

The Belt and Road Initiative and International Law: Viewed from the Perspective of the Supply of International Public Goods*

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Abstract

The international community is facing the dilemma of an insufficient supply of public goods due to the conjunction of various forces and factors including the profound impact of the economic crisis, increased trade protectionism, changes in the global governance system and the impact of the Covid-19 pandemic. The Belt and Road Initiative (BRI) is a non-rivalrous and non-excludable public good provided to the international community by China as a responsible major country in the new era of historical development. International law has an important role in promoting and guaranteeing the supply of international public goods (IPGs). Since the implementation of the Belt and Road Initiative, the international governance environment has changed dramatically, with the rule of law being the basic premise and important guarantee of the long-term and smooth implementation of the BRI. In pursuing the BRI, buttressed as it is by the rule of law, China should pay attention to diversified governance based on a combination of international soft and hard law and make judicious use of existing bilateral, regional and multilateral international legal mechanisms. In addition, China must also pay close attention to the latest developments in international economic and trade rules and must innovate and improve its ability to supply rules for investment, trade liberalization, etc. Buttressed by international law, the BRI should focus not only on recent concrete initiatives in trade and investment liberalization, but also on the long-term planning and sustainable development of institutional supply, so as to realize the vision and goals of the BRI.

Keywords: BRI, international public goods, BRI buttressed by the rule of law, international governance, international law

I. The Problematic

In recent years, the world landscape has been undergoing a complex and profound

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transformation: globalization has entered a period of adjustment and trade protectionism and unilateralism have been on the rise, intensifying the international community's concern about the failure of global governance.¹ The global outbreak of the Covid-19 pandemic in 2020 has led to a sharp decline in international investment and trade and posed even more serious challenges to global governance. In the US-led international economic order formed after World War II, the provision of international public goods (IPGs)² was an important way in which the United States led global governance and exerted international influence. In recent years, however, the US government has pursued an "America First" policy and lacks the intention and the ability to continue supplying public goods to the world. This has largely changed the main postwar form of international public goods supply and has led to the decentralization and dispersal of the global power system, raising concerns that the international community may fall into the Kindleberger Trap.³

When global governance is faced with a lack of IPGs, international institutions and the rules of international law are needed to help overcome governance failure and facilitate the provision of public goods. However, where rules are concerned, international economic and trade rules at the bilateral, regional and multilateral levels have become highly fragmented in recent years. This multipolarity and fragmentation has exacerbated the crisis in the multilateral system, and thus the provision of IPGs is facing more collective action dilemmas. The continuous restructuring of globalization and the rapidly changing international landscape require changes in the global governance system to reflect greater equity, inclusiveness and sustainability in order to achieve balanced and inclusive development for all countries.

The Belt and Road Initiative, or BRI, with the efforts of building a community with a shared future for mankind as its background, and achieving shared construction and growth through discussion and collaboration as its principle, is well suited to the developmental needs of many BRI countries in the course of economic transition. However, at the same time, due to the dramatic changes in the world landscape and global governance environment in recent years, construction of the BRI faces multiple challenges in the international arena; it is considered by some Western countries to be a geopolitical and geo-economic means for China

1 See Qin Yaqing, "Global Governance Failure and the Reconstruction of the Idea of Order"; Lu Jing, "The Current Institutional Dilemma of Global Governance and Its Reform."

2 IPGs are shared goods whose costs and benefits transcend national boundaries, generations and populations. See Meghnad Desai, "Public Goods: A Historical Perspective," in Inge Kaul *et al.*, eds., *Providing Global Public Goods: Managing Globalization*, p. 63.

3 In his *The World Economic Depression, 1929-1939*, the American economic historian Charles P. Kindleberger argued that the world economic system must be run by a country that plays a leading role in providing the costs necessary to maintain the stability of the system. In January 2017, Joseph Nye proposed the "Kindleberger Trap," a state in which no country has the capacity or the will (even if it has the capacity) to supply IPGs, reflecting a fear that once China had risen, it would be unwilling to assume the responsibility of supplying public goods. These views have attracted widespread concern and discussion.

to use its economic power to expand abroad.⁴ In order to avoid or lessen the international community's misinterpretation of the BRI, we must base ourselves on the foundation of the IPGs provided by the BRI and at the same time make effective use of the leading role and surety of international law in the construction of the BRI in order to create a beneficial and lasting external environment for pursuing the BRI. This process will demonstrate China's contribution to the development of the theory and practice of international law.

