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Investor-State Mediation and the Belt and Road Initiative: Examining the Conditions for Settlement

Mark McLaughlin[1]

Abstract

Despite its dominance in the field, the variety of reform proposals for investor-state dispute settlement indicates stakeholder discontent with arbitration. One suggested reform is the introduction of investor-state mediation, which has been supported by the conclusion of the Singapore Convention on Mediation and the proposal by ICSID of a set of mediation rules. This article examines the respective merits of arbitration and mediation to settle investment disputes related to the Belt and Road Initiative. Many of the principles underpinning the implementation of the BRI sit uncomfortably alongside an adversarial adjudicative mechanism, and access to arbitration is limited in some investment treaties. It is argued that, in some instances, mediation may be more attuned to the unique conditions of the BRI. Stakeholders have done considerable work to enhance the legitimacy of mediation within the field of investor-state dispute settlement, but it remains dormant in practice and comparatively rare within investment treaties. While a mediated settlement will remain elusive in many instances, it can be encouraged by a series of reforms to treaty drafting, the internal organization of government departments, and the actions of foreign investors.

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I. Introduction

For three decades, arbitration has dominated the world of investor-State dispute settlement (ISDS). The promise of an impartial, depoliticized, and enforceable mechanism for the settlement of investment disputes has driven the proliferation of arbitration clauses in investment treaties and arbitral tribunals in practice.[2] By granting standing rights to non-State actors, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('the ICSID Convention') has recast the boundaries of binding dispute resolution.[3] Despite its transformative effects, and often because of them, stakeholder commitment to arbitration has begun to falter.

From procedural fine-tuning to outright abolition, the spectrum of reform proposals for ISDS reflects a nascent discontent.[4] And yet, the use of mediation for the settlement of such disputes is comparatively rare. ICSID Conciliation Rules are neither widely utilised nor, in fact, mediation *per se*.[5] Evidence suggests that State officials consider mediation too ill-defined a

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[2] Taylor St John, *The Rise of Investor-state Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press, 2018).; Chester Brown and Kate Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011).; Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2018).

[3] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, signed on 18 March 1965, entered into force 14 October 1966.

[4] Jean E Kalicki and Anna Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff, 2015).; Michael Waibel, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International B.V., 2010).; Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (BRILL, 2017).

[5] Mediation typically involves a mediator facilitating meaningful negotiations and assisting parties to focus on their 'real interests' as opposed to their legal rights. While the ICSID Conciliation Rules do not prohibit this facilitative approach, the process of conciliation, by which a Conciliation Commission issues non-binding proposals for settlement, is generally considered to be a rights-based process, though the terms necessarily overlap. For a discussion of their relationship, see Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2015) at 406.

process with which to engage.[6] No internal framework exists to assign the authority to settle disputes. Critical policy questions, like the balance between transparency and confidentiality, remain untreated.[7] However, the emergence of an international legal framework for mediation, particularly the Singapore Convention on Mediation,[8] has prompted renewed optimism that investor-State mediation may yet have its golden age.[9]

Nonetheless, the political sensitivity of investment disputes and the accountability-averse nature of governments continue to disincentivise consensual settlement.[10] Officials' fear of media or public criticism foments a bureaucratic war of attrition in which posturing triumphs over prudence. A multitude of factors undermines the prerequisite of any successful mediation: a genuine desire to settle. As such, some experts estimate the number of disputes amenable to successful mediation to be 5-10% of arbitration's current caseload, equivalent to 3-5 cases annually.[11]

Against this background, this article evaluates the prospects for investor-State mediation in the context of disputes related to the Belt and Road Initiative (BRI). Part II considers the compatibility of arbitration and mediation with the characteristics of the BRI. The flexible,

[6] Seraphina Chew, Lucy Reid and J Christopher Thomas QC, 'Survey on Obstacles to Settlement of Investor-State Disputes', NUS Law Working Paper Series 2018/22, at 28. (hereafter CIL Survey on Obstacles to Settlement).
[7] Chester Brown and Phoebe Winch 'The Confidentiality and Transparency Debate in Commercial and Investment Mediation', in Catharine Titi and Katia Fach Gomez, *Mediation in International Commercial and Investment Disputes* (Oxford University Press, 2019).
[8] Convention on International Settlement Agreements Resulting from Mediation, signed on 7 August 2019, entered into force 12 September 2020.; S I Strong, 'Applying the Lesson of International Commercial Arbitration to International Commercial Mediation' in Titi and Gomez, ibid.
[9] Eunice Chua, 'The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution', 2 Asian Journal of International Law 9 (2019), at 195.
[10] See CIL Survey on Obstacles to Settlement, above n 6.; W Michael Reisman, 'International Investment Arbitration and ADR: Married but Best Living Apart', 1 ICSID Rev - Foreign Invest Law J 24 (2009), at 185.; Stephen M Schwebel, 'Is Mediation of Foreign Investment Disputes Plausible?', 2 ICSID Rev - Foreign Invest Law J 22 (2007), at 237.
[11] Charles H. Brower II, comments at the 'Webinar and Online Book Launch: Mediation in International Investment Disputes', 22 October 2020.

partnership-based approach to BRI norms and institutions is more attuned to mediation than an adversarial adjudicative mechanism. Given this premise, Part III re-examines China's approach to ISDS. It supplements the oft-told story of China's tentative embrace of investor-State arbitration with the under-told story of investment mediation in China. While Chinese treaty practice suggests a commitment to arbitration, mediation and settlement have been key pillars of China-related ISDS at home and abroad. Part IV surveys the emerging legal infrastructure of investor-State mediation and 136 Chinese international investment agreements (IIAs) to assess the extent to which mediation is feasible within the BRI dispute settlement frameworks. This survey reveals that Chinese IIAs rarely expressly reference mediation, but almost all obligate parties to attempt settlement within a designated period. While obstacles remain to the mediated settlement of investment disputes, Part V proposes reforms, in practice and in law, to support stakeholder confidence in investor-State mediation along the Belt and Road.

II. Arbitration and Mediation through a BRI Prism: Flexibility, Partnership, and Access

The BRI is a Chinese-led initiative for economic integration.[12] BRI projects span a diverse range of civil law, common law, and Islamic law jurisdictions.[13] Estimates as to the value of BRI projects range from USD 1 trillion to USD 8 trillion, much of which is delivered by

[12] *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, 28 March 2015. (hereafter *BRI Vision and Actions*).
[13] This article adopts a functional definition, see Heng Wang, 'China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability', 1 Journal of International Economic Law 22 (2019), at 32.

Chinese State-owned enterprises (SOEs).[14] Critical infrastructure, such as roads, ports, railways, extractive industries, and power plants are frequently the beneficiaries of this investment. Notably, these sectors are routinely the subject of investor-State arbitrations,[15] and many BRI countries fall far below the global average on the World Justice Project's Rule of Law Index.[16] Given this scale, legal diversity, and cultural divergence, investment projects will inevitably face disputes over the terms of their establishment, operation, and social and environmental issues. Consequently, stakeholders must appraise dispute settlement mechanisms for individual projects against the background of the broader strategic initiative.

Exploring the virtues of mediation vis-à-vis arbitration is a relatively well-ploughed furrow in dispute settlement literature.[17] A recurring theme is that of reduced time and cost, which applies notwithstanding the specific circumstances of the BRI. In 2012, the average length of arbitration at ICSID was over three years for an award at first instance and around two years for an annulment.[18] In contrast, the average length of ICSID conciliations, from registration to termination, is one and a half years.[19] Equally stark is the discrepancy in costs. Excluding legal

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[14] For a discussion of this discrepancy, see Jonathan E Hillman, 'How Big Is China's Belt and Road?', *Cent Strateg Int Stud* https://www.csis.org/analysis/how-big-chinas-belt-and-road.

[15] 'UNCTAD Investment Dispute Settlement Navigator', https://investmentpolicy.unctad.org/investment-dispute-settlement.

[16] World Bank, *Belt and Road Economics: Opportunities and Risks of Transport Corridors* (2019) https://www.worldbank.org/en/topic/regional-integration/publication/belt-and-road-economics-opportunities-and-risks-of-transport-corridors at 109.

[17] For example, see Carrie Menkel-Meadow, 'Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)' 83 Georgetown Law Journal 2663 (1995).

[18] David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', (2012) OECD Policy Papers 2012/03 at 71.

[19] Catherine Kessedjian et al, 'Mediation in Future Investor-State Dispute Settlement', Academic Forum ISDS Concept Paper 2020/16 at 15.

fees and expenses, the average cost of an ICSID tribunal is 920,000 USD,[20] whereas the average cost of ICSID conciliation proceedings is 182,000 USD.[21]

However, these practical benefits do not necessarily suggest that BRI investment disputes are particularly amenable to a mediated settlement. The synergies between investor-State mediation and the BRI are most potent when seen through the prism of China's approach to its implementation.

