TOWARDS A RULE-BASED BELT AND ROAD INITIATIVE — NECESSITY AND DIRECTIONS

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Abstract: At a time of rising protectionism and increasing undermining of the World Trade Organization (WTO), the international community has welcomed the China-led Belt and Road Initiative (B&R) as an admirable initiative to strengthen economic globalisation. The B&R, a new platform for economic cooperation, promises world-wide economic cooperation, in particular trade liberalisation and sharing of benefits of globalisation. This article argues that the United States’ repudiation of international obligations and withdrawal from some international organisations will severely harm the basic principles of international law, multilateralism and the framework of global governance. In this backdrop, it is argued that the B&R should proceed on a bottom-up, rule-based governance, adhering faithfully to the essential principles of international law. These are important not only in the context of the B&R but also in general, to advance multilateralism and reap the benefits of economic globalisation.

Keywords: belt and road (B&R); silk road; rule of law; rule-based governance; economic globalisation; trade war.

I. Introduction

The recent US trade wars, especially with China, has attracted much attention. Despite the common knowledge that trade wars are detrimental not only to national economies but also the world economy, there is no end in sight of such damaging rivalries. At the same time, the Belt and Road Initiative (B&R) proposed by China continues to receive support all-round.¹ By the end of 2017, 86 countries and

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¹ The Belt and Road Initiative refers to the Silk Road Economic Belt which focuses on bringing together China, Central Asia, Russia and Europe (the Baltic); linking China with the Persian Gulf and the Mediterranean Sea through Central Asia and the Indian Ocean and the 21st Century Maritime Silk Road which is designed to go from China’s coast to Europe through the South China Sea and the Indian Ocean in one route, and from China’s coast through the South China Sea to the South Pacific in the other. The Silk Road Economic Belt was first suggested by President Xi Jinping in a speech delivered at Nazarbayev University in September 2013 during his visit to Kazakhstan. Then in October 2013, Xi proposed building a 21st Century Maritime Silk Road in his speech at the Indonesian parliament. Also, at Xi’s initiation, the Asian Infrastructure Investment Bank (AIIB) was established to finance infrastructure construction and
international organisations had signed agreements relating to the B&R. The United Nations, at its 71st session held in 2016 with the participation of 193 countries, welcomed and urged “further efforts to strengthen the process of regional economic cooperation, including measures to facilitate regional connectivity, trade and transit, including through regional development initiatives such as the Silk Road Economic Belt and the 21st-Century Maritime Silk Road (the Belt and Road) Initiative.”

In the following year, the UN Security Council adopted a resolution expressing a similar sentiment.

Against the background of the US initiated trade war, in what direction should the B&R move? The fact that the Trump administration pursues unilateralism and protectionism and at the same time tries to conclude new agreements with its trading partners illustrates that globalisation is still the right way forward in international trade. This article will first analyse the impact on the international law principles of good faith and pacta sunt servanda of the trade war and the US cancellation of international agreements and withdrawal from some international organisations. It will then discuss the features of globalisation, the characteristics and limitations of the B&R implementation and recommend alternatives for enforcing the B&R including drafting a model agreement.

II. Impact of the Trade War on International Law

The start of the trade war was marked by the United States imposing a 25 per cent tariff on imported steel and a 10 per cent tariff on all imports of aluminium. This tariff increase was introduced purportedly for national security reasons. Under art.XXI of the General Agreement on Tariffs and Trade (GATT), a World Trade Organization (WTO) member may take “any action which it considers necessary for the protection of its essential security interests.”

Nevertheless, on 29 November
1982, the Contracting Parties to the GATT undertook “individually and jointly …

...to abstain from taking restrictive trade measures, for reasons of a non-economic
character, not consistent with the General Agreement.” Any WTO member
invoking the security exception has an obligation to inform “to the fullest extent
possible” of its measure.

When action is taken by a WTO member under art.XXI, all other WTO members
“affected by such action retain their full rights under the General Agreement.”
While what might constitute “full rights” was left undefined, art.1(b)(iv) of the
GATT 1994 has incorporated, among others, “decisions of the Contracting Parties
to GATT 1947,” which include the decision of 1982 mentioned above. Hence
the United States, as a WTO member, is obliged to enforce the 1982 decision in
accordance with the WTO procedures. Throughout the process of the trade war,
there did not appear to be any sign of the United States observing the above rules.
For instance, in the first place, the US unilateral tariff increases for security (non-economic character) reasons is contrary to the 1982 decision “individually and
jointly” to “abstain from taking restrictive trade measures.” Second, there was no
evidence that the US Government informed potentially affected WTO members to
the fullest extent possible.

