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The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges

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Abstract

The Belt and Road Initiative (BRI) has brought with it an unprecedented number of agreements. BRI agreements consist of primary agreements (particularly MOUs) and secondary agreements (like performance agreements). They are a distinct, landmark feature of the BRI. Focusing on primary agreements and their close link with secondary agreements, this paper explores the following questions: What are the legal status and characteristics of primary agreements? Why are they adopted by China? What challenges do they face? BRI primary agreements can be regarded as a form of soft law, but that repurposes soft law characteristics for project development rather than rule development. BRI primary agreements have the following unique characteristics: (i) minimal legalization, (ii) a coordinated, project-based nature, and (iii) a hub-and-spoke network structure. While BRI primary agreements benefit from the advantages of soft law (e.g., reduced contracting costs, flexibility), they face challenges including those concerning underlying interests and their effectiveness.

Keywords: BRI agreements; soft law; Belt and Road Initiative (BRI); legalization; network; challenges

1. Introduction

The Belt and Road Initiative (BRI) is a kind of megaregional arrangement[1] and profoundly affects the world in the twenty-first century.[2] BRI practice involves a highly complex network of agreements, ranging from memorandums of understanding (MOUs) to project contracts. The significance of BRI agreements cannot be ignored, with their many outcomes including infrastructure projects and new international mechanisms. BRI agreements are a hallmark of BRI practice, and carry profound implications for the future international economic order.

BRI agreements consist of BRI primary agreements and BRI secondary agreements. Primary agreements are non-binding instruments concluded by China and other governments and international organizations (other parties), which focus on the BRI. Of the 200 BRI documents concluded with 138 states and 30 international organizations,[3] the majority are primary agreements. Such a large number of non-binding instruments is unprecedented for China in international economic law practice. Primary agreements develop the framework for the BRI, and lay a foundation for secondary agreements implementing BRI projects. Secondary agreements include

[1]R. Cooper Dreyfuss (2017) 'Harmonization: Top Down, Bottom Up – And Now Sideways? The Impact of the IP Provisions of Megaregional Agreements on Third Party States', IILJ Working Paper 2017/2 (MegaReg Series), 1.

[2]C. Lattemann et al. (2018) 'Final Reflections', in W. Zhang, I. Alon, and W. Zhang (eds.), *China's Belt and Road Initiative: Changing the Rules of Globalization*. London: Palgrave Macmillan, 342.

[3]'An Overview of States that Have Signed BRI Collaboration Documents with China (2020)', www.yidaiyilu.gov.cn/xwzx/roll/77298.htm.

c The Author(s)

performance agreements to construct various projects (e.g., port and industrial projects) and underlying financing contracts.[4] Secondary agreements may also involve private parties such as the Public Private Partnership (PPP).

Understanding BRI agreements is thus crucial for exploring China's approach to international economic order. However, the nature and importance of primary agreements has to date not been fully explored. This paper bridges this gap by focusing on primary agreements and their close link with secondary agreements. It explores the following crucial questions: What are the legal status and characteristics of primary agreements? Why are they adopted by China? What challenges do they face? The paper proceeds as follows: Section 2 reviews the typology of BRI agreements, while Section 3 explores the legal status and characteristics of BRI primary agreements. It argues that while BRI primary agreements can be regarded as a form of soft law, they repurpose soft law characteristics for project development. Primary agreements have unique characteristics in terms of their legalization, substantive content, and structure. Section 4 argues that primary agreements benefit from the advantages of soft law to promote the BRI project, which explains why China selects primary agreements. The major challenges presented by primary agreements are explored in Section 5. Section 6 concludes with a discussion of potentially significant issues going forward. An annex, supplementary material, is included with a list of primary agreements.[5]

Several points should be made here. First, this paper focuses largely on China's perspective particularly regarding the rationale for choosing primary agreements, due in part to word limit constraints and the huge variety of BRI jurisdictions. The pros and cons of primary agreements for other BRI jurisdictions, which are explored only briefly in this paper, necessitate separate country-specific analysis. Second, the BRI is understood in its broad sense under a functional approach, which focuses on the measures and mechanisms (including institutions) 'put in place to serve the purposes of the BRI, regardless of whether they are externally labelled as part of the BRI'.[6]

2. The Typology of BRI Agreements

2.1 BRI Primary Agreements

The categorization of BRI primary agreements is critical due to the large volume of agreements and their complexity. Table 1 provides a taxonomy of these agreements along the parameters of type, parties, form, and issue areas. For types and parties, there are bilateral and plurilateral agreements, depending on the number of other parties that conclude an agreement with China. A consideration of the primary agreements reveals several points. First, bilateral MOUs with other governments are the most common agreements, reflecting China's preference for informal bilateralism.[7] Second, primary agreements demonstrate China's increasing interactions with the UN. China has concluded BRI agreements with around 20 UN agencies,[8] including the UNECE-NDRC MOU as the first China–UN MOU.

Regarding form, agreements include MOUs, the Memorandum of Arrangement (MOA), (framework) agreements, joint communiques and statements, guiding principles, and

[4]P. M. Norton (2018) 'China's Belt and Road Initiative: Challenges for Arbitration in Asia', *University of Pennsylvania Asian Law Review* 13: 72–84.

[5]The list of select BRI primary agreements can be found at www.researchgate.net/publication/346222225_List_of_select_Belt_and_Road_Initiative_BRI_agreements.

[6]H. Wang (2019) 'China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability', *Journal of International Economic Law* 22: 29–30.

[7]E.-U. Petersmann (2020) 'International Settlement of Trade and Investment Disputes Over Chinese "Silk Road Projects" Inside the European Union', in G. Martinico and X. Wu (eds.), *A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road?* London: Palgrave, 51.

[8]N. Rosellini (2019) 'Remarks at the Plenary Session of the BRI International Green Development Coalition (BRIGC)', United Nations in China, www.un.org.cn/info/7/966.html.

Table 1. BRI primary agreements

Type of agreements	Other parties to agreements	Forms	Issue areas[1]	Example(s)
Bilateral primary agreements	Subnational government	MOU	General	Victorian Government–NDRC MOU[2]
		Framework agreement	General	Victorian Government–NDRC Framework Agreement[3]
	National governments	MOU	General	Italy-China MOU,[4] Philippines–China MOU[5]
		MOA	General	China–New Zealand MOA[6]
		Framework agreement		China–United Arab Emirates Framework Agreement[7]
		Other agreements	Sectoral/issue-specific	China–Thailand Intergovernmental Agreement on the Peaceful Use of Nuclear Energy[8]
	International organizations (including regional organizations)	MOU	Sectoral/issue-specific	UNECE-NDRC MOU,[9] ESCAP-MFA MOU[10]
		Letter of Intent	Sectoral/issue-specific	ESCAP-MFA Letter of Intent[11]
		Other agreements	Sectoral/issue-specific	China–WIPO Agreement
Plurilateral primary agreements	More than one party	Joint Communique	General	BRF Joint Communiques[12]
		Joint Statement	General	ASEAN–China Joint Statement[13]
		Declaration of Action	General	China–Arab States Declaration of Action[14]
		MOU	Sectoral/issue-specific	China's MOUs with multilateral development banks (MDBs)[15]
		Guiding Principles	Sectoral/issue-specific	Guiding Principles on Financing the Development of the Belt and Road[16]
		Consensus	Sectoral/issue-specific	Suzhou Consensus[17]
		Initiative	Sectoral/issue-specific	'The Belt and Road' Digital Economy International Cooperation Initiative[18]
		Statement	Sectoral/issue-specific	Nanning Statement of the 2nd China–ASEAN Justice Forum,[19] Wuzhen Statement[20]
Third-party market		Joint Declaration		China–France Joint Declaration[21]

(*Continued*)

Table 1. (*Continued.*)

Type of agreements	Other parties to agreements	Forms	Issue areas[1]	Example(s)
cooperation agreements		MOU	General	China's third-party market cooperation MOUs with Japan, Italy, Spain, Belgium, Netherlands, Swiss and Singapore[22]

[1]The issue area has been identified based on the publicly available text (or, where the text is not available, the title) of the agreements in the examples at the time of writing. Where the text is not available, and the issue area cannot be determined from the title, this section has been left blank.
[2]Memorandum of Understanding between the Government of the State of Victoria of Australia and the National Development and Reform Commission 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 (2018), www.vic.gov.au/victorias-china-strategy (Victorian Government–NDRC MOU).
[3]Framework Agreement between the Government of the State of Victoria of Australia and the National Development and Reform Commission of the People's Republic of China on Jointly Promoting the Silk Road Economic Belt and the 21st Century Maritime Silk Road (2019), www.vic.gov.au/bri-framework (Victorian Government–NDRC Framework Agreement).
[4]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 (2019) (Italy–China MOU).
[5]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 (2018) (Philippines–China MOU).
[6]Memorandum of Arrangement on Strengthening Cooperation on the Belt and Road Initiative between the Government of the People's Republic of China and the Government of New Zealand (2017) (China–New Zealand MOA).
[7]This Agreement does not refer directly to the BRI, but is listed as a deliverable of the BRI Forum. China.org.cn, *Full Text: List of Deliverables of the Belt and Road Forum for International Cooperation* (2017), www.china.org.cn/chinese/2017-06/07/content_40983146.htm.
[8]China.org.cn, Full Text: List of Deliverables of the Belt and Road Forum for International Cooperation (2017), www.china.org.cn/chinese/2017-06/07/content_40983146.htm.
[9]Memorandum of Understanding between the United Nations Economic Commission for Europe and the National Development and Reform Commission of China (2017) (UNECE-NDRC MOU).
[10]Memorandum of Understanding between the United Nations Economic and Social Commission for Asia and the Pacific and the Ministry of Foreign Affairs of the People's Republic of China on the Belt and Road Initiative for the 2030 Agenda for Sustainable Development (2019) (ESCAP-MFA MOU).
[11]Letter of Intent between the United Nations Economic and Social Commission for Asia and the Pacific and the Ministry of Foreign Affairs, People's Republic of China on Promoting Regional Connectivity and the Belt and Road Initiative (2016) (ESCAP-MFA Letter of Intent).
[12]Joint Communique of the Leaders Roundtable of the Belt and Road Forum for International Cooperation (2017); Joint Communique of the Leaders' Roundtable of the 2nd Belt and Road Forum for International Cooperation (2019).
[13]ASEAN–China Joint Statement on Synergising the Master Plan on ASEAN Connectivity (MPAC) 2025 and the Belt and Road Initiative (BRI) (2019).
[14]Declaration of Action on China–Arab States Cooperation under the Belt and Road Initiative (2018) (China–Arab States Declaration of Action).
[15]Memorandum of Understanding on Collaboration on Matters of Common Interest Under the Belt and Road Initiative (2017), www.ndb.int/wp-content/uploads/2018/09/MOU-on-BRI-signed.pdf; Memoranda of Understanding on Collaboration on Matters to Establish the Multilateral Cooperation Center for Development Finance (2019), www.aiib.org/en/about-aiib/who-we-are/partnership/_download/collaboration-on-matters.pdf.
[16]Guiding Principles on Financing the Development of the Belt and Road (2017), www.mof.gov.cn/zhengwuxinxi/caizhengxinwen/202007/t20200724_3555773.htm.
[17]Suzhou Consensus of the Conference of Presidents of Supreme Courts of China and Central and Eastern European Countries (2017), www.sohu.com/a/73518080_117927 (Suzhou Consensus).
[18]'The Belt and Road' Digital Economy International Cooperation Initiative (2017), http://finance.jrj.com.cn/tech/2017/12/04073823734129.shtml.
[19]Nanning Statement of the 2nd China–ASEAN Justice Forum (2017), www.chinajusticeobserver.com/p/nanning-statement-of-the-2nd-china-asean-justice-forum.
[20]Wuzhen Statement (2019), www.chinatax.gov.cn/eng/n4260859/c5112273/5112273/files/a6466929ab654fbf842d982b0906442e.pdf.
[21]Joint Declaration between the People's Republic of China and the French Republic (2018), para. 15 ('the Joint Declaration between China and France on the partnerships in third-party markets of June 2015'), https://eng.yidaiyilu.gov.cn/zchj/sbwj/43581.htm.
[22]Zheng, 'The Significance, Practices and Prospect of China's Third-Market Cooperation', 78.

