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Johanna Aleria P. Lorenzo

A Multilateral Track for Sustainable Development Along the Belt and Road: Aligning Country Ownership with International Rule of Law

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A Multilateral Track for Sustainable Development Along the Belt and Road: Aligning Country Ownership with International Rule of Law

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Abstract:

The paper scrutinizes the purported synergies between the Belt and Road Initiative (BRI) and the United Nations 2030 Agenda for Sustainable Development by examining the normative framework of the Initiative. The examination focuses on whether and how the conduct of relevant actors is regulated, particularly with regard to the environmental and social impacts of the economic activities – bulk of which consists of infrastructure projects – along the Belt and Road. One problematic feature of the existing legal and regulatory framework is its fragmentation – the variability of applicable sustainability standards – due to the predominantly bilateral character of the pseudo-formal agreements between China and the BRI participating States. Using a narrow, outdated view of sovereignty, these agreements rely on the environmental and social standards of the host/borrowing State. Such reliance poses challenges to achieving sustainable development along the Belt and Road, given the weak or sometimes inexistent safeguards for the protection of people and the environment within the domestic legal and regulatory systems of many host/borrowing States. Recent reports of polluted or dried-up rivers, inhuman working conditions, and displacement of indigenous peoples or local communities in some BRI States are symptomatic of this broader problem.

To remedy such problem, I argue for the multilateralization of the international lawmaking process along the Belt and Road. Given the transnational or cross-border character of the BRI and the interdependent, multi-dimensional (economic, environmental, social) impacts of many of its projects, its legal and regulatory framework needs to be informed by and aligned with the normative framework and standard-setting efforts concerning sustainable development at the multilateral level. The related international obligations of China and of the other BRI participating States on environmental and human rights protection and their commitments to sustainable development have to be taken into account when designing, approving, financing, and implementing infrastructure projects along the Belt and Road. I further posit that, consistent with the duty of international cooperation and assistance, China, as the main proponent of the Initiative and the party to the bilateral agreements with greater resources and capacity to implement reforms, should ensure that BRI infrastructure projects do not undermine the host/borrowing State's ability to comply with its other obligations under international environmental law and international human rights law. Lastly, to bring the BRI in closer alignment with international sustainable development law, I suggest that the principles of integration and public participation, which also include transparency, have to be applied both at the project-level and during the negotiation phase for the memoranda of understanding and related financing agreements. The multi-dimensionality of sustainable development and the global holistic ambition of the Initiative call for a participatory and inclusive approach to decisionmaking and to the implementation of norms.

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1. Introduction

In September 2015, the United Nations General Assembly (UNGA) adopted “a plan of action for people, planet and prosperity” and 193 States¹ thereby pledged common action towards the achievement of 17 Sustainable Development Goals (SDGs) and 169 targets that “balance the three dimensions of sustainable development: the economic, social and environmental”.² 140 of those 193 States are also participants³ in the Belt and Road Initiative (*hereinafter*, “BRI” or “Initiative”), which China envisions as “instill[ing] vigor and vitality into the ancient Silk Road, connect[ing] Asian, European and African countries more closely and promot[ing] mutually beneficial cooperation to a new high and in new forms”.⁴ Spanning more continents than Marco Polo could have imagined exploring, covering close to fifty million square kilometers of land and sea,⁵ and comprising over two thousand infrastructure projects (railways, ports, bridges, power plants, etc.) estimated to be worth at least USD3.7 Tn (€3.06 Tn),⁶ the Initiative comprises one-third of the world’s gross domestic product (GDP)⁷ and is bound to affect no less than 65% of the world population, amounting to roughly 4.4 billion people.⁸ The Initiative likewise stands to fill a considerable global infrastructure investment gap, which roughly costs USD15 Tn (€12.54 Tn) with some regional variations.⁹

¹ United Nations, *Historic New Sustainable Development Agenda Unanimously Adopted by 193 UN Members*, SUSTAINABLE DEVELOPMENT SUMMIT NEWS (2015), <https://www.un.org/sustainabledevelopment/blog/2015/09/historic-new-sustainable-development-agenda-unanimously-adopted-by-193-un-members/> (last visited Feb 11, 2021).

² G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Oct 21, 2015) [*hereinafter*, “UN 2030 Agenda”].

³ Belt and Road Portal, “List of countries that have signed cooperation documents with China to jointly build the ‘Belt and Road’,” <https://www.yidaiyilu.gov.cn/gbjg/gbgk/77073.htm> (last visited Jan 13, 2021). (Per official Chinese records, “[a]s of January 11, 2021, China has signed 204 cooperation documents for the joint construction of the ‘Belt and Road’ with 140 countries and 31 international organizations.”).

⁴ National Development and Reform Commission (NDRC), Ministry of Foreign Affairs (MFA), and Ministry of Commerce (MOFCOM), with State Council authorization, *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, 28 March 2015. NDRC Website: https://en.ndrc.gov.cn/newsrelease_8232/201503/t20150330_1193900.html (last visited Jan 18, 2021) [*hereinafter*, “*Vision and Actions*”].

⁵ See Helen Chin & Winnie He, *The Belt and Road Initiative: 65 Countries and Beyond*, Fung Business Intelligence Center, May 2016, https://www.fbicgroup.com/sites/default/files/B&R_Initiative_65_Countries_and_Beyond.pdf (last visited Feb 12, 2021). See also Mercator Institute for China Studies (MERICS), “Mapping the Belt and Road Initiative: this is where we stand,” 07 June 2018, <https://merics.org/en/analysis/mapping-belt-and-road-initiative-where-we-stand> (last visited Feb 12, 2021).

⁶ Refinitiv, “BRI Connect: An Initiative in Numbers,” May 2019, https://www.refinitiv.com/content/dam/marketing/en_us/documents/reports/refinitiv-zawya-belt-and-road-initiative-report-2019.pdf (last visited Feb 12, 2021).

⁷ The World Bank, “Overview – BRI at a Glance,” 29 March 2018, <https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative> (last visited Feb 12, 2021).

⁸ Mengni Chen & Paul S. F. Yip, *A study on population dynamics in “Belt & Road” countries and their implications*, 2 CHINA POPUL. DEV. STUD. 158, 159 (2018).

⁹ Global Infrastructure Outlook website: <https://outlook.gihub.org/> (last visited Mar 12, 2021). See also UN Habitat, *The Sustainable Investment Gap and How to Close It: Cities, Infrastructure and SDG Investment Gap*, Discussion Paper 01 – Feb 4, 2020, https://unhabitat.org/sites/default/files/2020/02/the_sustainable_investment_gap_and_how_to_close_it_february_2020.pdf (last visited Mar 12, 2021); Jonathan Woetzel et al., *Bridging Infrastructure Gaps: Has the World Made Progress?*, Discussion Paper in Collaboration With McKinsey’s Capital Projects and Infrastructure Practice (2017), <https://www.mckinsey.com/-/media/McKinsey/Business%20Functions/Operations/Our%20Insights/Bridging%20infrastructure%20gaps%20How%20has%20the%20world%20made%20progress%20v2/MGI-Bridging-infrastructure-gaps-Discussion-paper.pdf> (last visited Mar 12, 2021).

The BRI has considerable impact on the prospects for realizing the SDGs. What is more, the Chinese government itself, together with various institutions and scholars, acknowledges this relationship and in fact touts or harps upon the existence of ‘synergies’ between the BRI and the sustainable development agenda. On paper at least, it appears that the BRI aims to align with the UN 2030 Agenda and to uphold the international legal obligations implicated in such global undertaking. However, in the light of reported harmful economic, environmental, and social impacts – denuded forests,¹⁰ dried-up or polluted rivers,¹¹ local communities’ loss of livelihood, displaced indigenous peoples¹² – of some BRI infrastructure projects, it bears asking whether such harms¹³ are due to the absence of standards and mechanisms, or perhaps the inadequacy of the nascent and emerging legal framework that can regulate the various activities within the Initiative. Alternatively, it may be asked whether these instances can be considered as isolated violations that can be addressed by establishing and/or strengthening accountability and enforcement mechanisms, which would facilitate compliance with the environmental and social safeguards.

What legal rules apply to the design, appraisal, and implementation of infrastructure projects in different States participating in the Initiative? Are there environmental and social safeguards in place to take into account and mitigate the risks to people and the environment posed by these primarily economic activities? Are these rules and safeguards consistently made available and uniformly applied across the various BRI participating countries? Can bilateral, pseudo-formal agreements embody values that promote sustainable development and international rule of law along the Belt and Road? How does the Initiative relate, if at all, to the international legal order and to the standard-setting processes, particularly those concerning sustainable development, occurring at the

¹⁰ See e.g. Elizabeth Losos, Alexander Pfaff & Lydia Olander, *The deforestation risks of China’s Belt and Road Initiative*, BROOKINGS: FUTURE DEVELOPMENT (2019), <https://www.brookings.edu/blog/future-development/2019/01/28/the-deforestation-risks-of-chinas-belt-and-road-initiative/> (last visited Feb 11, 2021).

¹¹ See e.g. Shibani Mahtani, *How China’s Belt and Road initiative is choking the Mekong River*, WASHINGTON POST, January 28, 2020, <https://www.washingtonpost.com/graphics/2020/world/the-mekong-river-basin-under-threat/> (last visited Feb 11, 2021).

¹² See People of Asia for Climate Solutions (PACS), The Asian Peoples’ Movement on Debt and Development (APMDD), and The Asia Comms Lab (ACL), *BELT AND ROAD THROUGH MY VILLAGE* (2021), available: <https://www.brivillage.asia/> (last visited Feb 11, 2021).

¹³ The adverse impacts of BRI infrastructure projects – ranging from various forms of environmental damage to involuntary resettlement or displacement of communities, including indigenous peoples, to inhumane working conditions – have been extensively documented by several authors, and will not be tackled in detail here. See e.g. China Development Bank & United Nations Development Programme (UNDP) China, *Harmonizing Investment and Financing Standards towards Sustainable Development along the Belt and Road* 24–25 (2019), <http://www.un.org.cn/uploads/20191108/bbb5cee285b9e35d7de574f4e9e4f6df.pdf> (last visited Jan 18, 2021); Organisation for Economic Co-operation and Development (OECD), *China’s Belt and Road Initiative in the global trade, investment and finance landscape*, in *OECD BUSINESS AND FINANCE OUTLOOK 2018* 61–101, 22 (2018), https://read.oecd-ilibrary.org/finance-and-investment/oecd-business-and-finance-outlook-2018/the-belt-and-road-initiative-in-the-global-trade-investment-and-finance-landscape_bus_fin_out-2018-6-en# (last visited Jan 3, 2020); Tymoteusz Chajdas, *BRI Initiative: a New Model of Development Aid?*, in *THE BELT AND ROAD INITIATIVE: LAW, ECONOMICS, AND POLITICS* 416–453, 446–47 (Julien Chaisse & Jędrzej Górski eds., 2018); Kelly Sims Gallagher & Qi Qi, *Policies Governing China’s Overseas Development Finance: Implications for Climate Change* 2–3 (2018), https://sites.tufts.edu/cierp/files/2018/03/CPL_ChinaOverseasDev.pdf (last visited Nov 14, 2020); Simon Zadek & Yuan Wang, *Sustainability Impacts of Chinese Outward Direct Investment: A review of the literature* 23 (2016), <https://www.iisd.org/publications/sustainability-impacts-chinese-outward-direct-investment-review-literature> (last visited Nov 15, 2020); Alison Hoare, Lan Hong & Jens Hein, *The Role of Investors in Promoting Sustainable Infrastructure Under the Belt and Road Initiative* 8 (2018), <https://www.chathamhouse.org/2018/05/role-investors-promoting-sustainable-infrastructure-under-belt-and-road-initiative-0> (last visited Jun 5, 2019); Hoong Chen Teo et al., *Environmental Impacts of Infrastructure Development under the Belt and Road Initiative*, 6 *ENVIRONMENTS* 72 (2019), <https://www.mdpi.com/2076-3298/6/6/72> (last visited Oct 21, 2020); Xiuli Han, *Environmental Regulation of Chinese Overseas Investment from the Perspective of China*, 11 *J. WORLD INVESTMENT & TRADE* 375 (2010).

multilateral level? What is the role of ‘international soft law’ in ensuring the economic, environmental, and social sustainability of infrastructure projects?

With these questions in mind, this paper examines the legal and regulatory framework governing the BRI, specifically its infrastructure projects. The examination focuses on the sustainable development aspects of the projects and the possible contribution of the Initiative as a whole to the rise or decline of international law. I survey not only the Chinese laws, regulations, and policies concerning BRI, but also those pertinent to the investments and activities of State-owned enterprises (SOEs) and other Chinese companies abroad. Additionally, I compare various memoranda of understanding (MOU) or cooperation agreements signed by China with States from Asia, Africa, and Europe. I likewise look at the ‘internal’ rules and annual (sustainability) reports of SOEs, since those materials also regulate the practices and shape the expectations of BRI participants. Of particular interest in this examination is the existence of references, if any, in these documents to international law, including arguably soft law instruments, in the field of sustainable development. One remarkable point revealed by the comparative analysis is the use of or reference to the domestic legal and regulatory framework of the host/borrowing State for the applicable environmental and social (specifically, labor) standards.

Given the transnational character of the Initiative, including the transboundary nature of its potential harms, I submit that, contrary to the status quo, the behavior of all relevant actors and their interrelationships should be mainly governed by international law. This proposition means that the rights and duties of host or borrowing States and of China (as well as other investors, creditors, and/or donors), including its SOEs, should be consistent with their other obligations under international economic law, international environmental law, and international social (human rights and labor) law, as well as with international commitments to sustainable development. The experiences of international financial institutions (IFIs), specifically multilateral development banks (MDBs), in financing development projects, many of which are infrastructure-related, are also instructive.

An underlying premise of this proposition is that the economic and financial support made available through the BRI makes it possible for the funder, whether deliberately or impliedly, to control the terms of engagement with host or borrowing States and the latter’s decisions with respect to development projects undertaken within their jurisdictions. It is in recognition of this asymmetry in economic power and bargaining strengths of the parties, and more critically, a possible vitiation of the weaker State’s consent and decisionmaking authority, that I view with suspicion the current practice of bilateral dealings prevalent along the Belt and Road, and thus insist on making BRI a genuinely multilateral endeavor.¹⁴ Multilateralization can proceed by aligning the Initiative’s sanctioned actions and decisions with the UN 2030 Agenda, and by ensuring that BRI participating

¹⁴ This scenario inspires another research question: Will the discrete bilateral agreements with BRI partner countries gradually or eventually create multilateral rules? What factors can catalyze or hamper such transformation? Are bilateral deals building blocks or stumbling blocks to global standard-setting? A comparative analysis can be done with the evolution (consolidation/codification) of multiple bilateral trade agreements into the General Agreement on Tariffs and Trade (GATT) rules, and subsequently, World Trade Organization (WTO) law. Another closely related example is the emergence of international investment law from different bilateral investment treaties (BITs) and the settlement, through arbitration, of disputes arising from them. Such analysis will also need to take into account the ‘dark side’ of ‘serial bilateralism’, *infra*.

countries are not constrained to breach their international environmental and human rights obligations when they participate in this economic endeavor.¹⁵

Considering that legal scholarship, especially from international lawyers, on the social and environmental concerns arising along the Belt and Road is still quite rare,¹⁶ a contribution that the present study makes is the closer scrutiny of the purported alignment between the legal and regulatory framework of the BRI and the international legal obligations and commitments relating to sustainable development. More broadly, such scrutiny constitutes an attempt to glean into China's attitude and approach to international law, including its motivations, if any, either to replace or reshape existing norms or to create new ones within the interrelated fields of international economic law, international environmental law, and international human rights law. While there seems to be no explicit effort to undertake lawmaking or standard-setting along the Belt and Road, especially with regard to the sustainable development aspects of the infrastructure projects, it is worth considering that, under the present political, economic, and social realities, China is presenting alternative views on international law and on (sustainable) development – or at the very least, suggesting modifications to the current international legal order. In this regard, the BRI cannot be examined in isolation from other China-led activities concerning international law and the global economy.

The framework I use to analyze the roles and potential contributions to international law of relevant actors – which include both States and non-State actors – in the BRI derives from the Research Group's 'Three Perspectives' (Values, Structures, Institutions¹⁷), complemented by the analytical lens¹⁸ of Philip Jessup's 'Transnational Law',¹⁹ as well as some of its subsequent modern iterations.²⁰ Moreover, apart from viewing *international law as a value-based system*, I also understand international lawmaking as a process of communication, meaning, interaction among relevant actors, who assume different functions, creates or influences expectations about legitimate behavior.

From a *structural* perspective, the informalization of international cooperation can imply both the creation of non-legally binding rules and/or the greater participation of non-State actors. In the BRI context, in slight contrast, cooperation is taking a pseudo-formal and bilateral turn, which, I argue,

¹⁵ As can be gleaned from their practice, there appears to be an growing, albeit implicit, recognition among multilateral development banks (MDBs) of their obligation, as financiers, not to cause the borrower, aid the recipient, or host State to breach its international legal obligations and commitments.

¹⁶ See Heng Wang, *Selective Reshaping: China's Paradigm Shift in International Economic Governance*, 23 J. INT'L ECON. L. 583, 586 (2020). (The BRI, as one of the landmark moves under China's selective reshaping, has triggered "transparency, sovereignty, debt sustainability and other socio-economic issues," the assessment of which "deserves separate legal, social and economic analysis").

¹⁷ The institution-building efforts in the BRI context are quite substantial and deserve closer scrutiny that, for reasons of space and time, has to be done in a separate research paper. Apart from the relationship of the Asian Infrastructure Investment Bank (AIIB) with the existing IFIs and its impact on the development finance system – which I briefly touch upon in an earlier article – another topic to be studied is the role of international trade law, specifically WTO rules, in the growing number of free trade zones established along the Belt and Road.

¹⁸ See generally Laure-Elise Mayard, *Can A Transnational Law Approach Offer A Better Understanding of International Law's Contribution to Sustainable Hydropower Projects? A Test Case from the Mekong River Basin*, 2 BRILL OPEN LAW 40 (2020).

¹⁹ Philip C. Jessup, *TRANSNATIONAL LAW* (1956); Philip C. Jessup, *The Subjects of a Modern Law of Nations*, 45 MICH. L. REV. 383 (1947).

²⁰ This research project has proceeded from Jessup's idea of using real-world problems as the starting point for analysis. See Gregory Shaffer & Carlos Coye, *From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders*, in *THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP'S BOLD PROPOSAL* 126–152, 128–29 (Peer Zumbansen ed., 2020).

is not a suitable approach to pursuing collective or multilateral goals like those comprising sustainable development that affect the international community. The MOUs, which ‘BRI partner countries’ sign with China, are described here as ‘pseudo-formal’, because although their form arguably qualifies as a treaty, as defined in the Vienna Convention on the Law of Treaties (VCLT) and relevant International Court of Justice (ICJ) jurisprudence, the legally binding character of their substance is ambiguous. Notably, China’s preference for pseudo-formal international arrangements relates to its assertion of sovereignty in international relations and concomitant strong emphasis on non-interference in other States’ affairs. For China, this understanding of sovereignty likewise justifies reference to or the use of domestic/national legal systems of host States as the applicable standards for environmental and social (human rights) protection in the context of BRI projects. As I expound below, however, these arrangements are problematic from the perspective of both sustainable development and international rule of law.

Rule of law is necessary for the pursuit and achievement of sustainable development in the context of a global cooperative endeavor such as the Belt and Road Initiative. Particularly, transparency and accountability need to be central to the processes, decisions, and activities undertaken as part of this endeavor.²¹ Moreover, the multi-dimensional nature of sustainable development and the global and holistic ambition of the BRI, both call for a participatory and inclusive approach to decisionmaking as well as implementation of norms. Inasmuch as the international rule of law is a crucial component of sustainable development, the realization of the latter is, in turn, a manifestation of the former. Indeed, as the Research Group defines it, the international rule of law refers to the “advance over the classical Charter international law ... towards a more value-based order which is operationally capable of protecting and serving the individual.”²² For purposes of this paper, the operation of the international rule of law is demonstrated through the inclusion of sustainable development – more specifically, the expression of its underlying principles and values in the international lawmaking process – in the objectives of global efforts and international legal projects, such as the United Nations 2030 Agenda for Sustainable Development and the BRI.

This paper views the BRI as an opportunity for international lawmaking in relation to sustainable development that also carries implications for the rise or decline of the international rule of law – meaning, the rules and mechanisms adopted and applied in this context can transform into global standards for safeguarding and integrating environmental and social concerns in economic activities such as infrastructure projects. Otherwise stated, this ambitiously grand, albeit somewhat fragmented, scheme of infrastructure-building across States and continents importantly involves a nascent and ongoing process of communication – regarding environmental and social standards for economic activities such as infrastructure development projects – among various participants of different legal statuses that can contribute to the formation and growth of international sustainable development law.

As can be observed from the mapping exercise below, the creation of rules, standards, and norms in the BRI reflects, to some extent, what has generally been occurring in global economic governance

²¹ Daniel Barstow Magraw, *Rule of Law, Environment and Sustainable Development*, 21 Sw. J. INT’L L. 277, 278 (2014); Irene Khan, *How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World?*, 13 MCGILL J. SUST. DEV. L. 211-218, 211-12 (2017).

²² Heike Krieger & Georg Nolte, *The International Rule of Law - Rise or Decline?: Points of Departure*, KFG WORKING PAPER SERIES No. 1, 9, 13 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2866940 (last visited Nov 9, 2020).

and global environmental governance.²³ Parenthetically, it is a bit curious that legal scholars hardly talk about a global human rights governance.²⁴ The increasing incorporation of *environmental, social, and governance (ESG)* considerations in financial and business decisionmaking is one major part of this trend, which can be covered by the notion of *transnational private regulation*.²⁵ To some legal academics and practitioners, part of this discourse would be familiar through the lens of the *business and human rights (BHR)* literature²⁶ and related standard-setting efforts,²⁷ including those at the UN level. Discussions about the extraterritorial effect of domestic law to reach the activities of certain actors, such as transnational or multinational corporations,²⁸ as well as the increasing instances of transnational public law litigation particularly arising from infrastructure projects,²⁹ are also relevant.³⁰ Perhaps tangentially, international lawyers might also touch upon some of these themes under the rubric of the States' customary duty to prevent significant transboundary harm³¹ ('harm prevention rule' or 'no harm principle').³²

The lacuna in rules and standards at the international level for economic, environmental, and social sustainability of infrastructure projects is the contextual lens with which to understand/appreciate the suggested international lawmaking function of BRI participants. Parenthetically, sustainability is not the only subject-matter of standard-setting in the BRI. Digital connectivity, including concomitant data privacy and security concerns, is another area in which international legal rules are currently lacking, and where the relevant actors, both State and non-State, in the BRI would likely fill in the gaps. It also bears noting that the BRI is not the only transnational and intercontinental connectivity plan presently being undertaken by States, international organizations, and private

²³ Interestingly, a similar shift, at least in the American context, from legislation and regulation to governance has been observed by Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

²⁴ The stability and 'hardness' of norms (*i.e.* the existence of clear treaty and customary sources) in international human rights law, or the fact that non-State actor participation has more readily been accepted in this field early on, have presumably made the scrutinized phenomenon less novel and/or problematic.

²⁵ See *e.g.* Fabrizio Cafaggi, *Transnational Private Regulation and the Production of Global Public Goods and Private 'Bads'*, 23 EUR. J. INT'L L. 695 (2012); Gail E. Henderson, *Making Corporations Environmentally Sustainable: The Limits of Responsible Investing*, 13 GERMAN L.J. 1412 (2012); Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L L.J. 411 (2005).

²⁶ See *e.g.* Andreas Heinemann, *Business Enterprises in Public International Law: The Case for an International Code on Corporate Responsibility*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 718–735 (Ulrich Fastenrath et al. eds., 2011); Nico Krisch, *Jurisdiction Unbound: Global Governance through Extraterritorial Business Regulation*, 6 PATHS WORKING PAPER (2020), <https://repository.graduateinstitute.ch/record/298516?ln=en> (last visited Apr 15, 2021).

²⁷ See Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 618 (2007). (Delegating "authority to set standards to private actors, in areas where governments have been reluctant to act" is one of the various alternatives to formal international law that hegemons prefer as part of their strategies for fragmentation).

²⁸ See *e.g.* Smita Narula, *International Financial Institutions, Transnational Corporations and Duties of States*, in GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW 114–150 (Malcolm Langford et al. eds., 2012).

²⁹ See Michael Likosky, *Mitigating Human Rights Risks Under State-Financed and Privatized Infrastructure Projects*, 10 IND. J. GLOBAL LEGAL STUD. 65, 69–72 (2003).

³⁰ In its General Comment No. 24 (2017), for example, the Committee on Economic, Social and Cultural Rights (CESCR) pointed to the home State's obligation to prevent human rights violations abroad by companies domiciled in them.

³¹ See International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries* (2001), U.N. Doc. A/56/10.

³² See generally Jutta Brunnée, *International Environmental Law and Community Interests: Procedural Aspects*, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 151–175 (Eyal Benvenisti, Georg Nolte, & Keren Yalin-mor eds., 2018).

entities, mostly acting together. These various efforts, however, appear to still be at their initial stages and are not as yet comparable in scale as the BRI: European Union (EU) Connectivity Strategy; Blue Dot Network; Asia-Europe Meeting (ASEM) Sustainable Connectivity Portal; EU-Japan Partnership on Sustainable Connectivity.

The paper is structured according to its descriptive, analytical, and normative components. Part 2 sketches the current patchwork of norms applicable along the Belt and Road. It describes China's bilateral, discrete dealings with three countries to illustrate the varying permissible conduct and the potentially contrasting sustainable development outcomes due to the use of a host State's environmental and social standards. Particular attention is also given to steps taken by non-State actors in formulating or adopting rules, guidelines, and policies to organize their decisions and interactions (among themselves and with States), specifically with regard to the infrastructure projects that constitute the main activities of the Initiative. Part 3 identifies the main features of the BRI normative framework: bilateral, pseudo-formal, non-State actor participation. The most problematic among these features – from the perspective of both sustainable development and international rule of law³³ – is the first, as bilateralism perpetuates the unregulated use of host/borrowing country standards, despite the fact that some of the latter afford less environmental and social protections. As such State-to-State contractual arrangements also preclude consideration of multilaterally-established values, including human rights norms, they are likely to diminish the importance of international law in tempering unequal power relations. The two other characteristics are analyzed more equivocally, since they present both challenges and opportunities for the international lawmaking process in the field of sustainable development. Part 4 argues that environmental and social problems arising from BRI infrastructure projects require solutions reached through multilateral processes. To bolster my normative claims about the form and content of the BRI legal and regulatory framework, I combine the concepts of community interests and global public goods with certain principles from the emerging international sustainable development law. I likewise relate these ideas with more familiar and well-established international human rights and environmental norms, including the duty to cooperate. By way of conclusion, I suggest the integration into the BRI normative framework of the multilateral standards and principles constituting the nascent international sustainable development law, consensus on which has been gradually increasing in recent years within the international community.