The BRI's legal foundation is a network of disparate but inter-connected soft and hard law instruments and institutions directed towards policy coordination, facilities connectivity, financial integration, unimpeded trade, and people-to-people bonds.[22] Three features of how China has implemented the BRI can guide the choice between mediation and arbitration for BRI investors: flexibility, partnership, and access.

A. Flexibility

One of the defining characteristics of China's approach to the BRI is 'maximised flexibility'.[23] BRI-related institutional design reflects this approach. For example, current policy does not envision a central institution. Instead, China has attempted to have the BRI recognised as a 'regional development initiative' in United Nations (UN) Resolution 2344 and incorporate BRI principles within other UN activities.[24] For BRI-related institutions, bilateralism is generally

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[20] Matthew Hodgson and Alistair Campbell, 'Damages and Costs in Investment Treaty Arbitration Revisited' Allen & Overy, 14 December 2017, https://www.allenovery.com/en-gb/global/news-and-insights/news/damages-and-costs-in-investment-treaty-arbitration-revisited.; See also Susan D Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press, 2019).

[21] Frauke Nitschke, 'ICSID Conciliation Rules in Practice' in Titi and Gomez, above n 7 at 139.

[22] *BRI Vision and Actions*, above n 12, at Part IV.

[23] See Wang, above n 13, China's Approach to the Belt and Road Initiative.

[24] UN Security Council Resolution 2344 (2017); see further at Wang, above n 13, at 38.

preferred to multilateralism, which allows for a tailored, case-by-case approach to negotiations. There is an emphasis on non-binding commitments and information exchange in those multilateral institutions that do exist, such as the Belt and Road Forum.[25] One prominent exception is the China International Commercial Court (CICC), which is of little relevance to investor-State cases as its jurisdiction is limited to 'international commercial disputes'.[26]

The predominantly non-binding method of norm-creation along the Belt and Road is another component of the 'maximised flexibility' approach.[27] Documents that apply principally to the BRI include memoranda of understanding (MOUs), guiding principles, joint communiques, letters of intent, 'vision' documents, and action plans.[28] In place of treaties seeking to harmonize BRI regulations, flexible soft law documents establish sector-specific legal frameworks that do not contain mandatory mechanisms for implementation.

The conscious elasticity of BRI design reflects uncertainty about the effects of Chinese investment on structural inequalities and the complexity inherent to a project spanning over 130 jurisdictions.[29] Demands for investment or international cooperation may fluctuate with global events, changing demographics, or the dynamism of local politics. By its nature, a bilateral soft law instrument is more amenable to amendment than a bilateral or multilateral treaty.

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[25] The first Joint Communique was endorsed only by some of the leaders, and identifies aspirational forms for cooperation, 'Joint Communique of the Leaders Roundtable of the Belt and Road Forum for International Cooperation', 16 May 2017, at http://www.beltandroadforum.org/english/n100/2017/0516/c22-423.html.

[26] CICC, 'Press Conference on the 'Opinion on the Establishment of 'The Belt and Road' International Commercial Dispute Settlement Mechanism and Institutions'' (28 June 2018) http://cicc.court.gov.cn/html/1/219/208/210/769.html.

[27] See Wang, above n 13, China's Approach to the Belt and Road Initiative at 39.

[28] Ibid at 40, see 'Belt and Road Initiative - Documents', *Belt Road Initiative* https://www.beltroad-initiative.com/documents/.

[29] For a list of those to have concluded a BRI MOU, see Christoph Nedopil Wang, 'Countries of the Belt and Road Initiative (BRI) – Green Belt and Road Initiative Center', https://green-bri.org/countries-of-the-belt-and-road-initiative-bri.

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Nevertheless, IIAs between China and Belt and Road countries establish legal standards for the treatment of foreign investment that, by design, are largely immune to changing circumstances.[30] The vast majority of these IIAs pre-date the BRI and thus are not BRI-specific documents, nor were they concluded with the BRI in mind.

Indeed, the enforcement of binding obligations through adjudication is entirely incongruous with 'maximised flexibility'. Investment treaty standards are not 'hortatory general statements of cooperation', but hard law instruments with in-built mechanisms to enforce compliance.[31] The initiation of investor-State arbitration would be to insist on rigid, binding standards which a BRI host State must uphold. It leaves no room to adapt to international, regional, or domestic politics.

Conversely, investor-mediation is consistent with an approach rooted in 'maximised flexibility'. Indeed, conscious flexibility is apparent from several mediation frameworks. The International Bar Association's Rules for Investor-State Mediation provides that 'the mediation shall be conducted in accordance with the parties' wishes' to facilitate 'free, informed and self-determined choices as to the process and outcome'.[32] Proposals for the new ICSID Mediation Rules are marginally more structured, with the mediator empowered to determine the mediation protocol in consultation with the parties.[33] They also apply notwithstanding the ICSID membership of States.

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[30] Although this is not always the case, see Jürgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis', 2 International and Comparative Law Quarterly 59 (2010), at 325.
[31] See Wang, above n 13, China's Approach to the Belt and Road Initiative at 44.
[32] Article 8, IBA Rules for Investor-State Mediation, https://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx (hereafter IBA Rules for ISM).; Frauke Nitschke, 'The IBA's Investor–State Mediation Rules and the ICSID Dispute Settlement Framework1', 1 ICSID Rev - Foreign Invest Law J 29 (2014), at 112.
[33] ICSID, Working Paper #3 Proposals for Amendment of the ICSID Rules, https://icsid.worldbank.org/sites/default/files/WP_4_Vol_1_En.pdf.

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In substantive terms, the sole focus of investor-State mediation is the resolution of the dispute, as opposed to maintaining transnational investment standards. As such, the rigid law-application inherent to arbitration is not present with mediation. There are broader dangers of this approach – it may stymie the development of investment law, and disputed measures remain unadjudicated – but it is precisely this malleability that makes mediation attuned to China's approach to the BRI.

B. Partnership

China's partnership-based approach to international cooperation with participating countries also suggests that mediation may be suited to resolving BRI investment disputes.[34] Normative documents and informal mechanisms for dialogue are established on the basis of voluntary cooperation, with good relations prioritised over regulatory harmonisation.

International cooperation along the Belt and Road takes the form of government-to-government cooperation.[35] The Belt and Road Forum is the most prominent example, but it is also apparent from various 'Visions', 'Action Plans' and MoUs between China and BRI countries. For example, the *Vision for Maritime Cooperation* and the *Vision and Actions for Energy Cooperation* establish sector-specific principles to be pursued by 'fostering closer ties'.[36] The documents provide that BRI countries should implement cooperation priorities through

[34] Jiangyu Wang, 'China's Governance Approach to the Belt and Road Initiative (BRI): Relations, Partnership, and Law', Global Trade and Customs Journal 14 (2019), at 222.
[35] Ibid at 226.
[36] *Vision for Maritime Cooperation under the Belt and Road Initiative*, (20 June 2017), https://www.yidaiyilu.gov.cn/wcm.files/upload/CMSydylgw/201706/201706200153032.pdf; *Vision and Actions for Promoting Energy Cooperation under the Silk Road Economic Belt and 21st Century Maritime Silk Road*, (May 2017), https://www.yidaiyilu.gov.cn/zchj/qwfb/13745.htm.

collaborative governance rather than regulatory standards. In place of dispute resolution mechanisms, cooperative organisations, like the Global Blue Economy Partnership Forum, promote new concepts and best practices.[37] Many BRI MOUs refer to 'common aspiration', 'cooperation', 'dialogue', 'joint contribution', and 'mutual benefit'.[38] Policy dialogue and high-level visits are the stated non-financial modes of cooperation, with consultation the preferred method of dispute settlement.

The absence of enforceable obligations may assuage lingering concerns about the imposition of Chinese dominance within host countries. They affirm the role of cooperation as opposed to imposition or coercion. In short, the continued acquiescence of host governments is a necessary prerequisite of BRI projects.

In this context, it is fairly apparent that investor-State arbitration sits uncomfortably alongside a partnership-based approach to the BRI. As many Chinese BITs require a negotiation period before arbitration, initiating arbitration proceedings is to concede that the partnership between the investor and host State may have come to an end.[39] The investor is relying on a third party to adjudicate 'international hard law' to protect its interests.

The adjudication of BRI investment disputes is also not compatible with State parties having control over the outcome of disputes. A party that submits a dispute for arbitration surrenders control, save for settlement during proceedings. Parties act not as partners but as adversaries. Indeed, the tribunal in *Achmea v Slovakia* highlighted the inflexibility of arbitration. It found that

[37] *Vision for Maritime Cooperation,* above n 36.

