



UvA-DARE (Digital Academic Repository)

A Path Toward Sustainable Development Along the Belt and Road

Lorenzo, J.A.P.

DOI

[10.1093/jiel/jgab032](https://doi.org/10.1093/jiel/jgab032)

Publication date

2021

Document Version

Final published version

Published in

Journal of International Economic Law

License

CC BY-NC-ND

[Link to publication](#)

Citation for published version (APA):

Lorenzo, J. A. P. (2021). A Path Toward Sustainable Development Along the Belt and Road. *Journal of International Economic Law*, 24(3), 591-608. <https://doi.org/10.1093/jiel/jgab032>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

A Path Toward Sustainable Development Along the Belt and Road

Johanna Aleria P. Lorenzo 

ABSTRACT

The article scrutinizes the purported synergies between the Belt and Road Initiative (BRI) and the United Nations (UN) 2030 Agenda for Sustainable Development by evaluating the transnational legal order regulating environmental and social impacts of BRI economic activities. From the perspective of international law and sustainable development, three problematic features are identified. First, the bilateral character of agreements between China and BRI-participating States produces fragmented and variable sustainability standards. Second, the informality of State-to-State arrangements often hinder parliamentary and public deliberation in host States. Lastly, BRI decision-making processes restrict non-State actor participation and thereby disregard the very communities harmed by infrastructure projects.

To clear its path to sustainability and bring it closer to the UN agenda, BRI's legal and regulatory framework must become multilateral, transparent, and inclusive. The proposal entails bringing to fore the relevant background international legal norms, especially on environmental, labor, and human rights protection, and consolidating them in a framework agreement that sets minimum sustainability safeguards for transboundary economic activities like foreign-funded infrastructure projects. Reforms are imperative because the subject matter of the Initiative requires international cooperation and involves not only the economic, environmental, and social concerns of two States but also implicates the goals and interests of the international community.

I. INTRODUCTION

In September 2015, the United Nations General Assembly adopted 'a plan of action for people, planet and prosperity' and 193 States thereby pledged common action toward the achievement of 17 Sustainable Development Goals (SDGs) that 'balance the three dimensions of sustainable

* Assistant Professor in Public International Law, Amsterdam Law School and Amsterdam Center for International Law, University of Amsterdam. E-mail: j.a.p.lorenzo@uva.nl. An earlier draft greatly benefited from discussions with Heike Krieger, Andreas Zimmermann, Andrew Hurrell, and colleagues from the Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?'. I am also grateful to the two reviewers and the JIEL editors for their probing questions and comments. All errors remain my own.

development: the economic, social and environmental'.¹ One hundred and forty of those 193 States are also participants² 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'.³ Central to 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'.⁴ The Initiative thus stands to fill a sizable global infrastructure investment gap, roughly costing USD15 Tn (€12.54 Tn),⁵ which traditional international financiers have neglected for a time.⁶

Cooperation along the Belt and Road centers on five major areas: (i) policy coordination, (ii) facilities connectivity, (iii) unimpeded trade, (iv) financial integration, and (v) people-to-people bonds.⁷ The present study concentrates on the second.⁸ There seems to be no explicit effort to undertake lawmaking or standard-setting along the Belt and Road, especially regarding the sustainable development aspects of infrastructure projects. This lacuna, or the perception of it, presents China with an opportunity to leverage its economic strength and increasing geopolitical influence and thereby promote its own values, practices, and approaches concerning sustainable development and international law. Considering its magnitude and the breadth of topics covered, the Initiative can either set expectations of behavior in areas yet to be clearly regulated by international law or modify existing international legal rules. Consequently, it cannot be examined in isolation from other China-led activities affecting the global economy and international law.

The BRI has potentially considerable and enduring impact on the SDGs, given its geographic scope and the myriad topics it covers. Significantly, the Chinese government itself,⁹ together with various institutions¹⁰ and scholars,¹¹ acknowledges this relationship and touts

¹ G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (21 October 2015) (hereinafter, 'UN 2030 Agenda').

² As of June 2021. 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> (visited 15 July 2021).

³ 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 (hereinafter, 'Vision and Actions'), https://en.ndrc.gov.cn/newsrelease_8232/201503/t20150330_1193900.html (visited 21 April 2021).

⁴ Vision and Actions, Framework.

⁵ Global Infrastructure Outlook <https://outlook.gihub.org/> (visited 22 April 2021). See also UN Habitat, 'The Sustainable Investment Gap and How to Close It: Cities, Infrastructure and SDG Investment Gap', Discussion Paper 01–4 February 2020, https://unhabitat.org/sites/default/files/2020/02/the_sustainable_investment_gap_and_how_to_close_it_february_2020.pdf (visited 22 April 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> (visited 22 April 2021).

⁶ 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 Julien Chaisse and Jędrzej Górski (eds), *The Belt and Road Initiative: Law, Economics, and Politics* (Leiden: Brill Nijhoff, 2018) 107–145, at 109.

⁷ Vision and Actions, Cooperation Priorities.

⁸ In delineating the somewhat vague scope of the Initiative, including the classification of activities as BRI projects, the article relies on statements made by State agencies and international organizations in publicly available official documents.

⁹ 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 (hereinafter, 'White Paper'), http://english.www.gov.cn/archive/whitepaper/202101/10/content_WSSffia6bbb6d0f72576943922.html (visited 20 April 2021). ('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').

¹⁰ China Development Bank and United Nations Development Programme (UNDP) China, *Harmonizing Investment and Financing Standards towards Sustainable Development along the Belt and Road*, Economic Development Along the Belt and Road (2019) <http://www.un.org.cn/uploads/20191108/bbbScee285b9e35d7de574fe4e4f6df.pdf> (visited 20 April 2021).

¹¹ Ling Jin, 'Synergies between the Belt and Road Initiative and the 2030 SDGs: from the perspective of development', 6 (3) Economic and Political Studies 278 (2018).

the existence of synergies between BRI and the sustainable development agenda. On paper,¹² the Initiative appears to align with and recognize the international legal obligations underpinning the 2030 Agenda. However, the documented adverse economic, environmental, and social impacts—debt traps, denuded forests,¹³ dried-up or polluted rivers,¹⁴ local communities' loss of livelihood, and displaced indigenous peoples¹⁵—of some BRI infrastructure projects belie these claimed synergies. Raising concerns about reported violations of economic, social, and cultural (ESC) rights in host countries, where China conducts economic and technical assistance projects, the Committee on Economic, Social and Cultural Rights (CESCR) called upon the State 'to adopt a human rights-based approach to its policies of international cooperation' by establishing '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.'¹⁶ The CESCR likewise recommended that China '[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 [ESC] rights in the context of their projects abroad.'¹⁷

This article inquires whether these harms¹⁸ result from the absence of law-based standards or the inadequacy of existing rules regulating activities within the Initiative. It further probes into how the Initiative relates to the international legal system and the multilateral standard-setting processes concerning sustainable development. To answer these questions, I employ the lens¹⁹ of Transnational Law to examine the laws, regulations, and policies applicable to BRI infrastructure projects and identify the relevant actors in the decision-making process. An actor- or participant-oriented approach, which constitutes one of the 'building blocks of a methodology of transnational law,'²⁰ signifies my view of international lawmaking as a

¹² BRI documents do refer to principles and rules within 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.

¹³ Elizabeth Losos, Alexander Pfaff and Lydia Olander, 'The deforestation risks of China's Belt and Road Initiative' (28 January 2019), *Brookings: Future Development* <https://www.brookings.edu/blog/future-development/2019/01/28/the-deforestation-risks-of-chinas-belt-and-road-initiative/> (visited 11 February 2021).

¹⁴ Shibani Mahtani, 'How China's Belt and Road initiative is choking the Mekong River', *Washington Post*, 28 January 2020, <https://www.washingtonpost.com/graphics/2020/world/the-mekong-river-basin-under-threat/> (visited 11 February 2021).

