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Chinese Resource-for-Infrastructure (RFI) Investments in Sub-Saharan Africa and the Future of the "Rules-Based" Framework for Sovereign Finance: The Sicomines Case Study

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CHINESE RESOURCE-FOR-INFRASTRUCTURE (RFI) INVESTMENT IN SUB-SAHARAN AFRICA AND THE FUTURE OF THE "RULES-BASED" FRAMEWORK FOR SOVEREIGN FINANCE: THE SICOMINES CASE STUDY

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I. INTRODUCTION

Chinese investment in sub-Saharan Africa has exploded over the past few decades and involves a deep collaboration between ostensibly private Chinese commercial parties and the Chinese state's sovereign interests. While the diversity of the Chinese political economy[1] has generated a multitude of modes and structures for Chinese investment abroad,[2] foreign policy and security interests have prompted the Chinese state to loom especially large in global natural resource and infrastructure development[3]—sectors

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1. The Chinese political economy is best described as a system in which the "party-state remains all-powerful, but private enterprise drives significant economic activity." Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261, 270 (2016). Existing economic paradigms like "state capitalism," "socialism," or "free market economy" do not adequately capture the Chinese system's unique characteristics. *Id*; *see also* John Osburg, *Global Capitalisms in Asia: Beyond State in Market in China*, 72 J. ASIAN STUD. 813, 814–15 (2013); Wentong Zheng & Curtis J. Milhaupt, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665 (2015).

2. *See, e.g.*, Giles Mohan & May Tan-Mullins, *The Geopolitics of South-South Infrastructure Development: Chinese-Financed Energy Projects in the Global South*, 56 URBAN STUD. 1368, 1372 (2019) ("While the types of contracts adopted by Chinese firms vary, the most relevant [to the study] are 'EPC' (Engineering, Procurement and Construction) contracts that circumscribe the obligations of the contractors and contrast with longer-term commitments through the 'BOT' (Build, Operate and Transfer) contracts increasingly used in Public–Private Partnerships"). *See generally* DEBORAH BRÄUTIGAM, THE DRAGON'S GIFT: THE REAL STORY OF CHINA IN AFRICA (2009).

3. *See* Chris Nwachukwu Okeke, *The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?*, 42 INT'L LAW. 193, 198 (2008) ("Indeed, China [has] declared energy security as one of the most important goals of its foreign policy."); *see also* Joseph McCarthy, *Crude 'Oil Mercantilism'? Chinese Oil Engagement in Kazakhstan*, 86 PACIFIC AFF. 257, 265 (2013) (noting that the Chinese Communist Party leadership regards

that hold especially vast growth potential in many African states.[4] In this sector, China, contracting through its state-owned enterprises ("SOEs"), has been particularly involved in resource-for-infrastructure ("RFI") investment. RFI transactional structures, broadly speaking, integrate bilateral development lending, direct aid, infrastructure-building, and resource extraction to such an extent that it is "virtually impossible to unbundle" what elements constitute Chinese "aid," "trade," and "Foreign Direct Investment" ("FDI").[5]

The unique forms of Chinese state involvement in cross-border commercial activity pose probing questions about the sustainability and relevance of incumbent, "rules-based" frameworks governing the global economy.[6] Commentators writing in fields as diverse as international trade, technology, and intellectual property have noted that the unique nature of Chinese political economy and its interface with global markets carry deeply disruptive potential for established transnational governance regimes.[7] Yet notwithstanding the intense scholarly dialogue that China's emergence as a major development financier—sub-Saharan Africa's largest—has generated in other, cognate fields, there has been scant *legal* analysis of this phenomenon.[8] We only have an emergent understanding, for example, of the precise contractual mechanisms used in RFI transactions[9] and of their

oil, natural gas, and certain mineral sectors as "strategic," and describing the special corporate governance rules that attach to such a designation); Mohan & Tay-Mullins, *supra* note 2, at 1372–74 (China's "diplomatic agenda" shapes its commercial engagements with developing countries, particularly in the energy, minerals, and infrastructure sectors).

4. UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA, AFRICA-BRICS COOPERATION: IMPLICATIONS FOR GROWTH, EMPLOYMENT AND STRUCTURAL TRANSFORMATION IN AFRICA iii (2013), https://repository.uneca.org/bitstream/handle/10855/22120/b10693683.pdf [hereinafter AFRICA-BRICS COOPERATION].

5. Raphael Kaplinsky & Mike Morris, *Chinese FDI in Sub-Saharan Africa: Engaging with Large Dragons*, 21 EUR. J. DEV. RES. 551, 561 (2009).

6. *Cf.* Wu, *supra* note 1, at 266 (2016) (arguing that the "China, Inc." style of political economy poses fundamental challenges to the current WTO, which may "weaken the institution" over time).

7. *See id.* at 300–08 (arguing that the WTO dispute settlement mechanism may not be able to adequately address unique trade-distortive effects arising out of Chinese economic structures and practices); JAMES LEWIS, CONFLICT AND NEGOTIATION IN CYBERSPACE 49–50 (2013); Christina Skinner, *An International Law Response to Economic Cyber Espionage*, 46 CONN. L. REV. 1165 (2014).

8. *See* Suzanne Siu, Note, *The Sovereign-Commercial Hybrid: Chinese Minerals for Infrastructure Financing in the Democratic Republic of the Congo*, 48 COLUM. J. TRANSNAT'L L. 599, 602 (2010) ("Though China's emergence as Africa's largest trade partner and prominent financier has generated abundant literature, legal issues are noted only tangentially, and individual case studies remain rare.").

9. One reason for this partial understanding is that many of the contractual documents underlying RFI transactions (and Chinese commercial engagements with developing countries more broadly) are typically shrouded in secrecy. *See* Mohan & Tay-Mullins, *supra* note 2, at 1375 (noting methodological limitations of their study due to incomplete knowledge of the "details" of the relevant contracts), 1380 (noting that certain lawmakers of the Cambodia Na-

interface with incumbent forms of international economic legal governance.[10]

Moreover, the extant scholarship examining Chinese RFI has largely focused on RFI within the context of FDI,[11] when the full impact of RFI agreements—both their economic and legal implications—can only be understood in the broader context of sovereign finance. "Sovereign finance," in my usage here, is a capacious term that includes "investment finance," "sovereign debt," and other pathways that developing states might use to engage in state-driven economic development.[12] The term recognizes that states seeking to leverage their natural resource endowments to produce economic development, including infrastructure expansion, are confronted with a range of options beyond merely inviting private-sector FDI.

Such states might, for example, borrow money from a banking syndicate, issue debt securities on global capital markets, receive bilateral development loans and/or aid, enter into a joint venture with a foreign multinational under an FDI regime, negotiate concessional financing arrangements from a multilateral body like the World Bank or International Monetary Fund ("IMF"), or any combination of the foregoing.[13] These pathways are

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tional Assembly opposed the Chinese-financed Kamchay Dam project because "they had not actually seen the terms of the contract"). The Sicomines Agreement thus represents a compelling case study for legal analysis of Chinese-origin RFI transactions in part because its text, including a subsequent amendment, are publicly available.

10. *Cf.* Siu, *supra* note 8, at 602.

11. *See* Won Kidane, *China's Bilateral Investment Treaties with African States in Comparative Context*, 49 CORNELL INT'L L.J. 141, 142 (2016) (arguing that "the principal legal instruments that govern China-Africa investment relations are Bilateral Investment Treaties ('BITs')," which govern FDI). But, as this note argues, contract and transactional structure remain under-theorized methods of transnational economic governance. *Cf.* Luke Sperduto, *Can Human Development Bonds Reduce the Agency Costs of the Resource Curse?*, 12 L. & DEV. REV. 191, 196 (2019) ("[C]ontract design remains an underexplored tool for addressing the challenges and opportunities of the new sovereign debt market.").

12. *See infra* Part II.C (noting the Sicomines Agreement combines various elements of extant modes of sovereign finance); *infra* note 14 (noting the economic and legal interplay between various pathways of sovereign finance); *infra* note 40 and accompanying text (discussing the "spectrum" of financing choices available to sovereign states to develop national infrastructure); *cf.* Patrick Bolton, *Debt and Money: Financial Constraints and Sovereign Finance*, 71 J. FIN. 1483 (2016) (arguing for a more holistic conception of "sovereign finance" than sovereign debt within the economic literature).

13. *See* APEC/OECD, FINANCING INFRASTRUCTURE IN APEC ECONOMIES: APEC/OECD REPORT ON SELECTED EFFECTIVE APPROACHES, 13–16 (2019) (comparing and contrasting the "diversity of financing options" for infrastructure development and noting possibility of "blended finance approaches") [hereinafter APEC/OECD Report]; Deborah Bräutigam, *Chinese Development Aid in Africa: What, Where, Why, and How Much?*, *in* RISING CHINA: GLOBAL CHALLENGES AND OPPORTUNITIES 203, 203–04 (Jane Golley & Ligang Song eds., 2011) (describing the "many different kinds of flows" that make up the "international financial architecture"); *see also* MAURO MEGLIANI, SOVEREIGN DEBT: GENESIS—RESTRUCTURING—LITIGATION 165–98 (on syndicated sovereign loans), 205–33 (on issuing bonded debt), 97–109 (on bilateral debt), 123–56 (on multilateral and concessional finance) (2015). Policymakers in developing states also see promoting FDI as an alternative or

subject to a series of dynamic interactions, which further nuance the sovereign financing picture and invite more holistic analysis.[14] Thus, viewing RFI within the comprehensive context of sovereign development finance provides a more robust framework for assessing the rise and internal logic of Chinese-origin RFI transactions, in large part because such transactions combine elements of extant financing pathways to produce a meaningful alternative to FDI alone.

The 2008 Sicomines Agreement between the Democratic Republic of Congo ("DRC") and various Chinese corporate entities, which combines a $3 billion USD infrastructure development package with a mineral extraction joint-venture project, presents a rare case study for assessing the transnational legal implications of Chinese RFI deals across sub-Saharan Africa.[15] This note contends that the Sicomines Agreement's transactional structure and its relationship to the incumbent international legal frameworks surrounding sovereign finance—from contractual mechanisms to endgame scenarios involving restructuring and litigation—operationalize the "disruptive" potential of Chinese-origin finance for such "rules-based" regimes. It demonstrates that the Sicomines Agreement selectively draws on and integrates pre-existing modes of sovereign development finance—but in ways that subvert the extant legal and customary frameworks those modes have depended on.

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supplement to state-led, debt-financed development; for this reason, I include it here. *See* APEC/OECD Report, at 14; Laura Alfaro et al., *FDI and Economic Growth: The Role of Local Financial Markets*, 64 J. INT'L ECON. 89, 90 (2004) (noting that policymakers in developing countries increasingly substituted FDI for sovereign debt to promote development goals in the wake of the 1980s debt crisis, which negatively impacted the availability of sovereign lending).

14. An emerging corpus of development economics literature has explored the economic relationships between sovereign credit, FDI, and economic growth. *See, e.g.*, CHRISTOPHER W. CROWE ET AL., MACROFINANCIAL LINKAGES: TRENDS, CRISES, AND POLICIES (2010); Monika Schnitzer, *Debt v. Foreign Direct Investment: The Impact of Sovereign Risk on the Structure of International Capital Flows*, 69 ECONOMICA 41 (2002); Miguel Fuentes & Diego Saravia, *Sovereign Defaulters: Do International Capital Markets Punish Them?*, 91 J. DEV. ECON. 336 (2010); Lilia Maliar et al., *Sovereign Risk, FDI Spillovers, and Growth*, 16 REV. INT'L ECON. 463 (2008). Additionally, the corresponding legal regimes have overlapped and intersected in a number of ways. For example, although much sovereign debt is currently privately-held, default often triggers the intervention of multilateral institutions like the International Monetary Fund ("IMF") through sovereign debt restructuring ("SDR"). MEGLIANI, *supra* note 13, at 252 (arguing that IMF involvement remains a common principle of sovereign debt restructuring). Additionally, recent debt crises have triggered interplay between the SDR and investor-state arbitration legal regimes. *See* Ellie Norton, *International Investment Arbitration and the European Debt Crisis*, 13 CHI. J. INT'L L. 291 (2012). The Sicomines Agreement potentially amplifies and/or nuances these regime interactions. *See infra* Part IV.B.1.

15. *See supra* note 9. *See generally* Andoni Maiza-Larrarte & Gloria Claudio-Quiroga, *The Impact of Sicomines on Development in the Democratic Republic of Congo*, 95 INT'L AFFAIRS 423 (2019) (describing and contextualizing the main characteristics of the agreement).

