

LEVERAGING ASEAN'S FULL POTENTIAL AS A REGIONAL LEGAL MECHANISM: A NECESSARY COMPROMISE TO ACHIEVE A GREENER BELT AND ROAD INITIATIVE IN SOUTHEAST ASIA

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China's "Green" Belt and Road Initiative could potentially create infrastructure in and bring commerce to previously underdeveloped regions in almost every corner of the world. Despite the sustainability rhetoric attached to the initiative, it threatens to wreak environmental havoc. For example, Belt and Road Initiative dams, highways, and ports could negatively impact ecosystems, livelihoods, security, and socio-economic well-being. As such, it is important that the proper mechanisms are put in place as soon as possible to ensure sustainable development.

The complex and far-reaching nature of the Belt and Road Initiative makes this a challenging task. Enforcement issues associated with international, Chinese, and host countries' domestic laws mean that many victims of environmental harm have limited options for legal recourse. Furthermore, for countries home to transnational ecosystems such as the Lancang-Mekong River Basin, lax regulation and poor bilateral trade agreements between China and one host country could cause harm in neighboring countries.

This Comment argues that countries in Southeast Asia (which in many ways is the most environmentally diverse and valuable region in the world) should look to cooperate and utilize the Association of Southeast Asian Nations to manage Belt and Road Initiative development. The regional body could be used to enforce binding regional environmental law, provide alternative dispute resolution mechanisms, and adjudicate lawsuits. Although doing so might sacrifice some sovereignty for each member state, it is the most practical way to swiftly and effectively protect Southeast Asia from unsustainable, environmentally harmful Belt and Road Initiative development.

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I. INTRODUCTION

For better or worse, China's Belt and Road Initiative (BRI) could fundamentally alter environmental welfare across the entire planet.¹ The initiative, first formally introduced by Chinese President Xi Jinping in 2013, is an expansive system of investments in infrastructure and trade routes between China and partner countries.² It has already cost over \$1 trillion and is active in over 140 countries, most of which are low or middle income.³ Experts estimate that BRI expenses could reach as much as \$8 trillion by its completion.⁴ Because the BRI is so far-

1. Compare Patrick Teese, *Exploring the Environmental Repercussions of China's Belt and Road Initiative*, ENV'T & ENERGY STUDY INST. (Oct. 30, 2018), <https://www.eesi.org/articles/view/exploring-the-environmental-repercussions-of-chinas-belt-and-road-initiative> (warning BRI may destroy ecosystems and export dirty energy production to developing countries and expressing doubt as to whether or not Chinese developers will adhere to various environmental standards), with *The Belt and Road Initiative International Green Development Coalition (BRIGC)*, U.N. ENV'T PROGRAMME, <https://www.unep.org/regions/asia-and-pacific/regional-initiatives/belt-and-road-initiative-international-green> (last visited Oct. 7, 2022) (describing BRIGC and its goals of coordinating, sharing, and encouraging green practices globally through Thematic Partnerships).

2. See Jariel Arvin, *How the US and China Can Jump-Start Cooperation on Climate Change*, VOX (Mar. 19, 2021, 6:30 PM), <https://www.vox.com/22319488/china-biden-alaska-blinken-climate-change> (describing scale of BRI).

3. *Id.*; Lingling Wei, *China Reins in Its Belt and Road Program, \$1 Trillion Later; After Loans Have Gone Sour and Projects Have Stalled, Beijing is Revamping Its Troubled Initiative*, WALL ST. J. (Sep. 26, 2022), <https://www.wsj.com/articles/china-belt-road-debt-11663961638>.

4. See James McBride et al., *China's Massive Belt and Road Initiative*, COUNCIL ON

reaching in scope, the assortment of participant host countries is incredibly varied.⁵ Unequal political, economic, and social conditions in host countries mean that BRI development could generate disparate environmental consequences.⁶

The environmental impact of the BRI is a global concern. The core concept of “telecoupling” is “a growing recognition that activities in any world region can have environmental impacts in other regions and even the wider Earth system,” and that “(un)sustainability in one place is closely linked to (un)sustainability [in] other places.”⁷ For example, “leakage” is a practice in which countries with stringent environmental law frameworks export dirty energy projects to countries with more lax environmental frameworks.⁸ Along with globally shared concerns regarding greenhouse gas emissions, BRI projects threaten to create further regional environmental challenges in transboundary ecosystems.⁹ While terrestrial development projects threaten to exacerbate habitat loss and pollution and introduce invasive species, maritime projects could contribute to overfishing, noise pollution, and damage to key habitats such as coral colonies, mangrove forests, and seagrass beds.¹⁰ This Comment will discuss Southeast Asia, which is home to rich ecological networks that spill across multiple national borders,¹¹ including the densely-populated Lancang-Mekong River Basin.¹²

Chinese BRI actors strive to account for the risks these transboundary environmental impacts pose, conduct thorough environmental impact analyses, and ensure sustainability.¹³ Indeed, the Chinese government regularly presents its

FOREIGN RELS., <https://www.cfr.org/background/chinas-massive-belt-and-road-initiative> (Feb. 2, 2023, 4:30 PM) (noting estimates on total BRI expenses vary).

5. See David Sacks, *Countries in China's Belt and Road Initiative: Who's In and Who's Out*, COUNCIL ON FOREIGN RELS.: ASIA UNBOUND (Mar. 24, 2021, 8:00 AM), <https://www.cfr.org/blog/countries-chinas-belt-and-road-initiative-whos-and-whos-out> (describing host countries involved in BRI).

6. See Haiyue Liu et al., *How Green is the “Belt and Road Initiative”? – Evidence from Chinese OFDI in the Energy Sector*, ENERGY POL'Y, Oct. 2020, at 1, 9 (detailing how heterogeneous host-country traits attracted disparate Chinese foreign investment).

7. See Johanna Coenen et al., *Environmental Governance of China's Belt and Road Initiative*, 31 ENV'T POL'Y & GOVERNANCE 3, 13 (2021) (explaining telecouplings form when systems connect and become dependent on one another).

8. *Id.*

9. See Ken W. F. Howard & Karina K. Howard, *The New “Silk Road Economic Belt” As a Threat to the Sustainable Management of Central Asia's Transboundary Water Resources*, 75 ENV'T EARTH SCI. 976, at 1 (2016) (stressing poorly planned BRI development plans pose threat to Central Asia in light of region's poor track record in water management).

10. Chunbo Huang et al., *Ecosystem Health and Environmental Geography in the Belt and Road Regions*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH 5843, 5852–53 (2022).

11. See, e.g., Shuneng Zhong & Xili Wu, *Indian Ocean Island Sustainable Development in the Context of the 21st-Century Maritime Silk Road*, 15 ISLAND STUD. J. 119, 126 (2020) (discussing calls to assess Maritime Silk Road's sustainability for islands such as Madagascar, Maldives, and Comoros to pursue their national interests).

12. See The ASEAN Post Team, *China's BRI Negatively Impacting the Environment*, THE ASEAN POST (Dec. 24, 2019), <https://theaseanpost.com/article/chinas-bri-negatively-impacting-environment> (describing how hydropower projects along Mekong River block fish migration and negatively affect multiple countries in the region).

13. See, e.g., Johanna Aleria P. Lorenzo, *A Path Toward Sustainable Development Along the*

vision of the BRI as an eco-friendly movement that has the potential to quickly bring clean, sustainable infrastructure to the developing world.¹⁴ The Chinese government aims, in theory, to comply with either international environmental standards for development or host-country environmental laws, whichever is more stringent.¹⁵ On the ground, though, BRI projects frequently misfire.¹⁶ Plans for a sustainable BRI have proven far messier in practice than in theory.¹⁷

This Comment will focus on the existing and prospective legal mechanisms available to those who are harmed or are at risk of being harmed by environmental damage created by BRI projects in member states of the Association of Southeast Asian Nations (ASEAN).¹⁸ It will outline the shortcomings of international, Chinese, and BRI host-country domestic law and demonstrate that, in its capacity as a transnational, regional legal mechanism, ASEAN has the potential to be the best forum for addressing environmental issues and ensuring sustainable BRI development in Southeast Asia.

Part I will provide an overview of the scope, purpose, and concept of the BRI and discuss the nature of the environmental harm that it poses, especially to ASEAN countries. Part II will examine the reasons that international law, Chinese

Belt and Road, 24 J. INT'L ECON. L. 591, 595 (2021) (mentioning environmental-impact-assessment requirement included in China's 2013 Guidelines for Environmental Protection in Foreign Investment and Cooperation is prioritized).

14. See Secretariat of BRI Int'l Green Dev. Coal., *The Ministry of Commerce and the Ministry of Ecology and Environment Jointly Issued the Guidelines for Green Development in Foreign Investment and Cooperation*, BRI GREEN REV., July 2021, at 5, 5–6 (describing aspirational Guidelines for Green Development in Foreign Investment and Cooperation issued by China's Ministry of Commerce and Ministry of Ecology and Environment).

15. Christoph Nedopil et al., *What China's New Guidelines on 'Green Development' Mean for the Belt and Road*, CHINA DIALOGUE (Aug. 18, 2021), <https://chinadialogue.net/en/business/what-chinas-new-guidelines-on-green-development-mean-for-the-belt-and-road>.

16. Despite its aspirational goals, the BRI experiences “big policy gaps in downstream flow, transboundary impacts, community relations and labour management.” May Tan-Mullins et al., *Evaluating the Behaviour of Chinese Stakeholders Engaged in Large Hydropower Projects in Asia and Africa*, 230 CHINA Q. 464, 480 (2017).

17. Compare Karen McVeigh, *Kenya's First Coal Plant Construction Paused in Climate Victory*, GUARDIAN (Jul. 11, 2019), <https://www.theguardian.com/global-development/2019/jul/11/kenya-first-coal-plant-construction-paused-climate-victory> (reporting grassroots legal victory where plans for Lamu Coal Plant were halted by Kenyan judges due to insufficiencies in environmental impact report prepared for project), with Richard C. Paddock, *A Hard-Fighting Indonesian Lawyer's Death Has Colleagues Asking Questions*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/world/asia/golfrid-siregar-death-indonesia.html> (describing suspicious death of Indonesian environmental lawyer who had alleged that signatures on environmental impact assessment for planned Batang Toru hydropower project in Sumatra had been forged).

18. This Comment will refer both to ASEAN—the intergovernmental political/economic union—and Southeast Asia—the geographical subregion of Asia. All ASEAN member countries are located in Southeast Asia, and as of this paper's completion, the organization accounts for ten of the eleven countries located in the subregion. See Lindsay Maizland & Eleanor Albert, *What Is ASEAN?*, COUNCIL ON FOREIGN RELS.: BACKGROUNDER, <https://www.cfr.org/backgrounder/what-asean> (Nov. 24, 2020, 7:00 AM) (noting East Timor has applied for ASEAN membership, but has not yet acceded).

law, and BRI host-country domestic law are insufficient mechanisms for ensuring environmentally sustainable BRI development. Part III will introduce the ASEAN intergovernmental cooperation and highlight its potential as a regional hub for managing environmental risks and harms associated with BRI projects. Part III will then focus on the prospect of ASEAN implementation of binding regional environmental law, alternative dispute resolution mechanisms, and adjudicative bodies to manage environmental risks and harms created by BRI projects. Part IV will analyze the functionality of transnational regional legal mechanisms in general. Finally, Part V will summarize the arguments made in this Comment, namely that regional environmental legal mechanisms are a necessary compromise to ensure effective environmental protection as BRI development takes off in Southeast Asia. Despite their limitations and implications on state sovereignty, such mechanisms are important given the massive environmental issues that spill across national borders.

