Soft law and Chinese investment dispute resolution with BRI countries

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Abstract. The article delves into the utilization of soft law as an effective mechanism for resolving investment disputes within the context of China's ambitious Belt and Road Initiative (BRI). With the resurgence of global investment and the expansion of BRI projects, the potential for disputes in investments has escalated. This article highlights the limitations of traditional dispute resolution methods, such as international investment arbitration and international commercial arbitration, including enforcement difficulties, high costs, and protracted proceedings. In contrast, soft law emerges as a flexible and efficient approach to address these challenges. The concept and characteristics of soft law are thoroughly explored, emphasizing its role as an alternative to conventional legal instruments. Soft law encompasses principles, codes of conduct, and rules, providing a broader range of subjects and facilitating tailored solutions adaptable to local conditions. Its inherent flexibility significantly enhances the efficiency of conflict resolution, reducing contractual and negotiation costs associated with more rigid legal frameworks. The application of soft law within the Chinese context is examined, highlighting the proactive role of Chinese institutions in incorporating soft law mechanisms. For instance, the Export-Import Bank of China (EximBank) incorporates soft law in its loan application process by requiring compliance with relevant environmental policies and standards of both China and the host country. This approach helps fill legal loopholes, ensures environmental protection, and promotes efficient dispute resolution. The article further argues that mediation, as a soft law-based dispute resolution mechanism, holds particular promise for resolving investment disputes. Mediation fosters a cooperative and collaborative environment, encouraging dialogue and negotiation between parties. Its introduction as an alternative to arbitration reduces costs and expedites the resolution process. Leveraging China's cultural tradition and appreciation for mediation, it is suggested that soft law, particularly mediation, can offer novel and effective pathways to address investment disputes arising from the BRI. By embracing the advantages of soft law, a more efficient and convenient dispute resolution mechanism can be established. This not only promotes the successful implementation of BRI projects but also contributes to enhancing China's national reputation, fostering stable relationships with participating countries, and creating a favorable environment for overseas investments. It is essential to establish a robust dispute resolution framework to ensure the smooth operation of the BRI and address the increasing number of investment disputes that may arise along its path. In conclusion, this article advocates for the adoption of soft law, particularly mediation, as a viable and effective approach to resolve investment disputes within the BRI framework. By harnessing the flexibility and efficiency of soft law mechanisms, a conducive environment for investment dispute resolution can be created, benefiting all parties involved and facilitating the realization of the Belt and Road Initiative's overarching goals.

Keywords: Dispute resolution; Belt and Road Initiative; Soft law.

1. Introduction

As the new coronavirus passes, international investment begins to recover. 2022 UN Investment Analysis reports that global direct investment will total $158 million in 2021, an increase of 64% compared to 2020 [1]. In order to recover economically, countries are beginning to see a gradual easing of financing conditions, major infrastructure projects are gradually increasing, and cross-border investments are beginning to recover and increase day by day. Along with this increase in international investment, disputes arising from investments may also increase.

In the context of world investment, China has proposed a national strategy of “One Belt, One Road”. The Belt and Road Strategy was first proposed in 2013 and has since been referred to as the "Belt and Road Initiative (BRI)" at the second Belt and Road Summit held in 2019. The strategy is

an ambitious and far-reaching project to achieve trade and investment in Asia and Europe with China through public infrastructure, minerals, natural resources, energy, and other projects. A report published by the World Bank Group in 2019 states that there are currently only a handful of laws on the Belt and Road strategy and therefore legislative protection in this direction needs to be strengthened.[2]

This article explores ways of resolving disputes concerning environmental investment in the context of the Belt and Road. The first part of the article analyses the current state of investment in Belt and Road projects, which is increasing day by day as international investment disputes increase and environmental issues come to the fore; the second part proposes three ways of resolving environmental disputes today; the third part describes in detail the concept and characteristics of "soft law" and the current The third part describes in detail the concept and characteristics of "soft law" and the current application of "soft law"; the last part compares several common dispute resolution methods and draws relevant conclusions. The investment disputes referred to in this article include not only disputes between host countries and investors but also investor-to-investor disputes.