2. One Initiative, Multiple Legal Regimes

Laws and regulations governing the economic, environmental,³⁴ and social sustainability of BRI infrastructure projects are fragmented and variable, due to the predominantly bilateral approach taken by China vis-à-vis the BRI participating States. Potential sources of norms concerning sustainability and accountability along the Belt and Road include Chinese laws and regulations, as well as government policy issuances, pertaining to environmental protection and corporate social responsibility (CSR), as applicable to overseas investment.³⁵ Since the BRI's introduction in 2013, the

³³ To the extent that these concepts have similar or shared principles and values, the legal and policy challenges to the existing BRI normative framework overlap to some degree. I leave for future research, however, the elaboration of the legal aspects and implications of the relationship between sustainable development and the international rule of law.

³⁴ See generally Johanna Coenen et al., *Environmental Governance of China's Belt and Road Initiative*, 31 ENV. POL. GOV. 3 (2020).

³⁵ Xiuli Han, *Environmental Regulation of Chinese Overseas Investment from the Perspective of China*, 11 J. WORLD INVESTMENT & TRADE 375, 383 (2010). ("At present, China has no special overseas investment law, nor does it have a

Chinese government has also promulgated a number of documents setting out some guidelines or overall direction on the conduct of activities under the BRI. Lastly, the behavior of actors in this context is likewise shaped by the lending rules and procedures of financial institutions, particularly the major policy banks of China, namely, the China Export-Import Bank and the China Development Bank. Parenthetically, these documents provide some glimpse into the special role played by SOEs in this context.

a) Domestic legislation

A critical feature of China's overall regulation of overseas investment and approach to international development cooperation is its 'light-touch' or 'hands-off' character, which is expressed in the reliance on host/borrowing State environmental and social standards. In some cases, as will be discussed in the next subsection, the Chinese SOEs or private corporations participating in BRI infrastructure projects look to voluntary guidelines and codes formulated by or with their peers in the industry. In other words, the responsibility of ensuring that these projects are consistent with sustainable development falls on either the State in whose territorial jurisdiction the activities are being conducted or on the construction companies and their financiers. This situation has led to environmental harms and labor issues – “legally ambiguous practices” as one author puts it – in Chinese development assistance projects.³⁶

Significantly, raising concerns about China's economic and technical assistance projects, some of which involve reported violations of economic, social and cultural rights in the receiving countries, the Committee on Economic, Social and Cultural Rights (CESCR) has called upon the State “to adopt a human rights-based approach to its policies of international cooperation”, through the establishment of “an effective monitoring mechanism to regularly assess the human rights impact of its policies and projects in the receiving countries and to take remedial measures when required”.³⁷ The Committee has likewise recommended China to “[a]dopt appropriate legislative and administrative measures to ensure the legal liability of companies and their subsidiaries operating in or managed from the State party's territory *regarding violations of economic, social and cultural rights in the context of their projects abroad*”.³⁸

special law on overseas environmental protection. The provisions on Chinese overseas investment and/or environmental protection sporadically appear in different legal instruments, that is, rules and regulations enacted by ministries and commissions of the State Council.”)

³⁶ Samuli Seppänen, *Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?*, 51 VAND. J. TRANSNAT'L L. 101, 125 (2018). (“In addition to illegal conduct ... Chinese development programs have given rise to forms of informal economy that exist outside formal government monitoring and taxation.”).

³⁷ Committee on Economic, Social and Cultural Rights, *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, U.N. Doc. E/C.12/CHN/CO/2 (13 June 2014), para. 12 [*hereinafter*, “CESCR Concluding Observations”].

³⁸ CESCR Concluding Observations, para. 13. Emphasis added.

aa) China

Ministry of Commerce (MOFCOM) and Ministry of Environmental Protection (MEP), *Guidelines for Environmental Protection in Foreign Investment and Cooperation* (2013)³⁹

In these *Guidelines*, the State directly addresses and instructs enterprises that are engaged in foreign investment and cooperation activities to “further regularize their environmental protection behaviors” and “support the sustainable development of the host country.”⁴⁰ The mandatory character of the *Guidelines* can be inferred from the almost consistent use of the word “shall,” as in Article 2, which provides that the *Guidelines* “shall be abided by enterprises consciously.” Consistent with the Chinese approach of referring to and respecting the host countries’ legal and regulatory frameworks, the *Guidelines* require Chinese enterprises to “understand and observe provisions of laws and regulations of the host country concerning environmental protection.”⁴¹ More particularly, Chinese enterprises are mandated to conduct environmental impact assessment (EIA) and take reasonable measures to mitigate any adverse impacts identified through the EIA, “in accordance with the requirements of laws and regulations of the host country.”⁴² Likewise, the *Guidelines* use the word “shall” in requiring the enterprises to “carefully consider the ecological function orientation of the area where the project is located ... to reduce adverse impacts on local biodiversity”⁴³ and to “construct and operate pollution prevention installations ... and ensure that the emission of exhaust gas, waste water, solid wastes or other pollutants meet the standards of the host country for pollutant emission.”

In striking contrast to these mandatory instructions concerning environmental protection, Chinese enterprises are merely “encouraged to take into account the impacts of their development and construction as well as production and operation activities on the social environment such as historical and cultural heritages, scenic spots and folk customs,” and no reference is made to the applicability of the host country’s laws and regulations on this subject, if they exist. Indeed, the *Guidelines* seem to treat social (including labor) concerns as incidental only to environmental protection, hence, Chinese enterprises are simply encouraged to take those into account, thus:

It is advocated that in the course of active performance of their responsibilities of environmental protection, *enterprises should respect* the religious belief, cultural traditions and national customs of community residents of the host country, safeguard legitimate rights and interests of labors, offer training, employment and re-employment opportunities to residents in the surrounding areas ... and carry out cooperation on the basis of mutual benefits.⁴⁴

³⁹ Dated 18 February 2013. MOFCOM English version available: <http://english.mofcom.gov.cn/article/policyrelease/bbb/201303/20130300043226.shtml> (last visited Jan 18, 2021). The translation comes with the following caveat: “All information published in this website is authentic in Chinese. English is provided for reference only.” See also MOFCOM, *Interpretation of the Guidance on Environmental Protection in Foreign Investment and Cooperation*, 04 March 2013, <http://english.mofcom.gov.cn/article/policyrelease/Cocoon/201401/20140100453042.shtml> (last visited Jan 18, 2021) [hereinafter, “*Guidelines*”].

⁴⁰ While it is repeatedly used throughout the document, the term “sustainable development” is not explicitly defined.

⁴¹ Art. 5.

⁴² Art. 8.

⁴³ Art. 15.

⁴⁴ Art. 3. Emphasis added.

In the same manner, the transparency, public participation, and information dissemination provisions of the *Guidelines* are not couched in obligatory or mandatory language. For example, Article 18 merely “[e]ncourage[s] enterprises to post their information on a regular basis, and publish their plans on implementation of laws and regulations on environmental protection, measures taken, and environmental performance achieved.”⁴⁵ Lastly, Chinese enterprises are not legally required to follow and implement the environmental protection “principles, standards and practices ... adopted by international organizations and multilateral financial institutions,” and are instead only “encourage[d] to research and learn” from them.⁴⁶

National Development and Reform Commission (NDRC), Ministry of Foreign Affairs (MFA), and Ministry of Commerce (MOFCOM), with State Council authorization, *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road (2015)*

Central to the BRI’s “ambitious economic vision of the opening-up and cooperation among the countries along the Belt and Road” is the improvement of regional infrastructure and “put[ting] in place a secure and efficient network of land, sea and air passages.”⁴⁷ Hence, this paper’s focus on infrastructure projects that are expected to have considerable economic, environmental, and social impacts in BRI countries and that can advance or deter the achievement of the SDGs in the region. Relatedly, cooperation along the Belt and Road is intended for the achievement of five major areas, namely, (i) policy coordination, (ii) facilities connectivity, (iii) unimpeded trade, (iv) financial integration, and (v) people-to-people bonds.⁴⁸ The present study mainly revolves around the first three and most closely examines the second area.

The *Vision and Actions* remarkably alludes to the need to “promote green and low-carbon infrastructure construction and operation management, taking into full account the impact of climate change on the construction.” Also relevant to sustainable development is the document’s expression of support for “localized operation and management of Chinese companies to boost the local economy, increase local employment, improve local livelihood, and take social responsibilities in protecting local biodiversity and eco-environment.”⁴⁹

China sees the BRI as enabling it “to further expand and deepen its opening-up, and to strengthen its mutually beneficial cooperation with countries in Asia, Europe and Africa and the rest of the world” and thus depicts the Initiative as a reflection of the “common ideals and pursuit of human societies” and “a positive endeavor to seek new models of international cooperation and global governance” geared towards “inject[ing] new positive energy into world peace and development.”⁵⁰ Accordingly, for this systematic project, “efforts should be made to integrate the development strategies of the countries along the Belt and Road.”⁵¹ Although grand and ambitious in terms of its geographic coverage, scope of activities, and range of areas of concern, the Belt and Road Initiative does not appear to be portrayed as a wholesale replacement to the existing global order. Affirming its respect and support for the existing international legal system, China expressly states that BRI “is

⁴⁵ See also Arts. 19-21.

⁴⁶ Art. 22.

⁴⁷ *Vision and Actions*, Framework.

⁴⁸ *Vision and Actions*, Cooperation Priorities.

⁴⁹ *Ibid.*

⁵⁰ *Vision and Actions*, Background.

⁵¹ Preface, para. 4

in line with the purposes and principles of the UN Charter.” It nevertheless qualifies this statement by lending some insight as to how it interprets (or would interpret) such purposes and principles, that is, through the lens of the “Five Principles of Peaceful Coexistence: mutual respect for each other’s sovereignty and territorial integrity, mutual non-aggression, mutual non-interference in each other’s internal affairs, equality and mutual benefit, and peaceful coexistence.”⁵² “The Belt and Road cooperation features mutual respect and trust, mutual benefit and win-win cooperation, and mutual learning between civilizations.”⁵³

CPC Central Committee and State Council, *Guidance on Promoting Green Belt and Road* (2017)⁵⁴

The contents of this instrument are presented as “opinions” by the CPC Central Committee and the State Council that are intended to, among others, “execute the Vision and Actions ... mainstream ecological civilization in the ‘Belt and Road’ Initiative, [and] promote green development.” With regard to significance, the promotion of green Belt and Road consists of “an internal need to share the ecological civilization philosophy and achieve sustainable development.” A “green” BRI is broadly described as “being resource efficient and environment friendly” and responsive to “the international trend of seeking green, low-carbon and circular development.” Its promotion entails “spur[ring] the enterprises to observe relevant environmental protection laws, regulations and standards, and boost green technology and industry development so as to enhance China’s capability to participate in global environmental governance.” Further, as part of the stated Basic Principles, businesses are urged “to observe international regulations on economy and trade and the laws, regulations, policies and standards of the host countries on eco-environment protection” as well as to accord great importance to the environmental protection concerns and appeals of local residents.

The CPC Central Committee and the State Council identify as among their main tasks the coordination of “existing domestic and international cooperation mechanisms,” the use of “eco-environment protection as a window for international cooperation,” the creation of “cooperation & exchange systems,” and the stronger “integration of eco-environment protection strategies and plans of countries or regions along the route.” Most *apropos* to the current research, the boosting of green infrastructure and the prioritization of environment quality are also included in the main tasks:

*We will formulate environmental protection standards and codes for infrastructure construction, increase environment protection service and support for major infrastructure construction projects along the route, popularize energy conservation and environmental protection standards and practice in such sectors as green transport, green building and clean energy, advance environmental protection in areas like water, atmosphere, soil and bio-diversity, promote environmental infrastructure construction and improve green and low-carbon construction and operation.*⁵⁵

Next in the enumeration is the advancement of green trade and promotion of sustainable production and consumption. This task includes the formulation of policy measures and relevant standards, the

⁵² *Vision and Actions*, Principles.

⁵³ *Vision and Actions*, Embracing a Brighter Future Together.

⁵⁴ Belt and Road Portal: <https://eng.yidaiyilu.gov.cn/zchj/qwfb/12479.htm> (last visited Jan 18, 2021) [hereinafter, “*Green B&R Guidance*”].

⁵⁵ Emphasis added.

incorporation of “environmental protection requirements into [free trade agreements (FTAs)],” and the acceleration of “research and formulation of green product evaluation standards.”

Recognizing that funding is critical to the fulfillment of these tasks, the Chinese agencies state that they “will push China’s financial institutions, multilateral development agencies initiated and participated by China and relevant enterprises to adopt the principle of voluntary environment risk management so as to support green ‘Belt and Road’ Initiative.” Additionally, they will “expand outbound assistance and support efforts and facilitate the implementation of green projects” and “prioritize infrastructure and capability building projects for energy conservation, emission reduction and eco-environment protection.” Strikingly, the *Green B&R Guidance* reveals the important role of Chinese policy banks along the Belt and Road:

We will also play the guiding role of the existing financial institutions such as China Development Bank and the Export-Import Bank of China in forming multi-channel investment system and long-term mechanism featuring integrated utilization of funds from the central and local governments and the society. We will make use of *unique advantages of policy-based financial institutions* in guiding and channeling the funds of various parties to jointly support the development of green ‘Belt and Road’ Initiative.⁵⁶

The need to meet BRI funding requirements is likewise among the considerations in the *Guidelines for Establishing the Green Financial System*,⁵⁷ which serves to fully implement the “Opinions of China’s Central Party Committee and the State Council on Accelerating the Development of Ecological Civilization” (Zhongfa [2015] No. 12) and the “Overall Plan for the Structural Reform for Ecological Civilization” (Zhongfa [2015] No. 25).⁵⁸ Although this issuance primarily addresses the domestic financial system, it contains a specific section (consisting of three paragraphs) concerning the promotion of international cooperation in green finance. Mention of the Belt and Road,⁵⁹ as among China’s overseas investment projects, relates to the enhancement of the “greenness” of the State’s outward investment. Such enhancement entails “strengthen[ing] environmental risk management, improv[ing] environmental information disclosure, adopt[ing] green financing instruments such as green bonds, develop[ing] green supply chain management, and explor[ing] the use of instruments such as environmental pollution liability insurance to manage environmental risks” – all of which tasks necessarily involves various entities, such as “domestic financial institutions, non-financial enterprises and multilateral development banks with China’s active participation.”

Significantly, although much has been written about the ambitiousness of China’s vision for global economic governance (and the international legal system more generally), less attention seems to be devoted to its lofty goals for global environmental governance. In the *Green B&R Guidance*, for instance, in the context of green BRI, the CPC Central Committee and the State Council undertake to “develop environmental cooperation mechanisms & platforms,” “facilitate the reform of,” and thereby “*perfect the international environmental governance system.*” It is particularly promising to see whether and how they will deliver on the creation of “diversified cooperation platforms

⁵⁶ Emphasis added.

⁵⁷ Issued, with approval of the State Council, by the following agencies: The People’s Bank of China, The Ministry of Finance, NDRC, MEP, China Banking Regulatory Commission, China Securities Regulatory Commission, and China Insurance Regulatory Commission on 31 August 2016.

⁵⁸ Neither of these two documents are available online.

⁵⁹ More accurately of the “One Belt One Road”, which is the label first given to the Belt and Road Initiative during its early beginnings (circa 2013-2014).

participated by governments, think tanks, enterprises, social organizations and the public,” since a recurring criticism against the BRI and other Chinese activities at the international level in general, pertains to the State’s preference for unilateral action and/or bilateral engagement, in lieu of multilateral solutions. The establishment of such diversified cooperation platforms is also important to the broader efforts to enhance the participation of non-State actors in global governance and the international legal system.

Ministry of Environmental Protection (MEP), *The Belt and Road Ecological and Environmental Cooperation Plan (2017)*⁶⁰

For its rationale, the document makes reference to prior issuances by the Chinese government: the *Vision and Actions*, the *13th Five-Year Plan for Protecting the Ecological Environment*, and the *Guidance on Promoting Green Belt and Road*. Similar to these instruments, the *Eco-Environmental Plan* mentions the “philosophies of ecological civilization and green development” several times, but despite these repetitions, it is still difficult to ascertain the meaning of the terms “ecological civilization” and “green development” due to the vague motherhood statements used throughout the document.

The *Eco-Environmental Plan* also expressly cites the UN 2030 Agenda, claiming that “cooperation [among diverse stakeholders] on eco-environmental protection under the framework of the Belt and Road Initiative will inject an effective impetus to accomplishment of environmental targets in the Agenda in countries along the routes.” The envisioned cooperation is said to be “characterized by government guidance, business commitment and social participation,” with “the business sector bearing the main responsibility and the market playing the due role.” Indeed, the *Eco-Environmental Plan* reiterates the earlier statement in the *Green B&R Guidance* regarding the establishment of “cooperation platforms with multiple participation that include governments, enterprises, think tanks, social organizations and the public” and adds a few details as to how this commitment will be realized. For example, the Chinese government commits to “support non-governmental environmental organizations to forge cooperative partnerships with relevant institutions of countries along the Belt and Road and maintain contact in various forms, such as public service, joint research, exchange visits, scientific and technological cooperation, forums and exhibitions.” It is likewise noteworthy that China gives importance to South-South cooperation, particularly to helping BRI countries “fulfill commitments under multilateral environmental agreements (MEAs).”⁶¹ Technological exchange is one of the means identified to realize this goal. For this purpose, “[d]emonstration bases for environmental technology and industrial cooperation will be set up for and with states from ASEAN, Central Asia, South Asia, Central and Eastern Europe, Arab World, and Africa.”

With regard to the major role of business within the BRI, the *Eco-Environmental Plan* echoes previous government issuances,⁶² the implementation of which is considered to strengthen the guidance towards green corporate behavior. Specifically, “[e]nterprises will be directed to develop low-carbon,

⁶⁰ Dated May 2017. Belt and Road Portal: <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13392.htm> (last visited Jan 18, 2021) [hereinafter, “*Eco-Environmental Plan*”].

⁶¹ Explicitly mentioned in this regard are the Convention on Biological Diversity (CBD Convention) and the Stockholm Convention on Persistent Organic Pollutants (POPs Convention).

⁶² Among those mentioned – the *Guidance*, the *Guidelines*, and the *Initiative on Corporate Environmental Responsibility Fulfillment for Building the Green “Belt and Road”* – only the latter has yet to be discussed here, the reason being that an English-translated full text thereof cannot be obtained.

energy-saving, environment-friendly materials, techniques and processes, increase reuse and reduce pollution generation and discharge from production, service provision and product use.”

As regards infrastructure, which is central to the Initiative, only the following elaboration is made: “We will improve green and low-carbon operation, management and maintenance of facilities by clarifying environment protection requirements in infrastructure construction standards and enforcing environmental standards and practices in such sectors as green transportation, green building and green energy.” The *Eco-Environmental Plan* says little about overseas infrastructure and/or investment projects, although it mentions the establishment of a green development fund, that is, “[a] dedicated fund for resource development and environmental protection ... to support eco-environmental infrastructure construction, capacity building and development projects of green industries in countries along the Belt and Road.” The notion of “green foreign aid” or foreign aid in the field of environmental protection is also mentioned, and priority will purportedly be given to “environmental policy and legislation, personnel exchanges and demonstration projects.” Interestingly, the *Eco-Environmental Plan* sets for BRI certain goals to be achieved by 2025. These goals are deemed to pave the way for achieving the SDGs by 2030 in countries along the Belt and Road. Relative to prior issuances, therefore, the *Plan* contains more concrete actions to be taken, although some concepts remain undefined, deliberately or otherwise.

Ministry of Ecology and Environment (MEE), National Development and Reform Commission (NDRC), People’s Bank of China (PBOC), China Banking and Insurance Regulatory Commission (CBIRC), and China Securities Regulatory Commission (CSRC), *Guidance Policy for Climate Investment and Finance (2020)*⁶³

Among the stated objectives of this *Climate Guidance Policy* are “to promote the implementation of the Nationally Determined Contribution (NDC)” pursuant to the Paris Climate Change Agreement and “to better play the supporting role of investment and finance on climate change”. One of the Basic Principles enumerated in paragraph 1.2 – “Adhere to open and collaborative spirit” – contains the first mention of the Initiative (albeit by its old/earlier name) and provides a glimpse of China’s envisioned role in global environmental governance: “promote the integration of investment and finance into One Belt, One Road development, *participate in the formulation and revision of international climate investment and finance related standards*, and promote the application of Chinese standards in overseas investment and development”.⁶⁴ More generally, China’s approach in this area seems to include supporting its financial institutions and enterprises “to carry out climate finance abroad” while also “[f]urther strengthen[ing] practical cooperation with international financial institutions and foreign enterprises in the field of climate investment and finance, and actively draw[ing] on good international practice and financial innovation”. Paragraph 6 of the *Climate Guidance Policy* is specifically aimed at international collaboration and lists a number of action items, such as “[s]tandardiz[ing] the investment and finance activities of financial institutions and enterprises abroad, promot[ing] them to actively fulfill their social responsibilities, and effectively prevent and mitigate climate risks”. In the same provision, financial institutions “are encouraged to support the *low-carbon development of the Belt and Road* and South-South

⁶³ Dated 21 October 2020. English translation by the Editorial Committee of Climate Investment and Finance for Promoting Ecological Civilisation Construction Platform (CIFE) available on their website: <https://mp.weixin.qq.com/s/McjDVDO-iU5RWekqLYWWUA> (last visited Jan 5, 2021) [*hereinafter*, “Climate Guidance Policy”].

⁶⁴ Emphasis added.

cooperation and to promote the implementation of climate mitigation and adaptation projects abroad”.⁶⁵

Lastly, somewhat elaborating the principle referring to the promotion of Chinese standards abroad, this paragraph advises, “Actively carry[ing] out research and international cooperation on climate investment and finance standards and *promote the application of Chinese standards applied in overseas investment and construction*”.⁶⁶ If (or once) implemented, this policy would have to be harmonized with the current policy and practice of referring to and using the legal and regulatory framework of host/borrowing States for the environmental and social standards applicable to infrastructure projects abroad.⁶⁷ In this regard, some of the recommendations I offer in this paper – e.g. adoption and enhancement of the existing environmental and social safeguards applied by IFIs/MDBs – are relevant.⁶⁸

With respect to the legal status of the *Climate Guidance Policy*, one commentator notes that although it is not a law, it is nonetheless “important for greening the Belt and Road Initiative” for several reasons, one of which is the fact that “multiple relevant Chinese ministries are aiming to build consensus around the need to transition to climate-friendly overseas investments” and thus building a common framework where loopholes will not be easily exploited.⁶⁹ The same author also points out the *Guidance Policy*’s identification of financial institutions as “a key lever for climate change” that creates the expectation that Chinese policy banks, i.e. CDB and EximBank, “will place a higher priority on tackling climate risks”.⁷⁰ Overall, the implementation of the *Climate Guidance Policy* could support a “moratorium on non-finished coal-fired power plants in the BRI” and such move “would give China’s pledge more credibility with its BRI and non-BRI partners”.⁷¹

The State Council Information Office of the People’s Republic of China, *China’s International Development Cooperation in the New Era* (2021)⁷²

The importance of this document is expectedly still subject to speculation. It does signify a milestone, however, as it is the first official publication on the topic following the establishment of the new China International Development Cooperation Agency (CIDCA) in 2018. More relevantly for this paper, it articulates more direct linkages between *international development cooperation*⁷³ and the BRI and

⁶⁵ Emphasis added.

⁶⁶ Emphasis added.

⁶⁷ See also Christoph Nedophil Wang, *Interpretation of the “Guidance on Promoting Investment and Financing to Address Climate Change” for the Belt and Road Initiative (BRI)*, Oct 27, 2020, <https://green-bri.org/interpretation-of-the-guidance-on-promoting-investment-and-financing-to-address-climate-change-for-the-belt-and-road-initiative-bri/> (last visited Jan 11, 2021).

⁶⁸ See Benjamin J. Richardson, *Can Socially Responsible Investment Provide a Means of Environmental Regulation*, 35 MONASH U. L. REV. 262, 283 (2009). (Chinese banks have been criticized for the environmentally harmful projects they finance and “for not following the World Bank’s example in adhering to environmental and human rights standards when lending to infrastructure projects in Africa.”).

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Dated 10 January 2021. State Council website: http://english.www.gov.cn/archive/whitepaper/202101/10/content_WS5ffa6bbbc6d0f72576943922.html (last visited Jan 20, 2021) [*hereinafter*, “Development Cooperation White Paper”].

⁷³ Defined in this document as “China’s multilateral and bilateral efforts, within the framework of South-South cooperation, to promote economic and social development through foreign aid, humanitarian assistance, and other means”.

expounds on the country's claimed contributions to the SDGs under the UN 2030 Agenda. It also affirms the global/international public goods conceptualization of the Initiative. Before discussing these details, a number of points are worth noting as well. First, proceeding from its self-identification as a developing State, China explicitly distinguishes its development cooperation approach from that of the Global North, stating that its "development cooperation is a form of mutual assistance between developing countries ... fall[ing] into the category of South-South cooperation and therefore is essentially different from North-South cooperation"⁷⁴ and clarifying that "[i]t will continue to shoulder the international responsibilities commensurate with its development level and capacity". It appears, however, that it does not claim to replace or supplant the existing international development cooperation architecture. Nonetheless, the establishment of the South-South Cooperation Assistance Fund (SSCAF) and the activities it will support deserve close monitoring.⁷⁵ Second, China anchors its support of development cooperation, in general, on the fact that it is a founding member of the United Nations and a permanent member of the Security Council. It additionally cites the *Five Principles of Peaceful Coexistence* as basis for such support. Lastly, one change that should be closely followed in the future – and especially critical for the sustainable development concerns in its activities abroad⁷⁶ – is the supposed improvement it has made on the evaluation mechanisms for its foreign aid projects: "mak[ing] feasibility studies more forward-looking" by taking into consideration their environmental impact and other long-term factors.