II. The Attributes of the BRI IPGs

On the basis of our analysis of the fundamental characteristics and conceptual evolution of IPGs, this part of our paper argues for the IPG attributes of the BRI and lays the theoretical foundation for the analysis below on the connection between international law and the IPG supply and on the role of international law in assuring the construction of the BRI.

1. Evolution of the concept of IPG and core concerns

The concept of "public good" is rooted in neoclassical economic theory, but has undergone constant change. Economists such as David Hume and Adam Smith proposed the concept of public good a long time ago,⁵ and this was developed into a systematic economic formulation by Paul Samuelson in the 1950s. Samuelson's theory defined public goods as non-rivalrous in terms of consumption and non-excludable in terms of benefit. These features of public goods lead inevitably to the problem of externalities, as the provider of the products generally receives no compensation or benefit.⁶ In addition, since the consumption of public goods does not involve any increase in marginal costs, they are prone to problems such as free-riding, over-consumption, and the "tragedy of the commons."⁷

IPGs are closely related to globalization, and the globalization process requires understanding of the concept of IPG, effective methods of IPG supply, and related public policy. Seen in the light of globalization, IPGs can be divided into "global natural commons" (e.g. a stable climate), "global man-made commons" (e.g. cultural heritage),⁸ and "global

4 Jianfu Chen, "Tension and Rivalry: The Belt and Road Initiative, Global Governance, and International Law," pp. 181-189.

5 In 1739, David Hume gave the example of waterlogged public meadows to show that collectively consumed goods could not rely solely on individuals to maximize the public good. See David Hume, *A Treatise of Human Nature (1739-40)*. In his *The Wealth of Nations*, Adam Smith made a division between public and private goods and provided a preliminary classification of public goods (cited from Richard A. Musgrave and Peggy B. Musgrave, "Prologue," in Inge Kaul *et al.*, eds., *Providing Global Public Goods: Managing Globalization*, p. xii).

6 For the externalities of public goods, see Richard Cornes and Todd Sandler, *The Theory of Externalities, Public Goods, and Club Goods*, 2nd ed., pp. 39-67.

7 The tragedy of the commons is also known as Hardin's tragedy of the commons. See Garrett Hardin, "The Tragedy of the Commons," pp. 1243-1248.

8 Ismail Serageldin, "Cultural Heritage as Public Good: Economic Analysis Applied to Historic Cities," in Inge Kaul *et al.*, eds., *Providing Global Public Goods: Managing Globalization*, pp. 240-245.

policy outcomes” (e.g. the free trade regime).⁹ These concepts and classifications show that following years of development, public goods have evolved from the traditional static idea to a modern dynamic one.

2. *The IPG attributes of the Belt and Road Initiative*

The BRI is a public good provided to the international community by China, as a responsible major country in a new era of historical development.

First, in terms of participation, the BRI is highly open and inclusive in scope. It covers, but is not limited to, the area of the ancient Silk Road. Any country and region or international organization may participate, so that the results of our concerted efforts will benefit a wider area.¹⁰ China and other participating countries have been jointly improving the mode and content of cooperation in building the BRI, opening up a new era of inclusive rules and institutional construction. This non-rivalrous participation is in line with the basic characteristics of IPGs, and thus is fundamentally different from the Marshall Plan implemented by the United States after World War II.¹¹

Second, in terms of beneficiaries, the BRI’s openness to participation means that it does not benefit any one country alone. Its principle of achieving shared growth through discussion and collaboration shows that the BRI is a joint endeavor that respects the actual development needs of participating countries and achieves mutual benefit through collaboration and the principle of shared interests.

Third, IPG theory emphasizes international cooperation as a means of resolving developmental problems of common concern to the international community, an approach that is highly compatible with the core content of the BRI.¹² The BRI is aligned with the fundamental interests of the international community, offers a positive exploration of a new model of international cooperation and global governance, and contributes to peaceful development across the world.

Based on the evolution of the IPG concept, the BRI, as an initiative put forward by China but benefiting the whole world, is a “global policy outcome” energetically promoted by China in the new era of historical development as a new type of “man-made global public good.”¹³ As the driving force and vehicle of this new globalization, the BRI has entered the international discourse system and has been incorporated into resolutions of

9 Joseph E. Stiglitz, “Knowledge as a Global Public Good,” in Inge Kaul *et al.*, eds., *Providing Global Public Goods: Managing Globalization*, p. 308.

10 National Development and Reform Commission, the Ministry of Foreign Affairs and the Ministry of Commerce of the PRC, “Vision and Actions on Jointly Building the Silk Road Economic Belt and 21st Century Maritime Silk Road,” issued on March 28, 2015.