consensuses. One form of an agreement may be used to deepen the engagement initiated under another form. For instance, the Chinese Ministry of Foreign Affairs (MFA) first signed a three-year Letter of Intent with the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP),[9] followed by a MOU which China has suggested further deepens the engagement.[10]

[9]ESCAP-MFA Letter of Intent, Article 18.
[10]Chinese Ministry of Foreign Affairs, 'The Ministry of Foreign Affairs and the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) Sign the Cooperation Document on the Belt and Road Initiative (2019)', www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1659284.shtml.

Concerning coverage, primary agreements address highly diverse subject matters, including 'joint transportation infrastructure development, joint set-up of industrial parks, establishment of sister-city networks, trade and investment promotion, financial cooperation (such as strategic cooperation with the Asia Infrastructure and Investment Bank, Asian Infrastructure Investment Bank (AIIB)) or the joint collaboration in regional initiatives',[11] and the digital economy. Some forms, such as framework agreements and MOAs, tend to cover general issues and work to develop a general framework.[12] Other forms, including intergovernmental agreements and guiding principles, address issues that are more specific. These issues, including energy, finance, and dispute settlement, are often those prioritized by China or reflect the focus area of the international organization party to the agreement (e.g., intellectual property in the China–World Intellectual Property Organization (WIPO) Agreement[13]). The distinction between general and specific coverage is not, however, absolute. MOUs, for example, have been used to address both general and specific issues.

Notably, third-party market cooperation agreements, which are usually concluded between China and advanced economies, are often considered as BRI agreements.[14] Dongchao Zheng argues that third-party market cooperation arrangements are concerned with using China's production capacity and developed countries' advanced technology to explore the markets of developing countries (the third-party market).[15] At the time of writing, China has signed third-party market cooperation documents with 14 states.[16]

Overall, primary agreements are heterogenous and address wide-ranging domains. They cross different spheres of international law, including trade, finance, investment, environment, and labor.

2.2 BRI Secondary Agreements

Secondary agreements are agreements to implement BRI projects, and sit under top-level primary agreements. Secondary agreements are often hard law agreements. Patrick M. Norton has identified that '[m]ost BRI projects will be initiated by, and conducted under the auspices of, intergovernmental agreements between the Chinese and host country governments'.[17] One primary agreement also explicitly provides for the '[e]xecution of a separate legal instrument between the parties to define and implement any subsequent activities, projects and programmes'.[18] Primary agreements are thus likely to have substantial effects on secondary agreements, and in

[11]beltroad-initiative.com, 'Cooperation Agreements and MOUs Under the Belt and Road Initiative', www.beltroad-initiative.com/memorundum-of-understanding-belt-and-road-initiative/.

[12]Research for TRAN Committee (2018) 'The New Silk Route – Opportunities and Challenges for EU Transport', http://bit.ly/2B6oyxJ.

[13]'Agreement on Enhancing "Belt and Road" Intellectual Property Cooperation between the Government of the People's Republic of China and the World Intellectual Property Organization (WIPO), World Intellectual Property Organization, WIPO Director General Visits Belt and Road Forum and China Supreme People's Court (18 May 2017)', www.wipo.int/about-wipo/en/offices/china/news/2017/news_0001.html.

[14]See, e.g., Bei An (2019) 'China Signed 197 BRI Cooperation Documents with 137 Nations and 30 International Organizations (2019)', www.xinhuanet.com/2019-11/15/c_1125237972.htm; D. Zheng (2019) 'The Significance, Practices and Prospect of China's Third-Market Cooperation', *Contemporary World* 76, 78; Chinese Ministry of Foreign Affairs (2019) 'List of Deliverables of the Second Belt and Road Forum for International Cooperation', www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1658767.shtml.

[15]D. Zheng (2019) 'The Significance, Practices and Prospect of China's Third-Market Cooperation', http://world.people.com.cn/n1/2019/1125/c1002-31473705.html, 78.

[16]Chinese National Development and Reform Commission (2019) *Third-Party Market Cooperation Guidelines and Cases*, 4.

[17]Norton, 'China's Belt and Road Initiative', 98.

[18]Memorandum of Understanding between the United Nations Environment Programme and Ministry of Environmental Protection of the People's Republic of China on Building a Green 'Belt and Road' (2016), https://wedocs.unep.org/bitstream/handle/20.500.11822/25336/MOU%20-%20Belt%20and%20Road%20Strategy%20-Dec%202016.pdf?sequence=20&isAllowed=y, Article 3.2(b) (MOU on Environmental Protection).

this way contribute to the final output of binding agreements. It is not easy to identify all secondary agreements, since the parameters for 'BRI projects' are often unclear,[19] and these agreements are usually not publicly available and less visible.

Secondary agreements consist of at least two categories of agreements, and may involve multiple contracts between the various bodies involved in a project.[20] One category is performance agreements, including performance guarantees, economic stabilization contracts, land usage contracts,[21] and concessions agreements that may involve exclusive concession rights (e.g., a build-own-operate-transfer concession).[22] The other category is finance agreements, including loan agreements and grant agreements.[23] They could involve China's banks and MDBs. Secondary agreements can be subject to domestic and international commercial legal scrutiny (such as in arbitration or adjudication). Many secondary agreements could be government-to-government directly or indirectly, business-to-business, or government-to-business. Various state-owned enterprises are involved in secondary agreements.

Secondary agreements are complex. They often have a long duration and several contract layers, and involve multiple parties from multiple jurisdictions, due to the nature of infrastructural projects.[24] Secondary agreements often involve large infrastructure projects ranging from ports[25] to railways,[26] which carry long-term distributive effects. They may be used to address many issues such as legal risks in investment ranging from political unrest, project delays, and cost overruns due to project abandonment.[27]

Governments play an important role in secondary agreements, with the exact nature of this role often determined by the type of infrastructure involved. Differing from traditional international commercial contracts (e.g., sales contract), secondary agreements are often based on the direct or indirect support of the governments (host country, home country, or both) in funding, concession, and other aspects like dispute settlement. For instance, China's Vice Foreign Minister Le Yucheng has stated that '[t]he BRI cooperation agreements we have signed with various countries include provisions that the host countries will take up the security responsibility'.[28] Host governments could be a party to secondary agreements (such as 'collateral government agreements', which include performance guarantees, and agreements on economic stabilization and land usage), and the 'highly political context of many BRI projects' means that their disputes are likely to be submitted to 'informal government-to-government discussion'.[29]

Secondary agreements should be considered alongside primary agreements in understanding the complex structure of the BRI holistically. Primary agreements not only have legal implications but could also send political signals to domestic actors that the BRI is acceptable in host states,

[19]M. Weissmann and E. Rappe (2017) 'Sweden's Approach to China's Belt and Road Initiative: Still a Glass Half Empty', www.ui.se/globalassets/ui.se-eng/publications/ui-publications/2017/paper-1-swedens-approach-to-chinas-belt-and-road-initiative.pdf. (China considered the construction of a Swedish high-speed railway and two private wind power projects as BRI projects 'simply because they are about infrastructure'.)

[20]Norton, 'China's Belt and Road Initiative', 72, 84.

[21]Ibid., at 84.

[22]H. Hamzah (2018) 'Legal Issues and Implications of the BRI', in M. Majid and Y. Jie (eds.), *China's Belt and Road Initiative (BRI) and Southeast Asia*, CIMB ASEAN Research Institute, 21.

[23]Ibid. at 20.

[24]Norton, 'China's Belt and Road Initiative', 84–85, 96.

[25]See, e.g., China Merchants Port Holdings Company Limited, Potential Discloseable Transaction Concession Agreement in Relation to Hambantota Port, Sri Lanka (2017), www.cmport.com.hk/UpFiles/bpic/2017-07/20170725061311456.pdf.

[26]See, e.g., Hamzah, 'Legal Issues and Implications of the BRI', 20–22.

[27]Clifford Chance, *Belt and Road: Dispute Resolution from a Chinese Perspective* (June 2018), https://financialmarketstoolkit.cliffordchance.com/content/micro-facm/en/financial-markets-resources/resources-by-type/thought-leadership-pieces/belt-and-road--dispute-resolution-from-a-chinese-perspective--ju/_jcr_content/parsys/download/file.res/BRI___Dispute_Resolution_from_a_Chinese_Perspective.pdf.

[28]'Transcript of Vice Foreign Minister Le Yucheng's exclusive interview with the Financial Times', *China Daily*, 26 September 2018, http://usa.chinadaily.com.cn/a/201809/26/WS5bab2f67a310c4cc775e8304.html.