II. BELT AND ROAD INITIATIVE OVERVIEW

A. Scope, Purpose, and Concept of the BRI

China's BRI encompasses plans for the Silk Road Economic Belt, which is a plan for economic corridors on land,¹⁹ and the 21st-Century Maritime Silk Road, which is a plan for economic corridors throughout various seas and oceans.²⁰ It borrows its concept and terminology from the ancient Silk Road, which connected Asia and Europe through trade routes.²¹ The BRI includes plans to cover six major land corridors throughout Eurasia.²² Most of the construction that is planned or in progress is located in Asia, Europe, the Middle East, and Africa, with additional plans in Latin America, Oceania, and even Antarctica.²³ The BRI plans to leave virtually no corner of the earth untouched.²⁴

19. Economic corridors are networks of economic infrastructure created to facilitate production and trade. See Hans-Peter Brunner, *What Is Economic Corridor Development and What Can It Achieve in Asia's Subregions?* 7 (Asian Dev. Bank Working Paper Series on Reg'l Econ. Integration, Paper No. 117, 2013) <https://www.adb.org/sites/default/files/publication/100110/reiwp-117-economic-corridor-development.pdf> (defining economic corridors and benefits of integration). They are development strategies that view regions and subregions as "nodes" within a greater geographic economic network. *Id.*

20. See Nadège Rolland, *A Concise Guide to the Belt and Road Initiative*, THE NAT'L BUREAU OF ASIAN RSCH. (Apr. 11, 2019), <https://www.nbr.org/publication/a-guide-to-the-belt-and-road-initiative> (outlining geographic reach of BRI).

21. *Id.*

22. The BRI corridors include the China-Mongolia-Russia Economic Corridor, New Eurasian Land Bridge Economic Corridor, China-Central Asia-West Asia Economic Corridor, China-Pakistan Economic Corridor, Bangladesh-China-India-Myanmar Economic Corridor, and China-Indochina Peninsula Economic Corridor. *Id.*

23. Rolland, *supra* note 20; see also Preethi Amaresh, *China's Increasing Foothold in Antarctica*, ON RSCH.: J. EU BUS. SCH., Nov. 2020, at 45, 45 (describing China's plans for an Arctic Silk Road under BRI).

24. Rolland, *supra* note 20.

On the ground, BRI projects include “hard infrastructure” such as transportation (including seaports, highways, and railroads), energy (including pipelines, electrical grids, and hydropower dams), and technological and communications-based infrastructure.²⁵ They also include “soft infrastructure,” which encompasses special economic zones, free-trade agreements, currency-swap agreements, reduced tariffs, and other tools designed to facilitate economic efficiency along the BRI network.²⁶ The bulk of BRI development involves either transportation or energy projects.²⁷

Conceptually speaking, the BRI is an umbrella term used to capture efforts to organize and integrate Chinese international development projects in order to foster large-scale economic prosperity.²⁸ The sweeping global scheme of the BRI is centrally coordinated by the Chinese government, and its greater vision has primarily been set out in several aspirational core policy documents, beginning with its *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road* published in 2015.²⁹ These vision documents and white papers signal the general direction China intends to take with its BRI projects.³⁰ In them, China pronounces its policy goals for the BRI, including that it aims to produce “green, low-carbon, circular, and sustainable . . . ecological civilizations” through “inclusive development.”³¹

BRI parties also look to international and transnational institutions as sources of governance.³² China and many BRI host countries have assigned greenhouse gas targets under the Paris Climate Agreement.³³ BRI efforts also utilize new, Chinese-launched transgovernmental mechanisms³⁴ and existing regional forums.³⁵ The Lancang-Mekong Cooperation, for example, serves as a cooperation mechanism focused on ensuring water security for various communities in countries along the

25. *Id.* (internal quotation marks omitted).

26. *Id.* (internal quotation marks omitted).

27. See Coenen et al., *supra* note 7, at 6 fig.2 (displaying chart with types of BRI projects in fifty-one countries).

28. Rolland, *supra* note 20.

29. *Id.* (internal quotation marks omitted).

30. Wang Jiangyu, *China's Governance Approach to the Belt and Road Initiative (BRI): Partnership, Relations, and Law* 5–6 (Nat'l Univ. of Sing. L., Working Paper No. 005, 2019) https://law.nus.edu.sg/wp-content/uploads/2020/04/005_2019_Wang-Jiangyu.pdf.

31. Michael Dunford & Weidong Liu, *Chinese Perspectives on the Belt and Road Initiative*, 12 CAMBRIDGE J. REGIONS, ECON. & SOC'Y 145, 155 (2019).

32. Coenen et al., *supra* note 7, at 3.

33. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, [hereinafter Paris Agreement].

34. In 2019, China launched the Coalition of Sustainable Cities on the Belt and Road Initiative, the Belt and Road South-South Cooperation Initiative on Climate Change, the BRI Green Cooling Initiative, BRI Environmental Big Data Platform, the BRI Green Lighting Initiative, and the BRI Green Going-Out Initiative. Coenen et al., *supra* note 7, at 10.

35. BRI actors utilize existing transnational institutions such as ASEAN, the Secretariat of the Organisation pour L'Harmonisation en Afrique du Droit des Affaires, the Asian Business Law Institute, and the Regional Comprehensive Economic Partnership. Matthew S. Erie, *Chinese Law and Development*, 62 HARV. INT'L L.J. 51, 92 (2021).

Lancang-Mekong River Basin.³⁶ As previously mentioned, this Comment will argue that ASEAN, in its capacity as an existing regional transnational institution, represents the greatest hope for effective implementation of sustainable BRI development.

Although its official pronouncements set forth a highly aspirational, top-down, and integrated governance strategy and attempt to dutifully utilize international governance frameworks, China, in reality, takes more of a coordinated, hands-off approach that allows it to retain only so much oversight as is necessary to facilitate speedy and expedient development throughout the BRI.³⁷ The fact that BRI developers have recently pulled out of environmentally risky projects both domestically and abroad serves as evidence that there is an economic incentive for China's public and private actors to remain true to China's aspirational values for the BRI, as well as those imposed by international norms.³⁸ Moreover, in a turn of events that may have a massive effect on global environmental health, President Xi Jinping announced via pre-recorded video at the United Nations (U.N.) General Assembly in September 2021 that "China would not build new coal-fired power projects abroad."³⁹ The rhetoric for green BRI implementation is there, or, at the very least, hints of the requisite ambition.

In reality, however, the translation from international and domestic norms to an effective legal framework is muddled and problematic.⁴⁰ While it is true that China and BRI developers will occasionally respond to social pressure or changing

36. See Xing Wei, *Lancang-Mekong River Cooperation and Trans-Boundary Water Governance: A Chinese Perspective*, 3 CHINA Q. INT'L STRATEGIC STUD. 377, 382–84 (2017) (describing how Lancang-Mekong River Cooperation serves as a mechanism for preserving water security).

37. Chinese officials and project developers often push for "quick signoffs on project memoranda of understanding (MOUs) and contracts, thereby locking in deals before the necessary due diligence has been undertaken." DANIEL R. RUSSELL & BLAKE BERGER, *NAVIGATING THE BELT AND ROAD INITIATIVE* 11 (2019), https://asiasociety.org/sites/default/files/2019-06/Navigating%20the%20Belt%20and%20Road%20Initiative_2.pdf.

38. See Bloomberg, *China's Mega-Dams Are Giving Way to Cheaper Renewable Energy*, AL JAZEERA (Jul. 6, 2020), <https://www.aljazeera.com/economy/2020/7/6/chinas-mega-dams-are-giving-way-to-cheaper-renewable-energy> (discussing shift in investment from hydropower to cheaper and easier renewables and coal plants); see also Joe Lo, *China's Biggest Bank Is Ditching Zimbabwe Coal Plant, Campaigners Say*, CLIMATE HOME NEWS (Jan. 7, 2021), <https://www.climatechangenews.com/2021/07/01/chinas-biggest-bank-ditching-zimbabwe-coal-plant-campaigners-say> (describing how Industrial Commercial Bank of China, China's largest bank, announced it would no longer finance a coal power plant in Zimbabwe as part of bank's efforts to perform better risk assessment and uphold higher sustainability standards).

39. Valerie Volcovici et al., *In Climate Pledge, Xi Says China Will Not Build New Coal-Fired Power Projects Abroad*, REUTERS (Sept. 22, 2021, 1:20 PM), <https://www.reuters.com/world/china/xi-says-china-aims-provide-2-bln-vaccine-doses-by-year-end-2021-09-21>.

40. See Sanja Bogojević & Mimi Zou, *Making Infrastructure 'Visible' in Environmental Law: The Belt and Road Initiative and Climate Change Friction*, 10 TRANSNAT'L ENV'T L. 35, 41 (2020) (describing how impact of infrastructure projects depends on environment in which they are built and expressing concern over use of one-size-fits-all approaches).

financial circumstances and choose greener methods,⁴¹ overall interest in BRI governance is almost entirely limited to decisions that impact the security of their own financial investments in host states.⁴² As a result, the obligation of protecting global environmental health necessarily shifts from BRI host countries to the international community and voices.⁴³

B. Environmental Concerns Regarding the BRI

The BRI includes plans for infrastructure projects all over the world and, accordingly, its environmental risks are enormous.⁴⁴ BRI corridors encompass “the [habitat] range[s] of 265 threatened species including 39 critically endangered species and 81 endangered species – including saiga antelopes, tigers and giant pandas.”⁴⁵ The corridors contain “1,739 Important Bird Areas or Key Biodiversity Areas and 46 biodiversity hotspots or Global 200 Ecoregions.”⁴⁶ The projects span rainforests, grasslands, and wetlands, where disruptions could have large-scale effects on water supplies and cause dangerous and costly floods.⁴⁷ Measuring overall impact, these concerns are most significant in Southeast Asia by a healthy margin.⁴⁸

Importantly, BRI plans that pose environmental risks include territories that carry great significance in terms of both biological diversity conservation and human social and economic value.⁴⁹ A great number of people and essential ecosystems are in danger.⁵⁰ Habitat destruction and resource scarcity—threats posed by potentially poorly regulated industrialization under the BRI—put host countries’ socioeconomic well-being at grave risk.⁵¹ The tenuous fate of the Tapanuli orangutan, the world’s rarest great ape, is perhaps the most iconic manifestation of the biodiversity threat the BRI poses.⁵² Environmental experts

41. Volcovici et al., *supra* note 39.

42. See Erie, *supra* note 35, at 76–77 (citing pursuit of self-interest as primary factor in BRI deal making and highlighting lack of effective coordination).

43. *Id.* at 76.

44. See Alice C. Hughes, *Understanding and Minimizing Environmental Impacts of the Belt and Road Initiative*, 33 CONSERVATION BIOLOGY 883 (2019) (describing countless environmental risks created by BRI projects across the world).

45. WORLD WILDLIFE FOUNDATION, THE BELT AND ROAD INITIATIVE: WWF RECOMMENDATIONS AND SPATIAL ANALYSIS 3–4 (World Wildlife Fund ed., 2017).

46. See *id.* at 3 n.5 (defining biodiversity hotspot as biogeographic region containing significant levels of biodiversity threatened by destruction, defining what Global 200 (G200) identifies, and detailing what constitutes Important Bird and Biodiversity Areas (IBA) as well as Key Biodiversity Areas (KBA)).

47. *Id.* at 3.

48. *Id.* at 5.

49. *Id.* at 4.

50. See *id.* at 2 (describing how infrastructure development must be carefully planned to avoid unintended negative environmental consequences).

51. *Id.* at 2–3.