11 Simon Shen and Wilson Chan, “A Comparative Study of the Belt and Road Initiative and the Marshall Plan,” pp. 1-10.

12 See He Chi, “The Belt and Road Initiative and the Construction of China’s International Law Discourse: From the Perspective of the Supply of International Public Goods.”

13 For global policy outcomes and the man-made global public good, see Joseph E. Stiglitz, “Knowledge as a Global Public Good,” p. 308.

the United Nations General Assembly and Security Council. The results achieved since the implementation of the BRI show that the new pattern of the supply of regional public goods among BRI participating countries is being reshaped, and the improvement of infrastructure has already catalyzed their economic development.

3. The BRI and bridging IPG supply gaps

A hot topic in global development issues is making the supply of IPGs effective and plugging the gaps. At present, the supply of public goods within the framework of global governance has gaps in three areas that can, to a certain extent, be filled by the BRI, which thus contributes to the supply of public goods.

The first is the jurisdictional gap, which refers to the lack of state-like public goods providers at the global level. At the same time, the traditional system of international law, with its foundation in the concepts of national sovereignty and consent-based treaty arrangements, means that the international community encounters the dilemma of collective action in IPG supply, which renders it difficult to coordinate international cooperation effectively.¹⁴ The BRI is a public good provided to the international community following China's participation in the development of globalization and achievement of a certain economic strength; it reflects a new concept of public goods provision under the new international concept of righteousness and benefit¹⁵ and thus helps to fill the jurisdictional gap in the provision of IPGs.

The second is the participation gap, which means that certain countries/regions, societal organizations or enterprises are excluded from the supply of IPGs and so are unable to participate and carry out democratic decision-making effectively. International cooperation is indispensable for the supply of IPGs. The BRI, which is rooted in the principle of achieving shared growth through discussion and collaboration, welcomes all participating countries and entities to consult together, formulate plans and measures for cooperation, and benefit from each other for mutual win-win advantages. This can help bridge the participation gap in the supply of public goods.

The third is the incentive gap, i.e., the lack of benefit-level incentives for IPG providers due to the nature of public goods and their externalities. The BRI provides incentives and conditions for China to enrich and perfect the theoretical system of international law. In the course of constructing the BRI, the continuous interaction between China and other participating countries will gradually build a realist Chinese conception of international law,¹⁶ including recognition of the legitimacy and authority of international law, and will internalize

14 See Nico Krisch, "The Decay of Consent: International Law in an Age of Global Public Goods," pp. 1-40; He Chi, "The Belt and Road Initiative and the Construction of China's International Law Discourse: From the Perspective of the Supply of International Public Goods."

15 See Liu Yi, "The Strategic Orientation of International Public Goods: More on the Concept of the Greater Public Good and Shared Interests of the Belt and Road Initiative."

16 For a realist conception of international law that China would be well advised to adopt, see He Zhipeng, "A Chinese Conception of International Law."

the interests of international law as China's own interests in the construction of the rule of law. Built on such a foundation, the Chinese theory of international law will have stronger interpretive and explanatory power. Together with the large quantity of international law practice generated by the BRI, this will constitute an original institutional contribution to the development of the world's international law system.

III. International Law and the Supply of IPGs: The BRI under the Rule of Law

As an important part of the international system, international law can, to a certain extent, overcome the failure of international political and economic markets and solve the problem of public goods supply, thus helping to make up for institutional deficiencies in global governance. The important connection between international law and IPGs is the functions of international law in the supply of public goods and the way these functions should be manifested and put into action.

1. The functions of international law in the supply of IPGs

Although the term "international public goods" is new to the field of international law and it is rarely discussed in the current international law literature, it should be noted that in most cases, the effective supply of IPGs is closely linked to international governance arrangements. Good institutions and rules can help promote the supply of public goods.

Types of IPGs and methods of provision vary; some rely on the best efforts of a single major country (referred to below as a "single effort"), while others rely on the collective efforts of all or most members of the international community (referred to below as a "collective effort"). The latter type of the supply of public goods is more prone to the dilemma of collective action.¹⁷ In some cases, the supply of IPGs relies on the cooperation of the weakest links (referred to below as the weakest link type); that is, the non-cooperation of a single country can nullify the efforts of other countries, for example in the prohibition of nuclear weapons. The different methods of IPG supply are accompanied by different problems and require corresponding governance systems, incentives and safeguards. It should be noted that the provision of IPGs poses new challenges to international law, mainly because the state, as the basic actor in international law, often has trouble effectively coordinating the collective action required for IPG provision due to factors such as state sovereignty and the lack of relatively strong enforcement mechanisms in international law.¹⁸ Therefore, we need to consider the limitations of international law when discussing IPG provision and take this as our basis in designing the appropriate operational mechanisms.