[29]Norton, 'China's Belt and Road Initiative', 84.

and thus advance a 'hardening' of the arrangements through secondary agreements. The coordination with other parties through primary agreements also helps to address complex issues arising in secondary agreements, including project-specific issues (e.g., energy-related) and general issues (e.g., funding, dispute settlement).

3. The Legal Status and Characteristics of BRI Primary Agreements

A rigid dichotomy between legalization and politics may not fully explain international agreements.[30] The legal status of BRI primary agreements is likely not the most important factor from the perspective of actors. Rather than an instrument's true legal status, legal considerations (e.g., 'rules of sovereignty and other background legal norms') work alongside political considerations to influence behavior.[31]

On the one hand, primary agreements are similar to currently recognized forms of soft law which live in the 'twilight' between law and politics.[32] In this paper, soft law refers to quasi-legal obligations or law-like promises that are not legally binding but may affect state behavior. Despite different definitions of soft law, soft law is generally regarded as 'norms that are neither law, nor mere political or moral statements, but lie somewhere in between'.[33] Soft law involves written international instruments containing hortatory rather than legally binding obligations,[34] and includes 'nonbinding standards, principles, and rules that influence and shape state behaviour'.[35] Essentially, soft law is 'law-like promises or statements that fall short of hard law'.[36]

BRI primary agreements can be regarded as soft law because they provide for certain quasi-legal obligations or law-like promises. To illustrate, plurilateral primary agreements to some extent resemble the G20 Leaders' Statement,[37] which forms part of the legislative products (like communiques and declarations) of the G20, a regulatory and political medium.[38] To a degree, bilateral primary agreements may display traits resembling the coordination under early bilateral investment treaties (BITs) of capital-exporting countries.[39] Various BRI primary agreements provide for enhanced policy coordination[40] generally (such as calling for regulatory harmonization[41]) or specifically regarding prioritized issues including currency (e.g., the use of local currencies in investment and trade[42]), dispute settlement (e.g., the presumption of reciprocity regarding the recognition and enforcement of civil and commercial judgments,[43] and the use of mediation[44]) and internet (e.g., the call for the 'full respect' of cyberspace

[30]K. W. Abbott et al. (2000) 'The Concept of Legalization', *International Organization* 54: 401–419.

[31]Ibid.

[32]M. E. Footer (2010) 'The (Re)turn to Soft law in Reconciling the Antinomies in WTO Law', *Melbourne Journal of International Law* 11: 241; O. Schachter (1977) 'The Twilight Existence of Nonbinding International Agreements', *The American Journal of International Law* 77: 296, 296.

[33]M. G. Desta (2012) 'Soft Law in International Law: An Overview', in A. K. Bjorklund and A. Reinisch (eds.), *International Investment Law and Soft Law*. London: Edward Elgar, 40.

[34]A. T. Guzman and T. L. Meyer (2010) 'International Soft Law', *Journal of Legal Analysis* 2: 171, 172.

[35]K. Alexander et al. (2006) *Global Governance of Financial Systems: The International Regulation of Systemic Risk*. Oxford University Press, 134.

[36]Guzman and Meyer, 'International Soft Law', 174.

[37]G20 Leaders' Statement: Extraordinary G20 Leaders' Summit Statement on COVID-19 (2020).

[38]C. Brummer (2015) *Soft Law and the Global Financial System: Rule Making in the 21st Century*, 2nd edn. Cambridge University Press, 73.

[39]L. N. Skovgaard Poulsen (2019) 'Beyond Credible Commitments: (Investment) Treaties as Focal Points', *International Studies Quarterly* 64: 26, 29, 32.

[40]beltroad-initiative.com, 'Cooperation Agreements and MOUs under the Belt and Road Initiative', www.beltroad-initiative.com/memorundum-of-understanding-belt-and-road-initiative/.

[41]China–New Zealand MOA, para. III.2.

[42]See, e.g., Philippines–China MOU, Part II.4; China–Arab States Declaration of Action, para. 11.8.

[43]Nanning Statement of the 2nd China–ASEAN Justice Forum, para. 7.

[44]Suzhou Consensus, para. VI.

sovereignty[45]). Many primary agreements have a similar basic structure and are linked to pre-existing legal platforms (e.g., the China–New Zealand Free Trade Agreement[46]).[47] The basic structure highlights policy coordination as one of five major areas under the BRI,[48] which is also a top priority of the BRI.[49] As another example, one primary agreement provides that the implementation of its subsequent activities 'shall necessitate the [e]xecution of appropriate separate legal instruments' between the parties to whose terms 'shall be read in parallel with' the primary agreement.[50] These factors together help explain why BRI MOUs in particular are often defined as soft law,[51] and why primary agreements are regarded as 'a quasi-legal instrument that doesn't carry any legally binding force, or whose legally binding force is weaker than that of traditional laws and regulations'.[52]

On the other hand, BRI primary agreements differ from existing soft law in terms of their legalization, substantive content, and structure, all of which will be discussed below in light of the legal–political continuum. BRI primary agreements largely emphasize project development, in contrast with many existing soft law instruments (like those in international financial law) that promote rule development. This is reflected in the substantive content of primary agreements (as discussed below).

3.1 Legalization: Minimal Legalization

Legalization is a useful way of assessing the soft or hard legal character of instruments, and it can be defined along three dimensions: obligation (states or others constrained by norms or commitments with their behavior subject to scrutiny), rule precision (clearly defined rules on state behavior), and delegation (third parties authorized to implement, interpret, apply, and even develop norms, including dispute resolution).[53]

Compared with existing soft law in these dimensions, most primary agreements are minimally legalized (aspirational, not precise, with weak institutionalization).[54] Primary agreements are weak across all three of these dimensions, while existing soft law is generally stronger in respect of one or more dimensions. Primary agreements feature softer legalization and a higher level of generality (e.g., heavy reliance on general statements).

First, primary agreements have low degrees of obligation and weak obligatory force. BRI primary agreements often explicitly indicate that they are not binding,[55] and their provisions are usually hortatory (e.g., 'endeavour to'[56]). The lowest level of obligation is to 'explicitly negate any intent to create legal obligations', such as 'Non-Legally Binding Authoritative Statement of Principles for a Global Consensus' and the 1975 Helsinki Final Act that indicated it was not

[45]'The Belt and Road' Digital Economy International Cooperation Initiative, para. 14.

[46]China–New Zealand MOA, para. III.2.

[47]C. Devonshire-Ellis (2018) 'Vassal States? Understanding China's Belt and Road MoU (2018)', www.silkroadbriefing.com/news/2018/02/08/vassal-states-understanding-chinas-belt-road-mou/.

[48]See, e.g., Italy–China MOU, para. II.

[49]National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization, 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road', 28 March 2015, http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html.

[50]MOU on Environmental Protection, Article 1.2.

[51]See, e.g., A. H. Qureshi (2015) 'China/Pakistan Economic Corridor: A Critical National and International Law Policy Based Perspective', *Chinese Journal of International Law* 14, 777, 788 ('the whole apparatus as between China and Pakistan is essentially set up in soft law'); P. Xiong and R. Tomasic (2019) 'Soft Law, State-Owned Enterprises and Dispute Resolution on PRC's Belt and Road – Towards an Emerging Legal Order?', *Hong Kong Law Journal* 49: 1025, 1045.

[52]M. R. Dahlan (2018) 'Dimensions of the New Belt and Road International Order: An Analysis of the Emerging Legal Norms and a Conceptionalisation of the Regulation of Disputes', *Beijing Law Review* 9: 87, 92.

[53]Abbott et al., 'The Concept of Legalization', 401, 418.

[54]Ibid., at 405.

[55]See, e.g., Victorian Government–NDRC Framework Agreement, Article 7.

[56]See, e.g., China–Swiss MOU on Developing Third-Party Market Cooperation (2019), paras. 1, 3.

an 'agreement … governed by international law'.[57] Notably, the Italy–China MOU indicates that it 'does not constitute an international agreement which may lead to rights and obligations under international law', and none of its provisions 'is to be understood and performed as a legal or financial obligation or commitment of the parties'.[58]

The low level of obligation is also reflected in the forms of primary agreements. Their forms range from statements to guidelines that are usually 'intended not to create legally binding obligations'.[59]

However, a small number of primary agreements that develop new plurilateral mechanisms (e.g., the Multilateral Cooperation Center for Development Finance (MCDF) and the Belt and Road Initiative Tax Administration Cooperation Mechanism (BRITACOM)) reflect a higher degree of obligation. China's 2017 MOU with six MDBs is observed to reveal 'a serious level of commitment' (including the plan to develop the MCDF),[60] followed by another MOU to establish the MCDF. These MOUs on the MCDF and BRITACOM use the term 'shall' regarding certain obligations,[61] contrasting with other primary agreements that use the word 'should'.[62] Moreover, the termination of certain BRI primary agreements requires 'joint agreement,'[63] arguably introducing some constraints.

Second, primary agreements usually do not delegate legal authority, unlike some, although not all, existing soft law instruments. Primary agreements do not have 'the characteristic forms of legal delegation', involving third-party adjudication to interpret and apply rules as per established international law doctrines.[64] Neither do they designate third parties (e.g., international organizations, courts[65]) to implement the agreements (such as general principles in the agreements). Primary agreements prefer diplomacy. For instance, the Italy–China Government Committee will 'monitor progress' of the Italy–China MOU and the differences in the MOU interpretation will be settled amicably through consultations.[66] China appears to prefer avoiding treaties with measurable compliance requirements in favor of less formal but more flexible arrangements.[67] Essentially, primary agreements are not linked to an institutional framework with independent authority.

Third, primary agreements generally have a lower level of precision than existing soft law, and this echoes China's preference of 'broadness is better than concreteness' in legislation.[68] Although soft law often features imprecise rules,[69] many soft law instruments (e.g., the Rio Declaration on Environment and Development and Agenda 21) are 'remarkably precise and dense', which

[57]Abbott et al., 'The Concept of Legalization', 410.

[58]Italy–China MOU, para. VI.

[59]Abbott et al., 'The Concept of Legalization', 411.

[60]S. Nanwani (2020) 'The Belt and Road Initiative: An Interface with Multilateral Development Banks on International Cooperation and Global Governance', in M. A. Carrai et al. (eds.), *The Belt and Road Initiative and Global Governance*. Edward Elgar Publishing, 99.