The US increase of tariffs triggered retaliation from its allies. Thereafter,
the United States chose to escalate its trade war with China by imposing a
25 per cent tariff on approximately $50 billion worth of Chinese imports covering
approximately 1,300 tariff lines. On 10 July 2018, President Trump ordered USTR
to begin the process of imposing a 10 per cent tariff on an additional $200 billion of
Chinese imports, which then increased to 25 per cent on 2 August 2018, in response
to the alleged Chinese currency manipulation. On 9 September 2018, President
Trump said that he would raise tariffs on all imports from China. Apparently
the United States was prepared to launch a comprehensive economic confrontation

6 GATT, 30 October 1947, 61 Stat A-11, 55 UNTS 194; see GATT, Ministerial Declaration of 29 November
7 WTO, Decision Concerning art.XXI of the General Agreement (30 November 1982), WTO Doc L/5426
(1982).
8 Ibid.
9 Press Release, USTR, Exec Office of the President, under s.301 Action, “USTR Releases Proposed List
of Tariffs on Chinese Products” (April 2018) (on file with author).
10 Press Release, USTR, Exec Office of the President, Statement by US Trade Representative
Robert Lighthizer on s.301 Claims (July 2018) (on file with author).
(visited 22 April 2019).
12 “Trump Threatens to Escalate the Trade War, Beijing Issues Serious Warning” (DW News, 10 September
2019).
with China, and not just a trade war. The above series of actions on the part of the United States is in violation of the WTO rules and runs counter to the irreversible trend of globalisation.

As an old Chinese proverb goes: “A violent wind does not blow the whole morning, nor does a rainstorm last the entire day.” The trend of globalisation cannot be halted by trade wars or actions or inactions of any country. Whilst engaging in a trade war with China, the United States began negotiations with the EU, Japan, Canada, Mexico, etc, aiming to conclude new trade agreements. On 27 August 2018, Trump announced that a new agreement with Mexico had been reached and that the new agreement would be called the United States–Mexico trade agreement. The US Government set 30 September 2018 as the deadline for negotiations with Canada. On 30 September 2018, the US Government announced that it had reached an agreement with Canada just beating the deadline. This new agreement called United States–Mexico–Canada Agreement or USMCA will replace NAFTA. Other countries are also negotiating for new trade deals. For instance, on 17 July 2018, the EU and Japan agreed to establish a free trade area — the largest in the world — under which the tariffs on all products from all participants will be eliminated within eight years.

The above examples illustrate that notwithstanding the US trade war with China, globalisation is still gaining momentum and cannot be stopped. Yet, what the United States has done will have a lasting impact on the international trade order and international law.

First, the US trade war against China is really to address its concern with China’s industrialisation process or “Made in China 2025.” In other words, the

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13 Article 2:1(a) of the GATT provides: “Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.” Text is available at https://www.wto.org/english/docs_e/legal_e/gatt47.pdf (visited 22 April 2019). According to this provision, tariffs imposed by the WTO members on imports from other members shall not exceed those in the Schedule. The US unilateral increase of tariff is in violation of this provision.

14 It was reported that this new agreement has the following features: (1) it would require that 75 per cent of the parts in any car sold in North America be produced in the United States or Mexico. Currently, about 62 per cent of parts are required to be produced in the United States, Mexico or Canada under NAFTA; (2) it would require that 40 to 45 per cent of auto parts in cars sold be made by workers earning at least 16 USD per hour; and (3) it will last for 16 years and will be reviewed every 6 years. Kevin Liptak, “US and Mexico Reach a Preliminary Trade Deal that Could Replace NAFTA” (CNN, 27 August 2018), available at https://www.cnn.com/2018/08/27/politics/mexico-us-trade-deal/index.html (visited 22 April 2019).


17 For instance, the USTRs report to the President expressed serious concern over China’s industrialisation by saying: “These policies [would] bolster China’s stated intention of seizing economic leadership in advanced technology as set forth in its industrial plans, such as Made in China 2025.” USTR, Exec Office of the President (n.9) (visited 22 April 2019).
US Government considers China more as a rival than a collaborator and as such cooperation between the two countries is not a priority. Had the US Government wished to reach an agreement with China on trade deficit, it would not have acted in this manner. To say the least, had the United States considered that China had violated the WTO rules, it could have resorted to the dispute settlement procedures of the multilateral trade organisation, as it is obliged to do.