¹⁵ 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) <https://www.brivillage.asia/> (visited 11 February 2021).

¹⁶ 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.

¹⁷ *Ibid.*, para 13.

¹⁸ The adverse impacts of BRI infrastructure projects have been extensively documented by several authors and will not be tackled in detail here. See, e.g. China Development Bank and United Nations Development Programme (UNDP) China, above n 9, at 24–25; 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* (2018) 61–101; Tymoteusz Chajdas, 'BRI Initiative: a New Model of Development Aid?' in Julien Chaisse and Jędrzej Górski (eds), *The Belt and Road Initiative: Law, Economics, and Politics* (Leiden: Brill Nijhoff, 2018) 416–453, at 446–47; Kelly Sims Gallagher and Qi Qi, *Policies Governing China's Overseas Development Finance: Implications for Climate Change* (Center for International Environment and Resource Policy, The Fletcher School, Tufts University, 2018) https://sites.tufts.edu/cierp/files/2018/03/CPL_ChinaOverseasDev.pdf (visited 06 July 2021), at 2–3; Simon Zadek and Yuan Wang, *Sustainability Impacts of Chinese Outward Direct Investment: A review of the literature* (International Institute for Sustainable Development (IISD), 2016) <https://www.iisd.org/publications/sustainability-impacts-chinese-outward-direct-investment-review-literature> (visited 06 July 2021), at 23; Alison Hoare, Lan Hong and Jens Hein, *The Role of Investors in Promoting Sustainable Infrastructure Under the Belt and Road Initiative* (Chatham House, 2018) <https://www.chathamhouse.org/2018/05/role-investors-promoting-sustainable-infrastructure-under-belt-and-road-initiative-0> (visited 06 July 2021), at 8; Hoong Chen Teo et al., 'Environmental Impacts of Infrastructure Development under the Belt and Road Initiative', 6 (6) *Environments* 72 (2019); Xiuli Han, 'Environmental Regulation of Chinese Overseas Investment from the Perspective of China', 11 (3) *Journal of World Investment & Trade* 375 (2010).

¹⁹ 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 (1) *Brill Open Law* 40 (2020).

²⁰ Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism', in Gunther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Leiden: Brill Nijhoff, 2012) 53–86, at 56.

process,²¹ meaning, ‘any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior must be considered functional lawmaking.’²²

Focusing on the Initiative’s sustainable development dimensions entails moving²³ between two legal vacuums. The first concerns the ostensible softness of international sustainable development law²⁴ itself. The second pertains to the seeming absence of concrete legal standards, especially global ones, defining ‘green’ or ‘sustainable’ infrastructure²⁵ and finance. By scrutinizing the purported synergies between the legal and regulatory framework of BRI and the international legal obligations and commitments relating to sustainable development, this article contributes to the still quite sparse legal scholarship,²⁶ especially from international lawyers, on the social and environmental concerns arising along the Belt and Road. My arguments favoring an integrative approach to different international law fields respond to the ‘growing value orientation’ of international economic law and ‘the need for finding an adequate balance between conflicting private and community interests.’²⁷

The article proceeds thus. Part II following this Introduction sketches the current patchwork of norms along the Belt and Road. It highlights Beijing’s ‘hands off’ or ‘light touch’ approach to regulating activities that impact people and the environment in BRI-participating States. Part III briefly presents sustainability as a normative framework and identifies the problematic features of the BRI legal and regulatory framework. It also explains why international solidarity and the duty to cooperate are relevant to the Initiative. To modify the fragmented environmental and social standards and the exclusionary and opaque bilateral arrangements,²⁸ Part IV proposes the incorporation into the BRI framework of environmental and social safeguards embodying sustainable development principles, including transparency and public participation. The Conclusion summarizes the legal and policy reasons why the pursuit of sustainable development along the Belt and Road needs a multilateral, transparent, and inclusive track.

II. BRI LEGAL AND REGULATORY CONTEXT

The transnational legal order²⁹ governing the economical, environmental, and social impacts of BRI infrastructure projects includes Chinese laws, regulations, and policy issuances pertaining

²¹ Janne E. Nijman, ‘Non-State Actors and the International Rule of Law: Revisiting the “Realist Theory” of International Legal Personality’, in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Surrey: Ashgate, 2010) 91–124, at 105.

²² W Michael Reisman, ‘International Lawmaking: A Process of Communication: The Harold D. Lasswell Memorial Lecture’, 75 *American Society of International Law Proceedings* 101 (1981), at 107.

²³ 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 non-State actors’ economic activities can be considered. See Larry Catá Backer, ‘The Cri de Jessup Sixty Years Later: Transnational Law’s Intangible Objects and Abstracted Frameworks’, in Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup’s Bold Proposal* (Cambridge: Cambridge University Press, 2020) 386–418, at 404.

²⁴ Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford: Oxford University Press, 2004), at 103.

²⁵ Maneuvering between the vacuums and analysis of prescriptive but non-binding international instruments are guided by the notion of a ‘global public law’, which can help ‘render[] this governance activity intelligible in legal terms’. See Megan Donaldson and Benedict Kingsbury, ‘Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation’, 14 *Chicago Journal of International Law* 1 (2013), at 39.

²⁶ Heng Wang, ‘Selective Reshaping: China’s Paradigm Shift in International Economic Governance’, 23 (3) *Journal of International Economic Law* 583 (2020), at 586 (‘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’).

²⁷ Karsten Nowrot, ‘Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future’, 18 *Indiana Journal of Global Legal Studies* 803 (2011), at 834.

²⁸ Inasmuch as this study avoids making a definitive claim regarding whether BRI MOUs are treaties, I use ‘agreements’ and ‘arrangements’ interchangeably. The latter is, in Aust’s words, a more neutral term. It thus fits well with the article’s willing suspension of disbelief about the international legal status of the subject documents.

²⁹ Gregory Shaffer and Carlos Coye, ‘From International Law to Jessup’s Transnational Law, from Transnational Law to Transnational Legal Orders’, in Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup’s Bold*

to environmental protection and corporate social responsibility, as applicable to overseas investment. The Chinese government has also promulgated BRI-specific documents setting out some guidelines or overall direction on the conduct of activities under the Initiative. In parallel to legislative acts, business enterprises, specifically commercial banks and construction companies, are voluntarily taking guidance from global standards, international organizations, professional associations, or foreign counterparts in the industry. Another critical feature of China's handling of overseas investment and international development cooperation is its reliance on host States' environmental and social standards. Accordingly, the responsibility for ensuring the sustainability of BRI infrastructure projects presently falls on either the State in whose territorial jurisdiction the activities are undertaken or on the contractors and their financiers.

A. Chinese domestic legislation

Domestic legislation concerning the behavior abroad of Chinese entities is of quite recent vintage. Prior to BRI's launch, China had no clear law regarding overseas investment and international cooperation and assistance—or any attempt to regulate such activities is minimal at best.³⁰ More critical observers stress the striking contrast between active efforts to 'green' its domestic economy, on the one hand, and the negligible, almost absent, steps to ensure that its companies, especially the State-owned enterprises (SOEs),³¹ do not cause environmental and/or social harms in the countries where they conduct business, on the other.³²

From a survey of Chinese official documents on this topic, a few observations are salient here. First, country ownership is central to the Chinese approach to international development cooperation and, by extension to BRI,³³ as the flagship program of its foreign policy. Its rationale lies in Beijing's self-identification as a developing country and interpretation of State sovereignty as noninterference. Second, in terms of mandatory character, human rights, social, cultural, and governance matters are given less importance than environmental protection. For example, the Guidelines for Environmental Protection in Foreign Investment and Cooperation (2013)³⁴ appear to treat labor and other social concerns as incidental only to the environmental impact assessment requirement; hence, Chinese enterprises are simply encouraged, not legally required, to take those into account.³⁵ Lastly, as another demonstration of its 'light touch' approach—and perhaps an interesting case study on the extraterritoriality of domestic law to regulate the activities multinational corporations³⁶ and other actors³⁷—China leaves wide a latitude for its financial institutions and construction companies to pursue

Proposal (Cambridge: Cambridge University Press, 2020) 126–152, at 128–29; Kenneth W. Abbott and Duncan Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit', 42 *Vanderbilt Journal of Transnational Law* 501 (2009).