2. Current status of Belt and Road investments

The Belt and Road project is a project in which infrastructure is the main investment, and based on President Xi Jinping's statements at the 2017 Davos Forum and the 2018 Boao Conference, the Belt and Road project can be considered a form of globalization with Chinese characteristics. [3] According to the 《China Belt and Road Trade and Investment Development Report 2022》 released by the Chinese Ministry of Commerce, China's trade in goods with countries along the Belt and Road will reach US$1.8 trillion in 2021, a record high in nine years. [4] As of 6 January 2023, China has signed more than 200 cooperation documents with 151 countries and 32 international organizations to build the Belt and Road.[5] With the increasing number of countries participating in the Belt and Road Initiative and the year-on-year increase in project transactions, its global impact is beginning to be felt and the problems that arise during project implementation are increasing by the day.

According to the Annual Report on China International Investment Arbitration published in 2022, the number of China-related dispute resolution cases in 2021 shows an increasing trend compared to 2020. The number of published cases in which the Chinese government is the respondent has increased by two and the number of cases brought by Chinese investors as claimants has increased by five, [6] which shows that the number of investment disputes will increase year on year.

As far as environmental disputes are concerned, the Belt and Road project involves the construction of a large number of large-scale transport infrastructures, which may have a negative impact on the environment of the host country and make it difficult for the host country to meet the nationally-owned carbon emission targets promised in the Paris Agreement. This has led to an increase in environmental investment disputes in recent years, such as the Lamu coal plant, the largest coal project in East and Central Africa, which was built mainly with Chinese funding. Omar Elmawi, head of the local activist group Decoalonize, said that the water pollution caused by the coal plant is endangering the mangrove forests on which local fish depend, and will cost nearly 6,000 local fishermen their jobs. [7] In addition to this, since 2019 Chinese companies have been involved in a number of other "climate lawsuits", such as power stations in Kenya, a "resources for infrastructure" agreement in Ghana and a river dredging project deep in the Amazon forest, to name but a few. This also shows the gradual increase in the number of investment disputes as the Belt and Road projects progress.

To sum up, in order to enhance China's national reputation and image, shape and maintain a stable and harmonious relationship between China and other countries, create a favourable environment for China's overseas investments, promote the implementation of the overall strategy of "going out" and make the Belt and Road strategy run smoothly. It is imperative to establish a good dispute resolution mechanism.

This paper uses several methods such as comparative analysis, textual analysis, case study analysis, and data analysis. Through comparative analysis, the characteristics of several arbitration dispute resolution mechanisms are analysed, and the superiority of soft law in resolving international investment disputes is concluded; through textual analysis, bilateral investment agreements and Chinese administrative law are analysed, and it is argued that investors may be hindered by host countries when trying to use the IIA disputes mechanism to resolve investment disputes; the article uses a range of data, such as the number of arbitrators, the average length of arbitration The article uses a range of data, such as the number of arbitrators, the average length and cost of arbitration, to argue that arbitration is not the only and high-quality method of resolving international investment disputes; and through an analysis of Groupe Maison Candia Inc v Canada (AG), it is concluded that expropriation may affect the interests of investors. Through this series of approaches, it is concluded that the use of "soft law" dispute resolution mechanisms in Belt and Road projects is more efficient and convenient, offering new possibilities for dispute resolution.

3. Investment dispute resolution

Depending on the nature of the transaction, disputes relating to Belt and Road can be divided into three categories, commercial disputes, international trade disputes, and investment disputes.[8] Commercial disputes generally occur between natural and legal persons, investment disputes generally occur between investors and host countries, and international trade disputes usually involve obligations under world trade agreements. There are three common methods of dispute resolution: the IIA, the ICA, and the WTO dispute settlement mechanism. The article focuses on the IIA and ICA settlement mechanisms.

3.1 International investment arbitration（IIA）

International investment arbitration (IIA) settles disputes between an investor and a host country, usually where the investor sues the host country because it has suffered losses due to non-compliance with bilateral or multilateral treaties.

When faced with an environmental investment dispute, the international arbitration community has found arbitration to be the best way to resolve such issues, with the Permanent Court of Arbitration in The Hague (PCA), established in 1988, being the most representative. Initially established to settle disputes between States, the Permanent Court has since expanded its scope to include the settlement of disputes between non-State subjects and State subjects, and has gradually developed a set of rules for the efficient and expeditious settlement of environmental disputes - the Selective Arbitration Rules of the Permanent Court of Arbitration for Disputes Relating to Natural Resources and the Environment.

