



Research on the International Law-making from the Perspective of the Belt Road Initiative

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Abstract. Under the international law framework, in accordance with the analysis of the current political, economical and governmental mechanisms and, in addition, the study of the sources of international law, studying the background, possibility and effectiveness of Chinese international law-making based on the Belt Road Initiative. The establishment of the Belt Road dispute settlement mechanism and institutions will help integrate China's global governance ideas and plans into the source of international law through the judicial path, and promote the construction of a community with a shared future for mankind. In addition to objectively assessing the law-making effect of the Belt Road Initiative, China also needs to strengthen relevant legal research in order to participate more actively and effectively in the international law-making.

Keywords: International Law; Law-making; Governance Theory; Belt Road Initiative.

1 Introduction

Facing an increasingly complex global situation, the international community lacks effective ways to develop new international legal norms.[1] Although country cannot solely solve this dilemma, in the face of various global disputes and problems, it is very necessary to use national wisdom and resources to participate in the creation of international law. Sources of international law can be understood as any basis for giving rise to obligations under international law. Thereby treaties and regional trade norms between countries are likely to become part of international law.[2]

As an important attempt to promote economic theoretical innovation based on the experience of developing countries, the Belt Road Initiative provides the theoretical and model reference for solving the international trade issues in terms of regional governance. Therefore, it is an important platform for China to participate international law-making, and China should optimize the investment and trade governance mechanism by creating an effective dispute settlement mechanism under the Belt Road Initiative.

2 Theoretical Analysis of International Law-making

The source of international law is not only the applicable law of international judicial bodies, but also international treaties covering the obligations of States.[3] Article 38 of the Statute of the International Court of Justice indicated that international law was made by treaties and by custom that evidenced general practice accepted as law and, in addition, international norms inferred from the general principles of law common to civilized States.[4] Besides, an international habit need to possess two elements, the state practices and legal beliefs, to become formal law.

2.1 The Theoretical Basis of China's International Law-making through the Belt Road Initiative

International laws usually arise from the common consent of member States, insofar as it can create obligations in the practice of international law. For example, the United Nations General Assembly adopted Declaration on the Establishment of a New International Economic Order and Declaration and Programme of Action on the Establishment of a New International Economic Order, and the key principles laid down in these programmatic documents are known as international development law.[5]

Among the sources of international law, such as international treaties, international practices with *opinio juris*[6], general principles of law and even *jus cogens*[7], legislation and judicature are two main different sources. Tracing back the conclusion process of the Vienna Convention on the Law of Treaties vividly reflects the characteristics of judicial law-making and its difference with legislation.[8] Legislation path generally refers to the adoption by international tribunals of the interpretation of treaties in dispute settlement proceedings, that is, creating a new applicable law to clarify the interpretation of the rights under an article and *erga omnes parties*. [9] At present, judging from trade and investment cooperation documents such as the Belt Road Initiative, Chinese law-making should be carried out through dispute settlement procedures and mainly through judicial path, duo to the high contracting cost and opportunity cost of legislative path.

Although the creation of international law through the judiciary is less stable and its legitimacy more vulnerable to challenge, its flexibility is well suited to the needs of States in addressing complex investment and contracting issues.[10]

2.2 The Compatibility Between the Belt Road Initiative and International Economic Law and the Conditions for Law-making

The jurisdiction of international dispute settlement bodies is often not limited to member States, such as the ICJ and ICSID, the efficiency and operability of conflict resolution exceed the legislative act itself. From the perspective of international custom, disputes between countries on trade and investment often seek remedies under international law, and the Belt Road Initiative focusing on investment and trade is compatible with international law.

In addition, a special condition for the international law-making through the judicial route is that the participating States can accept the sovereign cost and the loss of the case.[11] Since the establishment of WTO in 1995, expert group and appellate body were set up to form a two-level trial system, thus the dispute settlement regimes has experienced a course from diplomacy to law, and from law to nearly judicial.[12] In law scopes, the WTO Dispute Settlement mechanism and the WTO Appellate Body are the most authoritative ones. In turn, ICSID is the main body in transnational investment for resolving disputes between investors and host countries.[13]

Among the countries that have signed the Belt Road cooperation documents with China, most of them are members of the ICSID, and almost all of them have chosen ICSID as an investment dispute settlement body in their signed BIT.[14] It can be seen that for trade and investment, the maturity of the Belt Road State Parties in the the application of international law during legal regimes for resolving transnational disputes has provided a good environment for China to carry out law-making through the Belt Road platform.

3 The Motivation and Significance of China's International Law-making Based on the Belt Road Initiative

Countries participating in global trade governance are rational actors.[15] The global trade governance priority is constantly in the process of dynamic adjustment. In the ever-changing worldwide economic and trade pattern, countries often create norms that conflict with the existing trade system, so as to weaken the authority of the existing trade system based on their own interests.

3.1 Analysis of the Present International Situation

As the participants of global trade governance change in different periods, under the premise of basic norms and international economic law, countries tend to reform the governance mechanism to enhance the applicability of the governance system because of multiple factors such as the strength, demand and political relationship. When a state is not satisfied with the existing governance mechanism, it can actively try strategic reforms.

First of all, affected by trade protectionism and the novel coronavirus epidemic, loose monetary policies have led to excess liquidity in the market, and the global price index and inflation have been rising. Therefore, facing a sharp and complex shock, the existing international trade governance mechanism need the influence and restriction from relevant legal measures.[16] Secondly, with the changing roles of countries in the global trade and political pattern, the rising economic strength of emerging economies conflicts with their position in the weak distribution of global economic interests. The current global trade norms are controversial and need to be improved through strategy formulation and legal constraints.

