM?

The fact that the disputes investigated above emerged in Pakistan and Kenya may not be surprising. Both countries have developed rigorous environmental laws and have installed a judiciary willing to enforce these and related laws. Kenya revised its Constitution in 2010 to include the right ‘to have the environment protected for the benefit of present and future generations’,<sup>138</sup> and an obligation on the part of the state to ‘establish systems of EIA’.<sup>139</sup> As Soyapi remarks, this ‘recognises that the country’s quest for economic development needs to consider possible environmental degradation’.<sup>140</sup> Additionally, Kenya has adopted a rich body of environmental laws,<sup>141</sup> including climate change commitments following the Paris Agreement. Its Environment and Land Court (ELC), in operation since 2013, has ruled on several groundbreaking cases and developed robust jurisprudence on environmental protection.<sup>142</sup>

In the case of Pakistan, the judiciary has set out pioneering case law, especially regarding the interrelation of human rights and environmental protection in the context of climate change. The applicant in *Ali v. Pakistan* argues that ‘the apex Courts are the most effective forum for remedying violations of Fundamental Rights and the Doctrine of Public Trust and achieving protection of the Environment’.<sup>143</sup> In as early as 1994, the right to life was interpreted by the Supreme Court of Pakistan to include environmental safeguarding:

[The right to life] does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.<sup>144</sup>

<sup>137</sup> *Ali v. Pakistan*, n. 15 above, para. xxvi.

<sup>138</sup> Constitution of Kenya (2010), Art. 42(a).

<sup>139</sup> *Ibid.*, Art. 69(1)(f).

<sup>140</sup> C. Soyapi, ‘Environmental Protection in Kenya’s Environment and Land Court’ (2019) 31(1) *Journal of Environmental Law*, pp. 151–61, at 154.

<sup>141</sup> For an overview see P. Kameri-Mbote & E. Nyukuri, ‘Climate Change, Law and Indigenous Peoples in Kenya: Ogiek and Maasai Narratives’, in R. Abate & E. Kronk (eds), *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, 2013), pp. 535–60.

<sup>142</sup> Soyapi, n. 140, above, p. 152.

<sup>143</sup> *Ali v. Pakistan*, n. 15 above, preamble.

<sup>144</sup> *Shehla Zia v. WAPDA*, Supreme Court of Pakistan, PLD 1994 SC 693 (12 Feb. 1994).

The applicant in *Ali v. Pakistan* relies on this case.<sup>145</sup> In more recent jurisprudence, the Pakistani judiciary has further submitted that climate change is a serious threat to water, food, and energy security, and as such infringes the right to life.<sup>146</sup>

The importance of analyzing climate change litigation cases like *Lamu* and *Ali v. Pakistan* in the context of local friction arising from transnational infrastructure cannot be understated. Two factors to consider are the presence of local environmental laws, which have a crucial bearing on these disputes, and the role of the domestic judiciary in permitting adjudication.

Admittedly, our findings rely on a small number of cases. What is more, the Supreme Court of Pakistan has yet to decide on the admissibility of the claims raised in *Ali v. Pakistan*. Even when disputes are heard and resolved by the court, the resolution offered may seem futile. In the case of *Lamu*, for example, the Tribunal's judgment has sent the EIA back to the relevant national authority where the necessary approval for the project in question can be reinstated – this time, however, by the requisite procedures outlined in the applicable environmental laws. Whether this will contribute to true 'greening' of the BRI projects beyond the high-level rhetoric may be doubted. This is all to say that there are obvious limits to environmental law. Still, the mechanisms it provides to resolve friction, as discussed here, are significant, especially when considering the alternatives.

Indeed, friction may instead express itself through demonstrations and acts of civil disobedience, as exemplified by the Extinction Rebellion movement, which has made the following declaration:

When government and the law fail to provide any assurance of adequate protection of and security for its people's wellbeing and the nation's future, it becomes the right of citizens to seek redress in order to restore dutiful democracy and to secure solutions needed to avert catastrophe and protect the future. It becomes not only our right but our sacred duty to rebel.<sup>147</sup>

Climate action, on this view, must take place outside the parameters of law. Climate risks associated with BRI projects can give rise to friction manifested outside the legal system, with potentially adverse political and social consequences. This is recognized in a report by several State Council bodies and the UN Development Programme:

The environmental impacts of Chinese enterprises' overseas investment projects will, to a large extent, determine the feasibility and economic viability of the projects themselves. Moreover, the chain effects caused by environmental problems often go beyond an enterprise's control, escalating into incidents involving domestic politics and international relations.<sup>148</sup>

<sup>145</sup> *Ali v. Pakistan*, n. 15 above, para. 44(viii).

<sup>146</sup> *Ashgar Leghari v. Federation of Pakistan*, Case No. W.P. 25501/2015.

<sup>147</sup> Declaration of Rebellion, outlined in C. Farrell et al. (eds), *This Is Not a Drill: An Extinction Rebellion Handbook* (Penguin, 2019), p. 2.