³⁰ See Han, above n 18, at 383.

³¹ Given the complexity and peculiarity of China's government structure and domestic economy (the so-called State-led capitalism), and the comprehensive treatment it requires, I consider it beyond the scope of this paper to scrutinize the distinction between private/commercial companies and SOEs in terms of their decision-makers' identity and the legal rights and obligations that respectively accrue to them. I nonetheless delineate between the instruments *qua* legislative acts by the Chinese government (II.A) and the instruments formulated by Chinese businesses (some of which are arguably SOEs) to regulate their own conduct (II.B).

³² Johanna Coenen et al., 'Environmental Governance of China's Belt and Road Initiative', 31 *Environmental Policy and Governance* 3 (2020), at 7.

³³ See Jin, above n 11, at 279–80.

³⁴ Issued by Ministry of Commerce (MOFCOM) and Ministry of Environmental Protection (MEP), 18 February 2013, <http://english.mofcom.gov.cn/article/policyrelease/bbb/201303/20130300043226.shtml> (visited 22 April 2021).

³⁵ Art. 3: '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.'

³⁶ Smita Narula, 'International Financial Institutions, Transnational Corporations and Duties of States', in Malcolm Langford et al., (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2012) 114–150.

³⁷ CESCR General Comment No. 24 (2017) stressed the home State's obligation to prevent human rights violations abroad by companies domiciled in them.

economic objectives in foreign jurisdictions by permitting these entities to self-regulate. For instance, The Belt and Road Ecological and Environmental Cooperation Plan (2017)³⁸ portrays cooperation as ‘characterized by government guidance, business commitment and social participation,’ with ‘the *business sector bearing the main responsibility* and the market playing the due role.’³⁹

Other authors have done more comprehensive studies of BRI-relevant Chinese laws and regulations.⁴⁰ This article only updates the literature by briefly analyzing two recent issuances: the 2020 Guidance Policy for Climate Investment and Finance⁴¹ and the 2021 White Paper on China’s International Development Cooperation in the New Era.

The Climate Investment and Finance Policy aims to enhance the ‘supporting role of investment and finance on climate change.’ One of its basic principles contains the first mention of the Initiative (albeit by its old name) and provides a glimpse of Beijing’s envisioned role in global 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.’ China encourages its financial institutions and enterprises ‘to carry out climate finance abroad’ while also ‘[f]urther strengthen[ing] practical cooperation with [IFIs] and foreign enterprises in the field of climate investment and finance, and actively draw[ing] on good international practice and financial innovation.’ The list of action items includes standardizing investment and finance activities abroad, ‘promot[ing] [investors and businesses] to actively fulfill their social responsibilities, and effectively prevent[ing] and mitigate[ing] climate risks.’ Research and international cooperation on climate investment and finance standards are considered vital to the promotion of Chinese standards abroad. If (or once) implemented, this policy would need to be harmonized with the current policy and practice of using the host States’ domestic environmental and social standards.⁴²

The White Paper represents a milestone, being the first official publication on the topic after the 2018 establishment of the China International Development Cooperation Agency. Apart from articulating Beijing’s claimed contributions to the SDGs, it identifies BRI as a major platform for ‘international development cooperation,’ which term is defined 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.’ China remarkably distances itself from 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.’⁴³ Central to the ‘Beijing Consensus versus Washington Consensus’ discourse

³⁸ May 2017. Belt and Road Portal: <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13392.htm> (hereinafter ‘Eco-Environmental Cooperation Plan’) (visited 22 April 2021).

³⁹ Emphasis added.

⁴⁰ Donald J. Lewis and Diana Moise, ‘One Belt One Road (“OBOR”) Roadmaps: the Legal and Policy Frameworks’, in Julien Chaisse and Jędrzej Górski (eds), *The Belt and Road Initiative: Law, Economics, and Politics* (Leiden: Brill Nijhoff, 2018) 17–58; Anastas Vangeli, ‘The Normative Foundations of the Belt and Road Initiative’, in Wenhua Shan, Kimmo Nuotio and Kangle Zhang (eds), *Normative Readings of the Belt and Road Initiative: Road to New Paradigms* (Cham, Switzerland: Springer, 2018) 59–83.

⁴¹ 21 October 2020. English translation by the Editorial Committee of Climate Investment and Finance for Promoting Ecological Civilisation Construction Platform (CIFE) available: <https://mp.weixin.qq.com/s/McJDVDO-iUSRWEkqlyYWUUA> (hereinafter, ‘Climate Investment and Finance Policy’) (visited 21 April 2021).

⁴² 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), 27 October 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/> (visited 21 April 2021).

⁴³ Elsewhere in the White Paper, China distinguishes 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...’

is the supposed uniqueness of this development view.⁴⁴ Taking its statements at face value, China does not seem averse to international organizations and multilateralism in general,⁴⁵ although it characteristically emphasizes sovereignty and noninterference in other parts of this document.⁴⁶ One claim that deserves close monitoring—and especially crucial for sustainable development concerns in its activities abroad⁴⁷—is the supposed improvement of 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. That Chinese-led regional trade agreements (RTAs) are gradually incorporating environmental and labor provisions⁴⁸ likewise offers some cause for optimism.

B. Self-regulation

Financial institutions⁴⁹ influence, sometimes even dictate, development decisions.⁵⁰ One of the two⁵¹ most important financial institutions supporting Chinese-led projects, including the BRI, is the China Development Bank (CDB), which ‘owns the only Development Financing license in China’⁵² and today is ‘the largest development finance institution in the world and China’s largest bank specialized in medium and long-term lending.’⁵³ In 2006,⁵⁴ CDB joined the UN Global Compact, ‘[t]he world’s largest corporate sustainability initiative.’⁵⁵ It claims to ‘implement the Equator Principles’⁵⁶ in its operations, [although it is] not a formal member of the EP Association.⁵⁷ CDB plays a critical role in development finance cooperation generally and in BRI specifically, having ‘signed a cooperation agreement with the NDRC ... to provide no less than RMB 1.5 trillion in stimulus capital for [developing] strategically emerging industries.’⁵⁸ Its commitment to build ‘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’⁵⁹ is promising. Belief in this self-acclamation must be tempered, however, because the nonpublic disclosure of

⁴⁴ Gregory Shaffer and Henry Gao, ‘A New Chinese Economic Order?’ 23 (3) *Journal of International Economic Law* 607 (2020), at 611–12.

⁴⁵ ‘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.’

⁴⁶ ‘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.’

⁴⁷ Adva Saldinger, ‘New white paper outlines China’s development past and future’ (13 January 2021), *Inside Development| The Rise of Chinese Aid* <https://www.devex.com/news/new-white-paper-outlines-china-s-development-past-and-future-98898> (visited 21 April 2021).

⁴⁸ Henry Gao, ‘China’s evolving approach to environmental and labour provisions in regional trade agreements| International Centre for Trade and Sustainable Development’ (25 August 2017), *ICTSD—RTA Exchange* <https://ictsd.iisd.org/opinion/china-3> (visited 26 August 2021).

⁴⁹ Stephen Kim Park, ‘Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution,’ 54 (1) *Stanford Journal of International Law* 1 (2018), at 6.

⁵⁰ Benjamin J. Richardson, ‘Can Socially Responsible Investment Provide a Means of Environmental Regulation,’ 35 (2) *Monash University Law Review* 262 (2009), at 264.

⁵¹ Samuli Seppänen, ‘Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?’ 51 *Vanderbilt Journal of Transnational Law* 101 (2018), at 114 (‘To contextualize these two banks’ financial clout, their aggregate assets are just behind the combined assets of the World Bank and the regional MDBs.’)