52. See Nadine Freischlad, *Green Activists Vow to Keep Fighting Indonesia Dam Project that Could Wipe Out Rare Ape*, S. CHINA MORNING POST (Mar. 27, 2019, 6:00 AM), <https://www.scmp.com/lifestyle/article/3003172/green-activists-vow-fight-and-stop-china->

claim it may cease to exist if the Batang Toru hydroelectric power plant in North Sumatra is completed.⁵³

Despite President Xi Jinping's assurance that China will not pursue construction of coal-burning power plants in developing countries, the exportation of dirty energy through the pollution haven and halo effects remains a concern.⁵⁴ The aptly named "Shanghai effect" describes a phenomenon whereby wealthier countries with higher environmental standards export their dirty energy production to poorer countries with lower environmental standards, such as Pakistan, Bangladesh, and Cambodia.⁵⁵ Also, despite President Xi's promise, coal plant projects, including several in Indonesia, remain in progress.⁵⁶

The BRI umbrella still features extensive plans, funding, and construction for steel factories, mining complexes, hydropower plants, and other forms of infrastructure that carry environmentally problematic consequences.⁵⁷ From environmental, economic, and social standpoints, the BRI could ideally function as a "win-win" model for both China and host countries.⁵⁸ However, this cannot be achieved while the BRI "remains dominated by fossil fuels" and other harmful energy production techniques.⁵⁹

C. BRI in the ASEAN Region

The ASEAN region is one of immense strategic importance to China's BRI.⁶⁰

backed-us15-billion-sumatra-dam (explaining bluntly Batang Toru plant and Tapanuli orangutans cannot coexist).

53. *Id.*

54. See Coenen et al., *supra* note 7, at 11–12 (defining pollution haven effect as outsourcing pollution intensive industries from countries with strict environmental regulations to those with fewer environmental regulations and pollution halo effect as use of environmentally friendly technology and management practices by foreign companies spreading to their host countries).

55. *Id.* at 11.

56. Wang Zheng, *Assessing the Belt and Road Initiative in Southeast Asia amid the COVID-19 Pandemic (2021-2022)*, FULCRUM (June 10, 2022), <https://fulcrum.sg/assessing-the-belt-and-road-initiative-in-southeast-asia-amid-the-covid-19-pandemic-2021-2022/>.

57. See Vuk Vuksanovic, *How Serbia Became China's Dirty-Energy Dumping Ground*, FOREIGN POL'Y (July 16, 2021, 6:48 AM), <https://foreignpolicy.com/2021/07/16/serbia-china-bri-coal-copper-dirty-energy-dumping-ground/> (illustrating how China exported environmental damage through BRI project in Serbia and listing air and soil pollution as adverse environmental effects of steel factories and copper mines).

58. See Ruan Zongze, *The Belt and Road Initiative Is Shaping a Shared 21st Century*, 76 CHINA INT'L STUD. 5, 12 (2019) (describing BRI's potential to provide entire world with a sustainable future).

59. See Hillman & Tippet, *supra* note 4 (mentioning although China is world's largest domestic producer of renewable energy, much of BRI involves dirty energy production).

60. See Cheng-Chwee Kuik, *Irresistible Inducement? Assessing China's Belt and Road Initiative in Southeast Asia*, COUNCIL ON FOREIGN RELS.: ASIA UNBOUND (June 15, 2021, 5:09 PM), <https://www.cfr.org/blog/irresistible-inducement-assessing-chinas-belt-and-road-initiative-southeast-asia> (explaining Southeast Asia's status as object of geopolitical tug-of-war between United States and China and its importance as potential hub for sustainable resources and energy supplies).

It spans from mainland Southeast Asia to Oceania⁶¹ and encompasses countries along China's proposed Silk Road and Maritime Silk Road.⁶² In 2014, it surpassed China as the largest recipient of foreign direct investment in the developing world.⁶³ The region is one of the most biodiverse on Earth.⁶⁴ However, increased wildlife trafficking that may come with road access created by BRI development may threaten its value as a global biodiversity hotspot.⁶⁵ Furthermore, producing these road systems may require extracting cement from local karst ecosystems that host important biodiversity.⁶⁶

The region is also extremely rich in other forms of natural resources, such as minerals, agricultural products like rubber and coconut, and oil and natural gas.⁶⁷ It has a massive fishing industry that feeds its own residents and others through international seafood markets that are extremely susceptible to ecological harm.⁶⁸ Mainland Southeast Asia is home to several large and important mountain-flanked river basins, such as the Mekong and Irrawaddy, and contains nearly 15% of the world's tropical forests.⁶⁹

Protecting these ecosystems is essential not only to preserve the biological and environmental health of the ASEAN member countries, but also to prevent community displacement, public health crises, elimination of various sources of livelihoods, and loss of cultural heritage.⁷⁰ Southeast Asia is already prone to fires,

61. See *About ASEAN*, ASS'N SE. ASIAN NATIONS, <https://asean.org/about-us/> (last visited Nov. 12, 2021) (listing ten ASEAN member states as follows: Brunei, Cambodia, Indonesia, Myanmar, Laos, Malaysia, the Philippines, Singapore, Thailand, and Vietnam).

62. See Rolland, *supra* note 20 (describing association of BRI and China's Silk and Maritime Silk Roads).

63. Sungjoon Cho & Jürgen Kurtz, *Legalizing the ASEAN Way: Adapting and Reimagining the ASEAN Investment Regime*, 66 AM. J. COMPAR. L. 233, 235 (2018).

64. See Chin Yee Chan et al., *Fish to 2050 in the ASEAN Region* 22 (WORLD FISH & INT'L FOOD POL'Y RSCH. INST., Working Paper No. 01, 2017), <http://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/131069/filename/131280.pdf> (describing ASEAN region's coastal waters as some of the most biodiverse in the world).

65. See Hughes, *supra* note 44, at 889 (analyzing environmental risks of proposed BRI routes).

66. See *id.* at 890–91 (explaining BRI infrastructure requires cement likely sourced from limestone karst, home to endemic ecosystems).

67. See Solomon Prince Nathaniel, *Environmental Degradation in ASEAN: Assessing the Criticality of Natural Resources Abundance, Economic Growth and Human Capital*, 28 ENV'T SCI. & POLLUTION RSCH. 21766, 21767 (2021), <https://link.springer.com/content/pdf/10.1007/s11356-020-12034-x.pdf> ("The [ASEAN] region accounts for 82%, 70%, 70%, 56%, and 50% of the world's total production of natural rubber, coconut and copra products, tin, palm-oil, and hardwood respectively.").

68. See Chin Yee Chan et al., *supra* note 64, at 11–12 (illustrating historical fish consumption and trade data for the ASEAN region); see also DONALD LOW, RISKS OF BELT AND ROAD INITIATIVE PROJECTS IN ASEAN 2–3, 36–38 (2022) (explaining environmental risks posed by development in ASEAN region including hydraulic impacts, pollution, deforestation, biodiversity loss, ecosystem imbalance, and destruction of natural and cultural heritage).

69. See LOW, *supra* note 68, at 36–39 (highlighting significance of ASEAN countries' reliance on their river and forest ecosystems and risks China's BRI development projects pose to cultural heritage, biodiversity, and community sustenance).

70. *Id.*

erosion, monsoons, floods, and other environmental calamities both related and unrelated to climate change.⁷¹ Hydroelectric, railroad, highway, and other infrastructure projects under the BRI could wreak havoc in the region if they are not planned and regulated effectively.⁷²

The heavily politicized Myanmar Myitsone Dam project, which is currently suspended,⁷³ threatens to destroy the livelihood of the local Kachin community and rip their ethnic identity away.⁷⁴ By diverting water flow from the Irrawaddy river, the Myitsone Dam could also devastate Myanmar's rice cultivation and freshwater fishing industries, and wipe out the rare Irrawaddy dolphin species, all to export 90% of the electricity it generates to China.⁷⁵ Similar environmental and social concerns exist regarding the rushed agreements made to construct Malaysia's East Coast Rail Link and Indonesia's Jakarta-Bandung High Speed Railway.⁷⁶ In Cambodia, the Lower Sesan 2 Dam project has already displaced almost 5,000 people since 2018 and has likely generated a significant and devastating impact on the fishing industry in numerous countries across the entire Mekong River system.⁷⁷ With BRI projects well underway in Southeast Asia,⁷⁸ it is incumbent on ASEAN member countries to cooperate and take diplomatic action to protect their environmental, social, and economic well-being.

III. ISSUES WITH INTERNATIONAL, CHINESE, AND DOMESTIC LAW IN ASEAN

Legal disputes have and will continue to arise as BRI development progresses.⁷⁹ These disputes involve private parties and government actors, such as

71. *Id.*

72. *Id.*

73. See Laura Zhou, *China Faces Backlash as it Bids to Rekindle Stalled US\$3.6 Billion Myitsone Dam Project*, S. CHINA MORNING POST (Jan. 20, 2019, 8:31 AM), <https://scmp.com/news/china/diplomacy/article/2182825/china-faces-backlash-it-bids-rekindle-stalled-us36-billion> ("Political and religious leaders in Myanmar's Kachin state have hit back at apparent efforts by Beijing to breathe new life into a controversial China-funded dam project . . .").

74. See LOW, *supra* note 68, at 40–44 (mentioning Kachin ethnic group would be faced with relocation and economic loss).

75. See *id.* at 41 (mentioning freshwater fishery industry along Irrawaddy River would be devastated, along with rice industry, which provides almost 60% of Myanmar's rice).

76. RUSSELL & BERGER, *supra* note 37, at 11–12.

77. See HUM. RTS. WATCH, UNDERWATER: HUMAN RIGHTS IMPACTS OF A CHINA BELT AND ROAD PROJECT IN CAMBODIA 2 (2021) (describing negative effects of Lower Sesan 2 dam project).

78. See Kaho Yu, *The Belt and Road Initiative in Southeast Asia After COVID-19: China's Energy and Infrastructure Investments in Myanmar*, ISEAS – YUSOF ISHAK INST. (Apr. 6, 2021), <https://www.iseas.edu.sg/articles-commentaries/iseas-perspective/2021-39-the-belt-and-road-initiative-in-southeast-asia-after-covid-19-chinas-energy-and-infrastructure-investments-in-myanmar-by-kaho-yu/> (charting BRI investments in Southeast Asia growth from \$16.8 billion in 2014 to \$29.3 billion in 2019 and accounting for 36% of all BRI investments—the most of any region).

79. See Lutz-Christian Wolff, *Legal Responses to China's "Belt and Road" Initiative: Necessary, Possible or Pointless Exercise?*, 29 TRANSNAT'L L. & CONTEMP. PROBS. 249, 275–82 (2020) (detailing types of commercial disputes that are likely to arise in BRI development and

disputes between Chinese investment firms and their business partners in BRI host states or those between the Chinese government and BRI host-country governments.⁸⁰ Adequate dispute resolution mechanisms are essential tools for ensuring green BRI development. While international law has proven too aspirational and unenforceable in ASEAN countries,⁸¹ domestic law in the region has proven too inconsistent and unreliable.⁸² Furthermore, Chinese courts are still unproven with regard to BRI environmental disputes.⁸³ Although Chinese courts show some promise, there is reason to question their suitability.⁸⁴ Sections A, B, and C below will highlight specific reasons why international law and treaties, Chinese law, and domestic law in BRI host countries, respectively, do not provide sufficient legal mechanisms to resolve environmental disputes for BRI projects.

A. International Law and Treaties

China has attempted to draw from international legal frameworks for its BRI projects.⁸⁵ BRI actors comply with guidelines under existing international institutions including the Organisation for Economic Co-operation and Development (OECD) and the United Nations, which has outlined Sustainable Development Goals (SDGs).⁸⁶ As previously mentioned in Part II.A, China and many BRI host countries have assigned greenhouse gas targets under the Paris Climate Agreement.⁸⁷ These international frameworks are promising in theory, but relying on inherently soft and oftentimes unenforceable international law principles actually allows BRI developers to sidestep due diligence requirements, accelerate projects, and realize returns sooner.⁸⁸ Chinese actors regularly prioritize project development over rule development and favor minimal legalization, resulting in significantly diminished abilities to regulate BRI endeavors.⁸⁹

China makes use of bilateral and multilateral cooperation agreements that already exist and signs new agreements with host countries.⁹⁰ New bilateral

explaining current legal governance).

80. *Id.* at 275.

81. See Bogojević & Zou, *supra* note 40, at 41–42 (noting that China's BRI reference of international good practice, market orientation, and professional principles amounts to strategically vague soft-law).

82. See Cho & Kurtz, *supra* note 63 at 251–57 (describing “ASEAN Way” which is based upon principles of noninterference, consultation, and consensus from historical development of ASEAN that makes legal formalities difficult).