[38] For example, see 'Memorandum of Understanding between the Government of the Republic of Philippines and the Government of the People's Republic of China on Cooperation on the Belt and Road Initiative', 20 November 2018.

[39] A study of 729 ISDS arbitrations found that claimants 'reinvest' in 31% of cases, see Rachel L Wellhausen, 'International Investment Law and Foreign Direct Reinvestment', 4 Int Organ 73 (2019), at 841.

'the aims of both sides seem to be approximately aligned, and…the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case'.[40] Even if parties consider that the merits of their case justify an optimum outcome, the inconsistent jurisprudence often associated with investor-State arbitration injects an unavoidable degree of uncertainty.[41]

The complexities of distinguishing public and private enterprise in China is a further complication of initiating an arbitration in the BRI context.[42] The existence of a supervisory body for SOEs in the form of the State-owned Assets Supervision and Administration Commission (SASAC) has caused some host States to conflate SOEs with the Chinese State.[43] Indeed, under the State-Owned Assets Law, it is the function of the State to participate in major decision-making and contribute to the selection of management.[44] Even with privately-owned companies, it has been suggested that analysis of State control must move 'beyond ownership', and that we must instead examine the "political connections of the management; extent of financial support from government; chambers of commerce co-ordinating their activity;

[40] A*chmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008–13, (Vaughan Lowe, Albert Jan van den Berg, & V.V. Veeder, Arbs.) at 14.

[41] Christoph Schreuer, 'Diversity And Harmonization Of Treaty Interpretation In Investment Arbitration', in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill Nijhoff, 2010) at 129.

[42] For an exploration of this issue in a trade context, see Mark Wu, 'The China, Inc. Challenge to Global Trade Governance', Harvard International Law J 57 (2016), at 261.

[43] Mark McLaughlin, 'State-Owned Enterprises and Threats to National Security Under Investment Treaties', 2 Chinese Journal of International Law 19 (2020), at 289.

[44] Article 12, Law of the People's Republic of China on the State-owned Assets of Enterprises (promulgated by the Standing Comm. Nat'l People's Cong., October 28, 2008, effective May 1, 2009), http://www.lawinfochina.com/Display.aspx?lib=law&Cgid=109891

regulators conducting 'interviews' to compel or encourage compliance with government policies; and forced participation in restructuring".[45]

Nevertheless, there are significant principal-agency gaps in the governance of Chinese enterprises that indicate a high degree of operational autonomy. In an in-depth study of the governance of SOEs, Ding found that the level of government involvement in decision-making varies considerably.[46] Even for legally specified 'major decisions', the Board of Directors is incentivized to pursue a 'firm-specific strategy' rather than rely on direction by a government agency.[47] The scale and intricacy of Chinese investment overseas make micromanagement highly impractical, and directors' remuneration is based upon the commercial value they bring to the SOE. The SASAC does play a considerable role in restructuring and dissolutions, but is required by law to 'respect the rights legally enjoyed by the enterprises as the market participants' for non-major business decisions.[48] As such, examination of the relationship between a Chinese company and the Chinese State requires a nuanced, case-by-case analysis.

Against this background, the current dispute settlement regime is premised upon a meaningful distinction between the foreign investor and its home State; this is the root of claims to the 'depoliticising' effect of investor-State arbitration.[49] Within the BRI, investors are often SOEs, and participating countries designate particular projects as 'BRI projects'. As has been established, it is more difficult to draw a bright line between the foreign investor and its home

[45] Mark McLaughlin, 'Defining a State-Owned Enterprise in International Investment Agreements', 3 ICSID Rev - Foreign Invest Law J 34 (2019), at 624.; Curtis J Milhaupt and Wentong Zheng, 'Beyond Ownership: State Capitalism and the Chinese Firm' (2015) 103 Georgetown LJ 663
[46] Ru Ding, 'Interface 2.0 in Rules on State-Owned Enterprises: A Comparative Institutional Approach', 3 Journal of International Economic Law 23 (2020), at 643.
[47] Ibid at 649.
[48] Article 14, State-Owned Assets Law, above n 44.
[49] Ursula Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes', 1 ICSID Review - Foreign Investment Law Journal 33 (2018), at 14.

State in such circumstances.[50] A Chinese investor's internal cost/benefit analysis of different dispute settlement mechanisms will vary in accordance with the degree to which the goals of the State and the firm are aligned. The risk that BRI investments could become synonymous with costly legal entanglements, as opposed to a bilateral partnership, may weigh heavily on the decision to initiate arbitration for one venture.

In contrast, both parties must agree to the conclusion of an international mediated settlement agreement. It is an expression of the common will of the investor and host State, reached through facilitated dialogue. As with Chinese approaches to the BRI, a partnership is a necessary component of any successful mediation.

Indeed, the ability to preserve an ongoing business relationship is an oft-cited advantage of mediation over arbitration or litigation. In the Singapore International Dispute Resolution Academy's (SIDRA) 2020 International Dispute Resolution Survey, 'preservation of business relationship' was cited as the most influential factor for users who opted for a hybrid mechanism over standalone arbitration.[51] In the context of an investor-State relationship, the foreign investor has often committed substantial resources to establish operations in a host State. Host States may benefit directly through employment or taxes and indirectly through the development of downstream industries. Therefore, a more consensual approach at an early stage in the dispute may preserve, even strengthen, this ongoing relationship to the benefit of both parties. Indeed,

[50] See McLaughlin, above n 45.

[51] This encompasses commercial disputes as well as investment disputes, SIDRA International Dispute Resolution Survey: 2020 Final Report (hereafter SIDRA IDR Survey 2020) at 74, https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html.

empirical research suggests that disputes involving long term investments are more amenable to settlement than disputes involving short term investments.[52]

Sceptics may argue that many investors have little contact with the government of a host State, save for seeking approval for their investment. In such circumstances, a desire to preserve existing relations will not drive the growth of investor-State mediation, as this relationship does not exist. However, the unique dynamics of the BRI blunts the efficacy of this objection. Participating host States often become so by express agreement. In cases where the investor is a Chinese SOE in a BRI-designated project, it is self-evident that the ongoing relationship between China and the host country would be a material aspect of any investment dispute. Mediation facilitates this form of partnership.

C. Access to Arbitration

Leaving aside the incompatible cultures of the BRI and investor-State arbitration, there are two prominent legal and technical obstacles to the settlement of BRI disputes by arbitral tribunals. The most obvious is the absence of a BIT between China and some BRI countries. It is self-evident that an investor may not seek the enforcement of investment protection standards where States have established no such standards. In this regard, China has not concluded BITs with Afghanistan, Bhutan, East Timor, Maldives, Montenegro, Nepal, or Iraq. The BITs that China has concluded with Brunei and Jordan are not in force, and Indonesia terminated its BIT with China in 2015. For Chinese BRI investors operating in these States, the absence of a mechanism for initiating investor-State arbitration within an investment treaty curtails the possibility of

[52] Ana Ubilava, 'Amicable Settlements in Investor-State Disputes: Empirical Analysis of Patterns and Perceived Problems', 4 J World Invest Trade 21 (2020), at 528.

resolving investment disputes through arbitration. However, there are other methods by which parties can become involved in arbitration. For example, the investor and State may expressly agree to consent through the inclusion of a compromissory clause in an investment agreement that submits existing or future disputes to arbitration. Consent to arbitration could also be contained within host State legislation that provides that disputes 'shall be settled' by international arbitration, or that an investor 'may transfer the dispute' to international arbitration.[53] Therefore, while the absence of an investment treaty removes one method by which parties consent to ISDS, others remain available.

Secondly, many of the ISDS provisions within BITs between China and BRI countries limit access to arbitration. The majority of these treaties belong to the first generation of Chinese BITs, concluded in the 1980s and 1990s, and adopt a restrictive approach to granting foreign investors access to investor-State arbitration. Recourse to arbitration is limited by a series of safeguards and conditional consent, not least amongst which is the requirement to exhaust domestic remedies before an investor can initiate arbitration.[54] A common method of limiting access is to restrict subject-matter jurisdiction. For example, the China-Sri Lanka BIT provides investors access to arbitration only for a 'dispute involving the amount of compensation resulting from expropriation'.[55]

Arbitral jurisprudence is not consistent on whether such a provision allows for a substantive review. In the *Tza Yap Shum* case, the tribunal concluded that the phrase 'involving the amount of compensation' contained in the China-Peru BIT 1994 required consideration of

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[53] Christoph Schreuer, 'Consent to Arbitration' (26 June 2008), *Oxford Handbook of International Investment Law* https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199231386.001.0001/oxfordhb-9780199231386-e-21 (visited 21 June 2021) at 834.
[54] J Romesh Weeramantry, 'Investor–State Dispute Settlement Provisions in China's Investment Treaties', 1 ICSID Review - Foreign Investment Law Journal 27 (2012), at 192.
[55] Article 13(3) China-Sri Lanka BIT 1986.