⁵² CDB and UNDP, above n 10, at 32.

⁵³ China Development Bank, ‘About CDB,’ http://www.cdb.com.cn/English/gykh_512/khjj/ (visited 16 April 2021).

⁵⁴ United Nations Global Compact, ‘10000 companies + 4000 non-businesses,’ <https://www.unglobalcompact.org/what-is-gc/participants/2054-China-Development-Bank> (visited 16 April 2021).

⁵⁵ United Nations Global Compact, ‘Who We Are,’ <https://www.unglobalcompact.org/what-is-gc> (visited 16 April 2021).

⁵⁶ EP4, its latest iteration, took effect in October 2020. Equator Principles, ‘The Equator Principles,’ <https://equator-principles.com/about/> (visited 16 April 2021).

⁵⁷ Gallagher and Qi, above n 18, at 32.

⁵⁸ *Ibid.*, at 33.

⁵⁹ China Development Bank and United Nations Development Programme (UNDP) China, above n 10, at 145.

Chinese banks' investments renders the evaluation of their environmental and social impacts difficult.⁶⁰

The other leading bank is the Export-Import Bank of China (China ExIm Bank). As 'a state-funded and state-owned policy bank with the status of an independent legal entity',⁶¹ it is under the direct leadership of the State Council, which in 2015 mandated China ExIm Bank's transformation into a 'policy bank with sustainable development capacities'.⁶² In its 2016 White Paper on Green Finance, the Bank underscored the importance of a green economy to sustainable development and how a green economy 'requires ... government guidance, regulation and policy support, *as well as funding support from financial institutions*'.⁶³ The Bank seeks to demonstrate its commitment to sustainability by 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 will review relevant projects with reference to the Chinese standards or international norms'.

Among several commercial banks, the Industrial and Commercial Bank of China (ICBC) deserves mention due to its role as the financier of the coal-fired power plant that became a subject of litigation in Kenya.⁶⁴ Its subsequent withdrawal⁶⁵ could be understood relative to its roles as the organizer of the Belt and Road Bankers Roundtable⁶⁶ and initiator of the Belt and Road Green Finance (Investment) Index.⁶⁷ Although also not an Equator Principles Financial Institution, ICBC reports that it drew 'lessons from the Equator Principles and IFC performance standards' in formulating its classification of corporate loan customers and projects on the basis of their degree of impact on the environment.⁶⁸ Its environmental and social risk management framework purportedly derives from and combines 'international standards and domestic green credit classification standards'⁶⁹—bolstering my thesis that it is partly through business enterprises that certain multilateral standards can become part of the BRI normative framework. Parenthetically, the incorporation of environmental, social, and governance considerations in financial decision-making is a major component of transnational private regulation,⁷⁰

⁶⁰ See Hoare, Lan Hong, and Hein, above n 18, at 28.

⁶¹ Export-Import Bank of China, 'About the Bank', <http://english.eximbank.gov.cn/Profile/AboutTB/Introduction/> (visited 16 April 2021).

⁶² Gallagher and Qi, above n 18, at 32.

⁶³ Emphasis added.

⁶⁴ 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 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').

⁶⁵ John Muchangi, 'Lamu coal plant's biggest investor abandons project', *The Star*, 18 November 2020, <https://www.the-star.co.ke/news/2020-11-18-lamu-coal-plants-biggest-investor-abandons-project/> (visited 22 February 2021).

⁶⁶ ICBC News, 'The Belt and Road Bankers Roundtable Successfully Held in Beijing', 6 May 2019, <https://www.icbc.com.cn/icbc/en/newsupdates/icbc%20news/TheBeltandRoadBankersRoundtableSuccessfullyHeldinBeijing.htm> (visited 23 April 2021).

⁶⁷ ICBC BRI Green Index Research Group, Belt and Road Green Finance (Investment) Index, <http://v.icbc.com.cn/userfiles/Resources/ICBCLTD/download/2020/1d11EN20200921.pdf> (visited 23 April 2021).

⁶⁸ 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> (visited 23 April 2021); Environmental Paper Network, 'Industrial and Commercial Bank of China (ICBC)', In the Red, <https://environmentalpaper.org/industrial-and-commercial-bank-of-china-icbc/> (visited 23 April 2021).

⁶⁹ CDB and UNDP China, above n 10, at 143.

⁷⁰ Fabrizio Cafaggi, 'Transnational Private Regulation and the Production of Global Public Goods and Private "Bads"', 23 (3) *European Journal of International Law* 695 (2012); Gail E. Henderson, 'Making Corporations Environmentally Sustainable: The Limits of Responsible Investing', 13 (12) *German Law Journal* 1412 (2012); Dan Danielsen, 'How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance', 46 (2) *Harvard International Law Journal* 411 (2005).

which could also contribute to the business and human rights⁷¹ literature⁷² and related global standard-setting efforts.⁷³

China Civil Engineering Construction Corporation (CCECC), which is involved in many infrastructure projects in Africa and Asia (including the Philippines),⁷⁴ is one of the first Chinese SOEs to ‘go global’. CCECC ‘was established [originally, as the Foreign Aid Bureau of the Ministry of Railways] in 1979 under the approval of the State Council.’⁷⁵ Detailed information about this company’s operations, particularly its BRI involvement, is unfortunately scarce. It would be helpful to ascertain whether it adheres to the China International Contractors Association Guidelines of Sustainable Infrastructure for Chinese International Contractors,⁷⁶ which instructs companies to conduct a project feasibility report 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.’

As this brief sketch shows, non-State actors, albeit only a subset limited to commercial corporate entities, participate in the BRI norm-creation process—partially reflecting what has been occurring in global economic governance and global environmental governance. Minimal and fragmented regulations concerning foreign investment and overseas projects are sought to be augmented by self-regulatory efforts within the Chinese financial system⁷⁷ pushing overseas projects toward compliance ‘with three layers of regulation – respectively green credit guidelines at home, law and regulations in the host countries concerning environmental protection, plus commitment to compliance with international standards and norms or best practice.’⁷⁸ It remains to be seen whether these changes will better steer BRI infrastructure projects toward sustainability. Judging, however, from the project-affected communities’ grievances, the legal and regulatory framework still affords inadequate environmental and human rights protection.

C. Country systems

Most BRI documents and Chinese domestic issuances on international cooperation refer to the host State’s legal and regulatory framework as the primary, sometimes complementary, source of norms governing the projects’ environmental and social impacts. To the extent that it allows normative systems—China’s and the host State’s—to learn from each other, this referencing is commendable. However, such ‘renvoi’ is also alarming, especially from a sustainable development perspective, given the often lax (or worse, absent) laws and regulations for the protection of the environment, human rights, and labor in many BRI⁷⁹ host States.⁸⁰ Notably, the so-called country systems approach or country ownership principle is widely recognized as contributing to the development effectiveness of foreign aid and investment.⁸¹ As elaborated

⁷¹ 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).

⁷² Andreas Heinemann, ‘Business Enterprises in Public International Law: The Case for an International Code on Corporate Responsibility’, in Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: Oxford University Press, 2011) 718–735; Nico Krisch, ‘Jurisdiction Unbound: Global Governance through Extraterritorial Business Regulation’, PATHS Working Paper (2020), <https://repository.graduateinstitute.ch/record/298516?ln=en>.

⁷³ Eyal Benvenisti and George W. Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, 60 (2) *The Stanford Law Review* 595 (2007), at 618.

⁷⁴ CCECC, ‘About us’, <http://www.ccecc.com.cn/col/col7677/index.html> (visited 23 April 2021).

⁷⁵ *Ibid.*

⁷⁶ China International Contractors Association, *Guidelines of Sustainable Infrastructure for Chinese International Contractors*, 31 January 2018, <https://www.chinca.org/EN/info/18013108264011> (visited 21 April 2021).