Second, the US Government tries to use its bargaining power to secure better deals through bilateral negotiations, bypassing multilateral mechanisms. As discussed earlier, after its agreement with Mexico, the United States forced Canada to agree on the USMCA, the second trade agreement that the Trump administration concluded following the signing of a revised free trade agreement with Korea. The United States will now work hard to conclude agreements with the EU, Japan, etc. Once such bilateral agreements are concluded among the developed countries, a rich countries’ club will become the reality and the WTO would become defunct. Even if the WTO still exists, it might have to be reformed in the interests of the developed countries, which is one of the clear goals of the Trump administration. President Trump has already threatened that if the WTO does not shape up, he would consider withdrawing from the organisation. Whether or not the United States is really considering withdrawal from the WTO, it has already done severe damage to the multilateral organisation. The US blocking of the appointment and reappointment of the Appellate Body members is a case in point. There are only three members working in the seven-member Appellate Body. Unless the US changes its position, by the end of 2019 there will be only one member in the Appellate Body, which means that no disputes can be handled by the WTO, as it requires three members of the Appellate Body to form a division.

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18 Tom Miles, “US Says the Reckoning over China Trade is Too Big for WTO” (Reuters, 11 July 2018), available at https://www.reuters.com/article/us-usa-trade-china-wto/u-s-says-the-reckoning-over-china-trade-is-too-big-for-wto-idUSKBN1K1I1EQ (quoting US Ambassador to the WTO saying that the US dispute with China was too big for the WTO to handle). The WTO rules do not say that when a dispute involves certain matters, certain amounts or certain countries, WTO would be unable to handle. The Ambassador’s statement reflects the unwillingness of the USA to have its dispute with China settled through the WTO system.

19 The new agreement was concluded on 24 September 2018 and is a revised version of the Korea–US FTA signed in 2012. Although there are not many major revisions of the existing FTA, the new agreement allows more US exports to Korea. See Alexia Fernandez Campbell, “Trumps New Trade Deal with South Korea Explained,” Vox, available at https://www.vox.com/2018/9/24/17883506/trump-korea-trade-deal-korus (visited 1 October 2018).

20 See Christine Wang, “Trump Threatens to Withdraw from World Trade Organization” (CNBC, 30 August 2018), available at https://www.cnbc.com/2018/08/30/trump-threatens-to-withdraw-from-world-trade-organization.html (On 30 August 2018, President Trump made the statement. Later on, the Secretary of Commerce Wilbur Ross said it was premature to talk about withdrawing from the WTO).

21 The term of two of the three current members is to expire by the end 2019. See Dispute settlement — Appellate Body Members, WTO, available at https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (visited 1 October 2018).
Third, the US-led trade war constitutes a violation of the WTO rules and the well-established international law principles of honouring agreements (pacta sunt servanda) and dealing in good faith. Under the WTO Agreement, members must have their disputes settled exclusively in accordance with WTO procedures.\textsuperscript{22} As will be shown later, the principles of pacta sunt servanda and good faith are recognised by the international community and embodied in the laws of most countries.\textsuperscript{23} The bypassing of the WTO rules by the United States is coupled with its withdrawal from the Paris Agreement on Climate Change,\textsuperscript{24} Iran Nuclear Agreement,\textsuperscript{25} the Trans-Pacific Partnership (TPP),\textsuperscript{26} UNESCO\textsuperscript{27} and UN Human Rights Council.\textsuperscript{28} It should be pointed out that the United States played a leading role in concluding and establishing these treaties and international organisations. Where the country playing the leading role does not observe the principles of pacta sunt servanda and good faith, other countries are not likely to abide by the rules.

III. The Features of Globalisation

In today’s highly globalised world, no country can develop without collaboration. Such collaboration includes exchange of goods, services, funds and technology and access to markets. In some circumstances, countries may not be able to resolve their domestic problems without the assistance of the international community.

\textsuperscript{22} This can be illustrated by the following provisions. Article XVI:4 of the Agreement Establishing the WTO provides: “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”; and according to art.23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO members “shall have recourse to, and abide by, the rules and procedures of this Understanding” and “shall not make a determination to the effect that a violation has occurred,” when considering that another member has violated the WTO obligations.


\textsuperscript{25} For the full text of the Iran nuclear deal, see The Washington Post, available at https://apps.washingtonpost.com/g/documents/world/full-text-of-the-iran-nuclear-deal/1651/ (visited 30 September 2018) (naming China, France, Germany, the Federation of Russia, the United Kingdom, the United States and Iran as contracting parties).

\textsuperscript{26} The text of the Trans-Pacific Partnership Agreement is available at https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/ppp-full-text (visited 30 September 2018).

