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Chinese Investment in Malaysia: COVID-19, Democracy and Beyond

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Abstract

China's rising influence in parts of the developing world has raised concerns among the US and its allies. In the wake of the COVID-19 outbreak, the provision of vaccines and aid to countries in the Global South have further heightened anxieties over the potential for diffusion of China's ideals. China's investments are thought to promote the diffusion of its perspectives of rule of law and democracy, posing a challenge to the global dominance of Western liberal democratic values. Nonetheless, few studies have examined how the diffusion of China's ideals may occur through its investments and infrastructure projects in young democracies such as Malaysia whose governance and legal system significantly outperform China's according to various global indexes. This article investigates the increasing engagement with China and the reasons for this trend against the backdrop of Malaysia's legal and political institutions inherited from the West. It considers how young democracies like Malaysia are vulnerable to China's influence, intentional or unintentional, through investment. The analysis sheds light on the mechanisms that give rise to such vulnerability, exploring how the electoral system and rule of law may facilitate and amplify the impact of Chinese investment, with broader implications. Shared tacit understandings, such as the instrumentality of law and the nexus between state and business, which facilitate cross-country cooperation are also examined.

In the wake of the COVID-19 pandemic, China has assumed a significant role in providing vaccines to developing countries. China's rising influence in many parts of the world through investment and infrastructure development has heightened concerns among the US and its allies, one of the reasons being its alternative order and perspective of human rights that differs from liberal democratic values. While China's perspective of human rights and its emphasis on development has been promoted at international forums,¹ there is less clarity around the precise mechanisms through which China's ideals gain traction in countries that engage with its investments. Malaysia has been a strong supporter of China's Belt and Road initiative since its inception and has engaged extensively with Chinese investors, both public and private.² At the same time, the country has seen a rise in repression and major corruption at the highest level of government. Following the COVID-19 outbreak, collaboration with China has intensified, extending to digital infrastructure

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¹United Nations Human Rights Council, Resolution adopted by the Human Rights Council on 12 Jul 2019, 41/19: The contribution of development to the enjoyment of all human rights.

²Murray Hiebert, *Under Beijing's Shadow: Southeast Asia's China Challenge* (Center for Strategic & International Studies 2020) 372.

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and deeper cooperation on health, pandemic preparedness and broader issues of food security and defence.

With legal and political institutions inherited from the British which appear to be at odds with China's, the Malaysian experience provides the opportunity to gain a more nuanced understanding of the way in which countries that engage with China's investments may be influenced by its ideals. Malaysia has a Westminster system of Parliamentary democracy and a legal system based on English common law. Nonetheless, since the 1980s, repressive laws have been used to silence dissent while the ruling elite has emphasised the need to prioritise economic and social benefit to the community over individual rights in line with 'Asian values'.³ Democratic institutions were further eroded during former Prime Minister Najib Razak's tenure from 2009 to 2018, corresponding with an increasing pivot towards China and its investments. Najib was a strong advocate for China's investment in Malaysia and, controversially, Chinese investors were also implicated in a bail out of 1Malaysia Development Berhad (1MDB), a state-owned company established for the benefit of the Malaysian public in 2009, which was used by Najib and his allies as a vehicle for fraudulent transactions to embezzle more than USD4.5 billion in what the US Attorney-General described as the largest kleptocracy case in history.⁴

The increasing strength of Malaysia's collaboration with China raises several questions. What are the reasons for Malaysia's pivot to China? How does it maintain strong relations with China whose political governance would appear to be at odds with Malaysia's inherited western institutions? What are the mechanisms through which China has been able to influence Malaysia's democratic system? The article seeks to shed light on these questions through a closer examination of how and why Malaysia has increasingly turned to China and away from Western investors. The article also investigates the legal mechanisms that facilitate Chinese investments in Malaysia and what impacts there could be on Malaysia's democratic system.

This article begins by examining the growth of Chinese investments in Malaysia and the impact of COVID-19. Subsequently, both countries' tacit understandings of legality and the nexus between the state and business are considered. The discussion then turns to Malaysia's pivot towards China. Following this, we investigate how young democracies like Malaysia are vulnerable to China's influence through investment, and analyse the broader implications.

COVID-19 and Chinese Investment

The COVID-19 outbreak has brought significant challenges for Malaysia. At the peak of the pandemic in 2021, hospitals were overwhelmed, parking lots were used to treat the sick while morgues overflowed.⁵ The financial impacts of movement restrictions adversely affected some of the country's most vulnerable, particularly low-income earners. Desperate and in need of food, some hung white flags out of their windows as a cry for help.⁶ Malaysia's white flags have since gone viral and are seen as a reflection of despair among Malaysia's poorest who have suffered the most. Still reeling from the scandal, the Malaysian government has welcomed China's offers of assistance to battle the COVID-19 outbreak. These have come in various forms.

³HP Lee, 'Competing Conceptions of the Rule of Law in Malaysia', in Randall Peerenboom (ed), *Asian Discourses of Rule of Law* (Proquest 2003) 222.

⁴Jeff Sessions calls Malaysia's 1MDB scandal "kleptocracy at its worst" (Reuters, 5 Dec 2017) <<https://www.reuters.com/article/us-malaysia-scandal-doj-idUSKBNIDZ0MX>> accessed 18 Dec 2021.

⁵Shannon Teoh, 'Malaysia Turns To Field ICUs, Shipping Containers And Parking Lots To Cope With COVID-19 Overflow' (The Straits Times, 17 May 2021) <<https://www.straitstimes.com/asia/se-asia/malaysia-turns-to-field-ic-us-ship-ping-containers-and-parking-lots-to-cope-with-covid-19>> accessed 18 Dec 2021.

⁶Neryssa Azlan, 'To many, raising a white flag is a sign of defeat. But for Malaysians in lockdown it's about unity' (ABC News, 14 Jul 2021) <<https://www.abc.net.au/news/2021-07-14/malaysia-white-flag-movement-coronavirus-pandemic/100285948>> accessed 18 Dec 2021.

From the early days of the outbreak, China shared their expertise and sent medical equipment including AI-based assistive diagnostic systems to assist in the battle against COVID-19.⁷ Collectively, the Chinese government, business organisations and NGOs sent batches of protective equipment to Malaysia in recognition of the ‘enduring economic and people-to-people ties’ between China and Malaysia.⁸ The intergovernmental collaboration deepened as the pandemic progressed including a five-year agreement to cooperate on the development of COVID vaccines, and a high-level committee was established to facilitate cooperation on pandemic preparedness and broader issues such as food security, trade and investment, science and technology, and the Belt and Road initiative.⁹

The pandemic precipitated an increasing reliance on digitalisation, further strengthening Malaysia’s engagement with Chinese tech firms. Prior to the COVID-19 outbreak, Malaysia had welcomed Chinese investment in digital technology and the potential knowledge transfer such collaborations offered.¹⁰ These resonate with the government’s development policies which aspire towards a ‘digitally-enabled and technology-driven high-income’ economy as a means of providing the country a competitive edge in the rising competition from neighbouring Southeast Asian countries for foreign investment.¹¹ Chinese companies have collaborated with Malaysian partners in: cloud computing; equipping locals with skills in using artificial intelligence and big data; and setting up an AI park valued at USD1 billion to develop AI-related public service infrastructure.¹² Alibaba’s ‘City Brain’ technology for smart cities has also been adopted.¹³

Nonetheless, critics argue that Chinese investment has contributed to democratic recession in Malaysia. For example, the adoption by the Malaysian police of China’s AI surveillance technology including wearable cameras with facial recognition capabilities is of particular concern as repression has risen in the wake of the pandemic.¹⁴ Such curtailment of civil liberties resonates with a trend of rising intolerance of dissent which in turn corresponds with an increasing engagement with China over the past decade.

The nexus between investment, politics and law

The rise in repression over the past decade resonates with the current wave of ‘democratic backsliding’ as countries engage with China’s investments.¹⁵ Concerns have been raised over the diffusion of Beijing’s blend of ‘authoritarianism and a market economy’ which is thought to rival the liberal-

⁷‘Chinese Anti-COVID-19 Medical Team Arrives In Malaysia’ (The New Straits Times, 18 Apr 2020); ‘Assistive Diagnostic AI Tool To Tackle COVID-19 In Malaysia’ (Biospectrum, 20 Apr 2020) <<https://www.biospectrumasia.com/news/46/15811/assistive-diagnostic-ai-tool-to-tackle-covid-19-in-malaysia.html>> accessed 18 Dec 2021.

⁸Chee Leong Lee & Md Nasrudin Md Akhir, ‘Malaysia-China Relations During the Movement Control Order And Beyond’, in Nian Peng (ed), *The Reshaping of China-Southeast Asia Relations in Light of the COVID-19 Pandemic* (Springer 2021) 75.

⁹‘Malaysia In Deal With China For COVID-19 Vaccine Development’ (Reuters, 18 Nov 2020) <<https://www.reuters.com/article/us-health-coronavirus-malaysia-china-idUSKBN27Y11B>> accessed 18 Dec 2021. The high-level committee is chaired jointly by their foreign ministries with members from relevant agencies of both countries.

¹⁰Hew Wee Choong, ‘Malaysia Gateway to a Digital Silk Road’ (China Daily, 17 Oct 2019) <http://www.chinadaily.com.cn/global/2019-10/17/content_37516267.htm> accessed 18 Dec 2021.