⁷⁷ Daniel R. Russel and Blake Berger, *Navigating the Belt and Road Initiative* (Asia Society Policy Institute, 2019) https://asiasociety.org/sites/default/files/2019-06/Navigating%20the%20Belt%20and%20Road%20Initiative_2.pdf (visited 06 July 2021), at 18–19.

⁷⁸ Gallagher and Qi, above n 18, at 39.

⁷⁹ *Ibid.*, at 27.

⁸⁰ Philipp Dann and Michael Riegner, ‘The World Bank’s Environmental and Social Safeguards and the evolution of global order’, 32 (3) *Leiden Journal of International Law* 537 (2019), at 554.

⁸¹ 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).

below, most international financial institutions (IFIs)⁸² and some bilateral aid agencies⁸³ allow the application of domestic laws, regulations, and policies—but on the condition that the recipient country's standards are equally, if not more, protective than the lender's environmental and social safeguards.

In contrast, China's 'hands off'⁸⁴ approach—the 'conditionality of non-conditionality' as one colleague puts it⁸⁵—is ominous for its lack of attention to human rights, environment, rule of law, and other noneconomic concerns. Moreover, the ubiquitous project-level procurement requirements to favor its own SOEs and/or private companies⁸⁶ refute the Chinese model's supposed uniqueness and conditionality free nature.⁸⁷ There are undoubtedly strings attached to Beijing's aid and foreign investment but, rather than politically charged issues,⁸⁸ they pertain to seemingly less innocuous topics as 'tax law, company law, contract law, labor law, environmental law, and law relating to land expropriation.'⁸⁹ It is striking—and incompatible with its own official pronouncements—how China selectively limits its capacity to reshape rules and standards to those within international economic law while thereby disregarding the interrelated norms and concerns in international environmental law and international human rights law.

III. ROADBLOCKS TO SUSTAINABILITY

The Initiative is an opportunity for international lawmaking on sustainable development, meaning that the rules and practices adopted and applied in this context can transform into global standards for safeguarding and integrating environmental and social concerns in economic activities. Indeed, China strategically chose infrastructure investments to restructure extra-regional governance, and the BRI is part of broader efforts to selectively reshape international economic law.⁹⁰ To complement Heng Wang's findings, this article identifies obstacles that currently impede sustainable development along the Belt and Road and suggests ways to overcome such hurdles. My examination draws from the jurisgenerative potential of infrastructure⁹¹ and focuses on international 'soft' lawmaking and the dynamics among bilateralism, multilateralism, and asymmetric power relations.

A. Sustainability as normative framework

The concept of sustainable development⁹² and its underlying principles highlight interdependence: (1) of States and their peoples; (2) of present and future generations; and (3) of

⁸² The World Bank is gradually institutionalizing the use of country standards. See Gaia Larsen and 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> (visited 19 July 2021).

⁸³ For a brief survey of the general approach to environmental and social risk management of different multilateral and national financial institutions, see CDB and UNDP, above n 9, at 110.

⁸⁴ Cf. Russel and Berger, above n 77, 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').

⁸⁵ I am grateful to Alejandro Rodiles for this idea and to Andrew Hurrell who prompted me to think through the different forms of conditionality.

⁸⁶ Gregory T. Chin and Kevin P. Gallagher, 'Coordinated Credit Spaces: The Globalization of Chinese Development Finance', 50 (1) *Development and Change* 245 (2019), at 249–50.

⁸⁷ See Chajdas, above n 18, at 427–28.

⁸⁸ See Ngaire Woods, 'Whose aid? Whose influence? China, emerging donors and the silent revolution in development assistance', 84 (6) *International Affairs* 1205 (2008), at 1210 (Westerners are concerned that emerging donors' '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').

⁸⁹ Seppänen, above n 51, at 127.

⁹⁰ See Wang, above n 26, at 589, 597.

⁹¹ See Donaldson and Kingsbury, above n 25; Benedict Kingsbury, 'Infrastructure and InfraReg: on rousing the international law "Wizards of Is"', 8 *Cambridge International Law Journal* 171 (2019).

⁹² 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 (25 September).

economic, environmental, and social issues. The principle of integration covers the latter, which is the primary focus of this article. It essentially calls for ensuring that all three dimensions are taken into account in development decision-making.⁹³ Couched in negative normative language, it prohibits actors from making social and economic development decisions that disregard environmental considerations or ‘undertak[ing] environmental protection without taking into account relevant social and economic implications.’⁹⁴

The seemingly vague and debatable character of sustainable development as an international legal norm does not preclude principled arguments relevant to international law.⁹⁵ Its inherent lack of clarity in content is a feature, not a disadvantage, that ‘permitted the entire world community to embrace it.’⁹⁶ Indeed, global governance actors increasingly decide, act, and judge in the shadow of soft law on sustainable development. After BRI’s launch and especially once projects broke ground, nongovernmental organizations and academics began drawing attention to the projects’ economic, environmental, and social sustainability, supporting their arguments with references to the SDGs and the other international instruments relating to sustainable development. Thus, ‘sustainable development has emerged as the basis for judgment and aspiration’, and ‘[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.’⁹⁷ That China itself presents BRI as a global development initiative further justifies using the UN 2030 Agenda as a normative standard for actions and decisions along the Belt and Road.

B. Bilateral

The most objectionable characteristic of BRI is its bilateralism. Bilateralist international law suffers from ‘value-poverty’, to borrow Bruno Simma’s words, and is antithetical to the assertion of community interests, which notion implies that ‘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.’⁹⁸ In contrast to multilateral treaties, which are ‘vehicle[s] *par excellence* of community interest’,⁹⁹ State-to-State contractual agreements, such as the BRI memoranda of understanding (MOU), are inappropriate¹⁰⁰ and illegitimate¹⁰¹ means to address collective-action problems and pursue community interests because they impede consideration of externalities and usually fail to garner the requisite international cooperation to achieve multilaterally established goals concerning environmental and human rights protection.

⁹³ Rio Declaration, Principle 4.

⁹⁴ See Cordoner Segger and Khalfan, above n 24, at 104.

⁹⁵ See Bruno Simma, ‘Foreword’, in Nico J. Schrijver and Friedl Weiss (eds), *International Law And Sustainable Development: Principles And Practice* (Martinus Nijhoff Publishers, 2004) v–vi, at v (‘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’).

⁹⁶ *Ibid.*, at vi.

⁹⁷ Zadek and Wang, above n 18, at v.

⁹⁸ Bruno Simma, *From Bilateralism to Community Interest in International Law (Volume 250)* (Brill, 1994), at 233–34.

⁹⁹ *Ibid.*, at 323.

¹⁰⁰ Evan J. Criddle and Evan Fox-Decent, ‘Mandatory Multilateralism’, 113 (2) *American Journal of International Law* 272 (2019), at 324–25.

¹⁰¹ Nico Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’, 16 (3) *European Journal of International Law* 369 (2005), at 376 (‘[U]ntil the nineteenth 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’).