83. See Xu Qian, *The Legal Legitimacy of the Chinese International Commercial Court: History, Geopolitics, and Law*, 28 ASIA PAC. L. REV. 360, 367–79 (2020) (describing potential of China's International Commercial Court, sometimes called the BRI court).

84. See generally *id.*

85. See Coenen et al., *supra* note 7, at 8 (listing sources of BRI governance).

86. *Id.* at 7.

87. Paris Agreement, *supra* note 33, art. 4, 6–7, 14, 17, 23.

88. See RUSSELL & BERGER, *supra* note 37, at 11–17 (illustrating BRI governance issues from projects in Laos, Malaysia, Indonesia, Cambodia, and Myanmar).

89. Heng Wang, *The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges*, 20 WORLD TRADE REV. 282, 304 (2021).

90. Coenen et al., *supra* note 7, at 9.

agreements often come in the form of nonbinding Memoranda of Understanding (MOUs) or project contracts, which serve as quick and flexible ways for China and host countries to begin working on new projects.⁹¹ These documents all serve as “abstract and even ambiguous” means of “building confidence and developing good relations through volunteer cooperation and nonbinding promises.”⁹² This approach, which is rooted in pragmatism and flexibility, is aimed at expediting project signoffs but is ill-suited for environmental accountability.⁹³

The previously noted Jakarta-Bandung High Speed Railway in Indonesia and East Coast Rail Link in Malaysia began construction after hasty negotiations that lacked proper feasibility and impact analyses, open contract bidding processes, or even sufficient financial planning.⁹⁴ Construction of the Kunming-Vientiane Railway in Laos began without plans for compensation and resettlement, resulting in displacement for many Laotians.⁹⁵ These examples and various others show that although Chinese ministries urge corporations to self-regulate and responsibly disclose environmental information,⁹⁶ laissez-faire bilateral cooperation agreements largely frustrate the BRI's regulatory capacity to enforce sustainability goals.⁹⁷

BRI actors also utilize more formal agreements and institutions.⁹⁸ These include Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs), and intergovernmental organizations designed to facilitate international trade and development such as the World Trade Organization (WTO).⁹⁹ Other international conventions aimed at facilitating trade include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).¹⁰⁰

Public international law provides legal structure for Foreign Direct Investment (FDI) mainly through BITs.¹⁰¹ In practice, BITs pose real threats to state sovereignty, can be expensive, and do not ensure proper compensation for damages such as environmental degradation.¹⁰² Investor-state dispute settlement

91. See Jiangyu, *supra* note 30, at 6–7 (describing China's preferred soft-law approach to its BRI projects including MOUs).

92. *Id.* at 4.

93. RUSSELL & BERGER, *supra* note 37, at 11.

94. *Id.* at 11–12.

95. *Id.* at 11.

96. Coenen et al., *supra* note 7, at 8–9.

97. *Id.* at 10–11.

98. See Malik R. Dahlan, *Envisioning Foundations for the Law of the Belt and Road Initiative: Rule of Law and Dispute Resolution Challenges*, 62 HARV. INT'L L.J., 2020, at 1, 4–6 (pointing out that although no set terms or mechanisms for dispute resolution in BRI projects exist, a multitude of international mechanisms are utilized).

99. *Id.* at 5–6.

100. *Id.* at 6; see also *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”)*, U.N. COMM'N ON INT'L TRADE L. https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (last visited Sept. 20, 2022) [hereinafter *New York Convention*] (describing Convention's aim to provide common legal standards for settling international arbitration).

101. Dahlan, *supra* note 98, at 7.

102. See generally *id.*

provisions, often included in BITs and FTAs, usually only apply to compensation in the event of expropriation.¹⁰³ They provide rights for foreign BRI investors, but fail to ensure protections for BRI host countries.¹⁰⁴ This type of one-way provision is not an effective avenue for BRI project actors to resolve environmental disputes.¹⁰⁵

The WTO sets broad and sometimes unclear rules that do not bind nonmembers.¹⁰⁶ The organization has been criticized for its failure to account for governance issues and corruption in host countries and its subsequent failure to ensure that environmental best practices are followed for projects in those countries.¹⁰⁷ On top of this, engaging in the lengthy, complex, and expensive processes necessary to obtain funding from the WTO is less appealing given the availability of funding from private parties.¹⁰⁸

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a treaty created to provide uniform legal groundwork for private international contracts.¹⁰⁹ This Convention represents an interesting and promising foundation for BRI dispute resolution, but it is not yet a reliable mechanism to ensure environmental protection for Southeast Asian countries, which share common ecosystems and natural resources.¹¹⁰ As of October 2022, Laos, Vietnam, and Singapore are the only ASEAN countries that are contracting CISG members.¹¹¹ That leaves seven nonmember parties within the ASEAN region.¹¹² Although many ASEAN countries are considering becoming CISG members, their ascension could take time and involve setbacks and complications.¹¹³

103. *Id.* at 6; *see also* Wolff, *supra* note 79, at 280 (noting seventy-five of eighty-six BITs between China and other BRI states provide for investor-state dispute settlement options.).

104. Dahlan, *supra* note 98, at 7.

105. *See id.* at 4–9 (explaining investor-state dispute settlement provisions are not effective at resolving disputes in general).

106. *See id.* at 5–6 (explaining WTO rules cannot always resolve disputes between WTO nonmembers).

107. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1151 (Rachel E. Barkow et al. eds., 9th ed. 2021) (citing BRUCE RICH, FORECLOSING THE FUTURE: THE WORLD BANK AND THE POLITICS OF ENVIRONMENTAL DESTRUCTION (2013)).

108. *Id.* at 1149.

109. Wolff, *supra* note 79, at 282.

110. *See Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)*, U.N. COMM'N ON INT'L TRADE L., https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (last visited Feb 1, 2022) (verifying only three ASEAN countries are signatories); *see also* Howard & Howard, *supra* note 9 (discussing transboundary nature of water in Central Asia and dangers of mismanagement).

111. *United Nations Convention on Contracts for the International Sale of Goods*, U.N. TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20X/X-10.en.pdf> (last visited Feb. 1, 2022).

112. *See ASEAN Member States*, ASS'N OF SE. ASIAN STATES, <https://asean.org/member-states/> (last visited Sept. 19, 2022) (listing ten ASEAN states total).

113. *See* Wolff, *supra* note 79, at 283–84 (noting particular legal traditions and other country specific reasons may prevent ASEAN states from joining CISG).

However, every ASEAN BRI host country is a party to the New York Convention,¹¹⁴ which legally enforces awards from international arbitration tribunals.¹¹⁵ This mechanism could be an effective method of ensuring settlement award compliance without having to navigate domestic court systems.¹¹⁶ Still, courts throughout Southeast Asia have applied the New York Convention in different ways, meaning the treaty fails to produce its intended effect of uniformity.¹¹⁷ With the exceptions of Singapore and Malaysia, most courts in ASEAN countries tend to reexamine arbitral awards on the merits, which means that the New York Convention's goals of uniformity and dependability are often largely frustrated.¹¹⁸

Broad international institutions are generally ineffective for providing oversight of BRI projects in ASEAN countries because they fail to account for the complicated and varied circumstances that exist in the region.¹¹⁹ China and private BRI actors' most common approach to development projects is one in which they employ a strategic "laissez-faire dynamic" by deferring to host-country environmental laws in order to secure project deals and "benefit by cutting corners and evading responsibility."¹²⁰ Relying on soft-law principles of international law allows BRI developers to accelerate projects and see returns sooner than they would under more formal structures.¹²¹ This fluid dynamic stemming from the legal foundation for the BRI network is better suited for quick implementation than it is for thoughtful environmental planning.¹²²

114. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

115. Dahlan, *supra* note 98, at 6.

116. See Paula Hodges et al., *60 Years of the New York Convention: A Triumph of Trans-national Legal Co-operation, or a Product of Its Time and in Need of Revision?*, INSIDE ARB.: PERSPS. ON CROSS-BORDER DISPS., July 2018, at 2, 3, <https://www.herbertsmithfreehills.com/insight/inside-arbitration-issue-14> (scroll to bottom of page; then select "Previous Issues" drop-down menu; then click the link to download "Issue 6") (noting parties to Convention agree to respect nondomestic arbitral agreements and enforce awards in their jurisdictions with very limited grounds to refuse).

117. *Id.* at 7 ("[I]t was only with respect to Singapore that a large majority of the participants (81.63%) felt that the courts did not re-examine the merits . . . courts of the other ASEAN countries did sometimes expand the grounds in the New York Convention in order to re-examine the merits.").

118. *Id.*; see also *New York Convention*, *supra* note 100 (emphasizing Convention goal of equal enforcement of foreign and nondomestic arbitral awards).

119. See RUSSEL & BERGER, *supra* note 37, at 11 (noting developing countries lack ability to apply and enforce international standards).

120. See *id.* (emphasizing domestic laws of developing countries may be insufficient to protect local stakeholders' interests.).

121. See *id.* (emphasizing Chinese officials use principles of noninterference and reliance on local law to avoid adhering to international standards).

122. *Id.* at 13 (noting environmental and social impact assessments are either incomplete or bypassed due to inability to enforce environmental standards by developing countries and Chinese officials desire to expedite projects).

B. Chinese Law

Those who seek to remedy environmental harm in BRI host countries can theoretically bring their suits to court in China.¹²³ The First and Second International Commercial Courts—collectively the China International Commercial Court (CICC)—were established by the Supreme People's Court of China in 2018 to host international commercial cases.¹²⁴ The CICC utilizes panels of judges, appointed by the Supreme People's Court.¹²⁵ To its credit, it provides a useful forum, referred to as a “one-stop-shop service,” for all sorts of international disputes.¹²⁶ Even though the Supreme People's Court does not necessarily build on precedent,¹²⁷ the CICC represents an interesting possible way for BRI disputes to be synthesized under rule of law to some degree. “[The Supreme People's Court's] guiding opinions are considered highly persuasive and ‘in particular certain decisions can be read as generating legal norms with a binding effect on lower courts.’”¹²⁸

Still, the CICC must align with China's Central Committee's Fourth Plenum Decision, which “emphasises the need to protect China's sovereignty, security, and development interests.”¹²⁹ The Court's decisions are tailored to support China's governmental strategies.¹³⁰ Although the Court was established to compete with other international commercial courts,¹³¹ the CICC is still, at least in principle, bootstrapped to its governmental interests.¹³² Also, it remains unclear exactly how the Court will work in practice.¹³³ Because many of those who invest in BRI development are Chinese State-Owned Enterprises, there are questions regarding the CICC's judicial independence, and—regardless of whether these conflicts of interest really exist—there is potential for significant distrust between BRI host-country actors and the CICC.¹³⁴

123. See Qian, *supra* note 83, at 368–72 (discussing limitations to bringing suit in China International Commercial Court such as rigid test to determine jurisdiction and challenges of internationalization including prohibitions on direct representation by foreign lawyers).

124. *A Brief Introduction of China International Commercial Court*, CHINA INT'L COM. CT., <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (June 28, 2018).

125. *Id.*

126. See Jia Zuo, *One Belt One Road Disputes: Does China Have Dispute Resolution Methods Fit for Purpose?*, 5 LSE L. REV. 99, 108–09 (2020) (internal quotation marks omitted) (praising efficiency of CICC for its ability to handle various kinds of international disputes).

127. See *id.* at 103 (“China's legal system . . . does not recognise the enforcement or binding effect of Court's Opinions.”).

128. *Id.*

129. *Id.* at 111–12.

130. See *id.* at 112 (noting all Chinese courts must support government strategies such as major economic development like BRI).

131. Qian, *supra* note 83, at 361.

132. See Zuo, *supra* note 126, at 111–12 (discussing how CICC is bound to protect China's sovereignty and interests under Fourth Plenum Decision and must also support important government strategies).

133. See Qian, *supra* note 83, at 373–74 (noting concerns about enforceability of CICC's judgments and finality of these judgments).