¹¹Prime Ministers Department’s Economic Planning Unit, *Malaysia Digital Economy Blueprint* (2020).

¹²Royce Tan, ‘AI Park Will Help Malaysia Take the Lead in Digital Future’ (Star, 17 Oct 2020) <<https://www.thestar.com.my/business/business-news/2020/10/17/ai-park-will-help-malaysia-take-the-lead-in-digital-future>> accessed 19 Dec 2021.

¹³‘Malaysia to Implement Alibaba’s Smart City Solution in Capital’ (China Daily, 29 Jan 2018) <<https://www.chinadaily.com.cn/a/201801/29/WS5a6f0c85a3106e7dcd1376eb.html>> accessed 20 Dec 2021.

¹⁴CK Tan, ‘Malaysian police adopt Chinese AI surveillance technology’ (Nikkei Asia, 18 Apr 2020) <<https://asia.nikkei.com/Business/Companies/Chinas-startup-supplies-AI-backed-wearable-cameras-to-Malaysian-police>> accessed 19 Dec 2021.

¹⁵See eg, Tom Ginsburg, ‘The Future of Liberal Democracy in the International Legal Order’, in David L Sloss (ed), *Is the International Legal Order Unravelling?* (Oxford University Press 2022); Larry Diamond, ‘Facing Up to the Democratic Recession’ (2015) 26 *Journal of Democracy* 141.

democratic notion of political and economic development.¹⁶ In Malaysia, several projects are considered as geopolitical counterbalance against the United States and its democratic allies. These projects include ports located along coast of the South China Sea and the Straits of Malacca as well as the East Coast Rail Link development connecting Malaysia's west coast to the South China Sea. These allow China to bypass Singapore, a US ally whose location at the southern end of the Straits of Malacca is thought to pose a potential threat to China if conflict with the US in the region were to arise.¹⁷ It is estimated 80 per cent of China's oil and gas imports passes through the Straits of Malacca.¹⁸

Nonetheless, the mechanisms which might enable such influence to gain traction in recipient countries are debated.¹⁹ Beijing has remained inclusive with regard to the types of regimes it is willing to incorporate into its development initiatives and unlike its western counterparts does not overtly require recipient countries to adhere to specific values or incorporate regulatory reforms as a condition of investment. On the contrary, the principle of non-interference is central to China's foreign policy.

Ginsburg posits that although China does not overtly promote a specific model of domestic governance to recipient countries, where its economic interests are at stake it may intervene in domestic politics in support of regimes more favourable to its interests.²⁰ Scholars observe China's support for particular regimes in Sri Lanka, Maldives and Cambodia provided stability for Chinese investment. These regimes have often had authoritarian leanings although subject to some democratic processes which have at times resulted in their defeat in domestic elections.²¹

Jones refutes the idea that China is seeking to 'socialise' other countries into adopting its values, asserting that the pluralist worldview reflected in China's position has 'long been associated with non-Western states' which have 'traditionally been sceptical of Western values' supposed universality.²² China's investments merely provide 'developing countries an alternative to Western aid', increasing their leverage in resisting Western pressure.²³

The Malaysian experience resonates with Jones' proposition. Malaysia's ruling elites have been proponents of an 'Asian values' perspective of human rights several decades prior to the launch of the Belt and Road Initiative. Likewise, some of China's ways of doing business such as its use of state-owned corporations are familiar concepts which Malaysians have been accustomed to prior to China's growing influence. At the same time, however, Ginsburg's proposition of intervention in favour of particular regimes that are supportive of China's investments offer some explanation for former Prime Minister Najib and his political allies' resilience in the face of public outcry over corruption allegations. Economic development ostensibly helped bolster Najib's and the ruling political party's public image. An alleged bailout of 1MDB suggests the likelihood of China's intervention in Najib's favour, which in turn fostered better outcomes for Chinese investments in the country at a time when his political opponents were seeking to reduce China's influence.²⁴

¹⁶Thomas Ambrosio, 'The rise of the "China Model" and "Beijing Consensus": evidence of authoritarian diffusion?' (2012) 18 *Contemporary Politics* 381, 382.

¹⁷You Ji, 'Dealing with the Malacca Dilemma: China's Effort to Protect Its Energy Supply' (2007) 31 *Strategic Analysis* 469.

¹⁸Francis E Hutchinson, 'The Melaka Gateway Project: High Expectations but Lost Momentum?' (ISEAS Perspective Issue 2019 No 78, 30 Sep 2019).

¹⁹Lee Jones, 'Does China's Belt and Road Initiative Challenge the Liberal, Rules-Based Order?' (2020) 13 *Fudan Journal of the Humanities and Social Sciences* 113.

²⁰*ibid.*

²¹*ibid*; Sovinda Po & Kearnin Sims, 'The Myth of Non-Interference: Chinese Foreign Policy in Cambodia' (2021) 46 *Asian Studies Review* 36.

²²Jones (n 19) 125. See also Jing Yuan Zhou et al, 'China's New Global Health Governance' (2022) 17(S) *Asian Journal of Comparative Law* xx.

²³Jones (n 19) 129.

²⁴Liz Lee, 'Selling the Country to China? Debate Spills into Malaysia's Election' (Reuters, 27 Apr 2018) <<https://www.reuters.com/article/us-malaysia-election-china-idUSKBN1HY076>> accessed 20 Dec 2021.

Several projects financed by Chinese investors are thought to have channelled funds towards the embattled 1MDB, camouflaging the extent of its liabilities which grew as Najib expropriated funds for his personal use. In particular, the failed oil and gas pipeline project in Sabah with several billion ringgit that could not be accounted for was found by the subsequent government to have been a bailout of 1MDB.²⁵ The project was awarded to state-owned China Petroleum Pipeline Bureau, valued at RM9.4 billion and financed by a loan from a Chinese bank which was guaranteed by the Malaysian government. Although 88 per cent of payments were made, only 13 per cent of the work had been completed. The deal was concluded behind closed doors and its terms were not made public. Consequently, evidence of the impropriety was only discovered following Najib's defeat in the 2018 general elections.²⁶

The incoming government halted the gas pipeline project and the East Coast Rail Link citing excessive costs that the country could not afford.²⁷ They seized over RM1 billion (USD243 million) from the bank account of the Chinese state-owned company involved in the pipeline project²⁸ and sought to recover the missing RM8.3 billion by sending a senior government representative to China. These investments appear to have assisted in Najib concealing the extent of public funds expropriated beneath a façade of 'development' projects ostensibly for the benefit of Malaysians. Nonetheless, the construction of East Coast Rail Link subsequently recommenced following a renegotiation of the contract terms and a return to power of Najib's former allies has seen a renewed vigour for collaboration with China.

Emergency powers amidst the pandemic

While China's assistance in developing Malaysia's digital capabilities brings economic advantages, it also increases the capacity of Malaysian government to monitor the society and political dissidents amid the country's democratic backsliding over the past decade. In January 2021, the Malaysian government declared a state of emergency, suspending Parliament until August 2021. Without legislative approval, the government enacted the *Emergency (Essential Powers) (No 2) Ordinance 2021* which criminalised the dissemination of 'fake news' about the pandemic and emergency proclamation. Such provisions are similar to the Anti-Fake News Act 2018 which was used to silence dissent and suppress information about the 1MDB scandal towards the end of Najib's tenure, and have been criticised as contrary to the Constitutional right to freedom of expression.²⁹ Purportedly made on grounds of the pandemic, the declaration of emergency raised suspicions that the Prime Minister and his government, who were not elected but had gained power through a political manoeuvre, were using the emergency as a means of holding on to power amidst claims that they did not have the support of the majority and faced prospects of a vote of no confidence when Parliament reconvened.³⁰

The use of emergency powers is thought to be inimical to the rule of law, providing the Cabinet 'carte blanche to do as they please'.³¹ Human Rights Watch reported that, 'since taking power in

²⁵Govt Negotiating with China to Resolve Issues Pertaining to Two Pipeline Project' (The New Straits Times, 24 Sep 2019).

²⁶Daim leading negotiations with China to recoup RM8.3b payments for pipeline projects, says finance minister' (Malay Mail, 2 Oct 2019).

²⁷Hannah Beech, "'We cannot afford this': Malaysia pushes back against China's vision' (The New York Times, 20 Aug 2018) <<https://www.nytimes.com/2018/08/20/world/asia/china-malaysia.html>> accessed 20 Dec 2021.

²⁸Malaysia seizes \$240 million from Chinese firm's bank account: paper' (Reuters, 14 Jul 2019) <<https://www.reuters.com/article/us-malaysia-politics-china-idUSKCN1U9060>> accessed 20 Dec 2021.

²⁹Federal Constitution, art 10(1)(a); Tommy Thomas, 'The Draconian Anti-Fake News Bill 2018' (Malaysian Insight, 27 Mar 2018).

³⁰Lim Huey Teng, 'Explainer: Why a State of Emergency Raises Concerns in Malaysia' (Reuters, 12 Jan 2021) <<https://www.reuters.com/article/us-healthcare-coronavirus-malaysia-emerg-idUSKBN29H1HE>> accessed 20 Dec 2021.

³¹Lee (n 3) 233–235.