Based on a survey of BRI official documents, including MOUs with select countries,¹⁰² rules governing the Belt and Road projects' environmental and social sustainability are remarkably variable and fragmented. These characteristics perpetuate a 'race to the bottom' among host States that enables multinational corporations to select jurisdictions with loose regulatory restrictions and 'impose their own rules [which do not internalize the interests of all affected stakeholders] on foreign communities.'¹⁰³ These practices threaten to frustrate the object and purpose of environmental and human rights treaties to which BRI host States—as well as China itself—are parties. According to the CESCR, bilateral treaties (e.g. trade liberalization agreements) 'should not curtail or inhibit a country's capacity to ensure the full realization of human rights.'¹⁰⁴ Considering the extraterritorial obligations under the UN Charter,¹⁰⁵ and following the Maastricht Principles,¹⁰⁶ BRI projects can be considered as situations, wherein Beijing's 'acts or omissions bring about foreseeable effects on the enjoyment of [ESC] rights ... outside its territory'¹⁰⁷ or in which China can 'exercise decisive influence or [] take measures to realize [ESC] rights extraterritorially.'¹⁰⁸

While there is an unmistakable power asymmetry between China and each individual partner country, the former, as the stronger party to the bilateral MOU, does not appear to impose its will on and exploit the weaker State.¹⁰⁹ The nonuse of power in this situation, however, can still be exploitative, at least toward project-affected people and the international community, when adverse social and environmental impacts arise due to absent or inadequate regulation of economic activities regarding infrastructure construction. The dynamic that Gabriella Blum posits accordingly remains apropos: if the bilateral framework ends up exploiting a weaker party, the absence of a 'credible alternative in the guise of a multilateral [] agreement is problematic.'¹¹⁰

China's preference for bilateralism and applying host States' domestic environmental and social standards to BRI projects rests on the respect for sovereignty and a concomitant emphasis on noninterference in other States' affairs. This logic mirrors the depiction of the 'sweeping and frightfully ambiguous prohibition of intervention' as a 'weapon of bilateralism.'¹¹¹ However, a contemporary understanding of sovereignty as an international legal concept mandates States to become 'agents of humanity ... [who] take other-regarding considerations seriously into account in formulating and implementing policies, even absent specific treaty obligations.'¹¹² Moreover, the permanent sovereignty of natural resources should be construed as comprising both rights and duties that need to be balanced, especially in today's interdependent world.¹¹³

¹⁰² I present more detailed findings—including a comparative analysis of MOUs with three BRI partner countries (the Philippines, Italy, and Kenya)—in Johanna Aleria P. Lorenzo, 'A Multilateral Track for Sustainable Development Along the Belt and Road: Aligning Country Ownership with International Rule of Law', KFG Working Paper Series No. 47 (2021), at 33–43.

¹⁰³ Doreen Lustig and Eyal Benvenisti, 'The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings', 15 (1) *Theoretical Inquiries in Law* 125 (2014), at 144–45.

¹⁰⁴ CESCR General Comment No. 15 (2002), para 35 [water]; CESCR General Comment No. 14 (2000), para 50 [health]; CESCR General Comment No. 12 (1999), para 19 [food].

¹⁰⁵ Malcolm Langford, Fons Coomans and Felipe Gómez Isa, 'Extraterritorial Duties in International Law', in Malcolm Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2012) 51–113, at 55.

¹⁰⁶ *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, adopted by International Experts on 28 September 2011.

¹⁰⁷ *Ibid.*, Scope of jurisdiction, para 9 (b).

¹⁰⁸ *Ibid.*, Scope of jurisdiction, para 9 (c).

¹⁰⁹ China's interests and those of BRI-participating States are not diametrically opposed, at least not in the sense that China is benefiting from intentionally causing environmental and social harms abroad. Rather, the damaging effects of potential serial bilateralism in this case results from the powerful State taking advantage of the weak regulatory systems of other States—instead of using its superior capacity to help improve the latter's ability to protect people and the environment.

¹¹⁰ Gabriella Blum, 'Bilateralism, Multilateralism, and the Architecture of International Law', 49 *Harvard International Law Journal* 323 (2008), at 376.

¹¹¹ See Simma, above n 98, at 232.

¹¹² Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107 (2) *American Journal of International Law* 295 (2013), at 300.

¹¹³ Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997).

Lastly, the growing interdependence of economies, ecosystems, and societies creates a legitimate interest on the part of the international community in what States (still the major subjects of international law) do or abstain from doing.¹¹⁴

The principle of international solidarity, including the duty to cooperate,¹¹⁵ requires the more able and powerful party to empower or enable the weaker State to meet the latter's international legal obligations and commitments, through, among others, technical and financial assistance. In the context of development projects, the principle additionally includes doing no harm.¹¹⁶ Invocations of the principles of noninterference and 'respect for local law'¹¹⁷ cannot absolve home States of their obligations and business entities of their responsibilities¹¹⁸ to protect the people and the environment harmed by transnational economic activities. I, therefore, submit that a State's superior position justifies an expectation for it to insist on including a provision in a bilateral agreement that would allow the application of multilateral standards when these standards are more stringent and sustainability-oriented than the host State's domestic legal system.¹¹⁹ As the party with greater power and resources, China should not let the tendency to engage in a race to the bottom prevail. Instead, it should take the lead in ensuring that BRI projects do not undermine the host States' ability to comply with international environmental and human rights obligations and related international commitments to sustainable development.

International cooperation is significant to the SDGs and the right to development¹²⁰ because realizing them 'requires an enabling environment at both the national and international levels.'¹²¹ The Draft Convention on the Right to Development contains an undertaking—to ensure 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'¹²²—that should also cover BRI. Relevantly, given the crystallizing right to development, Diane Desierto explains that '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.'¹²³ Indeed, recognizing the interdependence¹²⁴ among members of the international community in today's globalized world, as well as the interrelationship of their economic, environmental, and social concerns, entails the incorporation of the principle of solidarity into obligations within international economic law, international environmental law,¹²⁵ and international human rights law.¹²⁶

¹¹⁴ See Blum, above n 110, at 348.

¹¹⁵ Commentary to RTD Draft Convention, Article 3—General principles, para 11.

¹¹⁶ Philipp Dann, 'Solidarity and the Law of Development Cooperation', in Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law* (Heidelberg: Springer, 2010) 55–91, at 65, 71.

¹¹⁷ See Russel and Berger, above n 77, at 11.

¹¹⁸ See André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', 34 *Michigan Journal of International Law* 359 (2012), at 375.

¹¹⁹ Inferring from MDBs' practice, there appears to be a growing, albeit implicit, recognition among them of their obligation, as financiers, not to cause the borrower country or aid recipient to breach its international legal obligations and commitments.

¹²⁰ 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').

¹²¹ Commentary to RTD Draft Convention, Article 13—Duty to cooperate, para 1.

¹²² RTD Draft Convention, Article 13, para 2(c).

¹²³ Diane A. Desierto, 'The Complexities of Democracy, Development, and Human Rights in China's Belt and Road Initiative', 35 *Connecticut Journal of International Law* 299 (2019), at 303.

¹²⁴ R. St J. MacDonald, 'Solidarity in the Practice and Discourse of Public International Law', 8 *Pace International Law Review* 259 (1996).

¹²⁵ Cf. Neil Craik, 'The Duty to Cooperate in the Customary Law of Environmental Impact Assessment', 69 (1) *International and Comparative Law Quarterly* 239 (2020), at 258 ('The conduct of EIA, as a legal requirement, 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').

¹²⁶ 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); Report of the Independent Expert on human rights and international solidarity, Virginia Dandan, U.N. Doc. A/72/171 (19 July 2017).

C. Quasi-formal

BRI MOUs are ‘quasi-formal’ or ‘pseudo-treaties’ because, while their legally binding character is questionable, the form arguably bears the characteristics of a treaty as defined by the Vienna Convention on the Law of Treaties (VCLT) and relevant International Court of Justice (ICJ) jurisprudence.¹²⁷ This article refrains from making general conclusions about the legal status of these documents because ascertaining the underlying reasons for the States’ (whether China’s alone or concurrently with the BRI partner State) preference for such arrangements demands a case-by-case empirical assessment quite beyond the present study’s scope. Nevertheless, my prior examination of some of these MOUs reveals that, although they contain provisions explicitly denying the creation of binding obligations for the States’ parties under international law, there are also expressions of commitment to adhere to, or act in accordance with, ‘applicable international law’—as in the case of the Italy–China BRI MOU.¹²⁸ One possible interpretation of this statement is that the States’ agreement is ‘governed by international law’, as the VCLT requires.