China's intervention within the sovereign finance framework challenges fundamental assumptions embedded in the design and logic of its rules-based architecture. First, China's "strategic integration" of different forms of sovereign finance subverts the longstanding trend of separating their bilateral aid, privately-held sovereign debt, trade, and FDI vectors.[16] A set of distinct, transnational legal rules has traditionally governed the workings of each mode of sovereign finance, albeit in sometimes subtler and less binding ways than the WTO's rules have governed international trade, for example.[17] FDI sits within a well-established body of international investment law—itself a mix of customary international law, a global network of treaties, and decisions from international tribunals.[18] Privately-held debt is governed by domestic, or municipal, law—almost universally English and New York State law.[19] Publicly-held bilateral debt, by contrast, is often controlled by public international law, and the Paris Club, an informal forum of creditor countries, coordinates responses to restructuring requests.[20] At the multilateral level, almost all major international financial institutions ("IFIs") have longstanding operating procedures on issuing and restructuring sovereign debt, often defined in their founding treaties or charters, and their interactions with states are further shaped by customary and normative frameworks.[21]

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16. Kaplinsky & Morris, *supra* note 5, at 560–61.

17. *See* Chris Brummer, *Why Soft Law Dominates International Finance—and Not Trade*, 13 J. INT'L ECON. L. 623, 623–24 (2010) (comparing the different institutional designs underlying the legal regimes governing international finance and international trade and noting that the latter encompasses rules largely codified through "hard law").

18. *See generally* OECD, INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS (2008) [hereinafter OECD Guide to IIL].

19. *See* MEGLIANI *supra* note 13, at 190 (for syndicated loans) and 225 (for bonded debt).

20. *See generally id*. at 277–307.

21. *See generally* John W. Head, *Law and Policy in International Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks*, 17 KAN. J.L. & PUB. POL'Y 194 (2007). IFIs, in addition to states, may also be formal subjects of international law. To the extent that financing agreements exist among states or between a host state and an international organization, these agreements are themselves treaties under public international law, whose interpretation is shaped by the Vienna Convention on the Law of Treaties ("VCLT") or its 1986 extension, the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, which although not in force remains influential. *See* MEGLIANI, *supra* note 13, at 123–25. Additionally, international "soft law"—for instance in the form of the Basel regulations' sovereign debt risk weightings, or the U.N. Conference on Trade and Development's Principles on Promoting Responsible Sovereign Lending and Borrowing—exerts pervasive influence throughout the sovereign finance ecosystem. *See generally* Brummer, *supra* note 17. Finally, IFIs themselves create far-reaching normative governance frameworks. *See generally* Jan Wouters & Jed Odermatt, *Comparing the 'Four Pillars' of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank, and WTO*, 17 J. INT'L ECON. L. 49 (2014). Taken together, this decentralized web of transnational rules forms part of the "rules-based" architecture of the global economy. *See id*. at 53.

By combining its investment pathways in this way, China undercuts the normative practice of determining the applicable legal regime based on the nature and identity of the investor and the transactional structure of the investment.[22] The legal regime for FDI, for example, assumes a sovereign host state and private investors.[23] On the other hand, the Paris Club forum presupposes sovereign (*i.e.* public) creditors, while concessional finance is most frequently funded by IFIs.[24] By contrast, Chinese RFI deals involve the strategic "bundling" or integration of several transactional pathways in which the Chinese state and its SOEs perform a range of sovereign finance roles: FDI investor (large Chinese state-owned industrial firms), sovereign creditor (China's EXIM Bank), and funder of bilateral public aid (the Chinese state).[25] As such, adjudicators have struggled to identify the appropriate legal regime to apply to the Chinese RFI deals, raising uncertainties over whether existing law can adequately capture the deals' underlying economic dynamics.[26]

Second, the financing terms and structure of Chinese RFI transactions clash with practical and normative aspects of existing forms of development finance, particularly those issued from IFIs. For example, by guaranteeing a multi-billion U.S. dollar development finance offer for infrastructure and mining developing from the China EXIM Bank on quasi-commercial terms, the DRC violated its pre-existing commitments to the IMF against incurring additional sovereign or sovereign-guaranteed debt.[27] Only through tortuous negotiations throughout 2007 and 2009 was the DRC able to participate in both the IMF's Heavily Indebted Poor Countries ("HIPC") debt relief program and the Sicomines Agreement.[28] Indeed, the Sicomines Agreement appears to be the first instance in which an HIPC participant contracted additional market-based debt outside the IMF framework.[29] By ignoring the

22. *See* OECD Guide to IIL, *supra* note 18, at 8 ("The definition[s] of investor and investment are among the key elements determining the scope of application of rights and obligations under international investment agreements."); MEGLIANI, *supra* note 13, at 4 ("The notion of State debt generally includes debts owed, guaranteed, or secured by a sovereign State or an agency or instrumentality thereof.").

23. *See infra* note 129 and accompanying text.

24. *See* MEGLIANI, *supra* note 13, at 123–25, 277–85. Concessional finance, broadly speaking, refers to development finance extended on non-market, *i.e.* "concessional" terms. *See infra* Part II.A.3 (defining concessional finance and discussing its hallmarks); *see also infra* Part III.B.1 (discussing legal issues arising from its definition in the IMF-sponsored debt restructuring context).

25. *See id*.; Siu, *supra* note 8, at 619–29.

26. *See infra* Part III.B.

27. *See* Bräutigam, *supra* note 13 at 213; Johanna Malm, When Chinese Development Finance Met the IMF's Public Debt Norm in DR Congo 144 (2016) (unpublished Ph.D. dissertation, Roskilde University) (on file with author).

28. *Id*.; *see also infra* Part III.B.1 and notes therein.

29. Although Sierra Leone, another HIPC participant, appears to have opened negotiations with China in around 2005–06, *see* BRÄUTIGAM, *supra* note 2 at 144–45, Johanna Malm

IMF's requirements, China and its counterparties to the Sicomines Agreement contested the IMF's preeminence within sovereign debt restructuring ("SDR") and development policy, raising questions about the normative "consensus" the IMF and other Bretton Woods institutions represent for the global economy.[30]

This note approaches these questions by unpacking the process, method, and structure of Chinese RFI financing transactions, using the Sicomines Agreement as a case study. Immediately following this introduction, Part II explains how the Agreement is a product of the traditional ecosystem of sovereign finance's limitations in meeting the DRC's development needs and the uniqueness of China's political economy. It sketches the Sicomines Agreement's structure in light of the niche it attempts to fill, showing that the Agreement selectively draws from and integrates key aspects of extant sovereign finance pathways. Part III explores the Sicomines Agreement's interface with international economic law: To what extent can incumbent legal and customary rules capture the *sui generis* transactional mechanisms at play in the Sicomines Agreement? It divides this analysis into two parts: (A) areas of the Sicomines Agreement that the extant framework adequately captures; and (B) elements of the transaction that subvert that framework, confounding existing rules. Finally, Part IV presents a more holistic analysis, proposing two axes along which stakeholders and policymakers might think about the systemic impacts of such agreements.

II. Explaining the Genesis and Structure of the Sicomines Agreement

In 2006, the Democratic Republic of Congo elected Joseph Kabila as President.[31] The election, which came less than three years after the official end of the DRC's second civil war, was the country's first democratic election in over four decades. Running on a "*Cinq Chantiers*" ("Five Public Works") campaign pledge, Kabila promised to deliver infrastructure, job creation, education, water, and electricity.[32] Yet, his administration inherited a staggering debt burden of $13.1 billion USD (owed to an array of credi-

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has argued that the Sicomines Agreement represents an unprecedented challenge to the conditionality norm associated with the HIPC program. *See* Malm, *supra* note 27, at 148–63.

30. *See* Malm, *supra* note 27, at ii–iii. *See generally* Ayse Kaya & Mike Reay, *How Did the Washington Consensus Move within the IMF? Fragmented Change from the 1980s to the Aftermath of the 2008 Crisis*, 26 REV. INT'L POL. ECON. 284 (2019) (discussing the evolving role of the IMF as a "disseminator" of the Washington Consensus, a controversial set of development policy prescriptions).

31. LE MONDE, *Joseph Kabila Prête Serment sur Fond de Combats dans l'est du Congo* (Dec. 6, 2006), https://www.lemonde.fr/afrique/article/2006/12/06/joseph-kabila-prete-serment-sur-fond-de-combats-dans-l-est-du-congo_842761_3212.html (French).

32. RADIO FRANÇAISE INTERNATIONALE, *Les Chantiers de Kabila* (May 12, 2006), http://www1.rfi.fr/actufr/articles/084/article_47988.asp (French).

tors)[33] and devastation wrought by decades of civil war.[34] This environment made further sovereign debt financing, either on international capital markets or through bilateral channels, almost impossible. Despite this, the DRC government had won $3 billion USD of funds from the Chinese towards landmark infrastructure projects by 2008.[35] Faced with a seemingly intractable financial situation, how did Kabila and DRC state officials obtain this financing for the *Cinq Chantiers* program? The answer came in the form of the Sicomines Agreement, an unprecedented financing package whose terms specifically addressed these historical limitations.

The historical, political, and economic contexts of the Sicomines Agreement shaped its transactional structure. Section A argues that traditional pathways of sovereign finance—debt capital markets, FDI, aid, and concessional finance—presented challenging, if not intractable, obstacles to the delivery of necessary infrastructure development to the DRC's heavily indebted, fragmentary post-war economy. Section B identifies the unique characteristics of the Chinese system of political economy, or "China, Inc.," that China leverages to develop packages like the Sicomines Agreement that address key shortcomings of traditional sovereign finance pathways. Section C analyzes how these factors together explain the mechanics and structure of the Sicomines Agreement.

A. *Historical Constraints on Infrastructure and Resource Development in DRC*

Kabila's *Cinq Chantiers* program sought to address the desperate infrastructure situation in the DRC at the close of its civil war. Decades of conflict had seriously damaged most infrastructure networks and left many remaining assets, including the nation's incomplete road and rail networks, in deteriorating condition.[36] Its power grid delivered electricity to just 15% of DRC's population.[37] In all, the World Bank estimated that these infrastructural deficits accounted for about 40% of the productivity gap facing the DRC's private sector with respect to the United Nation's Millennium Development Goals.[38] To catch up to the rest of the developing world, the

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33. IMF Press Release, *IMF Executive Board Approves US$551 Million PRGF Arrangement for the Democratic Republic of the Congo and US$73 Million in Interim HIPC Assistance*, IMF Press Release 09/455 (Dec. 11, 2009), https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr09455.

34. *See* Armin Rosen, *The Origins of War in the DRC*, ATLANTIC (June 26, 2013), https://www.theatlantic.com/international/archive/2013/06/the-origins-of-war-in-the-drc/277131.

35. Siu, *supra* note 8, at 601.

36. Vivien Foster & Daniel Alberto Benitez, *The Democratic Republic of Congo's Infrastructure: A Continental Perspective* 1–4 (World Bank Policy Research Working Paper No. 5602, 2011).

37. Maiza-Larrarte & Claudio-Quiroga, *supra* note 15 at 444.

38. Foster & Benitez, *supra* note 36 at 3.

World Bank estimated that the DRC needed to plug a $5.3 billion USD per year infrastructure financing gap.[39] Each of the established pathways for development finance within the extant sovereign finance ecosystem, however—global debt capital markets; FDI; and public sector concessional finance[40]—presented intractable obstacles.

1. Debt Capital Markets and Private Syndicated Lending

While many states directly finance infrastructure development out of their fiscs, tapping global debt capital markets to overcome the difference between extraordinary expenditure and normal revenue,[41] practical and legal constraints prevented the DRC from doing so following Kabila's election. Practically, the DRC's financial situation from 2006 to 2007 exhibited nearly all factors economists describe as inhibiting market access:[42] a high debt burden;[43] a recent sovereign default;[44] vulnerability to cyclicality and exogenous shocks due to reliance on highly variable mineral pricing;[45] poor governing institutions and rule of law;[46] and prior participation in the IMF's

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39. *Id*. at 1 (noting that "business as usual" would lead to an infrastructure gap lasting for at least a century).

40. *See generally* APEC/OECD Report, *supra* note 13; OECD, FOSTERING INVESTMENT IN INFRASTRUCTURE 20 (2015) (noting a "spectrum" of financing structures from traditional public procurement, including sovereign debt-financing, to partial and fully privatized investment, including FDI-financed) [hereinafter OECD Fostering Investment Report].