17 Daniel Bodansky, "What's in a Concept? Global Public Goods, International Law and Legitimacy," pp. 658-665; Gregory Shaffer, "International Law and Global Public Goods in a Legal World," pp. 675-681.

18 Nico Krisch, "The Decay of Consent: International Law in an Age of Global Public Goods," pp. 1-40.

2. *The necessity of the rule of law in the BRI in terms of public goods supply*

The BRI is regarded as a new form of international cooperation, a new platform for global governance and a new aspect of trans-regional cooperation; it therefore has an important position in modern international law.¹⁹ The construction of the BRI must be under the rule of law, especially international law.

(1) The BRI is a “single effort” IPG provided by China

First, the BRI was initiated by China and focuses on supporting infrastructure construction and interconnection, thus laying a foundation for the sustainable economic growth of BRI countries. Second, China adheres to the principle of achieving shared growth through discussion and collaboration; it does not claim dominance in the BRI. Based on its economic development and comprehensive capacity, it is committed to shouldering further responsibilities and obligations that fall within its capacities.²⁰ Third, the BRI explicitly welcomes other participating countries to enter into extensive in-depth win-win cooperation with China’s economy. This new principle of upholding justice while pursuing shared interests is in line with the nature of supplying IPGs through a “single effort.”

China provides substantial financial support for BRI construction, but because of the large amounts of investment involved, other partners are often required to participate in bringing joint projects to completion. In addition, such successful cooperation helps to avoid excessive free riders in the supply of public goods, thus making the provision of such goods more sustainable. Realizing the BRI vision requires cooperation at the national and governmental levels, but should also involve market and non-government providers in addition to governments in forming stable multilevel arrangements for the supply of public goods under the BRI. The different types of cooperation need to be guaranteed by effective international law mechanisms.

(2) International governance of the supply of public goods requires the BRI to be under the rule of law

The governance of the BRI, an international cooperation mechanism initiated by China, is based on the establishment of the fundamental legal principles and order to be followed in collaboration, the formation of a more stable legal framework and relatively fixed governance platform for governance issues, a clear definition of the rights and obligations of all parties, and effective dispute resolution. All of these must be based on law. Especially in the current international environment, progressing the BRI must take the rule of law route. Some view the BRI as a geopolitical and economic threat resulting from China’s rise,²¹

19 Yang Zewei *et al.*, *The Belt and Road Initiative and International Legal System*, pp. 24-28.

20 See the National Reform and Development Commission, the Ministry of Foreign Affairs and the Ministry of Commerce of the PRC, “Vision and Actions on Jointly Building the Silk Road Economic Belt and 21st Century Maritime Silk Road.”

21 Francisco J. Leandro, “The OBOR Geopolitical Drive: The Chinese Access Security Strategy,” in Julien Chaisse and Jędrzej Górski, eds., *The Belt and Road Initiative: Law, Economics and Politics*, pp. 83-106.

equating it with a Chinese version of the Marshall Plan or as a way for China to export excess production capacity, use government funds for resource extraction purposes, or trap underdeveloped countries in a debt trap.²² Such views are not only contrary to China's intentions in promoting the BRI, but are also not consistent with the actual construction of the BRI. To a large extent, they have created an unfavorable international public opinion environment for the BRI.

To eliminate the negative impact of such views, it is especially necessary to demonstrate China's awareness of international law in the construction of the BRI, fully respect and give full play to international law, and use rules and the rule of law as the basic guidelines for cooperation and dialogue in the BRI. By buttressing the BRI with the rule of law, China can form a stable identity as a "responsible developing major country" in the international law system, and get rid of the previous mentality of narrow instrumental rationalism, which regarded China as being outside international law. This will make China give more attention to the role of international law from the perspective of maintaining and seeking the cooperative interests, common interests and overall interests of the international community.²³

(3) Guarding against risks to IPG supply requires the BRI to be under the rule of law

The BRI covers a wide range of areas and exerts an extensive influence, so it has to preserve and deal with international relations and regional environments that are very complex. Therefore, we must work hard to improve our governance capacity for defusing risks, and buttressing the BRI with the rule of law is an important and effective way of doing this.