\textsuperscript{27} UNESCO, Facebook, available at https://www.facebook.com/unesco/ (visited 30 September 2018) (giving the history, function and members of UNESCO).

Greece’s sovereign debt crisis\textsuperscript{29} and Turkey’s financial crisis\textsuperscript{30} are recent examples. Matters such as climate change, environment protection, anti-money laundering and anti-terrorism require international cooperation.

For its success globalisation depends on several factors such as the practice of a market economic system by all the major players of international trade and investment so that they can operate on a level playing field. The dissolution of the former Soviet Union and Eastern Bloc triggered the spread of a market economy in the early 1990s, coupled with the Chinese Government’s efforts to establish a market economic system.\textsuperscript{31} Another factor for successful globalisation is the existence of a set of rules governing the relations and transactions among governments and non-government entities. The creation of the WTO in 1995 filled this gap.\textsuperscript{32} Although the WTO is a trade-oriented organization, it covers a wide range of subjects such as trade in goods and services, intellectual property protection, investment and dispute resolution.\textsuperscript{33} In addition, there exist other multilateral, bilateral and regional arrangements on trade, investments and finance, such as the International Monetary Fund,\textsuperscript{34} World Bank,\textsuperscript{35} Asia Infrastructure Investment Bank,\textsuperscript{36}

\textsuperscript{29} The Greek debt crisis began when in 2010 Greece announced that it might default on its debts. After several major rescue measures by the EU and the International Monetary Fund, Greece survived the crisis. Kimberly Amadeo, “Understand the Greek Debt Crisis in 5 Minutes”, available at https://www.thebalance.com/what-is-the-greece-debt-crisis-3305525 (visited 30 September 2018).


\textsuperscript{32} For an overview of the WTO and its role in global trade, see “What is the WTO?” WTO, available at https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (visited 1 October 2018).

\textsuperscript{33} See Peter Van de Bosche and Denise Prévost, Essentials of WTO Law (Cambridge: Cambridge University Press, 2016) (discussing the history, function, basic principles and other matters relating to the organisation); Guiguo Wang, The Law of the WTO: China and the Future of Free Trade (Hong Kong: Sweet & Maxwell, 2005) (discussing the history, actual operation of the WTO and its impacts on China).

\textsuperscript{34} For the IMF, see IMF, available at https://www.imf.org/en/About (visited 01 October 2018).


\textsuperscript{36} The AIIB was established in January 2016. It has 87 member states. See “About AIIB Overview,” AIIB, available at https://www.aiib.org/en/about-aiib/index.html (visited 1 October 2018) (giving a history and overview of the AIIB).
Asian Development Bank, Eurasian Economic Union, South Asian Association for Regional Cooperation and the trilateral investment agreement between China, Korea and Japan. These agreements together with many others form a broad framework of rules governing cross-border economic relations and exchanges.

Apart from sovereign states which play the most important part in international exchange, international organisations and non-government organisations too play an increasingly important role. Non-governmental entities and private persons are also active participants. Those in control of information and digital technology may be crucial in certain areas. This development has resulted in new issues such as information security, digital security, innovation and intellectual property protection. Another feature of this process of globalisation is a restraint on the exercise of sovereign rights. An example is the impact of the WTO on the legislative, administrative and judicial powers of its members, of which the quasi-automatic adoption of panel and Appellate Body reports and the retaliation mechanisms ensure compliance by members of decisions of the multilateral trade organisation. Though there is still room for improvement, the WTO regulates most economic sectors with binding rules. Restrictions on the exercise of sovereign rights also exist in the investment sector. Modern bilateral investment agreements (BITs) and the investment chapter of free trade agreements (FTAs) all contain an investor-state arbitration clause, through which host states consent to have their disputes with foreign investors settled by third-party arbitration. In practice, investor-state arbitration, without exception, involves actions and

37 The Asian Development Bank (ADB), available at https://www.adb.org (visited 14 October 2018) (ADB was established with the assistance of the UN in December 1966 as one of the regional development banks).
44 Ibid.
inactions of the host states and hence the arbitration tribunals serve as *de facto* quasi-judicial review bodies.\(^{45}\)