[61]Memorandum of Understanding on the Establishment of the Belt and Road Initiative Tax Administration Cooperation Mechanism (2019); Memoranda of Understanding on Collaboration on Matters to Establish the Multilateral Cooperation Center for Development Finance (2019).

[62]See, e.g., Memorandum of Understanding on the Establishment of the Belt and Road Initiative Tax Administration Cooperation Mechanism (2019).

[63]See, e.g., Victorian Government–NDRC MOU, Article V:IV; Victorian Government–NDRC Framework Agreement, Article 7.

[64]Abbott et al., 'The Concept of Legalization', 415.

[65]Ibid., at 415, 418.

[66]Italy–China MOU, paras. IV and V.

[67]M. M. Du (2016) 'China's "One Belt, One Road" Initiative: Context, Focus, Institutions, and Implications', *The Chinese Journal of Global Governance* 2: 30, 40.

[68]C. Cai (2019) *The Rise of China and International Law*. Oxford University Press, 108.

[69]P. Weil (1983) 'Towards Relative Normativity in International Law?', *The American Journal of International Law* 77: 413, 414.

'enhance[s] their normative and political value' from the perspective of proponents.[70] Primary agreements adopt general principles and sometimes standards, rather than the prescriptive terms and technocratic characteristics often found in existing soft law (e.g., international financial law instruments that spell out best practices[71]). For primary agreements, their principles are observed to be 'laissez fair' and 'minimal … which is descriptive more of the parameters within which the arrangement is to proceed and be cemented, as opposed to articulating a positive vision of a development strategy as such'.[72] Moreover, primary agreements lack specific procedures on further negotiations. Many primary agreements do not provide for concrete measures and instead contain 'pronouncements more along the lines of ideal outcomes'.[73] It is observed that primary agreements are a 'vague' form of governance.[74]

Certain rules of a small number of primary agreements are, however, precise, which mainly involve the roadmap and steps to promote projects. The Victorian Government–NDRC Framework Agreement, signed in October 2019, provides that the draft work plan will be formulated by the end of March 2020 and both parties 'agree to work towards having an agreed Cooperation Road Map on key areas by first half of 2020, with a view to having the joint chairs to sign'.[75] The China–New Zealand MOA provides for 'a more detailed work plan' to be formulated within 18 months of the MOA entering into force.[76] The Victorian Government–NDRC Framework Agreement provides for detailed rules on their working mechanisms (Working Group with a Secretariat), which is more developed than those under China's free trade agreements (FTAs) that usually do not have a secretariat.[77] It also provides for detailed rules on the steps on how to promote infrastructure projects (such as possibly 'a joint Infrastructure Accelerator').[78]

The degree of legalization of primary agreements however varies particularly according to the parties and purposes of the agreements. Concerning parties, primary agreements with developed countries (like the Italy–China MOU) and international organizations appear to slowly integrate more legalized provisions relative to those with developing countries. Concerning purposes, agreements that create plurilateral mechanisms appear to be of a higher level of legalization than other primary agreements, likely due to operational needs. As a typical example, the BRITACOM MOU contains 36 articles over 20 pages, and its rules are much more detailed than other primary agreements.

3.2 Substantive Content: Coordinated and Project-Based Nature

Substantive content is a characteristic distinct from legalization.[79] While existing soft law often establishes international regulatory standards,[80] BRI primary agreements feature a more project-based focus. Further, although this project-based focus can be seen elsewhere in international law (e.g., soft law in the context of the international space project[81]), they are neither as coordinated

[70]Abbott et al., 'The Concept of Legalization', 414.

[71]C. Brummer (2010) 'Why Soft Law Dominates International Finance – and not Trade', *Journal of International Economic Law* 13: 623, 632.

[72]Qureshi, 'China/Pakistan Economic Corridor', 782.

[73]J. Waters (2017) 'Unimpeded Trade in Central Asia – A Trade Facilitation Challenge', *Transnational Dispute Management* 14: 18.

[74]A. Umirdinov (2019) 'Generating a Reform of the BRI from the Inside: Japan's Contribution via Soft Law Diplomacy', RIETI Discussion Paper Series 19-E-076, 9.

[75]Victorian Government–NDRC Framework Agreement, Article 5.

[76]China–New Zealand MOA, para. III.5.

[77]Victorian Government–NDRC Framework Agreement, Article 2.

[78]Ibid., Article 4.

[79]Abbott et al., 'The Concept of Legalization', 402.

[80]T. Meyer (2009) 'Soft Law as Delegation', *Fordham International Law Journal* 32: 888, 890.

[81]See, e.g., A. Voronina (2016) 'The How's and Why's of International Cooperation in Outer Space: International Legal Forms of Cooperation of States In Exploration and Use of Outer Space', Theses, Dissertations, and Student Research in Space, Cyber, and Telecommunications Law, University of Nebraska College of Law, Spring 5-6-2016, 1–516.

nor of the same scale and extent as the BRI primary agreements. BRI primary agreements combine a project-based nature with coordination not seen in existing soft law (e.g., a large number of primary agreements, and BRI MOU template drafted by China[82]). In this way, primary agreements adopt many of the features of soft law, but direct these towards supporting BRI projects rather than rule development.

3.2.1 Project-Linked Agreements and Mechanism-Creating Agreements

Primary agreements consist of two categories. The first category is 'project-linked agreements' that focus on project promotion. These agreements are often (i) bilateral primary agreements with other governments, (ii) plurilateral agreements with a group of states, or (iii) third-party market cooperation agreements.

Primary agreements (particularly MOUs) are often expressly project-specific[83]: they feature 'a focus on pushing forward important areas and major projects',[84] aim to 'jointly ensure sound and smooth operation' of major projects,[85] and 'strive to promote the smooth progress of their cooperation projects'.[86] For instance, third-party market cooperation agreements aim at exploring projects in third states along the BRI.[87] BRI MOUs often provide for cross-border and regional initiatives with mid- and long-term development plans involving projects.[88] The Victorian Government–NDRC Framework Agreement goes further as most of its rules focus on project promotion (e.g., working mechanism, major areas, and steps to promote infrastructure projects, and roadmap development[89]).

Primary agreements could lead to project plans that are more detailed. They may require a roadmap in a short time[90] and the roadmap needs to be 'faithfully implement[ed]'.[91] As one example, the guidelines of G16+1 summits have developed from listing planned symposia to covering increasingly concrete plans (the building of Serbo–Hungarian railway connections), and mechanisms (e.g., the conclusion of the framework agreement on customs clearance facilitation between China, Hungary, Serbia, and Macedonia, and the participation of financial institutions of the Central and Eastern European Countries in the RMB Cross-border Inter-bank Payment System).[92]

Most BRI projects will be developed under the auspices of inter-governmental agreements.[93] The BRI relies on specific projects and related practices: MOUs will first be signed between governments, followed by contracts signed between participating businesses (participating firms may also conclude contracts with local governments).[94] To illustrate, the China/Pakistan Economic Corridor was launched in 2013, through the MOU between China and Pakistan, and involves

[82]J. Wang (2019) 'China's Governance Approach to the Belt and Road Initiative (BRI): Relations, Partnership, and Law', *Global Trade and Customs Journal* 14: 228.

[83]C. Devonshire-Ellis (2018) 'China's African Moves through the Belt and Road, Double Tax Treaties and AfCFTA', www.silkroadbriefing.com/news/2019/05/28/chinas-african-moves-belt-road-double-tax-treaties-afcfta/.

[84]Victorian Government–NDRC Framework Agreement, Article 1.

[85]China–New Zealand MOA, para. III.2.

[86]Italy–China MOU, para. I.2(ii).

[87]See, e.g., China–Swiss MOU on Developing Third-Party Market Cooperation, Preamble.

[88]J. Shi (2018) 'The Belt and Road Initiative and International Law: An International Public Goods Perspective', in Y. Zhao (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative*. Cambridge Univesity Press, 30.

[89]Victorian Government–NDRC Framework Agreement, Articles 2, 3, 4, 5.

[90]China–New Zealand MOA, Article 3.5; Victorian Government–NDRC Framework Agreement, Article 5.

[91]Victorian Government–NDRC Framework Agreement, Article 5.

[92]J. Górski (2018) 'China's Strategy toward Central and Eastern Europe within the Framework of 16 + 1 Group: The Case of Poland', in W. Zhang et al. (eds.), *China's Belt and Road Initiative: Changing the Rules of Globalization*. Palgrave Macmillan, 117.

[93]Norton, 'China's Belt and Road Initiative', 98.

[94]G. Wang (2019) 'The Belt and Road under Global Goverance Context' (2019), www.cssn.cn/gd/gd_rwxb/gd_ktsb_1681/zglshysdmxwl/201906/t20190614_4917648.shtml?COLLCC=703785388&.

a Chinese investment of some $45 billion into Pakistan.[95] Different Chinese and Pakistani organizations have concluded various agreements.[96] Relatedly, a BRI primary agreement may support existing projects (e.g., infrastructure projects).[97]

This reflects the BRI's 'result-oriented and progress-oriented' nature.[98] China emphasizes the need to 'transform leaders' political consensus into execution for specific projects.'[99] The BRI appears to be transitioning 'from making high-level plans to intensive and meticulous implementation',[100] although the outcome remains to be seen.

The other category of primary agreements is 'mechanism-creating agreements'. Primary agreements may lead to new formal and informal mechanisms, which could help to promote projects directly or indirectly through addressing selected issues behind the projects. Mechanism-creating agreements are usually bilateral agreements with international organizations and other plurilateral agreements. These mechanisms range from RMB clearing centers and economic zones,[101] to a multilateral dialogue mechanism on PPP.[102] Some agreements (e.g., the BRITACOM MOU and the MOU for the establishment of the MCDF[103]) are devoted to establishing mechanisms.

There could be overlap between project-linked agreements and mechanism-creating agreements. The Victorian Government-NDRC Framework Agreement is an example. It not only promotes projects but also provides for detailed working mechanisms (Working Group with a Secretariat), which arguably are more developed than those under China's FTAs, which usually do not have a Secretariat.[104]

3.2.2 Incongruence with Existing Soft Law Classification

Primary agreements promote projects directly through project-linked agreements, and indirectly through mechanism-creating agreements. The existing soft law categories (as discussed below) focus instead on rule development, problematizing primary agreements' placement within these categories.