First of all, as an international public good, the BRI is not a form of foreign aid. Its principle of collaboration means adhering to market operations, emphasizing compliance with the laws governing the market and internationally accepted rules, and giving full play to the decisive role of the market in resource allocation and the major role of various types of enterprises. Such laws and rules must be used to guard against commercial risks in the construction of the BRI.

Second, the BRI involves a great number of infrastructure projects that require large investments and involve high risks. A good many infrastructure projects adopt the public-private partnership (PPP) model and are closely connected to the host government; coupled with big investments and long lead times, this means that very complex legal

22 There have been international misunderstandings over the nature and purposes of the BRI since its introduction. See Simon Shen and Wilson Chan, "A Comparative Study of the Belt and Road Initiative and the Marshall Plan," pp. 1-11; Usman W. Chohan, "What Is One Belt One Road? A Surplus Recycling Mechanism Approach," in Julien Chaisse and Jędrzej Górski, eds., *The Belt and Road Initiative: Law, Economics and Politics*, pp. 205-219.

23 For a long time, China lay outside international law and treated it with "instrumental rationalism," which led to a lack of Chinese international law theory. See Xu Chongli, "The Mentality of China as a Country Outside International Law and the Lack of International Law Theory."

issues are involved.²⁴ In the face of the increasingly complex international environment in recent years and the actual development status of China and other participating countries, if we are to ensure the long-term stability and sustainable development of the BRI, we need to pay attention to guarding against various political and commercial risks that are detrimental or even damaging to the implementation of the BRI, and to avoiding the “weakest links” type. From the perspective of the current dilemma of IPG supply and responding to this dilemma, buttressing the BRI with the rule of law is an inevitable choice for China, and it is also what conforms to the rightful sense of China’s international rule of law concept in the new era.²⁵

IV. The Provision of International Legal Institutions and a BRI under the Rule of Law

At present, the BRI has no dedicated treaty-based mechanisms or arrangements; its implementation relies more on bilateral diplomacy and policy-level measures. The question that arises here is whether or how this model can reflect the construction of the BRI under the rule of law. How can we improve the provision of international legal institutions in order to achieve the long-term development of the BRI?

1. The basic problems in the BRI’s provision of international legal institutions

(1) Flexible arrangements for combining soft law and hard law

With its non-treaty-based loose and informal arrangements, the BRI is unlike traditional international legal mechanisms, but this does not mean that its construction falls outside international law mechanisms such as treaties. There are many norms in the current system of international law that are applicable to the construction of the BRI, including bilateral, regional and multilateral treaties. The limitations of international law in supplying IPGs also indicate that China needs to be more flexible in setting up suitable mechanisms according to the actual needs of BRI construction.

Apart from formal agreements such as bilateral investment treaties, regional trade agreements and bilateral taxation agreements, the innovations or breakthroughs in the construction of the BRI lie in the adoption of a large number of informal mechanisms and arrangements that constitute the vehicles and forms of the rule of law. These informal mechanisms take the form of “soft law” documents, including memorandums of understanding, declarations, initiatives, programs, standards, proposals, codes of conduct or action plans. As a new way of promoting global governance, the various forms of international “soft law” deserve attention as a means of expanding the scope

24 Huaxia Lai and Gabriel M. Lentner, “Paving the Silk Road BIT by BIT: An Analysis of Investment Protection for Chinese Infrastructure Projects under the Belt and Road Initiative,” in Julien Chaisse and Jędrzej Górski, eds., *The Belt and Road Initiative: Law, Economics and Politics*, pp. 283-285.

25 See Han Xiuli, “More on the Implementation of the Belt and Road Initiative under the Concept of the International Rule of Law.”

of international law, developing international law norms and enhancing the influence of international law.

In the supply of IPGs, soft law mechanisms have the advantages of facilitating implementation or compliance and low coordination costs. The uncertainty of international cooperation and the characteristics of soft law, such as the low cost of establishing sovereignty, frequency of experimental norms, the diversity of entities drawing up the arrangements and their flexible implementation, all determine that “soft law” is a good match for BRI construction.²⁶ This approach can maximize the flexibility of BRI implementation mechanisms and systems, and is conducive to dealing with the various uncertainties and challenges of the current stage.²⁷ In terms of governance content, the BRI does focus on economic issues such as infrastructure, trade and investment, currency and finance, but it also involves political and cultural issues which are not suited to the rule-based governance approach. The great differences in the various systems of participating countries raise the overall cost of rule-based governance, making it unfeasible in many cases.²⁸

A realistic consideration of the actual needs of the BRI and the current situation of the rule of law in participating countries indicates that the specific form of international law provision in the construction of the BRI should be determined by the context. With regard to the more binding legal forms, BRI legal provision should focus on treaties; however, soft law is a better choice for legal forms that require a flexible response. In addition, it should be noted that although the rapid growth of soft law in international relations has become an important phenomenon in international law, it also raises a series of new issues and challenges, including knowledge and understanding of the relationship between soft law norms and hard law rules and the mechanisms for their interaction. The BRI rule of law provides a good way to explore these issues through practice.