'not only the mere determination of the amount but also other issues that are normally inherent in an expropriation'.[56] Conversely, the tribunal in *RosInvest Co v Russia* adopted a more restrictive interpretation in finding that a similar provision 'does not include jurisdiction over the questions whether an expropriation occurred and was legal'[57] nor 'the occurrence or the validity of an expropriation'.[58] Consequently, this uncertainty and the restrictive interpretation represent barriers to BRI investors' access to investor-State arbitration within Chinese BITs.[59]

Viewed through these prisms – flexibility, partnership, and access – the incongruity of investor-State arbitration with disputes related to the Belt and Road Initiative is evident. Mediation is more attuned to the nature of the BRI. Given this premise, it is necessary to examine China's approach to the resolution of investment disputes.

III. Characterising China's Approach to Investment Disputes

The prominence of Chinese investment overseas has generated considerable interest in China's preferred approach to ISDS. However, the vast majority of this literature charts a tentative embrace of investor-State arbitration in BITs and analyses the few China-related arbitral cases.[60] A fuller picture of the Chinese approach to investment disputes must discuss these cases alongside China's investment mediation law and practice.

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[56] Decision on Jurisdiction and Competence, para 188, quoted in Tza Yap Shum v Republic of Peru, Decision on Annulment, ICSID Case No ARB/07/6 (12 February 2015), para 103.
[57] RosInvest Co UK Ltd v The Russian Federation, SCC Case No Arb V079/2005, Award on Jurisdiction (5 October 2007) para 114.
[58] Ibid, para 118.
[59] For an in-depth discussion on access to arbitration for BRI projects, including the use of most-favoured nation provisions to import procedural rights, see Julien Chaisse and Jamieson Kirkwood, 'Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty', 1 J Int Econ Law 23 (2020), at 245.
[60] For example, see Mark McLaughlin, 'Global Reform of Investor–State Arbitration: A Tentative Roadmap of China's Emergent Equilibrium', 1 Chinese Journal of Comparative Law 6 (2018), at 73.

Journal of International Economic Law, Volume 24, Issue 3, September 2021, Pages 609–629,
https://academic.oup.com/jiel/article-abstract/24/3/609/6356765?redirectedFrom=fulltext

A. The Uncertain Equilibrium of China's Policy on Investor-State Arbitration

Following Deng Xiaoping's 'Opening up' policy in 1979, in which a series of reforms overturned the prevailing socialist orthodoxy concerning foreign investment, China concluded its first BIT in 1982.[61] As previously discussed, these early BITs either contained no provision for investor-State arbitration or restricted the scope of such access. The 'Going Global' strategy of the late 1990s and China's emergence as a capital-exporting nation was a catalyst for a reoriented approach.[62] To enhance international competitiveness and promote exports, Chinese authorities facilitated outbound investment by reforming the approval process and making support available to prospective overseas investors.[63] The evolution of China's investment model can be traced through changes to the definition of investment, the introduction of broader substantive investment protections such as national treatment, and expanded access to investor-State arbitration.[64]

The landmark instrument in this reorientation was the 1998 China-Barbados BIT. Contrary to earlier practice, which had limited its scope to the 'amount of compensation', dispute settlement provisions covered 'any dispute'.[65] To arbitrate, investors need only attempt to settle the dispute amicably for six months. This relatively unqualified access to investor-State

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[61] China-Sweden BIT 1982.
[62] Axel Berger, 'China and the Global Governance of Foreign Direct Investment: The Emerging Liberal Bilateral Investment Treaty Approach, Discussion Paper no 10/2008 (German Development Institute 2008).
[63] Congyan Cai, 'Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice', 5 J World Invest Trade 7 (2006), at 630.
[64] Wenhua Shan and Norah Gallagher, 'China', in Chester Brown, *Commentaries on Selected Model Investment Treaties* (OUP Oxford, 2013) at 131.
[65] Article 9(1) Barbados-China BIT 1998.

arbitration represented a sharp about-turn in the evolution of the Chinese ISDS policy that had persisted for the preceding two decades.

Indeed, the Chinese proposal on ISDS reform, submitted to UNCITRAL Working Group III, affirms its continued commitment to investor-State arbitration.[66] The proposal expressly recognises the importance of ISDS for promoting cross-border foreign investments, developing the international rule of law, and avoiding economic disputes. It supports creating an appellate body to correct inconsistencies in arbitral jurisprudence, the establishment of procedures to ensure standards for arbitrators, and increased regulation of third-party funding.

However, this apparent support has not translated into a preference for arbitration amongst Chinese investors. Only eight Chinese investors have initiated investor-State arbitration, far below that of most other capital-exporting nations.[67] While there is no direct relationship between the volume of investment, treaty protections, and investment arbitrations, the lack of China-related arbitral practice is noteworthy. A cultural aversion to conflict-based mechanisms and the costs associated with them may contribute towards the relative lack of activity in Asia; a theory which is buttressed by a similarly low incidence of such claims by Japanese investors.[68] Legal and technical obstacles like the restrictive access to arbitration in ISDS clauses and narrow investment protections in BITs are also relevant factors. As such, the Chinese government's support for arbitration clauses in investment treaties cannot be conflated with a preference for arbitration in practice.

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[66] Submission from the Government of China to UNCITRAL Working Group III, 19 July 2019, A/CN.9/WG.III/WP.177.

[67] This does not include arbitrations by investors from Hong Kong.

[68] Luke Nottage and J Romesh Weeramantry, 'Investment Arbitration in Asia: Five Perspectives on Law and Practice', 1 Arbitration International 28 (2012), at 19.

Moreover, adverse reactions to losing a treaty arbitration are not uncommon.[69] No tribunals have yet decided against China, which leaves its commitment to the regime as yet untested. Chinese faith in the system may well be more fragile, or indeed more resilient, than can be asserted on the basis of current evidence.

One can draw two salient points from this account of China's approach to investor-State disputes. Firstly, significant shifts in Chinese investment policy often coincide with the enactment of its major strategic initiatives. Secondly, although China is committed to retaining investor-State arbitration as an available route to resolving disputes, investors do not routinely pursue such action, nor is support for it necessarily robust. Foundational reasons underpinning the reluctance to engage in investor-State arbitration provide a crucial broader context to Chinese ISDS policy.

B. Confucianism, Unequal Treaties and the 'Century of Humiliation'

Before the Xinhai Revolution of 1911, Confucianism was the predominant influence pervading Chinese culture, society, and law.[70] At its core was the necessity of maintaining natural harmony. The preservation of harmonious relations superseded claims to rights or interests. Thus, compromising one's rights-based position for the greater societal good was the expected mode of behaviour for 'respectable people'.[71] As such, litigation is a form of social vandalism that irrevocably disrupts normal relationships. Chinese proverbial insight explains the

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[69] In the *Philip Morris* cases, the initiation of arbitration provoked the Australian government to review its approach to ISDS, while the registration of a series of cases against India resulted in a revolution of investment policy.
[70] Luke T Lee and Whalen W Lai, 'The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist', 29 Hastings Law Journal at 1307.
[71] Benjamin Schwartz, 'On Attitudes Toward Law in China' in Milton Katz(ed) *Government Under Law and the Individual* (American Council of Learned Societies 1957) at 36.

prevailing position: 'it is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit'.

In practical terms, this Confucianist philosophy translated into a hierarchical societal structure and a legal system comprised of broad moral principles or virtues. After Chinese authorities introduced elements of legalism during the Qin dynasty, the law in China developed into a uniquely Chinese amalgam of virtues or principles that lacked detailed provisions for implementation. Non-litigation processes, such as negotiation and mediation, dominated the realm of dispute settlement for family and civil law issues.[72] Indeed, local officials regarded low incidences of litigation as being indicative of good governance.[73] While China's legal system has transformed over the last 40 years, the historical aversion to adversarial dispute settlement may inform the reluctance to initiate arbitration.