The BRI MOUs’ uncertain legal status, in and of itself, is a problem that others have examined through varying approaches.¹²⁹ Here, I consider MOUs’ problematic because of the legal implication that these instruments are shielded from parliamentary scrutiny and approval,¹³⁰ and more crucially from public consultation, because they are technically not treaties that create legal rights and obligations. In some BRI-participating States—adding to the rising cases of transnational public law litigation concerning infrastructure projects¹³¹—disclosure of the agreements had to be obtained through judicial remedies.¹³² At the core of this objection, therefore, is the lack of transparency compounding the lack of mechanisms to hold States and global governance actors accountable¹³³ for acts along the Belt and Road. Furthermore, given the possibly exploitative situation mentioned above, the fact that bilateral dealings draw less attention prevents project-affected people from rallying the support of the international community.¹³⁴

Lastly, the use of MOUs deserves closer scrutiny because ‘informalization tends to go hand in hand with increased hierarchy: informal regimes tend to be run by the powerful, not the underprivileged.’¹³⁵ This dangerous tendency risks being aggravated by the bilateral character of the arrangements along the Belt and Road that makes the power asymmetries more pronounced and enables China to engage in ‘serial bilateralism,’¹³⁶ which hampers the consolidation of sustainability standards and the defragmentation among international environmental law, international human rights law, and international economic law.

¹²⁷ *Aegean Sea Continental Shelf* (Greece/Turkey); *Qatar v Bahrain* (Jurisdiction and Admissibility).

¹²⁸ See Lorenzo, above n 102, at 37–39.

¹²⁹ Jingxia Shi, ‘The Belt and Road Initiative and International Law: An International Public Goods Perspective’, in Yun Zhao (ed), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge: Cambridge University Press, 2018) 9–31; Jiangyu Wang, ‘China’s Governance Approach to the Belt and Road Initiative (BRI): Relations, Partnership, and Law’, 14 *Global Trade and Customs Journal* 222 (2019).

¹³⁰ Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2013), at 42.

¹³¹ Michael Likosky, ‘Mitigating Human Rights Risks Under State-Financed and Privatized Infrastructure Projects’, 10 (2) *Indiana Journal of Global Legal Studies* 65 (2003), at 69–72.

¹³² Lian Buan, ‘After Chico river, Makabayan goes after Kaliwa dam at Supreme Court’, *Rappler*, 9 May 2019, <https://www.rappler.com/nation/makabayan-goes-after-kaliwa-dam-supreme-court> (visited 21 August 2021); CNN Philippines Staff, ‘Makabayan bloc heads to Supreme Court to stop China-funded Kaliwa Dam construction’, *CNN*, 9 May 2019, <https://www.cnn.ph/news/2019/5/9/Makabayan-petition-Kaliwa-Dam-Supreme-Court.html> (visited 21 August 2021).

¹³³ Benedict Kingsbury, Nico Krisch and Richard Stewart, ‘The Emergence of Global Administrative Law’, 3 *Law and Contemporary Problems* 68 (2005), at 15; Nico Krisch and Benedict Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’, 1 *European Journal of International Law* 17 (2006), at 1; Richard B. Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’, 108 *American Journal of International Law* 211 (2014).

¹³⁴ See Blum, above n 110, at 366.

¹³⁵ Jan Klabbers, ‘Governance by Academics: The Invention of Memoranda of Understanding’, 80 *ZaöRv* 35 (2020), at 60–61.

¹³⁶ See Benvenisti and Downs, above n 73, at 610–11; Alejandro Rodiles, *Coalitions of the Willing and International Law: The Interplay between Formality and Informality* (Cambridge: Cambridge University Press, 2018), at 238.

D. Skewed participation

Non-State actor participation in decision-making processes per se is not problematic, especially considering the view of international law I adopt. However, from the perspective of international sustainable development law,¹³⁷ the legitimacy of such participation is contingent on the transparency of decision-making processes and the actors' accountability to affected stakeholders. Endorsing multistakeholder partnership, particularly since the 2002 Johannesburg World Summit on Sustainable Development, the UN recognizes the value of drafting new norms 'based on a wider knowledge base' and the need to close existing gaps regarding democracy and legitimacy in global governance.¹³⁸ Non-State actors are important in fast-developing fields that require flexible, technical standards, and consensus among large constituencies.¹³⁹ Development assistance is such a field necessitating 'more inclusive processes for setting standards,' especially today as new (non-Western) donors are emerging and private entities are assuming bigger roles.¹⁴⁰

Although some non-State actors are currently participating in the creation, interpretation, and application of the BRI legal and regulatory framework, the exclusion of project-affected people, who directly experience environmental and social harms, renders such international lawmaking process suboptimal. I contrast the IFIs' participation in the international lawmaking process on sustainable development, on the one hand, with the standard-setting roles of banks and construction companies in the Initiative, on the other. As I expounded in my doctoral dissertation, apart from IFIs *qua* international organizations becoming international lawmakers themselves, an equally, if not more, important shift pertains to their enabling other non-State actors, including individuals, to also become participants in international lawmaking. While multilateral development banks (MDBs), like the World Bank, have historically been 'black boxes' and criticized for disregarding project-affected people's interests, they have evolved¹⁴¹: their processes are now relatively more transparent. Furthermore, there are presently mechanisms to hold them accountable for misconduct. These features do not obtain in the present standard-setting processes along the Belt and Road. Importantly, the Initiative lacks transparent processes and accountability mechanisms to operationalize the principle of public participation. Therefore, although non-State actor participation in international lawmaking is generally desirable, I remain skeptical about whether the current BRI participants promote and represent norms and values that advance sustainability, accountability, and international rule of law.

IV. CLEARING THE PATH TOWARD SUSTAINABLE DEVELOPMENT

To address the abovementioned problems and to facilitate the movement of international economic law 'towards a more value-based order which is operationally capable of protecting and serving the individual,'¹⁴² I recommend complementing BRI MOUs with a multilateral legal framework containing environmental and social safeguards. Since certain negative externalities—adverse environmental and social impacts not only in host States but also in other territories (perhaps even extending to some areas beyond national jurisdiction)—are

¹³⁷ Rio Declaration, Principle 10.

¹³⁸ Wolfgang Benedek, 'Multi-Stakeholderism in the Development of International Law', in Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: Oxford University Press, 2011) 201–210, at 202.

¹³⁹ *Ibid.*, at 204–205.

¹⁴⁰ See Woods, above n 88, at 1212.

¹⁴¹ Johanna Aleria P. Lorenzo, "'Development' versus 'Sustainable Development'?: (Re-)Constructing the International Bank for Sustainable Development', 51 *Vanderbilt Journal of Transnational Law* 399 (2018).

¹⁴² Heike Krieger and Georg Nolte, 'The International Rule of Law - Rise or Decline?: Points of Departure', KFG Working Paper Series No. 1 (2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2866940 (visited 27 March 2021), at 13.

not adequately internalized in bilateral MOUs, I submit that the multilateralization of BRI arrangements is one way to address such externalities and realize sustainable development. This proposal is not a wholesale rejection of bilateral treaties, which, I acknowledge, can help clarify and concretize vague standards contained in multilateral arrangements.¹⁴³ BRI MOUs, however, do not operate in this manner. Instead, they are silent about the applicable environmental and social safeguards—which omission could lead to an impression, however mistaken, that no such protections exist. In other cases, they rely on host States' laws and regulations even though the latter are often undeveloped and insufficiently protect the natural environment and the communities, especially (but not only) those within a project area.