(2) The move toward convergence in international economic and trade rules and buttressing the BRI with the rule of law

One of the priorities of BRI cooperation is to “organically combine investment and trade and use investment to drive trade development.” Although trade law and investment laws and regulations traditionally belong to two separate areas, and the rights and obligations they establish are substantively different,²⁹ in the context of the global value chain, international trade is increasingly driven by international investment, and the convergence of trade in goods and services and investment behavior is becoming ever more marked. The trend

26 See Han Yonghong, “On the Soft Law Protection for International Cooperation on the Belt and Road Initiative.”

27 Heng Wang, “China’s Approach to the Belt and Road Initiative: Scope, Character and Sustainability,” pp. 41-47.

28 See Chen Weiguang and Wang Yan, “Pursuing the Belt and Road Initiative through Collaboration: An Analytical Framework Based on Relational and Rule-Based Governance,” pp. 93-112.

29 Chios Carmody, “Obligations versus Rights: Substantive Difference between WTO and International Investment Law,” pp. 75-104.

toward convergence of rules requires a comprehensive and integrated vision of international economic and trade governance and the ability to coordinate and regulate issues in multiple normative fields.³⁰

In constructing a dispute resolution mechanism for the BRI, the efficient resolution of various disputes requires that we go beyond traditional thinking and consider the mechanisms of public and private law. Starting from dispute resolution principles, the integration of dispute types and the advantages and disadvantages of the existing system, it is imperative that we gradually create a unified mechanism covering investment and trade, reasonably incorporate Chinese elements into this mechanism, and combine dispute prevention, mediation, arbitration and litigation systems.³¹

(3) Using existing mechanisms and innovating new rules

Given that many in the international community have misinterpreted the BRI, special emphasis should be placed on the fact that it does not negate existing international economic and trade governance and rules, but rather continues and upgrades existing cooperation mechanisms, and that it seeks investment and trade liberalization and market integration on a larger scale and at a higher level.³² This is conducive to creating a favorable international environment for the construction of the BRI, and also avoids the duplication of legal systems and institutional arrangements. While using the existing mechanisms, we should also take the construction of the BRI as an opportunity to complement and improve the existing system of international economic law, rationally establish China's identity and standing in the distribution of institutional discourse rights in global economic governance, and reflect China's institutional contribution as a supplier of IPGs through this process.

2. *Legal protection of BRI investments*

On the premise of promoting the sustainable economic development of the places concerned, effectively guarding against risks to China's foreign investment is an important aspect of operating the BRI under the rule of law. In this regard, China needs to improve or update bilateral investment treaties with other BRI participating countries, lead the construction of regional and multilateral investment frameworks, employ overseas investment insurance systems and efficiently resolve investment disputes.

30 See Shi Jingxia, "The Reconstruction of International Trade and Investment Rules and China's Response."

31 See Shi Jingxia and Dong Nuan, "The Construction of the Investment Dispute Settlement Mechanism under the Belt and Road Initiative"; Sienho Yee, "Dispute Settlement on the Belt and Road: Ideas on System, Spirit and Style," pp. 908-910.

32 President Xi Jinping pointed out at the Belt and Road Forum for International Cooperation on May 14, 2017, that the BRI is not meant to reinvent the wheel. Rather, it aims to leverage the comparative strengths of the countries involved and coordinate their development strategies. (Xi Jinping, *The Governance of China*, vol. II, p. 509); Maria A. Carrai, "It Is Not the End of History: The Financing Institutions of the Belt and Road Initiative and the Bretton Woods System," in Julien Chaisse and Jędrzej Górski, eds., *The Belt and Road Initiative: Law, Economics and Politics*, pp. 164-170.