Another factor underpinning the Chinese reluctance to engage with the traditional ISDS regime is the perception of its neo-colonial roots.[74] In the mid 19th century, colonial States employed 'gunboat diplomacy' to protect ostensibly private interests, the fruits of which were often enshrined in unequal treaties establishing non-reciprocal rights and broad regions of extraterritorial jurisdiction. Following the Opium Wars of the mid 19th Century, China was forced to conclude a raft of such unequal treaties that ceded control of Hong Kong, established several treaty ports, and agreed to pay reparations to Western powers for war expenses.[75] The

[72] Stanley Lubman, 'Mao and Mediation: Politics and Dispute Resolution in Communist China', 5 California Law Review 55 (1967), at 1294.
[73] Albert Hung-Yee Chen, 'Mediation, Litigation and Justice: Confucian Reflections in a Modern Liberal Society', in Daniel A Bell and Hahm Chaibong, *Confucianism for the Modern World* (Cambridge University Press, 2003) at 262.; Albert Hung-Yee Chen, *An Introduction to the Legal System of the People's Republic of China* (Butterworths Asia, 1992) at 21.
[74] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013).
[75] In particular, the 1842 Treaty of Nanking with the United Kingdom, 1844 Treaty of Wang Hiya with the United States, and the 1858 Treaty of Tientsin with Russia.

period of intervention and subjugation that followed has become known in China as the 'century of humiliation'.[76]

China's early reticence to engage in a western-devised international investment regime should be viewed in this context. The use of investment mediation and other forms of consensual settlement for foreign investors within China is informed by a desire not to hand over the decision-making power fully to an 'outside' adjudicator, and a Confucianist-rooted aversion to adjudicative mechanisms.

C. Investment Mediation and Consensual Settlement in Chinese Law and Practice

Indeed, consensual settlement has been an ever-present feature of China's approach to investment disputes. China and Chinese investors have renegotiated the terms of investment projects in Malaysia and Sri Lanka[77] while also frequently refinancing or restructuring external sovereign debt obligations.[78] Of the eight arbitrations registered by Chinese investors, *BUCG v. Yemen* was discontinued pursuant to a settlement agreement;[79] and *Jetion and T-Hertz v. Greece* was discontinued without settlement.[80]

[76] Alison Adcock Kaufman, 'The "Century of Humiliation," Then and Now: Chinese Perceptions of the International Order', 1 Pacific Focus 25 (2010), at 1.
[77] Tom Mitchell and Alice Woodhouse, 'Malaysia renegotiated China-backed rail project to avoid $5bn fee', *Financ Times*, 15 April 2019, https://www.ft.com/content/660ce336-5f38-11e9-b285-3acd5d43599e.
[78] 'New Data on the "Debt Trap" Question', *Rhodium Group* https://rhg.com/research/new-data-on-the-debt-trap-question.
[79] Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen (ICSID Case No. ARB/14/30).
[80] 'Chinese solar investors withdraw Greece claim', *Global Arbitration Review* https://globalarbitrationreview.com/chinese-solar-investors-withdraw-greece-claim.

Furthermore, a network of complaint centres, mediation panels, and working panels have been created to resolve disputes between foreign investors and Chinese authorities.[81] In 2006, the Ministry of Commerce (MOFCOM) published the *Interim Measures on Complaints from Foreign-Invested Enterprises,* which established a National Complaint Centre to oversee the handling of complaints by foreign investors.[82] It established a Complaints Coordination Office to facilitate the involvement of local authorities and multiple ministries to facilitate the settlement process. Obligated to process the complaint within 30 days, National Complaint Centres issued opinion letters with settlement recommendations.

As such, there is a history of implementing processes that resemble investment mediation in China. In 1998, a labour dispute between German company Zibo Siemens and Zibo Municipal Government that threatened an ongoing investment was settled through the local Complaint Centre.[83] From 2002 to 2005, several mediations took place between Changchun Huijin Sewage Disposal, registered in the British Virgin Islands, and the Changchun Municipal Government over a sewage disposal plant.[84] The Foreign Trade Department of Jilin Province and the Intermediate People's Court acted as mediators, with the latter successfully resolving the dispute.

The Multilateral Investment Guarantee Agency (MIGA) is also thought to have played a prominent role in facilitating settlement between foreign investors and Chinese authorities.[85] The scope of this involvement is unclear due to the confidential basis on which mediation is

[81] Guiguo Wang, 'Chinese Mechanisms for Resolving Investor-State Disputes', 1 Jindal Journal of International Affairs 1 (2011), at 209.
[82] Article 5, Interim Measures of the Ministry of Commerce Concerning Complaints from Foreign-Invested Enterprises, 1 September 2006, http://www.asianlii.org/cn/legis/cen/laws/timotmocccffe1004/.
[83] See Wang, above n 81 at 211.
[84] Ibid at 217.
[85] Monika C E Heymann, 'International Law and the Settlement of Investment Disputes Relating To China', 3 J Int Econ Law 11 (2008), at 521.

conducted. Nevertheless, one published case involves a mediation over a reduction in payments to power plants.[86]

In August 2020, MOFCOM published the *Rules on Handling Complaints of Foreign Invested Enterprises*, which updates the mechanism for handling investment disputes.[87] It offers a higher degree of confidentiality than the previous mechanism and extends the maximum time to process complaints from 30 to 60 working days.[88] Alongside local and national complaint centres, MOFCOM is assigned responsibility for handling complaints that have 'significant national or international impact'.[89]

While the term 'mediation' does not appear in the regulations, the mechanism contains many steps that are synonymous with mediation. For example, the Agency Handling Complaints shall 'conduct sufficient communications with the Complainant and the Complainee… and work for an appropriate solution'.[90] At various stages, the Agency 'may request the Complainant to assist by offering further explanations' and 'invite the Complainant and the Complainee to state their opinions and discuss possible solutions'.[91] Indeed, the Agency may, according to the specifics of the complaints, promote mutual understanding, and submit recommendations to improve policy.[92] This process resembles a form of investment mediation, albeit with other State agencies as a mediator.

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[86] 'Agency Averts Claim for Power Project in China', *MIGA News (2002)* https://www.miga.org/sites/default/files/archive/Documents/vol10no2.pdf
[87] 'MOFCOM Order No. 3 of 2020 on Rules on Handling Complaints of Foreign-Invested Enterprises -', http://english.mofcom.gov.cn/article/policyrelease/aaa/202008/20200802997073.shtml.
[88] Ibid, Article 29 and Article 19.
[89] Ibid, Article 6(3).
[90] Ibid, Article 16.
[91] Ibid, Article 17.
[92] Ibid, Article 18.

China is also amongst the first signatories of the Singapore Convention on Mediation (SCM).[93] In fact, reports indicate that the Chinese delegation participated in drafting the text.[94] While issues remain over the compatibility of the Chinese legal system with the SCM (which will be discussed below), this is undoubtedly a positive sign for the legitimacy of mediation in China. To examine its potential along the Belt and Road, it is necessary to establish the extent to which existing mechanisms of BRI dispute resolution facilitate investor-State mediation.

IV. The Integration of Mediation into BRI Dispute Settlement Frameworks

The prospects for the use of investor-State mediation for the settlement of BRI disputes turn on two factors. Firstly, the emergence of an international legal infrastructure for investor-State mediation will support its growth by bolstering stakeholder confidence. Secondly, integrating mediation within BITs and BRI dispute resolution institutions can provide a structured mechanism for the pursuit of consensual settlement.

A. The International Legal Infrastructure of Investor-State Mediation

International stakeholders and dispute settlement institutions have undertaken a series of legitimacy-building measures to bolster confidence in mediation, which is largely dormant in the world of investor-State disputes. To date, the most high-profile development is the conclusion of the Singapore Convention on Mediation, which confers new status on international mediated

[93] 'China Signs the United Nations Convention on International Settlement Agreements Resulting from Mediation', http://english.mofcom.gov.cn/article/newsrelease/significantnews/201908/20190802891357.shtml.
[94] Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements', 1 Pepperdine Dispute Resolution Law Journal 19 (2019), at 1.

settlement agreements as *sui generis* enforceable legal instruments.[95] As of November 2020, fifty-three States are signatories to the SCM, including China, the United States of America, and India.

Its scope is restricted to agreements arising out of international commercial disputes.[96] The SCM does not define a 'commercial' dispute, but an argument that it can encompass some investor-State disputes can be advanced by reference to the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, which was adopted alongside the SCM.[97] The Model Law provides that 'commercial' 'should be given a wide interpretation', which incorporates transactions resulting from an 'investment'.[98] On the basis of these criteria, many investor-State disputes, and indeed BRI investment disputes, would fall within the scope of the SCM.