41. Indonesia, for example, recently raised approximately U.S. $2.5 billion in two yen-denominated sovereign issuances in 2017 and 2019 to fund its infrastructure development program. Wataru Suzuki, *Indonesia to Raise $900M in Samurai Bonds*, NIKKEI ASIAN REV. (May 31, 2017 1:25 PM), https://asia.nikkei.com/Economy/Indonesia-to-raise-900m-in-samurai-bonds; Jun Suzuki, *Indonesia Readies One of Asia's Biggest Samurai Bond Issuances*, NIKKEI ASIAN REV. (May 17, 2019 12:07 PM), https://asia.nikkei.com/Economy/Indonesia-readies-one-of-Asia-s-biggest-samurai-bond-issuances.

42. R. Gaston Gelos et al., *Sovereign Borrowing by Developing Countries: What Determines Market Access?*, 23 (IMF Working Paper WP/04/221, 2004).

43. International Monetary Fund ["IMF"], *Democratic Republic of the Congo: 2007 Article IV Consultation—Staff Report* 11, 19 (IMF Country Report No. 07/327, 2007) (noting that the DRC's total external public debt burden, inclusive of IMF obligations, stood at approximately U.S. $10.8 billion in 2006 and that its debt position was in distress) [hereinafter IMF 2007 Art. IV Consultation].

44. *Id*. at 5 (noting that the DRC failed to service parts of its sovereign debt in 2006).

45. *Id*. at 1 (noting that the DRC's fiscal situation would "worsen in the event of adverse exogenous shocks"); IMF, *Request for the Rapid-Access Component of the Exogenous Shocks Facility and Report on the 2008 Staff-Monitored Program* 12 (IMF Country Report No. 09/317, 2009) (noting that the "exogenous shocks" of falling commodities prices and the Global Financial Crisis were "likely to give rise to large fiscal and balance of payments financing gaps in 2009").

46. Siu, *supra* note 8, at 609 ("[C]orruption and poor governance records have stymied the DRC's attempts to secure additional sovereign loans, foreign aid and even IMF debt relief.").

Poverty Reduction and Growth facility.[47] Additionally, the DRC faced a legal obstacle: It had covenanted against the "contracting of nonconcessional debt" by acceding to various IMF debt-relief programs, creating a *de jure* prohibition on incurring private debt on open market terms.[48] The DRC thus could neither issue sovereign bonds in international capital markets nor assume privately syndicated, market-basis loans to fund its infrastructure development.[49]

2. Foreign Direct Investment and Public-Private Partnerships

FDI can facilitate infrastructure development through several mechanisms. FDI enables states to trade foreign ownership over their infrastructure for direct foreign funding of the same, for example. In the DRC, outside investors financed some infrastructure developments directly, but because foreign investors expect returns on their investment, these projects were often limited to consistently cash-producing investments such as telecommunications.[50]

States can also leverage FDI to indirectly promote infrastructure development, including by taxing profitable investment projects (such as in resource extraction) to fund unrelated infrastructure projects, or by compelling FDI-participating companies to contribute to the infrastructure used by their investments.[51] The DRC could not reliably leverage this paradigm, however, since it was limited by the low total volume of inbound investment.[52]

Although the DRC's unparalleled natural resource endowment provided an attractive FDI target,[53] and although the DRC engaged some FDI to im-

47. *See* IMF, IMF Completes Third Review Under the Democratic Republic of the Congo's Program Supported by the Poverty Reduction and Growth Facility (PRGF) Arrangement and Approves US$39 Million Disbursement, IMF Press Release 04/44 (Mar. 4, 2004), https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr0444.

48. Malm, *supra* note 27, at 92, 151.

49. *See* Siu, *supra* note 8, at 609.

50. World Bank, *Country Assistance Strategy for the Democratic Republic of Congo for the Period FY08-FY11*, Vol. 1, 6 (Report No. 41474-ZR, 2007) [hereinafter World Bank 2007 CAF].

51. Glen Robbins & David Perkins, *Mining FDI and Infrastructure Development on Africa's East Coast: Examining the Recent Experience of Tanzania and Mozambique*, 24 J. INT'L DEV. 220, 226 (2012) ("Governments have also seen mining as contributing to infrastructure indirectly through the contributions to the fiscus, which has been relatively significant in many countries with very low rates of revenue collection. Infrastructure can also be seen to impact on forward and backward linkages.").

52. *Compare* IMF 2007 Art. IV Consultation, *supra* note 43, at 24 (noting the DRC's estimated 2006 FDI of approximately U.S. $263 million), *with* Foster & Benitez, *supra* note 36, at 24 (describing the scale of infrastructure investment requirements).

53. *See* World Bank 2007 CAF, *supra* note 50 at 6 (new investment in the DRC in the 2003–2007 period often reflected "the private sector's interest in the country's immense natural resources").

prove its physical infrastructure,[54] structural limitations prevented FDI from substantially plugging the DRC's substantial infrastructure gap. First, the benefits of FDI for host country growth appear to require pre-existing working infrastructure,[55] lacking in the DRC. Second, effective governance institutions, such as property rights and the rule of law, are thought to condition FDI growth,[56] but were viewed as lacking in the DRC.[57] Third, corruption and weak negotiating leverage prevented the DRC from translating its FDI into meaningful economic development.[58] As the IMF indicated, inbound FDI would likely be insufficient to cover much more than a small proportion of the DRC's annual $5.3 billion USD infrastructure gap—even assuming the DRC enacted governance reforms and was able to efficiently convert FDI value into infrastructure growth.[59]

3. Aid and Concessional Finance

Concessional finance—direct aid and non-commercial loans coordinated by the World Bank and regional developmental institutions—is often a lifeline for infrastructure improvement in the poorest, most underdeveloped countries. This type of financing is less sensitive to the political risks and pre-existing infrastructure gaps that might impede private sector financing, since its very aim is often to improve those factors.[60] Moreover, concessional financing deals need not be structured on commercial terms, so they need not implicate the IMF's subsequent debt covenants.[61]

Concessional financing, however, lacks the liquidity to meet DRC's needs; its benefits are counterbalanced by a severely limited pool of capital. Concessional finance institutions like the World Bank and regional development banks candidly admit that they simply lack funds to finance all of

54. *See* Foster & Benitez, *supra* note 36, at 24 (noting "modest" pre-existing investment).

55. Farrokh Nourzad et al., *The Interaction Between FDI and Infrastructure Capital in the Development Process*, 20 INT'L ADVANCES ECON. RES. 203, 210 (2014).

56. Andrew Ross, *Governance Infrastructure and FDI Flows in Developing Countries*, 11 TRANSNAT'L CORP. REV. 109, 112 (2019).

57. Siu, *supra* note 8, at 609.

58. *See* Rebecca Bream, *A Bid for Front-line Command in Africa*, FIN. TIMES (Nov. 8, 2007), http://www.ft.com/cms/s/0/eec69b16-8d6e-11dc-a398-0000779fd2ac.html (noting that large foreign investors interested in the DRC were "deterred by the country's lack of infrastructure and widespread corruption"); Barry Sergeant, *Nikanor's DRC Mining Contract Quandary*, MINEWEB (Apr. 3, 2007 11:07 AM), https://archive.md/20150405104550/http://www.mineweb.com/archive/nikanors-drc-mining-contract-quandary; *cf.* Ross, *supra* note 56, at 112.

59. *See* IMF 2007 Art. IV Consultation, *supra* note 43, at 24 (projecting FDI to reach only slightly over U.S. $1 billion by 2012).

60. *See generally* MEGLIANI, *supra* note 13, at 123–57 (describing the genesis of multilateral institution-financed sovereign debt).

61. *Id.*; *see also* Malm, *supra* note 27, at 4.

the viable project proposals they review.[62] Unsurprisingly, these trends also played out in the DRC: Total aid and concessional finance inflows were estimated to only reach $800 million USD in 2005, far short of the DRC's development needs.[63]

* * *

In sum, existing pathways to infrastructure development did not offer the DRC a viable path to obtaining the $5.3 billion USD that it needed each year to fill its infrastructure financing gap. The large amounts of liquidity available on global markets remained out of the DRC's reach, due to its governance characteristics, limited infrastructure, and financial history. These factors similarly limited its access to FDI as a means to improving infrastructure. Finally, aid and concessional finance could not supply more than a small fraction of the funds the DRC required to meaningfully advance its infrastructure development goals.

B. *Leveraging China's Unique Political Economy*

Into this challenging financing ecosystem stepped the Chinese state and its subsidiaries. Over the past fifteen years, China has overtaken the United States and other Western countries as sub-Saharan Africa's largest trading partner and most significant bilateral financier—patterns reflected in its relationship with the DRC.[64] At a cursory glance, it might appear that China's activity in sub-Saharan Africa merely reflects its overall economic might. It comes as little surprise, in other words, that the world's second largest economy has commercial links across the world commensurate with its size. Yet, as some scholars have noted, there is something *qualitatively* different about China's involvement in sub-Saharan Africa[65]—differences embodied in the Sicomines Agreement and that, as this note argues, carry legal consequences.

The differences between Chinese and Global North cross-border economic activity arise in large part out of China's unique political-economic system. Existing conceptual paradigms like "state capitalism," "socialism," or "free market economy" do not adequately capture the Chinese system's unique characteristics; rather, Chinese political economy is best described as

62. Indeed, the World Bank estimated this deficit to be approximately U.S. $1 trillion globally in 2018. *See* James Kynge & Oliver Ralph, *World Bank Group Helps Plug Infrastructure Investment Gap*, FIN. TIMES (Mar. 14, 2018), https://www.ft.com/content/fd749a72-26d9-11e8-b27e-cc62a39d57a0.

63. World Bank 2007 CAF, *supra* note 50, at 11.

64. *See* Siu, *supra* note 8, at 602.

65. *See e.g.*, *id*. at 608 ("China's overwhelming gains in trade and outward foreign direct investment (OFDI) with Africa cannot be explained by economic clout alone."); Bräutigam *supra* note 13, at 752–53 (arguing that Chinese development finance in Africa may not be adequately described by existing standards and definitions).

a system in which the "party-state remains all-powerful, but private enterprise drives significant economic activity."[66] Several elements of China's political economy enabled Chinese entities to strategically bundle inputs to produce the Sicomines Agreement: consolidated ownership of corporate entities; centralized influence over the allocation of capital; coordination of economic planning and inputs; and Chinese Communist Party ("CCP") influence over key management.

1. Corporate Ownership: SASAC as the Chinese State's Corporate Holding Entity

China's State-controlled Assets Supervision and Administration Commission of the State Council ("SASAC") owns a wide swathe of Chinese corporate entities, allowing the Chinese state to leverage some of the largest companies in the world for its national interest.[67] While a strong SOE presence within a national economy is not unusual, the scale and, more importantly, centralization of SASAC's state corporate ownership is unprecedented.[68] Although a substantial number of Chinese SOEs were privatized or otherwise spun off in 1997, SASAC still owns more than half of China's Fortune 500 companies, especially in "critical sectors" such as energy, rail, shipbuilding, and telecommunications.[69] SASAC often actively manages these portfolio companies, much as private equity firms treat their sponsored companies.[70] Rather than act as a state sponsor for "national champions," however, SASAC often promotes market forces, including competition between its own portfolio companies—processes that have generated enormous economic growth in China.[71] The touchstone of this active management is not pure profit but the "Chinese state's interest, broadly de-

66. Wu, *supra* note 1, at 270; *see also* Osburg, *supra* note 1; Zheng & Milhaupt, *supra* note 1.

67. *See* Wu, *supra* note 1, at 270–73.

68. *Id*. at 271; *see also* Marcos Aguiar et al., *SASAC: China's Megashareholder*, BCG PERSPECTIVES (Dec. 1, 2007), https://www.bcgperspectives.com/content/articles/globalization_strategy_sasac_chinas_megashareholder.

69. Wu, *supra* note 1, at 272 ("Imagine if one U.S. government agency controlled General Electric, General Motors, Ford, Boeing, U.S. Steel, DuPont, AT&T, Verizon, Honeywell, and United Technologies . . . . It could hire and fire management, deploy and transfer resources across holding companies, and generate synergies across its holdings. While the West may once have marveled at Japan's powerful Ministry of Information Trade and Industry ('MITI') in its heyday, SASAC's grip over the Chinese economy today is even more direct and all encompassing."). Additionally, there are sub-national SASACs that further extend sovereign ownership of assets in the Chinese economy. *Id*. ("Each level of government replicates this structure. Provinces and municipalities have their own SASAC, reporting up to the central government's SASAC, and these local agencies serve as the controlling shareholders of the critical SOEs in their regions.").