134. *Id.* at 377–78.

In addition to the CICC, there are other ways that legal judgments may take effect in the Chinese judicial system.¹³⁵ In 2017, China's Wuhan Intermediate People's Court recognized and enforced a judgment from the Los Angeles Superior Court in *Liu Li v. Tao Li & Tong Wu*.¹³⁶ Liu, who had been awarded a default judgment against Tao in the United States, followed Tao to Wuhan, China and successfully sued for enforcement in the Wuhan Court.¹³⁷ The case marked the first time that China recognized and enforced a U.S. money judgment,¹³⁸ representing significant willingness to participate in private international law.¹³⁹

The Wuhan Court specified a reciprocal relationship must exist in order for it to enforce other countries' judgments in its own judicial system, meaning that the other country's court must demonstrate that it recognizes and enforces, or will recognize and enforce, Chinese judgments.¹⁴⁰ Article 282 of the Civil Procedure Law of the People's Republic of China states that:

Having received an application or a request for recognition and execution of a legally effective judgment or ruling of a foreign court, a people's court shall review such judgment or ruling pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity. If, upon such review, the people's court considers that such judgment or ruling neither contradicts the basic principles of the law of the People's Republic of China nor violates State sovereignty, security and the public interest, it shall rule to recognize its effectiveness. If execution is necessary, it shall issue an order of execution, which shall be implemented in accordance with the relevant provisions of the Law. If such judgment or ruling contradicts the basic principles of the law of the People's Republic of China or violates State sovereignty, security or the public interest, the people's court shall refuse to recognize and execute the judgment or ruling.¹⁴¹

As previously discussed, China uses a civil law system that is not bound by case precedent like judicial systems that use common law.¹⁴² However, the

135. See Ronald A. Brand, *Recognition of Foreign Judgments in China: The Liu Case and the "Belt and Road" Initiative*, 37 J.L. & COM. 29, 34–36 (2018) (detailing variety of ways in which foreign judgments can be recognized and enforced by Chinese courts).

136. Liu Li su Taoli he Wu Tong (刘莉诉桃李和吴彤) [*Liu Li v. Tao Li & Tong Wu*], translated in *Recognition of Foreign Judgments in China: The Liu Case and the "Belt and Road" Initiative*, in 37 J.L. & COM. 29 (2018) (Wuhan Intern. People's Ct. June 30, 2017).

137. Brand, *supra* note 135, at 31.

138. *Id.* at 34.

139. See *id.* at 30 (detailing how *Liu* case and other Chinese legal developments signal China's effort to become global player and openness to recognize foreign judgments).

140. See *id.* at 34–35 (noting reciprocity by Chinese courts may be narrowly applied to certain U.S. federal courts or state courts).

141. *Id.* at 31–32 (quoting *Zhonghua renmin gongheguo minshi susong fa* (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991), art. 282, translated in *Civil Procedure Law of the People's Republic of China (Revised in 2017)*, CHINA INT'L COM. CT. (June 29, 2017) (emphasis added), <https://cicc.court.gov.cn/html/1/219/199/200/644.html>).

142. See Zuo, *supra* note 126, at 103 (noting China's legal system is modified civil law

judgment in *Liu* still qualifies as a persuasive guiding case,¹⁴³ meaning in the absence of treaty obligations and without reviewing the underlying merits, China may be willing to recognize and enforce foreign judgments with a proper showing of reciprocity.¹⁴⁴ For example, a Thai village harmed by forest clearing funded by a Chinese BRI developer in order to build a highway may potentially petition a Chinese court to enforce the judgment and award damages, provided that it wins a judgment in a Thai court and demonstrates that said court recognizes and enforces Chinese judgments. Varying legal capacities within BRI host states in ASEAN still render this avenue less than ideal.¹⁴⁵

C. Domestic Law in BRI Host Countries

Perhaps most commonly, BRI actors rely on host-country governance while planning and executing projects.¹⁴⁶ China's hands-off approach disregards the complexities that exist within ASEAN host countries, which have varied actors in both governmental and nongovernmental capacities.¹⁴⁷ Where broad, aspirational, nonbinding documents for BRI projects succeed in facilitating quick and flexible agreements between certain involved parties, they fail to acknowledge all parties affected by development projects, to ensure compliance, and to effectively identify and manage environmental risks.¹⁴⁸

In practice, domestic law in the ASEAN region makes things considerably challenging for victims of environmental harm in those BRI host countries.¹⁴⁹ ASEAN countries consist of various forms of civil law, common law, communist legal ideology, and Islamic law.¹⁵⁰ The degree to which legal, political, and economic systems and cultural environments in ASEAN host countries vary serves

system where court opinions are not binding).

143. See *id.* (mentioning persuasive power of Supreme People's Court of China legal opinions in Chinese law).

144. See Brand, *supra* note 135, at 48 (discussing how *Liu* case and BRI documents represent a significant opening of Chinese legal system in judicial cooperation through reciprocity).

145. See *infra* Part III.C for an analysis of the problems with domestic legal capacity of ASEAN host countries.

146. See Coenen et al., *supra* note 7, at 10 (noting how numerous Chinese policies urge companies to follow host countries' environmental laws and regulations).

147. See Angus Lam, *Domestic Politics in Southeast Asia and Local Backlash Against the Belt and Road Initiative*, FOREIGN POL'Y RSCH. INST. (Oct. 15, 2020), <https://www.fpri.org/article/2020/10/domestic-politics-in-southeast-asia-and-local-backlash-against-the-belt-and-road-initiative/> (attributing China's failure to meet transparency and sustainability standards to its preference for voluntary initiatives and refusal to consult community stakeholders including local activists, indigenous groups, and governmental actors).

148. See RUSSEL & BERGER, *supra* note 37, at 11 (noting China's approach allows for Chinese actors to evade responsibility for legal, social, labor, and environmental issues with projects).

149. See *id.* at 13 (discussing how developing countries lack financial and human resource capacity to conduct comprehensive environmental and social impact assessments).

150. Low Kee Yang & Philip Zerrillo, *Negotiating the Legal Systems in ASEAN*, 5 A WALK THROUGH ASIA 71 (2018), https://cmp.smu.edu.sg/sites/cmp.smu.edu.sg/files/pdf/15.%20AMI_SMU_May2018_Asean.pdf.

as a deterrent for outside investors looking for uniformity, predictability, and security.¹⁵¹

Specific instances, including the mysterious motorcycle death in 2019 of Indonesian environmental lawyer Golfrid Siregar, who was working to protect rainforests and orangutans threatened by BRI dam construction in Sumatra, show that corruption, transparency, and enforcement issues in ASEAN BRI host countries can be seriously concerning.¹⁵² Another example of corruption's corrosive effect on enforcement of domestic environmental law in Southeast Asia is the Kaliwa Dam Project in the Philippines.¹⁵³ Although Filipino law requires that indigenous communities sign "free, informed, and prior consent" (FIPC) approvals to cede land for development projects, President Rodrigo Duterte's desire to attract Chinese BRI investment has led to significant government coercion.¹⁵⁴ In 2016, Filipino military personnel forced Alan Buenodicio, a village elder who had opposed the Kaliwa Dam Project, to drink whiskey every morning in an effort to secure his signature on an FIPC.¹⁵⁵ In May of that year, he died of a heart attack.¹⁵⁶

Issues with domestic laws exist within BRI host countries around the world.¹⁵⁷ High-level bribery attempts have been identified and prevented in connection with BRI development in countries such as Bangladesh, Chad, and Uganda.¹⁵⁸ Ten BRI host countries have ranked among those most at risk of bribery.¹⁵⁹ This, combined with the fact that many have few or no laws and regulations in place to protect the environment and human rights,¹⁶⁰ makes China's hands-off approach to development ill-suited for its portfolio of BRI host countries.

The 2018 Environmental Performance Index, which ranks each country based on performance indicators on environmental health and ecosystem vitality, lists six of the ten ASEAN countries in its bottom third.¹⁶¹ More generally, ASEAN countries aside from Singapore rank extremely low on the World Justice Project's

151. See Dahlan, *supra* note 98, at 5 (highlighting parties unfamiliar with BRI host country legal traditions have concerns about these countries' abilities to protect their interests).

152. See Paddock, *supra* note 17 (outlining significant issues with Batang Toru dam project, including potential forgery of documents, wildlife harm, and law enforcement corruption).

153. See Lam, *supra* note 147 (describing opposition to \$211 million dam project from NGOs and Indigenous communities).

154. See *id.* (referring to President Duterte's "Build, Build, Build" infrastructure program, which aims to complete nineteen major Chinese-funded projects before 2022, and deceitful methods employed to obtain FIPC signatures for land acquisition including false food distribution programs and physical force).

155. *Id.*

156. *Id.*

157. See Wade Shepard, *How China's Belt and Road Became a 'Global Trail Of Trouble'*, FORBES (Jan. 29, 2020, 4:40 AM), <https://www.forbes.com/sites/wadeshepard/2020/01/29/how-chinas-belt-and-road-became-a-global-trail-of-trouble/?sh=1775c928443d> (outlining detrimental impact lack of enforcement and regulation in countries with emerging markets has had on BRI).

158. *Id.*

159. *Id.*

160. Lorenzo, *supra* note 13, at 599–600.

161. Low, *supra* note 68, at 38–39.

Overall Scores and rankings, Regulatory Enforcement rankings, and Civil Justice rankings—which factor in alternative dispute resolution mechanisms—in its 2021 Rule of Law Index.¹⁶² As previously mentioned, Southeast Asia is a lush and diverse region but also extremely environmentally sensitive.¹⁶³ Weak governmental capacity for environmental regulation and management can have disastrous economic and social effects.¹⁶⁴ As a whole, domestic law in ASEAN countries is particularly ineffective for enforcing environmental law under the BRI.¹⁶⁵

IV. REGIONAL MECHANISMS: ASEAN

Along with broader international sources, BRI efforts utilize regional transnational institutions as sources of BRI governance.¹⁶⁶ While the previously mentioned Lancang-Mekong Cooperation focuses on protecting resources along one particular transboundary ecosystem,¹⁶⁷ others, such as ASEAN, serve a number of functions.¹⁶⁸ Utilizing regional frameworks means that Chinese actors must integrate their own norms with existing transnational law.¹⁶⁹ Ideally, this would allow non-Chinese voices to be given increased bargaining capabilities as a united front.¹⁷⁰ Furthermore, using regional mechanisms means that host countries are held accountable by surrounding countries that share vital transboundary ecosystems.¹⁷¹

National sovereignty is an essential part of China's BRI vision, ASEAN's purpose, and international development generally.¹⁷² Still, intergovernmental

162. See WORLD JUST. PROJECT, WORLD JUSTICE PROJECT: RULE OF LAW INDEX 2021, 10–11, 33–34 (2021) (showing ASEAN countries aside from Singapore, and, to a lesser degree, Malaysia, rank relatively low on each list, or don't rank at all).

163. See LOW, *supra* note 68, at 38 (detailing essential role of Southeast Asia's tropical forests and how these forests are endangered by infrastructure construction projects).

164. *Id.*

165. See Lorenzo, *supra* note 13, at 599 (emphasizing most BRI host states have lax or nonexistent laws for environmental protection).

166. Transnational institutions utilized by BRI actors include ASEAN, the Euro-Asia Economic Forum, the Shanghai Cooperation Organisation, the Lancang-Mekong Cooperation, and the 17 + 1 cooperation framework between China and Central and Eastern European countries. Coenen et al., *supra* note 7, at 9.

167. See Wei, *supra* note 36, at 379 (discussing how Lancang-Mekong River Basin ensures water security for various communities in it).

168. See generally Brian Dorman & Tyler James Olsen, *The ASEAN Way Out? Toward Cooperative Environmental Governance in Southeast Asia*, E-INT'L RELS. (Aug. 10, 2019), <https://www.e-ir.info/pdf/79678>.