March 2020, the government has initiated numerous criminal investigations for peaceful speech.³² The increase in surveillance against critics of the government is reflected in criminal proceedings brought against social media users³³ and peaceful protesters.³⁴ Reports emerged of people who had hung white flags as a sign of desperate need being threatened by the authorities.³⁵ Thirty-one participants at a candlelight vigil for those who died of COVID-19 were arrested,³⁶ and the police have used drones and other surveillance technology to photograph protesters and record evidence of participation in a peaceful protest.³⁷ The police subsequently announced that they would identify all participants and ‘call everyone involved.’³⁸

The unprecedented move to track down all protesters through the use of surveillance technology is worrying, particularly with the capacity to identify persons through the use of facial recognition and artificial intelligence. Cybercrime policing has been strengthened in recent years and used to monitor social media users for criticism of the government. Participants in the black flag campaign on social media which called for the resignation of the Prime Minister for allegedly failing to contain the pandemic were subject to criminal investigations under the *Communication and Multimedia Act 1998*, the *Sedition Act 1948* and the *Penal Code*.³⁹ Against this backdrop, the increasing adoption of digital technology raises concerns of potential misuse.⁴⁰ Smart cities which offer significant benefits such as better traffic management have surveillance capabilities such as multiple security cameras equipped with artificial intelligence. Consequently, China’s assistance in developing Malaysia’s digital capabilities increases risks that dissidents may be more closely monitored.

As collaborations with China have gained momentum in recent years, strengthening in the wake of the COVID-19 pandemic, several questions arise. Why is Malaysia with its democratic institutions and English common law legal system progressively pivoting to China and away from Western investors, and what are the implications?

Proximity

Despite Malaysia’s ostensibly western institutions inherited from the British, these have evolved since independence, developing distinct features that resonate with characteristics associated with Asian developmental states.⁴¹ Politics and business have been inextricably intertwined since the early 1980s following privatisation and redistribution policies. State ownership of corporations is widespread, state-controlled institutional investors hold a significant proportion of share capital

³²Linda Lakhdhir, ‘Troubling Cases of the Malaysian Government Criminalizing Speech’ (Human Rights Watch, 29 Apr 2021).

³³American Bar Association, ‘Malaysia: A Preliminary Report on Criminal Proceedings Against Blogger Dian Abdullah’ (Center for Human Rights, 23 Mar 2021); Nadirah H Rodzi, ‘Malaysia Probes Black Flag Movement for Alleged Seditious Elements’ (Straits Times, 6 Jul 2021).

³⁴Malaysia: Government Must Stop Harassment and Intimidation of Peaceful Protestors’ (Article19, 31 Jul 2021).

³⁵Jerry Choong, ‘Report: Kuantan Residents Say Told to Remove White Flags by Community Leader, Cops’ (Malay Mail, 1 Jul 2021) <<https://www.malaymail.com/news/malaysia/2021/07/01/report-kuantan-residents-say-told-to-remove-white-flags-by-community-leader/1986463>> accessed 24 Nov 2022.

³⁶Kalbana Perimbanayagam, ‘Cops Arrest 31 at “Candlelight Vigil” for Covid Victims for Illegal Assembly’ (The New Straits Times, 20 Aug 2021) <<https://www.nst.com.my/news/crime-courts/2021/08/719509/cops-arrest-31-candlelight-vigil-covid-victims-illegal-assembly>> accessed 24 Nov 2022.

³⁷#LAWAN: A Recap of 31 July’ (Amnesty International, 3 Aug 2021) <<https://www.amnesty.my/2021/08/03/lawan-a-recap-of-31-july/>> accessed 24 Nov 2022.

³⁸Austin Camoens, ‘Cops to Call up #Lawan Protestors: All Will Be Identified’ (Star, 31 Jul 2021).

³⁹Communication and Multimedia Act 1998, s 233; Sedition Act 1948, s 4; Penal Code, s 505(c); Faris Fuad, ‘Police Investigating Black Flag Campaign on Social Media’ (The New Straits Times, 4 Jul 2021).

⁴⁰Michael M Losavio et al, ‘The Internet of Things and the Smart City: Legal Challenges with Digital Forensics, Privacy, and Security’ (2018) 23 Security and Privacy 1.

⁴¹Yin-wah Chu, ‘The Asian Developmental State: Ideas and Debates’, in Yin-wah Chu (ed), *The Asian Developmental State* (Palgrave Macmillan 2016) 11; Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing 2012) 66.

of corporations listed on Bursa Malaysia,⁴² and political patronage further strengthens political influence over business.⁴³ Against this backdrop, tacit understandings of the interrelation between state and business lend strength to Malaysia's collaboration with China and the ease of doing business.

Rule of law, authoritarian legacy, and the state-business nexus

Although Malaysia is a young democracy, it has some authoritarian characteristics, limited.⁴⁴ Checks-and-balances and judicial independence has been curtailed.⁴⁵ Under the Najib administration (2009–2018), an upward trend of such authoritarian legacy has occurred due to its institutional weaknesses. While there was stronger support for civil rights from the Pakatan Harapan government following Najib's defeat in the 2018 elections, this was short-lived. Repression continued with the resurgence of Najib and his allies' party in early 2020.

Responses to the 1MDB scandal illustrate some of the institutional weaknesses. The scandal occurred in the midst of failure to safeguard against abuse of political power at multiple levels.⁴⁶ These include the concentration of power and control over resources in the office of the Prime Minister who also held the portfolio of the Minister of Finance. The Minister of Finance controls over an estimated 42 per cent of the total market capitalisation of companies listed on Bursa Malaysia, and other assets held through unlisted companies.⁴⁷ The lack of transparency around the financial management and transactions pertaining to state-owned assets contributed to the system's greater vulnerability to manipulation.⁴⁸ Licences, contracts and concessions have commonly been awarded to allies of the political elite in the absence of safeguards such as open tender or transparency requirements.⁴⁹ In return, political patrons are thought to derive undisclosed private benefits from opaque transactions.⁵⁰

Evidence of wrongdoing at 1MDB began to emerge as early as 2010, and within several years, the scandal precipitated investigations, civil and criminal proceedings in other countries.⁵¹ 1MDB was able to engage in closed-door negotiations and fraudulent transactions relatively unimpeded. The incorporation of 1MDB as an unlisted public company meant that transactions worth billions could be carried out in relative secrecy.⁵² As allegations of 1MDB's mismanagement emerged,

⁴²Effiezal A Abdul Wahab, Janice C Y How & Peter Verhoeven, 'The Impact of the Malaysian Code on Corporate Governance: Compliance, Institutional Investors and Stock Performance' (2007) 3 *Journal of Contemporary Accounting and Economics* 106.

⁴³Donald R Fraser, Hao Zhang & Chek Derashid, 'Capital Structure and Political Patronage: The Case of Malaysia' (2006) 30 *Journal of Banking and Finance* 1291.

⁴⁴James Chin, 'Malaysia: Pseudo-democracy and the Making of a Malay-Islamic State', in William Case (ed), *Routledge Handbook of Southeast Asian Democratization* (Routledge 2015) 399, 401–402; Harold Crouch, *Government and Society in Malaysia* (Allen & Unwin 1996) 5; Gordon Paul Means, 'Soft Authoritarianism in Malaysia and Singapore' (1996) 7 *Journal of Democracy* 103.

⁴⁵Harding (n 41) 66.

⁴⁶David Seth Jones, '1MDB Corruption Scandal in Malaysia: A Study of Failings in Control and Accountability' (2020) 23 *Public Administration and Policy: An Asia-Pacific Journal* 59.

⁴⁷Edmund Terence Gomez et al, *Minister of Finance Incorporated: Ownership and Control of Corporate Malaysia* (Palgrave Macmillan Singapore 2017) 176.

⁴⁸Edmund Terence Gomez, *Politics in Business: UMNO's Corporate Investments* (Forum 1990).

⁴⁹Peter Searle, *The Riddle of Malaysian Capitalism: Rent-Seekers or Real Capitalists?* (Allen and Unwin 1999).

⁵⁰Rajeswary Ampalavanar Brown, *The Rise of the Corporate Economy in Southeast Asia* (Routledge 2006).

⁵¹Yantoultra Ngui, 'About \$7 Billion Linked to 1MDB Flowed through Global Financial System, Switzerland Says' (Wall Street Journal, 10 Jul 2018); Lesli Shaffer, 'Deloitte Tries to Quit as 1MDB Auditor, as International Investigations of Fund Tied to Malaysia PM Najib Heat Up' (CNBC, 27 Jul 2016).