However, the most potent effect of the SCM is not necessarily in transforming the legal status of mediated settlement agreements; as a consent-based mechanism, compliance is often less problematic than following adjudication. Its greatest value is in contributing to the 'halo effect' around mediation. In an investor-State context, the International Bar Association (IBA) has begun to create this effect by publishing the IBA Rules for Investor-State Mediation in 2012, establishing a procedural framework for an investor-State mediation.[99] They address early management processes, co-mediation, and concurrent mediation and arbitration, providing a roadmap for consensual settlement. ICSID has also developed Draft Rules of Mediation

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[95] For an in-depth analysis, see Nadja Alexander and Shouyu Chong, *The Singapore Convention on Mediation: A Commentary* (Kluwer Law International B.V., 2019).
[96] Article 1 SCM.
[97] Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf>
[98] Ibid, footnote 1.
[99] IBA Rules for ISM, above n 32.

Proceedings that establish the procedure for investor-State mediation that aligns with the SCM's enforceability criteria. [100]

Aside from procedural rules, the International Mediation Institute has created Competency Criteria for Investor-State Mediators.[101] The inevitable dearth of experienced practitioners in the field of investor-State mediation necessitates internationally recognised standards. To this end, the criteria include sufficient understanding of investor-State issues, experience in mediation, understanding of arbitration and adjudication, and intercultural competency.

Finally, recent IIAs incorporate investor-State mediation procedures and a code of conduct for mediators within dispute settlement provisions. The EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU-Singapore Investment Protection Agreement, and the EU-Vietnam Investment Protection Agreement all contain such provisions.[102] They furnish parties with a procedure for selecting a mediator, the conduct of the mediation, the implementation of a mediated settlement agreement, confidentiality, time limits, costs, and a review mechanism.[103] Annex 29-B of CETA also provides a code of conduct that applies to mediators, incorporating disclosure and confidentiality obligations, responsibilities, and rules on independence on impartiality.

According to the 2020 SIDRA IDR Survey, client users of investor-State dispute resolution consider enforceability (67%), impartiality (47%), transparency of process (40%), and flexibility of process (27%) to be the most influential factors when choosing a dispute resolution

[100] ICSID Mediation Rules, above n 33.
[101] IMI Competency Criteria for Mediators, *International Mediation Institute* https://www.imimediation.org/about/who-are-imi/ism-tf/.
[102] Kun Fan, 'Mediation of Investor–State Disputes: A Treaty Survey', 2 Journal of Dispute Resolution (2020), at 10.
[103] Annex 29-C CETA; Chapter 15 EU-Singapore IPA; Annex 10, EU-Vietnam IPA.

mechanism.[104] Recent reforms to its international legal infrastructure have strengthened investor-State mediation in relation to all of these factors. Indeed, two recent cases have made use of this infrastructure. Parallel mediation and arbitration was conducted in *Pan African Burkina v. Burkina Faso*, and the International Chamber of Commerce hosted the first successful mediation under the IBA rules in *Systra SA v. Philippines*.[105]

B. Mediation in BRI Investment Treaties and Dispute Resolution Institutions

The degree to which BITs facilitate mediation is the subject of growing academic scrutiny.[106] Almost all investment treaties contain provisions for dispute resolution that shape how stakeholders approach investment disputes. While the vast majority of China's BITs provide for some form of investor-State arbitration, very few BITs expressly reference mediation.

A survey of 136 BITs and treaties with investment provisions (TIPs) that China has concluded since 1982 reveals that 118 do not refer to either mediation or conciliation to settle investment disputes.[107] Two directly reference mediation. The China-Colombia BIT provides that 'nothing in this Article shall be construed as to prevent the parties of a dispute from referring their dispute, by mutual agreement, to ad hoc or institutional mediation or conciliation before or

[104] SIDRA IDR Survey 2020, above n 51, at 22.
[105] 'ICC tribunal refuses to grant provisional measures absent irreparable harm in Pan African Burkina Ltd v. Burkina Faso arbitration' (4 July 2018), *Invesment Arbitration Reporter* https://www.iareporter.com/articles/icc-tribunal-refuses-to-grant-provisional-measures-absent-irreparable-harm/.; 'In an apparent first, investor and host-state agree to try mediation under IBA rules to resolve an investment treaty dispute' (14 April 2016), *Investment Arbitration Reporter* https://www.iareporter.com/articles/in-an-apparent-first-investor-and-host-state-agree-to-try-mediation-under-iba-rules-to-resolve-an-investment-treaty-dispute/.
[106] James Claxton, *Faithful Friend and Flattering Foe: How Investment Treaties Both Facilitate and Discourage Investor-State Mediation*, SSRN (2020) https://papers.ssrn.com/abstract=3690682.; Nancy A Welsh and Andrea Kupfer Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration', Harv Negot Law Rev 18 (2013), at 71. See Kessedjian et al, above n 19.; See Titi and Gomez, above n 7.
[107] This survey is limited to the IIAs contained the UNCTAD Investment Policy Database and on the website of China's Ministry of Commerce. Of the 169 instruments concluded, 33 IIAs are omitted as they have not been made public (5) or have no authoritative English-language version (28).

during the arbitral proceeding'.[108] Furthermore, under Article 19 of the Mainland-Hong Kong Closer Economic Partnership Agreement (CEPA), Hong Kong investors may submit investment disputes to mediation institutions on the Mainland, and Mainland investors may submit investment disputes to mediation institutions in Hong Kong. A detailed clarification supplements these provisions about the mediation process, including the mediation principles, conditions for submitting the dispute to mediation, rules on confidentiality, and the formalities of a mediation settlement agreement.[109]

16 IIAs in the survey contain an express reference to conciliation. Conciliation is referenced as a process that may occur either prior to submitting the dispute to arbitration or alongside arbitration. The China-Uzbekistan BIT is an example of the former, which provides disputes should, as far as possible, 'be settled amicably through negotiations between the parties to the dispute, including conciliation procedures'.[110] As for the latter, the China-Israel BIT provides that '[e]ach Contracting Party hereby consents to submit to [ICSID] for settlement by conciliations or arbitration'.[111]

Occasionally, IIAs implicitly reference mediation or conciliation. For example, the 1990 China-Turkey BIT provides that, should negotiations or consultations be unsuccessful, 'the dispute may be settled through the use of non-binding, third party procedures'.[112]

Nevertheless, the vast majority of Chinese BITs, including those concluded with BRI countries, do not refer to mediation or conciliation. In such cases, mediation may occur either during the 'cooling off' period – when parties should enter negotiations before initiating

[108] Article 9(3), China-Colombia BIT 2008.
[109] 'Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA)', https://www.tid.gov.hk/english/cepa/investment/mediation.html.
[110] Article 12(1) China-Uzbekistan BIT 2011.
[111] Article 8 China-Israel BIT 1995.
[112] Article VII, China-Turkey BIT 1990.; see also Article 152, China-New Zealand FTA 2008.

arbitration – or in parallel with arbitrations. In the survey, 96% of the Chinese IIAs that provide recourse to investor-State arbitration contain 'cooling-off periods'. These range from three months to 1 year. By far, the most common length of cooling off period in Chinese IIAs is six months.[113] The prospects for mediation might improve if parties were required to participate in the process of non-binding dispute settlement before initiating arbitration.

Moreover, Claxton has argued that the '[p]rospects for settlement may improve at the point when a respondent State has a sufficiently clear understanding of the factual and legal basis of an investor's claims'.[114] Only 13% of the surveyed Chinese BITs required more detail about claims to be included within the notification of a dispute. Most others simply required the investor to give 'written notice'. The China-Colombia BIT provides that the written notice of a dispute must contain 'detailed information about the facts and legal basis'.[115] The China-South Korea FTA goes further by providing a list of required details for a request for consultation, including the obligations alleged to have been breached, a summary of the facts, and the relief sought.[116] The most detailed requirements are contained in the China-Australia FTA. A comprehensive list of information is required for both the consultation stage and notice for arbitration, which includes 'the provision…alleged to have been breached and any other relevant provisions'; 'the measures or events giving rise to the claim'; 'a brief summary of the legal and factual basis'; and the relief and damages sought.[117]

Dispute resolution institutions of the BRI have also promoted mediation. On January 24th 2019, the Singapore International Mediation Centre (SIMC), the China Council for the

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[113] 115 Chinese IIAs in the survey had cooling off periods; 102 were 6 months.
[114] See Claxton, above n 106, Faithful Friend and Flattering Foe at 6.
[115] Article 9(2) China-Colombia BIT 2008.
[116] Article 12.12 China-South Korea FTA 2015.
[117] Article 9.11 Australia-China FTA 2015.

