

CHAPTER-10

THE NOTION OF LEGAL COOPERATION UNDER THE BRI AND THE SPIRIT OF UPHOLDING INTERNATIONAL LAW BY THE UNITED NATIONS - TAKING THE PPP PROJECTS AS AN EXAMPLE

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I THE NOTION OF LEGAL COOPERATION UNDER THE BRI AND THE SPIRIT OF THE UNITED NATIONS' OBJECTIVE TO UPHOLD INTERNATIONAL LAW

In 2013, the Chinese President Xi Jinping initiated the building of the "silk road economic belt" and the "21st maritime silk road", which are combined as the "Belt and Road Initiative" (BRI). Five years on, the physical connectivity¹ among the participant countries, such as building infrastructure, has made remarkable progress and is bearing rich fruit. Meanwhile, the need to improve the institutional connectivity², such as better policies, rules and standards, has also increased. The BRI involves countries in different regions, at different stages of development, with different cultures and different genealogies of law, which may increase the cost and risk of mutual trade and investment, and negatively impact the economic activities. The notion of legal cooperation under the BRI focuses on enhancing the harmonization of the policies, rules and standards among the participants involved in the BRI. Therefore, legal cooperation could provide legal supports and safeguards to the platform of BRI, which increases the sustainability of economic activities.

As a matter of fact, the notion of legal cooperation promoted under the BRI is consistent with the spirit of the UN's objective to uphold international law.

The UN Charter, in its Preamble, set an objective: "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". It could be seen that international law "as a means for strengthening international peace and security and promoting friendly relations and

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¹ Ministry of Foreign Affairs, *Foreign Minister Wang Yi Meets the Press* (2018-03-09), <http://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/t1540928.shtml> accessed 25 April 2018. "Physical connectivity" means cooperation on tangible infrastructure such as roads, railways, hospitals and so on.

² Ibid. "Institutional connectivity" means cooperation on intangible rules such as policies, laws, standards and so on.

co-operation among States", is a key part of the work of the UN.³

Considering the balance between the national sovereignty of countries participating in the BRI and the legal cooperation among of them, the legislative instruments as model laws and rules drafted by the UN may be the ideal choice for the foundation of legal cooperation under the BRI so far. Because of the status of the UN and its distinguished contribution to globalization in the past decades, the model laws and rules drafted by the UN may be reliable and more easily accepted by the countries participating in the BRI.

Considering in the past five years the most significant outcome under the BRI are public infrastructure, the widely applied project model PPP under the BRI is used as an example in this chapter. This chapter analyses and discusses the feasibility and value of promoting the legislative instrument drafted by the United Nations Commission on International Trade Law (hereafter referred as UNCITRAL) of upholding trade and investment, in order to prove that the legislative guide and provisions drafted by the UN could become the foundation of building the BRI.

II TAKING THE PPP PROJECTS UNDER THE BRI AS AN EXAMPLE

The most significant outcomes of the BRI so far are mostly the infrastructure built by the PPP model. The Cambodian Gan Then Hydropower Station is used as example. In April 2007, when the Industry Department of the Cambodian government opened tendering to build a Hydropower Station, the China Sinohydro Bureau 8 Co. Ltd. was awarded the project by using the PPP model. China Sinohydro Bureau 8 Co. Ltd. immediately registered the Gan Then Hydropower Ltd. in Cambodia. The Gan Then Hydropower signed the project agreement with the Cambodian government and applied for a 200-million-dollar loan from Export-Import Bank of China on behalf of itself. The station was constructed within 4 years. The Gan Then Hydropower station not only meets the requirement of electricity used by three major cities (Kampot, Takeo and the capital Phnom Penh), the station dam also brings benefits to irrigate a large area and improve the environment. Meanwhile, Gan Then Hydropower Ltd. has been allowed to operate the station for 40 years based on the contract that the State Power Corporation of Cambodia agrees to purchase electricity from the station for 40 years. After 40 years, Gan Then Hydropower Ltd. will transfer this station to the Cambodian government without any charge. It is easy to see in this case that the Cambodian government has not taken any financial responsibility for this expensive project but would eventually obtain the ownership of the station; whilst Cambodian citizens are satisfied with the requirements of electricity and other benefits. At the same time, Gan Then Hydropower Ltd. recovers its costs and makes reasonable profits through operating the station, and the Export-Import Bank of China gains the interest on the loan.

As can be seen from the above, the Cambodian Gan Then Hydropower Station is a typical multi-win PPP project under the BRI. As matter of fact, there are many successful PPP projects under the BRI, such as the Bangladesh Parala coal-fired power station, the East African-Asian railway and so on.⁴

³ United Nations, 'Uphold International Law' <<https://www.un.org/en/sections/what-we-do/uphold-international-law/index.html>> accessed 25 April 2018.