⁵²There are no requirements that financial reports or details about the financial management of state-owned companies should be disclosed to or approved by Parliament, or otherwise subject to public scrutiny. See Vivien Chen, 'Corporate Law and Political Economy in a Kleptocracy' (*American Journal of Comparative Law*, forthcoming).

several domestic investigations were launched but political intervention ensure that they were short-lived.⁵³ The Malaysian Anti-Corruption Commission attempted to investigate the scandal but were obstructed, witnesses were tampered with and intimidated, and a senior investigator likewise reported receiving threats.⁵⁴ Prime Minister Najib removed the then deputy prime minister who had criticised him and sacked the Attorney-General who was planning to file criminal charges against him.⁵⁵ The subsequent Attorney-General whom he appointed cleared him of wrongdoing.⁵⁶

As international investigations continued to gain momentum, the Najib administration used existing repressive laws to silence the rising domestic criticism levelled against him, bringing an unprecedented number of sedition charges.⁵⁷ In 2018, as the general elections approached and Najib faced widespread criticism over his corruption, the *Anti-Fake News Bill* was introduced. The new laws made it a criminal offence punishable with 10 years' imprisonment to discuss any information about 1MDB that was not verified by the government.⁵⁸ Public discussion of 1MDB was also suppressed through the *Communications and Multimedia Act 1998*.⁵⁹ Consequently, political intervention on multiple levels ensured that the Malaysian authorities did not bring enforcement proceedings in relation to 1MDB until the Najib administration fell in May 2018.⁶⁰

Such obstruction and manipulation of law enforcement is made possible mainly because political elites in Malaysia share a superficial, procedure-centric conception of the rule of law, separate from democratic principles, values and human rights. Leading Malaysian lawyers assert that law is used instrumentally to foster an appearance of legitimacy while repressing the civil rights movement, and to enhance the political elite's control over resources.⁶¹

That being said, the importance of maintaining global standards is reflected in Malaysia's legal reforms especially those about corporate governance. Since the mid-1960s, law reformers have

⁵³In 2015, an inquiry was conducted by the Auditor General at the Cabinet's request. The report was presented to the bi-partisan Parliamentary Public Accounts Committee which censured the board of 1MDB and its CEO for impropriety without mentioning the Prime Minister's involvement. Nonetheless, the report was immediately classified as an 'official secret' and its findings were suppressed. An opposition leader who disclosed part of the audit report was jailed for 18 months for violating the Official Secrets Act 1972. 'Malaysia Jails Opposition MP for Leaking Audit Details at Scandal-hit 1MDB' (Reuters, 14 Nov 2016) <<https://www.reuters.com/article/us-malaysia-scandal-court-idUSKBN1390U8>> accessed 24 Nov 2022; National Human Rights Society, 'Declassify the Auditor General's Report on 1MDB' (19 Jul 2016) <<http://hakam.org.my/wp/2016/07/19/statement-declassify-the-auditor-generals-report-on-1mdb/#more-7901>> accessed 24 Nov 2022.

⁵⁴Rozanna Latiff & A Ananthlakshmi, 'Malaysian Officials Details How Najib Razak Tried to Obstruct the 1MDB Probe' (Financial Review, 4 Jul 2018).

⁵⁵'1MDB Scandal: Malaysia PM Najib Razak Sacks Deputy, Attorney-General as Corruption Allegations Mount' (ABC News, 29 Jul 2015) <<https://www.abc.net.au/news/2015-07-29/malaysia-pm-razak-sacks-deputy-as-corruption-allegations-mount/6655342>> accessed 24 Nov 2022.

⁵⁶Euan McKirdy, 'Malaysian PM Cleared of Wrongdoing in Multimillion Dollar Transfer to His Accounts' (CNN Asia, 26 Jan 2016).

⁵⁷Amnesty International estimates that close to 170 sedition charges or investigations were instituted in 2013, the year in which general elections were held, approximately five times the number of cases brought during the first 50 years of Act's existence. In addition, the government amended the Sedition Act 1948 to provide for mandatory imprisonment on conviction. The frequent threat of sedition charges together with the introduction and use of the Security Offences (Special Measures) Act 2012 to detain critics without trial had a chilling effect on freedom of speech. See 'Malaysia Using Sedition Act to Crackdown on Hundreds of Critics' (Amnesty International, 26 Jan 2016).

⁵⁸Hannah Beech, 'As Malaysia Moves to Ban "Fake News", Worries about Who Decides the Truth' (New York Times, 2 Apr 2018).

⁵⁹Malaysia Toughens Sedition Law Penalties (BBC News, 10 Apr 2015) <<https://www.bbc.com/news/world-asia-32245750>> accessed 20 Dec 2021; Rozanna Latiff, 'Malaysia Blocks Access to News Portal for Violating Media Law' (Reuters, 26 Feb 2016) <<https://www.reuters.com/article/us-malaysia-politics-media-idUSKCN0VY1XL>> accessed 24 Nov 2022.

⁶⁰Lindsay Murdoch, 'Protesters and Investigators Arrested as Malaysian PM Najib Razak Cracks Down' (Sydney Morning Herald, 2 Aug 2015) <<https://www.smh.com.au/world/protesters-and-investigators-arrested-as-malaysian-pm-najib-razak-cracks-down-20150802-giple1.html>> accessed 20 Dec 2021.

⁶¹Tommy Thomas, *Abuse of Power* (Strategic Information and Research Development Centre 2016).

sought to align Malaysian corporate law with international standards as a means of attracting foreign investment including capital from China.⁶² Consequently, Malaysia is ranked second highest in the world for its minority shareholder protection on the World Bank's Doing Business index.⁶³ Notably, the Doing Business methodology is based primarily on law in the books and the challenges faced by minority shareholders in enforcing these protections in practice have not been taken into account.

Nonetheless, significant events such as money laundering through 1MDB, and the trial and imprisonment of opposition leader Anwar Ibrahim during the Mahathir administration drew criticism from western leaders, while international organisations have expressed concerns over breaches of human rights.⁶⁴ Unlike its western counterparts, China remained detached from controversies over corruption and the use of repressive laws in Malaysia. By contributing to development, it bolstered perceptions of the government's legitimacy.

Electoral Demand for Economic Performance

While some facets of democracy have been compromised, elections are regularly held, and the need to placate the electorate remains. Ruling elites have sought to regain public confidence in several ways including strengthening economic performance⁶⁵ and enacting laws that engage with popular topics such as gender equality.⁶⁶ China's offer of economic development played a significant role in enhancing performance legitimacy of the government, strengthening Najib and his allies' chances of re-election.⁶⁷ At the time of entry into the most of these transactions, the closed-door negotiations prevented scrutiny of the deals. However, subsequently, evidence emerged suggesting that Chinese funds were used to cover up the extent of 1MDB's insolvency.

After Najib was defeated in the 2018 general elections, investigations revealed that the failed gas pipeline project, the East Coast Rail Link (ECRL), valued at RM9.4 billion was a ruse to bail out 1MDB.⁶⁸ Further evidence suggested that the price of the ECRL had been inflated as part of a deal to acquire some of 1MDB assets.⁶⁹ These included China General Nuclear Power Corp paying USD 2.3 billion in cash and taking on an 'unspecified amount of debt for group of power plants' from 1MDB, and China Railway Construction Corp's purchase of a 60 per cent stake in a 1MDB project, Bandar Malaysia, for USD 1.7 billion.⁷⁰ At Najib's trial, his aide testified in court that he had been sent to China on a secret mission in 2016 to procure China's help

⁶²Malaysia Parliamentary Debates, Senate (23 May 2007) 113, 117–118; Securities Commission Malaysia, *Corporate Governance Blueprint 2011* (Jul 2011).

⁶³*Doing Business 2020 – Economy Profile: Malaysia* (World Bank 2020) <<https://www.doingbusiness.org/content/dam/doingBusiness/country/m/malaysia/MYS.pdf>> accessed 24 Nov 2022.

⁶⁴Barry Wain, *Malaysia Maverick: Mahathir Mohamad in Turbulent Times* (Palgrave Macmillan UK 2009) 260; 'Malaysia Using Sedition Act to Crackdown on Hundreds of Critics' (Amnesty International, 26 Jan 2016) <<https://www.smh.com.au/world/protesters-and-investigators-arrested-as-malaysian-pm-najib-razak-cracks-down-20150802-giple1.html>> accessed 20 Dec 2021.

⁶⁵Performance and Delivery Unit, *Economic Transformation Program* (Prime Ministers Department 2010).

⁶⁶Cecilia Ng, Maznah Mohamad & Tan Beng Hui, *Feminism and the Women's Movement in Malaysia: An Unsung* (Routledge 2006).

⁶⁷Dr Mustafa Izzuddin, Fellow at ISEAS-Yusof Ishak Institute, quoted in Nyshka Chandran, 'Malaysia's Najib Razak in China, as 1MDB Scandal, South China Sea Dispute Loom Over Talks' (CNBC, 30 Oct 2016) <<https://www.cnbc.com/2016/10/30/malysias-najib-razak-in-china-as-1mdb-scandal-south-china-sea-dispute-loom-over-talks.html>> accessed 24 Nov 2022.

⁶⁸Govt Negotiating with China to Resolve Issues Pertaining to Two Pipeline Projects' (The New Straits Times, 24 Sep 2019).

⁶⁹'Mahathir says the ECRL project contract is strange' (Edge Malaysia, 4 Jun 2018) <<https://www.theedgemarkets.com/article/mahathir-says-ecrl-project-contract-strange>> accessed 20 Dec 2021.

⁷⁰Chandran (n 67).

to bail out 1MDB.⁷¹ In return, Beijing's state-owned enterprises would be awarded infrastructure projects. While China has denied the alleged bailout, the Chinese government appealed for 'friendly consultations' to resolve the dispute over the pipeline project⁷² and subsequent closed-door negotiations led to a reduction in the price of the ECRL.⁷³ In addition to camouflaging the extent of 1MDB's indebtedness that resulted from Najib's embezzlement, the bail out arguably also enabled funds from 1MDB to be diverted towards political financing and to enhance his social media presence.⁷⁴

The Pivot Towards China

Foreign direct investment is an important driver of economic development in Malaysia⁷⁵ and, as observed earlier in this article, China's investments have engendered significant economic benefits for the country. In recent years, Chinese investors have built capabilities in digital technology, facilitated knowledge transfer, provided access to funding and promoted infrastructure development⁷⁶ substantially more than their western counterparts. Scholars such as Wang Gungwu assert that China's Belt and Road Initiative is underpinned primarily by economic interests⁷⁷ and the circumstances surrounding the rise of Chinese investment in Malaysia suggest that mutual economic benefits are likely to be central in the increasing engagement with China.