Existing soft law (which is defined in terms of the distinction from hard law rather than on its own terms, with a presumption that it is desirable for soft law to transform into hard law) consists of: (i) elaborative soft law, guiding the interpretation or application of hard law ('soft law which builds from hard law'); (ii) emergent hard law, aiming to negotiate a subsequent treaty through 'piloting', or evolving into binding custom through state practice and *opinio juris* ('soft law which builds to hard law'); (iii) soft law evidencing the existence of hard obligations ('soft law which builds to hard customary international law'); and (iv) parallel soft and hard law, similar provisions articulated in hard and soft forms with the soft one acting as 'a fall-back provision' ('co-regulation'), and (v) soft law being a source of obligation, 'through acquiescence and estoppel, perhaps against the original intentions of the parties'.[105]

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[95]Qureshi, 'China/Pakistan Economic Corridor', 778.

[96]Ibid., at 786.

[97]See, e.g., China–Arab States Declaration of Action, para. 9.

[98]J. Wang, 'China's Governance Approach to the Belt and Road Initiative', 224.

[99]Ministry of Foreign Affairs Holds Briefing for Chinese and Foreign Media on President Xi Jinping's Attendance and Chairing of Related Events of the BRF (18 April 2017), www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1455115.shtml.

[100]Office of the Leading Group for Promoting the Belt and Road Initiative (2019) *The Belt and Road Initiative: Progress, Contributions and Prospects*. Foreign Languages Press, 3.

[101]See, e.g., China–Arab States Declaration of Action, para. 9.

[102]Memorandum of Understanding between the United Nations Economic Commission for Europe and the National Development and Reform Commission of China (2017), Article 1(1)(d).

[103]Memoranda of Understanding on Collaboration on Matters to Establish the Multilateral Cooperation Center for Development Finance (2019).

[104]Victorian Government–NDRC Framework Agreement, Article 2.

[105]C. Chinkin (2000) 'Normative Development in the International Legal System', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*. Oxford University Press, 30–31; G. C. Shaffer

Primary agreements do not fit in these categories. At this stage, primary agreements do not elaborate on existing treaties as 'soft law which builds from hard law', and do not involve international tribunals with authority to interpret international rules. They contrast with the judgments of international courts (e.g., the WTO dispute settlement system, and the International Court of Justice) and the resolutions of international organizations (e.g., the United Nations General Assembly Resolution on Measures to Eliminate International Terrorism, which relates to the details of the Refugee Convention).[106]

Primary agreements usually do not endeavor to negotiate a treaty through piloting as 'soft law which builds to hard law'. There is no plan for a BRI-wide treaty. It is difficult for primary agreements per se to evidence the existence of hard obligations as 'soft law which builds to hard customary international law'. This is partially attributable to primary agreements' high level of generality. Most primary agreements per se will continue to operate 'on [their] own terms',[107] and have made limited progress in making new regulatory disciplines.

In the same vein, primary agreements are too general to be a fallback version if hard law (like the WTO rules) does not function. Primary agreements themselves can hardly be a source of obligation given their vague terms, which arguably resemble a kind of 'incomplete contract'. That said, BRI primary agreements are not just political statements: they provide for quasi-legal obligations, and support secondary agreements that contain the binding obligations. Instead of engaging in rule development, as occurs under many existing soft law instruments, primary agreements adopt a coordinated and project-based nature.

3.3 Structure: Hub-and-Spoke Network

Primary agreements are special in forming a hub-and-spoke network with China as the hub. They create a centralized network that consists of multi-layer agreements (primary and secondary agreements). To illustrate, a number of bilateral agreements could be concluded between China and another state. The Italy–China MOU is complemented by 19 other agreements on specific issue areas ranging from culture, sport, energy, to finance and infrastructure.[108] As another example, over 51 MOUs have been signed between China and Pakistan,[109] which may include secondary agreements.

Primary agreements are all signed with China and usually focus on the BRI. BRI primary agreements 'set the stage' for a new extra-regional governance on selected issues (e.g., infrastructure, finance, and internet) in which China plays the leading role.[110] It is observed that the China emphasizes negotiating and signing general cooperation agreements with developing states along the BRI's trade routes.[111]

China drafts the BRI MOU template, and establishes the framework for future negotiations and for new international governance.[112] BRI primary agreements sometimes use a kind of 'boilerplate language' (e.g., 'similar standardized terms'), which is to some extent similar to the

and M. A. Pollack (2010) 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', *Minnesota Law Review* 94: 706, 724–725.

[106]Guzman and Meyer, 'International Soft Law', 207–210, 213–218.

[107]Cf. K. W. Abbott and D. Snidal (2000) 'Hard and Soft Law in International Governance', *International Organization*, 54: 421, 423, 427.

[108]G. Martinico (2020) 'Comparative Law Reflections on the Use of Soft Law in the Belt and Road Initiative', in G. Martinico and X. Wu (eds.), *A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road?* Palgrave Macmillan, 13.

[109]Qureshi, 'China/Pakistan Economic Corridor', 785–786.

[110]Petersmann, 'International Settlement of Trade and Investment Disputes Over Chinese "Silk Road Projects" Inside the European Union', 49.

[111]V. Bath (2017) 'The South and Alternative Models of Trade and Investment Regulation: Chinese Investment and Approaches to International Investment Agreements', in F. Morosini and M. Ratton Sanchez Badin (eds.), *Reconceptualizing International Investment Law from the Global South*. Cambridge University Press, 80.

[112]J. Wang, 'China's Governance Approach to the Belt and Road Initiative', 228.

coordination under early BITs that excluded investor–state dispute settlement.[113] For instance, BRI bilateral MOUs usually provide for the parties' 'understanding' of five priorities (i.e., policy coordination, facilities connectivity, unimpeded trade, financial integration, people-to-people bonds).[114] The prioritized areas under the Italy–China MOU also largely respond to the priorities in the BRI vision issued by China.[115] China aims to enhance the '"soft connectivity" of the Belt and Road regulations and standards',[116] with laws, regulations, and policies all identified as part of this 'software connectivity'.[117] This could involve the alignment of laws and policies in areas like transport facilitation and paperless trade, and the harmonization of select technical standards, shipping documents and rules.[118] Relatedly, the UNECE–NDRC MOU also aims to assist BRI states to '[e]stablish a sound PPP legal, regulatory and governance framework to attract investment in infrastructure projects'.[119]

Taken as a whole, both the volume of primary agreements and China's leading role across the agreements differentiate them from existing soft law China has been involved in (like China's MOUs with the EU and US on antitrust cooperation[120]). Various primary agreements appear to promote China-preferred 'software' (e.g., China-led mechanisms, China's standards and experience[121] through projects), and 'hardware' (e.g., strengthening the synergy between other countries' infrastructure and the BRI[122]). Primary agreements also differ from soft law approaches in international financial law that relies on 'a network of international organizations (i.e. such "transnational regulatory networks" as the Bank of International Settlement and Financial Stability Board)'.[123]

3.4 Summary

While many prior observations on soft law are relevant in analyzing primary agreements, their different attributes need to be considered. For instance, the precision of primary agreements centers on project-related aspects and mechanism development to promote projects. This contrasts with rule development under existing soft law and broadly much of international law that is 'quite precise'.[124]

It is useful to understand primary agreements as sitting on the legal-political continuum instead of under a rigid dichotomy between legalization and politics. As observed by Kal Raustiala, '[t]hat many nonbinding commitments ultimately influence state behavior illustrates the complexity of world politics, not the legal character of those commitment'.[125] It is observed

[113]Poulsen, 'Beyond Credible Commitments', 26, 29, 32.

[114]beltroad-initiative.com, 'Cooperation Agreements and MOUs Under the Belt and Road Initiative', www.beltroad-initiative.com/memorundum-of-understanding-belt-and-road-initiative/.

[115]Martinico, 'Comparative Law Reflections on the Use of Soft Law in the Belt and Road Initiative', 138.

[116]Chinese Ministry of Foreign Affairs (2018) 'Forum on the Belt and Road Legal Cooperation Opens in Beijing', www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1573758.shtml.

[117]ESCAP-MFA Letter of Intent, Article 9.

[118]Ibid., Article 11.

[119]Memorandum of Understanding between the United Nations Economic Commission for Europe and the National Development and Reform Commission of China (2017), Article 1(1)(a).

[120]K. Hiu Fai Kwok (2018) 'The Belt and Road Initiative: Cooperation in Trade Liberalisation and Antitrust Enforcement', in Yun Zhao (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative.* Cambridge University Press, 126–127.

[121]Victorian Government–NDRC Framework Agreement, Article 4 ('learn from China's experience').

[122]See, e.g., Italy–China MOU, para. II.2.

[123]C. Chen (2018) 'ASEAN Financial Integration and the Belt and Road Initiative: Legal Challenges and Opportunities for China in Southeast Asia', in Y. Zhao (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative.* Cambridge University Press, 194.

[124]Abbott et al., 'The Concept of Legalization', 414.

[125]K. Raustiala (2005) 'Form and Substance in International Agreements', *The American Journal of International Law* 99: 581, 590.

that 'law is a continuation of political intercourse, with the addition of other means'.[126] The full text of many primary agreements is not publicly available, and huge varieties among BRI primary agreement exist in terms of their form, context, and content. Specific primary agreements and their implementation need to be analyzed on a case-by-case basis.

4. Why Does China Adopt BRI Primary Agreements?

BRI primary agreements currently draw on soft law but adopt a focus on project development over rule development, unlike under existing soft law. In general, primary agreements have benefitted substantially from the advantages of soft law, and as such existing soft law analysis is largely applicable to the BRI primary agreements. These advantages include lower contracting costs and flexibility, which help China to build the framework of the BRI. Primary agreements may also help raise the legitimacy of the BRI. All these advantages correspond with China's pragmatic interest in promoting the BRI and enhancing China's role in international governance.

Furthermore, the repurposing of soft law characteristics in BRI primary agreements may be explained by China's current priorities. Existing soft law (such as international financial law) is often led by advanced economies with an aim to develop new and often detailed regulatory disciplines. China, meanwhile, currently displays a priority for project development over the development of detailed regulatory disciplines. Therefore, the formation of agreements falling with existing soft law definitions would not meet China's preferences or initiate the BRI projects in a short time. Instead, by utilizing many of the characteristics of soft law but directing these towards project development, BRI primary agreements enable China to benefit both from the advantages of soft law while also developing the BRI.