The rules make it possible for non-state subjects to sue state subjects; create a multi-party arbitration process that apportions the costs of arbitration and reduces the costs to litigants; and construct two lists: one providing a list of arbitrators deemed to have expertise in the field of environmental energy and the other providing a list of expert witnesses in the field of environmental energy, making the outcome of the arbitration fairer, more impartial and more professional. However, only two investment disputes involving China are given in the PCA's typical case database .[9]

The CSID International Arbitration Centre is one of the best options for resolving international investment disputes, but there are only two cases in the ICSID casebook involving Chinese investment disputes with the Vietnamese government relating to infrastructure [10], which shows that investment disputes involving China have not been resolved through international arbitration.

The two sets of data above show that there are only a few cases where the Chinese government or a Chinese company is a party to international investment arbitration.

3.2 International commercial arbitration (ICA)

Conflicts between investors are often resolved using dispute resolution mechanisms such as International Commercial Arbitration (ICA). The key point in the use of ICA is the contractual provisions between the parties, so when drafting the contract, the following aspects are usually taken into account: the choice of the place of settlement of the dispute depending on the location of the investor or the place where the contract was signed, the choice of the law and the procedure to be used for the settlement of the dispute based on the interests of the parties, the language to be used in the dispute settlement mechanism and the composition of the arbitral tribunal such as The language of the dispute resolution mechanism and the composition of the arbitral tribunal, such as the arbitrators involved, etc.

3.3 International Commercial Court of the PRC- Localised ICA in China

During the second meeting of the Central Leadership Group of the Communist Party of China, President Xi Jinping stressed the need to establish a dispute resolution mechanism based on the principles of mutual consultation, joint establishment, and common sharing. [11] The conference proposed for the first time the establishment of a Belt and Road dispute settlement mechanism and institution. In July of the same year, during the Belt and Road Legal Cooperation Forum, the Minister of Foreign Affairs of the People's Republic of China, Wang Yi, announced at the opening ceremony that "a settlement mechanism featuring litigation, arbitration, and mediation will be established at an early date". [12] On 1 July 2018, the Supreme People's Court of the People's Republic of China formally established the International Commercial Court to provide a "one-stop" commercial dispute resolution mechanism, linking mediation, litigation, and arbitration mechanisms. On 21 July 2021, the Supreme Court's "one-stop" platform for the diversified settlement of international commercial disputes was launched on the website of the International Commercial Court for trial operation. The International Commercial Court has now been chosen to be established in Xi'an, Shenzhen, and Beijing.

However, as most of the investors in the Belt and Road are mainly Chinese state-owned enterprises, the procedures and content of the litigation are relatively complex compared to other ordinary cases as there will be a certain degree of state control of such companies, and the recognition of the final outcome of the case will be reduced due to its special nature.

In short, the treaties concluded by China and the legal system currently in place in China may also not be able to resolve all issues related to the Belt and Road, and therefore new ways need to be found to resolve conflicts and frictions arising from the environment.

4. Soft law

The term "soft law" refers to all principles, rules, codes of conduct, rules of internationalization, etc., other than treaties. [13]

4.1 The soft law has several distinctive features.

4.1.1 More flexible application of the subject matter

Under the traditional international law framework, international dispute resolution begins with the determination of the legal personality of the company and the nationality of its location. Soft law offers a new legal regime that uses a wider range of subjects of law, such as global accounting firms, law firms, banks, and financial institutions.

4.1.2. More efficient use of 'soft law' to resolve conflicts

The use of 'soft law' in conflict and dispute resolution allows individual countries to adapt their commitments to their particular circumstances and make them more relevant to local conditions, rather than rigidly adapting existing texts to solve all problems. [14] This flexibility can greatly improve the efficiency of conflict resolution, with lower contractual costs and lower negotiation costs.

