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Environmental Litigation in BRI Host Countries

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Key Points:

- In light of the growing emphasis on “greening” the BRI and interest in forms of BRI-related dispute resolution, observers should not ignore environmental lawsuits brought in BRI host countries’ domestic legal systems. CLD researchers are in the process of conducting fieldwork on such issues.
- Environmental lawsuits against coal-fired plants funded and built by Chinese companies in Kenya and Indonesia shed light on environmental issues and the ways in which local citizens mobilize through their domestic courts.
- Looking ahead, we can expect to see more environmental litigation in other jurisdictions that pursue similar strategies.

Among the projects affiliated with China’s Belt and Road Initiative (BRI), investments in carbon-emitting fuel sources have garnered special attention and criticism.¹ In addition to raising alarm about global emissions, affected communities have protested the impacts that environmental degradation would have on local ecosystems, human health, and economies.² Lamenting the supposedly fragile regulatory frameworks of BRI host countries, commentators have encouraged the Chinese government to force its companies to bring stricter environmental standards along with them.³

In response, China’s top leaders have emphasized the need to “green” the BRI. At the Second Belt

¹ See, e.g., LACHLAN CAREY & SARAH LADISLAW, CHINESE MULTILATERALISM AND THE PROMISE OF A GREEN BELT AND ROAD, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (2019); Han Chen, *Greener Power Projects for the Belt & Road Initiative (BRI)*, NATURAL RESOURCES DEFENSE COUNCIL (Apr. 22, 2019), <https://www.nrdc.org/experts/han-chen/greener-power-projects-belt-road-initiative-bri>; Isabel Hilton, *How China’s Big Overseas Initiative Threatens Global Climate Progress*, YALE ENVIRONMENT 360 (Jan. 3, 2019), <https://e360.yale.edu/features/how-chinas-big-overseas-initiative-threatens-climate-progress>.

² See, e.g., GREENPEACE, POLLUTING PARADISE (2018); Tommy Apriando, *Local People Challenge Coal Plant Expansion in*

Bali, CHINA DIALOGUE (Sept. 4, 2019), <https://chinadialogue.net/en/pollution/11497-local-people-challenge-coal-plant-expansion-in-bali-2>; Jevans Nyabiage, *China Meets Resistance Over Kenya Coal Plant, in Test of its African Ambitions*, SOUTH CHINA MORNING POST (July 14, 2019), <https://www.scmp.com/news/china/diplomacy/article/3018489/china-meets-resistance-over-kenya-coal-plant-test-its-african>; Maina Waruru, *Backers of Lamu Coal Project Lose Court Case*, CHINA DIALOGUE (July 4, 2019), <https://chinadialogue.net/en/energy/11355-backers-of-lamu-coal-project-lose-court-case>.

³ See, e.g., Tancrede Voituriez, Wang Yao & Mathias Lund Larsen, *Revising the ‘Host Country Standard’ Principle*,

and Road Forum in April 2019, President Xi Jinping stressed “open, green and clean cooperation,” and suggested that China “may launch green infrastructure projects, make green investment and provide green financing to protect the Earth which we all call home.”⁴ Chinese agencies are also increasingly involved in the day-to-day work of environmental governance along the Belt and Road.⁵

Alongside discussions about greening the BRI, a parallel literature on BRI-related dispute resolution has emerged. These works have focused on the ecology of alternative dispute resolution centers and their likely role in arbitrating or mediating BRI-related disputes.⁶ Much writing has also looked at the potential for dispute resolution by national Chinese courts, such as the China International Commercial Court.⁷ Less scholarly attention, it seems, has been paid to litigation that arises in a host country’s domestic legal system.⁸

This Research Brief draws attention to environmental lawsuits filed in a BRI host country’s national court system. These instances of litigation not only occur, but they also have

impacts on the parties involved, as well as potential downstream effects in the host country and elsewhere. Below, I describe two recent examples in Kenya and Indonesia. In both cases, litigants requested that the courts halt the construction or expansion of Chinese-backed coal-fired power plants. In addition to explaining the projects, their connections to the BRI, and the plaintiffs’ legal claims, I discuss the potential implications, including the high likelihood that similar environmental lawsuits will continue to occur.