In the *Development Cooperation White Paper*, the BRI is identified as a major platform for international development cooperation, thus:

The Silk Road Economic Belt and the 21st Century Maritime Silk Road are *significant public goods China offers to the whole world* and a major platform for international development cooperation. China has joined hands with other countries to promote policy, infrastructure, trade, financial and people-to-people connectivity, to build the Belt and Road into a path towards peace, prosperity, opening up, innovation, green development, cultural exchanges, and clean government.⁷⁷

Interestingly, while the BRI is correctly described as China-led, this document implicitly acknowledges what some writers⁷⁸ have previously observed: that even with its vast resources, China would still need assistance and support from other States and international organizations for this

⁷⁴ Elsewhere in the *Development Cooperation White Paper*, China distances itself again from the North through a paragraph entitled *Promoting a global community of shared future is the mission of China's international development cooperation*, in which China vows to work together with developing countries "to narrow the North-South gap, eliminate the deficit in development, establish a new model of international relations based on mutual respect, equity, justice and win-win cooperation, and build an open, inclusive, clean and beautiful world that enjoys lasting peace, universal security and common prosperity".

⁷⁵ It seems from the *Development Cooperation White Paper* that alongside the BRI, the SSCAF (set up in 2015) is the centerpiece of China's international development cooperation approach. Notably, China reports that by the end of 2019, it "had launched 82 projects under the SSCAF framework in cooperation with 14 international organizations, including the United Nations Development Programme (UNDP), World Food Programme (UNFP), World Health Organization (WHO) ... and International Committee of the Red Cross (ICRC)".

⁷⁶ Adva Saldinger, *New white paper outlines China's development past and future*, INSIDE DEVELOPMENT | THE RISE OF CHINESE AID (2021), <https://www.devex.com/news/new-white-paper-outlines-china-s-development-past-and-future-98898> (last visited Jan 14, 2021).

⁷⁷ Emphasis added.

⁷⁸ See e.g. Chi He, *The Belt and Road Initiative as Global Public Good: Implications for International Law*, in NORMATIVE READINGS OF THE BELT AND ROAD INITIATIVE: ROAD TO NEW PARADIGMS 85–104, 100 (Wenhua Shan, Kimmo Nuotio, & Kangle Zhang eds., 2018). ("[T]here are some goods which cannot be provided by China alone but need to incorporate the efforts of all the countries concerned.")

flagship program to succeed. The Multilateral Cooperation Center for Development Finance (MCDF) – jointly established by China, the World Bank, a few regional/multilateral development banks, and the International Fund for Agricultural Development – is a testament to this need, as it “aims to promote connectivity among international financial institutions and relevant partners, and *attract more investment in the Belt and Road* through sharing information, supporting project preparation and building capacity”.⁷⁹ More generally, China promotes co-financing and “has strengthened exchanges and cooperation with the World Bank, Asian Development Bank (ADB) and other multilateral and bilateral financial institutions to provide financial support to some countries”.

With regard to the linkages between China’s international development cooperation activities and the UN 2030 Agenda, one of the noteworthy – because of the reference to international conventions – statements in the document is the following:

Upholding the vision of harmonious existence between humanity and nature, China has proactively assisted other developing countries in promoting new energy, protecting the environment, and addressing climate change. China has shared its experience in green development, fulfilled its commitments under international conventions, and expanded international cooperation on wildlife protection and desertification control, to join other countries in preserving our beautiful planet.

Taking its statements at face value, China does not seem averse to international organizations and multilateralism in general, although it characteristically emphasizes sovereignty and non-interference in other parts of this document:⁸⁰

Strengthening solidarity to meet global challenges. China firmly supports multilateralism, and takes an active part in bilateral and multilateral dialogue and cooperation on international development. We work to improve global governance in international development cooperation, and safeguard the international system with the UN at its core. We will give more financial support to international organizations ... We will enhance communication and coordination with other countries and international organizations ... on the basis of fully respecting the sovereignty and will of recipient countries, and seek to break new ground in international development cooperation.⁸¹

We will earnestly implement the cooperation initiatives announced by President Xi Jinping at major international events including the Belt and Road Forum for International Cooperation, the summits commemorating the UN’s 70th anniversary, the 2018 Beijing Summit of the Forum on China-Africa Cooperation, the 73rd World Health Assembly, and the high-level meetings marking the UN’s 75th anniversary.

In the face of the impact of Covid-19, the Belt and Road Initiative has continued to show great vitality, giving confidence to participating countries and *providing a realistic choice. China will work to integrate its responsibilities in building the Belt and Road and in implementing the UN*

⁷⁹ Emphasis added.

⁸⁰ It is on the basis of these principles that China purportedly does not attach political strings to its foreign aid. Apart from the doubtful veracity of such claim, this apathetic position is untenable in the BRI context due to the asymmetrical relationships therein and the concomitant special responsibility, which I posit in the concluding section below.

⁸¹ Emphasis in the original.

2030 Agenda for Sustainable Development, strengthen coordination of international macroeconomic policies to respond to the concerns of developing countries ... and safeguard the stable and smooth operation of international industrial and supply chains.⁸²

Such openness to multilateral solutions and the recognition of international solidarity hold some promise for the recommendations I elaborate below.

bb) Host /borrowing States

As the immediately preceding section shows, most BRI documents and Chinese domestic legislation on international cooperation refer to the laws, regulations, and policies of the States hosting or receiving the BRI infrastructure projects and investments as complementary, sometimes even primary, sources of norms governing the participants' behavior. This referencing is noteworthy, because it enables the interaction of at least two normative or legal systems – China's and the host State's – that creates the potential to learn from or influence each other.⁸³ Additionally, it is possible for the interaction to include another actor, *i.e.* another State or an international organization that could co-finance a given BRI project. This situation is already fairly common among IFIs, such as the World Bank and, lately, the Asian Infrastructure Investment Bank (AIIB). The environmental and social framework or policies of these institutions typically include a provision about the 'applicable law' in situations of co-financing. Notably, most IFIs⁸⁴ and some States' bilateral aid agencies also allow the application of the borrowers' laws, regulations, and policies⁸⁵ – on the condition that the host country's standards are equally, if not more, protective than the IFI's environmental and social safeguards⁸⁶ – in line with the so-called 'country systems approach' or 'country ownership' principle, which is among those now widely recognized as contributing to the development effectiveness of foreign aid and investment.⁸⁷

Country ownership is central to the Chinese approach to international development cooperation and, by extension, to the BRI, as the flagship program of such international engagement.⁸⁸ Its underlying

⁸² Emphasis added.

⁸³ See Coenen et al., *supra* note 34 at 9–10. (“[T]here are to date no empirical studies of how the BRI affects the environmental governance of host countries and vice versa.”).

⁸⁴ The World Bank, for example, has gradually been institutionalizing the use of country standards, but since there are still only a few projects as of date that did apply the borrower's standards, a systematic analysis of such policy has yet to be undertaken. See generally Gaia Larsen & Athena Ballesteros, *Striking the Balance: Ownership and Accountability in Social and Environmental Safeguards*, WORLD RESOURCES INSTITUTE REPORT (2014), <https://www.wri.org/publication/striking-balance-social-environmental-safeguards> (last visited Feb 19, 2019).

⁸⁵ For a brief survey of the general approach to environmental and social risk management of different multilateral and national financial institutions, see China Development Bank & United Nations Development Programme (UNDP) China, *supra* note 13 at 110. (“[M]any MDBs have a ‘conditional’ approach ... whereas some NDBs such as those from China defer to host country standards. Some banks such as KfW, and now the World Bank and IDB are more ‘capability enhancing’”).

⁸⁶ *Infra*.

⁸⁷ OECD, Paris Declaration on Aid Effectiveness (2005); OECD, Accra Agenda for Action (2008); UN, Monterrey Consensus on Financing for Development (2002); UN, Doha Declaration (2008); UN, Addis Ababa Action Agenda (2015).

⁸⁸ See Ling Jin, *Synergies between the Belt and Road Initiative and the 2030 SDGs: from the perspective of development*, 6 ECONOMIC AND POLITICAL STUDIES 278, 279–80 (2018). (“Based on a variety of development theories, which include comparative advantage, interdependence and trade-development-peace theories, the uniqueness of the BRI development logic is as follows: ownership is the fundamental driving force for development, economic infrastructure is its indispensable basis, and trade and financial integration rather than aid are necessary for development.”).

rationale lies in China's self-identification as a developing country⁸⁹ and firm emphasis on State sovereignty and the international legal norm of non-interference.⁹⁰ The uniqueness of this development view – sometimes couched as the 'Beijing Consensus' versus the 'Washington Consensus'⁹¹ – is portrayed in a somewhat positive light:

Therefore, comprising a great area and a variety of participating countries with various levels of development and political contexts, the BRI in reality will inevitably diversify into projects that correspond to the different local circumstances ... *This is consistent with the principle of Chinese governance by experimentation, improvisation and pragmatic solution-seeking* based on the empirical reality, not blindly following ideology and teleology ("seek truth from facts"). This is in many ways the point where the BRI departs from the Western deductive thinking, which seeks universality, conformity, and consistency, and which expects that global undertakings such as the BRI will remake the world according to the Chinese expectations. *In reality, the BRI will change the world very much in interaction within the possibilities of the local circumstances*, with the thinking and practice brought by China being in dialogue with both the domestic thinking and practice and the conditions on the ground.⁹²

The same author – along with others⁹³ – clarifies, however, that China is neither imposing its development model on other States nor seeking to replace the present development finance framework (which reflects the Western approach), but it is simply demonstrating by example "that alternatives can exist successfully"⁹⁴. The official position seems to confirm this view:

South-South cooperation is the focus. In spite of China's tremendous achievements, two realities have not changed: China is in the primary stage of socialism and will remain so for a long time to come, and China is still the world's largest developing economy. *China's development cooperation is a form of mutual assistance between developing countries. It also falls into the category of South-South cooperation and therefore is essentially different from North-South cooperation.* China is a staunch supporter, active participant and key contributor of South-South cooperation. It will continue to shoulder the international responsibilities commensurate with its development level and capacity, and further expand South-South cooperation, so as to promote joint efforts for common development.⁹⁵

⁸⁹ *Ibid.* at 281. ("Compared with the Washington Consensus, China's own development experience and its cooperation with African countries demonstrate ... [that] as a developing country itself, China is better able to understand the centrality of infrastructure to development aims.").

⁹⁰ *Ibid.* at 280. Emphasis added. ("In the BRI framework, China's understanding of country ownership is a set of principles and approaches by which local actors – governments, civil societies and private sector actors – have a greater voice and greater hand in development activities.").

⁹¹ Anastas Vangeli, *The Normative Foundations of the Belt and Road Initiative*, in *NORMATIVE READINGS OF THE BELT AND ROAD INITIATIVE: ROAD TO NEW PARADIGMS* 59–83, 71 (Wenhua Shan, Kimmo Nuotio, & Kangle Zhang eds., 2018). ("[I]t was Westerners who coined terms such as Beijing Consensus or the China Model, but China embraced them as they were signifiers of certain achievement that can be capitalized on.").

⁹² *Ibid.* at 76. Emphasis added.

⁹³ See Maria Adele Carrai, *It Is Not the End of History: the Financing Institutions of the Belt and Road Initiative and the Bretton Woods System*, in *THE BELT AND ROAD INITIATIVE: LAW, ECONOMICS, AND POLITICS* 107–145, 111 (Julien Chaisse & Jędrzej Górski eds., 2018). ("[T]he zero-sum game that characterizes much of the literature about China's rise hampers our understanding of the BRI and its related institutions, which should be understood more as a healthy competitor to Bretton Woods in a context of increasing multipolarity.").

⁹⁴ Vangeli, *supra* note 91 at 70.

⁹⁵ *Development Cooperation White Paper*. Emphasis in the original. Italics added.

The BRI is supposedly meant to simultaneously proceed on both bilateral and multilateral tracks. There is a strong emphasis in the *Vision and Actions* on the openness and inclusivity of the endeavor, such that, even though it was initiated and being led by China, the latter “is ready to conduct equal-footed consultation with all countries along the Belt and Road to seize the opportunity provided by the Initiative.”⁹⁶ At the moment, however, bilateral cooperation mechanisms seem to take more precedence, as demonstrated by the growing list of cooperation MOUs or plans separately signed with various States and international organizations. On the other hand, the use of multilateral cooperation mechanisms, including international forums and exhibitions at regional and sub-regional levels, is apparently (only) for “strengthen[ing] communication with relevant countries, and attract[ing] more countries and regions to participate in the Belt and Road Initiative.”⁹⁷ The establishment and elaboration of rights and obligations, some of which could be legally binding, are thus likely to be made on a bilateral basis, wherein political and economic inequalities between parties (particularly governments) can be more pronounced.

China’s ‘light-touch’ approach to international cooperation and development assistance – the ‘conditionality of non-conditionality’ as one colleague puts it⁹⁸ – is ominous for its lack of attention to vital non-economic concerns, such as human rights, good governance, and the rule of law.⁹⁹ Further, other commentators question the uniqueness of the Chinese model, specifically casting doubt on the claim that it does not involve conditionalities¹⁰⁰ by citing the Chinese government’s requirement “that recipients of Chinese aid obtain much of the requisite goods and services from Chinese companies” and that certain amendments be made to the receiving State’s domestic legislation.¹⁰¹ Simply put, it appears that there are ‘strings attached’ to China’s aid and foreign investment, but they pertain, not to politically-charged issues like good governance and human rights, but to seemingly less innocuous topics such as “tax law, company law, contract law, labor law, environmental law, and law relating to land expropriation”.¹⁰² Moreover, as part of the Chinese development finance model of creating ‘coordinated credit spaces’, China has been shown to attach project-level purchasing and procurement conditions to favor its own SOEs and/or private companies operating abroad.¹⁰³ It is thus striking – and incompatible with some its own official pronouncements – how China selectively wields its capacity to (re-)shape international rules and standards, limits it to those within international economic law,¹⁰⁴ and thereby neglects the

⁹⁶ *Vision and Actions*, Embracing a Brighter Future Together.

⁹⁷ *Vision and Actions*, Cooperation Mechanisms.

⁹⁸ I am grateful to Alejandro Rodiles for this idea and to Andrew Hurrell who prompted me to think through the different kinds or forms of conditionality.

⁹⁹ See Seppänen, *supra* note 36 at 119.

¹⁰⁰ Tymoteusz Chajdas, *BRI Initiative: a New Model of Development Aid?*, in *THE BELT AND ROAD INITIATIVE: LAW, ECONOMICS, AND POLITICS* 416–453, 427–28 (Julien Chaisse & Jędrzej Górski eds., 2018). (Given the manner of financing the projects it supports, it is doubtful that “China’s bilateral lending is entirely devoid of conditionality”. At the very least, there are “indirect forms of conditionality associated with Chinese lending practices due to the emphasis put on the ‘mutual’ development”).

¹⁰¹ Seppänen, *supra* note 36 at 116.

¹⁰² *Ibid.* at 127. In this regard, China is no different from other donor States and international organizations like the World Bank that condition their assistance on law reform in developing countries.

¹⁰³ Gregory T. Chin & Kevin P. Gallagher, *Coordinated Credit Spaces: The Globalization of Chinese Development Finance*, 50 *DEV’T & CHANGE* 245, 249–50 (2019).

¹⁰⁴ Wang, *supra* note 16 at 593. (“BRI primary agreements, along with BRI secondary agreements, promote the use of Chinese standards, and could affect IEL rule-making in the long run.”).

interrelated norms and concerns in international environmental law¹⁰⁵ and international human rights law.

Domestic legislation pertaining to the behavior abroad of Chinese entities, State-owned or private, is of quite recent vintage. Commentators indeed note that prior to launching the BRI, China had no clear law regarding international cooperation and assistance, overseas investment, or the activities of Chinese companies abroad – or, any attempt to regulate such activities is minimal at best. More critical observers stress the contrast between the active efforts to ‘green’ its domestic economy, on the one hand, and the negligible, almost absent, steps to ensure that decisions and actions of its companies, especially the SOEs, do not cause environmental and/or social harms in the developing countries where they conduct business, on the other.¹⁰⁶

In relation to the earlier issuances by the Chinese government regarding foreign investment and cooperation, the CPC Central Committee and the State Council commit to fortifying environment management of overseas investment and formulating and executing “policies and measures to prevent eco risks of investment and financing projects ... and drive enterprises to voluntarily bear environmental and social responsibilities.” Another part of the *Guidance* in fact mentions the implementation of the “Guideline of Environment Protection for Overseas Investment and Cooperation” and driving enterprises “to voluntarily obey local environmental protection laws, regulations, standards and codes, honor environmental and social responsibilities and release annual environmental reports.” Chinese enterprises, specifically industry associations and chambers of commerce, are likewise encouraged to self-regulate by establishing codes of conduct for environmental protection.

Post-BRI, the patchwork of minimal regulations concerning foreign investment and overseas projects consists of issuances such as the following:

[T]he China Banking Regulatory Commission (CBRC) issued in 2017 the “Standardization of Banking Services Enterprises Going Global: Strengthen the Guidance of Control and Risk Prevention,” which holds that financial institutions should conduct an independent, comprehensive, and in-depth assessment of the environmental, legal, social, and political risks in evaluating the feasibility of a project.¹⁰⁷

According to Article 21 of the *Green Credit Guidelines* and Article 4.21 in the *Key Indicators of Green Credit Performance* issued by CBRC in 2014, *China’s overseas projects are expected to comply with three layers of regulation – respectively green credit guidelines at home, law and regulations in the host countries concerning environmental protection, plus commitment to*

¹⁰⁵ But see Hoare, Lan Hong & Hein, *The Role of Investors in Promoting Sustainable Infrastructure under the Belt and Road Initiative* 29 (2018) <https://www.chathamhouse.org/2018/05/role-investors-promoting-sustainable-infrastructure-under-belt-and-road-initiative> (last visited Jun 5, 2019). (According to the policies of CDB and China ExIm Bank, the required environmental assessment for loan approval “should be based on host-country policies and standards”, and in the absence of such framework, “Chinese standards or international practices are referred to”).

¹⁰⁶ See e.g. Coenen et al., *supra* note 34 at 7. (As of 2020, “no formal law regulating environmental matters in Chinese overseas investments exists”. The voluntary character of current environmental protection measures means that “while companies can be held accountable for their potential impact within China, they will not be legally sanctioned by the Chinese government for operations abroad”).

¹⁰⁷ Daniel R. Russel & Blake Berger, *Navigating the Belt and Road Initiative* 18–19 (2019), https://asiasociety.org/sites/default/files/2019-06/Navigating%20the%20Belt%20and%20Road%20Initiative_0.pdf (last visited Nov 14, 2020). Citation omitted.

compliance with international standards and norms or best practice. In the Green Credit Statistics System launched by CBRC in 2013, *overseas projects aligned with international standards are separately listed as the 12th category of green projects.* However, projects in this category are still required to conform with any of the project description listed in the other 11 categories, which indicates consistency in the definition of green projects for the provision of green credits at home and abroad.¹⁰⁸

It remains to be seen whether these regulatory changes will better steer and improve the behavior of relevant actors in BRI infrastructure projects towards sustainability. Judging, however, from the grievances of project-affected communities – reported in the media and some that have even resulted in complaints filed before domestic courts in host/borrowing States – the abovementioned regulations are still inadequate.

b) Voluntary and self-regulatory standards

One possible source of optimism is the fact that, in parallel to China’s legislative and regulatory efforts, some of the Chinese companies are voluntarily taking guidance from multilateral standards, international organizations, or their foreign peers/counterparts in the industry.¹⁰⁹ For instance, as of January 2021, six (6) commercial banks from China have adopted the Equator Principles,¹¹⁰ although none of them appears to be currently involved in Belt and Road projects.

This section identifies the ‘relevant actors’ and broadly delineates their respective roles and functions in the context of the BRI – to better understand what values they articulate, specifically as regards sustainable development, and also how they express and propagate such values. The examination also involves looking into these actors’ engagement, if any, with the international legal system, and the rules and guidelines concerning sustainable development that apply to them. The underlying claim in this mapping exercise is that the actions and decisions, which affect economic growth and human rights and environmental protection, are not only those of States but of international organizations, SOEs, private companies, and other non-State actors as well. The exercise reveals the plurality and variety of actors participating in the international lawmaking process relating to sustainable development in the BRI context.

Non-State actors engaged in transnational private regulation play a role in structuring the global economy, although “private transnational governance is itself shaped by global social, economic and political forces.”¹¹¹ For instance, banks and other financial institutions¹¹² influence, sometimes even

¹⁰⁸ Kelly Sims Gallagher & Qi Qi, *supra* note 13 at 39. Citations omitted. Emphasis added.

¹⁰⁹ See Coenen et al., *supra* note 34 at 10. (“Overall, the development of the institutional landscape for the ‘green BRI’ mirrors major trends in global environmental governance toward increasing reliance on transnational multi-actor governance and the use of soft law.”).

¹¹⁰ Equator Principles, “EP Association Members & Reporting,” n.d., <https://equator-principles.com/members-reporting/> (last visited Jan 10, 2021).

¹¹¹ A. Claire Cutler, *Locating Private Transnational Authority in the Global Political Economy*, in *THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP’S BOLD PROPOSAL* 321–347, 339 (Peer Zumbansen ed., 2020).

¹¹² See e.g. Stephen Kim Park, *Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution*, 54 *STAN. J. INT’L L.* 1, 6 (2018). (Using “quasi-regulatory tools”, a constellation of market participants comprising “issuers, underwriters, investors, credit rating agencies and research organizations, advocacy groups, multilateral institutions, stock exchanges, and government agencies that regulate [these other actors]” presently “serve as *de facto* market-based [regulators]”).

dictate, development choices and decisions.¹¹³ One of the two most important financial institutions supporting the BRI and other Chinese-led projects in general is the China Development Bank (CDB), which “owns the only Development Financing license in China”¹¹⁴ and today is “the largest development finance institution in the world and China’s largest bank specialized in medium and long-term lending and bond issuance”.¹¹⁵ CDB is “a policy financial institution under the direct leadership of the State Council of China”¹¹⁶ that not only supports the ‘Go Global’ strategy of several Chinese companies but also extends financial support to foreign governments.¹¹⁷ Given that it is bound to play a critical role in development finance cooperation in general¹¹⁸ and in the Belt and Road particularly, having “signed a cooperation agreement with the NDRC in June 2017 to provide no less than RMB 1.5 trillion in stimulus capital for the development of strategically emerging industries”,¹¹⁹ it is promising that CDB “has built a comprehensive green financial system to actively promote green and sustainable development, environmental protection, and energy saving and emission reduction, while managing environmental and social risks during the entire credit process”.¹²⁰ This confidence based on China’s self-acclamation must be tempered, though, since the fact that these Chinese policy banks’ “policies on the sustainability of their investments are, in many cases, not public”,¹²¹ pose difficulties in properly evaluating the impact of such policies on the environment.

CDB joined the United Nations Global Compact in 2006¹²² and claims to be “implement[ing] the Equator Principles in its operations, [although it is] not a formal member of the EP Association”.¹²³ The Equator Principles Association¹²⁴ comprises 114 financial institutions¹²⁵ in 37 countries that have adopted the *Equator Principles*, which is “a risk management framework ... for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard of due diligence and monitoring to support responsible risk decision-making.”¹²⁶ Now in its fourth iteration,¹²⁷ the *Equator Principles* was initially derived from the International

¹¹³ Richardson, *supra* note 68 at 264.

¹¹⁴ China Development Bank & United Nations Development Programme (UNDP) China, *supra* note 13 at 32. Citation omitted. Emphasis added.

¹¹⁵ China Development Bank official website, “About CDB,” available: http://www.cdb.com.cn/English/gykh_512/khjj/ (last visited Nov 16, 2020).

¹¹⁶ *Ibid.*

¹¹⁷ China Development Bank & United Nations Development Programme (UNDP) China, *supra* note 13 at 32. Citation omitted. Emphasis added.

¹¹⁸ See Seppänen, *supra* note 36 at 114. (Based on some estimates, CDB has overtaken the World Bank as a global development financier).

¹¹⁹ Kelly Sims Gallagher & Qi Qi, *supra* note 13 at 33. Citations omitted. Emphasis added.

¹²⁰ China Development Bank & United Nations Development Programme (UNDP) China, *supra* note 13 at 145.

¹²¹ HOARE, LAN HONG, AND HEIN, *supra* note 105 at 28. Emphasis added.

¹²² United Nations Global Compact, “10,000 companies + 4,000 non-businesses,” available: <https://www.unglobalcompact.org/what-is-gc/participants/2054-China-Development-Bank> (last visited Nov 16, 2020). Further discussed below.

¹²³ Kelly Sims Gallagher & Qi Qi, *supra* note 13 at 32. Citations omitted. Emphasis added.

¹²⁴ Equator Principles Association, “EP Association Members & Reporting,” available: <https://equator-principles.com/members-reporting/> (last visited Jan 10, 2021).

¹²⁵ As of January 2021, six (6) banks have China as their country of headquarters: Bank of Guizhou, Bank of Huzhou, Bank of Jiangsu, Chongqing Rural Commercial Bank, Industrial Bank Co., Ltd, and Mian Yang City Commercial Bank.

¹²⁶ Equator Principles, “The Equator Principles,” available: <https://equator-principles.com/about/> (last visited Nov 29 2020).

¹²⁷ Its latest iteration, the EP4, was published in July 2020.