China's offers of much-needed foreign direct investment unencumbered by conditions of reforms provide an alternative to Western capital amidst criticisms and withdrawal of support by the latter.⁷⁸ For example, when Malaysian palm oil exports were rejected by the European Union (EU) based on environmental and social grounds, Malaysia turned to China. As the second largest producer of palm oil in the world, the EU's decision to phase out palm oil-based biodiesel by 2030 had a major impact on Malaysia.⁷⁹ In October 2020, China revealed plans to purchase 'large volumes of palm oil, Malaysia's core export'⁸⁰ amidst discussions on deepening mutual cooperation in response to COVID-19 and engagement in the Belt and Road Initiative. Concerns raised in US,

⁷¹Hafiz Yatim, 'ECRL, pipeline projects offered to China to bail out 1MDB' (Edge Markets, 5 Sep 2019) <<https://www.theedgemarkets.com/article/ecrl-pipeline-projects-offered-china-bail-out-1mdb>> accessed 20 Dec 2021. Najib has since been imprisoned for abuse of power, criminal breach of trust and money laundering; 'Malaysia's ex-PM Najib jailed after appeal in 1MDB case rejected' (Al Jazeera, 23 Aug 2022) <<https://www.aljazeera.com/news/2022/8/23/malaysia-top-court-upholds-ex-pm-najibs-conviction-in-1mdb-case>> accessed 24 Nov 2022.

⁷²'China asks "friendly consultation" in Malaysia dispute' (ABC News, 16 Jul 2019) <<https://abcnews.go.com/Business/wireStory/china-asks-friendly-consultation-malaysia-dispute-64359786>> accessed 20 Dec 2021.

⁷³Hazlin Hassan, 'Work Resumes on Malaysia's East Coast Rail Link' (The Straits Times, 25 Jul 2019).

⁷⁴Hafiz Yatim, Adam Aziz & Chester Tay, 'Najib Paid Agency RM2m to Strengthen Govt's Social Media Presence After Poor 2008 Election Results' (Edge Markets, 28 Aug 2019) <<https://www.theedgemarkets.com/article/najib-paid-agency-rm2m-strengthen-govts-social-media-presence-after-poor-2008-elections>> accessed 20 Dec 2021; Emir Zainul, '80 Persons, Entities Fined for Receiving RM420m from 1MDB' (Edge Financial Daily, 8 Oct 2019) <<https://www.theedgemarkets.com/article/80-persons-entities-fined-receiving-rm420m-1mdb>> accessed 20 Dec 2021.

⁷⁵Siew Yean Tham et al, 'Bilateral Export Trade, Outward and Inward FDI: A Dynamic Gravity Model Approach Using Sectoral Data from Malaysia' (2018) 54 *Emerging Markets Finance and Trade* 2718.

⁷⁶Edmund Terence Gomez et al, *China in Malaysia* (SpringerLink 2020) 102.

⁷⁷Wang Gungwu, 'China and the International Order: Some Historical Perspectives', in Wang Gungwu & Zheng Yongnian (eds), *China and the New International Order* (Routledge 2008) 21, 28–29.

⁷⁸Prashanth Parameswaran, 'What Trump's TPP Withdrawal Means for US Asia Policy' (The Diplomat, 24 Jan 2017) <<https://thediplomat.com/2017/01/what-trumps-tpp-withdrawal-means-for-us-asia-policy/>> accessed 1 Dec 2022.

⁷⁹'Malaysia to escalate EU all dispute at WTO' (Reuters, 28 May 2021) <[https://www.reuters.com/world/asia-pacific/malaysia-escalate-eu-palm-oil-dispute-wto-2021-05-28/#:~:text=GENEVA%2C%20May%2028%20\(Reuters\),dispute%20settlement%20body%20on%20Friday.>](https://www.reuters.com/world/asia-pacific/malaysia-escalate-eu-palm-oil-dispute-wto-2021-05-28/#:~:text=GENEVA%2C%20May%2028%20(Reuters),dispute%20settlement%20body%20on%20Friday.>) accessed 20 Dec 2021.

⁸⁰Takashi Nakano, 'Malaysia Promised Priority Access to China's Coalbed Vaccine' (Nikkei Asia, 14 Oct 2020) <<https://asia.nikkei.com/Politics/International-relations/Malaysia-promised-priority-access-to-China-s-COVID-vaccine>> accessed 20 Dec 2021.

UK and Australia relating to modern slavery have further affected key Malaysian exports.⁸¹ The shift to Chinese companies is also seen in relation to controversies such as the construction of mega dams, from which Australian investors withdrew following protests by environmental and human rights activists.⁸²

Ironically, Australian withdrawal from the Bakun Dam project did not prevent but worsened the displacement of indigenous communities. The project was given to a consortium comprising local and Mainland Chinese companies including state-owned Sinohydro. This ultimately led to worse outcomes for indigenous communities as Australian departure from Sarawak resulted in displaced communities losing benefit of the corporate social responsibility initiatives that Australians had planned.⁸³ As the project was endorsed by the government and environmental and social impact assessments were undertaken by Malaysian partners of the joint venture, Chinese companies involved in the construction of hydroelectric dams remained detached from the controversies surrounding the Bakun project. They were subsequently engaged in the construction of the Murum dam and other large hydro-electric dams. Both the Bakun and Murum dams had devastating consequences for displaced indigenous communities.⁸⁴

China's offers of investments without criticisms or reform conditions reflect its foreign policy of non-interference in other countries' domestic affairs. This is consistent with the approach of Southeast Asian countries, or ASEAN,⁸⁵ where 'non-interference in the internal affairs' of other countries is a central tenet,⁸⁶ which is reflected in Malaysian foreign policy.⁸⁷ The value of mutual respect for other countries' internal affairs, and resistance against Western pressure towards stronger human rights and democratic reforms, have been prevalent in Malaysia prior to China's emergence.⁸⁸ Both countries have claimed that such criticisms are reminiscent of Western imperialism. Eschewing the rhetoric of universal human rights, they have put forward alternative perspectives of human rights, emphasising the need for cultural and contextual relevance. China's Foreign Minister Wang Yi's remarked that human rights should be protected 'in light of their national realities and the needs of their people'.⁸⁹ Likewise, the claim that 'ignoring some individual rights is necessary in order to ensure collective rights'⁹⁰ resonates with former Malaysian Prime Minister Dr Mahathir's assertions that collective good and economic development should take precedence over individual rights.⁹¹

⁸¹ibid; Max Walden, 'Rubber gloves entering Australia from Malaysia could be linked to forced labour, with US restricting imports' (ABC News, 20 Jul 2020) <<https://www.abc.net.au/news/2020-07-20/gloves-malaysia-forced-labour-us-detention-order-australia/12292708>> accessed 20 Dec 2021.

⁸²Shun Deng Fam, 'China Came, China Built, China Left?: The Sarawakian Experience with Chinese Dam Building' (2017) 46 *Journal of Current Chinese Affairs* 119.

⁸³ibid 131.

⁸⁴Suruhanjaya Hak Asasi Manusia [Human Rights Commission of Malaysia], 'Report of the National Inquiry into the Land Rights of Indigenous Peoples' (2013) 164 <<https://nhri.ohchr.org/EN/Themes/BusinessHR/Business%20Womens%20and%20Childrens%20Rights/SUHAKAM%20BI%20FINAL.CD.pdf>> accessed 24 Nov 2022 (link is broken).

⁸⁵ASEAN is the acronym for the Association of Southeast Asian Nations, a political and economic organisation which comprises Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

⁸⁶Treaty of Amity and Cooperation in Southeast Asia (1976), art 2(c).

⁸⁷Ministry of Foreign Affairs Malaysia, 'Foreign Policy Framework of the New Malaysia' (Jun 2019) 15 <<https://www.pmo.gov.my/2019/09/foreign-policy-framework-of-the-new-malaysia/>> accessed 24 Nov 2022.

⁸⁸Wain (n 64) 242–254.

⁸⁹Wang Yi, 'A People-Centred Approach for Global Human Rights Progress', 46th Session of the United Nations Human Rights Council, 22 Feb 2021.

⁹⁰Yun Jiang, managing editor of China in the World at the Australian National University, quoted in Sean Mantesso, 'China Hits Back as it Faces Growing Criticism of its Human Rights Record, Treatment of Uyghurs' (ABC News, 20 Jul 2021) <<https://www.abc.net.au/news/2021-07-20/china-responds-to-western-criticism-of-human-rights-record/100295550>> accessed 20 Dec 2021.

⁹¹Carolina Lopez C, 'Globalisation, State and G/local Human Rights Actors: Contestations Between Institutions and Civil Society', in Edmund T Gomez (ed), *Politics in Malaysia: The Malay Dimension* (Routledge 2007) 50.