Relatedly, there could be various reasons for other parties to conclude primary agreements. They include low contracting costs (due to minimal legalization of primary agreements), possible first-mover advantages (to join the BRI as a new network), potential access to funding regarding infrastructure, and possible geopolitical considerations. For instance, primary agreements do not require binding commitments, which arguably 'reduce the fear of the BRI countries that, given the power asymmetry between them and China, as well as, the uncertainty about China's intention and future'.[127] Given the huge variety of other parties, the reasons for concluding primary agreements need to be analyzed on a case-by-case basis. The following section will focus on China's perspective, but many reasons below (e.g., reduced contracting costs) may also apply to other parties depending on the context.

4.1 Reduced Contracting Costs

It is much easier to conclude primary agreements compared with, for example, concluding a treaty. BRI primary agreements are thus similar to soft law in that they work to reduce contracting costs (including the large number of parties, domestic ratification process, and sensitive issues,[128] possibly reducing 'the transactions costs of continual bargaining'[129]) and therefore can be concluded quickly.[130] A number of short primary agreements could be concluded with other parties, as a series of shorter instruments 'avoid … the bargaining costs associated with a single, long agreement'.[131] China may not wish to introduce detailed rules into primary

[126]Abbott et al., 'The Concept of Legalization', 419.
[127]J. Wang, 'China's Governance Approach to the Belt and Road Initiative', 225.
[128]Shaffer and Pollack, 'Hard vs. Soft Law', 720.
[129]Abbott and Snidal, 'Hard and Soft Law in International Governance', 448.
[130]Brummer, 'Why Soft Law Dominates International Finance', 631.
[131]B. Koremenos et al. (2001) 'The Rational Design of International Institutions', *International Organization* 55: 761, 794.

agreements as this could delay the initiation of the BRI.[132] The BRI is project-oriented and starts with MOUs, which correspond with China's tradition of '[h]e who wants to accomplish a big and difficult undertaking should start with easier things first'.[133]

Primary agreements take advantage of the elements of soft law instruments to address sensitive issues, since the BRI often involves national interests and sensitivity. Soft law can be used to address the situation when 'norms are contested and concerns for sovereign autonomy are strong, making higher levels of obligation, precision, or delegation unacceptable'.[134] For sensitive issues, soft law imposes lower 'sovereignty costs', and also permits the parties to be more ambitious and conduct 'deeper' cooperation than they would if they had to be concerned about enforcement.[135] Soft law arguably represents 'a somewhat less serious pledge of a state's reputational capital'.[136] BRI primary agreements are highly vague and not subject to enforcement. The parties to the MOU could theoretically 'moderate and modulate their level of commitment' through soft law, limiting their obligation via the designation of their undertakings as non-binding, 'hortatory language, exceptions, reservations and the like'.[137]

4.2 Flexibility

Primary agreements allow for maximized flexibility, which is a key characteristic underpinning China's BRI approach.[138] Maximized flexibility arises from minimal legalization in terms of obligation, precision, and delegation. For instance, China retains more latitude through primary agreements with conditional language. For powerful states, 'loosening their own constraints is often more important than having others tightly constrained', and this brings 'greater latitude in application'.[139] It is observed that powerful states often do not want to be obligated and have 'less need for legalization'.[140]

First, flexibility is desirable since China has not fully determined what is in its best interests in respect of many issues (particularly in new areas like digital trade). To illustrate, data localization requirements may not necessarily work for the benefits of Chinese businesses operating overseas as they would increase costs.[141] More broadly, the BRI is an unprecedented extra-regional initiative. It is also affected by geopolitical and other dynamics (e.g., COVID-19 outbreak[142]). Views and policies regarding the BRI are, to a certain extent, in flux. As with soft law, primary agreements will often be preferable if states' interests are less clear.[143] The recourse to soft law occurs when states are not sure the norms they adopt will be desirable in the future.[144] If the focuses and

[132]G. Wang (2019) 'Global Governance and the Principles and Directions of the Rule-Based Belt and Road', *Economic and Business Law Review*, 1, 7.

[133]Ibid.; Translation Seminar of China International Publishing Group, 'Classical Poetry Translation Collected by Translation Seminar of China International Publishing Group', www.cipgtraining.org/?xyjl=中国外文局翻译研修班整理古诗词英语翻译.

[134]Abbott et al., 'The Concept of Legalization', 407.

[135]Shaffer and Pollack, 'Hard vs. Soft Law, 719.

[136]A. T. Guzman and T. L. Meyer (2009) 'International Common Law: The Soft Law of International Tribunals', *Chicago Journal of International Law* 9: 515, 519.

[137]K. W. Abbott and D. Snidal (2004) 'Pathways to International Cooperation', in E. Benvenisti and M. Hirsch (eds.), *The Impact of International Law on International Cooperation: Theoretical Perspectives*. Cambridge University Press, 54.

[138]H. Wang, 'China's Approach to the Belt and Road Initiative', 29, 43–50.

[139]N. Krisch (2005) 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', *European Journal of International Law* 16: 369, 390.

[140]Abbott and Snidal, 'Hard and Soft Law in International Governance', 448.

[141]Relatedly, China's WeChat was banned for a short time in Russia. The ban was removed after the firm provided 'relevant information' for the registration. Z. Xin (2017), *Russia Unblocks China Social Media App Wechat*, www.scmp.com/print/news/china/diplomacy-defence/article/2094004/russia-unblocks-china-social-media-app-wechat.

[142]M. Erie (2020) 'BRI COVID-19, China', Law and Development Research, Brief No. 5/2020 (2020), 1, 1–7.

[143]On soft law, see Shaffer and Pollack, 'Hard vs. Soft Law', 788.

[144]Guzman and Meyer, 'International Soft Law', 171.

priorities of the BRI change, primary agreements may change. It is much easier to change soft law instruments than hard law, in part due to the imprecise terms.[145] Such flexibility allows time for China to ascertain its interests, and accordingly promote the BRI projects step by step.

Second, primary agreements enable China to learn by practice and allow trial-and-error in the BRI design and implementation. China is comparatively less experienced in addressing global affairs than major Western states (particularly the US), and needs to learn in the international arena.[146] Primary agreements benefit from the advantages of soft law in terms of flexibility in responding to political dynamics and informality.[147] Primary agreements also increase the elasticity of China in addressing the difficulty of building BRI projects.[148]

Third, primary agreements provide flexibility to China in securing broad participation in the BRI and initiating BRI projects. Differing forms of primary agreements are adopted to meet various needs, including different governments and international organizations (e.g., the China–New Zealand MOA, and UNECE–NDRC MOU), areas and sectors (e.g., the MOU in the Field of Water Resources with the Government of Malaysia), and projects (e.g., the Protocol on Establishment of Joint Ocean Observation Station with the Ministry of Environment of Cambodia).[149] Applying the discussion of soft law by Shaffer and Pollack, China selects regimes (primary instruments) based on characteristics including their membership (e.g., bilateral and plurilateral), parties involved (national and sub-national governments, international organizations such as the UN), institutional characteristics (e.g., the absence of strict dispute settlement procedures), substantive focus (e.g., dispute settlement, trade facilitation, infrastructure finance, digital economy, and infrastructure standards), and predominant functional representation (e.g., by trade or finance ministries).[150] Relatedly, the network of primary agreements could enjoy the benefit of a network in terms of the 'ability to add new members quickly and at low cost'.[151]

4.3 Legitimacy

Primary agreements may increase the domestic and international legitimacy of the BRI, thereby helping to promote BRI projects. For domestic legitimacy in China, primary agreements help to show international support for the BRI,[152] including the third-party market cooperation agreements with advanced economies. As another example, the BRF Joint Communiques indicate the support of the BRI by the participants.

In respect of international legitimacy, primary agreements may be similar to soft law in that they may be used in justifying a state's actions.[153] Many of China's primary agreements link to existing international institutions and refer to international standards or rules (e.g., the adherence to 'international good practice',[154] and the compliance with 'the purposes and principles of the UN Charter', and the 2030 Agenda for sustainable development and the Paris Accord on climate change[155]). This

[145]Abbott and Snidal, 'Pathways to International Cooperation', 54.

[146]Bloomberg News, 'China Cites "The Art of War" as Trump Signals Trade Battle' (28 November 2016), www.bloomberg.com/news/articles/2016-11-28/china-turns-to-the-art-of-war-as-trump-signals-battle-on-trade.

[147]Shaffer and Pollack, 'Hard vs. Soft Law', 710; Meyer, 'Soft Law as Delegation', 897.

[148]Du, 'China's "One Belt, One Road" Initiative', 40.

[149]See e.g. China.org.cn, Full Text: List of Deliverables of the Belt and Road Forum for International Cooperation (2017), www.china.org.cn/chinese/2017-06/07/content_40983146.htm.

[150]Shaffer and Pollack, 'Hard vs. Soft Law', 738.

[151]M. Kahler (2009) '*Networked Politics: Agency, Power, and Governance*', in M. Kahler (ed.), *Networked Politics: Agency, Power, and Governance*. Cornell University Press, 15.

[152]J. Wang, China's Governance Approach to the Belt and Road Initiative, 228.

[153]T. Broude and Y. Shereshevsky (2017) 'Explaining the Practical Purchase of Soft Law: Competing and Complementary Behavioral Hypotheses', Hebrew University of Jerusalem Legal Studies Research Paper Series No. 18-7, 7.

[154]China–New Zealand MOA, para. II.3.

[155]See, e.g., Italy–China MOU, Preamble; Memorandum of Understanding on Collaboration on Matters of Common Interest Under the Belt and Road Initiative, Article I.1(v).

may help to show the consistency of primary agreements with the normative status quo, and lend MOUs 'more ability to claim legitimacy'.[156] That said, the effects of BRI primary agreements remain to be seen as the reshaping of the existing international order require wide support from the world community.

4.4 Summary

Crucially, BRI primary agreements help to promote BRI projects with reduced contracting costs and flexibility. From China's perspective, they may help establish the legitimacy of the BRI (e.g., by demonstrating the support of other parties to primary agreements). There is also likely to be a range of additional reasons behind the use of primary agreements. For instance, China appears to adopt a constructivist approach by taking advantage of 'the communicative and constitutive impact' of soft law.[157] Other reasons may include the various advantages of soft law, such as incrementalism,[158] and the response to 'uncertainty by designing arrangements that are less formalized than full legalization'.[159] All these considerations behind primary instruments appear to be closely related to China's efforts to promote the BRI projects.