Finance Corporation's (IFC) Performance Standards for Environmental and Social Sustainability.¹²⁸ CDB is also a member of the International Development Finance Club, which serves as a platform for its twenty six (26) national and regional development banks "to promote and leverage sustainable development investment worldwide" through their USD 4 trillion in combined assets and over USD 600 billion annual commitments, including USD 150 billion of climate finance.¹²⁹

The other leading financial institution for purposes of the BRI is the Export-Import Bank of China (China ExIm Bank), which is "dedicated to supporting China's foreign trade, investment and international cooperation."¹³⁰ China ExIm Bank is "a state-funded and state-owned policy bank with the status of an independent legal entity,"¹³¹ meaning that like CDB, it is under the direct leadership of the State Council, which in fact announced in 2015 that China ExIm Bank "must transform into a 'policy bank with sustainable development capacities'".¹³² "Its preferential facilities include government concessional loans and preferential export buyer's credit to foreign governments with a sovereign guarantee – an important source of financing for large BRI infrastructure projects, for which private investor appetite is often limited."¹³³ To appreciate the enormity of these two banks' resources and the extent of their potential financial clout, it bears stressing that their combined assets "are just behind the combined assets of the World Bank, Asian Development Bank, Inter-American Development Bank, European Investment Bank, European Bank for Reconstruction and Development, and African Development Bank".¹³⁴

In its *White Paper on Green Finance*, China ExIm Bank explains how a green economy is important to the realization of sustainable development – which it describes as a concept necessitating a "balance between the promotion of human welfare and the reduction of environmental risks"¹³⁵ – and how a green economy, in turn, "requires a combination of measures, including the indispensable means of government guidance, regulation and policy support, as well as funding support from financial institutions".¹³⁶ China ExIm Bank holds itself out as being committed to sustainable development since its establishment in 1994, and among its efforts to realize such commitment is requiring that "loan projects comply with the environmental protection policies, laws and regulations of China and host countries, and obtain necessary approval from relevant authorities," and, in the event that a host country lacks an environmental and social impact assessment policy or standards, "the Bank

¹²⁸ The recurring dialogue between these two frameworks is well-documented. See e.g. Cynthia A. Williams, *Regulating the Impacts of International Project Financing: The Equator Principles Resulting the Impacts of International Project Financing*, 107 AM. SOC'Y INT'L L. PROC. 303, 304 (2013); David M. Ong, *From International to Transnational Environmental Law - A Legal Assessment of the Contribution of the Equator Principles to International Environmental Law*, 79 NORDIC J. INT'L L. 35, 37 (2010); Michael Riegner, *The Equator Principles on Sustainable Finance Assessed from a Critical Development and Third World Perspective*, 5 TRANSNAT'L LEGAL THEORY 489, 490 (2014).

¹²⁹ International Development Finance Club (IDFC), "Mission & Vision," available: <https://www.idfc.org/mission-vision/> (last visited Nov 29 2020).

¹³⁰ Export-Import Bank of China official website, "About the Bank," available: <http://english.eximbank.gov.cn/Profile/AboutTB/Introduction/> (last visited Nov 29 2020).

¹³¹ *Ibid.*

¹³² Kelly Sims Gallagher & Qi Qi, *supra* note 13 at 32. Citation omitted.

¹³³ China Development Bank & United Nations Development Programme (UNDP) China, *supra* note 13 at 33. ("EximBank has extended USD 100 billion through mid-2017, supporting some 1200 BRI construction projects in over 50 countries.")

¹³⁴ Seppänen, *supra* note 36 at 114. Citation omitted.

¹³⁵ The Export-Import Bank of China, *White Paper on Green Finance 2* (2016).

¹³⁶ *Ibid.* at 4. Emphasis added.

will review relevant projects with reference to the Chinese standards or international norms.”¹³⁷ From the Bank’s perspective, the green development concept is implemented through concessional loans and loans for overseas project contracting and investment that “support[] enterprises to go global and promot[e] the Belt and Road Initiative.”¹³⁸ Significantly, the Bank considers financial means or influence as having “special advantages in terms of monitoring, regulating and guiding enterprises in their environmental protection actions and promoting green development.”¹³⁹

These two banks and their activities are noteworthy, not only for the size of their potential financial contributions to the BRI, but also, and more importantly, for the fact that their financial decisions are directed, whether explicitly or implicitly, by the State. While this situation does not, at first glance, differ from other States’ development financial institutions, it bears highlighting that there are doubts whether the funds provided by CDB and China ExIm Bank are technically considered “aid” or official development assistance (ODA). The characterization is significant, because most of the existing global or multilateral prescriptions on the economic, environmental, and social sustainability of finance apply to ODA *qua* public funds, while their applicability to partly private or commercial money remains open to debate.

Among the several commercial banks participating along the Belt and Road, the Industrial and Commercial Bank of China (ICBC) should be specially mentioned, due to its role as financier of the coal-fired power plant that became subject of litigation in Kenya (discussed below). Such involvement, which was subsequently withdrawn,¹⁴⁰ should be understood in relation to its roles as organizer of the Belt and Road Bankers Roundtable¹⁴¹ and initiator of the Belt and Road Green Finance (Investment) Index.¹⁴² It also launched “the world’s first green Belt&Road Inter-bank Regular Cooperation Bond (‘BRBR’ bond)”, which is “a four-tranche US\$ 2.2 billion bond to finance green projects from the Belt and Road Initiative”.¹⁴³ Similar to CDB, the ICBC, while not officially an EPFI, reports¹⁴⁴ that it drew “lessons from the Equator Principles and IFC performance standards and guidance” in formulating its measures for classification of corporate loan customers and projects on the basis of their degree of impact on the environment.¹⁴⁵

¹³⁷ *Ibid.* at 22.

¹³⁸ *Ibid.* at 27.

¹³⁹ *Ibid.* at 4.

¹⁴⁰ John Muchangi, *Lamu coal plant’s biggest investor abandons project*, THE STAR, November 18, 2020, <https://www.the-star.co.ke/news/2020-11-18-lamu-coal-plants-biggest-investor-abandons-project/> (last visited Feb 22, 2021).

¹⁴¹ ICBC News, “The Belt and Road Bankers Roundtable Successfully Held in Beijing,” 6 May 2019, <https://www.icbc.com.cn/icbc/en/newsupdates/icbcnews/TheBeltandRoadBankersRoundtableSuccessfullyHeldinBeijing.htm> (last visited Jan 23, 2021).

¹⁴² ICBC BRI Green Index Research Group, *Belt and Road Green Finance (Investment) Index*, n.d. <http://v.icbc.com.cn/userfiles/Resources/ICBCLTD/download/2020/1d11EN20200921.pdf> (last visited Jan 23, 2021).

¹⁴³ Filipe Wallin Albuquerque, *ICBC Launches First Green Belt and Road Bond | NordSip* (2019), <https://nordsip.com/2019/04/23/icbc-launches-first-green-belt-and-road-bond/> (last visited Jan 23, 2021).

¹⁴⁴ Interestingly, from 2016, the ICBC has begun referring to its Corporate Social Responsibility Report as “ESG Report”.

¹⁴⁵ Industrial and Commercial Bank of China (ICBC), *2018 Corporate Social Responsibility Report: Environmental | Social | Governance*, <http://v.icbc.com.cn/userfiles/Resources/ICBCLTD/download/2019/2018csrEN.pdf> (last visited Jan 10, 2021). See also Environmental Paper Network, “Industrial and Commercial Bank of China (ICBC),” *In the Red*, <https://environmentalpaper.org/industrial-and-commercial-bank-of-china-icbc/> (last visited Jan 20, 2021).

The actions and decisions of ICBC are relevant to the present study, to the extent that its environmental and social risk management framework reportedly derives from and combines “international standards and domestic green credit classification standards”¹⁴⁶ – lending credence to my hypothesis that it is through non-State actors that certain multilateral standards become part of the existing normative framework for the BRI. More generally, there is some empirical support for such claim:

In spite of the absence of government incentives and evaluation mechanisms, the majority of the top 21 Chinese banks (accounting for around 80% of total banking assets), have more or less integrated the concept of green credit into their operations ... In an effort to align with international standards, at least 7 commercial banks have referred to sustainability reporting promoted by Global Reporting Initiative while drafting their corporate social responsibility reports ... ICBC has also referred to Equator Principles and International Finance Corporation (IFC) key KPIs in the categorization of corporate loans, and ABC has signed an agreement with IFC for advice on the development of its green-finance portfolio.¹⁴⁷

China Civil Engineering Construction Corporation (CCECC), which is involved in many infrastructure projects in Africa and Asia (including the Philippines),¹⁴⁸ is one of the first Chinese state-owned enterprises to “go global”. According to its official website,¹⁴⁹ CCECC “was established [originally, as the Foreign Aid Bureau of the Ministry of Railways] in 1979 under the approval of the State Council ... and was [merged with and] incorporated into China Railway Construction Corporation (CRCC) in 2003 for strategic regrouping under the approval of the State-owned Assets Supervision and Administration Commission.” The company categorizes its business activities as follows: (i) Real estate and others; (ii) Design and consultancy; (iii) National contracting; (iv) Foreign aid; and (v) International contracting.¹⁵⁰ Detailed information about this company’s operations, particularly its involvement in BRI infrastructure projects, is, unfortunately, scarce. It would be helpful to find out whether it is a member of the China International Contractors Association (CHINCA) and covered by the “Guidelines of Sustainable Infrastructure for Chinese International Contractors”.¹⁵¹ The latter defines ‘sustainable infrastructure projects’ as those “which fully integrate ... sustainable development into the processes [throughout a project’s lifecycle] to eliminate or ensure the least harm to stakeholders’ rights and interests ... minimize natural resource consumption and adverse environmental effect, keep in harmony with the host community, and meet the local needs for medium-to-long-term socioeconomic growth”. It also instructs companies to conduct a project feasibility report in order to understand and evaluate investment risks, “take full account of economic, environmental and social costs”, and mitigate any negative environmental and social impacts of projects “at present and in the future”.

¹⁴⁶ China Development Bank & United Nations Development Programme (UNDP) China, *supra* note 13 at 143. Emphasis added.

¹⁴⁷ Kelly Sims Gallagher & Qi Qi, *supra* note 13 at 40. Citations omitted. Emphasis added.

¹⁴⁸ As at end of 2016, “CCECC has established resident offices or project management headquarters in 89 countries and regions ... [spanning] across Asia, Europe, Africa, America and Oceania.” CCECC, “About us,” available: <http://www.ccecc.com.cn/col/col7677/index.html> (last visited Nov 25, 2020).

¹⁴⁹ CCECC, “About us,” available: <http://www.ccecc.com.cn/col/col7677/index.html> (last visited Nov 25, 2020).

¹⁵⁰ CCECC, “Business Activities,” available: <http://www.ccecc.com.cn/col/col7683/index.html> (last visited Nov 25, 2020).

¹⁵¹ China International Contractors Association, *Guidelines of Sustainable Infrastructure for Chinese International Contractors*, 31 January 2018, <https://www.chinca.org/EN/info/18013108264011> (last visited Jan 21, 2021).

Like CDB, a few Chinese companies¹⁵² (in the financial services and the construction and materials sectors) also participate in the UN Global Compact,¹⁵³ which tags itself as “the world’s largest corporate sustainability initiative”.¹⁵⁴ Launched in 2000 by then UN Secretary-General Kofi Annan as a means “to bring business and the United Nations together to give a human face to the global market”,¹⁵⁵ the UN Global Compact is now a network-based organization that has, at its center, *Ten Principles* derived from the Universal Declaration of Human Rights (UDHR), the International Labor Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.¹⁵⁶ In a nutshell, the Ten Principles harnesses and builds upon the private sector’s CSR efforts and aligns the latter with internationally recognized minimum social and environmental standards.¹⁵⁷ Closely related to the Global Compact are the *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy Framework’ Framework*, which John Ruggie, as the Special Representative of the Secretary-General on Business and Human Rights, developed and submitted to the UN Human Rights Council, which then endorsed the Guiding Principles [‘UNGPs’] in its resolution 17/4 of 16 June 2011.¹⁵⁸ These developments are succinctly and appropriately framed in this wise:

[T]he long-standing collision between CSR norms and human rights norms has found a certain consolidation and *produced a new normative bottom line on business and human rights* ... The UNGPs occupy a central position in this entangled web of norms, which is illustrative of the way in which normative frameworks operate, are created and enforced in the global arena. The interface conflict, driven by both irritation and institutional rivalry, is still far from finally settled, but we can see how here (as in the World Bank case) it has been not so much a destabilizing force but a *driver of change – an expression of societal contestation* which has pushed CSR into a more widely acceptable direction.¹⁵⁹

A last example of transnational private regulation relevant to the BRI context is the Global Reporting Initiative (GRI), which is an “independent, international organization that helps businesses and other organizations take responsibility for their impacts, by providing them with the global common

¹⁵² 425 out of 16468 Participants as of January 2021. United Nations Global Compact, “Our Participants,” https://www.unglobalcompact.org/what-is-gc/participants/search?utf8=%E2%9C%93&search%5Bkeywords%5D=&search%5Bcountries%5D%5B%5D=38&search%5Bper_page%5D=10&search%5Bsort_field%5D=&search%5Bsort_direction%5D=asc (last visited Jan 23, 2021).

¹⁵³ But see Han, *supra* note 35 at 396. (“NGOs worry that without any effective monitoring and enforcement provisions, the voluntary Compact fails to hold corporations accountable.”).

¹⁵⁴ United Nations Global Compact, “Who We Are,” <https://www.unglobalcompact.org/what-is-gc> (last visited Jan 23, 2021).

¹⁵⁵ United Nations Global Compact, “Uniting Business for a Better World,” <https://d306pr3pise04h.cloudfront.net/docs/publications%2FUN-Global-Compact-20th-Anniversary-Campaign-Infosheet.pdf> (last visited Jan 23, 2021).

¹⁵⁶ United Nations Global Compact, “The power of principles,” <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Jan 23, 2021).

¹⁵⁷ United Nations Global Compact, *The UN Global Compact Ten Principles and the Sustainable Development Goals: Connecting, Crucially (White Paper)*, June 2016, https://d306pr3pise04h.cloudfront.net/docs/about_the_gc%2FWhite_Paper_Principles_SDGs.pdf (last visited Jan 23, 2021).

¹⁵⁸ United Nations Office of the High Commissioner on Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 2011, https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (last visited Jan 23, 2021).

¹⁵⁹ Nico Krisch, Francesco Corradini & Lucy Lu Reimers, *Order at the margins: The legal construction of interface conflicts over time*, 9 GLOBAL CONSTITUTIONALISM 343, 356 (2020). Citation omitted. Emphasis added.

language to communicate those impacts”¹⁶⁰ and “work[s] with investors, stock exchanges, and capital market regulators to improve ESG disclosure and with governments to stimulate corporate transparency and encourage private sector responsibility for sustainable development”.¹⁶¹ As of December 2020, the CDB and the ICBC are among the organizations¹⁶² in the GRI Sustainability Disclosure Database, meaning, they have published “sustainability/Integrated reports based on the GRI Standards or previously existing Sustainability Reporting Frameworks for which there is a GRI Content Index available”.¹⁶³ Also included in the GRI Database are some companies from the construction sector, such as the China State Construction Engineering Construction, which is “one of the first groups of Chinese companies to go global”¹⁶⁴ and counts itself as an active player along the Belt and Road.¹⁶⁵

Guiding Principles on Financing the Development of the Belt and Road¹⁶⁶

Different from the other materials previously examined, this document is not issued by the Chinese government but rather by the *finance ministers of several States*¹⁶⁷ who are “call[ing] upon the governments, financial institutions and companies” of BRI countries “to follow the principles of equal-footed participation, mutual benefits and risk sharing as they work together to build a long-term, stable, sustainable financing system that is well-placed to manage the risks.” From governments, what signatories of the *Guiding Principles* expect are coordination of their development strategies and investment plans, sharing of experiences about implementation, and formulation of principles for identifying and prioritizing major projects. Although, as earlier mentioned, businesses are seen as major BRI actors, the “guiding role of public funds in planning and building major projects” is still recognized, and policy financial institutions and export credit agencies are thus encouraged “to continue offering policy financial support for the development of the Belt and Road.” Existing public funding channels, such as inter-governmental cooperation funds and foreign assistance funds, will likewise remain in use. Relatedly, the finance ministers “encourage multilateral development banks and national development financial institutions to actively participate in the development of the Belt and Road within their mandates, particularly cross-border

¹⁶⁰ Global Reporting Initiative, “About GRI,” <https://www.globalreporting.org/about-gri/> (last visited Jan 23, 2021).

¹⁶¹ Global Reporting Initiative, “Our partnerships and collaboration,” <https://www.globalreporting.org/public-policy-partnerships/sustainable-development/> (last visited Jan 23, 2021).

¹⁶² See Kelly Sims Gallagher & Qi Qi, *supra* note 13 at 40. (“In an effort to align with international standards, at least 7 commercial banks have referred to sustainability reporting promoted by Global Reporting Initiative while drafting their corporate social responsibility reports.”).

¹⁶³ Global Reporting Initiative, *Sustainability Disclosure Database: Data Legend* 11 (2020), <https://www.globalreporting.org/media/m22dl3o0/gri-data-legend-sustainability-disclosure-database-profiling.pdf> (last visited Jan 23, 2021).

¹⁶⁴ China State Construction Engineering Corporation, “Overview,” <https://english.cscec.com/AboutCSCEC/Companyprofile/> (last visited Jan 23, 2021).

¹⁶⁵ China State Construction Engineering Corporation, “A snapshot of CSCEC’s 2019 overseas projects,” 21 February 2020, <https://english.cscec.com/CompanyNews/CorporateNews/202002/3020650.html> (last visited Jan 23, 2021).

¹⁶⁶ *Guiding Principles on Financing the Development of the Belt and Road*, <http://m.mof.gov.cn/czxw/201705/P020170515761133537061.pdf> (last visited Jan 21, 2021).

¹⁶⁷ Argentina, Belarus, Cambodia, Chile, China, Czech [Republic], Ethiopia, Fiji, Georgia, Greece, Hungary, Indonesia, Iran, Kenya, Laos, Malaysia, Mongolia, Myanmar, Pakistan, Qatar, Russia, Serbia, Sudan, Switzerland, Thailand, Turkey, and United Kingdom.

infrastructure construction through loan, equity investment, guaranty, co-financing and other relevant financing channels.”

In the area of infrastructure investment, the proactive participation of “long-term institutional investors such as pension funds and sovereign wealth funds” is deemed important, and consistent with the “decisive role of the market in financial resources allocation,” “all types of commercial financial institutions such as commercial banks” are expected to provide funds and other financial services for the development of the Belt and Road. Public-private partnerships are likewise expected to play a role in “channel[ing] funds and improv[ing] the efficiency and quality of infrastructure supply.” Given the private sector’s participation, and in keeping with well-established and widely accepted principles and norms in international economic law, the *Guiding Principles* also emphasize the value of, among others, transparency and non-discrimination.¹⁶⁸

Lastly, among the most significant points in the *Guiding Principles*, especially for this paper, is the finance ministers’ recognition of the necessity to take into account non-economic concerns arising from or related to development projects and international cooperation activities:

We underscore the need to strengthen social and environmental impact assessment and risk management of projects, improve cooperation on energy conservation and environmental protection, fulfill social responsibilities, promote local employment and ensure sustainable economic and social development. We also need to take into account debt sustainability in mobilizing finance.

This statement aligns with their reaffirmation of “the important role of infrastructure in sustainable economic and social development,” which fact is supported by the experiences of many countries and further corroborated by the studies of various scholars and international organizations, such as multilateral development banks.

c) A tale of three countries

As mentioned earlier/above, there are presently about 200 MOUs/bilateral documents that China has signed with various States and international organizations. It bears stressing, however, that many of these documents are not available or accessible online. Nevertheless, among the contributions to the literature that this paper makes is with regard to the methodology used, *i.e.* an in-depth textual analysis of the available official documents¹⁶⁹ relating to the BRI, including a few of the MOUs or bilateral agreements entered into between China and various States. Part of this examination entails looking into references made by official BRI documents to international instruments concerning sustainable development. Although these documents are arguably not sources of international law under Article 38(1) of the ICJ Statute, they are highly relevant to ascertaining and understanding the emerging global framework for governance of BRI projects, in particular, and of foreign-funded infrastructure projects in general. I submit that these materials expound and operationalize the concept of sustainable development in the context of infrastructure construction, specifically

¹⁶⁸ “We advocate for a *transparent, friendly, non-discriminatory and predictable financing environment*. We support greater openness to FDI as appropriate, speeding up trade and investment facilitation where needed, and opposing trade and investment protectionism of all forms. We advocate for *fair, equitable, open and efficient legal systems*, as well as mutual-beneficial and investor-friendly taxation regimes. We support the settlement of debt and investment disputes in a fair, lawful and reasonable way to effectively protect the legitimate rights and interests of creditors and investors.” Emphasis added.

¹⁶⁹ Subject also to language limitations and reliance on English translations (mostly official) of these documents.

projects supported by foreign financiers and contractors. Given the aforementioned limitations, the present analysis is limited to three BRI participating States, namely, the Philippines, Kenya, and Italy.¹⁷⁰ Another caveat to mention is that accounts of the environmental and social harms connected to BRI infrastructure projects rely on already existing reports and empirical studies.¹⁷¹

Philippines

Three main documents establish and define the relationship between China and the Philippines in the BRI context: the *Memorandum of Understanding between The Government of the Republic of the Philippines and The Government of the People's Republic of China on Cooperation on the Belt and Road Initiative* (hereinafter, "Philippines-China BRI MOU"),¹⁷² the *Joint Statement between the People's Republic of China and the Republic of the Philippines* (hereinafter, "2018 Joint Statement"),¹⁷³ and the *Joint Statement between the Government of the Republic of the Philippines and the Government of the People's Republic of China* (hereinafter, "2017 Joint Statement").¹⁷⁴ The latter was signed during the official visit to the Philippines by Premier of the State Council, Li Keqiang, in 2017 while the first two were executed a year later on the occasion of President Xi Jinping's State visit to Manila, capital of the Southeast Asian country. Apart from these documents, however, several others have been simultaneously entered into. These implementing contracts or elaborative instruments are enumerated in the Annexes to the 2017¹⁷⁵ and the 2018¹⁷⁶ Joint Statements. Not all of them, however, are publicly available. In fact, for one of the infrastructure projects – a hydroelectric dam – that became controversial due to its reported adverse effects on the natural environment and on indigenous peoples, as well as the potentially onerous terms of the underlying loan, the project-affected communities and their lawyers had to file a petition before the Philippine Supreme Court to

¹⁷⁰ This sampling does not purport to be representative of the entire BRI network, although it does attempt to cover the three continents (Asia, Africa, and Europe) that are *officially* mentioned in most BRI documents. It is also acknowledged, however, that the Initiative has *actually* extended to Latin America, and a number of studies have in fact scrutinized the infrastructure projects undertaken there.

¹⁷¹ My research was purely documents-based and did not involve field work in any of these countries.

¹⁷² Signed on 20 November 2018

¹⁷³ Signed on 21 November 2018, http://www.xinhuanet.com/english/2018-11/21/c_137622271.htm (last visited Jan 19, 2021).

¹⁷⁴ Signed on 16 November 2017, <https://dfa.gov.ph/dfa-news/statements-and-advisoriestupdate/14643-joint-statement-between-the-government-of-the-republic-of-the-philippines-and-the-government-of-the-peoples-republic-of-china> (last visited Jan 19, 2021).

¹⁷⁵ Total of fourteen (14) signed Cooperation Documents, including: (i) *Memorandum of Understanding on Jointly Promoting the Second Basket of Key Infrastructure Projects Cooperation between the Department of Finance of the Government of the Republic of the Philippines and the Ministry of Commerce of the Government of the People's Republic of China*; (2) *Exchange of Letters on Project of Two Bridges across Pasig River between the Government of the Republic of the Philippines and the Government of the People's Republic of China*; and (3) *The Financing Cooperation Agreement on Chico River Pump Irrigation Project and New Centennial Water Source – Kaliwa Dam Project between the Government of the Republic of the Philippines represented by the Department of Finance and the Export-Import Bank of China*.

¹⁷⁶ Total of twenty-nine (29) agreements and MOUs, including: (i) *Memorandum of Understanding between the Government of the People's Republic of China and the Government of the Republic of the Philippines on Cooperation within the Framework of the Belt and Road Initiative*; (ii) *Infrastructure Cooperation Program between the Government of the People's Republic of China and the Government of the Republic of the Philippines*; (iii) *Memorandum of Understanding on Supporting the Feasibility Study of Major Projects between the China International Development Cooperation Agency of the Government of the People's Republic of China and the Department of Finance of the Government of the Republic of the Philippines*; (iv) *Preferential Buyer's Credit Loan Agreement on the New Centennial Water Source – Kaliwa Dam Project between the Export-Import Bank of China and the Metropolitan Waterworks and Sewage System (MWSS)*; and (v) *Contract Agreement of the New Centennial Water Source – Kaliwa Dam Project between China Engineering Corporation and the Metropolitan Waterworks and Sewage System (MWSS)*.

compel the concerned executive departments/agencies to make the project-related documents available to the public.¹⁷⁷

Based on these documents, the parties characterize their bilateral relationship as one of ‘Comprehensive Strategic Cooperation’.¹⁷⁸ This designation is consequential, as it indicates the deepest possible degree of intimacy and collaboration between China and a BRI participating State. One in-depth study of legal and policy frameworks along the Belt and Road identify a hierarchy among the MOUs/bilateral agreements:

A key integral feature of [One Belt, One Road (OBOR)] is the designation of specific countries along OBOR routes as “strategic partners” ... Such partnerships are predicated more on trade and economic relations, rather than security cooperation. *There exists a hierarchy in China’s strategic partnerships from strategic partnerships simpliciter to “co-operative strategic partnerships” to “comprehensive strategic partnerships” – each successively indicating a deeper degree of intimacy and collaboration ... In the OBOR context, many bilateral strategic partnership agreements have already been concluded, including with ASEAN ... China also has a comprehensive strategic partnership with the EU, and, remarkably, with all of Africa. Strategic partnership agreements usually set forth preferential terms for trade as well as conditions for investment cooperation between China and the host OBOR country. Typically, they provide for cooperation on specific large infrastructure projects ... Strategic partnerships are often coupled with a related OBOR implementation MoU.*¹⁷⁹

Significantly, even prior to the official signing of a BRI MOU between China and the Philippines, the two States have “recognize[d] the potential of the Philippine development plans and the Belt and Road Initiative, and their synergies with the Master Plan on ASEAN Connectivity”¹⁸⁰ and thereby initiated a number of infrastructure projects in the Philippines.¹⁸¹ In this regard, the parties “agree[d] that infrastructure projects jointly undertaken will be subject to proper procurement process, transparency, and in compliance with relevant domestic laws and regulations, and international practices and standards”.¹⁸² Indeed, in recognition of the fact that “infrastructure cooperation has been a highlight of China-Philippines bilateral cooperation” the parties agreed to “work towards the

¹⁷⁷ Lian Buan, *After Chico river, Makabayan goes after Kaliwa dam at Supreme Court*, RAPPLER, May 9, 2019, <https://www.rappler.com/nation/makabayan-goes-after-kaliwa-dam-supreme-court> (last visited Feb 22, 2021); CNN Philippines Staff, *Makabayan bloc heads to Supreme Court to stop China-funded Kaliwa Dam construction*, CNN, May 9, 2019, <https://www.cnn.ph/news/2019/5/9/Makabayan-petition-Kaliwa-Dam-Supreme-Court-.html> (last visited Feb 22, 2021).