Promotion of International Trade (CCPIT), and the China Chamber of International Commerce Mediation Centre (CCIC) signed a memorandum of understanding.[118] It provides that the SIMC/CCPIT/CCIC establish a BRI Mediator Panel comprised of experienced dispute resolution professionals from China, Singapore, and recipient BRI countries to develop protocols for mediation practice. Similarly, the International Chamber of Commerce has published Guidance on the Mediation of Belt and Road Disputes that recommends that 'mediation always be considered for Belt and Road disputes' either as a standalone procedure or as part of a mixed-mode process.[119]

Taken in their totality, the emerging legal infrastructure of investor-State mediation and the opportunities for settlement within BITs create the conditions for the growth of investor-State mediation along the Belt and Road. However, many of the commonly identified obstacles to consensual settlement continue to apply, and IIAs are not optimised to encourage settlement.

V. Supporting the Mediated Settlement of BRI Investment Disputes: Restrictions and Reforms

When considering how to support the use of mediation for BRI investment disputes, it is necessary to examine three areas. Firstly, to assess the extent to which traditional obstacles to the settlement exist in a BRI context; secondly, to address lingering issues around the enforcement of mediated settlement agreements; and thirdly, to reform the approach of BRI countries to

[118] 'SIMC and CCPIT Mediation Center establish international mediator panel to resolve BRI-related disputes', https://simc.com.sg/blog/2019/01/25/simc-and-ccpit-mediation-center-establish-international-mediator-panel-to-resolve-bri-related-disputes/.
[119] 'ICC Guidance on Mediation of Belt and Road Disputes', https://iccwbo.org/publication/icc-guidance-mediation-belt-road-disputes/.

investment disputes and BITs to bolster the legitimacy of mediation. The characteristics of some investor-State disputes will render mediation unviable for certain BRI projects. For those that are amenable to settlement, concrete reforms can build stakeholder confidence in mediation.

A. Traditional Obstacles to Settlement in a BRI Context

In the Centre for International Law's Survey on Obstacles to the Settlement of Investor-State Disputes, respondents were asked whether the investor or the State was more reluctant to settle an investment dispute. Perhaps unsurprisingly, 70% of respondents considered that the State party was more reluctant to consider settling.[120]

Respondents were also asked to rank the top obstacles to settlement. Many of these will apply to investment disputes in general, not merely BRI investment disputes. Above all, respondents indicated that the internal organization of States disincentivizes State parties to be accountable for settlement.[121] Participants expressed fears over prosecution for corruption of the official that signed off on the settlement agreement. One response indicated that this might be a particular concern in developing countries in which a future administration may question the agreement entered into by a previous administration.[122] Ministries tasked with managing budgets may be suspicious about voluntarily awarding compensation to a foreign investor due to the potential appearance of bribery, to which personal liability would attach.

The roots of a State's reluctance to settle are also political, stemming from fear of media or public criticism or the sensitivity of the sector in which the investment is taking place.[123] By

[120] See CIL Survey on Obstacles to Settlement, above n 6, at 1.
[121] Ibid at 12.
[122] Ibid at 13
[123] Ibid.

its nature, democratic governance necessitates careful consideration of the likely public reaction to government decisions. Settling with a foreign investor may draw accusations that incumbent officials unduly favour foreign investors or, in extreme circumstances, are 'puppets of foreign interests'.[124] Participants identified transboundary resources, the extractive industries, and civil aviation as sectors that are highly politicised.[125] Governments are likely to be especially wary of inviting sharp criticism at critical periods in an electoral cycle.

Responses indicate that States are concerned about setting a precedent that would encourage further claims.[126] For example, should a government agree to compensate a foreign investor in a dispute over legislation, other affected investors may be encouraged to seek similar arrangements.

Participants also considered that the existence of multiple stakeholders within the chain of decision-making hinders the process of settlement. Internal information-sharing systems can be slow and cumbersome, delaying the possibility of concluding an agreement at an early stage. Conflicting priorities within different ministries, administrative bodies, and political figures may exacerbate the difficulties of reaching consensus on a negotiating position. At the same time, the absence of a recognised legal framework leaves unanswered the questions of who should be in charge of negotiating the settlement and attaining budgetary approval.[127]

Other obstacles to settlement identified by respondents include State parties having insufficient information to facilitate early settlement, a new administration being hostile to the

[124] Ibid.
[125] Ibid at 20.
[126] Ibid at 12.
[127] Catherine Titi, 'Mediation and the Settlement of International Investment Disputes: Between Utopia and Realism' in Titi and Gomez above n 7, at 37.

negotiating stance of an old administration, and that disputing parties may not maintain an ongoing relationship.[128]

Utilising this framework, the unique characteristics of the BRI may make settlement more contentious or less contentious, depending on the circumstances. On the one hand, the fear of public or media criticism may be compounded when another State owns the foreign investor. Indeed, as the soft law infrastructure of the BRI is concluded between governments, a new administration may be less inclined to maintain BRI infrastructure projects than its predecessor. Moreover, the creation of transport corridors is a key component of the BRI, which necessarily involves constructing ports and airports, while many projects in Central Asia are in the extractive industries. Respondents of the SIDRA IDR Survey identified these as politically sensitive sectors in relation to which States may be reluctant to settle.[129] Alongside these factors, BRI documents do not ameliorate the difficulties in obtaining budgetary approval for settlement nor remedy fears of prosecution for corruption.

Consequently, settlement will not be possible for all BRI disputes. Many of the obstacles to settlement will remain insurmountable.

On the other hand, several features of the BRI will ease the process of settlement. Perhaps the most significant is the necessity of preserving an ongoing business relationship in a BRI context. For a typical investment, the investor may have little or no relationship with the incumbent government; their business relationship will be with local private partners. As such, parties will be less inclined to forego a rights-based process if there is no relationship to preserve. In a BRI context, many projects are implemented by SOEs and form an interconnected set of ventures. The relationship at issue is not merely between the host State and investor but

[128] Ibid at 28.
[129] Ibid at 20.

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also involves other BRI investors and their home country. Both parties are less likely to accelerate a breakdown in relations if this would jeopardise multiple projects and strain diplomatic relations.

Additionally, the presence of a pre-existing mechanism of information exchange may ease the process of settlement, particularly where the investor is an SOE. China has identified areas of cooperation in MoUs with participating countries, including infrastructure development, investment and trade issues, and social-cultural exchange.[130] Dispute settlement provisions in many MoUs, which typically provide that disputes related to the MOU be 'settled amicably by consultations', will also aid government-government cooperation.[131] Consequently, while obstacles to settlement may be greater in some BRI contexts, the necessity of preserving good relations and existing systems of information exchange support the conditions for settlement in others.

B. Enforcing Mediated Settlement Agreements along the Belt and Road

Alongside traditional obstacles to settlement, the enforcement of mediated settlement agreements remains a complex issue along the Belt and Road. While compliance is less problematic when parties control the outcome, an efficient mechanism for enforcing mediated settlement agreements contributes to the efficacy and legitimacy of mediation. Of the 53 countries who are signatories to the SCM, 39 have signed BRI MoUs or are involved in BRI projects. All six countries to have ratified the Convention – Belarus, Ecuador, Fiji, Qatar, Saudi Arabia, and Singapore – participate in the BRI. China is among those BRI countries to have not

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[130] For example, Part II China-Philippines MoU on BRI, above n 38.
[131] Ibid at Part IV.

yet ratified the SCM. Nevertheless, in most BRI countries, a mediated settlement agreement may only be enforced as a contract or, under certain conditions, a court order or a consent arbitral award.[132]

One remedy is for China to encourage BRI States to sign and ratify the SCM through the BRI infrastructure and begin its own ratification process. However, China's embrace of the SCM has not been without its hesitancies. Several agencies within China have expressed concerns over the compatibility of the Chinese legal system with SCM requirements, as there is no comprehensive law for commercial mediation.[133] The SCM bypasses the recognition procedure for mediated settlements under China's Civil Procedure Law.[134] Provisions of the 2010 People's Mediation Law also prevent mediation commissions from charging fees and members are selected from village committees and labour unions.[135] Consequently, some aspects of China's legal system sit uncomfortably alongside key pillars of the SCM by omitting the need for official qualifications and stymying the creation of a professional class of mediators.