Kenya: Save Lamu v. National Environmental Management Authority

In September 2014, the Amu Power Company won a bid to construct a 1050 mega-watt coal-fired power plant in Lamu County, Kenya—a coastal county famous for its island chains and natural beauty. Amu Power is run by a consortium of Kenyan, Omani, American, and Chinese companies, including the state-owned China Huadian Corporation.⁹ In 2017, the state-owned Power Construction Corporation of China agreed to build the plant, and the plant had been

CLIMATE POLICY (2019); Elizabeth Losos et al., *Is a Green Belt and Road Feasible?*, WORLD BANK BLOGS (Jan. 29, 2019), <https://blogs.worldbank.org/trade/green-belt-and-road-feasible-how-mitigate-environmental-risk-bri-infrastructure-project>.

⁴ Xi Jinping, President, People’s Republic of China, Keynote Speech at the Opening Ceremony of the Second Belt and Road Forum for International Cooperation: Working Together to Deliver a Brighter Future for Belt and Road Cooperation (Apr. 26, 2019), https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1658424.shtml.

⁵ See Johanna Coenen et al., *Environmental Governance of China’s Belt and Road Initiative*, ENVIRONMENTAL POLICY AND GOVERNANCE (2020).

⁶ See, e.g., Nguyen Thi Lan Anh & Mai Ngan Ha, *Legal Challenges to the Belt and Road Initiative*, in CRITICAL REFLECTIONS ON CHINA’S BELT & ROAD INITIATIVE 159 (2020); Matthew S. Erie, *The New Legal Hubs*, 60 VIRGINIA JOURNAL OF INTERNATIONAL LAW 225; Patrick M. Norton, *China’s Belt and Road Initiative*, 13 UNIVERSITY OF PENNSYLVANIA ASIAN LAW

REVIEW 73 (2018); Malik R. Dahlan, *Envisioning Foundations for the Law of the Belt and Road Initiative*, 62 HARVARD INTERNATIONAL LAW JOURNAL ESSAY (2020).

⁷ See, e.g., Pamela Bookman, *The Adjudication Business*, 45 YALE JOURNAL OF INTERNATIONAL LAW 227 (2020); Sheng Zhang, *China’s International Commercial Court*, 11 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 150 (2020); Matthew S. Erie, *Update on the China International Commercial Court*, CHINA, LAW AND DEVELOPMENT RESEARCH BRIEF (June 30, 2019), <https://cld.web.ox.ac.uk/file/438421>.

⁸ One exception is Ma Tianjie, *INTERVIEW: China’s Overseas Investments Face Legal Pushback*, DIALOGO CHINO (Feb. 4, 2020), <https://dialogochino.net/en/extractive-industries/33346-interview-chinas-overseas-investments-face-legal-pushback>.

⁹ Dana Ullman, *When Coal Comes to Paradise*, FOREIGN POLICY (June 9, 2019 04:48 AM), <https://foreignpolicy.com/2019/06/09/when-coal-came-to-paradise-china-coal-kenya-lamu-pollution-africa-chinese-industry-bri>.

designated as part of the BRI by the Chinese government.¹⁰ Reports indicate that the Industrial and Commercial Bank of China provided loans that totaled somewhere between \$900 million and \$1.2 billion.¹¹

The Lamu power plant project sparked immediate pushback. Activists argued that the plant would cause air pollution, water pollution, and increased carbon emissions that would result in premature human deaths, low birth weights, acid rain, and the destruction of mangrove forests and marine habitats.¹² Much attention was also paid to the plant's proximity to Lamu Town, a UNESCO World Heritage Site known for being "the oldest and best-preserved Swahili settlement in East Africa."¹³

In November 2016, Save Lamu and deCOALonize (two grassroots NGOs) filed a lawsuit in the National Environmental Tribunal of Kenya (NET) against the Amu Power Company and the Kenyan National Environmental Management Authority (NEMA).¹⁴ In accordance with Kenyan statutes and regulations,¹⁵ Amu Power conducted an Environmental and Social Impact Assessment (ESIA). In September 2016, NEMA approved the assessment and issued an Environmental Impact Assessment License. Arguing that the license was issued following a rushed consultation process and a lack of public participation, the litigants asked the NET to nullify the ESIA and to revoke the license.