(1) Upgrading or renegotiating bilateral investment treaties (BITs)

The Vision and Actions on Jointly Building the Silk Road Economic Belt and 21st Century Maritime Silk Road (referred to below as the “Vision and Actions”) makes it clear that it is necessary to “speed up investment facilitation, eliminate investment barriers, and advance negotiations on bilateral investment protection agreements and double taxation avoidance agreements to protect the lawful rights and interests of investors.” China’s existing mechanisms show that the country has signed nearly 150 bilateral investment treaties since the reform and opening up policy was implemented in the late 1970s, 104 of which are currently in force and more than half of which were signed with BRI participating countries.³³ Despite the large number, a study of the core provisions of these treaties shows that the existing treaties are clearly insufficient to protect the rights and interests of the BRI’s overseas investments.³⁴ It is therefore necessary to give thought to a systematic solution and in due course launch the upgrading or renegotiation of the BITs.

(2) Promoting the formation of regional and multilateral investment frameworks under the framework of the BRI

On the basis of upgrading or renegotiating bilateral investment agreements, China should take the opportunity of the BRI to actively participate in the reform of international investment law and governance, promote the gradual formation of regional investment rules, and influence the development of rules governing international investment law. This is not only conducive to protecting the security and legitimate rights and interests of Chinese enterprises’ overseas investment, but also effectively increases the supply of international law systems for the construction of the BRI. In considering the formulation of regional investment rules under the BRI framework, China can refer to the progress in recent years of WTO negotiations on investment facilitation and can, when conditions are ripe, promote the BRI multilateral investment framework.³⁵ In this process, due to the highly integrated nature of the legal issues involved in infrastructure, special attention and regulation should be given to areas which span public and private law, including concession agreements, PPPs and closely connected issues such as project financing and insolvency risk segregation. All these reflect the special requirement for the BRI to be constructed under the rule of law.

(3) Overseas investment insurance in the BRI

In addition to investment treaty protection, the high political risk of investment in most

33 See Department of Treaty and Law, Ministry of Commerce of the People’s Republic of China, “List of Bilateral Investment Treaties Signed by China,” <http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml>, accessed August 9, 2021.

34 See Deng Tingting and Zhang Meiyu, “Treaty Protection of China’s Overseas Investment under the Belt and Road Initiative”; Anna Chuwen Dai, “The International Investment Agreement Network under the Belt and Road Initiative,” in Julien Chaisse and Jędrzej Górski, eds., *The Belt and Road Initiative: Law, Economics and Politics*, pp. 251-254.

35 Anna Chuwen Dai, “The International Investment Agreement Network under the Belt and Road Initiative,” in Julien Chaisse and Jędrzej Górski, eds., *The Belt and Road Initiative: Law, Economics and Politics*, pp. 266-270.

other BRI participating countries means that overseas investment insurance mechanisms should be appropriately utilized. The first thing to that needs to be done here is to accelerate the construction of China's overseas investment insurance system. Due to the lack of laws and regulations, the amount of overseas investment insurance underwritten by China Export & Credit Insurance Corporation is still small in proportion to its total underwriting, and the irrational operating mode of overseas investment insurance urgently needs to be reformed and improved. In addition, China should encourage enterprises to make more use of the World Bank's Convention Establishing the Multilateral Investment Guarantee Agency Convention (the MIGA Convention) to insure their investment projects in BRI participating countries, as a useful supplement to China's overseas investment insurance system.³⁶

3. Trade law protection in the BRI

In international trade law, the goal of buttressing the BRI with the rule of law is to achieve smooth trade flows, at the heart of which lie the strengthening of trade facilitation and the construction of a package of supporting measures. We suggest that free trade agreements be negotiated and signed or upgraded with other BRI participating countries. At the same time, attention should be paid to the harmonization of commercial laws at the private law level in order to promote a greater flow of goods and services.

(1) Expanding the network of BRI free trade agreements

At present, China's free trade agreement negotiations within the BRI framework have achieved noteworthy results, but overall, these agreements still leave much room for improvement in terms of scope of application, degree of openness and provision of advanced rules. In constructing the BRI, it is necessary to continue to expand the network of free trade agreements, further enhance the level of openness, and effectively coordinate domestic and BRI pilot free trade zones or ports to achieve a virtuous interaction between international and domestic law.³⁷ In light of the actual needs of the BRI, China should choose the appropriate negotiating parties for adopting the negative list approach. The Covid-19 pandemic has hit international merchandise trade hard, but the development of the digital economy and trade in services have increased significantly. We should incorporate new issues and rules such as digital trade into the construction of the electronic Silk Road; sign high-standard, high-quality free trade agreements; and when conditions are ripe, set up a Model BRI Free Trade Agreement. In terms of integration with the construction of domestic pilot free trade zones or ports, successful domestic experience should be transformed into the relevant legislation in a timely manner and extended to the free trade agreements signed between China and other BRI countries. In addition, the advanced rules formed in the BRI should be absorbed into the domestic pilot free trade zones or port

36 See Wang Junjie, "On the Response to Political Risks of Investment in the Belt and Road Countries."

37 See Peng Yu and Shen Yuliang, "Free Trade Agreements of the Belt and Road Initiative Countries and the Construction of China's FTA Network."

systems in a timely manner to achieve effective interaction between developing domestic law and strengthening the BRI with the rule of law.