5. What Are the Challenges Faced by BRI Primary Agreements?

There are usually two major problems of international cooperation regardless of the substantive domain: bargaining problems and enforcement problems.[160] In the same vein, BRI primary agreements face at least two major challenges in terms of substantive rules and enforcement. The handling of these challenges will in turn affect the legitimacy of the BRI. Based on the analysis of these challenges, broader challenges for the parties to primary agreements will be explored.

5.1 Substantive Rules

Major challenges in substantive rules include rule inconsistency, ambiguity and vacuum, the balance between different considerations, a possible gap between the law-in-the-books and the law-in-action, and the relationship between primary agreements and other rules. These factors may lead to considerable issues in respect of the certainty and credibility of commitments.

First, primary agreements may face rule inconsistency, ambiguity, and vacuum. It is observed that 'Western trade and investment projects would require the application of a uniform set of rules at the three levels of international/bilateral cooperation, domestic regulation, and private transactions.'[161] China appears to adopt a 'One Country, One Approach' to the BRI.[162] It is challenging in developing '"one legal framework" to find a single, common ground.'[163] Given the tremendous variation between the parties involved, primary agreements differ substantially, although they often share a similar basic structure. Additionally, the low level of precision results in a lack of elaborate rules (e.g., concrete required or disfavored behavior) and makes it more difficult to ensure the provisions are related to each other in a consistent manner.[164] The

[156]Devonshire-Ellis (2018) Vassal States? Understanding China's Belt and Road MoU.

[157]G. Shaffer and M. A. Pollack (2012) 'Hard and Soft Law', in J. L. Dunoff and M. A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art.* Cambridge University Press, 218.

[158]D. M. Trubek et al. (2005) '"Soft Law", "Hard Law", and European Integration: Toward a Theory of Hybridity', University of Wisconsin Legal Studies Research Paper No. 1002, 11–12.

[159]Koremenos et al., 'The Rational Design of International Institutions', 794.

[160]J. D. Fearon (1998) *Bargaining, Enforcement, and International Cooperation*, *International Organization* 52: 269, 270.

[161]J. Wang, 'China's Governance Approach to the Belt and Road Initiative', 223.

[162]Ibid., at 224.

[163]Hamzah, 'Legal Issues and Implications of the BRI', 19.

[164]Abbott et al., 'The Concept of Legalization', 413.

relationship among myriad forms of primary agreements is unclear and there is no central repository for BRI agreements. Even for BRI agreements concluded with one state, it is not easy to ensure their consistency (e.g., 51 MOUs concluded between China and Pakistan).[165]

Rule ambiguity or vacuum could exist regarding various issues. The BRI projects invest largely in jurisdictions where other states and international financial institutions have been reluctant to invest,[166] and few of these countries are 'noted for the rule of law'.[167] The BRI also expands to infrastructure and other new areas (e.g., data flow in Digital Silk Road). Many BRI legal issues fall outside the scope of WTO rules, FTAs, and BITs. All of these factors call for rules under the BRI and particularly international rules. However, primary agreements seldom address many of these issues. For instance, they rarely address wider social issues (e.g., labor issues and environment) and the robust monitoring of these issues, which affect the BRI's relationships with civil society and local communities.[168] Labor issues are generally untouched by primary agreements. The China–New Zealand MOA incorporates one 'short and relatively weak'[169] clause that mentions environmental matters, calling for 'push[ing] forward coordinated economic, social, environmental and cultural development and common progress'.[170] The Italy–China MOU provides a more detailed, although still general, provision on environment, including the participation in the International Coalition for Green Development on the Belt and Road.[171] This is partially explained by China's pragmatic project-based approach and social issues not being the major focus of China (e.g., China's FTAs and BITs lacking systematic rules on social issues). It is yet to be seen whether and how a regulatory system and governance standards in various BRI states would be put in place to properly address BRI related legal issues (e.g., long-term due diligence and financing, and social issues).[172]

Second, it remains an open question as to how the balance is to be struck between different roles and considerations, and a gap could exist between the law-in-the-books and the law-in-action. A government may be an economic actor and a regulator, and there is tension behind these roles (e.g., economic and social considerations).[173] It is unclear how to best balance economic security (the right to regulate) with the constraints of economic sovereignty, which is a particular issue given the majority of BRI states are developing countries.[174]

Free market principles are recognized in various primary agreements.[175] Due to the minimal legalization of primary agreements, time will tell whether and how these principles will apply in the practice. For instance, it is yet to be seen how the possible preferential treatment of Chinese products and services (given the source of the investment) will be balanced with market principles based on competition (like non-discrimination treatment provided in treaties).[176]

Third, the relationship between primary agreements and other rules is not always clear. The obligations in primary agreements have legal implications for the signatories and even non-

[165]G. Wang (2018) 'On the Development of Belt and Road Under the Context of Trade War', *China Law Review* 5: 25.

[166]Avery Goldstein, 'A Rising China's Growing Presence: The Challenges of Global Engagement', in *China's Global Engagement: Cooperation, Competition, and Influence in the 21st Century* (2017), 9.

[167]P. Ferdinand (2016) 'Westward Ho – the China Dream and "One Belt, One Road": Chinese Foreign Policy Under Xi Jinping', *International Affairs* (2016), 941, 953.

[168]Hao Tian (2018) 'China's Conditional Aid and Its Impact in Central Asia', in M. Laruelle (ed.), *China's Belt and Road Initiative and Its Impact in Central Asia*. The George Washington University, 33.

[169]B. Boer (2019) 'Greening China's Belt and Road: Challenges for Environmental Law', Sydney Law School Research Paper, 14.

[170]China–New Zealand MOA, third preambular paragraph.

[171]Italy–China MOU, para. II.6.

[172]R. Nurgozhayeva (2020) 'Rule-Making, Rule-Taking or Rule-Rejecting under the Belt and Road Initiative: A Central Asian Perspective', *The Chinese Journal of Comparative Law* 8: 250, 255.

[173]Hamzah, 'Legal Issues and Implications of the BRI', 23.

[174]G. Wang, 'The Belt and Road under Global Goverance Context'.

[175]See, e.g., China–New Zealand MOA, paras. II.3; Italy–China MOU, para. III.2.

[176]Qureshi, 'China/Pakistan Economic Corridor, 789–790.

parties. To illustrate, the China–Pakistan Economic Corridor Memoranda may have multilateral effects on relationships other than between China and Pakistan (e.g. China–Russia, China–India and Pakistan–India relationships), and both states' rights and obligations under international organizations to which they are members (like the WTO, World Customs Organization, the IMF, the World Bank, and the Asian Development Bank).[177]

5.2 Enforcement

Challenges in enforcement may arise due to various factors, ranging from the minimal legalization of primary agreements to the actors' negotiation positions. Primary agreements encounter enforcement issues as with existing soft law that 'avoids judicialization'.[178] Minimal legalization of primary agreements (weak obligations, rule imprecision, and low delegation) makes enforcement more difficult. Flexibility could give rise to opportunistic behavior whenever 'economic, political, or other pressures make compliance inconvenient'.[179] With weak legalization, 'imprecise norms are, in practice, most often interpreted and applied by the very actors whose conduct they are intended to govern'.[180]

For obligations and precision, the efficient operation of the BRI will probably require a certain level of legal harmonization[181] that could bring reduced regulatory differences. However, primary agreements have a low level of obligation and precision. As observed by Kenneth W. Abbott and Duncan Snidal, 'compliance issues are largely moot' if soft law instruments have 'little content.'[182] Primary agreements are insufficient to address possible problems like local protectionism or judicial corruption in the BRI practice.[183] Ambiguity would also 'deflect …accountability'.[184] A low level of precision allows for wide discretion, in turn making it difficult to assess compliance.[185]

For delegation, primary agreements are usually subject to consultation rather than a panel process.[186] In some exceptional circumstances, primary agreements provide for conciliation under UNCITRAL Conciliation Rules,[187] arbitration,[188] or lack a dispute settlement provision entirely.[189] Disputes over the interpretation of BRI agreements may arise, especially due to their general language, which cannot be fully addressed within the existing dispute settlement system.[190] Primary agreements do not bring a BRI-wide dispute settlement and monitory arrangement that will help enforcement, and it is unlikely that such an arrangement will be created anytime soon.

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[177]G. Wang (2017) 'Legal Challenges to the Belt and Road Initiative', *Journal of International and Comparative Law* 4: 309, 323.

[178]Martinico, 'Comparative Law Reflections on the Use of Soft Law in the Belt and Road Initiative', 136.

[179]L. R. Helfer (2012) 'Flexibility in International Agreements', in J. L. Dunoff and M. A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*. Cambridge University Press, 176.

[180]Abbott et al., 'The Concept of Legalization', 414.

[181]W. Gu (2018) 'China's Belt and Road Development and a New International Commercial Arbitration Initiative in Asia', *Vanderbilt Journal of Transnational Law* 51: 1305, 1316.

[182]K. W. Abbott and D. Snidal (2004), '*Pathways to International Cooperation*', in E. Benvenisti and M. Hirsch (eds.), *The Impact of International Law on International Cooperation: Theoretical Perspectives*. Cambridge University Press, 54.

[183]J. Tao and M. Zhong (2018) 'The Changing Rules of International Dispute Resolution in China's Belt and Road Initiative', in Wenxian Zhang et al. (eds.), *China's Belt and Road Initiative: Changing the Rules of Globalization*. London: Palgrave Macmillan, 308.

[184]T. Broude (2019) 'Belt, Road and (Legal) Suspenders: Entangled Legalities on the "New Silk Road"', Hebrew University of Jerusalem Legal Research Paper 20-01, 17.

[185]Abbott et al., 'The Concept of Legalization', 414.

[186]Philippines–China MOU, Part IV.

[187]ESCAP-MFA MOU, Article IX.

[188]MOU on Environmental Protection, Article 13.2.

[189]ESCAP-MFA Letter of Intent.

[190]Dahlan, 'Dimensions of the New Belt and Road International Order', 87.

Consultations can hardly provide sufficient predictability for public and private actors, and may struggle to search for ad hoc solutions. Such difficulties may arise in practice including the calls for debt relief on BRI projects after the COVID-19 outbreak.[191] If consultations fail, the parties may only be able to rely on direct sanctions or on reputational sanctions which do not compensate the breached-against actors.[192] Soft law 'often garners widespread participation, but it creates few concrete incentives for states to improve behavior'.[193] The lack of compliance review mechanism like third party enforcement may eventually lead to high transaction costs of interstate interaction to address disputes.