In June 2019, the NET ruled on behalf of the plaintiffs. The NET found that both defendants failed to properly involve, engage with, and respond to the public during the ESIA process. For example, although there were various stakeholder meetings organized during the scoping phase of the project in 2015, there was no evidence that public consultation meetings took place when the ESIA study was being conducted between January and July 2016.¹⁶ Nor was there any indication that the defendants sought or received public input during the study phase, despite the requirements in Kenya's Environmental Impact Assessment Regulations.¹⁷

After Amu Power sent the ESIA study to NEMA for review in July 2016, NEMA likewise did not properly engage with the public. Although NEMA held a number of public consultation meetings, the NET criticized the agency for "nonchalantly" dealing with community objections.¹⁸ Moreover, the NET found that the agency had failed to make the information in the study report available "in good time to members of the public, or at all."¹⁹ The lack of public participation also led the NET to question the quality of the proposed environmental mitigation measures, such as whether or not the study's adaptation measures for climate change complied with obligations under Kenya's Climate Change Act or the Paris Agreement.²⁰

In addition to outlining the details of the inadequate process, the NET emphasized the

¹⁰ Tom Wilson & Christian Shepherd, *Kenyan Court Blocks China-backed Power Plant on Environment Grounds*, FINANCIAL TIMES (June 27, 2019), <https://www.ft.com/content/9313068e-98dc-11e9-8cfb-30c21dcd229>.

¹¹ *Id.*; Nyabiage, *supra* note 2. Note also that U.S. company General Electric purchased a 20 percent stake worth \$400 million in the power plant in May 2018.

¹² Waruru, *supra* note 2.

¹³ *Lamu Old Town*, UNESCO WORLD HERITAGE CONVENTION, <https://whc.unesco.org/en/list/1055>.

¹⁴ *Save Lamu v. National Environmental Management Authority* (2019) (N.E.T.) (Kenya).

¹⁵ *See id.*; Arend Kolhoff, *Kenya SEA Profile*, NETHERLANDS COMMISSION FOR ENVIRONMENTAL ASSESSMENT (Jan. 27, 2015), <https://www.eia.nl/en/countries/kenya/eia-profile>.

¹⁶ *Save Lamu* at 47.

¹⁷ *Id.* at 48.

¹⁸ *Id.* at 72.

¹⁹ *Id.* at 69.

²⁰ *Id.* at 135-41.

normative significance of public participation, especially in the context of decisions regarding the proper balance between environmental protection and economic development:

[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 By all accounts, [this report] was an impressive piece of literal work but devoid of public consultation content . . . thus rendering it ineffective and at best only of academic value.²¹

Indonesia: Wijana v. Governor of Bali Province

Not all local environmental litigation is successful, however, as illustrated by the case of the Celukan Bawang coal-fired power station in North Bali, Indonesia. In October 2010, the Indonesian government and two subsidiaries of China Huadian Corporation reached an agreement on the construction of a 380-plus mega-watt power station.²² The China Development Bank provided a \$700 million loan, with additional support coming from the Export-Import Bank of China.²³ The first units came online in August 2015.²⁴ Although the project was conceived before the start of the BRI in 2012, reports suggest that China's National Development and Reform Commission (a key player in implementing the BRI) was a strong supporter of this and similar projects in Indonesia.²⁵

Like the proposed Lamu power plant, the construction of the Celukan Bawang power station generated resistance from Indonesian citizens and international partners. Focusing here on the environmental concerns, NGO reports and news outlets have described the environmental degradation caused by the station's construction, which harmed the community's farming and fishing industries.²⁶ There was a lack of detail and transparency surrounding the station's waste management plan, and residents fear the potential negative effects of mercury pollution, falling coal ash, and nitrogen-dioxide emissions.²⁷

In 2014, after the launch of the BRI, discussions about a second-phase expansion began. Following an environmental impact assessment, the proposed expansion plan received an Environmental Development Permit from the provincial government of Bali in April 2017. Against the backdrop of dissatisfaction with the existing power station and growing documentation of its negative effects, Indonesian residents and Greenpeace Indonesia filed an administrative lawsuit against the Bali provincial government in January 2018 for improperly issuing the environmental permit.²⁸

Similar to the litigation against the Lamu power plant, the plaintiffs focused on the lack of public participation and transparency during the permitting process.²⁹ They also criticized the environmental impact assessment for failing to holistically evaluate the environmental effects of

²¹ *Id.* at 73.