Jones posits that rather than China socialising other countries into sharing its perspectives, similar views have been prevalent in the non-Western world long before China's economic rise.⁹² Challenges of soft authoritarianism in Malaysia likewise predate the increase in Chinese investment and arise from a complex web of factors including domestic politics.⁹³ Resistance against Western imposition of human rights norms by the Malaysian political elite has been present for decades and has been attributed to influences such as cultural norms and colonial history.⁹⁴ One possible explanation for the rise in authoritarianism in recent years, coinciding with increasing Chinese investment, is that the capacity to turn to China as an alternative means of stimulating economic development enables local elites to resist reforms that erode their dominance and to consolidate their control over economic resources.⁹⁵ Hence, Chinese investment appears to be one of several factors that, in the circumstances, correlates with a rise in authoritarianism in a country that had pre-existing vulnerabilities.

The pivot to China appears to be facilitated by affinities across a range of tacit understandings of how business is conducted, often with the involvement of the state or state-owned entities. While the interconnectedness of state and business is at times viewed with suspicion by Western parties, to many Malaysians, the merger of state and business is ubiquitous.⁹⁶ Similar to the characteristics of Chinese capitalism, scholars have described Malaysia's 'relationship-based capitalism' or political patronage as having overlapping and mutually-reinforcing economic, social and personal components.⁹⁷ As noted earlier, common ground is found in shared perspectives on matters such as human rights and mutual respect for other countries' conduct of their domestic affairs. Likewise, both countries emphasise the importance of economic development for the benefit of the broader community while civil and political rights are seen as being of lesser importance. Both countries have histories involving Western dominance, and Malaysia has sought to establish its post-colonial identity by modelling its economic development policies on those of leading Asian economies as reflected in the 'Look East' policy.⁹⁸ In the face of increasing resistance from the West over sustainability and human rights concerns, China's offers of investment without criticism provide a viable alternative, and analysts observe that the 'Look East' approach has since expanded to China.⁹⁹

The unquestioning stance towards other countries' internal affairs is illustrated by former Prime Minister Najib Razak's engagement with China as he was increasingly shunned by Western leaders for his corruption. Investigations into the scandal commenced in at least six countries,¹⁰⁰ and the US Department of Justice filed civil proceedings to recover assets which Najib embezzled through 1MDB.¹⁰¹ In contrast with the scrutiny from Western countries, China's involvement in projects which were subsequently implicated in a bailout of 1MDB suggests a hands-off approach to the conduct of domestic affairs. In the subsequent fallout over the failed gas pipeline project with the government that replaced the Najib administration, both countries resorted to negotiating at the highest

⁹²Jones (n 19) 125.

⁹³Means (n 44); Hoong Phun Lee, *Constitutional Conflicts in Contemporary Malaysia* (2nd edn, Oxford University Press 2017) 127.

⁹⁴Anthony Milner, 'Long-term Themes in Malaysian Foreign Policy: Hierarchy Diplomacy, Non-interference and Moral Balance' (2020) 44 *Asian Studies Review* 117.

⁹⁵Jones (n 19).

⁹⁶Gomez et al. *China in Malaysia* (n 76) 91, 97.

⁹⁷Fraser, Zhang & Derashid (n 43) 1294.

⁹⁸Wain (n 64) 246–247.

⁹⁹Elina Noor, 'Foreign and Security Policy in the New Malaysia' (Lowy Institute, 7 Nov 2019) <https://www.lowyinstitute.org/publications/foreign-and-security-policy-new-malaysia#_ednref57> accessed 24 Nov 2022.

¹⁰⁰'Timeline: how Malaysia's 1MDB financial scandal unfolded' (Al Jazeera, 28 Jul 2020) <<https://www.aljazeera.com/news/2020/7/28/timeline-how-malysias-1mdb-financial-scandal-unfolded>> accessed 20 Dec 2021.

¹⁰¹Reuters (n 4). 1MDB was incorporated as an unlisted public company and was wholly owned by the Minister of Finance Inc.

levels of the government to resolve the conflict.¹⁰² Similarities in understandings of legality, rights, and legitimacy appear to have facilitated the use of informal and extra-legal mechanisms to resolve disputes with Chinese state-owned enterprises.

As Malaysia's engagement with China has gained momentum, questions arise as to the implications of this trend. Although some have raised concerns over the possible diffusion of Beijing's blend of authoritarianism and a market economy rivalling the liberal-democratic notion of political and economic development,¹⁰³ others posit that China's motivations are not to dominate but to foster a more balanced and multipolar world, a more interdependent rule-based global market economy, and alternative, better routes to development 'than those offered by the World Bank-IMF models'.¹⁰⁴ Malaysia's increased engagement with China in the wake of the COVID-19 outbreak¹⁰⁵ has brought economic benefits, building capacity in much-needed digital technologies. At the same time, a rise in authoritarianism suggests the need to more closely examine the mechanisms by which vulnerable democracies may be exposed to unintended consequences.

Vulnerable Democracy

Scholars have been debating about China's potential diffusion of authoritarianism and state capitalism to developing countries, consciously or not, via its foreign investment and economic collaboration. Issues such as debt traps, corruption, wasteful investment have been under scrutiny. Besides these unveiled economic impacts, however, it is unclear yet whether its ideas of legality, legitimacy, and political culture have also had an impact on political and legal systems in those recipient countries of China's investment.

In this regard, Malaysia presents an interesting case. Despite its worrying authoritarian legacy and recent upward trend of oppressive political culture, Malaysia is nonetheless a functional democracy with stable rule of law and regular elections, coupled with solid economic performance. It differs from those underdeveloped states that lack institutional capacity and economic prospects and thus depend on China's investment. According to the WJP Rule of Law Index 2021, Malaysia is ranked 7th in Asia, only after New Zealand, Australia, Singapore, Japan, Hong Kong and South Korea, significantly better than China, which is ranked 12th regionally and 88th internationally. More broadly, according to World Bank's Worldwide Governance Indicators, Malaysia's performance is consistently better over the past decade (2010–2020) than the average of East Asian and Pacific countries in terms of rule of law, government effectiveness, regulatory quality, and corruption control.¹⁰⁶ Malaysia also outperforms China significantly in terms of all other good governance indicators.

While the diffusion effects that trickle down from China to countries of lower middle income and low income are understandable, much less attention is paid on the trickle-up effects from China to upper middle income and high-income countries that have better legal and democratic institutions in place.

Performance accountability of young democracies

In theory, we are likely to presume that, compared to non-democratic or developing countries of low income, functional democracies would be equipped with better institutional mechanisms that

¹⁰²Matthew S Erie, 'Chinese Law and Development' (2021) 62 *Harvard International Law Journal* 51, 55 and 101.

¹⁰³Thomas Ambrosio, 'The Rise of the "China Model" and "Beijing Consensus": Evidence of Authoritarian Diffusion?' (2012) 18 *Contemporary Politics* 381, 382.

¹⁰⁴Wang (n 77) 28–29.

¹⁰⁵Ho Wah Foon, 'Malaysia Should Consider Getting China's Help on COVID-19 Crisis' (Star, 30 May 2021) <<https://www.thestar.com.my/opinion/columnists/anything-chinese/2021/05/30/malaysia-should-consider-getting-chinas-help-on-covid-19-crisis>> accessed 20 Dec 2021.

¹⁰⁶World Bank, 'The Worldwide Governance Indicators' <<https://info.worldbank.org/governance/wgi/Home/Reports>> accessed 20 Dec 2021.

strengthen accountability and checks-and-balances and hence less vulnerable to any negative impact of Chinese investments. The executive branch of a functional democracy should be held accountable for its policies to engage in Chinese investment projects, and any resulting breach of people's fundamental rights, such as property rights, is subject to judicial review. There usually exists a governmental agency in charge of reviewing and monitoring the flow of foreign capital, which would vet any speculative and exploitative investment. Other institutional mechanisms, such as environmental impact analysis, could also limit undesirable impacts brought by foreign investment. Law enforcement agencies including the police and judiciary could prevent outright predatory behaviour such as land grab and discipline officials for their misconducts. Most importantly, electoral competition is the vital mechanism to expose rent-seeking behaviours and punish corrupt politicians by votes.

However, our case study suggests that the combination of some aspects of democracy, alongside weaknesses in safeguards against rent-seeking, give rise to receptivity towards Chinese investments which in turn may erode the democratic system. The mechanisms of such penetrative effects in democratic countries differ from those in non-democratic countries. In non-democratic countries, a small cluster of powerful leaders, usually not accountable for any constituency, could make quick decisions about business engagement with foreign investors. Negotiation failure between transactional parties is less likely to happen due to the small number of actors involved. In comparison, it is a much more complex process to deal with various stakeholders and governmental agencies in democratic contexts. However, once the actors have muddled through the democratic process to carry out transactions, a democratic system could facilitate such transactions through its institutional capacity and the collusion between politicians and foreign agents would be more justifiable and less visible.

Several reasons account for vulnerability of Malaysia's democracy in the face of China's investment. To begin with, regular elections in Malaysia are quite competitive and therefore put politicians under scrutiny for their performance. As a young democracy, legitimacy of the Malaysian government still lies in its economic performance and social benefit provided. To win election, politicians need to deliver performance in the form of employment rates, GDP, and national income growth and therefore have to please their constituency as much as possible. Such performance accountability creates not only the greatest constraint on politicians but also constitute their strong incentives to seek foreign investment that can boost economic growth during their tenure and supplement those areas short of the government's budgetary support.