4.2 Application of soft law in China

With the globalization of the economy, the use of 'soft law' to resolve international conflicts is on the increase. International commercial banks have been leaders in the use of soft law legal norms and are no exception in China. [15] In its "white paper on Green France" Chapter II published in 2016, the Export-Import Bank of China (EximBank) requires companies applying for loans to comply with the relevant environmental protection policies of China and the host country, and to obtain permission from the relevant government agencies when When the host country lacks relevant policies, standards or protection mechanisms, they can refer to Chinese, host country or international standards. These environmental-related standards are one of the soft laws. For example, The EximBank financed a project for a power station in Kostolac, Serbia (Phase 1), which will modernize its power generation facilities upon completion and will be fully compliant with EU emission standards, significantly reducing its air pollution. [16]

From the experience of the Export-Import Bank of China, it is easy to see that the use of soft law is convenient and quick in resolving investment issues while at the same time closing relevant legal loopholes. As investment disputes increase, the application of soft law can be extended for the resolution of related disputes.

5. Soft law for investment dispute resolution

5.1 Shortcomings of using ICA for dispute resolution

5.1.1 The International Commercial Court is not sufficient to resolve all investment disputes

The International Commercial Court has the following four categories of cases: international commercial cases where the parties have agreed to choose the jurisdiction of the Supreme People's Court and the subject matter is over RMB 300 million; international commercial cases of first instance that should be heard by the High People's Court, but the High People's Court considers that they need to be heard by the Supreme People's Court and the Supreme People's Court has granted permission; international commercial disputes that have a significant impact nationwide; cases that are arbitrated within the framework of the international commercial dispute resolution mechanism, and cases where the parties apply to the International Commercial Court for the preservation of property or for the setting aside of an award or for the enforcement of an arbitral award [17].

According to the relevant judicial interpretations, there are two criteria for commercial cases: first, the dispute is a civil or commercial legal dispute between equal subjects; second, one or both parties are foreigners, stateless persons, or foreign enterprises and organizations; one or both parties have their usual place of residence outside the People's Republic of China; the subject matter is outside the People's Republic of China; and the legal fact of the occurrence, modification or extinction of the legal relationship takes place outside the People's Republic of China, and all commercial cases with such foreign-related factors are international commercial cases [18]

As can be seen from the above-mentioned scope of commercial cases and the scope of commercial court cases, international commercial tribunals cannot resolve disputes arising between investors and host governments, nor can they hear cases where the subject matter is too small. There is therefore a need to introduce a new settlement mechanism to fill this gap.

5.1.2 International commercial arbitration (ICA)

5.1.2.1 Enforcement difficulties

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention on Arbitration or the New York Convention, is one of the key instruments in international arbitration. The New York Convention applies to the recognition and enforcement of foreign arbitral awards and to court referrals to arbitration.[19]

On 2 December 1986, the Standing Committee of the National People's Congress of the People's Republic of China adopted a resolution on China's accession to the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) and submitted its application on 22 January 1987. In its accession to the Convention, China made reservations to both "reciprocity" and "commercial", with the "commercial" reservation stating that the provision only applies to commercial disputes between the parties and does not cover non-commercial disputes such as those between investors and the Chinese government. The "commercial" reservation states that the provision applies only to commercial disputes between the parties and does not cover non-commercial disputes such as those between investors and the Chinese government. [20] It follows that there are still many inconveniences in relation to the enforcement of non-commercial disputes.

In addition, some of the countries participating in the Belt and Road project, such as Maltives, Sudan, East Timor, Turkmenistan, Irap and Yemen, are not parties to the New York Convention [21], which means that the Convention cannot be used in the enforcement of judgments, which makes the enforcement of judgments unlawful and does not facilitate the resolution of related investment disputes. This means that the New York Convention cannot be used in the enforcement of judgments and that enforcement of judgments is not based on law and is not conducive to the settlement of investment disputes.

5.1.2.2 Higher costs

When determining dispute resolution, both investors can specify the language to be used in the arbitration process, with the cost of dispute resolution increasing with each additional language. According to the cost calculator provided by the ICC website, the average cost per arbitral tribunal is 39,379 for a dispute of US$1 million, [22]which shows that as the number of arbitrators involved in an arbitration increases, so does the cost of hearing the case.