3.2 Defects of the Existing Dispute Settlement Mechanism Dominated by International Law

The international dispute settlement regime is an important way to maintain and promote the adjustment of the international situation, the generation of international law and the realization of its role requires the cooperation of relatively independent, impartial and enforceable judicial adjudication bodies. However, the contract and agreement based on the consent of sovereign States have different characteristics from domestic law, so it is necessary to put this exploration in the macro framework of international law with contractual attribute, and deeply understand the nature of international law.[17]

At present, International Center for Settlement of Investment Disputes, the world's leading arbitration body, is often subject to controversy due to inconsistencies in its rulings. The WTO dispute settlement mechanism may increase the time cost and uncertainty of dispute settlement because of its finality and temporary arbitrators. For example, since 2017, the United States has continued to obstruct the selection process for the appointment of Appellate Body members, which directly led to the insufficient number of serving judges and the formal suspension of the Appellate Body on December 11, 2019. It can be seen that the existing dispute settlement mechanism is vulnerable to political interference, and does not meet the needs of balancing interests among member States in the new international pattern.

On the contrary, China has made continuous attempts to reform financial and trade governance mechanisms, creating more opportunities for the optimization of global governance. A study shows that economy of China developed further with the dissemination of COVID-19 through the promotion of the role of digital economy.[18] In this context, the Belt Road Initiative proposed by China can well integrate into the developing trend of economic globalization and bring new vitality to regional trades.

4 The Belt Road Initiative and the Development of International Law

Till now, in the Belt Road Initiative, China has established strategic cooperative partnership with nearly a hundred countries to promote project cooperation and improve political measures. At the same time, it has brought great opportunities and challenges for Chinese enterprises to explore foreign markets and promote their own development. However, controversy over the Belt Road Initiative is still rife, therefore sustainable dispute settlement formulations shall be steadily proposed along the initiative by China.

4.1 Dispute Resolution Regarding Transnational Business Practices

The institutional design in the law scopes along the Belt Road Initiative need to learn form foreign advanced treaties. Taking the time clause as an example, the 2012 BIT template from USA sets an arbitration limitation period for investment arbitration,

and constrained the jurisdiction of the arbitral tribunal from the legal level.[19] By incorporating time limitation clauses in the BIT, China can exclude overdue investment disputes from the jurisdiction of the tribunal, thereby improving the timeliness and effectiveness of dispute resolution.

In addition, in the international cooperation, the intersection of the BIT signed with international law and even the laws of the host country is bound to be taken into consideration. While countries often agree when signing up to a BIT that an investment must be good law and regulations, parties often disagree about what law applies when disputes arise. According to an ICSID case, *Desert Line Projects LLC V. The Republic of Yemen*, the tribunal interpreted the "compliance with host country law" clause in response to the claim that the treaty should not protect illegal investment. The BIT requiring investments to be in conformity with the host country law is to "ensure the legality of investments made under the BIT and exclude investments that violate the fundamental principles of the laws of the host country from the scope of protection"

4.2 The Inclusive Development of International Law

The United Nations introduced the concept of inclusiveness in its Millennium Development Goals. The concept of Inclusive Growth means that economic growth should not be achieved at the cost of the polarization of the wealth gap. Economic development should take into account the interests of all social strata and its results should benefit the general public. The fruits of globalization should benefit the people of all countries, especially the vulnerable groups in society, which also reflects the importance of China's continuous promotion of international law through the Belt Road project.

The Belt Road Initiative goes beyond a certain region in terms of geographical scope, running through the continents of Asia, Europe and Africa, covering five continents and connecting four oceans. It also outbreaks the traditional Center-Periphery governance model, but adopts the 1+N Convener Model initiated by China, and constantly adjusts the cooperation mode according to the will of both sides. In order to eventually form a multilateral flat cooperation network, and build a new dimension of inter-regional cooperation among countries in the world.[20]

At the same time, the meeting of the Central Leading Group for Comprehensively Deepening Reform deliberated and adopted the document *Opinions on the Establishment of the Belt Road Dispute Settlement Mechanism and Institutions* on January 23, 2018, this shows that China is gradually integrating domestic and foreign legal resources based on the existing judicial, arbitration and mediation institutions, and building a diversified dispute resolution mechanism connecting litigation, mediation and arbitration under the Belt Road Initiative.

Based on the Belt Road Initiative, China should fully utilize the draft articles for law-making conventions and soft law guidelines under International Law Commission to promote research on inclusive international law issues. [21]

5 Conclusion

The Belt Road Initiative aims to build a global partnership based on equality, mutual benefit, openness and cooperation, expand the converging interests of all countries, and develop true multilateralism based on the UN Charter.[2] So far, the UN Security Council has repeatedly included the community of shared future for mankind in its resolutions, and Chinese ideas in peace and development are highly consistent with the theme of the United Nations such as “promoting international cooperation”.

Considering that law about the state-to-state cooperation along the Belt Road Initiative are facing various trade-restrictive measures, China shall establish institutions outside of national sovereignty to balance the interests of all countries, curb the inappropriate acts of States, and safeguard the rational use of funds. Although the Belt Road Initiative is limited to trade and investment for present purpose, it can still promote the big ball of the entire global governance pattern through the small ball of regional economic and trade development.[22]

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