Furthermore, the strong desire for economic development gives rise to performance accountability between the state and the people, which differs from procedure-centric accountability commonly seen in western democracies. Under such performance accountability, the end still should not justify the means, unlike in many authoritarian countries; nonetheless, the end can definitely facilitate the means through the democratic process. For example, the environmental impact analysis, hearings, and other procedural requirements could be skillfully organised in a way in which they would not delay the policy making process. This is seen in the government's adherence to formal legislative requirements on environmental impact assessments (EIA)¹⁰⁷ for the construction of the Murum and Bakun dams, providing a veneer of legitimacy to processes which were skewed in their favour. For example, transparency of the EIA for the Murum dam was nominal as independent consultants and displaced indigenous communities were not involved.¹⁰⁸ Nonetheless, the EIA procedure diffused the tensions between different government agencies in a formalistic way and help put aside the initial concerns of the Human Rights Commission of Malaysia that construction of the dam

¹⁰⁷Environmental Quality Act 1974, s 34A.

¹⁰⁸Both the Murum and Bakun dams forcibly displaced indigenous communities from native customary land with inadequate compensation, resulting in substantial hardship and poverty. See also *SUHAKAM's Report on The Murum Hydroelectric Project and Its Impact Towards the Economic, Social and Cultural Rights of the Affected Indigenous People in Sarawak* (Human Rights Commission of Malaysia 2009) II <<http://www.suhakam.org.my/wp-content/uploads/2013/12/Murum1.pdf>> accessed 24 Nov 2022.

was ‘contracted out without the finalization of an EIA’.¹⁰⁹ In the case of Bakun dam’s EIA, as a local university had engaged with indigenous communities as their consultant, the government had to offer better procedural fairness but nonetheless made selective use of the EIA by highlighting information favourable to its development proposals.¹¹⁰

Various democratic, procedural requirements in Malaysia could largely strengthen legitimacy of governmental policies and shield the government from criticism, even though they are fulfilled in a formalistic fashion. Political leaders’ wide but legitimate discretion also renders any collusion and corrupt behavior less likely to be caught as the causation between any bribe and payoff would be remote and indirect, and the forms of such bribes and payoffs might be diverse and ambiguous. This ambiguity could also diminish the function of judicial supervision which requires strict rules of evidence and proofs. Under a functional system of rule of law, the lack of judicial disciplinary decision in turn strengthens the legitimacy of problematic policies and politicians involved therein. This is illustrated in Malaysia’s Appellate Court decision which dismissed the application by indigenous people displaced by the Bakun Dam.¹¹¹ The decision ostensibly legitimised the government’s plans to construct the Bakun Dam despite the obvious conflict with the *United National Declaration on the Rights of Indigenous People* and common law.¹¹²

Paradox of compliance and rule of law

Malaysia is one of many countries where robust rule of law has co-existed with weak democracy or authoritarian polity.¹¹³ Historically, Germany is a typical case in point. Before Germany became a democracy in 1923 (Weimar Republic), Germans had enjoyed rule of law and civil rights such as freedom of speech and research for more than one hundred years.¹¹⁴ In Asia, Japan’s Meiji Constitution embraced rule of law and constitutionalism under an authoritarian monarchy for nearly five decades until WWII.¹¹⁵ Taiwan and South Korea had established functional rule of law too during their pre-democratic periods.¹¹⁶ In all these cases, the legal system has institutionalised politics and largely constrained political actors while offering rights protection for citizens. This kind of rule of law was made possible under authoritarian regimes because there existed a de facto checks-and-balances or political competition, which effectively constrained the top rulers from abusing the legal system and violating civil rights. In the case of German Empire in the 19th century, for example, this was the checks-and-balances between the emperor and the church, the emperor and local princes, and the

¹⁰⁹ibid.

¹¹⁰Fadzilah Majid Cooke et al, ‘The Limits of Social Protection: The Case of Hydropower Dams and Indigenous Peoples’ Land’ (2017) 4 Asia & the Pacific Policy Studies 437, 444–445.

¹¹¹*Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek & Ors* [1997] 3 MLJ 23.

¹¹²Wendy Zeldin, ‘Malaysia: Native Villagers Lose Land Rights Suit over Bakun Dam Construction’ (Global Legal Monitor, 12 Sep 2011) <<http://www.loc.gov/law/foreign-news/article/malaysia-native-villagers-lose-land-rights-suit-over-bakun-dam-construction/>> accessed 24 Nov 2022; Gurdial Singh Nijar, ‘The Bakun Dam Case: A Critique’ [1997] 3 Malayan Law Journal ccxxix.

¹¹³We do not intend to engage in the debate about rule of law and rule by law; but rather, we adopt a functionalist perspective here as to whether the legal system has largely institutionalised and therefore constrained political powers and, at the same time, has offered rights protection for citizens. If the answer is positive, the rule of law exists.

¹¹⁴Deiter Grimm, ‘Levels of Rule of Law on Possibility of Exporting a Western Achievement’ (2011) 1 European-Asian Journal of Law and Government 5.

¹¹⁵Tom Ginsburg, ‘From Signal to Legality: Meiji Japan and Authoritarian Constitutionalism’, in Weitseng Chen & Hualing Fu (eds), *Authoritarian Legality in Asia: Formation, Development and Transition* (Cambridge University Press 2020) 205–224.

¹¹⁶Weitseng Chen, ‘The Twins of Opposites – Why China Will Not Follow Taiwan’s Model of Rule of Law Transition toward Democracy’ (2018) 66 American Journal of Comparative Law 3; Seung Wha Chang, ‘The Role of Law in Economic Development and Adjustment Process: The Case of Korea’ (2000) 34 The International Lawyer 267; Youngjoon Kwon, ‘Bridging the Gap between Korean Substance and Western Form’, in Ann Black & Gary Bell (eds), *Law and Legal Institutions of Asia* (Cambridge University Press 2011).

Catholic church and protestants. In the case of Taiwan and South Korea, similar to Malaysia, it was made possible because of the political competition between the ruling party and dissident groups during regularly-held elections, which are nation-wide, quite real and competitive.

However, if such an equilibrium between law and politics breaks, the rule of law system may eventually become subject to politics. With a functional legal system but without constraints on rulers anymore, political rulers could carry out political agenda more efficiently than their counterparts in countries without assistance by a functional legal system. They could weaponise this functional legal regime if necessary. Adolf Hitler's populist rise to power, for example, ended German's a century-long practice of rule of law and took advantage of German legal system to swiftly implement anti-Semitic and fascist policies.¹¹⁷ In Japan, military nationalists ended the constitutionalism and rule of law during Meiji era and quickly mobilised the country towards wars and invasions.¹¹⁸

In the case of Malaysia, such an equilibrium between law and politics had already turned fragile even before the arrival of massive FDI from China. The consolidation of this young democracy tumbled from time to time when politicians manipulated the legal system for their own benefits. Now, in the face of Chinese investment together with political impact, intentional or unintentional, the concern is whether the functional rule of law system in such weak democracies could actually help to facilitate the penetrative effects of Chinese investment into this young democracy?

This concern can be exemplified by the binding effect of loan agreements between China and its FDI recipient countries. In recent years, Chinese investment entities have been equipped with great capacity to utilise international business law to structure their loan agreements and address transaction risks in foreign markets. A recent study of more than one hundred loan agreements between China and foreign countries show that lawyers on behalf of Chinese banks have been able to advance the legal structure of sovereign debt agreements by borrowing complex legal structures from global commercial loan markets. However, these legal arrangements and their structures, once applied in the context of sovereign debts, have created much more stringent and wider effects on borrowing states.¹¹⁹ For example, a cross-default provision could prevent Chinese banks as the creditor from falling behind other creditors in the repayment queue. Such cross-default, however, could be triggered by factors ranging from the debtor's default on any other contract to any actions broadly defined by China as adverse to interests of 'PRC entity'.¹²⁰ As a state's national interests could be much more widely construed than those of a commercial entity could possibly be, it is unsurprising that no similar precedent exists in any other existing sovereignty debt contract.¹²¹ Such broadly defined national interests incorporated in loan agreements between Chinese banks and foreign governments grant China an enormous bargaining power, both legally and politically, over their counterparties.

Notably, the efficacy of such legal mechanisms is available only if a legal system largely functions, makes relevant parties bound by such agreements, adjudicates disputes pursuant to the terms of such agreements, and enforces court decisions or arbitral awards thereafter. The confidentiality provision included by these agreements is a case in point. The above-mentioned study has collected more than one hundred agreements which all have a confidentiality clause, requiring non-disclosure or even non-acknowledgement of the existence of China's investment projects.¹²² Despite such confidentiality, the research team nonetheless has collected more than one hundred agreements from various channels. While most agreements are from African countries, none of them involves

¹¹⁷Ingo Mueller, *Hitler's Justice: The Courts of the Third Reich* (Harvard University Press 1991).

¹¹⁸Ginsburg (n 136).

¹¹⁹Anna Gelpern et al, 'How China Lends, A Rare Look into 100 Debt Contracts with Foreign Governments' (Centre for Global Development, 31 Mar 2021) <<https://www.cgdev.org/publication/how-china-lends-rare-look-into-100-debt-contracts-foreign-governments>> accessed 20 Dec 2021.

¹²⁰ibid 7–8.