Thanks to globalisation, there is an appreciable harmonisation of national and international rules. It is often the case that treaty negotiators incorporate their national law provisions, principles and concepts into their proposals.\(^ {46}\) An example is the language of the chapeau of art.XX of the GATT which was first proposed by the United States, which after revision by the negotiating parties, was formally adopted.\(^ {47}\) Another example is the jurisdiction of the Appellate Body of the WTO which functions almost identically to a court of appeal in many jurisdictions.\(^ {48}\) Through this process of treaty making, national norms are elevated into international norms and then become binding rules on the contracting parties.\(^ {49}\) Such rules are subject to interpretation by the panels and Appellate Body of the WTO and investment tribunals, through which more specific criteria and standards are set for their implementation. Such criteria and standards themselves become binding and have direct effect on the behaviour of the contracting parties.\(^ {50}\) In fact, decisions of these dispute settlement bodies have constituted case law in their own respective sector with a spilling effect.\(^ {51}\) Investment tribunals and WTO Appellate bodies may review and override the views of national authorities to reach a different conclusion.\(^ {52}\) Article 17(6) of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides: “An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.”\(^ {53}\)

\(^{45}\) For example, in *Hussein Nuaman Soufraki v United Arab Emirates*, which concerned the validity of the complainant’s nationality, the Tribunal stated that it will “in the end decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question” … *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Award, [55] (7 July 2004). The Ad Hoc Committee of the case also ruled: “an international tribunal may review and override the views of national authorities to reach … a different conclusion.” Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki, ICSID Case No ARB/02/7, [58] (5 June 2007); see also Guiguo Wang, *International Investment Law: A Chinese Perspective* (Routledge, 2015) Ch.1.

\(^{46}\) See Antony Taubman, “Thematic Review: Negotiating ‘Trade-Related Aspects’ of Intellectual Property Rights” in Jayashree Watal and Antony Taubman (eds), *The Making of the TRIPS Agreement Personal: Insights from the Uruguay Round Negotiations* (WTO, 2015) pp.15–53 (after examining the negotiation history of the TRIPs, the author points out that the leadership and experience of the negotiators could have important impacts on outcomes).


\(^{48}\) Article 17(6) of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides: “An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.”


Body making references to decisions made by each other is an example.\(^\text{52}\) The process of the case law formation — decision-making by dispute settlement bodies — further incorporates, through the understanding of the tribunal members, national legal concepts, values and principles into international law with binding effect on the states concerned.

The B&R promotes globalisation and it must take into consideration the characteristics of countries at different stages of development and in different sectors. In other words, the implementation of the B&R should maximise the nature and characteristics of globalisation. To accomplish this goal, the B&R should be implemented in accordance with the trend, features and requirements of globalisation.

**IV. Necessity of a Rule-Based B&R**

Currently the B&R is project based and there has been no comprehensive agreement signed by the governments concerned. At least in one case, the Chinese Government and a foreign government signed a joint declaration, government departments concluded memorandums of understanding, and enterprises carrying out the projects signed contracts with their counterparts in the host country and agreements with local government departments. The advantage of project-based approach is efficiency, which might be the right choice at the beginning of the B&R.

Project-based B&R relies strongly on government policies. Where there is a change of government, eg, resulting from a general election, the new government may not recognise or give effect to the projects its predecessor approved. For example, Myanmar, Nepal and Malaysia either cancelled, suspended or postponed certain projects after a newly elected government assumed office.\(^\text{53}\) Cancellation by the Sri Lankan Government of the Hambantota port is another example.\(^\text{54}\) On some other occasions, even where there was no change of government, projects were cancelled because of international or domestic pressure. The cancellation by Pakistan of a hydroelectric project is a case in

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54 The Sri Lankan Government first cancelled the agreement for construction of the Hambantota port and later agreed to resume the project because of its indebtedness. For details, see http://www.ftchinese.com/story/001075441 (visited 2 October 2018).
These cases illustrate the instability and unpredictability in carrying out B&R projects due to the lack of a comprehensive legal framework regulating such matters. Without a comprehensive legal framework with detailed criteria and standards for determining breach of obligations, entities may not have their losses compensated adequately, if at all.

Policy can never substitute rules in international transactions. With a well-drafted legal framework between the concerned governments in place, enterprises carrying out projects are able to foresee the treatment and compensation standards they are entitled to in case of breach of contract or agreement. They should also be aware in advance of the procedures for resolving disputes with the host governments. These are pre-conditions for cross-border transactions. The B&R should certainly follow the international practice.

Another reason for having a comprehensive legal framework in place is that, in addition to local laws and regulations, culture and tradition of the countries involved play an important part in the successful implementation of the B&R. In formulating the legal framework, one must take into account the culture, tradition, history and law of the B&R countries. Only through this process would the participating countries be prepared to enforce such rules.