70. *Id.*

71. *Id*. at 271–72.

fined."[72] Significantly for this analysis, SASAC owns two of the three Chinese parties to the Sicomines Agreement: Sinohydro Group[73] and China Railway Group.[74]

2. Centralized Capital Allocation: The Central Huijin's Control of Chinese Financial Institutions

Formally constituted under the Chinese state's sovereign wealth fund, the Central Huijin is to China's financial institutions what SASAC is to China's large blue-chip corporations.[75] Through its control of Chinese financial institutions, it has enormous sums at its disposal: These Chinese financial institutions include, among them, the four largest banks in the world by assets.[76] Even where the Central Huijin is not the controlling shareholder in a financial institution, it facilitates debt and shareholding structures that allow the state to retain tight control over commercial and investment banks[77] and directs the allocation of capital to serve its policy objectives.[78] In 2009, it controlled the equivalent of over $2 trillion USD in foreign currency reserves.[79]

From 2007 to 2009, the Central Huijin used a series of currency reserve transfers and bond issuances to inject over $32 billion in capital into the China Development Bank and the Chinese EXIM Bank[80]—coinciding with

72. *Id.*; Barry Naughton, *SASAC Rising*, CHINA LEADERSHIP MONITOR, Apr. 2005, at 9, https://www.hoover.org/sites/default/files/uploads/documents/clm14_bn.pdf.

73. *Directory*, State-Owned Assets Supervision & Administration Commission of the State Council ["SASAC"], http://en.sasac.gov.cn/directorynames.html (last visited Jan. 21, 2020) [hereinafter SASAC Directory]. POWERCHINA, *Corporate Profile*, https://en.powerchina.cn//2019-05/23/content_16651992.htm (last visited Jan. 21, 2020).

74. SASAC Directory, *supra* note 73. Note that Zhejiang Huayou Cobalt Co., Ltd., the third Chinese signatory, is not owned by SASAC but rather is a publicly-traded company listed on the Shanghai Stock Exchange. REUTERS, *Zhejiang Huayou Cobalt Co. Ltd. Company Profile*, https://www.reuters.com/companies/603799.SS (last visited May 18, 2020).

75. Wu, *supra* note 1, at 273–74 ("The closest analogue would be if . . . the U.S. Treasury Department set up a single government entity to act as the controlling shareholder of JPMorgan Chase, Bank of America, Citibank, and Wells Fargo.").

76. *Id.* ("Through Central Huijin and other financial vehicles, the Chinese state has a larger pool of financial resources at its direct disposal than any other comparable government in the world.").

77. Wu, *supra* note 1, at 274–75.

78. *Id.*

79. *Currency Contortions*, ECONOMIST (Dec. 17, 2009), http://www.economist.com/displayStory.cfm?story_id=15127500.

80. REUTERS, *China Huijin to Recapitalise Exim Bank Soon—Media* (Nov. 12, 2009), https://www.reuters.com/article/china-exim-huijin/china-huijin-to-recapitalise-exim-bank-soon-media-idUSPEK13684620091112 (noting the "unusual" nature of the bond issuance recapitalization mechanism for the EXIM Bank capital injection).

a wave of development finance transactions across sub-Saharan Africa, including the Sicomines Agreement.[81]

3. Economic Coordination: The NRDC's Control of Planning and Inputs

The Chinese state does not just control assets but also coordinates economic activity across sectors through its National Development and Reform Commission ("NDRC").[82] The NRDC reports directly to the State Council and has a uniquely wide-ranging economic policymaking mandate, enabling it to coordinate policy objectives in the economic sphere.[83] While many other countries have central economic policy entities (such as the National Economic Council in the United States), the NRDC's policymaking scope and power are much larger: It sets the prices of commodities like electricity, oil, natural gas, and water, allowing it to control a wide range of industry costs,[84] and it approves all large investment projects, enabling it to affect market supply, capacity, and the allocation of investment capital.[85]

4. Chinese Communist Party's Management of Personnel Decisions

Even corporations not directly under SASAC's control are influenced by the Chinese Communist Party, which works to align their activities with the interests of the party-state.[86] While the dominant political party is synonymous with the state in some authoritarian countries, the Chinese Communist Party is simultaneously an institution independent of the state and a body with ultimate authority over state decisions.[87] This creates a "dual-track" system of governance.[88] In the economic sphere, the CCP controls appointment and promotion in both official state organs, such as the SASAC, Central Huijin, and NDRC, and also in private sector entities (including entities not otherwise owned by SASAC or another state body), aligning ambitious individuals' career incentives with the CCP's interests and objectives.[89] In this way, the party-state does not need to own a corporate entity through SASAC or Central Huijin to leverage those assets for its interests.[90]

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81. BRÄUTIGAM, *supra* note 2, at 145–48 (noting other RFI deals in Sierra Leone and Angola during this period).

82. Wu, *supra* note 1, at 275–76.

83. *Id.*

84. *Id.* at 276.

85. *Id.*

86. *Id.* at 280.

87. *Id.*

88. *Id.*

89. *Id.* at 281.

90. *Id.* For example, it is probable that even though SASAC does not own Zhejiang Huayou Cobalt Co., Ltd., the third Chinese signatory to the Sicomines Agreement, the CCP

* * *

Together, these four features of the Chinese political-economic system enable the Chinese party-state to create unprecedented finance, investment, aid, and trade packages. Specifically, the party-state is able to coordinate the salient features of existing sovereign finance pathways while avoiding their practical weaknesses. Because market growth and competition in China have generated huge economic activity and capital accumulation rivaling that found in global financial markets, liquidity is not a substantial limit on Chinese investment. At the same time, the party-state's influence over economic decisions means that China can override the singular focus on risk-adjusted return maximization fundamental to traditional, market-based sources of sovereign finance.[91] Indeed, the Chinese party-state uses many levers to direct Chinese corporate entities' economic activity towards state objectives.[92] Finally, government ownership and party control of large corporate entities enables the party-state to coordinate its economic actions across sectors and modalities.[93] Collectively, these tools enable innovative transactional structures in cross-border investments at scale.

C. *The Structure and Mechanics of the Sicomines Agreement*

The Sicomines Agreement, a commercial agreement between representatives of the DRC and SASAC-owned Chinese enterprises, displays the interface between the DRC's infrastructure financing needs and Chinese entities' unique abilities to meet them. The Agreement selectively draws on and bundles incumbent pathways of sovereign finance in innovative and subversive ways, overcoming the limitations that pre-existing finance strategies face when pursued individually.

The Sicomines Agreement, at its core, combines direct investment in resource extraction with infrastructure development. Phase I of the Agreement sets the framework for this transactional mechanism.[94] It provides for an initial exchange of direct bilateral aid in the forms of a $350 million USD signing bonus (*pas de porte*) and a $50 million USD private commercial loan backed by mineral concessions from Gecamines, the DRC state-owned mining enterprise, to the public-private joint venture set up by the Agreement (Sicomines JV).[95] It also pumps FDI into said Sicomines JV, a partner-

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and/or Chinese state exerts significant influence over its operations, as it operates in the mining sector. *See* Kaplinsky & Morris, *supra* note 5, at 561.

91. *See supra* Part II.A.

92. *See generally* Wu, *supra* note 1.

93. *Id.* at 278–79.

94. Siu, *supra* note 8, at 630.

95. Collaboration Agreement Between the Democratic Republic of the Congo and the Group of Chinese Companies: China Railway Group Limited/Sinohydro Corporation Considering the Development of a Mining Project and Infrastructure Project in the Democratic Re-

ship between Gecamines and the consortium of the Chinese parties, with 68% ownership by the Chinese consortium and 32% ownership by Gecamines.[96] In return, Phase I requires the DRC to make several sovereign concessions up front, not only passing title to the not-yet-mined minerals to the Sicomines JV, but also implementing a range of regulatory tax and customs waivers.[97]

Phase II of the Agreement disburses two $3 billion USD loan tranches[98] (referred to, collectively, as the "central infrastructure development loan") from China's EXIM Bank at a non-concessional (or "market") rate of one hundred basis points more than the contemporaneous London Interbank Offered Rate to fund large-scale infrastructure projects.[99] Subsequent re-negotiations, discussed below, revised the central infrastructure development loan down to a single $3 billion USD tranche with a slightly reduced interest rate mechanism.[100]

The Agreement has Sinohydro and China Railway and other potential Chinese contractors tender bids to work on a list of pre-agreed infrastructure development projects,[101] and it transfers the entirety of the loan funds directly from the EXIM Bank to the Chinese corporate entities that win the infrastructure development contracts, such that the financing never actually "leaves" China.[102] At this stage, the Agreement anticipates that the Sicomines JV will begin to produce mineral trade revenue.[103] The Agreement anticipates this revenue to be sufficient to pay back not only the initial Phase I $50 million USD commercial loan but also to pay the costs of the $3 billion USD central infrastructure development loan.[104] Only after these loans are

public of Congo arts. 4–5 (Apr. 22, 2008) (on file with the author) [hereinafter Mining & Infrastructure Collaboration Agreement].

96. *Id*. arts. 3–7; *see also* David Landry, *The Risks and Rewards of Resource-for-Infrastructure Deals: Lessons from the Congo's Sicomines Agreement* 9–10 (China-Africa Research Initiative, School of Advanced International Studies, Johns Hopkins University, Working Paper No. 2018/16) (noting that the total sum of FDI placed into the Sicomines JV by the parties was later revealed to be approximately $3.2 billion USD).

97. Mining & Infrastructure Collaboration Agreement, *supra* note 95, arts. 5, 14, 15, & 16.

98. Siu, *supra* note 8, at 630.

99. Bräutigam, *supra* note 13, at 213–14.

100. *See* Maiza-Larrarte & Claudio-Quiroga, *supra* note 15 at 426–28 (describing the re-negotiated central infrastructure loan); *infra* Part III.B.1 (discussing the re-negotiation more broadly).

101. Mining & Infrastructure Collaboration Agreement, *supra* note 95, arts. 8–11 & Annex C.

102. *Id.*; *see also* BRÄUTIGAM, *supra* note 2, at 142; Kaplinsky & Morris, *supra* note 5, at 561 (describing how the infrastructure finance component of these RFI deals "never leave[s] China but are transferred directly from the EXIM Bank to the (largely SOE) firms that have won the tenders for the work.").

103. Siu, *supra* note 8, at 630.

104. *Id.*

repaid in full do the Sicomines JV's shareholders enter Phase III, receiving profits proportional to their ownership.[105]

The Sicomines Agreement radically expanded the DRC's access to development finance compared with extant pathways of sovereign finance. The depth of Chinese capital reserves, and, more importantly, the unique coordination between corporate entities within the transaction, enabled the Chinese EXIM Bank's provision of the Agreement's $3 billion USD central infrastructure development loan. Moreover, the Agreement's transactional structure removed two primary obstacles to the DRC's pursuit of FDI by simultaneously providing for the revenue-generating investment (the Sicomines JV) and the infrastructure linkages that investment would use.[106]

First, by guaranteeing that the Sicomines JV can export revenue-generating products via rail, ports, and other newly-financed infrastructure, the Agreement removes the lack of pre-existing infrastructure in the DRC as an impediment to FDI.[107] Second, the Agreement provides a direct means of repaying infrastructure debt (the Sicomines JV's trade revenue), expanding the scope of infrastructure that can be financed in this way. Using mining trade revenues to directly repay the infrastructure loan links the development of "public good" infrastructure (*i.e.* infrastructure which is not directly profitable to outside investors) to profitable commercial ventures. That it does so through the mining JV's trade revenues, rather than the state's taxes and customs, directly ties FDI to infrastructure development where such links are, in other contexts, more tenuous. In other words, it enables the transaction to develop not only infrastructure directly used by the investment (the natural resource extraction project), but also other infrastructure projects designated by the host state, not necessarily related to the investment.[108] Finally, this bundling also enables larger flows of capital than would otherwise be allowed under the IMF's *de jure* prohibitions on non-concessional indebtedness. As discussed more below, bundling a variety of contractual obligations provides a workaround to those covenants, since it enables the inclusion of more factors or inputs in the IMF's calculation of concessionality.[109]

Additionally, many of the Agreement's other contractual provisions also integrate features of existing sovereign finance pathways. The choice-of-

105. *Id.*

106. *See generally* Nourzad et al., *supra* note 55; Ross, *supra* note 56; Sergeant, *supra* note 58; IMF 2007 Art. IV Consultation, *supra* note 43 (describing the DRC's obstacles to FDI-driven infrastructure development).

107. This would, according to prevailing views in the FDI literature, also encourage later FDI from other investors. *See generally* Robins & Perkins, *supra* note 51; Nourzad et al., *supra* note 55.