¹⁷⁸ 2018 Joint Statement, para. 4: “The two Leaders recognize that the elevation of China-Philippines relations to higher levels is in line with the fundamental interests and shared aspiration of the two countries and peoples. Thus, on the basis of mutual respect, sincerity, equality, mutual benefit and win-win cooperation, the Leaders decided to establish the relationship of Comprehensive Strategic Cooperation”.

¹⁷⁹ Donald J. Lewis & Diana Moise, *One Belt One Road (“OBOR”) Roadmaps: the Legal and Policy Frameworks*, in THE BELT AND ROAD INITIATIVE: LAW, ECONOMICS, AND POLITICS 17–58, 35–36 (Julien Chaisse & Jędrzej Górski eds., 2018). Emphasis added.

¹⁸⁰ 2017 Joint Statement, para. 5.

¹⁸¹ In the White Paper on International Development Cooperation, the incumbent Philippine president’s ‘Build Build Build program’ is among the enumerated “development strategies of participating countries” with which the BRI dovetails. Also cited are the Agenda 2063 of the African Union, the Master Plan on ASEAN Connectivity 2025, and EU’s Europe-Asia connectivity strategy.

¹⁸² 2017 Joint Statement, para. 8. The related exchange of letters and agreements for the following – New Centennial Water Source – Kaliwa Dam Project, Chico River Pump Irrigation Project, the Philippine National Railways South Long Haul Project and the construction of the Binondo-Intramuros and Estrella-Pantaleon Bridges – were signed during the visit.

formulation of relevant procedures and protocols for government concessional loan (Renminbi-denominated loan), and utilize preferential buyer's credit, commercial loans for development and co-financing arrangements between China and multilateral development banks, to provide support to key infrastructure projects".¹⁸³ This statement provides a glimpse of how dispersed and incremental standard-setting, particularly in relation to infrastructure projects and investments, can take place along the Belt and Road.

References to international law and multilateral institutions are scant. The "universally recognized principles of international law, including the Charter of the United Nations and the 1982 UNCLOS" are expressly and consistently mentioned in the two Joint Statements as guiding their conduct and relationship concerning the South China Sea.¹⁸⁴ The two States also "agree[d] to promote ... a rules-based multilateral free trade regime, and development cooperation, as well as enhance cooperation within relevant multilateral frameworks including the United Nations (UN) system".¹⁸⁵ Additionally, the Asia-Pacific Economic Cooperation (APEC), Association of Southeast Asian Nations (ASEAN), and Asia-Europe Meeting (ASEM) are mentioned as the regional and multilateral frameworks wherein they would "stay in close communication and support each other on major issues of shared concern".¹⁸⁶ Lastly, the Philippines-China relationship includes a specific focus on maritime cooperation, "including maritime oil and gas exploration, sustainable use of mineral, energy and other marine resources" and the "implementation of relevant international maritime instruments to ensure the safety of life at sea, maritime environmental protection, and human resources development".¹⁸⁷ This last point is noteworthy and relevant to the present research, not only for its reference to international instruments, but also its mention of sustainable use of resources and environmental protection. More particularly, the *Memorandum of Understanding on Cooperation on Oil and Gas Development* signed by the two governments has considerable sustainable development implications that deserve closer attention in the future once more concrete steps are taken to implement the agreement.

As is common among BRI bilateral agreements, the Philippines-China BRI MOU begins with an affirmation of the Participants' cooperation within the framework of the Initiative "with the strictest respect for national laws, rules, regulations and policies" for the purpose of, among others, "realiz[ing] sustainable growth and development through the Belt and Road Initiative".¹⁸⁸ The principles guiding these States' cooperation are fairly similar to those enumerated in official BRI documents. In this MOU, the cooperation principles grouped into two: *first*, mutual respect for territorial integrity and sovereignty; transparency in their common endeavors to expand mutually beneficial cooperation; and *second*, maximization of existing bilateral, regional, and multilateral mechanisms to achieve synergies faster.¹⁸⁹ Part II of the Philippines-China BRI MOU lists the standard BRI five areas of cooperation, namely, Policy Dialogue and Communication; Infrastructure Development and Connectivity; Cooperation on Trade and Investment; Financial Cooperation; and Socio-cultural Exchanges. Dispute settlement is addressed in only one provision, which, like most other Chinese MOUs or bilateral agreements, states: "Any difference arising from the interpretation

¹⁸³ 2018 Joint Statement, para. 16.

¹⁸⁴ 2017 Joint Statement, para. 15; 2018 Joint Statement, para. 24.

¹⁸⁵ 2018 Joint Statement, para. 29.

¹⁸⁶ 2017 Joint Statement, para. 16.

¹⁸⁷ 2018 Joint Statement, para. 27.

¹⁸⁸ Philippines-China BRI MOU, Part I, para. 1.

¹⁸⁹ Philippines-China BRI MOU, Part I, para. 2.

or the implementation of this Memorandum of Understanding will be settled amicably by consultations through diplomatic channels”.¹⁹⁰ Another characteristic provision pertains to the legal status of the MOU, which is explicitly stated as “not creat[ing] legally binding obligations for the Participants” and being merely “an expression of their common aspiration to cooperate on the Belt and Road Initiative for their mutual benefit”.¹⁹¹ Curiously, despite this assertion of its non-binding character, the immediately succeeding provision states that the MOU “will take effect upon the receipt of later written notification by the Participants through diplomatic channels, indicating the completion of domestic legal procedures”.¹⁹² In the same part, it is clarified that the MOU’s termination “will not affect any programs being implemented and programs to be implemented until their completion according to timetable agreed upon by the Participants”.¹⁹³

Among the authors who have scrutinized the ambiguous legal status of BRI MOUs, one concludes – proceeding from the same perspective as this paper that the BRI is an international rule-making opportunity – that in order for the Initiative to gain greater legitimacy at the world stage, “China needs to extend its newly established ‘law-based governance’ to the international arena by employing international legal mechanisms in BRI implementation”.¹⁹⁴ There is some cause for optimism in this regard, considering the Chinese supreme leader’s recent calls for “adherence to international rules and standards in project development, operation, and procurement” and invitation for multilateral financing institutions’ participation in the Initiative.¹⁹⁵

Italy

Among the immediately striking features of the *Memorandum of Understanding between The Government of the Italian Republic and The Government of the People’s Republic of China on Cooperation Within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative* (hereinafter, “Italy-China BRI MOU”) and other bilateral documents between these States, such as the *Joint Statement on the 9th Meeting of the China-Italy Joint Government Committee* (hereinafter, “2019 Joint Statement”), are the clear/direct and liberal references to sustainable development, multilateralism, rules-based systems, international instruments, and international law. For example, one of the preambular paragraphs of the Italy-China BRI MOU reiterates the Parties’ “commitment to honor the purposes and principles of the UN Charter and to promote inclusive growth and sustainable development, in line with the 2030 Agenda for sustainable development and the Paris Accord on climate change”. It echoes the 2019 Joint Statement, which confirmed the States’ “intention to intensify and expand [their] *Global Strategic Partnership* with the aim of contributing to reinforce peace, security, international stability and sustainable development, in full compliance with the goals and principles of the Charter of the United Nations” and their “will to promote multilateralism and the rules-based international system, with the United Nations at the centre”.¹⁹⁶ Parenthetically, Italy and China characterize their bilateral relationship as a ‘Global Strategic

¹⁹⁰ Philippines-China BRI MOU, Part IV

¹⁹¹ Philippines-China BRI MOU, Part V

¹⁹² Philippines-China BRI MOU, Part VI, para. 1.

¹⁹³ Philippines-China BRI MOU, Part VI, para. 3.

¹⁹⁴ Jingxia Shi, *The Belt and Road Initiative and International Law: An International Public Goods Perspective*, in INTERNATIONAL GOVERNANCE AND THE RULE OF LAW IN CHINA UNDER THE BELT AND ROAD INITIATIVE 9–31, 9–10 (Yun Zhao ed., 2018). Citation omitted. Emphasis added.

¹⁹⁵ See Russel & Berger, *supra* note 107 at 30.

¹⁹⁶ 2019 Joint Statement, para. 4. Emphasis added.

Partnership’, which is presumably¹⁹⁷ almost comparable in character as the ‘Comprehensive Strategic Partnership’ that the EU and China have. In their MOU, Italy and China express their recognition of “the importance and benefits of improving connectivity between Asia and Europe and the role that the Belt and Road Initiative can play in this respect”.¹⁹⁸

In this regard, it is interesting to note that the Italy-China BRI MOU has a provision entitled ‘Applicable Law’, which similarly refers to domestic laws – as in other BRI MOUs – but contains ‘as well as applicable international law’ as an additional clause, thus:

This Memorandum of Understanding does not constitute an international agreement which may lead to rights and obligations under international law. No provision of this Memorandum is to be understood and performed as a legal or financial obligation or commitment of the Parties. This Memorandum of Understanding will be interpreted in accordance with the legislations of the Parties as well as applicable international law and, as for the Italian Party, with the obligations arising from its membership of the European Union.¹⁹⁹

The same balancing act appears in one of the cooperation principles, stating that “the Parties will strive to promote the smooth progress of their cooperation projects” “[i]n accordance with their respective domestic laws and regulations, consistent with their respective international obligations”.²⁰⁰ Another bilateral cooperation principle provides that the Parties will be “[g]uided by the purposes and principles of the UN Charter”.²⁰¹ The apparent importance accorded to international law and organizations is also reflected in the Parties’ reaffirmation of “their commitment towards an open world economy and against protectionism and unilateralism, with a view to achieving globalisation in a way that might be inclusive, sustainable, equitable and advantageous for all” and “their support for a transparent, inclusive, non-discriminatory, rule-based multilateral trade system with the WTO at its centre”.²⁰² In contrast, the relevance and applicability of sustainable development, multilateralism, and international law to China’s bilateral relations with the Philippines and with African countries like Kenya are less clear from the MOUs signed with those States.

The other glaring difference pertains to the areas of cooperation between Italy and China. Whereas there are five standard cooperation priorities along the Belt and Road – Policy dialogue; Transport, logistics and infrastructure; Unimpeded trade and investment; Financial cooperation; People-to-people connectivity – the Italy-China BRI MOU adds ‘Green development cooperation’. This additional paragraph is worth quoting in full:

Both Parties are fully supportive of the objective to develop connectivity following a sustainable, environmentally friendly approach, actively promoting the global process towards green, low carbon and circular development. In this spirit, the Parties will cooperate in the field of ecological and environmental protection, climate change and other areas of mutual interest. The Parties will share ideas about green development and actively promote

¹⁹⁷ It does not fall squarely in the categorization by Lewis & Moise, *supra* note 179.

¹⁹⁸ Italy-China BRI MOU, Preamble.

¹⁹⁹ Italy-China BRI MOU, Paragraph VI.

²⁰⁰ Italy-China BRI MOU, Paragraph I, section 2(ii).

²⁰¹ Italy-China BRI MOU, Paragraph I, section 2(i).

²⁰² 2019 Joint Statement, para. 9.

the implementation of the 2030 Agenda for Sustainable Development and the Paris Accord on Climate Change. The Ministry for the Environment, Land and Sea of the Italian Republic will actively participate [in] the International Coalition for Green Development on the Belt and Road²⁰³ initiated by the Ministry of Ecology and Environment of the People's Republic of China and the United Nations Environment Programme (UNEP).²⁰⁴

In the earlier Joint Statement, the Parties likewise emphasized their determination “to strengthen their coordination on multilateral issues, intensifying their collaboration within the United Nations, the G20, the ASEM, and the WTO, and have a closer exchange of opinions on important international issues, especially global governance, the multilateral trading system, the 2030 Agenda for Sustainable Development, climate change and the ‘Paris Agreement’”.²⁰⁵ More broadly, one of their cooperation principles within the BRI context pertains to “explor[ing] synergies and ensur[ing] consistency and complementarity with existing bilateral and multilateral cooperation mechanisms and regional cooperation platforms”.²⁰⁶ Given the States’ overall acknowledgment of a prevailing normative framework and established institutions in the international system, there appears to be less leeway for lawmaking opportunities within or through the bilateral relationship. Accordingly, the Parties look to international organizations and multilateral fora as venues to promote their bilaterally agreed interests and preferred norms.²⁰⁷ For instance, in relation to the enhancement of policy dialogue on “connectivity initiatives and technical and regulatory standards”, the Parties agreed to “work together within the Asian Infrastructure Investment Bank (AIIB) to promote connectivity in accordance with the purpose and functions of the Bank”.²⁰⁸

A final point worth noting about Italy’s BRI participation is the fact that no specific and concrete infrastructure projects seem to be discussed or planned at the moment. Therefore, based on the existing documents at least, the relationship between the two States seems to be truly more of a partnership rather than Italy simply being a ‘host State’ for Chinese infrastructure projects and investments. Indeed, in one of the cooperation areas under their MOU, the Parties refer to: (i) expansion of “two-way investment and trade flow, industrial cooperation as well as cooperation in third country markets”; (ii) promotion of “transparent non-discriminatory, free and open trade and industrial cooperation, an open procurement, level playing field and respect for intellectual property

²⁰³ Kenya is also one of the twenty-five (25) countries whose environmental departments joined this coalition at its launching in 2019. See Ministry of Foreign Affairs of the People's Republic of China, “List of Deliverables of the Second Belt and Road Forum for International Cooperation”, 27 April 2019, https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1658767.shtml (last visited Jan 20, 2021).

²⁰⁴ Italy-China BRI MOU, Paragraph II, section 6.

²⁰⁵ 2019 Joint Statement, para. 5. The diversity and breadth of cooperation between Italy and China is further elaborated in paragraph 12, which refers to the ‘bilateral Action Plan 2017-2020’ that enumerates the following areas: a) the environment and sustainable energy; b) agriculture; c) sustainable urban development; d) healthcare; e) aviation; f) space technologies and related applications; and g) infrastructure and transport.

²⁰⁶ Italy-China BRI MOU, Paragraph I, section 2(iii).

²⁰⁷ See Joint Statement, para. 8 (“The two Ministers reaffirmed their will to leverage their common membership of the AIIB to favour joint projects to promote China-European connectivity through an inclusive, open and sustainable approach. The two Ministers emphasized their will to strengthen cooperation and coordination within the ASEM, in order to give new impulse towards improving the connectivity between Europe and Asia...”).

²⁰⁸ Italy-China BRI MOU, Paragraph II, section 1. See also 2019 Joint Statement, para. 5 (Parties’ agreement about the “importance of reforming the United Nations Security Council with a view to reinforcing its authority and effectiveness”) and para. 9 (Parties’ expression of “support [for] the necessary reform of the WTO, with the aim of reinforcing its role”).

rights”; and (iii) exploration of “closer and mutually beneficial collaboration and partnerships, which include advancing North-South, South-South and triangular cooperation”.²⁰⁹

Kenya

Relative to the other countries studied, the place of Kenya²¹⁰ along the Belt and Road is the most palpable and advanced, yet, ironically, the least documented.²¹¹ On the one hand, there exist actual BRI infrastructure projects with tangible impacts in Kenya that evidence this State’s participation in the Initiative. Examples of such projects are the Lamu Coal Power Station²¹² and the Mombasa-Nairobi Standard Gauge Railway (‘SGR’).²¹³ For purposes of this paper, data had to be gathered and pieced together from documents that demonstrate Africa-China relations in general instead of Kenya-China in particular. Significantly, although Kenya is officially listed as among the BRI participating countries – being one of the twenty-eight (28) African countries that signed a BRI MOU with China in 2018²¹⁴ – and various sources²¹⁵ confirm it, the actual document cannot be obtained. As documents relating to the mentioned projects²¹⁶ were also inaccessible, specifically the Lamu

²⁰⁹ Italy-China BRI MOU, Paragraph II, section 3.

²¹⁰ In terms of economic and financial flows, Kenya (along with Ethiopia) is reported to be the most heavily involved in the BRI among the African countries. It is also “a key maritime pivot point”. See Muhammad Sabil Farooq, *Kenya and the 21st Century Maritime Silk Road: Implications for China-Africa Relations*, 4 CHINA Q. INT’L STRATEGIC STUD. 401, 404 (2018).

²¹¹ Alternatively, perhaps the more accurate description is that the publicly available documents do not clearly and exclusively refer to the BRI’s involvement in Kenya. Those that focus on Kenya are mostly anecdotal accounts rather than the international legal materials, such as MOUs and other bilateral documents, that I am interested in. In any event, this situation unfortunately limits the analysis undertaken in this paper.

²¹² See David Schlissel, *The Proposed Lamu Coal Power Plant: The Wrong Choice for Kenya*, Institute for Energy Economics and Financial Analysis, June 2019, <https://ieefa.org/wp-content/uploads/2019/05/The-Proposed-Lamu-Coal-Project-June-2019.pdf> (last visited Feb 20, 2021); DeCOALonize, *The Impacts on the Community of the Proposed Coal Plant in Lamu: Who, if Anyone, Benefits from Burning Fossil Fuels?*, UN ENVIRONMENT PERSPECTIVES, Issue No. 31 (n.d.), https://wedocs.unep.org/bitstream/handle/20.500.11822/25363/Perspectives31_ImpactCoalPlantLamu_28032018_WEB.pdf?sequence=1&isAllowed=y (last visited Feb 20, 2021).

²¹³ Ian Gorecki, *Kenya’s Standard Gauge Railway: The Promise and Risks of Rail Megaprojects*, AFRICA UP CLOSE (2020), <https://africaupclose.wilsoncenter.org/kenyas-standard-gauge-railway-the-promise-and-risks-of-rail-megaprojects/> (last visited Feb 22, 2021); Mombasa-Nairobi Standard Gauge Railway Project, Kenya, RAILWAY TECHNOLOGY, <https://www.railway-technology.com/projects/mombasa-nairobi-standard-gauge-railway-project> (last visited Feb 22, 2021).

²¹⁴ Belt and Road Portal, “List of countries that have signed cooperation documents with China to jointly build the ‘Belt and Road’”, 12 April 2019, <https://www.yidaiyilu.gov.cn/gbjg/gbgk/77073.htm> (last visited Jan 20, 2021); Belt and Road Portal, “China has signed 123 ‘Belt and Road’ cooperation documents with 105 countries”, 08 September 2018, <https://www.yidaiyilu.gov.cn/xwzx/gnxw/66324.htm> (last visited Jan 20, 2021).

²¹⁵ See e.g. Christoph Nedophil, “Countries of the Belt and Road Initiative (BRI)”, 2021, <https://green-bri.org/countries-of-the-belt-and-road-initiative-bri/#:-:text=Map%20of%20the%20countries%20of,with%20China%20is%20highly%20specific> (last visited Jan 20, 2021); Dr. Sebastien Goulard, “Obstacles to the BRI in Kenya”, 11 July 2020, <https://www.oboreurope.com/en/obstacles-bri-kenya/> (last visited Jan 20, 2021); David Herbling & Dandan Li, “China’s Built a Railroad to Nowhere in Kenya”, *Bloomberg*, 19 July 2019, <https://www.bloomberg.com/news/features/2019-07-19/china-s-belt-and-road-leaves-kenya-with-a-railroad-to-nowhere> (last visited Jan 20, 2021).

²¹⁶ The SGR was also subjected to litigation in Kenyan courts, but since the issues raised in the case primarily concerned the financial/economic aspects (e.g. procurement, debt sustainability) of the project, the matter is beyond the stated scope of this paper.

project, information about their contents were inferred from the court submissions and judicial decisions,²¹⁷ as well as news articles,²¹⁸ surrounding such power plant.

Indeed, even prior to the launching of the BRI in 2013, China has been investing and undertaking infrastructure projects²¹⁹ (a number of them are transboundary) in various African countries, and one of the main mechanisms facilitating these relationships is the Forum on China-Africa Cooperation (FOCAC), which has fifty-three (53) African countries as members. In addition to the abovementioned materials, instruments from the 2018 FOCAC Summit in Beijing are used here to ascertain the relationship between Kenya and China in the BRI context: (i) *Beijing Declaration – Toward an Even Stronger China-Africa Community with a Shared Future* (hereinafter, “Beijing Declaration”) and (ii) *Forum on China-Africa Cooperation Beijing Action Plan (2019-2021)* (hereinafter, “FOCAC Beijing Action Plan”). The Beijing Declaration characterizes the relationship between Africa and China as one of “comprehensive strategic and cooperative partnership”²²⁰ that, following the Lewis and Moise hierarchy, indicates a deep and intricate connection between the two sides. Another indication of such closeness can be inferred from the identification of a “community with a shared future”. The great importance that these States put on the BRI reflects in the markedly positive description of the Initiative, thus:

We applaud that, under the Belt and Road Initiative, the principle of extensive consultation, joint contribution and shared benefits is observed; market principles and international norms are followed; openness, transparency, and win-win results are advocated and practices; efforts are made to develop inclusive, accessible and reasonably priced infrastructure that delivers extensive benefits and are consistent with the national conditions and laws and regulations of related countries, with a view to promoting high-quality and sustainable development for all. The Belt and Road development responds to the call of the times and brings benefits to all peoples.²²¹

Somewhat similar to the documents concerning the Italy-China bilateral relationship that explicitly link the Belt and Road cooperation with sustainable development, multilateralism, and international law and organizations, the Beijing Declaration expresses the parties’ agreement “to form a strong

²¹⁷ *Save Lamu, et al. vs. National Environmental Management Authority (NEMA) and Amu Power Company Limited*, Tribunal Appeal No. NET 196 of 2016 (Judgment of 26 June 2019). (Kenya’s National Environmental Tribunal [NET] found the Environmental and Social Impact Assessment conducted for the project to be inconsistent with the requirements under the relevant Kenyan legislation – the Energy Act 2019 and the Environmental Management and Coordination Act 1999 – due to the “failure to carry out effective public participation during this process as well as after the preparation of the voluminous EIA study report”).

²¹⁸ Kenya halts Lamu coal power project at World Heritage Site, BBC News, June 26, 2019, <https://www.bbc.com/news/world-africa-48771519> (last visited Jan 7, 2021); Maina Waruru, *Backers of Lamu coal project lose court case*, CHINA DIALOGUE (2019), <https://chinadialogue.net/en/energy/11355-backers-of-lamu-coal-project-lose-court-case/> (last visited Jan 7, 2021); Coal in Kenya, *China’s role in Lamu coal plant & advocacy efforts*, MEDIUM (2020), <https://decolonize.medium.com/chinas-role-in-lamu-coal-plant-advocacy-efforts-3be03222d289> (last visited Jan 7, 2021).

²¹⁹ Some portions/phases of the SGR, for example, were initiated and completed before the BRI’s conception. The extension or addition of routes connecting to the SGR, however, are being proposed and undertaken as BRI projects. This situation is fairly common in practice: “[A] number of already existing projects or even platforms for cooperation are added the BRI label retroactively, such as infrastructure projects negotiated, or platforms for cooperation (such as the one between China and the sixteen countries of Central, East and Southeast Europe) that had been launched before the official announcement of the BRI – but became part of it afterwards.” See Vangeli, *supra* note 91 at 63. Citation omitted.

²²⁰ Beijing Declaration, para. 1.1.

²²¹ Beijing Declaration, para. 4.1.

synergy between the Belt and Road Initiative and the 2030 Agenda for Sustainable Development of the United Nations, Agenda 2063 of the African Union (AU), as well as the development strategies of African countries”.²²² The two sides likewise “emphasize[d] the importance of upholding the purposes and principles of the UN Charter and supporting the active role of the UN in international affairs”,²²³ and in the same breath, “oppose[d] interference in others’ internal affairs ... and reaffirm[ed] the need to deepen mutual understanding and enhance coordination and collaboration with each other at the UN and other fora”.²²⁴ References to the World Trade Organization (WTO) and calls for its reform also echo similar remarks in the Italy-China instruments. For instance, China and the African countries “firmly uphold multilateralism and oppose all forms of unilateralism and protectionism, support a WTO-centered, rules-based multilateral trading regime that is transparent, non-discriminatory, open and inclusive, and support the efforts for an open and inclusive world economy”.²²⁵ Lastly, the two sides situate their enhanced cooperation “under the framework of the [AIIB], the New Development Bank, the Silk Road Fund, the World Bank, the African Development Bank (AfDB) and other multilateral development organizations” and base their interaction on existing multilateral rules and procedures.²²⁶ The similarities between Italy and Kenya (Africa) stop there, however.

Upon reading the FOCAC Beijing Action plan, the Africa-China relationship looks more like that between the Philippines and China, wherein one party is clearly the ‘host State’ or recipient for the other’s infrastructure projects and investments. To illustrate:

China will, on the basis of the ten cooperation plans already adopted, launch eight major initiatives including an industrial promotion initiative, an infrastructure connectivity initiative, a trade facilitation initiative, a capacity building initiative, a health care initiative, a people-to-people exchange initiative, and a peace and security initiative in close collaboration with African countries in the next three years and beyond, to support African countries in achieving independent and sustainable development at a faster pace. The content of the eight major initiatives will be reflected in the following articles of this *Action Plan*.²²⁷

China will extend loans of concessional nature, export credit line and export credit insurance to African countries, make the loans reasonably more concessional, create new financing models and improve the terms of the credit to support China-Africa Belt and Road cooperation

²²² Beijing Declaration, para. 4.2. See also FOCAC Beijing Action Plan, para. 3.2.3: “The two sides will advance industrial capacity cooperation along with the implementation of the Belt and Road Initiative and in line with the Agenda 2063 ... and leverage the exemplary role of large projects in strengthening such industrial capacity cooperation”.

²²³ See also FOCAC Beijing Action Plan, para. 7: “China and Africa reaffirm their commitment to mutual support in international affairs, and to the purposes and principles of the UN Charter, multilateralism, the authority of the United Nations, and the important role of the UN in international affairs. The two sides will strengthen coordination and collaboration in the United Nations and other multilateral organizations, and enhance cooperation in trade, finance, environmental protection, peace and security, cultural and people-to-people exchanges, economic and social development and human rights”.

²²⁴ Beijing Declaration, para. 17.

²²⁵ Beijing Declaration, para. 12.

²²⁶ FOCAC Beijing Action Plan, para. 3.9.5.

²²⁷ FOCAC Beijing Action Plan, para. 1.8.

and industrial capacity cooperation ... China will extend US\$20 billion of credit lines and support the setting up of a US\$10 billion special fund for development financing.²²⁸

Attempts to highlight the innocuous nature of the dependency/patronage can be seen from assurances such as this one: “China will, as always, offer assistance and support to Africa’s development with no political strings attached”.²²⁹ This situation contrasts with the equal and two-way partnership of Italy and China, as depicted above.