During the time of the ancient Silk Road, the Chinese regulated trade by creating “a formal framework for controlling merchants who came from outside territories. … These measures are to be understood not as a form of suspicious surveillance, but rather as a means of being able to note accurately who was entering and leaving China, as well as what they were doing there, and above all to record the value of the goods that were bought and sold for custom purposes.” Such rules were national in nature at that time. In the contemporary globalised age, rule of law being an important element of the business environment, it is necessary to have a set of rules governing programmes like the B&R. Agreements, memorandums and other documents cannot be coordinated in the absence of a comprehensive legal framework. For instance, in relation to the China–Pakistan Economic Corridor, governments and departments of the two countries signed 51 agreements in respect of more than 30 projects.

Most, if not all, B&R participating countries are parties to a number of international organisations, multilateral treaties and bilateral agreements. Each one of them has assumed obligations under such international instrumentalities.

57 See https://www.pakistantoday.com.pk/2015/04/21/pak-china-tighten-knot-with-51-agreements-33-projects/ (visited 2 October 2018) (documents included a joint declaration between the two governments, agreements between government departments of the two countries and contracts between entities and Pakistani authorities. (Full text of these documents on file with author.)
58 For instance, most of the B&R participating countries are members of the WTO. Many of them are members of regional arrangements such as ASEAN, Eurasian Economic Union, South Asian Association for Regional Cooperation, etc.
In implementing the B&R, there must be a mechanism coordinating the B&R-related rules with those of other treaties and agreements, under which the participating countries assume rights and obligations. According to the traditional Chinese culture as revealed in the teachings of Lao Zi, “action should be taken before a thing has made its appearance; order should be secured before disorder has begun.” Five years have passed since the introduction of the B&R: it is high time to introduce a comprehensive legal framework for implementing the programme.

V. A Model Agreement for the B&R

For the purpose of implementing the B&R, it is crucial, as a matter of urgency, to have in place a comprehensive set of rules. The question then is how to create such rules. As the market economic system is the basis of globalisation, the ideal B&R legal framework must take into account the pattern of cooperation in market economies, which should contain both the basic principles and operational rules, and will, in the proverbial sense, “carry it out to its breadth and greatness, so as to omit none of the more exquisite and minute details which it embraces.” To achieve this goal, a model agreement should be drafted for governments to consider in their negotiations with one another. The aim of the model agreement is that, with modifications through negotiations, it would be adopted by the B&R participating countries. It must hence contain rules that will reflect the nature, characteristics and needs of the B&R, and the culture, history, laws, legal systems, traditions and customs of the participating countries. The model agreement should be forward-looking and not a mere reproduction of existing FTAs.

Most of the B&R participants are developing countries, which pay more attention to sovereign rights including economic security in international cooperation. The exercise of sovereign rights being restrained in an era of globalisation notwithstanding, these states are still the main participants in international collaboration and sovereignty remains the basis for such collaboration. Therefore, in implementing the B&R, a balance between rights and obligations of the countries concerned must be made. At the same time, adequate attention should be paid to the economic security concerns of states. A rule-based B&R that takes into account the interests of all the participating countries will have the support of these countries. The principle articulated by the Chinese Government in pursuing the B&R — “wide consultation, joint contribution and shared benefits” — reflects the equality of sovereign states.

The right to economic development, which is well-recognised in international law, is of great importance to developing countries. As early as 1986, the United Nations adopted a Declaration on the Right to Development, recognising that the right to development is an inalienable human right, and that states have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development. It further stipulates that “[t]he realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.” It makes cooperation for development among states a duty of all states. The WTO Doha Round also endorses development agenda as its theme. Hence, it is only natural that the model B&R agreement must enlist the right to development as a basic principle.

In international law, good faith and *pacta sunt servanda* are often applied together. According to some, *pacta sunt servanda* became a basic principle of international law in the late 19th and early 20th centuries when it was implicitly incorporated into the Covenant of the League of Nations and the Charter of the United Nations. The *pacta sunt servanda* as a fundamental principle of international law is confirmed by the Vienna Convention on the Law of Treaties, which declares in its preamble that the principles of good faith and the *pacta sunt servanda* rule are universally recognised. It goes on to provide in art.26 that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

On a number of occasions, the ICJ has invoked the principle of good faith and *pacta sunt servanda* as international principles. For instance, the ICJ once ruled that the purpose of the Vienna Convention the intentions of the parties in concluding it should prevail over its literal application. “The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its


61 UNGA Res (n.67) art.1.3(1).
63 *Ibid.*, art.3(3).
64 Negotiations on the Doha Development Agenda started in November 2001, but no significant result has been achieved so far. For a useful commentary, see Simon Lester “Is the Doha Round Over? The WTOs Negotiating Agenda for 2016 and Beyond” (2016), available at https://object.cato.org/sites/cato.org/files/pubs/pdf/ftb64.pdf (visited 3 October 2018).
67 For a detailed discussion, see B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons Ltd., 1953) Ch.4.
The Court also stated that “it would set a precedent with disturbing implications for … the integrity of the rule pacta sunt servanda if it were to conclude that a treaty in force … might be unilaterally set aside on grounds of reciprocal non-compliance.”