108. *See* Maiza-Larrarte & Claudio-Quiroga, *supra* note 15 at 433–36 (detailing DRC infrastructure projects financed by the Sicomines Agreement).

109. *See infra* Part III.B.1 (discussing the mechanics and implications of the IMF's concessionality calculations with respect to the Sicomines Agreement).

law and forum-selection clauses align the Agreement with established dispute resolution mechanisms for traditional FDI—specifically, through the parties' consent to participate in ICSID's forum for investor-state arbitration.[110] Yet other features of the deal resemble sovereign debt transactions. In particular, in the event of Sicomines JV's failure to pay back the infrastructure loan, the DRC appears to have sovereign liability: The Agreement grants the Chinese EXIM Bank recourse to "other mining deposits, resources, or other satisfactory means."[111] Commentators have widely interpreted this clause to create a sovereign guarantee for the infrastructure loans that, much like ordinary sovereign indebtedness, directly impacts the DRC's fiscal position.[112]

As the Agreement largely incorporates transactional elements seen elsewhere, it is not impossible that its structure could have arisen among traditional, private, or multilateral entities. Yet, the Agreement's deep integration of inputs and commercial modalities and the parties' willingness to suppress imminent profit for more speculative, even intangible, gains evidence the Chinese state's fingerprints.[113] These same features in turn give rise to novel legal quandaries, discussed in the next part.

III. THE SICOMINES AGREEMENT'S INTERNATIONAL LAW IMPLICATIONS

The proper legal characterization of the Sicomines Agreement has vexed political leaders, bureaucrats, and even judges. On the one hand, the DRC's Central Bank Governor Jean-Claude Masangu declared that, after final negotiations concluded on the Agreement in 2009, "we are left with a purely commercial contract."[114] Doctrinally, he was correct: The People's Republic of China is not a party to the Agreement and did not assent to be bound under international law, precluding the Agreement's characterization as a treaty under the Vienna Convention of the Law of Treaties (the

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110. Mining & Infrastructure Collaboration Agreement, *supra* note 95, arts. 20–21 (note that "CIRDI" is the French acronym for "ICSID," or the International Centre for Settlement of Investment Disputes); *see also* Kaplinsky & Morris, *supra* note 5 (analyzing this genre of RFI deals in the context of FDI).

111. Mining & Infrastructure Collaboration Agreement, *supra* note 95, art. 10.3; Collaboration Agreement Relating to the Development of a Mining Project and an Infrastructure Project in the Democratic Republic of the Congo, Amendment No. 3, art 5 (Apr. 22, 2008) (modifying the Mining & Infrastructure Collaboration Agreement in relevant part) [hereinafter Amendment to the Mining & Infrastructure Collaboration Agreement].

112. *See* Maiza-Larrarte & Claudio-Quiroga, *supra* note 15, at 427–28; Malm, *supra* note 27, at 131–32; *infra* Part III.A.1.

113. *See, e.g.*, Kaplinsky & Morris, *supra* note 5, at 559–64; BRÄUTIGAM, *supra* note 2, at 71–104; Malm, *supra* note 27, at 107–16; Siu, *supra* note 8, at 607–08.

114. Joe Bavier, *UPDATE 2—Congo to Downsize Chinese Deal in Debt Relief Bid*, REUTERS (Aug. 18, 2009), https://www.reuters.com/article/congo-democratic-china/update-2-congo-to-downsize-chinese-deal-in-debt-relief-bid-idUSLI37257520090818.

"VCLT").[115] The text of the Agreement, particularly its dispute settlement provisions, also supports this reading.

Yet the Hong Kong courts—widely respected in commercial law—reached the opposite conclusion, describing the Agreement as between "two sovereign states."[116] In particular, the Hong Kong High Court found that, while China was not a named party to the Agreement, its SOEs were merely an "umbrella" between it and the DRC and accordingly held that principles of public international law governed the Agreement's interpretation.[117]

These conflicting interpretations and characterizations raise unsettled questions. What, exactly, *is* the Sicomines Agreement: A public international law treaty, or a private commercial contract? How do the separate legal frameworks for bilateral aid, FDI, sovereign debt, and commercial trade govern the deeply interlinked inputs and transactional modalities of the Agreement? While the interface between the Sicomines Agreement and existing international economic law is uneasy, legal issues arising under the Agreement may be divided into two analytical categories. The first category, discussed in Section A, encompasses those aspects of the Agreement whose close resemblance to existing practices, or legal separability from other transactional structures, allows governance by existing rules. Section B argues that a second set of the Agreement's transactional elements confound precise definition under existing legal regimes or subvert their underlying logic, posing novel legal issues. This novelty potentially upsets the parties' *ex ante* expectations, distorting the Agreement's risk allocations.

A. *Aspects of Sicomines for Which the Existing Sovereign Finance Framework Is Adequate*

Although the distinctive structure of the Sicomines Agreement presents many interpretive challenges, the existing sovereign finance framework is not altogether ineffective in capturing and governing aspects of this deal. To the extent that certain aspects of the Agreement—such as the assignment of sovereign contingent liabilities to the DRC and the formation of the Sicomines JV—still involve or closely resemble common sovereign finance ar-

115. Mining & Infrastructure Collaboration Agreement, *supra* note 95, art. 4; Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 ("'Treaty' means an international agreement concluded between States in written form and governed by international law.").

116. FG Hemisphere Assocs. LLC v. Democratic Republic of the Congo, 2008 H.C.M.P. 928, ¶ 21, http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=63653&QS=(firm)&TP=JU (C.F.I., Hong Kong, 2008). Although the Sicomines Agreement has itself never been litigated, the issue of its interpretation arose when FG Hemisphere, a U.S.-based vulture fund, acquired a multinational energy company's arbitral award against the DRC. Alleging that Sicomines Agreement-related payments routed through entities in Hong Kong constituted DRC state property, FG Hemisphere brought suit in Hong Kong seeking an *ex parte* injunction against the fund transfers and enforcement of the arbitral award under the New York Convention. *See* Siu, *supra* note 8, at note 185.

117. FG Hemisphere, 2008 H.C.M.P. 928, *supra* note 116.

rangements, existing legal and customary rules provide a clear roadmap to resolving potential issues.

1. The DRC's Contingent Liabilities as Sovereign Debt

Even as the DRC was negotiating debt relief with the IMF, it was also negotiating the Sicomines Agreement—containing sovereign guarantees with the potential to destabilize its fiscal position.[118] These guarantees include article 10.3, which is reasonably construed as an implicit sovereign guarantee of repayment, as it requires the DRC to use further mining concessions or "any other satisfactory means" to repay the infrastructure loan if the Sicomines JV profits are insufficient.[119] They also include article 13.3.4, which makes article 10's guarantee explicit, albeit after a period of 25 years.[120]

International finance rules require that any sovereign debt restructuring ("SDR") participants accurately identify, account for, and incorporate a sovereign debtor's contingent liabilities.[121] As a matter of soft law, the U.N. Conference on Trade and Development's Principles on Responsible Sovereign Lending and Borrowing provide that "debtors should make public disclosure of their financial and economic situation, providing . . . details of any kind of implicit and explicit sovereign guarantees."[122] The European Union's and the IMF's respective regulatory frameworks have promulgated similar, more binding requirements.[123]

These standards allowed the DRC's major international creditors to identify the implicit and explicit sovereign guarantees in the Sicomines Agreement and incorporate them into their SDR conversation. In April 2008, Belgium identified and criticized the DRC's assumption of several billion USD in contingent liabilities pursuant to these provisions as jeopardizing its SDR program.[124] Over the next few months all of the DRC's international creditors united in this consensus and voiced opposition to the Sicomines Agreement's guarantee provisions.[125] This led, in part, to the Agreement's renegotiation, and to the subsequent incorporation of the Agreement's financing provisions into the DRC's ongoing IMF-sponsored

118. Bräutigam, *supra* note 13 at 213.

119. *See supra* note 111 and accompanying text.

120. Amendment to the Mining & Infrastructure Collaboration Agreement, *supra* note 111, art. 13.3.4.

121. Lee Buchheit & Mitu Gulati, *Restructuring a Sovereign Debtor's Contingent Liabilities* 3–4 (Dec. 26, 2012) (unpublished manuscript) (on file with author).

122. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, PRINCIPLES ON PROMOTING RESPONSIBLE SOVEREIGN LENDING AND BORROWING, principle 11, implication 3 (Jan. 10, 2012) (titled "Disclosure and Reporting").

123. Council Directive 2011/85, art. 14.3, 2011 O.J. (L 306) 41 (EU); Buchheit & Gulati, *supra* note 121, at 3–4.

124. *See* Malm, *supra* note 27, at 131.

125. *Id.*

SDR process.[126] To this extent, the existing consensus international rules on disclosure of contingent liabilities performed exactly as their drafters intended: allowing stakeholders to identify potentially destabilizing off-balance sheet liabilities and incorporate them into the SDR process or evaluate whether they should be incurred altogether.[127]

2. The Sicomines JV and Investor-State Arbitration

The Sicomines JV created under the Agreement interfaces neatly with the international investor-state arbitration regime. The Agreement creates effective ICSID jurisdiction over disputes arising out of the Sicomines JV, providing protection for the Chinese investors' property interests under international investment law ("IIL"). The Sicomines JV is subject to ICSID jurisdiction since the Agreement manifests the DRC's consent to arbitration and the Sicomines JV meets ICSID's definition of an "investment" under each of the extant approaches in ICSID case law.[128]

First, the forum-selection clause in article 20 expressly provides for ICSID as the dispute settlement forum, establishing the DRC's consent to arbitrate disputes arising out of the Agreement.[129] Second, the Sicomines JV qualifies as an "investment," under either of the two extant tests in the case law. The *Salini* multi-factor test articulates the traditional approach: A transaction is an investment if it involves (1) a contribution of money or assets (2) incurring risk, (3) occurring over a period of time.[130] *Salini* also includes a fourth requirement—that the transaction contribute to the host state's economy—whose inclusion has divided subsequent tribunals.[131]

The Sicomines JV represents the quintessential investment envisioned by the *Salini* tribunal. First, it is funded by Chinese investors' contribu-

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126. *See infra* Part III.B.1 (discussing these processes and the legal issues that arose during them).

127. Buchheit & Gulati, *supra* note 121, at 3–4 (discussing the purpose of rules on the identification of sovereign contingent liabilities). As Part III.B.1, *infra*, discusses, however, the liabilities' substantive treatment in SDR presents more difficult legal issues.

128. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25(1), Oct. 14, 1966, 575 U.N.T.S. 159, 17 U.S.T.S. 1270. ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.") [hereinafter ICSID Convention]. Note that whether or not the Chinese state is a party to the Agreement is a non-issue for determining ICSID jurisdiction; it is enough that the DRC, as a Contracting State, is a party, and that the investors are *nationals* of China, another Contracting State.

129. Mining & Infrastructure Collaboration Agreement, *supra* note 95, art. 20.2.

130. Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (2003), 6 ICSID Rep. 400 (2004).

131. *See* Electrabel S.A. v. The Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 5.43 (2012) (noting controversy over the fourth *Salini* factor).

tions.[132] Second, both common sense and the Agreement's text—particularly the sovereign guarantee—recognize the risk that the Sicomines JV will not be a commercial success.[133] Third, the Agreement is structured into chronological phases, rather than as a single infusion of cash.[134] Finally, the Agreement would likely also meet the *Salini* tribunal's more stringent articulation of the test, requiring a fourth prong—evidence of the investment's contribution to the host state's economy—given the economic scale of the transaction and its direct contribution to the DRC's physical infrastructure.[135]

The Sicomines JV is also an "investment" under the modern, bilateral investment treaty driven approach laid out in more recent cases such as *Malaysian Historical Salvors*. This approach considers the legal documents granting consent to arbitrate—typically, but not exclusively, BITs—to be the "engine" of ICSID jurisdiction.[136] Consequently, whether a given transaction constitutes an "investment" for ICSID jurisdiction purposes primarily depends on the definition contained in the applicable consent-granting document binding the host state.[137] Although the Agreement does not explicitly define "investment," because it contains a forum-selection clause explicitly granting consent to ICSID arbitration, a tribunal applying the *Malaysian Historical Salvors* approach would likely *ipso facto* recognize the transactions in the Agreement to be "investments" for the purposes of finding jurisdiction.