Sustainable development concerns are community interests, meaning, 'they go far beyond interests held by States as such; rather, they correspond to the needs, hopes and fears of all human beings.'¹⁴⁴ The inclusion of sustainable development—more specifically, the legal expression of its underlying principles and values—in global undertakings such as BRI and the UN 2030 Agenda indicates that '[i]nternational law is finally overcoming the legal as well as moral deficiencies of bilateralism and maturing into a much more socially conscious legal order.'¹⁴⁵

Proceeding from the 'dominant assumption that global problems require global solutions'¹⁴⁶ and observing that many of the harms associated with the Initiative are transnational¹⁴⁷ in character, I submit that, contrary to the status quo, the behavior of all relevant actors and their interrelationships should be mainly governed by international law and multilateral standards, including sustainable development principles, such as transparency and public participation, that also promote the rule of law.¹⁴⁸ The current policy/practice of applying host States' standards to foreign-funded infrastructure projects should be modified so that such use is complemented by a reference to basic minimum standards that were set in a multilateral manner and consistent with obligations and commitments under international economic law, international environmental law, and international human rights law.¹⁴⁹ These default standards can be drawn from MDBs' environmental and social safeguards,¹⁵⁰ which integrate 'non-economic' concerns in the design, planning, and implementation of infrastructure projects. Essentially, these policies and procedures—on (i) environmental (impact) assessment¹⁵¹; (ii) indigenous peoples¹⁵²;

¹⁴³ See Blum, above n 110, at 370.

¹⁴⁴ See Simma, above n 98, at 244.

¹⁴⁵ *Ibid.*, at 234.

¹⁴⁶ See Blum, above n 110, at 348.

¹⁴⁷ International lawyers might recognize some of this article's themes in relation to the States' customary duty to prevent significant transboundary harm ('no harm principle'). See International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, U.N. Doc. A/56/10 (2001).

¹⁴⁸ Daniel Barstow Magraw, 'Rule of Law, Environment and Sustainable Development', 21 *Southwestern Journal of International Law* 277 (2014), at 278; Irene Khan, 'How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World?' 2 (13) *McGill Journal of Sustainable Development Law* 211 (2017), at 211–12.

¹⁴⁹ 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?' (16 May 2017), *EJIL: Talk!* <https://www.ejiltalk.org/chinas-one-belt-one-road-initiative-can-a-bilaterally-negotiated-globalization-2-0-internalize-human-rights-labor-and-environmental-standards/> (visited 27 March 2021).

¹⁵⁰ IFIs/MDBs stipulate compliance with these safeguards as a loan 'condition'.

¹⁵¹ The ICJ has tackled 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, Principle 17.

¹⁵² Of particular importance is their right to free, prior, and informed consent. See United Nations Declaration on the Rights of Indigenous Peoples; Rio Declaration, Principle 22.

(iii) involuntary resettlement; and (iv) stakeholder engagement/consultation—are procedural¹⁵³ and due diligence¹⁵⁴ standards to ensure protection against environmental and social harms arising from the pursuit of economic growth through infrastructure. As I elaborated elsewhere,¹⁵⁵ the IFIs' safeguards contribute to the international lawmaking process on sustainable development by operationalizing the principles of integration and public participation.

Notably, the process of formulating these safeguards—characterized as 'a strategy of increasing legalization and juridification as part of a larger strategy [by the World Bank] of technocratic legitimization'¹⁵⁶—involved a multistakeholder approach that sought to integrate the international organizations' technical expertise with the views and interests of States and diverse non-State actors. In the same manner, these multilaterally set standards can serve as a benchmark or zero draft that can later be modified in a process—perhaps the Belt and Road Forum—wherein all relevant BRI actors are participating. The modified standards would then be consolidated in a model or framework agreement that can be referred to when evaluating the sustainability of infrastructure projects authorized by different bilateral MOUs. Deviation from these standards—i.e. applying the host country's domestic laws and regulations—can be negotiated on the condition that an assessment would first have to be conducted to determine (i) whether such domestic framework affords comparable level of protection 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 for 'equivalence and acceptability' assessment¹⁵⁷—e.g. a Safeguards Diagnostic Review, in the parlance of the World Bank¹⁵⁸—can guide the adoption of similar mechanisms for the Initiative.

Despite well-documented objections against conditionalities, and contrary to hypotheses that developing States prefer the BRI due to its less burdensome environmental and social requirements, a survey of approximately 100,000 leaders, i.e. development policymakers and practitioners in both public and private sectors, from 141 countries and semiautonomous territories revealed that 'leaders were less opposed to the inclusion of social, economic, or democracy conditions in development projects than one might expect' and '[r]espondents were 1-2 percentage points more likely to choose projects with these conditions rather than to choose those with none at all.'¹⁵⁹ Respondents were also more likely to choose aid projects with attached regulations (than those without) concerning the minimization of environmental damage and protection of workers from unfair labor practices.¹⁶⁰ It can be reasonably assumed that these preferences include those of leaders in most BRI host States. Therefore, it is not unrealistic to argue (as I do here) that a multilateral environmental and social framework supplementing the

¹⁵³ Jutta Brunnée, 'International Environmental Law and Community Interests: Procedural Aspects', in Eyal Benvenisti, Georg Nolte and Keren Yalin-mor (eds), *Community interests across international law* (Oxford: Oxford University Press, 2018) 151–175.

¹⁵⁴ Jorge E. Viñuales, 'Due Diligence in International Environmental Law: A Fine-Grained Cartography', in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford: Oxford University Press, 2020) 111–128; Diane A. Desierto, 'Due Diligence in World Bank Project Financing', in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford: Oxford University Press, 2020) 329–347.

¹⁵⁵ Johanna Aleria P. Lorenzo, 'International law-making in the field of sustainable development and an emerging *droit commun* among international financial institutions', 7 (2) *Cambridge International Law Journal* 327 (2018).

¹⁵⁶ Dann and Riegner, above n 80, at 540.

¹⁵⁷ 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; 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; Asian Infrastructure Investment Bank (AIIB), Environmental and Social Framework, 'Use of Country and Corporate Systems', paras 52–56, Approved February 2016 (Amended February 2019).

¹⁵⁸ 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.

¹⁵⁹ Samantha Custer et al., *Listening to Leaders 2021: A report card for development partners in an era of contested cooperation*, Policy Report (Williamsburg, VA: AidData at the College of William & Mary, 2021) <https://www.aiddata.org/publications/listening-to-leaders-2021> (visited 07 July 2021), at 13.

¹⁶⁰ *Ibid.*, at 13.

current standards implicitly endorsed in bilateral BRI MOUs would be a welcome reform for developing country leaders. Likewise, the abovementioned evolution of China's approach to noneconomic issues in RTAs signals receptiveness to change toward a sustainability-oriented direction.

V. CONCLUSION

The harmful environmental and social impacts associated with BRI projects suggest that the Initiative hampers, more than it supports, sustainable development. To ensure the sustainability of infrastructure projects along the Belt and Road and to make credible the claimed synergies between the Initiative and the UN 2030 Agenda, this article makes three recommendations. First, the bilateral arrangements should be multilateralized: the MOUs have to be negotiated, interpreted, and applied in the context of principles and rules within and across international economic law, international environmental law, and international human rights law—so as not to frustrate the object and purpose of the treaties, to which China and many BRI-participating States are legally bound. Second, the pseudo-treaties should be made transparent and subjected to greater public deliberation, especially in the host States. Third, non-State actor participation in the international lawmaking process within the BRI should include not only Chinese business enterprises and financial institutions but also project-affected people and communities in host States.

Where project-affected people and the environment are not sufficiently protected by their own States' laws, the option to invoke and use higher, more protective standards—such as the environmental and social safeguards applied in IFI-supported development projects—should be made available. In this scenario, it behooves the more powerful and economically capable State (and other donors/creditors) to ensure that bilateral arrangements do not impair the capacity of host States to perform their international legal obligations and commitments. My recommendations thus entail modifying China's 'hands-off' approach. The BRI legal and regulatory framework needs to be understood and implemented as part of an international legal system that comprises norms that emphasize solidarity and international cooperation for shared goals such as sustainable development. For all the flaws and discontents associated with multilateralism, the present proposal to move toward that direction is a small step away from perpetuating the 'globalization of indifference'¹⁶¹ that threatens our common future.

FUNDING

The work was funded by Deutsche Forschungsgemeinschaft (DFG) thru Kolleg-Forschungsgruppe (KFG) Berlin Potsdam Research Group 'The International Rule of Law - Rise or Decline?.'

¹⁶¹ Pope Francis, *Laudato Si*, para 52.