Interestingly, considering the activities involved in the foregoing plans, specifically the various infrastructure projects, the participation of non-State actors, such as international financial institutions, commercial banks, and private companies, is clearly acknowledged in the Africa-China documents. For instance, the FOCAC Beijing Action Plan mentions that, given Africa’s cross-border and trans-regional infrastructure development plans, “China has decided to jointly formulate a China-Africa infrastructure cooperation plan with the African Union” and it “will support Chinese companies participating in Africa’s infrastructure development by way of investment-construction-operation or through other models”.²³⁰ Different funding sources – traditional and otherwise – are to be tapped, namely, “policy banks, development financial institutions, commercial banks, multilateral financial institutions, equity investment funds and export credit insurance institutions”, as well as “institutional investors that tend to make long-term investments such as insurers and sovereign wealth funds”.²³¹ It is, in part, the growing involvement of such non-traditional and diverse funders/investors and the emphasis on green and socially responsible infrastructure projects that make imperative the formulation of standards for sustainable finance.

3. BRI: International Lawmaking Opportunities and Challenges

Given its geographical scope and the myriad of topics it seeks to cover, the Belt and Road Initiative creates a potential for relevant States and non-State actors either to set standards of behavior in areas yet to be clearly regulated by international law or to trigger the modification of existing international legal rules. From such broad range of concerns (‘cooperation priorities’, per BRI documents) – Policy coordination, Facilities connectivity, Unimpeded trade and investment, Financial integration, People-to-people bond – the analysis here centers on the normative framework for safeguarding and integrating environmental and social concerns in economic activities such as infrastructure projects. A few other scholars have analyzed the jurisgenerative potential of infrastructure²³² and some have hinted at how China “meticulously chose infrastructure connectivity investments as its way to reshape extra-regional governance”,²³³ because international rules in this area remain vague, thereby leaving considerable space for standard-setting based on practice. In a similar vein, I submit that the decisions of States and non-State actors along the Belt and Road, as

²²⁸ FOCAC Beijing Action Plan, para. 3.9.1.

²²⁹ Beijing Declaration, para. 11. See also FOCAC Beijing Action Plan, para. 4.1.1: “The African side appreciates the long-standing assistance that China has provided without any political attachment to African countries and their people to the best of its abilities.”

²³⁰ FOCAC Beijing Action Plan, para. 3.3.2.

²³¹ FOCAC Beijing Action Plan, para. 3.9.4.

²³² See generally Megan Donaldson & Benedict Kingsbury, *Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation*, 14 CHI. J. INT’L L. 1 (2013); Benedict Kingsbury, *Infrastructure and InfraReg: on rousing the international law ‘Wizards of Is’*, 8 CAMBRIDGE INT’L L.J. 171 (2019).

²³³ Wang, *supra* note 16 at 597. Citations omitted. Emphasis added.

well as the interactions among them, have implications on the international lawmaking process in the field of sustainable development.

The lacuna or gap (or at least the perception of it) in international law pertaining to the regulation of conduct concerning economic, environmental, and social sustainability – and particularly the lack of legally binding global standards for sustainable infrastructure²³⁴ and sustainable finance – has created an opportunity for China to leverage its economic strength and increasing geopolitical influence and thereby promote its own values, practices, standards, and rules concerning sustainable development and international law more generally. Indeed, the BRI is, according to one scholar, part of China's broader efforts to selectively reshape international economic law:

[R]eshaping refers to developments regarding institutions and rules that go beyond existing standards or structures, although they are not necessarily all created by China and may build on previous experience (like the AIIB learning from the World Bank reform ideas). Building upon selective adaptation, selective reshaping may, in its early stages, continue to be a way of mediating legal transplants. However, *selective reshaping shifts the focus to developing new institutions and rules. This is particularly the case under the BRI, China's landmark move for extra-regional engagement ...* China's efforts to reshape hard and soft law can be found at the multilateral (such as in the WTO, the World Customs Organization (WCO), G20, and the United Nations Commission on International Trade Law (UNCITRAL)), regional (e.g. trade remedy rules in the free trade agreements (FTA) between China and Korea), and domestic levels (like the free trade zones (FTZs)).²³⁵

To complement Heng Wang's examination of the substantive or primary rules that China has been reshaping, this paper looks into the procedural or structural rules that could also be transforming in connection with the manner that norms are formed along the Belt and Road. In particular, my examination focuses on (i) non-State actor participation and international 'soft' lawmaking and (ii) the dynamics among bilateralism, asymmetric values and power relations, and fragmentation of international law.

My analysis of the BRI views it as offering opportunities to elaborate and operationalize the concept of sustainable development, and to thereby contribute specific rules and standards to the international lawmaking process concerning sustainability that is simultaneously occurring at the global, regional, and municipal levels. BRI's contribution to international lawmaking in the field of sustainable development can be classified into two main categories, based on the actor who initially formulated or conceptualized the instrument containing the norms. The first category includes the aforementioned municipal laws, regulations, and policies issued by different agencies or departments of the Chinese government to control or guide the behavior, particularly with regard to environmental and social concerns, of Chinese institutions and enterprises that are 'going global', *i.e.* involved in overseas investment and/or international cooperation. The second category comprises the voluntary codes or guidelines that private organizations (business entities, chambers of commerce, etc.) themselves create by way of self-regulation. While all of these instruments appear

²³⁴ See Kingsbury, *supra* note 232 at 181–82. (The following observation particularly resonates with some of my ideas in this project: "These infrastructural choices operate as regulation – but these regulators are often themselves only thinly or unevenly regulated. One idea of infrastructure-as-regulation ('infra-reg') is that infrastructure can (and often does) operate in some significant relation to law ... It may be a substitute for law or displace law.").

²³⁵ Wang, *supra* note 16 at 589. Emphasis added.

to be purely domestic, internal, or non-public in character, their common objective of regulating cross-border economic activities that have transboundary environmental and social impacts links them with parallel, contemporary efforts at the global level to operationalize and elaborate the legal dimensions of the concept of sustainable development. At present, these global efforts arguably still fall short of producing any of the classical sources of international law. Hence, the products of these efforts are what some scholars classify as ‘international soft law’.

Apart from viewing international law as a value-based system, I also understand international lawmaking as a process of communication, meaning “any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior must be considered functional lawmaking.”²³⁶ International law results from a dynamic and deliberative interaction, both unintentional and deliberate, wherein good practice of relevant actors can incrementally be considered by the relevant actors as a legal obligation. This understanding seems suitable for evaluating the impact on the international legal order of the BRI, which one scholar describes as requiring a view of international law, not as “a set of tactic rules but a fluid discourse,” because it is “built upon a different philosophy” that could potentially “add some new elements to [the] language [adopted by States to relate to one another]”.²³⁷ I submit that the normative framework for sustainability and accountability in the BRI context is created, interpreted, and applied by States and non-State actors alike. Notably, an actor- or participant-oriented approach forms a vital part of the process view of international law.²³⁸ Likewise, actors, norms, and processes constitute the “building blocks of a methodology of transnational law”.²³⁹ In the exercise of ascertaining the rules, processes, and norms applicable to the Initiative, the transnational lens that I adopt here “eschew[s] the hegemony of realism which belittles the importance of international law as a mere tool of power politics, [and] the straitjacket of legal positivism which can only shed so much light on how international law actually operates by focusing on ‘what the law is’”.²⁴⁰

a) Bilateral

The most objectionable characteristic of the BRI is its bilateralism,²⁴¹ which can be broken down into

²³⁶ W. Michael Reisman, *International Lawmaking: A Process of Communication: The Harold D. Lasswell Memorial Lecture*, 75 AM. SOC’Y INT’L L. PROC. 101, 107 (1981).

²³⁷ He, *supra* note 78 at 98.

²³⁸ Janne E. Nijman, *Non-State Actors and the International Rule of Law: Revisiting the “Realist Theory” of International Legal Personality*, in NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 91–124, 105 (Math Noortmann & Cedric Ryngaert eds., 2010). Citations omitted. Italics in the original.

²³⁹ Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism*, in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 53–86, 56 (Gunther Handl, Joachim Zekoll, & Peer Zumbansen eds., 2012).

²⁴⁰ Jolene Lin & Joanne Scott, *Looking Beyond the International: Key Themes and Approaches of Transnational Environmental Law*, 1 TRANSNAT’L ENVTL L. 23, 29 (2012).

²⁴¹ The Chinese practice can be likened to the United States’ “serial bilateralism,” which Benvenisti and Downs describes as a strategy by hegemon or powerful States to “shape the evolution of norms in areas ... where they have vital interests at stake” but their position differ considerably from the vast majority of States. I note, however, that China’s interests and those of the BRI participating States are not diametrically opposed, at least not in the sense that China is intentionally causing environmental and social harms for its own benefit. Rather, the damaging effects of serial bilateralism in this case results from the powerful State taking advantage of the weak regulatory systems of poorer States – instead of using its superior capacity to help improve the latter’s ability to protect people and the environment – and prioritizing its own economic and presumably geopolitical agenda. See Benvenisti & Downs, *supra* note 27 at 610–11.

two problems. The first involves the power imbalance²⁴² between China and most BRI participating States: the parties' often unequal bargaining position potentially renders the poorer and weaker countries vulnerable to accede to demands detrimental to their interests. The second pertains to the fragmented, variable, and uncertain environmental and social standards applicable to projects across different jurisdictions: it is particularly problematic from a sustainable development perspective due to the possibility of a 'race to the bottom' and under-regulation.

aa) Unequal treaties²⁴³

Given the undeniable asymmetry in power between China and many BRI participating countries,²⁴⁴ as well as the likely translation of such inequality into legal terms that are detrimental to the people and the environment, particularly of the weaker (host/borrowing) State, a few questions about the potential international legal responsibility of China, as a creditor and/or donor, are worth exploring. The idea is not to outright label or classify the MOUs and other BRI bilateral agreements as 'unequal treaties', at least not in the sense that the term has historically been used to refer to the capitulations treaties and/or those agreements entered into between China and the Western (Great) Powers during the late 19th and early 20th centuries.²⁴⁵ Rather, it is simply to raise a red flag of sorts about the potential adverse consequences arising from the imbalances in economic power and bargaining strength that are palpable in many of these primarily bilateral arrangements.²⁴⁶ Significantly, this situation deserves the attention not only of the host or borrowing States but of the international community as a whole.²⁴⁷ Host/borrowing States need to be cautioned against the possible restraints on their sovereign prerogatives, including their ability to perform their international legal obligations, when they sign these MOUs or bilateral agreements. On the part of international lawyers and, more broadly, the various members of the international community, the substance of international legal obligations at stake – e.g. human rights, environmental, and social protection – should give cause for some concern, especially given the magnitude of this Initiative.

bb) Race to the bottom and under-regulation

The bilateral (country-by-country) approach to dealing with environmental and social impacts

²⁴² See generally Bruno Simma, *From bilateralism to community interest in international law*, 250 RECUEIL DES COURS 217, 233 (1994). (Apart from obstructing "stronger solidarity in international relations", "bilateralism unveils, and even endorses, the crucial dependence of the enforceability of a State's international legal rights upon a favourable distribution of factual power".).

²⁴³ See Matthew Craven, *What Happened to Unequal Treaties - The Continuities of Informal Empire*, 74 NORDIC J. INT'L L. 335, 382 (2005). (In tracing the reasons for the failure of the concept or category of unequal treaties to find doctrinal foundations in international law, he underscores the "international lawyers' unwillingness to engage effectively with the problem of inequality").

²⁴⁴ See generally Vangeli, *supra* note 91 at 79. ("The asymmetrical relationships that comprise the BRI create similar – but not identical – conditions for symbolic domination compared to the East Asian legacy of the dynastic era.").

²⁴⁵ See generally Ingrid Detter, *The Problem of Unequal Treaties*, 15 INT'L & COMP. L.Q. 1069 (1966).

²⁴⁶ There are a few appealing ideas in this regard, such as "creating a presumption in favour of renegotiation when circumstances of manifest inequality emerge during the implementation of treaty terms". See Alice De Jonge, *From Unequal Treaties to Differential Treatment: Is There a Role for Equality in Treaty Relations*, 4 ASIAN J. INT'L L. 125, 127 (2014).

²⁴⁷ See Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 372 (2005). ("Quite surprisingly, the role of power inequality in the international legal system has rarely been studied systematically.").

allows, if not encourages, albeit perhaps unwittingly, a regulatory ‘race to the bottom’,²⁴⁸ wherein host/borrowing States under-regulate to make themselves ‘attractive’ investment and project destinations. This practice can ultimately hamper the pursuit of sustainable development along the Belt and Road and possibly frustrate the goals (object and purpose) of the other treaties to which these host/borrowing States²⁴⁹ – as well as China itself – are parties, particularly those concerning human rights and environmental protection.

Related to the under-regulation problem is the potential conflict of laws, including confusion or uncertainty regarding applicable law, when a project spans two or more States, as is the case in many transboundary BRI infrastructure projects. The regulatory uncertainty also poses difficulties for the non-State actors involved in these projects, such as the financiers/investors, lenders, and construction companies. In fact, some studies claim that the environmental and social problems arising in BRI projects are partly due to the ignorance of these businesses or private entities about the domestic laws and regulations of the host/borrowing States.²⁵⁰ In a similar vein, the UNEP and the CDB observe that companies’ unfamiliarity with the host State’s laws, regulations, customs, and values and the resulting absence of a ‘localization strategy’ cause cultural differences – that influence labor relations management, for instance – between China and host States to be ignored.²⁵¹ On the flipside, however, there also exists the danger that big multinational or transnational corporations will select jurisdictions with loose regulatory restrictions and simply “impose their own rules [which do not internalize the interests of all affected stakeholders] on foreign communities”.²⁵²

b) Pseudo-formal

Another striking feature of the BRI is the minimal reliance of its participants – States, international organizations, SOEs, and private companies – on formal legal documents. Instead, as has been the preference and practice of China, the leading proponent of the Initiative, the relevant actors’ conduct is regulated by standards and/or guidelines embodied in MOUs and other legally non-binding instruments. The informal character of these materials, juxtaposed with the central role played by non-State actors in the BRI context, evokes questions similar or aligned to those that are driving the research agenda of the Group. I make a distinction between the ‘softness’ or informality of acts and materials due to their non-State origins or elements, on the one hand, and the ‘softness’ or pseudo-formal character of BRI MOUs, which are entered into by States but made to be non-binding.²⁵³

²⁴⁸ Hoong Chen Teo et al., *Environmental Impacts of Infrastructure Development under the Belt and Road Initiative*, 6 ENVIRONMENTS 72 (2019), <https://www.mdpi.com/2076-3298/6/6/72> (last visited Oct 21, 2020) (“[T]he disjuncture between Chinese policy and host countries’ poor environmental records means the BRI is an environmental ‘race to the bottom’.”).

²⁴⁹ Ngaire Woods, *Whose aid? Whose influence? China, emerging donors and the silent revolution in development assistance*, 84 INT’L AFFAIRS 1205, 1210 (2008). (“A further western concern about emerging donors is that their offers of ready money permit poor-country governments to turn down aid that comes with demands that they work to improve good governance, and incorporate adequate environmental and social protections within development projects.”).

²⁵⁰ Kelly Sims Gallagher & Qi Qi, *supra* note 13 at 41. (“A study of a few recent failed projects reveals that some failures have been caused by the lack of awareness or understanding of the latest environmental laws in the host countries or international standards.”).

²⁵¹ China Development Bank & United Nations Development Programme (UNDP) China, *supra* note 13 at 149.

²⁵² Doreen Lustig & Eyal Benvenisti, *The Multinational Corporation as “the Good Despot”: The Democratic Costs of Privatization in Global Settings*, 15 THEORETICAL INQUIRIES IN LAW 125, 144–45 (2014).

²⁵³ I set aside for now a further exploration of the question whether the BRI MOUs/bilateral instruments legally meet the definition of an international agreement or treaty under the Vienna Convention on the Law of Treaties (VCLT).

Notably, as can be seen from my choice of materials to analyze, I view the Initiative’s informality with less skepticism than I do its bilateral character. What is objectionable about the MOUs’ pseudo-formality is its legal implication (based on the domestic laws of many countries, at least) that they no longer need to be subjected to parliamentary scrutiny and approval, much less to public consultation and debate, because they are formally not treaties that create legal rights and obligations.²⁵⁴ The lack of transparency stemming from the pseudo-formality of BRI arrangements can also compound the lack of mechanisms for holding States²⁵⁵ and other global governance actors²⁵⁶ accountable for their decisions and actions. At the core of this objection, therefore, are the lack of transparency and inclusivity and the insufficient diversity of non-State actors participating in decisionmaking processes in the BRI. More critically, the non-State actors excluded from participation are the very individuals and communities who directly experience the project’s environmental and social harms. This situation contradicts claims about synergies between the BRI and the UN 2030 Agenda, since non-State actor participation and multi-stakeholder partnerships are central to the pursuit of development, including the international lawmaking process relating to it. Indeed, in endorsing multi-stakeholder partnerships, particularly since the 2002 Johannesburg World Summit on Sustainable Development, the United Nations recognized the value of drafting new norms “based on a wider knowledge base”, the contribution of innovative forms of governance for effective implementation of the new norms, and the need to close existing gaps regarding democracy and legitimacy in global governance.²⁵⁷

Wolfgang Benedek highlights the important role of non-State actors or stakeholders in fields – “like the environment or the regulation of the Internet” – that are fast developing, require flexible, technical standards, as well as consensus among large constituencies, and for which “international non-contractual law or ‘soft law’” appears more appropriate.²⁵⁸ Remarkably, development assistance is another field where standards are crucial, especially at present when new (non-Western) donors are emerging and private sector actors are taking on bigger roles. These changes call for “more inclusive processes for setting standards ... so as to ensure that emerging donor governments, private sector companies, media and civil society groups are all engaged in generating standards that countries and communities are in a position to implement.”²⁵⁹

Significantly, linking the rights and obligations connected to international cooperation with multi-stakeholderism²⁶⁰ and non-State actor participation in development finance bolsters the proposal

²⁵⁴ Questions and comments from my colleagues at the Berlin Potsdam Research Group were helpful in pushing me to elaborate on the implications of pseudo-formality and analytically distinguish it from bilateralism.

²⁵⁵ See generally Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295, 300 (2013).

²⁵⁶ See generally Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1 (2006); Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT’L L. 211 (2014).

²⁵⁷ Wolfgang Benedek, *Multi-Stakeholderism in the Development of International Law*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 201–210, 202 (Ulrich Fastenrath et al. eds., 2011). Emphasis added.

²⁵⁸ Benedek, *supra* note 257 at 204–205.

²⁵⁹ Woods, *supra* note 249 at 1212.

²⁶⁰ See Benedek, *supra* note 257 at 209. (To clarify, multi-stakeholderism serves not to replace existing State-based structures, such as conventional and customary international law, but to complement them by “add[ing] a dimension to international normative processes and allow[ing] for more nuanced results” that acknowledge contemporary international realities).

and legal justifications in this paper for multilateralizing the environmental and social standards along the Belt and Road.

c) Non-State actor participation

Among the key characteristics²⁶¹ of the BRI that this paper focuses on is the central role played by non-State actors²⁶² such as commercial banks and private construction companies. It is their behavior, as well as their relationships with the BRI participating States, that should be regulated – preferably by international law. At the same time, through their voluntary codes and guidelines, they also participate to some extent in the creation of the pertinent legal and regulatory framework.²⁶³ Because their participation affects the kinds or types of values and institutions upheld and established in this context, it is important to ask whether (and how) such entities support or promote sustainable development. Decisions and actions taken along the Belt and Road, as well as the interrelationships among States and non-State actors, produce, and are guided by, informal arrangements and non-traditional international legal instruments. Proceeding from this view, the materials examined here include so-called soft law instruments, such as resolutions, declarations, guidelines, etc. issued not only by States but by international organizations, international nongovernmental organizations, and business or private associations as well.

Considerable attention was likewise devoted to the domestic/municipal laws, regulations, and policies of China as the leading proponent of the BRI.²⁶⁴ In other words, the transnational legal order²⁶⁵ for the BRI comprises various forms of outputs by not only China and other participating States but also by international organizations – specifically IFIs and development finance institutions (DFIs) – enterprises/corporations (whether purely commercial or State-owned),²⁶⁶ civil society organizations (CSOs), and other non-State actors, who are not viewed as traditional subjects of international law or international lawmakers.²⁶⁷

²⁶¹ The other major characteristic is the predominantly bilateral arrangements entered into by China with other States and international organizations.

²⁶² See Lewis & Moise, *supra* note 179 at 41. (“This expansive strategy is building a network by conducting bilateral and multilateral negotiations with the States along the route, employing a new concept of ‘economic corridor’ ... Additionally, the strong reliance on private businesses, as shown by PPP initiatives, contributes to the prosperity of the markets along the way, much like the corridors’ ancient counterparts.”).

²⁶³ See generally Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT’L L. 501 (2009); John A. Spanogle, Jr., *The Arrival of International Private Law*, 25 GEO. WASH. J. INT’L L. & ECON. 477 (1991).

²⁶⁴ Another reason for examining these materials is offered by Vangeli, *supra* note 91 at 61. (“The normative side of the BRI can be therefore only grasped if scholars critically analyze China’s official discourse and the practice of the BRI in light of broader policy and theoretical debates on China, but also on the trajectories of the global political economic order. A closer look into the discourse and practice of the BRI reveals a multi-faceted concept that creates dialectical relationship between politics and economics, the national and the international...”).

²⁶⁵ See generally Donaldson & Kingsbury, *supra* note 232.

²⁶⁶ Although it is beyond the scope of this paper to scrutinize the distinction between private/commercial companies and SOEs, in terms of the identity of their decisionmakers and the legal rights and obligations that respectively accrue to them, it bears noting the major role that SOEs play within the BRI, given China’s predominance in this endeavor and the structure of its government and domestic economy.

²⁶⁷ For a balanced, somewhat skeptical, treatment of these “steering regimes beyond the state [that] are increasingly characterized by a linkage of hard and soft law” and are emerging in various areas of international law, see Karsten Nowrot, *Aiding and Abetting in Theorizing the Increasing Softification of the International Normative Order: A Darker Legacy of Jessup’s Transnational Law?*, in THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP’S BOLD PROPOSAL 105–125, 110–13 (Peer Zumbansen ed., 2020).

Non-State actor participation is not *per se* problematic, especially considering the view of international law that I take here.²⁶⁸ However, from the perspective of international sustainable development law, and essential for the rule of law as well, the legitimacy of such participation is contingent on the transparency of these actors' decisionmaking processes and their accountability to affected stakeholders. The inclusion of non-State actors in the international lawmaking process is normatively desirable, to the extent that it allows a broader set of ideas, interests, and perspectives to be expressed, thereby enhancing the communication and interaction among these different actors. Inasmuch as the BRI is essentially a global project, covering a number of diverse legal, political, economic, and sociocultural systems, its standard-setting process has to take into account such diversity.

From a normative standpoint, I distinguish between the participation of IFIs in the international lawmaking process relating to sustainable development, on the one hand, and the situation currently under examination, of private actors and/or State-owned or directed entities apparently filling a lacuna in international law and thereby creating transnational law, on the other. As I expounded in my doctoral dissertation, in addition to the significant change of IFIs *qua* international organizations becoming international lawmakers themselves, an equally (if not more) important movement pertains to these entities becoming enablers or catalysts for other non-State actors, including individuals, to become participants in the international lawmaking process in the field of sustainable development as well. This phenomenon does not seem to obtain in the emerging standard-setting processes taking place along the Belt and Road. Particularly lacking in the Initiative are transparent processes and accountability mechanisms to operationalize the principle of public participation.

The crucial distinction can be attributed to the character of the non-State actors involved and the values or norms they possess and uphold. While IFIs, such as the World Bank, have themselves been historically characterized as 'black boxes' and criticized for their failure to take into account the interests of project-affected people and communities, they have gradually evolved,²⁶⁹ such that they are now relatively more transparent in their actions and decisions. Moreover, there are presently some means of holding them accountable for their misbehavior. Part of the reason for these changes is the fact that IFIs are multilateral institutions that remain subject to the scrutiny, if not the control, of States, the latter's citizens, and the international community as a whole. In contrast, the private companies and the SOEs, who are the predominant participants in the international lawmaking process along the Belt and Road, are not creatures of international law and are not legally bound and expected to embody and promote multilateral/global goals. Accordingly, although I consider desirable the inclusion of non-State actors in this process, I am still slightly skeptical about the substance of their contributions, *i.e.* whether they promote and represent norms and values that would advance sustainability, accountability, and international rule of law along the Belt and Road.

²⁶⁸ See Saskia Sassen, *The State and Economic Globalization: Any Implications for International Law?*, 1 CHI. J. INT'L L. 109, 111-12 (2000). (Given the fact that States are no longer "the only or the most important strategic agents" in the globalized landscape, "my question to international law experts is whether such a change will weaken or alter the organizational architecture for the implementation of international law".) In response to such question, I offer in this paper – using the BRI as an example – a glimpse of how the dynamics between States and non-State actors operates, to show that the new configuration will not necessarily weaken international law but will certainly alter it.

²⁶⁹ See Johanna Aleria P. Lorenzo, "Development" versus "Sustainable Development"?: (Re-)Constructing the International Bank for Sustainable Development, 51 VAND. J. TRANSNAT'L L. 399 (2018).

4. Multilateral Solutions for Transnational Problems:²⁷⁰

To address the problems identified above, I recommend that BRI MOUs/bilateral agreements be multilateralized. Specifically, the current norm of applying host/borrowing States' environmental and social laws and regulations to infrastructure projects should be modified, so that such use is accompanied by a reference to a basic minimum (default) standard that has been set in a multilateral manner and is consistent with obligations and commitments under international economic law, international environmental law, and international human rights law.²⁷¹ This standard can be drawn from the IFIs'/MDBs' environmental and social safeguards, which, as I elaborated elsewhere, have underwent and are still going through incremental reform and harmonization, and contribute to the international lawmaking process relating to sustainable development.²⁷² These safeguards can be used as a benchmark, *a la* zero draft, that would then be modified in a setting/process (perhaps the Belt and Road Forum) where all relevant BRI actors, State and non-State, are participating. One of the remarkable features of this standard-setting process – characterized by Dann and Riegner as “a strategy of increasing legalization and juridification as part of a larger strategy [by the World Bank] of technocratic legitimization”²⁷³ – is a multi-stakeholder approach that sought to integrate the international organizations' technical expertise with the views and interests, not only of States, but also of relevant non-State actors such as non-economic/financial IOs,²⁷⁴ NGOs (particularly those working in the environmental and human rights fields), academics from various disciplines, private sector representatives (e.g. commercial banks, institutional investors, construction companies), and project-affected people and communities.