169. See Erie, *supra* note 35, at 92–93 (noting China has formed an FTA with ASEAN).

170. See *id.* (explaining China must make concessions to effectively negotiate with transnational regional organizations).

171. See generally Martti Koskenniemi, *What Use for Sovereignty Today?*, 1 ASIAN J. INT'L L. 61 (2011).

172. See Geoffrey B. Cockerham, *Regional Integration in ASEAN: Institutional Design and the ASEAN Way*, 27 E. ASIA 165, 184 (2009) (stating ASEAN has developed to balance state sovereignty and shared economic interests despite ASEAN Way's strong commitment to preserve state sovereignty).

cooperation, including that which is organized through ASEAN, plays a key role in achieving shared political, social, and economic gains in regions around the world.¹⁷³ Sustainability and environmental health are necessary for long-term attainment of all three of those conditions, so it too is an essential component.¹⁷⁴

The potential for drastic environmental impact in Southeast Asia as a result of BRI development projects means that there must be some degree of a tradeoff between state sovereignty and intergovernmental cooperation.¹⁷⁵ Notably, ASEAN “has arguably matured into one of the most robust regional organizations in the developing world,” evolving to the point where it now handles transnational issues, including environmental protection, through cooperative, intergovernmental work.¹⁷⁶ To properly manage the transboundary environmental challenges that come with BRI development, ASEAN needs to harness its potential as a regional mechanism to foster community empowerment for “bottom-up environmental regimes.”¹⁷⁷

Section A below will provide an overview of ASEAN, including its history and purpose regarding regional environmental management. Section B will outline ASEAN's potential as a regional environmental law mechanism. Sections C, D, and E will then discuss what binding regional environmental law, alternative dispute resolution for environmental disputes, and adjudication for environmental disputes, respectively, could look like under the ASEAN regional mechanism.

A. ASEAN Overview

ASEAN was established in 1967—at a time where “the environmental debate was still in its infancy”—and originally included Indonesia, Malaysia, the Philippines, Singapore and Thailand.¹⁷⁸ The central needs driving establishment of the organization were peace, stability, and security.¹⁷⁹ Sensitive to the political circumstances at the time¹⁸⁰ and wary of state sovereignty, the organizational design was initially set forth in its 1967 ASEAN Declaration (Bangkok Declaration) as informal and nonbinding cooperation, representing a “loose legal approach to the manner in which the organization conducted its affairs for [the

173. *Id.*

174. See generally Steve Cohen, *Economic Growth and Environmental Sustainability*, COLUM. CLIMATE SCH. (Jan. 27, 2020), <https://news.climate.columbia.edu/2020/01/27/economic-growth-environmental-sustainability/> (arguing that, as evidenced by economic growth in America following the creation of EPA, environmental protection is key to economic growth).

175. See Dorman & Olsen, *supra* note 168, at 1 (noting ASEAN's policy of noninterference is, on some levels, incompatible with regional environmental protection).

176. See *id.* at 2 (asserting ASEAN members do not strictly adhere to state sovereignty and noninterference).

177. *Id.* at 5.

178. Ben Boer, *Introduction to ASEAN Regional Environmental Law*, in REGIONAL ENVIRONMENTAL LAW: TRANSREGIONAL COMPARATIVE LESSONS IN PURSUIT OF SUSTAINABLE DEVELOPMENT 251, 252–53 (Werner Scholtz & Jonathan Verschuuren eds., 2005).

179. *Id.* at 253.

180. ASEAN's founding in 1967 took place in the middle of the Second Indochina War, also known as the Vietnam War. *The Founding of ASEA (Part 2)*, ASS'N SE. ASIAN NATIONS, <https://asean.org/the-founding-of-asean/the-founding-of-asean-part-2/> (last visited Oct. 7, 2022).

next] 40 years.”¹⁸¹ Nevertheless, the original Bangkok Declaration stressed regional solidarity and cooperation, recognizing that the rise of globalization and shared regional challenges and opportunities meant that Southeast Asian countries could actually gain *more* sovereignty and mutually benefit from banding together.¹⁸²

The scope of ASEAN’s purpose has since clearly expanded to include transnational environmental concerns.¹⁸³ Although there is currently no “over-arching binding legal agreement to underpin its regional environmental management,”¹⁸⁴ the ASEAN Charter of 2007 introduced ASEAN’s institutional framework. The Charter specifically mentioned “promotion of ‘sustainable development so as to ensure the protection of the region’s environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples.’”¹⁸⁵ Similarly, the ASEAN 2020 Vision set out to create “a clean and green ASEAN with fully established mechanisms for sustainable development.”¹⁸⁶ ASEAN may not yet be firmly established as a mechanism for transboundary environmental management in practice, but the institutional framework suggests that it is aimed in that direction.¹⁸⁷

B. ASEAN’s Potential as a Regional Environmental Law Mechanism

There is evidence that growing concern over environmental issues can cause public sentiment towards transnational cooperation to become more positive.¹⁸⁸ Under *jus cogens* and customary international law, each country “possesses the sovereign right to utilize its natural resources as it sees fit,” but “no country can utilize its natural resources in a manner that harms either another country or any territory shared in common with all countries.”¹⁸⁹ This presents an inherent tension between state sovereignty and collective environmental health.¹⁹⁰

181. Boer, *supra* note 178, at 253.

182. Ass’n of Southeast Asian Nations [ASEAN] Declaration pmbl. (Aug. 8, 1967), <https://agreement.asean.org/media/download/20140117154159.pdf>.

183. See Boer, *supra* note 178, at 254 (maintaining ASEAN has long remained dedicated to environmental protection).

184. *Id.* at 255.

185. *Id.* at 256 (quoting Ass’n of Southeast Asian Nations [ASEAN] Charter art. 9 (Aug. 8, 2007)).

186. Ass’n of Southeast Asian Nations [ASEAN] 2020 Vision pmbl. (Dec. 15, 1997).

187. See BOER, *supra* note 178, at 254–56 (explaining environmental protection has been an objective of ASEAN but without legally binding enforcement, but a number of recent non-legally-binding instruments have created a more coherent framework of environmental policies compared to other Asian regions).

188. See Jing Wei et al., *News Media Coverage of Conflict and Cooperation Dynamics of Water Events in the Lancang–Mekong River Basin*, 25 HYDROLOGY EARTH SYST. SCI. 1603, 1610–11 (2021) (showing news media coverage of concerns over water security and dam construction along Lancang–Mekong River basin since 2008 has caused public to become more interested in articles discussing cooperative means to address situation).

189. Claire Wright, *Blueprint for Survival: A New Paradigm for International Environmental Emergencies*, 29 FORDHAM ENV’T L. REV. 221, 261–62 (2017).

190. Benjamin Habib, *Climate Change and the Re-imagination of State Sovereignty*, E-

Much like issues such as international terrorism, transboundary environmental issues necessitate a collaborative, regional response.¹⁹¹ Indeed, ASEAN members have already teamed up to present a united front in the face of shared issues caused by China's maritime claims in the South China Sea and the Rohingya refugee crisis.¹⁹² One weak link in Southeast Asia's shared ecological systems could mean, and has meant,¹⁹³ that many ASEAN countries could suffer. The region must cooperate in order to meet environmental challenges posed by BRI development.

C. Binding Regional Environmental Law Under ASEAN

Although the aforementioned ASEAN Charter verbiage mostly constitutes soft law, akin to the international law discussed in Part III.A of this Comment,¹⁹⁴ ASEAN has also tried its hand in establishing more enforceable environmental law mechanisms.¹⁹⁵ Transboundary haze pollution from Indonesian wildfires is a clear-cut example of dangerous spillover environmental problems that threaten the health of multiple nations' populations within the ASEAN region.¹⁹⁶ The haze is created by fires used to clear forest for agricultural operations.¹⁹⁷ The problem has been so severe that it has led to some of the only hard-law provisions under the ASEAN framework.¹⁹⁸ The ASEAN Agreement on Conservation of Nature and Natural Resources (ACNNR) would require consideration of transboundary environmental harm in environmental impact assessments for commercial activities.¹⁹⁹ The document remains unratified by most ASEAN countries and is

INT'L RELS. (Nov. 8, 2015), <https://www.e-ir.info/2015/11/08/climate-change-and-the-re-imagination-of-state-sovereignty/> (pointing out climate change has caused a dilemma of common interests which necessitates increased international cooperation).

191. See Koskeniemi, *supra* note 171, at 61 (discussing state sovereignty's failure in addressing transboundary challenges such as climate change and terrorism).

192. Hazmi Rusli et al., *Transboundary Haze Pollution: Balancing the ASEAN Way and Malaysian Approach*, 10 J. E. ASIA & INT'L L. 561, 567 (2017) (mentioning Declaration on Conduct of Parties in South China Sea, and Malaysia, Indonesia, and Thailand's willingness to accept Rohingya migrants in order to ease region-wide crises). The Rohingya people are a stateless Muslim ethnic minority within Myanmar's Rakhine State who experienced systematic discrimination and targeted violence. *Myanmar-Genocide of the Rohingya*, WORLD WITHOUT GENOCIDE, <http://worldwithoutgenocide.org/genocides-and-conflicts/myanmar> (January 2021). In 2017, thousands of Rohingya refugees fled religious persecution in Myanmar, creating a region-wide refugee crisis. *Id.*

193. See *infra* Part IV.C for an analysis of the transboundary haze emanating from Indonesia that is harming residents of other Southeast Asian countries.

194. See *supra* Part III.A for an analysis of how soft law fails to provide legal environmental protection for ASEAN countries involved in BRI development.

195. See Laely Nurhidayah et al., *Regional Environmental Governance: An Evaluation of the ASEAN Legal Framework for Addressing Transboundary Haze Pollution*, 15 AUSTRALIAN J. ASIAN L. 87, 94 (2014) (describing potential of Ass'n of Southeast Asian Nations [ASEAN] Agreement on Conservation of Nature and Natural Resources (ACNNR) to effectively regulate problem of haze pollution).

196. *Id.* at 87.

197. *Id.*

198. *Id.* at 94.

199. *Id.*

not yet in force.²⁰⁰

Conversely, the ASEAN Agreement on Transboundary Haze Pollution (AATHP) entered into force in 2003²⁰¹ and has been ratified by every ASEAN country.²⁰² The document contains provisions obligating parties to “take legislative and/or other measures,” in order to “monitor,” “assess,” and “respond,” to haze issues, as well as structural and procedural obligations.²⁰³ Still, it is hamstrung to some extent by the noninterference, state sovereignty prioritization that remains part of the “ASEAN Way.”²⁰⁴ There are no provisions for legal enforcement mechanisms for noncompliance, no dispute resolution mechanisms, and no all-out bans on commercial forest burning activities designed to create land for agriculture.²⁰⁵

Indeed, the AATHP’s soft underbelly was exposed in 2015.²⁰⁶ After Indonesia signed and ratified the AATHP, destructive fires flared up once again—as they do almost annually—during the dry season.²⁰⁷ The 2015 fires were particularly devastating to the ASEAN region, with some estimating that particulate matter from the haze killed more than 100,000 people in Indonesia, Malaysia, and Singapore.²⁰⁸ Singapore had to take measures to keep children home from schools in order to protect them from the haze,²⁰⁹ Malaysia incurred extreme healthcare expenses,²¹⁰ and, given the fact that much of the data regarding the disaster was neither recorded nor reported, many other nearby countries likely saw great

200. *See id.* (noting only six countries have signed agreement and only three of those have ratified it).

201. *Id.* at 95.

202. *See* Arran Hurley & Taedong Lee, *Delayed Ratification in Environmental Regimes: Indonesia’s Ratification of the ASEAN Agreement on Transboundary Haze Pollution*, 34 PAC. REV. 1108, 1108–09 (mentioning that after years of delay, Indonesia finally ratified AATHP in 2015).

203. Ass’n of Southeast Asian Nations [ASEAN] Agreement on Transboundary Haze Pollution art. 4, ¶¶ 3, 7–9 (Jun. 10, 2003), <https://asean.org/wp-content/uploads/2021/01/ASEANAgreementonTransboundaryHazePollution-1.pdf>.