(2) Improving trade liberalization and facilitation

Compared with the substantial progress made by the EU and ASEAN in achieving regional integration, trade liberalization among BRI participating countries remains at a low level.³⁸ China should improve its own trade facilitation as soon as possible, while at the same time focusing on promoting the trade liberalization and facilitation of BRI participants.³⁹ In addition to customs measures, cross-border trade cooperation involves the coordination and harmonization of rules in many areas such as quarantine and inspection of commodities; intellectual property rights; product quality and technical standards; and environmental standards. To achieve trade facilitation in the implementation of the BRI, we should also pay attention to innovating in and responding to trade systems in these areas.⁴⁰

(3) Paying attention to harmonizing commercial laws with BRI participating countries at the private law level

The fact that the legal traditions and customs of the countries participating in the BRI clearly differ make it very difficult to harmonize their laws. The costs of legal harmonization will be greatly reduced if, in the course of drawing up new legislation or revising existing legislation, countries can refer to or adopt international documents that represent the best legal practice in a particular area. This is one of the positive effects of international law on the supply of IPGs. Various legal documents (including conventions, model laws, and legislative guides) developed by international organizations such as the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law (HCCH) have long played a key role in the harmonization and unification of international commercial law. These documents have a wealth of content and cover many areas of international trade and economic law. At present, there is a great difference between China and other BRI participants in the acceptance of the legal documents of these important international organizations, and the overall rate of acceptance is low. We suggest that participating countries should undertake a serious analysis of the relevant documents formulated by these organizations and study the necessity and feasibility of incorporating them into their own legislation. Moreover, they should be brought on and encouraged to take note of and adopt these documents, so as to better promote the coordination and unification of economic and trade law and lay a solid legal foundation for trade and investment liberalization.

38 Joanna Waters, "Unimpeded Trade in Central Asia: A Trade Facilitation Challenge," in Julien Chaisse and Jędrzej Górski, eds., *The Belt and Road Initiative: Law, Economics and Politics*, pp. 384-394.

39 See Sheng Bin and Jin Chenxi, "Trade Facilitation in the Belt and Road Initiative Countries."

40 Joanna Waters, "Unimpeded Trade in Central Asia: A Trade Facilitation Challenge," pp. 396-398.

V. Conclusion

As the guiding idea for the construction of the BRI, the concept of international rule of law in Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era advocates building a community with a shared future for mankind for win-win cooperation at the level of values. Alongside Chinese innovations in the international rule of law, it promotes the development of the basic principles of international law at the level of practice.⁴¹ At the same time as it alleviates the shortage of IPGs, the BRI is conducive to the promotion of a development-oriented and balanced and inclusive governance system, providing a solid foundation for theoretical and practical innovation in international law and enhancing China's institutional discourse in global economic governance. The implementation of the BRI requires the powerful protection of the international legal system and at the same time offers an important platform for China to change and develop its ideas and practices with regard to the international rule of law. At this stage, the focus of the BRI under the rule of law is to comply with and improve the relevant international rules, promote legal coordination and cooperation in multiple fields including trade, investment, finance, taxation, intellectual property and environmental protection, and build a stable, transparent and non-discriminatory institutional framework and an efficient dispute resolution system. In the future, depending on actual needs, regional or multilateral legal mechanisms should be created under the framework of the BRI.

As the world economy continues in the doldrums and the Covid-19 pandemic affects international trade and investment, the international community is particularly in need of quality public goods for the post-pandemic era. Building the BRI as a high-quality global governance platform, together with successful international experience in the supply of public goods and with the judicious application and innovation of international law enhances China's participation in the reform and development of the global governance system as it gradually grows from being the adopter and follower of existing international rules to being the coauthor and reformer of innovative rules. At the same time as it realizes the vision and goals of the BRI, China should dig deeper into the international law implications of the relevant issues, further promote the theoretical and practice-based innovation of the international law system, and incorporate more Chinese elements into the development of an international legal system under the rule of law.

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41 Yang Zewei et al., *The Belt and Road Initiative and International Legal System*, pp. 28-34.

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