Because, under either approach, the Agreement qualifies for ICSID dispute resolution, an ICSID tribunal may enforce IIL's enumerated set of investors' rights and protections in the event of a dispute between Sicomines JV parties. Although the Agreement's choice-of-law clause identifies DRC law as applicable to disputes, with international law to apply in the case of ambiguity, the DRC's national property and investor protection statutes explicitly adopt IIL investor protection standards.[138]

Through the incorporation of these IIL investor protection standards, DRC law first affords Sicomines JV investors protections from expropria-

132. *See* Mining & Infrastructure Collaboration Agreement, *supra* note 95, arts. 3–7.

133. *Id.*

134. *See supra* Part II.C.

135. *Id.*

136. Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 73 (Apr. 16, 2009).

137. *See id.*

138. *See* Investment Code (2002) art. 25, Law No. 004/2002 (Democratic Republic of Congo) ("The Democratic Republic of the Congo undertakes to ensure fair and equitable treatment, in accordance with the principles of international law, of investors and investments made in its territory, and to ensure that the exercise of the right thus recognized is neither hindered nor in law, not in fact.") [hereinafter DRC Investment Code].

tion,[139] such that the DRC cannot seize or take title of Sicomines JV, except where such a seizure serves a public purpose, is carried out with legal due process in a non-discriminatory manner, and is accompanied by compensation.[140] In other words, as set out in the DRC's investment laws, IIL affords investors recourse against the DRC if its actions, including through unfavorable regulations or judicial decisions, have the overall effect of depriving the JV investors of the "effective use, control, and benefits of their property interests."[141]

Second, the IIL standards incorporated in DRC law give the DRC a duty of "fair and equitable treatment" to investors.[142] Although the precise contours of this duty are murky, recent tribunals read it to restrain "manifestly arbitrary" decisions[143] and to protect investors' "legitimate investment expectations"[144] with regard to "specific undertakings" made by the host state to "induce" investment.[145] The DRC's tax, customs, and regulatory commitments within the Agreement could be held to form the "specific undertakings" forming investors' "legitimate expectations," such that any material change in their application to Sicomines JV would create a cause of action.[146]

If the DRC violates either of these protections, an ICSID tribunal could follow an established (if complex) set of formulae and factors to determine an aggrieved investor's compensation, depending on the specific IIL violation(s) and the factual findings surrounding the investment at issue.[147]

The harmony between the Sicomines Agreement and the international investor-state dispute settlement regime establishes a straightforward avenue for resolving disputes regarding the DRC's treatment of the Sicomines

139. *See* CONSTITUTION (DRC) (2005), art. 34 ("No one may be deprived of his/her property except for reasons of public utility and in return for prior payment of just compensation under the conditions established by law. A person's assets may only be seized by virtue of a decision issued by a competent judicial authority."); DRC Investment Code, *supra* note 138, art. 26 ("An investment cannot be, directly or indirectly, in whole or in part, nationalized or expropriated by a new law, and/or a decision of a local authority having the same effect . . .").

140. *See* Steven Ratner, *Compensation for Expropriations in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction*, 111 AM. J. INT'L L. 7 (2017) (noting convergence within treaty law towards these four criteria).

141. Starrett Housing Corp. v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 112 (1987); *see also* DRC Investment Code, *supra* note 138, art. 26.

142. DRC Investment Code, *supra* note 138, art. 25.

143. Phillip Morris Brands SÀRL v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 5 (2016).

144. Glamis Gold, Ltd. v. United States of America, ICSID, Award, ¶ 621 (June 8, 2009).

145. *See id.* ¶ 622.

146. *Id.*

147. *See generally* Ratner, *supra* note 140 (describing various formulae used to reach a decision).

JV. This is not, however, to say that resolution of any such dispute would be predictable, convenient, or prompt. In practice, investor-state arbitrations tend to involve significant litigation and varying, sometimes even erratic, readings of legal doctrine.[148] Yet those aspects are longstanding features of the IIL regime itself,[149] rather than products of applying that regime to the Sicomines Agreement.

* * *

In sum, the current network of legal and customary rules surrounding sovereign finance is not entirely ill-suited to tackle some aspects of the Sicomines Agreement. In fact, these rules have allowed international actors to conceptualize the DRC's sovereign-guaranteed debt and provide a clear and consistent roadmap to resolve most disputes that could arise out of the Sicomines JV. In these discrete situations that closely resemble established patterns of sovereign finance, the existing international legal framework is sufficient.

B. *Aspects of Sicomines That Subvert the Existing Sovereign Finance Framework*

More difficult issues arise where the Sicomines Agreement bundles familiar transactional elements in unprecedented ways. The Agreement created a *sui generis* contractual structure that combined a $3 billion USD infrastructure development facility with a public-private resource extraction joint venture, conditioning repayment of the former on the trade revenue of the latter. Additionally, it collateralized the DRC's mineral reserves to secure the development finance loan. This integration of inputs and transactional modalities—and the Chinese political-economic structures that enabled them—push the contours of existing international economic law in two main areas: (1) incumbent sovereign debt contracting and restructuring frameworks, and (2) the doctrinal divide between international treaty and contract.

1. The IMF's Debt Restructuring Modifications to Accommodate the DRC's Sovereign Liabilities Under the Agreement

The Sicomines Agreement has challenged incumbent SDR rules and practices in several novel ways. Most significantly, the Sicomines Agreement was a *prima facie* violation of the DRC's covenants against subse-

148. *See* Julian Arato et al., Concept Paper on Issues of ISDS Reform: Working Group No. 3: Lack of Consistency and Coherence in the Interpretation of Legal Issues 1–2 (Jan. 30, 2019) (unpublished manuscript) (on file with author).

149. *See* Jan Paulsson, *Avoiding Unintended Consequences*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 241 (2008).

quent incurrence of non-concessional debt.[150] Only a series of compromises among the DRC, the Chinese parties, and the DRC's international creditors permitted the DRC's continued participation in the IMF's debt-relief programs.[151] These compromises fundamentally changed the landscape of IMF-sponsored debt restructuring, raising the possibility of distortive effects over the course of the DRC's own ongoing SDR process.

While the identification and disclosure of sovereign contingent liabilities is relatively straightforward,[152] their substantive treatment in the SDR context is more complex and often diverges from ordinary indebtedness.[153] Indeed, sovereign guarantees raise difficult issues in a wide range of sovereign restructurings.[154] What is novel about the Sicomines Agreement, however, is the *packaging* of the DRC's sovereign guarantees to fit within the covenants attached to the DRC's participation in the IMF's debt restructuring assistance programs.

This structure reflected a series of compromises among the DRC, the Chinese parties, and the DRC's international creditors that stretched the contours of extant sovereign debt rules. As mentioned above, the DRC's creditors mounted pressure against the Agreement in the latter half of 2008 and into 2009 for two interrelated reasons.[155] First, the DRC's guarantee of Sicomines JV debt seriously jeopardized the DRC's debt sustainability; and second, it violated the IMF's *de jure* prohibitions on further debt incurrence.[156] Western political pressure culminated in the IMF's then-Managing Director Dominique Strauss-Kahn's May 2009 visit to Kinshasa, the DRC's capital, to plead for reconciliation between the DRC's participation in IMF-sponsored SDR and the Sicomines deal.[157] Two weeks later, DRC officials and the Chinese parties re-opened negotiations, amending the Agreement to remove the DRC's sovereign guarantee for the mining development loan—but not for the $3 billion USD infrastructure development facility.[158] Following the amendment, the IMF recalculated the concessionality level of the revised transaction and found that the Agreement fell within the relevant legal threshold for an exception to its debt incurrence prohibition.[159]

While political ends motivated the IMF and its sponsors to make that recalculation, the bundled structure of Sicomines Agreement enabled them

150. *See* Bräutigam, *supra* note 13, at 214.

151. *Id. See generally* Malm, *supra* note 27.

152. *See supra* Part II.A.1.

153. *See* Buchheit & Gulati, *supra* note 121, at 5–7.

154. *Id.* at 1–2.

155. *See supra* Part III.A.1.

156. *See* Bräutigam, *supra* note 13, at 213–15.

157. *See* Malm, *supra* note 27, at 131–33.

158. *Id.* at 133; *see also* Amendment to the Mining & Infrastructure Collaboration Agreement, *supra* note 111, art. 6.

159. Malm, *supra* note 27, at 136; *see also* Bräutigam, *supra* note 13, at 213–15 (discussing the IMF's definition and calculation of "concessionality").

to the manipulate extant legal definitions to do so. The IMF relied on two crucial assumptions in reading the Agreement as consistent with the DRC's debt-relief covenants. First, the IMF read article 13.3.4's explicit sovereign guarantee of the Sicomines JV revenues, triggering after 25 years, as an ordinary loan with a 25-year grace period.[160] In doing so, the IMF construed a substantial contingent liability as an ordinary loan but under "terms so generous that they look like aid."[161]

Second, the IMF read the $350 million USD *pas de porte* as indissociable from the loan component, calculating it as a grant within the infrastructure package.[162] As Debra Bräutigam points out, this diverges from market custom; the *pas de porte* was transferred directly to the DRC's treasury as a signing bonus for the mining component of the Agreement and was not directly related to the Agreement's infrastructure development loan.[163] Such provisions are "a common feature of natural resource extraction projects, but not public works infrastructure projects."[164] The Sicomines Agreement's structure, however, enabled the IMF to make such a leap: Because the mining FDI and infrastructure loan components were integrated into a single agreement, the customary *pas de porte* on the resource extraction side could factor into an analysis of the concessionality of the infrastructure development program.

By bundling transaction modes, the Agreement in its totality presented an awkward, uneasy fit for the IMF's rules on further debt incurrence; its transactional structure permitted the IMF, under political pressure, to analyze it in ways that pushed the contours of those rules. The re-shaping of IMF norms allowed the Agreement to coincide with IMF financial facilities, but it did more: It changed aspects of the international, IMF-sponsored SDR process as a whole. Following its review of the Agreement, the IMF changed the subsequent debt incurrence rules for its debt-relief programs to allow participants to contract non-concessional debt on a case-by-case basis.[165]

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160. IMF, *Democratic Republic of the Congo: 2009 Article IV Consultation—Staff Report* 76 (IMF Country Report No. 10/88, 2010) ("The present-value calculations underlying the DSA take into account that the public guarantee can only be invoked after 25 years. . . [W]e assume the worst outcome—zero operating income over the entire 25-year period."); Bräutigam, *supra* note 13, at 214 (arguing that the IMF's "extraordinary" methodological assumptions are tantamount to construing the sovereign guarantee as an ordinary loan in deferment).

161. Bräutigam, *supra* note 13, at 213–15.

162. *Id.*

163. *Id.*

164. *Id.*

165. IMF, *Public Debt Limits in IMF-Supported Programs* (July 2015), https://www.imf.org/external/np/spr/2015/conc/index.htm (noting that the IMF's 2009 reforms included the possibility of "case-specific" incurrence of non-concessional debt, and the "integrated treatment of concessional and non-concessional external debt").

By emphasizing flexibility to permit a potentially beneficial arrangement for the DRC, however, the IMF traded off certainty regarding several legal questions that might arise under the Agreement down the road. Because the IMF construed the DRC's article 13.3.4 sovereign guarantee not as a contingent liability, but as an ordinary loan in deferment, there is substantial uncertainty as to how all of the DRC's contingent liabilities would be brought into an SDR settlement. Would they receive special, contingent liability treatment, or would they be modified on a strictly proportional basis as an ordinary loan?[166] The answer to this question is especially important since the invocation of this guarantee and its potential impact on the DRC's debt sustainability is heavily conditioned on volatile global commodities prices.[167]

Additionally, the Agreement's mineral security provisions potentially upset the customary practice of IMF loan participants granting only the IMF priority (in debt distress scenarios, for example) and treating all other sovereign debt as *pari passu*.[168] As a general rule, secured creditors receive preference over unsecured creditors,[169] but how this priority rule interfaces with the IMF's normative supremacy over other creditors remains a novel issue for sovereign debt law and practice.[170] The uncertainty the Agreement generates with respect to the seniority structure of the DRC's sovereign debt could thus disrupt any future SDR by the DRC, creating hidden risks for the DRC and other stakeholders in the event of the DRC's default.[171]

166. SDR often treats sovereign contingent liabilities in unique ways, since the nature of these commitments fundamentally differs from ordinary debt. *See* Buchheit & Gulati, *supra* note 121, at 1–7.

167. *See* Siu, *supra* note 8, at 633 ("[T]he reliance of loan terms on the fluctuations of commodity prices presents fundamental uncertainties about the retirement of financing.").

168. On the implicit and shifting seniority structure of sovereign bonds, see Matthias Schlegl et al., *The Seniority Structure of Sovereign Debt* (Federal Reserve Bank of Minneapolis, Working Paper No. 759, 2019).