<sup>148</sup> Chinese Academy of International Trade and Economic Cooperation, Ministry of Commerce of the PRC; Research Centre of the State-owned Assets Supervision and Administration Commission of the State Council of the PRC; and UN Development Programme China, '2017 Report on the Sustainable Development of Chinese Enterprises Overseas', 8 May 2017, available at: <https://www.cn.undp.org/>

Climate risks can give rise to these chain effects, causing pushbacks and protests by local communities in host countries and potentially affecting China's relations with host country governments.

The Chinese-led AIIB, which invests in numerous BRI projects, saw a public demonstration held by climate activists and civil society groups from various countries, including BRI countries, outside its annual meeting in Luxembourg in July 2019. The AIIB has fashioned itself as 'clean and green', with an Environmental and Social Framework that vows to prioritize 'investments promoting greenhouse gas emission neutral and climate resilient infrastructure'.<sup>149</sup> However, the rhetoric has not been reflected in practice, with 20% of the AIIB's direct investments to date going into fossil fuels and only 8% into renewables.<sup>150</sup> The protesters, among them representatives of Extinction Rebellion, called for the AIIB to live up to its green promise and stop financing fossil fuel projects, committing to a time-bound climate action plan. A civil society representative from Bangladesh at this protest conveyed the concerns of local communities about the AIIB's fossil fuel projects in Bangladesh, one of the countries that are most vulnerable to climate change, and whose coastal zone is 'already facing adverse impacts from climate change'.<sup>151</sup> These demonstrations, like the considerable number of protests that have occurred so far in BRI host countries over various environmental issues,<sup>152</sup> are warning signs of local frictions arising from BRI infrastructure projects that are not stabilized by law. This is not to say that litigation exhausts the need for demonstrations and other acts of civil disobedience. Our point is rather that adjudication offers a much-needed platform where local and global infrastructure-related visions and concerns can be vocalized and potentially resolved.

## 6. CONCLUSION

The ancient Silk Road, by comparison with which the BRI attempts to gain a symbolic aura, emphasizes global connectivity. As Han and others point out, however, the name 'Silk Road' is misplaced, in that it focused on:

small volume, high value trade that was enjoyed only by the elite ... obscur[ing] the fact that much of the exchange across Asia in antiquity – and indeed since then – was more intensive between individual towns and their hinterlands, and between neighbouring

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[content/china/en/home/library/south-south-cooperation/2017-report-on-the-sustainable-development-of-chinese-enterprise.html](https://www.chathamhouse.org/sites/default/files/CHHJ8010-Sri-Lanka-RP-WEB-200324.pdf).

<sup>149</sup> AIIB, 'Environmental and Social Framework', Feb. 2016, available at: [https://www.aiib.org/en/policies-strategies/\\_download/environment-framework/20160226043633542.pdf](https://www.aiib.org/en/policies-strategies/_download/environment-framework/20160226043633542.pdf).

<sup>150</sup> K. Geary, 'AIIB Faces Climate Protests at Annual Meeting in Luxembourg', *China Dialogue*, 12 July 2019, available at: <https://www.chinadialogue.net/article/show/single/en/11378-AIIB-faces-climate-protests-at-annual-meeting-in-Luxembourg>.

<sup>151</sup> *Ibid.*

<sup>152</sup> See, e.g., protests on environmental grounds in Sri Lanka against the Chinese-funded Colombo Port City project, as noted by G. Wignaraja et al., 'Chinese Investment and the BRI in Sri Lanka', Mar. 2020, p. 20, available at: <https://www.chathamhouse.org/sites/default/files/CHHJ8010-Sri-Lanka-RP-WEB-200324.pdf>.

towns themselves, than it was across thousands of miles or between imperial rulers and their capitals.<sup>153</sup>

Narratives surrounding the BRI similarly stress global market connectivity and overlook the locality through which infrastructure runs and where disputes erupt.

Examining the BRI through an environmental law lens makes these frictions visible, as this body of law and its scholarship inevitably deal with questions of ‘place’.<sup>154</sup>

Infrastructure is thus a relevant site of investigation for environmental law scholars. In this study we focus on climate change-related disputes arising from the BRI, which are predicted to multiply in the future, both within and between countries.<sup>155</sup>

As shown here, such frictions could be voiced, resolved and stabilized through environmental law and before formal legal channels, such as courts. This is to underline the significance of both environmental law and the judiciary in such stabilizing efforts. Otherwise, there is a real risk that such frictions will unfold outside the legal system, with the potential result of political and social instability.

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<sup>153</sup> S. Brakman et al., ‘The New Silk Roads: An Introduction to China’s Belt and Road Initiative’ (2019) 12(1) *Cambridge Journal of Regions, Economy and Society*, pp. 3–16, at 6.

<sup>154</sup> Fisher, n. 13 above.

<sup>155</sup> Han et al., n. 88 above.