²² 2 *Chinese Firms to Build New Coal Plant*, JAKARTA POST (Oct. 29, 2010 10:53), <https://www.thejakartapost.com/news/2010/10/29/2-chinese-firms-build-new-coal-plant.html>.

²³ Apriando, *supra* note 2.

²⁴ Julkifli Marburn, *Celukan Bawang Coal Powered Plant Comes on Stream in Bali*, REPUBLIKA (Aug. 12, 2015 23:33), <https://en.republika.co.id/berita/en/national->

[politics/15/08/12/nsz10r317-celukan-bawang-coal-powered-plant-comes-on-stream-in-bali](https://www.thejakartapost.com/news/2010/10/29/2-chinese-firms-build-new-coal-plant.html).

²⁵ Yan Zhou & Zhao Hua Huang, *Indonesian 'Gold Rush'*, CHINA DAILY (Nov. 15, 2010), <https://www.pressreader.com/hong-kong/china-daily/20101114/282823597567522>.

²⁶ GREENPEACE, *supra* note 2, at 5.

²⁷ *Id.* at 7; Apriando, *supra* note 2.

²⁸ Complaint (Unofficial Translation), *Wijana v. Governor of Bali Province* (Jan. 24, 2018) (Indonesia).

²⁹ *Id.* at 73-78.

the expansion, among other deficiencies.³⁰ In addition to alleging violations of Indonesian statutes related to the protection and management of coastal areas and small islands, the litigants alleged violations of the United Nations Framework Convention on Climate Change and the Paris Agreement.³¹ Nine local and international environmental NGOs filed an amicus brief in support of the litigants' claims in June 2018.³² The litigants requested that the court enjoin the expansion project and nullify the environmental permit.

Unlike in Kenya, the Indonesian courts ruled against the plaintiffs. The Denpasar State Administrative Court rejected the case in August 2018.³³ Although I was unable to find much detail on the reasoning of the court, news reports alluded to the plaintiffs' lack of standing and the court's belief that new technology would be able to mitigate the risk of pollution.³⁴ Both the Surabaya High Court and then the Supreme Court of Indonesia upheld the decision on appeal.³⁵

Potential Impacts and Implications

By presenting these case studies side by side, I draw attention to a specific but important type of legal response to the BRI. Although the cases resulted in different outcomes, they indicate the environmental concerns generated by BRI projects more generally. The examples also point to the kinds of domestic legal claims that might be brought to resist these projects.

Zooming in on the decisions themselves reveals some of the limits of environmental litigation. In Indonesia, the courts allowed the proposed expansion to proceed despite the litigants' best efforts to challenge the legitimacy of the licensing process. In Kenya, while the NET ruled in favor of the plaintiffs, the decision was quite narrow. For example, the NET emphasized that it was not questioning the legitimacy of coal energy as a possible energy source, but only whether the defendants complied with the procedures for setting up such plants.³⁶ Even after the decision in favor of the plaintiffs, Amu Power Company can conduct a new ESIA; if approved and proper, the Lamu power station may still come online in the coming years.

Nonetheless, I suggest that the two cases have implications beyond the four corners of their respective judgments. For Chinese companies and officials, the setback in Kenya highlights the difficulties of handling the environmental concerns that accompany international development efforts. Notably, Chinese ambassador to Kenya Wu Peng invited members of deCOALonize to discuss the Lamu power station only two days after the NET decision. In the meeting, Ambassador Wu emphasized the right of Kenyans to decide whether there would or would not be a coal-fired power plant as well as his personal opposition to such plants.³⁷ Despite the failed litigation at Celukan Bawang, the

³⁰ *Id.* at 113-34.

³¹ *Id.* at 48-65.