169. This principle also appears to apply where sovereign and sub-sovereign debt are treated as secured debt. Nigel A. Chalk, *The Potential Role for Securitizing Public Sector Revenue Flows* 1 (IMF Working Paper No. 02/106, 2002) ("Secured financing" by public sector entities "subordinate[s] existing and future creditors").

170. *See* Schlegl, *supra* note 168; BRÄUTIGAM, *supra* note 2, at 147. Indeed, few, if any formal mechanisms for establishing seniority in sovereign debt transactions currently exist. *See, e.g.*, Satyajit Chatterjee & Burcu Eyigungor, *A Seniority Arrangement for Sovereign Debt*, 105 AM. ECON. REV. 3740 (2015); Anil Ari et al., *Debt Seniority and Sovereign Debt Crises* (IMF Working Paper No. 18/104, 2018).

171. BRÄUTIGAM, *supra* note 2, at 147 ("If a significant share of revenues is held outside the budget and used to repay the very large Chinese debt first, this could shake the foundations of the system of privileged creditors.").

2. The Hybrid Nature of the Sicomines Agreement: Is It Governed by Private or Public International Law?

The Sicomines Agreement's hybridity is not limited merely to its input and transaction types, but also encompasses its potential interplay of private and public international law. The Agreement is facially a contract, not a treaty.[172] The VCLT—considered the authoritative public international law text on treaty interpretation—establishes the bright-line rule that only states may enter into treaties.[173] Without a sovereign state party on the Chinese side of the transaction, the Agreement presumptively identifies as a private, commercial agreement.[174] Yet recent litigation surrounding the Agreement and applicable comparative jurisprudence have raised provocative reasons for reading the Agreement as sounding in public international law. Because the rules around contract and treaty interpretation can differ widely, the current international law regime may inadequately capture the hybrid sovereign-commercial dynamics at play in the Sicomines Agreement.

First, in the *FG Hemisphere* case, introduced above, the Hong Kong High Court ruled that the Agreement is a "cooperative venture between two sovereign states," rather than a commercial contract.[175] For Judge Reyes, the *nature* and scope of the Agreement's commitments tipped it from a purely commercial contract to an agreement sounding in public international law: The transaction bore the "hallmarks of the exercise by states of sovereign authority in the interests of their citizens."[176] The presence of corporate entities on the Chinese side did not "detract" from this finding, since their purpose, as state instrumentalities, was merely to set up a shield or "umbrella" between China and the DRC to evade state responsibility.[177] As the Agreement was functionally between two states, the Court held, public international law principles applied.[178]

Relevant comparative jurisprudence from the World Trade Organization ("WTO") bolsters the Hong Kong Court's characterization of the DRC's counterparty as the Chinese state, rather than merely the consortium of Chinese entities who served as signatories. The WTO considered a similar question in the context of subsidies. WTO law permits countermeasures

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172. *Supra* text accompanying note 115.

173. *Id.*

174. *Id.*

175. FG Hemisphere, 2008 H.C.M.P. 928, *supra* note 116, ¶ 86.

176. *Id.* ¶ 92.

177. *Id.* ¶ 86; *see also* Siu, *supra* note 8, at 641. The Court's finding bears some resemblance to a decision to "pierce the corporate veil" in corporate law doctrine, which recognizes that the owner of an otherwise limited liability corporation is, in fact, responsible for that corporation's liabilities in certain circumstances. *See, e.g.*, Lowendahl v. Balt. & Ohio R.R. Co., 247 A.D. 144 (NY App. Div. 1936).

178. *See generally* FG Hemisphere, 2008 H.C.M.P. 928, *supra* note 116.

only against *state* subsidies.[179] As the WTO Appellate Body clarified in a consolidated Chinese action against the United States, the test for whether a subsidy could be attributed to the state, when it was made by an SOE instead, can be satisfied in two independent ways: (1) if a subsidy-granting SOE was clothed in the "authority to exercise government functions;" or (2) if the state exercised *de facto* control over the subsidy-granting SOE.[180] Note that, under prong two, *de jure* ownership over an entity is not sufficient. Rather, the state must exercise "effective" control, for instance by directly controlling appointments to managerial positions.[181]

The WTO Appellate Body's analytical framework for assessing when to impute an SOE's actions to its state owner presents a striking parallel to Judge Reyes's findings in *FG Hemisphere*. SASAC both owns and actively manages two of the Chinese parties to the Sicomines Agreement; in fact, because Sinohydro and China Railway operate within "critical sectors" of the Chinese economy, this active management is likely to be especially tight.[182] Furthermore, because the CCP exercises wide-ranging influence over high-level personnel choices at all three of the Chinese parties, these corporate entities also likely meet the *de facto* control test put forward by the Appellate Body.[183] Thus, under this analytical framework, too, a fact-finder could impute the actions of the Chinese parties to the Chinese state.

Ultimately, the emerging international economic jurisprudence on China's cross-border trade and investment suggests that the existing international legal framework—particularly the divide between private and public international law—cannot adequately capture the hybrid public-private dynamics at apply in the Sicomines Agreement.[184] The existing black letter law on international treaties, as articulated by the VCLT, unambiguously characterizes the Agreement as a private commercial contract, rather than a public international law treaty. Yet China exerts such an unparalleled degree of influence over the decisions of certain Chinese corporate entities that the fact-finders in *FG Hemisphere* and *US—AD & CVD* imputed those entities' actions to the Chinese state. Without a clear and principled methodology for

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179. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1, Subsidies and Countervailing Measures Agreement art 1.1, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994) ("[A] subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a Member . . . .").

180. Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties (China)*, ¶ 318, WTO Doc. WT/DS379/AB/R (adopted Mar. 2011) [hereinafter *US—AD & CVD*].

181. *Id.*

182. *See supra* notes 3 and 90 and accompanying text.

183. *See US—AD & CVD*, *supra* note 180, ¶ 611(a)(ii) (imputing actions by Chinese state-owned commercial banks to the Chinese state).

184. *See* Siu, *supra* note 8, at 652 ("[T]he frameworks of state responsibility and of private actors seem to leave the conduct of hybrid actors in one of the 'blind spots' of investment law.").

articulating the legal implications of this hybridity, *FG Hemisphere* appears to create a precedent for applying doctrinal elements from public international law in interpreting the Agreement, rather than solely from private contract law. This creates substantial interpretive uncertainty, since treaty and contract law differ dramatically on textual interpretation and second-order rules regarding validity, modification, and other defenses.[185] This interpretive uncertainty raises the unpredictability of dispute settlement and potentially disturbs the parties' *ex ante* risk allocation.

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The constituent, decentralized web of legal and customary rules that composes the existing framework of sovereign finance can adequately handle some, but not all, issues arising out of the Sicomines Agreement. International rules surrounding public debt efficiently addressed the disclosure of the DRC's sovereign-guaranteed debt, and investor-state arbitration appears able to resolve disputes arising out of the Sicomines JV. Yet the Agreement's transactional structure interfaces awkwardly with the IMF's SDR regime and elides straightforward characterization under the doctrinal divide between treaty and contract. As the Sicomines Agreement's mineral production stages come into effect,[186] how these points of tension affect the deal's risk-reward allocation and the broader framework of sovereign finance remain to be seen.

IV. The Sicomines Agreement and the Future of Sovereign Finance

While the Sicomines Agreement was unprecedented, it is no longer unique. Rather, RFI deals are an increasing presence in China's economic relations with developing countries. In light of the Sicomines Agreement's uneasy interface with the existing legal framework of sovereign finance, it is worth considering what systemic effects, if any, such deals might have on that legal framework and their normative implications. I propose two axes along which to think about this impact: (A) the extent to which international law, broadly defined, binds states acting *domestically*; and (B) the extent to which law mediates economic relationships *transnationally*.

A. *Sovereign Finance and the "Resource Curse": Implications for Financial Interventions in Domestic Policy*

One of the central difficulties to the DRC's economic development was insufficient infrastructure financing—its inability to find investors who were willing to assume the requisite levels of political and economic risk to invest

185. *Id.* at 641–43.

186. *See generally* Landry, *supra* note 96.

in DRC infrastructure at scale.[187] That the Sicomines Agreement unlocked $3 billion USD in infrastructure development capital represents an enormous achievement in this regard, and forms part of a trend of drastically expanding access to capital for states previously locked out of international markets. Yet the role of naked access to capital in sustainable growth has been contested, particularly in light of the "resource curse" dynamics present in many resource-rich yet underdeveloped countries.[188] Both IFIs, through their financing and aid programs, and scholars have taken the position that sources of sovereign finance should attach to sovereign commitments on domestic policy, in part to counter governance problems engendered by the resource curse. Chinese RFI transactions, should they continue to proliferate, have the potential to intervene in this field because they tend neither to impose governance covenants, nor to condition economic terms upon domestic policies.

RFI transactions, like the Sicomines Agreement, reinforce and extend the recent trend towards expanded access to capital among developing countries. In international capital markets, for example, lower prevailing interest rates—often times converging towards zero—in most of the developed world since the Financial Crisis have driven return-seeking investors into riskier but higher-yielding assets, including emerging market countries' sovereign debt.[189] Over the past decade or more, these patterns have generated unprecedented amounts of liquidity for poor and middle-income countries.[190] This sovereign debt expansion did not reach all countries, however; sovereigns with fiscal positions and governance records deemed by markets to be especially poor remained largely shut out of access to capital.[191] As Part II demonstrated, Chinese RFI transactions like the Sicomines Agreement, by bundling aspects of existing sovereign finance modes in novel ways, overcome these obstacles to deliver substantial sums of development finance capital to such states.[192] In this respect, the DRC, by entering the Sicomines Agreement, can be seen as keeping pace with the rest of the developing world in its access to sovereign finance, reinforcing a broader trend.

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187. *See* discussion *supra* Part II.A.

188. *See* Sperduto, *supra* note 11, at 199–205; *see also* Antonio Cabrales & Esther Hauk, *The Quality of Political Institutions and the Curse of Natural Resources*, 121 ECON. J. 58, 61 (2011); Hans Gersbach, *Competition of Politicians for Incentive Contracts and Elections*, 121 PUB. CHOICE 157, 159 (2004).

189. *See* Itai Agur et al., *On International Integration of Emerging Sovereign Bond Markets* 3–4 (IMF, Working Paper 18/18, 2018); Gene Frieda, *Sovereign Debt Markets*, *in* SOVEREIGN DEBT MANAGEMENT 293 (Rosa Lastra & Lee Buchheit eds., 2014); Sperduto, *supra* note 11, at 193 ("Rich countries' persistently low postcrisis interest rates are widely acknowledged as the primary driver of the growing supply of private credit to sovereigns in emerging and frontier markets.").

190. *Id*.

191. *See supra* Part II.A.1.

192. *See supra* Part II.

Whether improved access to capital can deliver sustainable growth for resource-rich developing countries, however, remains an unsettled question. As Luke Sperduto argues, while the interests of creditors, governments, and citizens in natural resource economies align in their desire for economic growth, there are divergences in who benefits from the nature and timing of that economic growth.[193] The "resource curse" engenders an agency problem in sovereign finance, incentivizing governments to misspend to the detriment of their citizens.[194] This dynamic is captured in three main features:

> (1) incumbent governments face a political imperative to credibly commit to expenditures that *only* benefit constituents *if* the government stays in power, (2) this imperative tends to produce a bloated public sector and underinvestment in education and (3) a bloated public sector and a shortage of human capital are detrimental to both the stability and rate of long-term economic growth.[195]

In other words, merely supplying capital to developing countries' governments often will not produce the kind of sustainable, broad-based economic growth their stakeholders desire.[196] Consequently, the IMF—the institution most deeply challenged by the Agreement—typically imposes not only covenants against further debt incurrence but also a range of macroeconomic and governance policy prescriptions ostensibly aimed at producing sustainable growth in poor, primary resource producing countries.[197] Scholarly proposals have alternately proposed contractual solutions, for example indexing sovereign bond coupon payments to measures of human capital, to create countervailing incentives to the dynamics engendered by the resource curse.[198]

It is thus striking that while many current and proposed forms of sovereign finance, particularly sovereign debt,[199] seek to discipline the agency

193. Sperduto, *supra* note 11, at 199–201.

194. *Id.* at 199–205.

195. *Id.* at 202.

196. *See id*.

197. *See generally* Alexander E Kentikelenis et al., *IMF Conditionality and Development Policy Space, 1985–2014*, 23 REV. INT'L POL. ECON. 543 (2016) (discussing the purpose of IMF conditionality programs and providing an empirical overview of their content between 1985 and 2014); Axel Dreher, *IMF Conditionality: Theory and Evidence*, 141 PUB. CHOICE 233 (2009) (canvassing theoretical arguments for and against the IMF's use of conditions).