Investment tribunals also regard them as principles of customary international law.

The WTO Appellate Body has, on several occasions, referred to good faith as a general principle of international law. In *US-Shrimp*, the Appellate Body stated that “the principle of good faith … at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of abus de droit [abuse of right], prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.”

Equally in international investment law, the principle of good faith is considered “a supreme principle, which governs legal relations in all their aspects and content” of the contracting parties. This principle requires parties to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantages. In other words, no country may use its domestic law as a defence for not enforcing its treaty obligations.

The international law principles of good faith and pacta sunt servanda, however, face serious challenges now. Newly elected governments have repeatedly repudiated their existing treaty obligations that were made by a government with a different socio-political orientation, and the United States, as a major economic player, doing the same has not been helpful at all. On many occasions, this was

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68 See *Hungary v Slovakia* (n.23) [142].
69 Ibid., [114].
70 Report of the Appellate Body (n.47) [157].
72 *Phoenix Action, Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award, [107] (15 April 2009). In *Plama* case, the tribunal stated that “the principle of good faith which is part not only of Bulgarian law … but also of international law.” See *Plama Consortium Ltd v Bulgaria*, ICSID Case No ARB/03/24, Award, [144] (27 August 2008).
74 After being elected, leaders of Myanmar and Malaysia either cancelled, suspended or postponed several major projects their respective predecessors had concluded. Such changes of mind following change of governments through democratic elections have become a new kind of investment and commercial risk. See Witold J Henisz and Bennet A Zelner, “The Hidden Risks in Emerging Markets” (April 2010) *Harvard Business Review*, available at https://hbr.org/2010/04/the-hidden-risks-in-emerging-markets (visited 15 October 2018), who argue that there are more non-commercial risks in the developing countries and offered some solutions for reducing such risks. The democratic election-related risks have now expanded from the emerging markets to the developed countries with Trump administration as an example.
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done under the pretext of honouring election campaign promises. The truth is that it is a serious violation of the principle of *pacta sunt servanda*, which does not only diminish the confidence of one country in another and the economic interest of enterprises in question, but also make the business environment unpredictable and unstable. When major economic powers breach the principle of good faith, other countries will follow, or will have to follow, in order to defend their own interests, which constitutes a serious challenge to international law.

In these circumstances, how to uphold the principle of good faith and *pacta sunt servanda* is a challenging mission for all countries. Through implementation of the B&R, international rule of law should be promoted in accordance with the principle noted by Lao Zi’s ancient Chinese doctrine that “to those who observe good faith, I observe good faith and to those who do not observe good faith, I still observe good faith.” It is important that the principle of good faith and *pacta sunt servanda* be reflected throughout the model agreement, which is significant in both practice and theory.

In order for enterprises engaging in cross-border business to act in compliance with the rule of law, they must know the laws and law enforcement mechanisms of the countries concerned. Currently, many countries require enterprises to provide training to their officials to be familiar with their anti-corruption and anti-money laundering laws. Those enterprises that have provided such training may be less severely punished in case of unintended violations. Environment, social responsibility of enterprises, etc, have also become important concerns of the international community. Another issue of concern is the standards of government behaviour. The WTO Agreement requires members to follow the standard of objectivity, fairness, justice and reasoned decisions in their administration. The contemporary BITs and the investment chapter of FTAs all require host states to provide foreign investors and foreign investments with fair and equitable treatment, full protection and security, non-discriminatory treatment, etc. Through investment arbitration, the terms of fair and equitable and non-discriminatory treatment have been interpreted to require the host states not to be arbitrary or manifestly unfair.

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76 In this regard, NAFTA has a separate agreement on the environment and the TPP has a chapter on the environment. The significance of incorporating environmental considerations in the agreement itself is that any violation of environmental considerations will be same as a violation of other obligations imposed by the agreement. For further discussion, see https://www.americanbar.org/publications/trends/2015-2016/may-june-2016/the_environment_chapter_of_the_trans-pacific_partnership.html (visited 3 October 2018).