5.2 Flaws in problem-solving with IIA disputes

5.2.1 The body hearing the case is in dispute

The host country, when faced with a prosecution, will usually challenge that the case falls outside the scope of the treaty, that it is a commercial case and that jurisdiction lies with the host country's courts and not with the international arbitration body, and that the IIA's dispute resolution mechanism cannot therefore be used to resolve the dispute in question. In addition, Article 26 of the Washington Convention provides that a Contracting State may require the exhaustion of all local administrative or judicial remedies as a condition of its submission to arbitration under this Convention. [23] That is, under the ICSID regime, where the exhaustion of local remedies principle is expressly required, a range of local remedies need to be applied when bringing an arbitration, and China is part of the ICSID regime. In China, the two main routes for local remedies are administrative litigation and administrative reconsideration, with administrative reconsideration taking up to 60 days and administrative litigation taking up to six months [24], which greatly slows down the resolution of disputes and is contrary to the principle of efficiency in commercial conduct. As a result, investors may encounter obstacles from the host country when attempting to use IIA to resolve disputes.

5.2.2 Expropriation

Expropriation may occur in cases involving the protection of the environment, where environmental issues are of vital national interest to the host country, and expropriation may be permissible and therefore the host country may have exemptions, when the vital interests of the investor are compromised. For example, the federal Endangered Species Act ("SARA") provides that government departments may issue emergency orders that may apply not only to crown lands but also to private property in the course of protecting wild species. In Groupe Maison Candiac Inc v Canada (AG), In order to protect the western choral frog, the government issued an injunction, which prohibits excavation, deforestation and construction within two square kilometres of the cities of La Prairie, Candiac and Saint-Philippe, Quebec. The order restricts development on private land. As a

result of the ban, Groupe Maison Candiac Inc. was forced to reduce its residential development by 171 units. [25]

5.2.3 Small Arbitrators' Pool

Compared to international commercial arbitrators, the number of such arbitrators is less than 100 and the increase in the number of arbitration cases leads to a larger workload for the arbitrators, affecting the quality and specific time of the arbitration. According to the ICSID website, there are only 704 arbitrators recorded on the official website worldwide [26], which does not match the number of international investment disputes in the world.

5.2.4 Lengthy and costly trials

The Hong Kong International Arbitration Centre ("HKIAC") has officially released its latest report on the average cost and length of arbitration proceedings administered under the HKIAC Institutional Arbitration Rules ("the Rules"). The data shows that the average length of time spent in arbitration between 1 November 2013 and 31 May 2021 was 16.9 months and the average cost of arbitration was US$137,332. [27] The high costs and lengthy trial periods make it an obstacle for investors to use this method of dispute resolution.

5.3 Soft law is more efficient and convenient for conflict resolution.

When there is no bilateral or multilateral investment agreement between the parties to a dispute, the parties can use international practices, trade customs, and other forms of soft law to resolve the conflict between them easily and efficiently, in which case arbitration or mediation can be introduced to resolve the dispute. The timing of mediation can also be adjusted more easily and flexibly, and the cost of mediation can be relatively low. The parties can also use mediation or arbitration at their own discretion, thus reducing the cost of negotiations.

When a bilateral investment agreement exists between the disputing parties, and when an arbitration agreement exists between the disputing parties, if the parties can only resolve the conflict on the basis of arbitration. This is contrary to the efficiency of the commercial act itself, which takes too long to hear, involves huge costs and some state subjects are reluctant to be bound by such coercive force. In this case, we can also introduce mediation into the settlement mechanism in accordance with the relevant provisions of the "soft law", avoiding the use of arbitration, which is a costly and labor-intensive method of settlement.

5.4 Mediation

Mediation is applied as a soft law to investment dispute resolution mechanisms, i.e. when there is no bilateral or multi-variant investment agreement between the parties, mediation is used to resolve issues.

Mediation mechanisms have always been highly valued by the Chinese government. Due to Chinese cultural traditions, investors rarely choose to use arbitration or the International Commercial Court to resolve conflicts, preferring instead to use mediation as a relatively benign means of dealing with the conflict in question. When an investor chooses mediation, the International Commercial Experts Committee or the International Commercial Court will commission the appropriate international commercial mediation body to mediate. Once a mediation agreement has been reached, the International Commercial Court can prepare a letter of conciliation in accordance with the parties' hospital, which has legal effect once it has been served and has the same legal effect as a judgment in the subsequent enforcement process, solving the problem of enforcement difficulties, etc.

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