⁴ Ministry of Finance of PRC, China Public Private Partnership Center, *Case Studying of the PPP Projects*

There are problems with the PPP model described above, however. For one, the conflict of laws and rules between different countries may cause the PPP project's cost and risk to escalate and may even threaten the collapse of the project. As an example of this, the XX railway project was suspended because of the conflict of laws between the host country where the project was located and the home country from where the private foreign investor came from. The different explanations of the contract items by different laws resulted in many disputes during the initial stages of the project, which caused the cost to rise significantly to the extent that the project had to be suspended.⁵ Examples such as this demonstrate the importance of enhancing legal cooperation among the countries participating in the BRI.

At present, there are four instruments drafted by the UNCITRAL relevant to PPP project—"UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects" (2000) (hereafter referred as "Legislative Guide"); "UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects" (2003) (hereafter referred as "Legislative Provisions"); "UNCITRAL Arbitration Rules"(2010) (hereafter referred as "Arbitration Rules"), and, "UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration"(2014) (hereafter referred as "Rules on Transparency").⁶ The aim of UNCITRAL in writing the four instruments was to harmonize two aspects of laws in terms of PPP projects: the substantive law regulating PPP projects, and dispute settlement by arbitration.

Considering the global impact of the UN, if the countries participating in the BRI, which lack the necessary technique to establish relevant laws, were to establish their laws and rules on the basis of the instruments issued by the UNCITRAL, this could not only modernize the national law of these countries, but also enhance the harmonization of laws with respect to PPP projects among the countries participating in the BRI.

2.1 Substantive Law

The "Legislative Guide" and "Legislative Provisions" issued by the UNCITRAL could be used as a template for substantive law as regards the PPP projects for those countries participating the BRI.

In essence, the content and legal relations of the PPP project under the title of BRI are not too different from the general PPP projects applied in other places. Therefore, in theory, the laws and rules that could apply to general PPP projects, are also compatible with PPP projects under the BRI. The primary problem at present is that the countries participating in the BRI, most of which are developing countries or least developed countries, may not have enough technique and capability to establish their national legal framework regarding to PPP project. Therefore, UNCITRAL plays an important role in developing that framework because of its mandate to prepare the legislative instruments in a number of key areas and to promote their use and adoption. These instruments are negotiated through an international process involving a variety of UNCITRAL's members who are structured so as to be

Under BRI <<http://www.cpppc.org/en/International/index.jhtml>> accessed 27 April 2018.

⁵ Shouqing Wang, 'The political risk of PPP project under the Belt and Road' (2017) 11 *Construction Enterprise Management* 58-60.

⁶ UNCITRAL, <http://www.uncitral.org/uncitral/en/uncitral_texts.html> accessed 27 April 2018.

representative of different legal traditions and levels of economic development. As a result of this process, the UNCITRAL texts are widely accepted as offering solutions appropriate to many different countries at different stages of economic development.⁷ In this case, the "Legislative Guide" and "Legislative Provisions" issued by the UNCITRAL could be considered as to offer the essential technical assistance and appropriate solutions to those countries, which have no legislation regarding PPP projects, or which hope to improve their national law in this area. In addition, considering the sensitive issue in respect of state judicial sovereignty, the legislative instruments issued by the UNCITRAL, rather than a specific country, are easier to accept by countries.

More important than the above is that the "Legislative Guide" and "Legislative Provisions" issued by the UNCITRAL provide a set of legislative recommendations regulating to PPP projects, including all models and almost all aspects of PPP projects. The "Legislative Guide" gives a set of legislative recommendations, followed by an explanatory discussion of the pertinent issues and the possible options available. The "Legislative Guide" content involves the legislative issues regarding PPP projects, including the "General legislative and institutional framework"; "Project risks and government support"; "Selection of the concessioner"; "Project agreement and other general agreements"; "Settlement of disputes", and so on. It also confirms the four legislative principles of PPP projects as transparency, fairness, long-term sustainability and eliminating undesirable restrictions.⁸ Meanwhile, the "Legislative Provisions" were prepared by UNCITRAL as an addition to the "Legislative Guide" to PPP models. It provides a set of core provisions for dealing with matters that deserve attention in legislation specifically concerned with PPP projects. The countries who intend to draft their national laws in respect of PPP projects could use this as a legislative model but adjust certain provisions according to their requirements.⁹

2.2 Mechanism of Dispute Settlement

The "Arbitration Rules" and "Rules on Transparency" issued by the UNCITRAL could be used to establish the mechanism of disputes settlement regarding to PPP projects under the BRI.

The UNCITRAL has issued the "Arbitration Rules" and "Rules on Transparency" in order to regulate the procedure of commercial arbitration. The "Arbitration Rules" covers all aspects of the arbitral process, providing a model arbitration clause; setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings; and, establishing rules in relation to the form, effect and interpretation of the award. Though the "Arbitration Rules" is not specialized for PPPs project, it could be applied for the settlement of commercial disputes between foreign private investors and host states.¹⁰ Whereas the disputes of PPP projects under the BRI usually arise between the foreign private concessioner and the host state where the projects are located, the "Arbitration Rules" regulating the

⁷ UNCITRAL, 'Technical Assistance and Coordination' <http://www.uncitral.org/uncitral/en/technical_assistance_coordination.html> accessed 28th April 2018.