¹²¹ibid.

¹²²ibid 6.

Malaysia government or Malaysian entity mostly likely due to stringent compliance with such confidentiality by Malaysia.¹²³ Paradoxically, the Malaysian government's legal consciousness and compliance makes such investment projects much less transparent and more secretive to the outside world.

Furthermore, freedom of contract could be used as an excuse of exploitation by the rich and the powerful, provided such contracts are compiled and enforceable. It has been well uncovered that Western colonial powers began foreign exploitation by asking their local partners to sign contracts without informed knowledge about the long-term impact. Chinese banks' usage of international commercial terms for sovereignty debts would create similar effects that the recipient countries might not be able to foresee. For example, the cross-default provision put recipient countries, especially countries like Malaysia that has a functional legal system and consciousness of compliance, under enormous pressure to not act in a way adverse to China's national interests widely defined by their loan agreements.

Additionally, more than 90 per cent of the contracts analysed by the above-mentioned research team include an early-termination provision and thereby create lock-in effects.¹²⁴ Such clause allows China to terminate the contract and request for immediate repayment if any significant law or policy change in the debtor countries has occurred. This provision would greatly constrain the sovereign debtors' latitude in policymaking and deter any reformist efforts to address issues caused by the investment projects.

Another similar lock-in term in China's investment contracts is the stabilisation clause, whereby the debtors/recipient countries are required to assume all the costs of change in their environmental and labor policies.¹²⁵ In a dynamic, young democracy, general public's reactions, positive or negative, to China's investment projects are inevitable.¹²⁶ When citizens, activists and non-governmental organisations react to any negative impact and require the government to address public concerns, the executive branch may oppose due to concerns about potential legal defaults.

To be fair, it is understandable for international lawyers that represent China to borrow such lock-in clauses from commercial deals when working on novel projects. These commercial terms, however, are designed for much narrower scope of business and entities in commercial contexts. If they are applied to sovereign states and public polices, the impacts are on a slippery slope. For example, the stabilisation and cross-default clauses are designed to hedge against any adverse interest to the contracting entity. In commercial contexts, adverse interests usually surround certain business activities and financial status of the specific private entity, and therefore, are generally identifiable. However, it is not the case if contracting parties are sovereign states. If a policy or bill is passed to improve, for example, environmental conservation and labor working conditions in the recipient country and thereby increases the compliance costs of Chinese entities, the stabilisation clause could be triggered to allow Chinese entities to seek compensation and immediate repayment. Such lock-in arrangements could possibly explain why China has been very successful in managing high-risk projects in Malaysia.

Overall, China's lock-in deal structure creates a mismatch between political and economic developments in recipient countries. Politically, a democratic country often increases social welfare benefits and develop progressive schemes along with economic growth. When economic conditions improve, calls for wealth distribution would kick in and politicians need to respond. Such political

¹²³ibid.

¹²⁴ibid 7.

¹²⁵ibid 37.

¹²⁶Joel Liew Sze Kiong, 'The Fate of Chinese Mega Projects in Myanmar in Light of Growing Sentiment Against Chinese Investors' (China, Law and Development Research Brief No 7/2020, 15 Jul 2020) <<https://cld.web.ox.ac.uk/files/finaliewwpdf>> accessed 20 Dec 2021; Michael Leong Wen Wei, 'The Questionable Legality and Prospects of Chinese Hydropower Dam Investments in Cambodia' (China, Law and Development Research Brief No 6/2020, 15 Jul 2020) <<https://cld.web.ox.ac.uk/files/finalleongpdf>> accessed 20 Dec 2021.

development eventually would have an impact on the economic system; for example, transaction parties' compliance costs of labor and environmental regulations would increase. However, under the current legal structure of China's development projects, the lock-in mechanisms deem such foreseeable democratic development as an event of default. Consequently, it disincentivises incumbent politicians from accepting progressive reforms; otherwise, their political capital may suffer due to potential termination of China's investment projects. As a result, calling for reforms are intensified due to such inaction. As tensions accumulate, politicians turn insure in the face of next election. Worrying about increasing opposition and any irregularity to be exposed during election, ruling elites would begin to take harsher position towards the opposition, on the one hand, and increase dependence on Chinese investment to boost short-term performance in order to increase their popularity, on the other. In short, a vicious cycle emerges in this electoral democracy.

This vicious cycle would continue until an election defeat breaks it. The rise and fall of Najib's ascendance is a case in point. However, this does not mean the electoral system serves a mechanism of ending this vicious cycle. Rather, the electoral system would prolong and continue this vicious cycle under the current deal structure of Chinese projects. The lock-in clauses constitute the strong incentive of ruling elites to rely on Chinese capital to increase the probability of electoral victory. Sometimes, the electoral system could serve as a circuit breaker of this vicious cycle if ruling elites fail to contain the increasing amounts of public anger and suffer election loss. However, the subsequent government has to face the same lock-in structures and dynamics in relation to Chinese investment. Also, the new government still needs foreign investment to boost its economic performance. Observers have witnessed such continuity in the post-Najib era in Malaysia – only three years after Najib's fall in 2018, Malaysia renewed its vigorous collaboration with China.

Malaysia possesses a shared, highly instrumental understanding of legality with China, as part of the authoritarian legacy that many young democracies have to deal with in the process of democratic consolidation. Such understanding of legality, which defines what is legal, is usually subject to negotiations between transaction parties during the law enforcement process, rather than negotiations between general stakeholders during the legislative process. Therefore, while a law is supposed to define the boundary between legality and illegality, such negotiated legality renders any law at issue merely as a reference point for subsequent negotiations in the process of enforcement. Such understanding of legality is vulnerable to manipulation, political interference, and rent-seeking. However, it is flexible, spontaneous, and efficient under certain circumstance, and offers good-enough predictability and certainty for various stakeholders in the field. Also, negotiation costs during enforcement would be arguably lower than those during legislation process because fewer parties are involved, issues are more specific, and ad hoc solutions are usually easier to come up with than drafting abstract and coherent rules in the legislative or contract-making process to apply to future disputes. This may explain how Chinese investment projects could be quickly executed in Malaysia and may subsequently be subject to political and legal negotiations afterwards.

Considering that many democracies lack sufficient legal institutions to scrutinise long-term effects of foreign investment, scholars have called for the establishment of constructive vigilance to scrutinise any negative influence on open democracy brought about by foreign investors, including those from China.¹²⁷ This is a reverse trend against the previous version of globalisation that advocates for free capital flow. Existing regulatory frameworks regarding foreign investment commonly shared by democratic countries do not have regulatory capacity sufficient for immense scale of investment. The purpose of such vigilance is to establish screening, monitoring or defensive mechanisms in order to maintain the openness and fairness of democracy. Such vigilance could range from the further requirement of disclosure of investment projects, to the establishment of the codes of conducts to improve the integrity of actors involved in investment and collaboration

¹²⁷Larry Diamond & Orville Schell, *Chinese Influences & American Interests: Promoting Constructive Vigilance* (Hoover Institution Press 2018).

with Chinese entities, also from imposition of reciprocity to ensure mutual access and openness for information, investment and exchange opportunities, to the creation of a new governmental agency that provides guidelines and information (including confidential background check on individuals and organisations involved in such transactions) for other governmental and non-governmental organisations.¹²⁸ Tit-for-tat is not excluded as a means to achieve such goals.¹²⁹ Lack of such vigilance would render democratic countries as vulnerable as non-democratic countries.

Conclusion

China's investments offer much-needed economic and infrastructure development to Malaysia, propelling it towards aspirations of establishing a globally competitive economy. At the same time, a rise in repression and weakening of democratic institutions has become apparent. Several potential explanations for the phenomenon arise from this case study. For Malaysia's ruling elite, China's investments offer additional benefits of enhanced performance legitimacy in the eyes of constituents in the form of economic development. Against a background of accountability structures that had been weakened in earlier years, investments without questions or reforms premised on liberal democratic values appears to have strengthened the position of the ruling elite, enabling them to resist reforms that weaken their dominance.

While an increase in authoritarianism has been observed in recent years, an 'Asian values' perspective of human rights and the rule of law has been prevalent in Malaysia for several decades prior to its engagement with Chinese investors. The strength of collaboration with China and support for economic development including finance arguably emboldens the ruling elite in reiterating perspectives shared with a rising global economic powerhouse. From civil society's perspective, the rise in repression is concerning in light of enhanced digital surveillance capabilities. As a young democracy, Malaysia is at crossroads. It outperforms China in terms of all good governance indicators. However, its democratic institutions at the moment still lack vigilance to scrutinise potential impacts of Chinese investment. China might not intend to diffuse any ideas of authoritarianism in Malaysia, and its policy of non-interference in other countries' internal affairs resonates with perspectives that have been central to the region long before China's economic ascent. Nevertheless, this case study suggests the need for accountability mechanisms to mitigate the risk that flow from foreign investment. Functional rule of law coupled with weak democracy create an optimal environment for such a potential abuse. The risks are especially pertinent where the political elite in vulnerable democracies with some authoritarian characteristics draw on the benefits engendered by foreign direct investment to consolidate their control over resources, resist reforms and entrench their political power through repressive measures. Finally, this case study suggests the need for further research to investigate alternative approaches to development in the Global South, seeking to strike a balance between growth, autonomy, and human rights.

¹²⁸ibid.

¹²⁹ibid.