Many issues remain open. Soft law could be under-enforced if it turns out to be economically or politically more costly than the parties originally expected, and a party cherry picks certain aspects of soft law instruments.[194] For instance, it may be questioned whether enforcement is even a goal of primary agreements, when considered against the need for flexibility and preference for avoiding the tough decisions required for enforceable agreements. Will current primary agreements provide an efficient level of compliance? If a party to a primary agreement violates any obligation therein, will the other party halt its own compliance in retaliation? Is the ending of compliance by other parties a credible way to deter violations? All these are case-specific and depend on many aspects, including the issues and focuses of primary agreements, and actors involved. Factors beyond the agreements themselves, like domestic interest, will play a role. Essentially, there is a complex trade-off between compliance benefits and violation costs.

5.3 Broader Challenges

There are broader issues faced by the parties to primary agreements, which exist in both substantive rules and enforcement. An exhaustive list of all challenges cannot be developed here. However, several major areas deserve attention as they may make parties re-evaluate their expectations and also affect the views of outsiders towards the initiative.

Foremost, primary agreements impose challenges for BRI states regarding their negotiation capacity. This is particularly the case for small developing economies. BRI states may need to negotiate various issues as there is a lack of BRI-wide rules. Neither is there a central institution (e.g., an international organization) for formal rule-making under the BRI. Many BRI issues (e.g., infrastructure finance, technical standards, and e-commerce) are new or more complex than traditional issues (e.g., tariff reduction). The negotiations require the understanding of distributive consequences arising from rules (such as on trade, finance and investment) for different actors.[195] It is not easy to foresee the future ramifications of measures in fast changing circumstances.[196] Essentially, the negotiations involve the underlying issue of equity.

Second, there are challenges regarding various interests behind primary agreements. Primary agreements face the fact that actors have different interests, values, and degrees of power.[197] There are legal, political, economic, and social differences among a large number of BRI states. The BRI involves complicated issues areas, ranging from infrastructure to internet governance. For

[191]J. Kynge and S. Yu (2020) 'China Faces Wave of Calls for Debt Relief on "Belt and Road" Projects', *Financial Times*, www.ft.com/content/5a3192be-27c6-4fe7-87e7-78d4158bd39b.

[192]Meyer, '*Soft Law as Delegation*', 899–900.

[193]Jing Tao (2019) 'TPP and China: A Tale of Two Economic Orderings?', in B. Kingsbury et al. (eds.), *Megaregulation Contested: Global Economic Ordering After TPP*. Oxford University Press, 93.

[194]Brummer, 'Why Soft Law Dominates International Finance', 635, 636.

[195]Ibid., at 623.

[196]M. Eilstrup-Sangiovanni (2009) 'Varieties of Cooperation: Government Networks in International Security', in M. Kahler (ed.) *Networked Politics: Agency, Power, and Governance*. Cornell University Press, 208.

[197]Abbott and Snidal, '*Hard and Soft Law in International Governance*', 423, 448.

instance, infrastructure may 'severely affect national interests'.[198] There could be gaps in a number of aspects: '(a) divergence in interests (who gains, who losses, who gains more); (b) conflicting ideational stakes (conflicting positions in preserving sovereignty, autonomy and identity); and (c) conflicting positions over alignment preferences (a big power wanting smaller states to side with or align more closely with it, while smaller states insist on retaining their external space for manoeuvre)'.[199] It is observed that '[t]he absence of common cultures, legal systems, and geopolitical interests among the BRI participants also forms significant political obstacles to the emergence of common legal practices or institutions across the BRI's extraordinary geographic scope'.[200] There is not always congruity between China and other parties in these aspects.

Third, uncertainties exist regarding the effects of primary agreements. There could be concerns that soft law may bring distorting effects on competition, which are linked with distributive imbalances and power asymmetries.[201] Soft law is often viewed as 'a power or a persuasive force in its own right'.[202] To illustrate, Hanim Hamzah posits that 'it is common for sponsors to provide legal terms in their favour', which may affect the competitiveness of domestic industries of BRI states, and that an across-the-board 'centrally coordinated' approach could be problematic.[203] The BRI practice also faces concerns like transparency,[204] environment, labor, and debt sustainability.[205] In a broader sense, there could be challenges regarding legitimacy. Precision enhances the legitimacy of rules and their normative 'compliance pull',[206] while primary agreements have low level of precision. Soft law (e.g., international financial law) may be deemed to protect the interests of 'key players' and be vulnerable to power relations, and cause concerns over representativeness (e.g., more finite universe of interests), transparency, and accountability.[207] It is observed that standard-setting on a bilateral or regional basis 'allow[s] for stronger influence by important actors'.[208] The challenges include how to address possible distributive implications of primary agreements as they often involve long-term projects (e.g. infrastructure), how to understand and address national interests in various states (e.g. Malaysia's East-Coast Rail Link project that was suspended on national interests and then restarted),[209] and how to address possible power asymmetries (e.g. reciprocal market access rights).[210]

Finally, other challenges include that the perception of BRI agreements may differ between China and other parties. It is observed that '[w]hat one state believes it is signalling is not necessarily what another states[sic] hears'.[211] This issue may arise due to the sensitivity of many issues involved (e.g. infrastructure) and the minimal legalization of primary agreements, which often leave terms open to multiple interpretations.

[198]Wangwei Lin et al. (2019) 'Legal Challenges in China's "One Belt and One Road" Initiative', *The Company Lawyer* 49: 91, 92.

[199]Cheng-Chwee Kuik (2020) 'Connectivity and Gaps: The Bridging Links and Missed Links of China's BRI in Southeast Asia', in M. A. Carrai et al. (eds.), *The Belt and Road Initiative and Global Governance*. Edward Elgar Publishing, 90.

[200]Norton, 'China's Belt and Road Initiative', 79.

[201]A. Di Robilant (2006) 'Genealogies of Soft Law', *The American Journal of Comparative Law* 54: 499, 508.

[202]Brummer, 'Why Soft Law Dominates International Finance', 634.

[203]Hamzah, 'Legal Issues and Implications of the BRI', 23, 24.

[204]See, e.g., Xiong and Tomasic, 'Soft Law, State-Owned Enterprises and Dispute Resolution on PRC's Belt and Road', 1028 ('very sparse' information concerning the financing of BRI projects).

[205]See, e.g., D. Dollar (2019) 'Understanding China's Belt and Road Infrastructure Projects in Africa', *Global China*, 2 September.

[206]Abbott et al., 'The Concept of Legalization', 413.

[207]Brummer, 'Why Soft Law Dominates International Finance', 630, 642.

[208]Krisch, 'International Law in Times of Hegemony', 379.

[209]Hamzah, 'Legal Issues and Implications of the BRI', 23, 24.

[210]Petersmann, 'International Settlement of Trade and Investment Disputes Over Chinese "Silk Road Projects" Inside the European Union', 53, 54, 65.

[211]T. Meyer (2012) 'Towards a Communicative Theory of International Law', *Melbourne Journal of International Law* 13: 921, 936.

6. Conclusion

BRI primary agreements can be regarded as soft law developing quasi-legal obligations across the BRI network. However, these agreements are also seen to repurpose the characteristics of soft law to support project development, distinct from the rule development pursued through many existing soft law instruments. Primary agreements have three major characteristics that differ from existing soft law: minimal legalization, a coordinated and project-based nature, and a hub-and-spoke network structure. In addition, primary agreements should be understood holistically with secondary agreements that often contain binding obligations to implement BRI projects. Primary agreements serve to promote projects directly (through project-linked agreements), and indirectly (through mechanism-creating agreements). It is not, however, simply the project nature of the primary agreements, but rather their scale and the extent of coordination involved that makes primary agreements unique. Minimal legalization is the pathway that China appears to have chosen to develop the BRI framework, with a hub-and-spoke network with China at the center as the structure built by primary agreements.

BRI primary agreements draw substantially on the advantages of soft law, and these advantages may largely explain the rationale behind China's adoption of primary agreements. Reduced contracting costs and flexibility help China to build wide participation and develop the BRI framework. From China's perspective, primary agreements may help its efforts to seek legitimacy (e.g. via a large number of parties signing primary agreements). In addition, the repurposing of soft law characteristics to drive project development can also be seen to align with China's current apparent prioritization of such project-based efforts over rule development more generally.

Given the focus on project development rather than on rule development, primary agreements may face various challenges. To illustrate, minimal legalization makes it difficult to regulate behavior and may create more uncertainties if interests or circumstances change. There is a long way for primary agreements to go in terms of the predictability, consistency, and stability of extra-regional economic order.

That said, the differences between project development and rule development are not absolute. BRI primary agreements currently appear to prioritize promoting project development over rule development, but it remains to be seen whether this will change in the future. There is a possibility that China may alter its priorities over time. In the long term and if everything goes smoothly, BRI primary agreements may also help China incrementally promote its role in international rule-making[212] and selectively reshape rules.[213] For instance, the effects on rules may include the promotion of Chinese standards,[214] and agenda setting and possible rule development under China-led mechanisms. A number of issues deserve further study: Are primary agreements sustainable? Will primary agreements shift towards a greater focus on rule development? Will projects become the major way to reshape international rules in the future? Will primary agreements per se develop towards harder rules? Will other states follow the path of such primary agreements? What is the impact of COVID-19 outbreak on primary agreements, and how will primary agreements interact with secondary agreements (e.g., the extent of the former's effects on the latter)? Primary agreements and their implications deserve close attention. It remains to be seen whether they will allow for rapid responses to the fast-changing world in the post-COVID-19 era.

[212]Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law, Part 7.7 (2014); Chatham House (2017), *China and the Future of the International Legal Order*, www.chathamhouse.org/file/china-and-future-international-legal-order.

[213]Heng Wang (2020) 'Selective Reshaping: China's Paradigm Shift in International Economic Governance', *Journal of International Economic Law* 23: 583–606.

[214]For instance, it is observed that 35.1% of China's construction projects under the BRI adopt Chinese standards, higher than the proportion of other standards. Ying Qin et al., *The Application of China's Construction Standards Along the Belt and Road Initiative*, www.cecs.org.cn/xsyj/zdkt/10424.html.

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