77 More and more international trade and investment agreements have begun to contain provisions on social responsibility of enterprises. The TPP and Canada–EU Comprehensive Economic and Trade Agreement are cases in point. Although such provisions constitute an agreement of states, they have direct impacts on the operation of enterprises. See further Rafael Peels et al., “Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Business, and workers” (April 2016) ILO Research Paper No.13, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_476193.pdf (visited 15 October 2018).
in their decision-making and to make all their decisions in compliance with due process including an appeal procedure, and to take into account foreign investors’ expectations. Transparency is already an important element in the dispute settlement mechanism of the WTO and is increasingly demanded in investor-state arbitration. The model agreement must include rules regulating such sectors.

In implementing the B&R, the function of the governments is to provide policy support and a regulatory framework for enterprises to carry out their projects. While currently Chinese state-owned companies play a key role in implementing projects, with the implementation of the B&R, private entities, foreign entities, entities from Hong Kong and Macau, etc, will participate. The model agreement should stipulate rules assisting these enterprises in their business transactions. To take goods passing through the customs for example, in addition to tariffs, there are issues concerning the language of communication, expediting compliance with formalities, and availability of electronic forms, etc. The WTO has an agreement on trade facilitation which the model agreement could adopt with modifications. Trade in goods also involves sanitary, safety, technical and phytosanitary standards, etc. The WTO has specific agreements dealing with these matters. The B&R model agreement may incorporate such rules and standards by reference. Needless to say, in adopting the rules of other treaties, the model agreement should follow the age-old principle “to benefit from good examples and avoid bad examples.”

**VI. Conclusion**

Trade wars provoked by the United States will have an adverse impact on the recovery of the world economy. The withdrawal by the United States from treaties and international organisations, the formation of which was under the leadership of the United States, sets a bad example for other countries. In addition to its violation of international law principles, in particular the principle of good faith and pacta

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78 The following cases illustrate how the fair and equitable and non-discrimination clauses are interpreted: Técnicas Medioambientales, TECMED SA v United Mexican States, ICSID Case No ARB (AF)/00/2, Award, [154] (29 May 2003); Waste Management, Inc v United Mexican States, ICSID Case No ARB (AF)/00/3, Award, [98] (30 April 2004). In Gami, the tribunal stated that serious maladministration by the host government might constitute a violation of fair and equitable treatment obligation. Gami Investments, Inc v Government of the United Mexican States, UNCITRAL Arbitration, Final Award, [103] (11 November 2004).


80 The WTO Trade Facilitation Agreement was concluded in 2013 and came into force on 22 February 2017. WTO, Trade Topics, available at https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (visited 3 October 2018) (stating the aims and objects, and contents of the Agreement as well as its significance to the contracting parties).

sunt servanda, the unilateralism and protectionism pursued by the United States is contrary to the irreversible trend of globalisation and hence not sustainable.

As the second largest economy in the world, China initiated the B&R five years ago, which has secured wide support. The implementation of the B&R will help sustain multilateralism and trade liberalisation, which is in contrast to the unilateralism currently being practised by the United States. By doing so, the B&R participating countries will not only provide a new paradigm but also help the world economy which faces serious difficulties resulting from unilateralism. One way for intensifying the implementation of the B&R is to direct it to rule-based governance.

For the purpose of a rule-based B&R, it is necessary to have a model agreement that could be drafted with private initiation, whilst incorporating the experience and rules of other treaties and organisations. This model agreement must reflect the characteristics of the B&R and the need of the participating countries including their concerns on economic security, cyber security, digital trade security, etc. Considering that the B&R involves very complicated issues in its implantation, some of which were discussed previously, and the characteristics of the contemporary world, it would rouse mistrust and suspicion among the participating countries if the model agreement is to be proposed by any one government. To avoid such unnecessary issues, the drafting of the model agreement should be undertaken by experts from the B&R participating countries. When a draft is agreed by international experts, the model agreement should be submitted to the participating governments for consideration and adoption. This process will ensure that the model agreement is of high professional standard and readily acceptable to the participating countries. It goes without saying that the model agreement must reflect both the features of globalisation and the needs of the B&R participating countries in order to secure full support of all the participating countries. Once a model agreement is agreed upon by international experts, it should be submitted to the B&R participating countries for adoption.

As an old Chinese proverb summarises appropriately: “A tree which fills the arms grew from the tiniest sprout, the tower of nine storeys rose from a (small) heap of earth, and the journey of a thousand li commenced with a single step.”