204. Helena Varkkey, *Revisiting the “Myth” of the ASEAN Way: Recent Developments on Transboundary Haze*, 15 INDON. J. INT’L L. 553, 555 (2018) (“The ASEAN Way is a set of behavioral and procedural norms that include the pursuit of consensus; the sanctity of sovereign rights and the related concept of noninterference; the principles of sensitivity and politeness; nonconfrontational negotiation processes; behind-the-scenes discussions; an emphasis on informal and nonlegalistic procedures; and flexibility.”).

205. *See* Nurhidayah et al., *supra* note 195, at 98–99 (praising AATHP for its focus on prevention and cooperation but pointing out that it is not entirely effective because it lacks provisions such as civil penalties, criminal sentences, trade restriction, or options to refer to international courts and arbitration tribunals).

206. Wright, *supra* note 189, at 255–56.

207. *Id.* at 251 (quoting University of Queensland Professor Eric Meijaard, who described the fires as the biggest environmental crime of the century that made BP’s 2010 oil spill look benign in comparison).

208. *Id.* at 252.

209. *Id.* at 256.

210. *Id.* at 254.

harm.²¹¹

The fires highlight the harm Indonesians face as the result of corruption within the country. Importantly, the fires cost Indonesia at least \$16.1 billion,²¹² more than 8,000 square miles of extremely biodiverse peat forests,²¹³ and many lives.²¹⁴ The Indonesian government has downplayed the harm caused by the fires and claimed that they occurred naturally.²¹⁵ In fact, many of the fires are started by companies with ties to national and local officials looking to clear land to farm products including palm oil.²¹⁶

In light of its recurrent wildfires, Indonesia has “resisted outside assistance” and disregarded opportunities to reach out to the ASEAN Coordinating Centre for Transboundary Pollution Control established under the AATHP.²¹⁷ The fires show that AATHP lacks some of the teeth necessary to enforce environmental protection in the ASEAN region, but it still marks an important shift towards formal, regional environmental law in the wake of a shared ASEAN environmental crisis.²¹⁸ If the provisions of the AATHP were adhered to in practice, transboundary haze would likely be a thing of the past.²¹⁹ Perhaps, with greater integration, participation, and enforcement from ASEAN member states, binding regional environmental laws instituted by ASEAN can prevent potential environmental damage caused by BRI developers in Southeast Asia.²²⁰

D. Alternative Dispute Resolution Mechanisms Under ASEAN

ASEAN states have shown increasing interest in incorporating more legalistic dispute resolution mechanisms into the regional cooperation.²²¹ Numerous disputes have been brought before the International Court of Justice (ICJ) seeking resolution, including a 1998 territorial dispute between Indonesia and Malaysia and a 2003 dispute between Malaysia and Singapore.²²² Taking it one step further, ASEAN included in its own charter a 2004 Protocol on Enhanced Dispute

211. *See id.* at 253 (explaining extensive study conducted by Harvard and Columbia failed to include effects of particulate matter created by 2015 Indonesian fires in other countries, including Cambodia, India, the Philippines, and Thailand).

212. *Id.* at 253 (citing World Bank estimates and pointing out that this is almost 2% of Indonesia's GDP in the year 2015).

213. *Id.* at 252.

214. *Id.*

215. *Id.* at 252, 254.

216. *Id.* at 252.

217. *Id.* at 256.

218. *See* Nurhidayah et al., *supra* note 195, at 98–99 (highlighting AATHP's focus on prevention and cooperation in assessment that significant reform is needed before AATHP can be considered an effective mechanism in addressing transboundary haze).

219. *See* Rusli et al., *supra* note 192, at 569 (claiming best way for ASEAN countries to combat smog is to utilize AATHP more formally).

220. *See supra* Part II.C for an analysis of environmental threats that the BRI poses to Southeast Asian countries.

221. Cockerham, *supra* note 172, at 183.

222. *Id.*

Settlement Mechanism (DSM).²²³

As previously discussed, ASEAN members frequently frustrate the purpose of the New York Convention by refusing to accept award decisions on their merits.²²⁴ Countries such as Myanmar, Laos, and Cambodia are notably reluctant to enforce arbitration decisions.²²⁵ ASEAN's own Enhanced DSM was far from effective at first,²²⁶ but reduced credibility of the World Trade Organization's Dispute Settlement Understanding, increased technical issues arising from BRI environmental disputes, and practical amendments made to the Enhanced DSM in 2019 may lead to greater reliance on the mechanism.²²⁷

The North American Free Trade Agreement's (NAFTA) Free Trade Commission includes a provision for a scientific review board with which parties may consult in order to tackle technical issues such as those involving the environment.²²⁸ As BRI projects continue to proliferate in Southeast Asia, ASEAN would benefit from a similar mechanism, designed to handle region-specific environmental disputes.²²⁹ As a regional dispute resolution mechanism, the Enhanced DSM is likely better suited than an international one to account for local needs and individualized host-country circumstances.²³⁰

The development of the Asian Comprehensive Investment Agreement (ACIA) shows that ASEAN members are interested in attracting foreign investment by offering international development but are potentially keen on keeping the arbitration venues within their own region.²³¹ Although the agreement lists numerous possible venues inside and outside of Southeast Asia,²³² the nearby

223. See *id.* (mentioning Enhanced DSM, which has penal measures for noncompliance, shows that ASEAN members have moved towards embracing legalism).

224. Hodges et al., *supra* note 116.

225. Alex Larkin, *Commercial Arbitration in the ASEAN Region Poised to Increase Confidence in Foreign Investment*, 45 INT'L L. NEWS 1, 8 (2017).

226. See Edmund W. Sim, *ASEAN Further Enhances Its Dispute Settlement Mechanism*, 7 INDONESIAN J. INT'L & COMPAR. L. 279, 282 (2020) (listing confrontational nature of intraregional mechanism, the fact that it was relatively untested, and actual procedural deficiencies in 2004 incarnation of Enhanced DSM).

227. See *id.* at 290–91 (discussing improvements made through 2019 revisions of Enhanced DSM that may bring it more credibility within ASEAN).

228. Koesrianti, *Legalization and Adjudicative Legitimacy of the ASEAN Trade Dispute Settlement Mechanism*, 8 COMP. L. REV., 2017, at 1, 24.

229. See Matthew Baird & Brendon Thomas, *Greening the BRI in ASEAN*, 4 CHINESE J. ENV'T L. 217, 232–33 (2020) (arguing body dedicated to hearing and mediating environmental disputes arising from BRI projects could be effective and should directly involve project-affected communities).

230. See *id.* (highlighting importance of developing localized frameworks and mechanisms that can apply to each country's individualized needs and standards).

231. See Larkin, *supra* note 225, at 5–6 (highlighting arbitration venues for ACIA investors are overwhelmingly centralized in Southeast Asia).

232. Other arbitration venues under the ACIA include the International Centre for Settlement of Investment Disputes (ICSID), the Hong Kong International Arbitration Center, the Vietnam International Arbitration Center, and Cambodia's National Commercial Arbitration Centre. *Id.* at 6.

centers in Malaysia and Singapore have emerged as favorites.²³³

Although it may be practically challenging and sacrifice some of the autonomy that comes with utilizing local arbitration centers, ASEAN members could also consider adopting the six Hague Conventions²³⁴—which structure international arbitration agreements to create greater efficiency and ensure that they will be enforced²³⁵—and joining the Hague Conference as a Regional Economic Integration Organisation (REIO).²³⁶ This way, they could represent the region's collective wants and needs on a global stage and address BRI matters as a united front.²³⁷

E. Adjudication Under ASEAN

If ASEAN successfully implements a regional adjudicative body, it could fill considerable gaps in its ability to manage transboundary environmental problems. The aforementioned Indonesian wildfires and transboundary haze serve as an unfortunate example of an incident that customary international law could not prevent and that Indonesian domestic civil liability could not sufficiently deter or punish.²³⁸ The country has imposed “only limited numbers of administrative and criminal sanctions . . . on the corporations responsible, or their high-ranking officers . . . [and] [w]orse still, no lawsuits were brought by the government, through government legal standing, or by victims, for instance through class actions.”²³⁹ Although Indonesia's internal framework for imposing liability on those who cause the fires has improved in recent years,²⁴⁰ the ongoing transboundary haze issues still highlight the need for an integrated regional adjudicative body.

Illegal wildlife trafficking is another example of an environmental concern that ASEAN could address by providing an adjudicative body.²⁴¹ The capture and

233. *Id.*

234. The six Hague Conventions referenced include the Apostille Convention, the Service Abroad Convention, the Evidence Abroad Convention, the Choice of Court Agreements Convention, the Recognition of Trusts Convention, and the Securities Convention. Anselmo Reyes, *ASEAN and the Hague Conventions*, 22 ASIA PAC. L. REV. 25, 34–42 (2014).

235. *See id.* at 27 (positing implementation of Hague Conventions could provide harmonizing, streamlined, and coherent legal infrastructure to ASEAN DSMs).

236. *Id.* at 43–44.

237. *See id.* at 43 (“ASEAN states would be able to represent an ASEAN front within the Hague Conference. ASEAN states could draw attention . . . to private international law areas of concern to ASEAN. ASEAN states can then have an input into development of new commercial law conventions, especially conventions to facilitate an increase of cross-border trade within ASEAN and between ASEAN and the rest of the world.”).

238. *See* Andri G. Wibisana, *The Many Faces of Strict Liability in Indonesia's Wildfire Litigation*, 28 REV. EUR. COMPAR. & INT'L ENV'T L. 185, 185–86 (2019) (explaining Indonesia's failure violated international law principle of State responsibility).

239. *Id.* at 186.

240. *See* Wright, *supra* note 189, at 256 (recognizing since 2015 some companies have been charged with fines totaling millions of dollars).

241. *See* Giovanni Broussard, *Building an Effective Criminal Justice Response to Wildlife Trafficking: Experiences from the ASEAN Region*, 26 REV. EUR. COMPAR. & INT'L ENV'T L. 118,

sale of endangered species originating in Southeast Asian countries are made possible by complex and evasive criminal networks.²⁴² Although they look promising in some respects, large-scale international legal frameworks either contain loopholes²⁴³ or have not gained enough support throughout ASEAN to effectively enforce wildlife trafficking laws.²⁴⁴ Implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has been mired by corruption throughout Southeast Asia.²⁴⁵

While more robust regional environmental regulations may help with preventing Indonesian fires, wildlife crimes, and similar environmental problems that may arise from BRI development projects, a regional body capable of adjudicating civil and criminal suits over environmental damages could help create deterrence and provide restitution to victims.²⁴⁶ Moreover, some ASEAN countries do not prosecute any wildlife offenses or fail to cooperate with nearby countries to conduct criminal investigations.²⁴⁷ Therefore, in addition to holding the power to collaborate across national boundaries in investigating and apprehending wildlife traffickers, ASEAN regional networks should have access to a regional court for prosecuting the criminals.²⁴⁸

There is reason to believe that, similar to the Court of Justice of the European Union and the European Court of Human Rights, ASEAN could institute a regional court capable of adjudicating environmental disputes between countries.²⁴⁹ Persistent and widespread calls to create an international environmental court²⁵⁰ illustrate the point that existing international courts which

121 (2017) (discussing potential utility of the United Nations Convention against Transnational Crime as a solution to the issue of wildlife trafficking in ASEAN).

242. *Id.* at 118.

243. *See id.* at 120 (recognizing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) fails to penalize smugglers who sell alien species in countries without adequate legislation).

244. *See id.* at 122 (referencing rapid U.N. Office on Drugs and Crime survey showing select ASEAN countries made only six mutual legal assistance requests using the U.N. Convention against Transnational Crime (UNTOC) in 2015–16 to demonstrate that the program has thus far been underutilized in the region).

245. *See id.* at 125 (mentioning CITES authorities often succumb to pressure from business owners and affiliates in ASEAN countries).