⁸ UNCITRAL, *The Legislative Guide*, Chap. I on General legislative and institutional framework, 23-24, para.4-6.

⁹ UNCITRAL, *The Model Legislative Provisions*, Foreword.

¹⁰ Arbitration Rules (as revised in 2010), Resolution adopted by the General Assembly 26th December 2010, the report of the Sixth Committee (A/65/465).

arbitral procedure are still very useful for dispute settlement related to PPP projects under the BRI. Meanwhile, the "Rules on Transparency" comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-state arbitration.¹¹ These Rule could also be applied to the arbitral dispute settlement mechanism of PPP projects under the BRI, which can enhance the fairness of the mechanism and increase investor confidence.

It is worth noting that, besides arbitration, there are many other methods to settle disputes arising in PPP projects, such as mediation, negotiation, expert appraisal, even litigation. Though the "Legislative Guide" and "Legislative Provisions" recommend these dispute settlement methods in the substantive law part, the UNCITRAL does not provide procedure rules in detail as reference to arbitration. This does not mean that these dispute resolution methods are not important, but the UNCITRAL, considering the complication of PPP projects, intends to facilitate the parties to achieve an agreement to solve the disputes with more flexible methods.¹² As a matter of fact, the countries participating in the BRI, which provides a platform of cooperation, should be easier to negotiate with and achieve bilateral or multilateral agreements in this respect, to form an effective mechanism of solving disputes arising in PPP projects.

2.3 Modernization of the National Law

PPP projects under the BRI involve a great deal of cross-border cooperation, which may be technical cooperation, labor cooperation, financial cooperation, or management cooperation. Since there is no specific dispute settlement mechanism for the BRI, countries may be required to establish legal cooperation as far as possible to resolve disputes arising from the project. If some countries have inappropriate or no legislation on PPP projects, disputes may be more likely to arise and cannot be solved.

Unfortunately, because many of the countries participating in the BRI are developing or least developed countries, these countries have no or few legal norms concerning PPP projects. According to the statistics of the China Development Bank, many countries participating in the BRI have strong negative ratings on the rule of law.¹³ In such cases, countries participating in the BRI could review their domestic law on the basis of the substantive law and procedural law with regard to PPP projects provided by UNCITRAL. In this way, not only can they modernize the national law concerning PPP project of the countries which have no legislative technology, but it also can promote legal cooperation regarding PPP projects among the countries under the BRI.

2.4 Harmonization of the International Law under the BRI

If all the countries participating in the BRI establish their domestic law of the PPP project based on legislative instruments provided by the UNCITRAL, these countries' domestic laws concerning the PPP projects are going to approach the UN's international standard. It is helpful to achieve the harmonization of the law regarding PPP projects under

¹¹ Rules on Transparency, Resolution adopted by the General Assembly on 16th December 2013, the report of the Sixth Committee (A/68/462).

¹² UNCITRAL, *The Legislative Guide*, Chap. VI on Settlement of disputes, Section B General remarks, paras.1.

¹³ China Development Bank, *The Legal Risk Review of the Belt and Road Countries* (Law Press China, 2016).

the BRI. The benefit of the harmonization of law is that conflicts and obstacles caused by different national laws arising in cross-border PPP projects will be reduced.

In addition, the gradual harmonization of dispute settlement procedures is helpful to establish a specific mechanism of dispute settlement concerning PPP projects under the BRI, which could more effectively solve the disputes in the PPP projects, promote the development of the PPP projects, and accelerate the construction of infrastructure in developing and least developed areas.

III CONCLUSION

From the example of the PPP project used above, it is evident that the BRI does not intend to establish another legal system of international law, but to support the spirit and rules of the UN, which are also beneficial for promoting trade and common development. Both the notion of legal cooperation under the BRI and the spirit of the UN to uphold international law are used to promote the modernization of national laws and the harmonization of international law.

It is appropriate to apply the legislative instruments issued by the UN, when the platform of the BRI is built. On the one hand, this can reduce the pressure from participants to question the platform, and on the other hand, it is indeed more acceptable to participants. In addition, the UN's function on supervising and improving law can promote legal cooperation among the countries participating in the BRI. For example, in March 2014, the UN released a report on the gap between the states' domestic legislation concerning PPP and the legislative model issued by the UN. The BRI can consider the use of this report as a reference in order to examine the gap between participating countries and to provide assistance to those which need it.

Along with the increase in the number of countries to join the BRI platform, the legal instrument concerning PPP projects issued by the UN will be realized and applied more widely, which is advantageous for the achievement of the UN's objective to promote the development of economy, the harmonization of law, and the acceleration of globalization. This will lead to a win-win outcome.

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