At the risk of oversimplifying, the multilateral²⁷⁵ solutions, whose adoption I suggest here, consist of *environmental and social safeguards* that provide standards²⁷⁶ for at least three areas of concern in

²⁷⁰ See Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 348 (2008). (“The lodestar guiding the movement towards universal legislation over the past 150 years or so has been the increasingly dominant assumption that global problems require global solutions ... The more interdependent the world becomes, the more international cooperation is necessary to achieve collective goals and fend off global harms.”).

²⁷¹ This proposal draws inspiration from the broader recommendation to “internal[ize] international economic, social, and cultural rights, international labor agreements, and international environmental agreements ... into the long-term domestic regulatory frameworks governing One Belt, One Road projects” for the purpose of “redressing the bargaining imbalance for developing countries and ensuring mutual accountability for all global partners in China’s push as a ‘responsible power’ driving ‘Globalization 2.0’ bilaterally through the One Belt, One Road Initiative”. See Diane Desierto, *China’s ‘One Belt, One Road’ Initiative: Can A Bilaterally-Negotiated ‘Globalization 2.0’ Internalize Human Rights, Labor, and Environmental Standards?*, EJIL: TALK! (2017), <https://www.ejiltalk.org/chinas-one-belt-one-road-initiative-can-a-bilaterally-negotiated-globalization-2-0-internalize-human-rights-labor-and-environmental-standards/> (last visited Mar 27, 2021).

²⁷² See Johanna Aleria P. Lorenzo, *International law-making in the field of sustainable development and an emerging droit commun among international financial institutions*, 7 CAMBRIDGE INT'L L.J. 327 (2018).

²⁷³ Cf. Philipp Dann & Michael Riegner, *The World Bank’s Environmental and Social Safeguards and the evolution of global order*, 32 LEIDEN J. INT'L L. 537, 540 (2019). (The authors attribute the World Bank safeguards’ “expanded substantive convergence with other norms of international law” to the participation of other international institutions in the consultation process and drafting stage. They nevertheless point out that “application of the Safeguards in daily practice remains characterized by inter-institutional fragmentation.”).

²⁷⁴ *Ibid.* at 558.

²⁷⁵ Blum, *supra* note 270 at 348–49. (“[M]ultilateralism, often with its regulatory component, seem intuitively the most effective and efficient tool for facilitating universal cooperation and policing international behavior.”).

²⁷⁶ See He, *supra* note 78 at 100. (“Since the BRI may facilitate the provision of GPGs, there is room for international law to maneuver ... In the environmental protection along the BRI, it is possible to develop new rules for international cooperation on environmental impact assessment, cross-country environmental inspection as well as coherent transboundary damage compensation.”).

the design, planning, and implementation of infrastructure projects: (i) environmental (impact) assessment;²⁷⁷ (ii) indigenous peoples;²⁷⁸ (iii) involuntary resettlement; and (iv) stakeholder engagement/consultation. Each of the major international financial institutions, including the World Bank, have in their ‘internal law’ specific policies and procedures for integrating these concerns that are usually implicated in economic activities like infrastructure construction. Significantly, compliance with these safeguards can be construed as a loan ‘condition’ that IFIs/MDBs have traditionally required at the outset. Likewise, instruments of transnational private regulation such as the Equator Principles include standards or best practices for the conduct of an appropriate environmental and social assessment that serves to address risks and impacts to “Workers, Affected Communities, and the environment”.²⁷⁹ The Principles are accompanied by an Implementation Note and Guidance Notes²⁸⁰ that detail how the Equator Principles Financial Institutions (EPFIs) should apply the Principles. Essentially, these safeguards are due diligence standards to ensure protection against harms – to the natural environment and to the project-affected people and their human rights – arising from the pursuit of economic growth through infrastructure building and development projects in general. Further, these standards operationalize certain sustainable development principles, namely, *integration*²⁸¹ and *public participation*.²⁸² My proposal to require similar safeguards for BRI infrastructure projects entails a modification of China’s ‘hands-off’ or apathetic approach to environmental and social concerns in relation to international cooperation and development assistance.

It bears emphasis how transnational private regulatory instruments derive content from or refer to resolutions, declarations, statements, frameworks, and reports by various UN bodies, IFIs, and other multilateral organizations. As previously mentioned, the Equator Principles, for instance, was originally based on the IFC Performance Standards. Moreover, one of the Guidance Notes accompanying the current version of the Principles expressly state at the outset that “[t]he Equator Principles Association recognizes that financial institutions and their clients have a responsibility to respect Human Rights” and that the EPFIs “will fulfill this responsibility in line with the United Nations Guiding Principles on Business and Human Rights (‘UNGPs’) by carrying out Human Rights due diligence on the projects EPFIs finance (EP 4 Preamble)”. In the Guidance Note concerning indigenous

²⁷⁷ The International Court of Justice (ICJ) has tackled the States’ duty to conduct environmental assessment in the context of transboundary projects and in relation to the harm prevention rule. See *Gabčíkovo-Nagymaros; Pulp Mills; Costa Rica v Nicaragua*. See also *Rio Declaration on Environment and Development*, Principle 17: “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority”.

²⁷⁸ Of particular importance are the obligation to obtain the free, prior and informed consent (FPIC) of indigenous peoples for certain State actions and decisions affecting them and their right to participate in decisionmaking that would affect their rights. See *United Nations Declaration on the Rights of Indigenous Peoples*. See also *Rio Declaration*, Principle 22.

²⁷⁹ Capitalized words are defined terms under the Equator Principles, which generally use the definitions provided in the IFC Performance Standards.

²⁸⁰ The current version – Equator Principles 4 (effective: October 2020) – has eight (8) Guidance Notes, including one on the implementation of Human Rights Assessments, another on Evaluating Projects with Affected Indigenous Peoples, and still another on Climate Change Risk Assessment.

²⁸¹ *Rio Declaration*, Principle 4: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”.

²⁸² *Rio Declaration*, Principle 10: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities ... and the opportunity to participate in decision-making processes”.

peoples, the matter of interaction with laws and other standards is addressed, albeit not in a very comprehensive manner: “[P]rojects must comply with all relevant national law, *including those laws implementing host country obligations under international law*, and with reference to IFC PS7. Legal benchmarking will likely be required for projects in jurisdictions where Indigenous Peoples laws on consultation already exist.”²⁸³

My recommendation is to treat these preexisting multilateral environmental and social safeguards as the ‘default’ or minimum core obligations in all infrastructure projects along the Belt and Road. Deviation from these standards – by applying the national laws and regulations of either the host or the home country – can be negotiated between China and a BRI participating State, on the condition that an assessment would first have to be made to determine (i) whether such domestic legal and regulatory framework affords the same level of protection (for people and the environment) as the multilateral standards, and (ii) whether the country implementing the project has the track record and capacity to apply such standards. Rules and procedures used by IFIs/MDBs for such ‘equivalence and acceptability’ assessment²⁸⁴ – e.g. a Safeguards Diagnostic Review, in the parlance of the World Bank²⁸⁵ – can guide the adoption of similar rules and procedures that should be agreed upon by BRI participating States, relevant international organizations, members of civil society, and affected individuals and communities.

To clarify, the recommendation is not to altogether dispense with bilateral interactions, which can admittedly still be useful in fleshing out details and accommodating any special circumstances. Rather, it is to consolidate all the background norms identified above in one overarching instrument that serves as the core minimum for each and every bilateral MOU. This instrument is multilateral or collective, in the sense that it would take into account the participation of both States and non-State actors in the international lawmaking process along the Belt and Road, and, more importantly, the relevant norms for ensuring the economic, environmental, and social sustainability of the whole undertaking.

Another recommendation is to create a classification or categorization scheme of acceptable, *i.e.* consistent with sustainable development – projects that can be undertaken in the BRI context. It can be patterned after the *EU Taxonomy*.²⁸⁶ As the European Commission rationalizes, directing investments towards projects and activities, which would help achieve the EU’s climate and energy targets for 2030, requires “a common language and a clear definition of what is ‘sustainable’”, and it

²⁸³ Emphasis added.

²⁸⁴ See Asian Development Bank (ADB), “Strengthening the Use of Country Safeguard Systems to Address Environmental and Social Safeguard Issues,” Appendix 6 to *Safeguard Policy Statement*, June 2009, <https://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june-2009.pdf> (last visited Feb 13, 2021); African Development Bank (AfDB), *Assessment of the use of “Country Systems” for environmental and social safeguards and their implications for AfDB-financed operations in Africa*, February 2015, [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/SSS - Use of Country Systems- Int%C3%A9rieur web - EN.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/SSS_-_Use_of_Country_Systems_-_Int%C3%A9rieur_web_-_EN.pdf) (last visited Feb 13, 2021); Asian Infrastructure Investment Bank (AIIB), *Environmental and Social Framework*, “Use of Country and Corporate Systems,” paras. 52-56, Approved February 2016 (Amended February 2019), <https://www.aiib.org/en/policies-strategies/download/environmental-framework/Final-ESF-Mar-14-2019-Final-P.pdf> (last visited Feb 13, 2021).

²⁸⁵ World Bank Operational Policy (OP) 4.00, “Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects,” Revised April 2013, <https://ppfdocuments.azureedge.net/1564.pdf> (last visited Feb 13, 2021).

²⁸⁶ Regulation (EU), 2020/852 (Taxonomy) on the establishment of a framework to facilitate sustainable investment [*hereinafter*, “EU Taxonomy Regulation”].

is for this purpose that the “creation of a common classification system for sustainable economic activities” is needed.²⁸⁷

In sum, I suggest that the network of bilateral agreements that currently functions as the normative framework in the BRI has to be understood and implemented as being embedded in an international legal framework comprising norms that aim towards sustainable development, including international cooperation and assistance for sustainability. Among the implications of this proposition inspired by a *universalist approach*²⁸⁸ is that activities authorized by the bilateral MOUs should not run counter to the two parties’ respective treaty obligations and sustainability commitments, and should not hinder the fulfillment of the sustainable development goals agreed upon and being pursued by the *international community*. In this regard, the conduct of participants, both States and non-State actors alike, must be guided not only by the bilateral arrangements but also by multilateral standards and transnational private regulatory instruments.

In the succeeding sections, I outline the international legal principles and concepts that serve as bases and inspiration for the foregoing recommendations.

a) International sustainable development law

Although still in its nascent phase, international sustainable development law offers methods and perspectives to integrate the different fields of international law that regulate the environmental and social impacts of economic activities. One of the persistent criticisms against international sustainable development law (which I allude to here and addressed in greater detail in my doctoral dissertation) is the fact that it mostly comprises declarations, guidelines, and other international instruments, which arguably do not qualify as treaties and fall short of contributing to custom formation. At best, therefore, so the challenge goes, there is international soft law on sustainable development. At present, the most pertinent and prominent among these ‘soft’ international legal instruments is the UNGA Resolution laying down the 2030 Agenda and the SDGs. To the extent that these documents contain non-binding international commitments, they can be readily dismissed as being irrelevant to international law, and more particularly to international lawmaking.

In the case of the China-led BRI, it took only a short time after it was launched in 2013 that various statements from States and international organizations were made, raising questions about the sustainable development aspects of this global endeavor. Soon thereafter, especially once some of the projects have broken ground (quite literally), a few NGOs and academics began drawing attention to the economic, environmental, and social sustainability of the projects, bolstering their arguments with references to the SDGs and the other international instruments relating to sustainable development.

From a classic or traditional international legal perspective, the context in which the Belt and Road Initiative is being undertaken can be characterized as one that is ‘lawless’, meaning there are no formal sources of law – treaty, custom, general principles – governing the obligations and rights of

²⁸⁷ European Commission, *EU taxonomy for sustainable activities*, BUSINESS, ECONOMY, EURO - BANKING AND FINANCE - SUSTAINABLE FINANCE (n.d.), https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en (last visited Jan 5, 2021).

²⁸⁸ Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT’L L. 265 (2009); Philip Allott, *The Emerging Universal Legal System*, 3 INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL 12 (2001).

the States, much less of the non-State actors involved in this ambitious global endeavor. This seeming absence²⁸⁹ of international legal regulation can be attributed to two (2) interrelated factors. First, China, the progenitor of the Initiative seems to prefer to conduct its international legal affairs on a bilateral basis and using less formal (what I describe here as ‘pseudo-formal’) instruments. Hence, the MOUs, joint declarations, and/or other bilateral agreements were signed separately with a number of States and with international organizations. Additionally, there are non-binding documents formulated by the Chinese government or by some of its SOEs (e.g. guiding opinions, blueprints, action plans, declarations, statements) that seem intended to apply, at the very least, only as domestic law. Second, bulk of the activities concerning infrastructure projects, the economic, environmental, and social sustainability of which is the primary focus of this paper, involved in the Initiative are being undertaken by non-State actors, such as private corporations, who are traditionally not international legal persons bound by international law.

The focus on sustainable development further complicates the legal landscape, inasmuch as the binding character of the multilateral instruments relating to sustainable development and the very existence of international sustainable development law are still subject to debate. According to the majority view, international sustainable development law is, at best, *de lege ferenda*, i.e. the international legal framework regarding the pursuing of economic, environmental, and social sustainability has yet to be fully formed and embodied in the sources of law per Article 38(1) of the ICJ Statute. Framed differently, there remains a lacuna in international law pertaining to the regulation of the pursuit of sustainable development. I insist, however, that this perceived deficiency is specious. Adequate normative guidance and boundaries can be inferred from “a specific, narrower set of legal instruments and provisions where environment, social and economic considerations are integrated to varying degrees in different circumstances.”²⁹⁰ To clarify, the term *international sustainable development law* is used here in the sense explained by Cordonier Segger and Khalfan, thus:

The concept of sustainable development integrates economic, environmental and social (including human rights) priorities. As a point of departure, *international sustainable development law addresses the area of intersection between three fields of international economic, environmental and social law ...* As not all international law in these three areas is (or even needs to be) integrated, the term “sustainable development law” refers to a specific, narrower set of legal instruments and provisions where environment, social and economic considerations are integrated to varying degrees in different circumstances. And by extension, *the principle of integration is fundamental to sustainable development law.*²⁹¹

The concept of sustainable development²⁹² and the principles underlying it highlight interdependence²⁹³, namely: (1) of States and their peoples; (2) of present and future generations;

²⁸⁹ Some authors have also highlighted the rising tendency and capacity for China to “fill in the void in global governance and international [law]” through, among others, the creation of new international organizations. See e.g. Vangeli, *supra* note 91 at 64.

²⁹⁰ Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* 103 (2004).

²⁹¹ *Ibid.* at 103. Emphasis added.

²⁹² The ICJ views the concept of sustainable development as “aptly express[ing]” the “need to reconcile economic development with protection of the environment. *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v Slovakia), Judgment, 1997 I.C.J. Rep. 7, 78, 140 (Sept. 25).

²⁹³ See Benvenisti, *supra* note 255 at 317. (Interdependence is among the contemporary circumstances, together with “resource scarcity ... as well as the wide recognition of the equal moral worth of all human beings” that

and (3) of economic, environmental, and social issues. The first two relations are addressed by the principles of intra-generational equity and inter-generational equity, respectively, while the third is covered by the principle of integration. Because BRI infrastructure projects affect these interrelationships, they cannot be characterized as strictly bilateral (and State-to-State) undertakings, and the interests involved cannot thus be encapsulated in the existing arrangements that constitute the Initiative. This point will be elaborated below.

The principle of integration essentially calls for ensuring that all three dimensions/considerations are taken into account in development decisionmaking. It can also be couched in a negative normative language as prohibiting actors from either making social and economic development decisions that disregard environmental considerations, or “undertak[ing] environmental protection without taking into account relevant social and economic implications.”²⁹⁴ As applied to infrastructure in particular, there are, as yet, no authoritative and binding global standards for evaluating whether a project is consistent with sustainable development and its underlying principles. The same is true with regard to ‘sustainable finance’. The status quo, instead, consists of emerging and disconnected or fragmented frameworks (most by way of guidelines and recommendations) that are formulated, espoused, and implemented by non-State actors, such as IFIs and business enterprises, sometimes in coordination with a State or a select group of States.

By focusing on the considerable participation of non-State actors in the Initiative and tackling the sustainable development dimensions of such global undertaking, this working paper thus somewhat moves within or between two legal vacuums.²⁹⁵ The first has previously been alluded to in relation to the purported softness of international sustainable development law.²⁹⁶ The second vacuum²⁹⁷ pertains to the similarly soft international law relating to CSR or to the absence altogether of legal standards, especially global or multilateral ones, requiring corporations and similar entities in the private sector to act responsibly and/or sustainably. Questions and debates surrounding ‘green’ or ‘sustainable’ finance belong to this second gap in the law. In this sense, therefore, the paper can be seen as a project in gap- or lacuna-filling.²⁹⁸

makes it imperative to recognize “a fundamental legal obligation upon sovereigns to note the interests of others when making policy choices that directly affect them.”).

²⁹⁴ Cordonier Segger & Khalfan, *supra* note 209 at 104.

²⁹⁵ This movement allows one to glean the “space created where the ideologies of the state and the market meet” and where the regulation of sustainable development dimensions of economic activities by non-State actors can be considered. See Larry Catá Backer, *The Cri de Jessup Sixty Years Later: Transnational Law’s Intangible Objects and Abstracted Frameworks*, in *THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP’S BOLD PROPOSAL* 386–418, 404 (Peer Zumbansen ed., 2020). (“The notion of the transnational as the law of the ‘in-between’ [peeks] out from the consideration of regulatory (transnational?) responses to ... sustainability and human rights consequences (the ‘situation’) of economic activity by enterprises (the ‘ad-hoc’).”).

²⁹⁶ Perhaps another way of framing the challenge of soft law is to argue that there is no international law governing the pursuit of sustainable development.

²⁹⁷ A third *factual* vacuum can be identified, namely, the huge “infrastructure vacuum” or gap – left unfinanced by the traditional IFIs/MDBs – that has enabled Chinese geopolitical and geo-economic strategy. See Carrai, *supra* note 93 at 109.

²⁹⁸ Maneuvering between the vacuums described here is guided by the notion of a “global public law” as a “distinct mode of ordering”. See Donaldson & Kingsbury, *supra* note 232 at 39. (“A global public law applied to the prescriptive but non-binding international instruments ... might have at least two purposes: first, rendering this governance activity intelligible in legal terms ... and second, vindicating some sense of the specificity and complexity of law as both a set of existing norms and a distinct intellectual and political practice.”).

Despite the seemingly vague and amorphous quality of the concept of sustainable development, principled arguments are possible and remain relevant to international law.²⁹⁹ It is also important to appreciate the somewhat inherent lack of clarity in content and contours of the integrative concept sustainable development, not as a disadvantage, but as a feature that, according to Judge Bruno Simma, has “permitted the entire world community to embrace it.”³⁰⁰ The novelty of sustainable development and its place in legal and political discourse are also noteworthy, in that the concept partly alters the views and interests of, and the interrelationships among, States of varied economic and political power.

Indeed, notwithstanding the non-binding character of sustainable development as an international legal norm, it has increasingly been referenced by both States and non-State actors in different circumstances to evaluate various economic activities, such as those relating to trade, investment, and finance, in terms of their environmental and social dimensions. In the same vein, infrastructure projects have far-reaching potential impacts, both positive and negative, on the economy, the natural environment, and peoples and communities. States, international organizations, nongovernmental organizations, and scholars increasingly invoke sustainable development commitments and instruments when they undertake certain actions that have a transboundary effect, participate in multilateral conferences and fora, and criticize the actions of States and non-State actors at the international level. Participants in the international lawmaking process relating to sustainable development, such as the States and non-State actors along the Belt and Road, increasingly make their decisions and pursue their actions ‘in the shadow of soft law’, i.e. the body/collection of resolutions, declarations, frameworks, guidelines, and other international instruments. Implicit in the choice to examine such a broad and diverse set of materials is the proposition that the rise of international law is still possible even when it is mostly ‘international soft law’ that regulates the behavior, interaction, and responsibilities of relevant diverse actors – provided that these instruments are not sealed off from other fields of international law. These materials complement the traditional sources of international law, particularly those that lie at the intersection of international economic law, international environmental law, and international human rights law.³⁰¹

Accordingly, “sustainable development has emerged as the basis for judgment and aspiration,” such that “[i]t is now accepted that Chinese – and indeed all – investment will and should be judged on the basis of the contribution it makes to sustainable development in the investor’s home country and in the countries and communities hosting the investment.”³⁰² Moreover, the fact that the BRI

²⁹⁹ See Bruno Simma, *Foreword*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE* v–vi, v (Nico J. Schrijver & Friedl Weiss eds., 2004). (“Principles and practice of international law, its raw material, have one thing in common: both may develop from a state of amorphous flux until, after meanderings, and metamorphoses – ‘Prinzipienwanderung’, ‘Verdichtung von Praxis’ – they may crystallize as the (legal) crux of a subject matter, perhaps enjoying unquestioned even unchallenged authority in law.”).

³⁰⁰ *Ibid.* at vi.

³⁰¹ My overall focus on the concept of sustainable development and arguments favoring an integrative approach to these international law branches – in this paper as well as in other research projects – are in parallel to the observation about the “growing value orientation of [international economic law]” and “the need for finding an adequate balance between conflicting private and community interests”. See Karsten Nowrot, *Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future*, 18 *IND. J. GLOBAL LEGAL STUD.* 803, 834 (2011).

³⁰² Zadek & Wang, *supra* note 13 at v.

presents itself as a global development initiative³⁰³ justifies its comparison with the UN 2030 Agenda, and more specifically, using the latter as a normative standard for actions and decisions undertaken along the Belt and Road. Remarkably, in addressing sustainable development issues, some of the BRI documents and materials do refer to principles and rules within (and across) international economic law, international environmental law, and international human rights law, as well as to resolutions, declarations, statements, and studies by various United Nations bodies and other multilateral institutions or fora. Considering the claimed synergies³⁰⁴ between these broad and ambitious global endeavors, a comparative and international legal analysis of the two is imperative.

For purposes of this paper, the following definitions are adopted:

The [Inter-American Development Bank] IDB Group defines sustainable infrastructure as infrastructure projects that are planned, designed, constructed, operated, and decommissioned in a manner to ensure economic and financial, social, environmental (including climate resilience), and institutional sustainability over the entire life cycle of the project.³⁰⁵

Sustainable finance generally refers to the process of taking due account of **environmental, social and governance (ESG) considerations** when making investment decisions in the financial sector, leading to increased longer-term investments into sustainable economic activities and projects. More specifically, **environmental considerations** may refer to climate change mitigation and adaptation, as well as environment more broadly, such as the preservation of biodiversity, pollution prevention and circular economy. **Social considerations** may refer to issues of inequality, inclusiveness, labour relations, investment in human capital and communities, as well as human rights issues.³⁰⁶

Although the terms are not always used consistently, in general a *distinction can be drawn between approaches to sustainable finance* that take a broader environmental, social, economic and governance approach, *and those that take a narrower, 'green finance' one* concerned only with environmental issues. Even more narrowly focused are those targeted only on climate change mitigation and/or adapting to climate change impacts.³⁰⁷

At bottom, the common denominator among the various definitions of sustainable infrastructure and sustainable finance is their holistic approach to development “based on global and domestic

³⁰³ See Jin, *supra* note 88 at 279. (BRI’s development logic and approaches are in line with the SDGs, although there has so far been “little discussion and analysis comparing the two.”).

³⁰⁴ See The State Council Information Office of the People’s Republic of China, *China’s International Development Cooperation in the New Era* (White Paper), 10 January 2021, http://english.www.gov.cn/archive/whitepaper/202101/10/content_WS5ffa6bbbc6d0f72576943922.html (last visited Jan 20, 2021) [*hereinafter*, “China’s International Development Cooperation White Paper”]. (“The 2030 Agenda is a guiding blueprint for development cooperation around the world and has a lot in common with the Belt and Road Initiative.”) See also Jin, *supra* note 88; CHINA DEVELOPMENT BANK AND UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP) CHINA, *supra* note 13.

³⁰⁵ Inter-American Development Bank, *What is Sustainable Infrastructure? A Framework to Guide Sustainability Across the Project Cycle 7* (2018).

³⁰⁶ European Commission, *Overview of sustainable finance*, BUSINESS, ECONOMY, EURO - BANKING AND FINANCE - SUSTAINABLE FINANCE (n.d.), https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/overview-sustainable-finance_en (last visited Jan 5, 2021). Emphasis in the original.

³⁰⁷ Maya Forstater & Naurin Nuohan Zhang, *Definitions and Concepts: Background Note*, UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP) INQUIRY WORKING PAPER 16/13, 10 (2016), https://wedocs.unep.org/bitstream/handle/20.500.11822/10603/definitions_concept.pdf?sequence=1&isAllowed=y (last visited Jan 5, 2021).

sustainable development goals”.³⁰⁸ Notably, in one of its reports, the United Nations Environment Programme (UNEP) also adopted the IDB definition, although pointing out that its concern regarding sustainable development and infrastructure goes beyond the project level.³⁰⁹ The United Nations Development Programme (UNDP) and the CDB, in a joint study, likewise cite this definition, in addition to other frameworks, including one created by the China International Contractors Association, whose “framework for public- and privately-financed sustainable infrastructure, as well as planning, designing and financing of sustainable assets” is anchored in four pillars, namely, “Economic and Financial Sustainability, Environmental Sustainability and Climate Resilience, Institutional Sustainability and Social Sustainability”.³¹⁰ Other international organizations,³¹¹ multilateral fora,³¹² and initiatives led by international NGOs³¹³ and the private/business sector,³¹⁴ in line with their respective mandates and goals, have also put forward standards and guidance for defining and operationalizing sustainable infrastructure and sustainable finance.³¹⁵ The Organisation for Economic Co-operation and Development (OECD), for instance, looks to the UN 2030 Agenda for guidance in undertaking sustainable infrastructure:

To achieve such positive outcomes, infrastructure investment should be guided by a sense of shared, long-term responsibility for the planet *consistent with the 2030 Agenda for Sustainable*

³⁰⁸ Hannah Logan, Joanne Emerson Taqi & Michael Weissman, *Sustainable infrastructure: A path for the future*, THE OATH – THE MIDDLE EAST LAW JOURNAL FOR CORPORATES (2017), <https://www.nortonrosefulbright.com/en/knowledge/publications/0c89c7b4/sustainable-infrastructure-a-path-for-the-future> (last visited Jan 4, 2021). See also Martin Dietrich Brauch, *Contracts for Sustainable Infrastructure: Ensuring the economic, social and environmental co-benefits of infrastructure investment projects*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (IISD) REPORT, December 2017, available: <https://www.iisd.org/sites/default/files/publications/contracts-sustainable-infrastructure.pdf> (last visited Jan 18, 2021) (“To achieve the SDGs and climate change objectives, the infrastructure to be upgraded and built must be *sustainable* – that is, it must be specifically designed to mitigate economic, social and environmental risks, and to generate economic, social and environmental co-benefits.”).