246. *See id.* at 126 (highlighting how robust and specialized law enforcement authorities are far more effective in addressing environmental and wildlife crimes, including tackling criminal networks).

247. *Id.*

248. This includes the ASEAN Wildlife Enforcement Network (ASEAN-WEN) and the ASEAN Senior Officials Meeting on Transnational Crime (SOMTC). *Id.* at 124.

249. *See* Iliana Cenevska, *A Thundering Silence: Environmental Rights in the Dialogue Between the EU Court of Justice and the European Court of Human Rights*, 28 J. ENV'T L. 301, 303 (2016) (describing how Court of Justice and Court of Human Rights have their own individual approaches to environmental rights).

250. *See* Alfred Rest, *The Indispensability of an International Environmental Court*, 7 REV. EUR. COMPAR. & INT'L ENV'T L. 63, 66 (1998) (arguing implementation of an International Environmental Court is “indispensable”); *see also* Vinita Banthia, *Establishing an “International Climate Court”*, 34 J. ENV'T L. & LITIG. 111, 115 (2019) (arguing importance of establishing an

do not specifically focus on environmental cases²⁵¹ are insufficient.²⁵² Some argue that there may be confusion with transboundary disputes that include environmental questions which are seemingly inseparable from nonenvironmental ones.²⁵³

Furthermore, there are concerns that an international environmental court may create opportunities to forum shop or otherwise “encroach on existing courts.”²⁵⁴ Specifically, some worry that an international environmental court would weaken existing courts by ruling on other areas of law which overlap with environmental law.²⁵⁵ A regional environmental court, in theory, could serve as a forum staffed by qualified individuals with knowledge of regional environmental science, environmental law, and socio-political customs. This would seemingly be a more appropriate way to adjudicate transnational environmental suits.²⁵⁶

Although specialized environmental courts are not widely known in regional governance, environmental issues are commonly adjudicated in regional human rights courts.²⁵⁷ Indeed, the Inter-American Court and Inter-American Commission on Human Rights have evolved to adjudicate indigenous land claims.²⁵⁸ The African Charter on Human and Peoples’ Rights, through its quasi-judicial African Commission on Human and Peoples’ Rights body, has also recognized and protected environmental rights.²⁵⁹ In *Social and Economic Rights Action Center v.*

international climate court to enforce global climate agreements).

251. Examples of these courts include the International Court of Justice (ICJ) and the International Criminal Court (ICC). Rest, *supra* note 250, at 64–66.

252. See Ole W. Pedersen, *An International Environmental Court and International Legalism*, 24 J. ENV’T L. 547, 550–51 (2012) (claiming special environmental court is needed to give international environmental law more credibility and address specialized questions of environmental law).

253. *Id.* at 551.

254. See Susan M. Hinde, *The International Environmental Court: Its Broad Jurisdiction as a Possible Fatal Flaw*, 32 HOFSTRA L. REV. 727, 756 (2003) (arguing proposals for an international environmental court will fail unless they limit scope of jurisdiction).

255. *Id.* at 749.

256. “Judicial bodies, such as the WTO, can be ‘weighted far too much in favor of trade and investment, and not enough in the direction of environmental protection.’” *Id.* at 740 (quoting Sean D. Murphy, *Does the World Need a New International Environmental Court?*, 32 GEO. WASH. J. INT’L L. & ECON. 333, 343 (2000)).

257. See Lauren E. Bartlett, *Human Rights Guidance for Environmental Justice Attorneys*, 97 U. DET. MERCY L. REV. 373, 404 (2020) (explaining environmental rights are interpreted as human rights).

258. See, e.g., Enzamaría Tramontana, *The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Natural Resources*, 17 INT’L J. ON MINORITY & GRP. RTS. 241, 260–61 (2010) (demonstrating how Inter-American Commission and Court have interpreted Article 21 of the American Convention on Human Rights to protect Indigenous land claims and entitle Indigenous people to just compensation for land degradation caused by development).

259. See, e.g., Rebecca M. Bratspies, *Human Rights and Environmental Regulation*, 19 N.Y.U. ENV’T L.J. 225, 251 n.93 (2011) (citing *Soc. And Econ. Rts. Action Ctr. v. Nigeria*, No. 155/96, Decision, African Court on Human and Peoples’ Rights, ¶¶ 52–57 (Oct. 27, 2001), <https://www.achpr.org/sessions/descions?id=134>) (highlighting African Commission on Human and Peoples’ Rights ruling that recognized Ogoniland peoples’ environmental rights in light of

Nigeria (the *Ogoniland* case), the African Commission on Human and Peoples' Rights specifically held that countries should "take reasonable measures 'to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.'"²⁶⁰ The European Court of Human Rights and, to a lesser degree, the Court of Justice of the European Union have also both dealt with cases involving environmental rights.²⁶¹

Although adjudication of transboundary environmental issues through regional human rights mechanisms may make logical sense and has shown increasingly promising results, there are still drawbacks. The process can take a long time,²⁶² and the human rights courts must determine that environmental rights are in play in order to take cases into consideration.²⁶³ Furthermore, although there has been a push to promote business and human rights,²⁶⁴ basic civil suits, such as basic BRI contract disputes, cannot be brought to regional human rights courts.²⁶⁵ A regional human rights court in Southeast Asia would likely be too limited in scope to provide individuals and organizations judicial relief from the broad array of potential environmental harms that may arise from BRI development projects.

BRI developers need to be deterred from acting negligently or maliciously while working in host countries,²⁶⁶ and ASEAN host-country citizens deserve recourse if and when they are harmed.²⁶⁷ To give the extreme environmental risks associated with the BRI the consideration they deserve, ASEAN should institute an independent regional environmental court system.

Nigeria's compliance with corporations' harmful oil extraction practices in Ogoniland territory) [hereinafter *Ogoniland* case]).

260. See Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 *FORDHAM ENV'T L. REV.* 471, 474 (2007) (quoting *Ogoniland* case, No. 155/96, ¶¶ 52–53).

261. For example, both have guaranteed the right to environmental information and access to courts concerning environmental matters, but the European Court of Human Rights seems closer to explicitly recognizing a substantive right to a clean environment. See Cenevska, *supra* note 249, at 322–23 (comparing reasoning each court employs while looking at environmental rights cases).

262. See, e.g., Bartlett, *supra* note 257, at 432 (pointing out Inter-American Commission can take more than ten years to issue decision).

263. See, e.g., Hana Müllerová, *Environment Playing Short-handed: Margin of Appreciation in Environmental Jurisprudence of the European Court of Human Rights*, 24 *REV. EUR. COMPAR. & INT'L ENV'T L.* 83, 91–92 (2015) (mentioning environment is only indirectly protected through the European Convention on Human Rights and environmental rights are not highly valued by the European Court of Human Rights).

264. See Cherie Blair et al., *The Medium Is the Message: Establishing a System of Business and Human Rights Through Contract Law and Arbitration*, 35 *J. INT'L ARB.* 379 (2018) (arguing every individual should have the right to benefit from global development).

265. See, for example, *supra* Part II.C for an analysis of the Myitsone Dam project's environmental impact.

266. See *supra* Part II.C for an analysis of environmental threats the BRI poses to Southeast Asian countries.

267. See Cenevska, *supra* note 249 and accompanying text for the understanding that the European Human Rights Court and the Court of Justice of the European Union recognize the right to access courts regarding environmental matters.

V. REGIONAL LEGAL MECHANISMS IN GENERAL

U.S. case law shows that environmental problems can require collective federal action rather than individual state action. This need for collective action suggests that some amount of sovereignty must be set aside. The judgment in *United States v. Olin Corp.* showed that regulation of hazardous wastes in individual states had a significant impact on interstate commerce sufficient to permit federal lawmaking on the matter.²⁶⁸ Similarly, the judgment in *National Association of Home Builders v. Babbitt* demonstrated that threats to biodiversity, even if the insects in question were only present in a small part of a single state, had significant enough of an impact on interstate commerce to permit invocation of federal law.²⁶⁹ In essence, environmental concerns, even if they do not directly leak across state borders, can be of national concern and justify interstate, cooperative efforts to ensure the safety and well-being of the entire U.S. population. The same can be said for environmental concerns with Southeast Asian BRI projects. All of Southeast Asia is entitled to protection, and regional cooperation is necessary to accomplish it.

Reflecting on NAFTA, Professor Robert Percival states the following:

First, policies associated with trade liberalization can lead to environmental problems if they are used to justify dismantling or not enforcing domestic environmental regulations, as has unfortunately sometimes been the case. Second, effective environmental policies are not likely to discourage foreign investment and can avoid substantial costs from pollution. And third, Mexico and other developing nations require much greater assistance to develop and implement effective environmental policies simultaneously with the development of the laws and institutions required for economic growth. *While economists have widely recognized the general importance of laws and institutions as a fundamental condition for economic growth, few recognize the analogous importance of the same for environmental policies.*²⁷⁰

He aptly points out that regulation is needed in international development, that effective environmental policies are not likely to scare away investors, and that there is a need for resources and perhaps guidance when it comes to implementing environmental policies in host countries.²⁷¹ Utilizing ASEAN as the regional hub for BRI sustainable development in Southeast Asia would be an effective way to pool member state resources and facilitate responsible and successful development.

Regional bodies often serve as platforms for countries to buy into what is

268. See *United States v. Olin Corp.*, 107 F.3d 1506, 1511 (11th Cir. 1997) (holding Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), instituting liability for hazardous waste dumping, applied to intrastate disposal activities because they affect interstate commerce).

269. See *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C. Cir. 1997) (holding that protecting Delhi Sands Flower-Loving Flies, only found in two California counties, under the Endangered Species Act of 1973 affected interstate commerce and was constitutional).

270. See PERCIVAL ET AL., *supra* note 107, at 1275 (emphasis added) (citing KEVIN GALLAGHER, *FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND* (2004)).

271. *Id.*

called the “spill-over effect,” which is when countries that cooperate in one area tend to then cooperate in other areas.²⁷² Transboundary haze issues show that environmental crises should serve as the logical tipping point for ASEAN to develop into a more functionally interdependent regional legal mechanism²⁷³ in light of increasing transboundary environmental threats, such as those the BRI threatens to bring.²⁷⁴

VI. CONCLUSION

For Southeast Asia, the BRI is an opportunity not only to build sustainable infrastructure that it currently lacks and needs to prosper economically, but also to build and coordinate regional mechanisms needed to ensure that the projects deliver on those goals. A BRI that wreaks environmental havoc will certainly fail to do so. Given the transboundary nature of the environmental issues that could result from BRI projects that are planned or currently being implemented,²⁷⁵ it makes sense that ASEAN should step in as a regional intergovernmental tool for ensuring equitable success for its members.

ASEAN represents an opportunity for Southeast Asia to compensate for legal deficiencies in its individual member states.²⁷⁶ Similarly, it represents an opportunity to fill the enforceability gap that soft international standards leave.²⁷⁷ It has the potential to serve as a jointly held bargaining chip in order to effectively negotiate terms with China and its BRI investors without risking the loss of valuable development deals. Although it means sacrificing some state sovereignty and creating obligations under international environmental law, accelerating ASEAN’s transformation into an agreement with a certain enforceable environmental framework, such as binding laws, alternative dispute resolution, and an adjudicative body, is a necessary step Southeast Asian countries must soon take to protect their collective future well-being.

272. Laurence Henry, *The ASEAN Way and Community Integration: Two Different Models of Regionalism*, 13 EUR. L.J. 857, 857 (2007).

273. See *supra* Part IV.C for an analysis of Indonesia’s failure to utilize resources offered by ASEAN to combat wildfires and subsequent environmental disaster.

274. See *supra* Part II.C for an analysis of the environmental threats the BRI poses to Southeast Asian countries.

275. *Id.*

276. See *supra* Part III.C for an analysis of the legal deficiencies in Southeast Asian BRI host state countries.

277. See *supra* Part III.A for an analysis of the legal deficiencies of international frameworks for environmental management.