198. *See, e.g.*, Sperduto, *supra* note 11, at 219–29 (proposing "Human Development Bonds" to create contractual incentives to counteract the agency problems created by the resource curse).

199. The concept of using law or legal governance to discipline agency problems with respect to developing countries, however, is not solely limited to sovereign debt. *See* Alan Sykes, *The Economic Structure of International Investment Agreements*, 113 AM. J. INT'L L. 482 (2019) (arguing that IIL can be conceptualized, in part, as reducing agency costs with respect to FDI).

problems engendered by the resource curse, the Sicomines Agreement contains no such normative component.[200] The DRC is free to choose a list of infrastructure projects into which the Chinese contractors tender, and the Agreement does not otherwise impose conditions on DRC domestic policy.[201] These characteristics are by design: IMF conditionalities, criticized as sovereignty-intrusive and ineffective,[202] for example, have long grated leaders of developing countries.[203] The lack of such conditions in Chinese RFI deals represents an attraction, rather than a drawback, for leaders of host states.[204] The Sicomines Agreement, when read in light of the resource curse literature, suggests that stakeholders and policymakers should consider whether the unique access to development finance that RFI transactions represent justifies trading off mechanisms—whether binding or incentive-based—that address the resource curse and purport to promote sustainable growth.[205]

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200. *See* BRÄUTIGAM, *supra* note 2, at 148–49.

201. *See* Siu, *supra* note 8, at 615–26.

202. *See, e.g.*, Thomas Stubbs et al., *The Impact of IMF Conditionality on Government Health Expenditure: A Cross-National Analysis of 16 West African Nations*, 174 SOC. SCI. & MED. 220 (2017) (finding that IMF conditionality programs reduce per capita health spending by reducing fiscal space for investment in health); Timon Forster et al., *How Structural Adjustment Programs Affect Inequality: A Disaggregated Analysis of IMF Conditionality, 1980–2014*, 80 SOC. SCI. RES. 83 (2019) (finding that IMF conditionality programs have contributed to inequality in borrowing countries).

203. *See* Kentikelenis et al., *supra* note 197, at 549 (noting criticisms of IMF conditionality programs as challenges to national sovereignty and the domestic policy space).

204. For example, John Mahama, then Vice-President of one of Ghana's two major political parties, compared China to IFIs: "China has emerged as a significant source of credit to Africa[.] [T]raditionally our partners have been the World Bank and IMF. . . . The process of accessing World Bank and IMF credit has been unfortunately quite tiresome and comes with a lot of strings . . . we find it easier to go to the BRIC countries." BLOOMBERG, *Ghana Signs $1 Billion Loan with China for Natural Gas Project* (Apr. 17, 2012), https://www.bloomberg.com/news/articles/2012-04-16/ghana-signs-1-billion-loan-with-china-for-natural-gas-project. Some scholars have pointed out that creditors' conditions on African states' domestic policy raise some parallels to the history of imperialism, which in turn has influenced contemporary policy discourse. *See, e.g.*, Uche Ewelukwa, *Trade, Empires, and Subjects: China-Africa Trade Relations—A New Fair Trade Arrangement or the Third Scramble for Africa?*, 41 VAND. J. TRANSNAT'L L. 505 (2008).

205. This note does not assert a conclusion either way, but rather leaves the matter open for further investigation. Notably, some studies of recipients of Chinese development finance, including RFI deals, already evidence the dynamics Sperduto, Gersbach, and others predict with respect to the resource curse. *See, e.g.*, Mohan & Tan-Mullins, *supra* note 2, at 1368 ("These international deals are secured at the political elite level and so bypass established forms of national governance and accountability in the recipient countries, while the turnkey construction projects remain locally enclaved. The cases also show that wider developmental benefits are limited, with 'ordinary' citizens—especially those in the rural areas—gaining relatively little from these major energy projects and the benefits accruing to urban-based elites.").

B. *Sovereign Finance and Global Governance: The Future of the Rules-Based Framework?*

Not only does the Sicomines Agreement imply an unorthodox perspective on the extent to which sovereign finance frameworks should constrain a state's domestic policy choices, but it also challenges incumbent transnational economic regimes—*i.e.* the rules-based regimes that mediate cross-border economic activity. First, the Agreement amplifies emerging interactions between FDI and the incumbent SDR regime. Second, the Agreement carries the potential to challenge the primacy of multilateral institutions.

1. Regime Overlap and Interplay

The Sicomines Agreement creates novel intersections between the various pathways for sovereign finance and their legal regimes, traditionally thought to be separate. A prominent example is the emerging intersection between investor-state arbitration and SDR. Existing ICSID case law has suggested that actions taken by a sovereign in SDR may impact investors' rights under IIL.[206] Because sovereign debt can constitute an "investment" for the purposes of IIL, a sovereign's restructuring strategies could violate bondholders' rights under IIL.[207] As neither regime explicitly provides for clear rules about overlap and interplay,[208] commentators have been divided about the desirability of actions taken under one regime being legally reviewable under the other.[209]

The Sicomines Agreement amplifies these uncertainties, since it creates a novel collision between the two regimes: Its provision for FDI, packaged with a *de facto* sovereign-guaranteed $3 billion USD loan, destabilized the DRC's participation in ongoing IMF-sponsored SDR by further burdening its balance sheet, in apparent contravention of the DRC's IMF covenants.[210] The DRC's inbound FDI, in the form of the Sicomines JV, thus potentially affects its restructuring process, since whether the DRC actually incurs sovereign liability for the infrastructure loan will depend almost entirely on the JV's trade revenue.[211] If the use of such complex package-finance deals continues to grow, stakeholders and policymakers will need to engage with ad-

206. *See* Rachel D. Thrasher & Kevin Gallagher, *Mission Creep: The Emerging Role of International Investment Agreements in Sovereign Debt Restructuring*, 6 J. GLOBALIZATION & DEV. 257, 266 (2015); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 715 (2007); Norton, *supra* note 14 at 292.

207. *Id.* at 747.

208. Waibel, *supra* note 206, at 717 ("Current international investment law has few rules to resolve such [jurisdictional] conflicts between the two regimes.").

209. *Compare* Thrasher & Gallagher, *supra* note 206, *with* Norton, *supra* note 14.

210. *See supra* Part III.B.2.

211. *Supra* text accompanying note 182.

ministrable, predictable, and distributively just approaches to dealing with these complex, liminal legal spaces.[212]

2. Multilateral Governance

Agreements like the Sicomines challenge the primacy of international financial institutions, especially the IMF, in ways similar to how China's cross-border trade practices challenge the sustainability of the WTO.[213] The Agreement's provision for effectively "secured" sovereign debt challenges the IMF's implicit seniority within sovereign debt transacting and restructuring; more broadly, the IMF's accommodation of the Agreement in its SDR programs has undermined its normative, rule-setting primacy.[214] Yet while "China, Inc.'s" challenge to the WTO could create a real loss for multilateral governance,[215] the systemic impacts of China's bundled approach to RFI are likely to be more nuanced.

The difference between WTO law and international finance rules explains why the Sicomines Agreement is likely to have a more attenuated impact. WTO law is hard law in the sense that WTO rules are promulgated by treaty and are enforceable by the WTO's dispute settlement mechanism.[216] By contrast, international finance—including the frameworks that govern sovereign finance (but excluding investor-state arbitration)—remain largely soft law guidance: influential, but unenforceable and more easily modified over time. Its institutions are similarly less centralized.[217] This fundamental difference represents what some argue are careful and rationally chosen balances between hard (WTO) and soft (international finance) law, with differential balances between binding *ex ante* legal rules and malleability over time. As Chris Brummer explains, the differences derive in part from how stable the consensus around normative rules is, and how dynamic the underlying economics in each field are.[218]

Viewed from this perspective, China's approach represents less of an *existential* challenge to international financial governance than to trade law because international financial rules are more flexible, and its institutions more decentralized, by design. Although the Agreement's unique transactional structure has challenged the *status quo* within international finance through its subversion of IMF norms and procedures, the nature and logic of

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212. *See* Thrasher & Gallagher, *supra* note 206, at 276–82. *But see* Norton, *supra* note 14, at 291 (arguing that regime overlap may prove to be a "positive" development).

213. *See* Wu, *supra* note 1, at 314–22.

214. *See supra* Part III.B.1.

215. *See* Wu, *supra* note 1, at 314–22.

216. *See* Brummer, *supra* note 17, at 626.

217. *See generally* Wouters & Odermatt, *supra* note 21.

218. Brummer, *supra* note 17 at 628–41.

international finance rules accommodate such evolutive changes.[219] In this respect, for example, the revision of IMF HIPC subsequent debt rules during the negotiation of the Sicomines Agreement represents a feature, rather than an aberration, of the system.

To the extent the dynamics of RFI transactions disrupt *status quo* normative consensuses, however, their emergence may work against efforts to make certain international finance rules "harder" like the WTO regime—more enforceable, institutionalized, and global. The Agreement's *ad hoc* interface with SDR, for instance, represents a trend away from the kind of uniform, institutionalized structures that proposals for a global SDR court system represent.[220]

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The Sicomines Agreement is an innovative, even unprecedented transactional structure. As such, it and future RFI deals of its kind carry the potential to disrupt the operation of extant rules in two dimensions: vertically, *i.e.* the scope of sovereign finance legal frameworks' interventions in a host state's domestic policy decisions, particularly in the context of the resource curse; and horizontally, *i.e.* within global or transnational financial governance. While the Sicomines Agreement could push and stretch existing international finance norms along both axes, it likely does not represent the kind of systemic, existential challenge to existing frameworks that China's trade actions do to WTO law.

V. Conclusion

Resource-rich countries in sub-Saharan Africa face real dilemmas cultivating their resource wealth. Historical factors have often left them without adequate sources of funding for state-led infrastructure development. Through RFI financing deals, such as the Sicomines Agreement, Chinese parties have attempted to fill this funding gap. They have lent vast sums to host states to develop infrastructure at those states' discretion, conditioning

219. *Cf. id*. (explaining the choices and perspectives underlying the institutional design of international financial regulation). The international financial system has endured substantial changes over time, such as the 1973 "collapse" of the Bretton Woods system of fixed currency exchange rates. *See, e.g.*, Michael D. Bordo, *The Operation and Demise of the Bretton Woods System: 1958 to 1971*, at 21–26 (Nat'l Bureau Econ. Res. Working Paper No. 23189, 2017); Catherine R. Schenk, The Decline of Sterling: Managing the Retreat of an International Currency, 1945–1992, at 315–95 (2010) (providing a detailed historical account of this episode, focusing on the role of the pound sterling).

220. *See, e.g.*, Anne O. Krueger, A New Approach to Sovereign Debt Restructuring (2002); Jonathan Sedlak, *Sovereign Debt Restructuring: Statutory Reform or Contractual Solution*, 152 U. Pa. L. Rev. 1483 (2004); Charles W. Mooney Jr., *A Framework for a Formal Sovereign Debt Restructuring Mechanism: The Kiss Principle (Keep It Simple, Stupid) and Other Guiding Principles*, 37 Mich. J. Int'l L. 57 (2015).

loan repayment directly on mineral extraction revenue and soliciting sovereign guarantees and other wide-ranging concessions.

RFI financing deals like the Sicomines Agreement integrate existing sovereign finance transactional pathways in innovative but also subversive ways. The bundling of various financing and development inputs expands the availability of capital and enlarges the scope of potential foreign-funded infrastructure development, but it also raises significant economic and legal ambiguities that may distort risk allocations. Definitional uncertainties surrounding sovereign liabilities like those undertaken by the DRC undermine the security of lenders' fiscal positions, particularly in the event of a future restructuring. More broadly, the Sicomines Agreement evades easy categorization as a treaty or contract, introducing doctrinal uncertainty into its interpretation.

The Sicomines Agreement's varied and awkward points of contact with incumbent legal regimes surrounding sovereign finance thus represent a compelling case study for considering the systemic effects of bundled international finance pathways in RFI transactions generally. Rather than judge or predict such effects, however, this note proposes two axes along which future scholars and policymakers might think holistically about RFI transactions: legal frameworks' ability (whether regulatory or transactional) to shape or curtail host states' domestic policy; and international economic law as transnational governance. Underlying the analysis throughout this note is an intuition of the significance of transactional structure and institutional process for RFI investment: They most strongly determine actual material outcomes for African host states and the stakes for international legal regimes more broadly, and it is here that stakeholders and policymakers should focus.