³⁰⁹ United Nations Environment Programme (UNEP), *Integrated Approches to Stustainabl Infrastructure* 9 (2019), [https://www.greengrowthknowledge.org/sites/default/files/downloads/resource/Integrated Approches To Sustainable Infrastructure UNEP.pdf](https://www.greengrowthknowledge.org/sites/default/files/downloads/resource/Integrated%20Approches%20To%20Sustainable%20Infrastructure%20UNEP.pdf) (last visited Apr 15, 2021). Emphasis added.

³¹⁰ China Development Bank & United Nations Development Programme (UNDP) China, *supra* note 13 at 75–76. Citations omitted. Italics in the original.

³¹¹ OECD, *Sustainable Infrastructure Policy Initiative* (n.d.), <http://www.oecd.org/finance/Sustainable-Infrastructure-Policy-Initiative.pdf> (last visited Feb 28, 2021); EU Strategy on Green Infrastructure, https://ec.europa.eu/environment/nature/ecosystems/strategy/index_en.htm (last visited Feb 28, 2021); Master Plan on ASEAN Connectivity 2025, <https://asean.org/wp-content/uploads/2016/09/Master-Plan-on-ASEAN-Connectivity-20251.pdf> (last visited Feb 28, 2021).

³¹² See e.g. G20 Principles for Quality Infrastructure Investment, G20 Principles for Quality Infrastructure Investment, endorsed by the G20 Finance Ministers and Central Bank Governors on June 9, 2019, available: https://www.mof.go.jp/english/international_policy/convention/g20/annex6_1.pdf (last visited Feb 28, 2021); Sustainable Infrastructure Alliance (SIA), *International Standards for Sustainable Infrastructure: An overview* (April 2020), https://gib-foundation.org/wp-content/uploads/2020/05/International_Standards_for_Sustainable_Infrastructure-2.pdf (last visited Feb 28, 2021).

³¹³ See e.g. International Institute for Sustainable Development (IISD), “Infrastructure,” <https://www.iisd.org/topics/infrastructure> (last visited Feb 28, 2021).

³¹⁴ See e.g. KPMG, “Achieving sustainable infrastructure,” <https://home.kpmg/xx/en/home/insights/2020/01/enabling-sustainable-infrastructure.html> (last visited Feb 28, 2021); International Federation of Consulting Engineers (FIDIC), “Sustainable Infrastructure: Standards & Guidelines,” <https://fidic.org/node/5965> (last visited Feb 28, 2021).

³¹⁵ See Hans-Peter Egler & Raul Frazao, *Sustainable Infrastructure and Finance: How to Contribute to a Sustainable Future*, UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP) INQUIRY WORKING PAPER 16/09, 25 (2016), <https://wedocs.unep.org/handle/20.500.11822/7756> (last visited Jan 5, 2021). (The need for greater and common understanding of what sustainable development means in the context of infrastructure “is why institutions including the UN, the OECD, the World Bank ... are calling for a standardized approach to sustainability and resilience in order to improve the quality of projects and investments.”).

*Development, national and local development strategies, and relevant international commitments, and in the spirit of extensive consultation, joint efforts and shared benefits. Domestic resource mobilisation is critical to addressing the infrastructure financing gap. Assistance for capacity building, including for project preparation, should be provided to developing countries with the participation of international and regional organisations and development institutions and agencies.*³¹⁶

Apart from the principle of integration, these concurrent standard-setting efforts share a common recognition of *international cooperation and assistance* – which is variably conceived of as a duty/obligation, a principle, or even simply an undeniable reality – and of its importance to the pursuit of sustainable development.

The purpose of the foregoing ‘digression’ into international sustainable development law is to emphasize that the BRI and the concomitant norm creation relating to it are not, and cannot be, limitless or unrestrained. The BRI MOUs have to integrate or take into account the growing body of international soft law relating to sustainable development.

b) Community interest and global public goods

Fragmented and variable standards ensuing from bilateralist relations are incompatible with pursuing community interests and solving collective-action problems,³¹⁷ such as those sought to be addressed by the UN 2030 Agenda and the BRI. Drawing insights from the conceptual distinction between multilateral *lawmaking treaties* and bilateral-Statist agreements/contracts,³¹⁸ I scrutinize the legitimacy³¹⁹ and adequacy of bilateral MOUs in addressing the multidimensional sustainable development concerns along the Belt and Road. The notions of *international community* and *community interest* – which are antithetical to bilateralism – are also central to my arguments about the need for greater and broader participation in the negotiation, design, planning, and implementation of BRI infrastructure projects. More specifically, my proposal for taking a multilateral track to pursue sustainable development along the Belt and Road proceeds from Bruno Simma’s view of international law “finally overcoming the legal as well as moral deficiencies of bilateralism and maturing into a much more socially conscious legal order” by recognizing the existence of “community interest”, which he describes as “a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States”.³²⁰ Interestingly, for Simma in 1994, there was already “a worldwide social consciousness ... that ‘communalizes’ and

³¹⁶ Organisation for Economic Co-operation and Development (OECD), *OECD Compendium of Policy Good Practices for Quality Infrastructure Investment* 14 (2020), <http://www.oecd.org/finance/oecd-compendium-of-policy-good-practices-for-quality-infrastructure-investment.htm> (last visited Jan 4, 2021). Emphasis added.

³¹⁷ See Evan J. Criddle & Evan Fox-Decent, *Mandatory Multilateralism*, 113 AM. J. INT’L L. 272, 324–25 (2019). (“[I]n numerous contexts involving issues of transnational or global concern, states do not enjoy unfettered discretion to decide whether to cooperate with their peers.”).

³¹⁸ See generally Catherine Brölmann, *Law-Making Treaties: Form and Function in International Law*, 74 NORDIC J. INT’L L. 383 (2005); Daniel Costelloe & Malgosia Fitzmaurice, *Lawmaking by treaty: Conclusion of treaties and evolution of treaty regimes in practice*, in RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING 111–32 (Catherine Brölmann & Yannick Radi eds., 2016).

³¹⁹ See Krisch, *supra* note 247 at 376. (“Conceptions of legitimacy change over time ... until the 19th century, there was hardly an expectation for dominant states to act through multilateral treaties; today this has become the standard form of law-making and deviations require justification.”).

³²⁰ Simma, *supra* note 242 at 233–34.

‘publicizes’ international relations far beyond the traditional rituals of governmental interaction” that is demonstrated by “[t]he rapidly increasing international concern with human rights, the environment, the global commons, the spread of nuclear weapons, and economic interdependence”.³²¹ I consider the present paper as contributing to ensure that such positive trend is not reversed.

The application³²² of the global/international public goods theory³²³ to the Initiative corroborates the imperative for a common language – which, I argue, should be international law – to facilitate cooperation among several actors who may have slightly diverging interests and capabilities but nonetheless face a common threat or share a common concern. For this purpose, I adopt the following conceptualization:

The IPG concept, as reconstructed by the UNDP, covers a very large spectrum of global issues, ranging from (1) ‘natural global commons’ such as climate stability; (2) ‘human-made global commons’ such as cultural heritage and knowledge; to (3) ‘global policy outcomes’ such as distributive justice. The BRI may fall within the ambit of the second category, i.e. it is a China-advocated initiative with the capacity to be transformed into a global commons. *At another level, IPGs have developed, and indeed come to include, economic governance and trade integration ... Reflecting the common ideals and pursuits of humane societies, the BRI can be seen as a positive endeavour to seek new models of international cooperation and global governance and to inject new energy into the pursuit of world peace and development.*³²⁴

International sustainable development law and the notions of international community and global public goods are still in a nascent phase and remain quite abstract, and thus would arguably face operationalization difficulties. My proposal for multilateralization, however, can also find support from more established fields of international law, as discussed in the next section.

c) International human rights and environmental legal norms

The BRI MOUs have to be negotiated, interpreted, and applied in the context of the principles and rules within and across international economic law, international environmental law, and international human rights law – so as not to frustrate or defeat the object and purpose of treaties in those interrelated areas, to which China and many BRI participating States are legally bound. These bilateral instruments can be likened to trade liberalization agreements, which, according to the Committee on Economic, Social and Cultural Rights (CESCR), “should not curtail or inhibit a country’s

³²¹ *Ibid.* at 234.

³²² The official Chinese position supports such framing. See China’s International Development Cooperation White Paper. (“The Silk Road Economic Belt and the 21st Century Maritime Silk Road are significant public goods China offers to the whole world and a major platform for international development cooperation.”).

³²³ He, *supra* note 78 at 86. See also İbrahim Öztürk, *The belt and road initiative as a hybrid international public good*, WORKING PAPER ON EAST ASIAN STUDIES No. 125/2019, University of Duisburg-Essen, Institute of East Asian Studies (IN-EAST), 1 (2019), <https://www.econstor.eu/bitstream/10419/206655/1/1681557835.pdf> (last visited Oct 28, 2020).

³²⁴ Shi, *supra* note 194 at 18. Citations omitted. Emphasis added.

capacity to ensure the full realization of the right to water”,³²⁵ to health,³²⁶ to food,³²⁷ and to other human rights. Relatedly, according to some scholars, “it is arguable that the extraterritorial obligations arising from the Charter need to be prioritised or at least taken into account in many other spheres, for example, trade and investment law, environmental law ... or in the design of policies such as loan and development programmes through multilateral agencies”.³²⁸ Moreover, given the crystallizing right to development, as Diane Desierto explains, “no single sovereign – including China – can reject the full application of international labor, environmental, social, and all other human rights obligations in sovereign project financing activities and the long-term implementation of infrastructure connectivity to achieve genuine integral human development.”³²⁹ Indeed, with the growing realization – facilitated by the concept of sustainable development – that decisions and actions governed by these various fields are often, if not always, interrelated, there arises a need to (re-)organize and reconsider the nature of the communication among States and between States and non-State actors.

Proceeding from these statements, I submit that, as the more powerful and capable party in these bilateral transactions, China (or any creditor or lender State, for that matter) should not let the tendency to engage in a race to the bottom prevail. Following the Maastricht Principles,³³⁰ BRI infrastructure projects can be considered as situations, wherein China’s “acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights ... outside its territory”,³³¹ or in which China “is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially”.³³² Moreover, invocations of the principles of non-interference and ‘respect for local law’³³³ cannot be used to absolve home States of their obligations³³⁴ and business entities of their responsibilities³³⁵ to protect the people and the environment in the context of transnational/cross-border economic activities. This imperative is

³²⁵ CESCR General Comment No. 15 (2002), para. 35.

³²⁶ See CESCR General Comment No. 14 (2000), para. 50. (“[T]he failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations” is included in examples of violations of the obligation to respect).

³²⁷ See CESCR General Comment No. 12 (1999), para. 19. (“[T]he failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations” can constitute a violation of the right to food.).

³²⁸ Malcolm Langford, Fons Coomans & Felipe Gómez Isa, *Extraterritorial Duties in International Law*, in GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW 51–113, 55 (Malcolm Langford et al. eds., 2012).

³²⁹ Diane A. Desierto, *The Complexities of Democracy, Development, and Human Rights in China’s Belt and Road Initiative*, 35 CONN. J. INT’L L. 299, 303 (2019).

³³⁰ *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, adopted by International Experts on 28 September 2011 [*hereinafter*, “Maastricht Principles”].

³³¹ Maastricht Principles, Scope of jurisdiction, para. 9 (b).

³³² Maastricht Principles, Scope of jurisdiction, para. 9(c).

³³³ See Russel & Berger, *supra* note 107 at 11. (“China’s laissez-faire approach to infrastructure development makes it easier for Chinese actors to secure project deals and allows developers to benefit by cutting corners and evading responsibility for legal, social, labor, environmental, and other issues.”).

³³⁴ See Han, *supra* note 35 at 387.

³³⁵ André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. INT’L L. 359, 375 (2012). (“[T]here is an increasing push to consider the role and responsibility of the private entity itself. Illustrative of this point are the U.N. Guiding Principles on Business and Human Rights, which envisage a distribution of responsibilities among states and businesses that operate in delicate human rights situations.”).

even more salient given the often lax (or worse, absent)³³⁶ laws and regulations for the protection of the environment, human rights, and labor in many host States and particularly BRI participating countries.³³⁷ In a situation where project-affected people are not sufficiently protected by their own States' laws and regulations, the option to invoke and use higher, *i.e.* more protective, standards should be made available.

Significantly, the 'country systems approach' or principle of ownership purports to uphold/respect State sovereignty. A contemporary understanding of sovereignty as an international legal concept, however, emphasizes "responsibilities that sovereigns are inherently bound by – regardless of their consent" and mandates States to be "agents of humanity ... obligated to take other-regarding considerations seriously into account in formulating and implementing policies, even absent specific treaty obligations".³³⁸ Moreover, the permanent sovereignty of natural resources has also been construed as comprising both rights and duties, which, as Nico Schrijver argues, need to be balanced, especially in today's interdependent world.³³⁹ Indeed, it is through such lens that I view with suspicion the Chinese practice of allowing the domestic law of host/borrowing States³⁴⁰ – even when there are clear indications that such system is inadequately protective – to govern the environmental and social impacts in BRI infrastructure projects. A more appropriate approach, I submit, should be founded on the principle of solidarity and consistent with the UN Charter provisions on international economic and social cooperation.

aa) Duty of international cooperation and assistance

As the main proponent of the Initiative³⁴¹ and the party to the MOUs/bilateral agreements having greater resources and capacity to implement reforms, China should ensure that BRI infrastructure projects (and other activities pursued in relation to the Initiative) do not undermine the host/borrowing State's ability to comply with its international environmental and human rights obligations and related international commitments to sustainable development. Relatedly, China should not create or facilitate the creation of a situation wherein a weaker State would more likely fail to comply with its international legal obligations and commitments. Put differently, the less powerful party to a bilateral agreement should not be placed in a position wherein it would be constrained to breach one obligation to comply with another obligation. To the contrary, consistent with the duty of international cooperation and assistance, the more able and powerful party should empower or enable the weaker State to meet the latter's international legal obligations and

³³⁶ See Dann & Riegner, *supra* note 273 at 554. ("Previous experiences with the [use of country standards] show that national regulations and processes, in particular in the social realm, are generally not as protective as the World Bank standards.")

³³⁷ Kelly Sims Gallagher & Qi Qi, *supra* note 13 at 27. ("Certain investment destinations in the European Union and even some developing countries with fragile eco-systems would demand stricter emissions control or meeting higher environmental performance standards than China currently requires domestically, but it is incontrovertible that environmental governance is much weaker in many of the countries covered under the BRI compared with China's.")

³³⁸ Benvenisti, *supra* note 255 at 300.

³³⁹ See generally Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997).

³⁴⁰ See Han, *supra* note 35 at 386.

³⁴¹ Relevant to this point is the statement in the *Development Cooperation White Paper* that it "will devise medium- and long-term foreign aid plans and targeted plans for different regions, countries and projects as needed, while taking full account of other developing countries' development priorities and needs, and the goals of the Belt and Road Initiative and the UN 2030 Agenda." China further states, albeit ambiguously, that it "will continue to improve relevant laws, regulations and institutions, providing a legal guarantee for international development cooperation".

commitments through, for example, technical and financial assistance and capacity-building programs. Further, it is also worth considering whether a State's superior position can be invoked as basis for expecting it to insist on including a provision in the MOU or other bilateral agreement that would allow the application of multilateral standards, such as the multilateral development banks' environmental and social safeguards, when these standards are more stringent, *i.e.* more comprehensive and oriented towards sustainable development than the domestic laws and regulations of the host/borrowing State.³⁴²

Notably, there are ongoing efforts at the UN level relating to the drafting of a convention on the right to development, and one provision in the draft is devoted to elaborating the duty to cooperate.³⁴³ The portions of such article that would be relevant and applicable to China and the BRI include the undertaking of States, as duty-bearers of the right to development, to ensure that "obstacles to the full realization of the right to development are eliminated in all international legal instruments, policies and practices"³⁴⁴ and that "the formulation, adoption and implementation of all international legal instruments, policies and practices are consistent with the objective of fully realizing the right to development for all".³⁴⁵ In the draft convention, States Parties also "undertake to ensure that financing for development, and all other forms of aid or assistance given or received by them, whether bilateral, or under any institutional or other international framework, are consistent with the provisions of the present Convention".³⁴⁶ The duty to cooperate is highly significant to the right to development, in the sense that it "runs through the entire draft convention like a golden thread binding together all its provisions" and still deserves a separate and detailed provision, because realizing the right "requires an enabling environment at both the national and international levels".³⁴⁷

bb) Principle of solidarity

The recommendation to pursue a multilateral track for sustainability along the Belt and Road also finds basis in the principle of solidarity, which, as Philipp Dann explains, "invokes the idea of help and fair burden sharing and the need for the stronger to contribute more" and also includes an element of doing no harm in the context of development projects.³⁴⁸ It also bears highlighting that international solidarity, which includes the duty to cooperate,³⁴⁹ is one of the general principles identified in the Draft Convention on the Right to Development that should guide the implementation

³⁴² Pope Francis, for instance, highlights the stark difference in the developed world's treatment of foreign debt and of ecological debt: "The foreign debt of poor countries has become a way of controlling them, yet this is not the case where ecological debt is concerned ... *The developed countries ought to help pay this debt by ... assisting poorer countries to support policies and programmes of sustainable development.* The poorest areas and countries are less capable of adopting new models for reducing environmental impact because they lack the wherewithal to develop the necessary processes and to cover their costs." See *Laudato Si*, para. 52. Emphasis added.

³⁴³ Zamir Akram (Chair-Rapporteur), *Draft Convention on the Right to Development, with commentaries*, U.N. Doc. A/HRC/WG.2/21/2/Add. 1 (20 January 2020) [*hereinafter*, "Commentary to RTD Draft Convention"].

³⁴⁴ Commentary to RTD Draft Convention, Article 13, para. 2(b).

³⁴⁵ Commentary to RTD Draft Convention, Article 13, para. 2(c).

³⁴⁶ Commentary to RTD Draft Convention, Article 13, para. 3.

³⁴⁷ Commentary to RTD Draft Convention, Article 13 – Duty to cooperate, para. 1.

³⁴⁸ Philipp Dann, *Solidarity and the Law of Development Cooperation*, in *SOLIDARITY: A STRUCTURAL PRINCIPLE OF INTERNATIONAL LAW* 55–91, 65, 71 (Rüdiger Wolfrum & Chie Kojima eds., 2010).

³⁴⁹ See Commentary to RTD Draft Convention, Article 3 – General principles, para. 11. ("International solidarity is to the duty of international cooperation what human dignity is to human rights.").

of obligations relating to the right to development. The enabling environment required to realize the right is seen as being “created through a spirit of unity among individuals, peoples, States and international organizations, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals”.³⁵⁰ As elaborated above, BRI infrastructure projects entail international legal obligations arising from interrelated fields. I posit that recognizing the interdependence³⁵¹ among members of the international community in today’s globalized world,³⁵² as well as the interdependence of their economic, environmental, and social concerns, entails the incorporation of the principle of solidarity³⁵³ into obligations arising from international economic law, international environmental law,³⁵⁴ and international human rights law.³⁵⁵ Concretely, this assertion means that bilaterally-agreed standards cannot exclusively regulate the pursuit of sustainable development along the Belt and Road, and that BRI infrastructure projects must be understood, designed, and implemented in the light of the participating States’ legal obligations to protect people and the environment.

5. Preliminary conclusions: Sustainable development and international legal concerns along the Belt and Road

States and non-State actors have various legally significant roles and functions, through which they contribute to the formulation of standards concerning the economic, environmental, and social sustainability of projects along the Belt and Road. The rules and mechanisms they formulate and apply can contribute to the hardening of international ‘soft’ law instruments, particularly on sustainable infrastructure and sustainable finance. Under certain conditions, such contribution bodes well for the progressive development of international law in the field of sustainable development. At present, however, the harmful economic, environmental, and social impacts reported in a number of BRI infrastructure projects suggest that values and norms underpinning the

³⁵⁰ Commentary to RTD Draft Convention, Article 3(g).

³⁵¹ See generally R. St. J. MacDonald, *Solidarity in the Practice and Discourse of Public International Law*, 8 PACE INT’L L. REV. 259 (1996). (“Solidarity, as a principle of international law, creates a context for meaningful cooperation that goes beyond the concept of a global welfare state; on the legal plane it reflects and reinforces the broader idea of a world community of interdependent states.”).

³⁵² Cf. Benvenisti, *supra* note 255 at 301–302. (As trustees, sovereign States are obligated “both to exercise their authority in ways that take the rights of all individuals to democracy and to equality into account, and to bear in mind the promotion of global welfare”. This proposition, however, does “not depend on any assumption about the existence of an ‘international community’ – that is, of a shared sense of group solidarity”).

³⁵³ See generally Esin Küçük, *Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?*, 23 MAASTRICHT J. EUR. & COMP. L. 965 (2016).

³⁵⁴ Cf. Neil Craik, *The Duty to Cooperate in the Customary Law of Environmental Impact Assessment*, 69 INT’L & COMP. L.Q. 239, 258 (2020). (The conduct of environmental impact assessment, as a legal requirement, reflects and gives effect to the shift in international law towards community interests. However, this procedural mechanism does not require States to “abandon self-interest in favour of international solidarity, it simply requires that they take steps to understand and account for the interests of those States potentially affected by their activities”).

³⁵⁵ See generally *Draft declaration on the right to international solidarity*, Annex of the Report of the Independent Expert on human rights and international solidarity, U.N. Doc. A/HRC/35/35 (25 April 2017) (“The right to international solidarity is grounded in the codification and progressive development of freedoms and entitlements contained in international human rights treaties reflecting civil and political rights, economic, social and cultural rights, the right to development and international labour standards, and complemented by other responsibilities arising from voluntary commitments undertaken in the relevant fields at the bilateral, multilateral, regional and international levels.”). See also Report of the Independent Expert on human rights and international solidarity, Virginia Dandan, U.N. Doc. A/72/171 (19 July 2017).

concept of sustainable development are not being fully adopted by the relevant actors' decisions and actions on the ground.

Non-State actor participation in the international lawmaking process along the Belt and Road can indicate a rise in the international rule of law, since it makes the decisionmaking process more pluralistic and adaptable to contemporary and future developments. However, such participation falls short of the inclusive, multi-stakeholder engagement necessary to integrate the goals of economic growth, environmental protection, and social progress (including respect, protection, and fulfillment of human rights), because it is limited to a select group of economic entities that are predominantly based on one State. The lack of transparency and accountability mechanisms critically leaves out the concerns of project-affected people and allows the perpetuation of environmental and social harms in several BRI partner countries .

The preference for bilateral and pseudo-formal arrangements in what purports to be a multilateral initiative could contribute to a decline in the international rule of law, as the previous juridification of international relations becomes weakened by the reality of asymmetric economic and political power among States. China relies on the international legal norm of non-interference to justify its 'light touch' approach to sustainability issues arising from BRI infrastructure projects and the concomitant use of host/borrowing State's environmental and social standards. Such application of the country ownership principle is not *per se* objectionable. What makes it problematic is the fact that the legal and regulatory systems of many developing countries along the Belt and Road cannot adequately protect people and the environment, especially in the context of foreign-funded infrastructure projects. In these situations, a passive or 'hands off' approach contradicts claims of consistency with sustainable development principles, which include international cooperation and assistance, broadly construed. It bears emphasizing that the pursuit of economic activities under the BRI implicates international environmental law and international human rights law, inasmuch as the sought-for enhancement of trade, investment, and financial opportunities – made possible by infrastructure construction – affects the capacity of States to perform their obligations under those other areas. In this context, the economically and politically dominant States, acting as creditors or donors, have a duty to ensure that the capacity of the host/borrowing States to perform their international legal obligations is not impaired by their involvement in the BRI.

Multilateral standards – possibly by way of a model contract or framework agreement – are thus needed to assess the economic, environmental, and social sustainability of infrastructure projects along the Belt and Road. Such standards would also be helpful in delineating the responsibilities of the State and non-State actors concerned. In this working paper, I suggested that such standards can draw inspiration from the environmental and social safeguards applied in IFI-supported development projects, as well as from ongoing efforts of regional and supranational organizations to classify economic activities based on their consistency with sustainable development. To the extent that the BRI presents itself as a global undertaking, the norms governing the decisions, relationships, and overall behavior of the actors within the Initiative need to be formulated and implemented through a process that is multilateral, transparent, and inclusive. Legal obligations arising from BRI infrastructure projects include not only the bilateral economic relations of the donor/creditor/investor and the host/borrowing State but also the pursuit of the interdependent interests of the international community concerning the protection of people and planet, *i.e.* the natural environment. Accordingly, given the cross-border character of the BRI and the multi-dimensional impacts of its projects, its legal and regulatory framework needs to be informed by and

aligned with the normative environment comprising contemporaneous multilateral standard-setting efforts, foremost of which is the UN 2030 Agenda for Sustainable Development.

In sum, the use of multilateral standards is not only for the purpose of preventing the weaker party from being subjected to undue pressure by the more powerful party. It is likewise for the promotion of the interests of the international community – in protecting the individual and the natural environment – that are affected by the bilateral transactions. Otherwise stated, the subject matter of the BRI MOUs and bilateral agreements involves not only the economic, environmental, and social concerns of the two States but comprises community interests as well. Accordingly, these community interests that find expression in the concept of sustainable development, which is currently being elaborated and operationalized in various international instruments and multilateral efforts undertaken by both States and non-State actors, need to be incorporated into the normative framework along the Belt and Road. For all the flaws and discontents associated with multilateralism, the present proposal to move towards that direction is a small step away from perpetuating the “globalization of indifference”³⁵⁶ that threatens our common future.

³⁵⁶ Pope Francis, *Laudato Si*, para. 52.

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

The Research Group brings together international lawyers and political scientists from three institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam. An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