³² Brief for Wijani et al. as Amici Curiae Supporting Plaintiffs, *Wijani v. Governor of Bali Province* (June 26, 2018) (Indonesia).

³³ Michael Taylor, *Court Rejects Bid to Stop Expansion of Coal-Fired Power Plant in Bali*, JAKARTA GLOBE (Aug. 18, 2018), <https://jakartaglobe.id/news/court-rejects-bid-to-stop-expansion-of-coal-fired-power-plant-in-bali>.

³⁴ *Id.*

³⁵ Apriando, *supra* note 2.

³⁶ *Save Lamu v. National Environmental Management Authority* (2019) (N.E.T.) (Kenya), 19.

³⁷ *deCOALonize Team Meets with Chinese Ambassador to Kenya WU Peng Over Controversial Lamu Coal Plant*, DECOALONISE (July 1, 2019), <https://www.decoalonize.org/decoalonize-team-meets-with-chinese-ambassador-to-kenya-wu-peng-over-controversial-lamu-coal-plant>. In contrast, U.S. ambassador to Kenya Kyle McCarter registered his dissatisfaction in a tweet that stated: "Kenya needs a larger less costly base load of power first. Coal is the cleanest

litigation trained local and international attention on Chinese investments in Indonesia and elsewhere.

The two cases also present a blueprint for future challenges in other jurisdictions. The United Nations Environment Programme applauded the Lamu litigation for its lessons to others about successful grassroots coordination, media campaigns, information sharing, and lobbying.³⁸ As discussed, the two cases involved comparable legal tactics and arguments, with a focus on the environmental impact assessment process and administrative licensing. Although Chinese parties strive to sidestep local law and host state courts,³⁹ similar instances of environmental litigation may be hard to avoid, especially given China's heavy involvement in carbon-intensive energy projects.

In fact, we can expect at least one more court decision in the near future. In April 2016, Rabab Ali—a seven-year-old girl from Karachi, Pakistan—filed a petition on behalf of herself, her generation, and future generations against the Pakistani government for approving a plan to develop coal fields in the Thar Desert.⁴⁰ Again, we see allegations that the Pakistani government violated its commitments under local laws (including the Pakistani Constitution) and international treaties. And again, we see the footprint of the BRI, as the petition explicitly

mentions the \$1.2 billion of funding approved by China's State Council and the project's connection to the China-Pakistan Economic Corridor. The Supreme Court of Pakistan has determined that the minors were indeed allowed to file a petition through their attorneys,⁴¹ and a ruling on the merits is pending. In Peru, local groups are also gearing up to file legal challenges to the environmental impact assessments related to state-owned Sinohydro's Amazon Waterway project.⁴²

For all the attention rightly paid to less transparent forms of dispute resolution or the potential for Chinese national courts to get involved, this Research Brief reminds us to not forget the role of national courts in BRI host countries. Although it is difficult to track domestic cases across jurisdictions, keeping tabs on this type of litigation is critical to understanding the state-society relations implicated by most BRI projects. For those interested in Chinese efforts to "green" the BRI, environmental lawsuits also provide a helpful window onto the on-the-ground problems faced by local communities and the ways in which they may mobilize in response.

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least costly option. Investors will come." Waruru, *supra* note 2.

³⁸ *Lamu Coal Plant Case Reveals Tips for Other Community-Led Campaigns*, UN ENVIRONMENT PROGRAMME (Aug. 22, 2019), <https://www.unenvironment.org/news-and-stories/story/lamu-coal-plant-case-reveals-tips-other-community-led-campaigns>.

³⁹ Matthew S. Erie, *Chinese Law and Development*, 62 HARVARD INTERNATIONAL LAW JOURNAL (forthcoming).

⁴⁰ *Petition, Ali v. Federation of Pakistan* (Apr. 1, 2016) (Pakistan).

⁴¹ Naeem Sahoutara, *Seven-year-old Girl Takes on Federal, Sindh Governments*, EXPRESS TRIBUNE (June 29, 2016), <https://tribune.com.pk/story/1133023/seven-year-old-girl-takes-federal-sindh-governments>.

⁴² Ma, *supra* note 8.