Two further uncertainties have been identified regarding the ratification of the SCM in China.[136] Firstly, the expansive scope and ambiguous language of the SCM will require interpretation by Chinese judges before operation. For example, judges must determine whether obligations are 'clear and comprehensible' or if there 'was a serious breach of mediator standards'.[137] Due consideration should be given as to the level of court designated to adjudicate

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[132] Eunice Chua, 'Enforcement of International Mediated Settlements without the Singapore Convention on Mediation', Singapore Academy Law Journal 31 (2019), at 572.
[133] 'China's Mediation Revolution? Opportunities and Challenges of the Singapore Mediation Convention' (28 August 2019), *Opinio Juris* http://opiniojuris.org/2019/08/28/chinas-media-revolution-opportunities-and-challenges-of-the-singapore-mediation-convention/.
[134] Article 97, Civil Procedure Law of the People's Republic of China.
[135] Article 4 and Article 9 PRC People's Mediation Law 2010
[136] Carrie Shu Shang and Ziyi Huang, 'Singapore Convention in Light of China's Changing Mediation Scene', 1 Asia Pacific Mediation Journal 2 (2020), at. 74
[137] Article 5 SCM.

mediation proceedings to reflect the qualifications necessary to devise standards for enforcement. The second uncertainty is determining the 'place of business', which has no equivalent in China's Civil Procedure Law.[138] The phrase 'principal place of business' appears in the Choice of Law for Foreign-related Civil Relationships and the Contract Law,[139] which suggests that a company may have multiple places of business. As a result, parties seeking to avoid enforcement may claim an alternative territory has the 'closest relationship to the dispute'.[140] Thus, considerable work is necessary to ready the foundations of mediation in China for the SCM.

The UNICTRAL Model Law on International Commercial Mediation, adopted alongside the SCM, can inform changes to mediation legislation in China and other BRI countries.[141] It provides standards on the commencement and termination of mediation, the admissibility of evidence in mediation, and the rules of confidentiality and disclosure. By utilising the Model Law, BRI countries can harmonise standards and bring domestic laws in line with the SCM to ease enforcement.

C. Devising a Mediation-friendly Approach to Investment Disputes and BITs in BRI Countries

States and foreign investors can support the legitimacy and efficacy of mediation both within the existing BIT network and through the conclusion of new IIAs with BRI countries.

1. Within the Existing IIA Framework

[138] See Shang and Huang, above n 137. at 75.
[139] Ibid.
[140] Article 1(a) SCM.
[141] UNCITRAL Model Law, above n 97.

The majority of Chinese BITs provide a 'cooling off' period for negotiations and consultations, which typically last six months. BRI investors and BRI States can change their practice within this framework to create more hospitable conditions for a successful mediation.

For BRI investors, the most notable change to practice should be in the content of the written notice of a dispute. The China-Australia FTA provides a model of best practice, which stipulates the requirements for a request for consultation. It requires the name and address of the claimant or enterprise, the investment protection standards alleged to have been breached, the measures or events that allegedly caused the breach, a legal and factual summary of the problem, and the relief sought, including the basis upon which potential compensation has been calculated.[142] Crystallising the key points of contention will help avoid unrealistic expectations or an inaccurate evaluation about the merits of the case.

Moreover, if a notice of dispute contains a reference to mediation, the (albeit limited) evidence of the China-Hong Kong CEPA suggests that host States may favour a recognised mediation institution, perhaps in the host country or a third country.

On the State side, the essential reforms relate to the institutional readiness for mediation. A Guide on Investment Mediation has been devised by the Energy Charter Secretariat for governments and companies to make an informed decision about when to opt for mediation.[143] Alongside a step-by-step guide to the process, it provides criteria by which parties can appraise the suitability of a dispute to settlement by mediation.

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[142] Article 9.11 Australia-China FTA 2015.
[143] International Energy Charter, Guide on Investment Mediation (2016).

The Guide is complemented by a Model Instrument on Management of Investment Disputes.[144] Developed in collaboration with the International Mediation Institute's Investor-State Mediation Taskforce, it seeks to remedy the ambiguities over which body has the authority to negotiate and settle disputes. It explicitly recognises the importance of alternative dispute resolution, recommends the designation of a 'responsible body' for investment disputes, and allocates a budget for preventative measures and defence proceedings. The diffusion of these documents through BRI mechanisms will help familiarise BRI States with investor-State mediation without concluding new BITs.

2. Devising a Mediation-friendly IIA Framework

Notwithstanding the potential of these efforts, the experience of investor-State arbitration demonstrates that the explicit inclusion of mediation in investment treaties will be a catalyst to the growth of its use. Requirements to provide detailed information in the China-Australia FTA are a first step in creating conditions for settlement. However, mediation-specific reforms to treaty drafting can shape the behaviour of investors and States.

The most obvious change is for contracting parties to make express reference to mediation within ISDS provisions. There are several means of doing so. One method is to simply leave open the possibility of mediation at any stage, such as in the China-Colombia BIT. It provides that 'nothing in this Article shall be construed as to prevent the parties of a dispute from referring their dispute, by mutual agreement, to ad hoc or institutional mediation or conciliation

[144] Energy Charter Model Instrument on Management of Investment Disputes https://www.energychartertreaty.org/model-instrument/ (hereafter ECT Model Instrument).

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before or during the arbitral proceeding'.[145] Another method is to reference mediation among the list of non-binding procedures through which to attempt settlement during the 'cooling off' period.[146]

A further possible reform, of which there is no example in China's IIAs, is mandatory mediation.[147] Familiarising officials with the mediation process may be an insufficient counterweight to the low risks of simply submitting to arbitration.[148] Installing mediation as a precondition to arbitration would allay fears about mediation being seen as a sign of weakness or showing deference to foreign investors.[149] Indeed, the Australia-Indonesia CEPA provides that after the 'cooling off' period, 'the disputing Party may initiate a conciliation process, which shall be mandatory for the disputing investor'.[150] Whether such an approach will become commonplace is yet to be seen, but recent developments indicate that support for compulsory mediation or conciliation may be more robust than might have been anticipated.

Nonetheless, adding a stage to the ISDS process has time and cost implications, and mediation may not always be the most appropriate mechanism for all disputes. The risk of bad faith participation remains, either by parties failing to engage or using the mediation process to collect information for a subsequent adjudicative process. Taking these difficulties into account,

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[145] Article 9(3) China-Colombia BIT 2008.
[146] Article 19(1)(v) Mainland-Hong Kong CEPA 2017.; Jack Coe, 'Concurrent Co-Mediation: Toward a More Collaborative Centre of Gravity in Investor-State Dispute Resolution' in Titi and Gomez, above n 7, at 61-78.
[147] Dorcas Quek Anderson, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program', 2 Cardozo J Confl Resolut 11 (2010), at 479.
[148] James Claxton, 'Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?', 1 Pepperdine Dispute Resolution Law Journal 20 (2020), at 78.
[149] Lisa Blomgren Bingham, 'Opportunities for Dispute Systems Design in Investment Treaty Disputes: Consensual Dispute Resolution at Varying Levels', in Susan D. Franck and Anna Joubin-Bret (eds), *Investor-State Disputes: Prevention and Alternatives to Arbitration II Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution* (29 March 2010) (United Nations, 2010) at 36.
[150] Article 14.23(1) Australia-Indonesia CEPA 2019; see also Article 8(3) Hong Kong-UAE BIT 2019.

one viable suggestion may be the inclusion of mediation as an automatically applicable process, with a provision that allows parties to opt-out.[151]

Future IIAs should contain explicit reference to procedures and institutions for investor-State mediation. Given the institution's prominence in investor-State disputes, the ICSID Conciliation Rules and proposed ICSID Mediation Rules may help to shape the field in the years ahead.[152] In this regard, the aforementioned EU instruments with Canada, Vietnam, and Singapore can provide a model for future treaties. Express adoption of the IBA Rules for Investor-State Mediation would lend credence to the process, particularly as they have already been utilised in *Systra SA v Philippines*. The IBA Rules provide for the confidentiality of sensitive aspects of the mediation process while allowing for transparency as to its outcome. Therefore, concerns about secret settlements or performative participation in the process can be mitigated.[153] The inclusion of ICSID Rules for Mediation Proceedings, once finalised, will likely carry authority with officials accustomed to dealing with investment disputes. If implemented within BITs between BRI countries, these reforms provide the means, motive, and opportunity for investor-State mediation.

VI. Concluding Remarks

[151] Jack J Coe, 'Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch', 7 University of California Davis Journal of International Law and Policy 12 at 37.
[152] Michael Waibel, *Articles 28-35 ICSID Convention*, SSRN Scholarly Paper ID 3548560 (Rochester, NY: Social Science Research Network, 2020) https://papers.ssrn.com/abstract=3548560 at 3, 16.
[153] Chester Brown and Phoebe Winch 'The Confidentiality and Transparency Debate in Commercial and Investment Mediation', in Titi and Gomez, above n 7.

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The conditions for the growth of investor-State mediation are particularly hospitable in the context of the BRI. Not all disputes will be amenable to settlement, and not all settlements will require mediation. However, several factors suggest that the parties involved in BRI investment disputes will be more open to consensual settlement. Confidence in mediation, in particular, can be supported by a series of reforms.

In the context of China's flexible, partnership-based approach to the BRI institutions and norms, arbitration takes insufficient account of the need to preserve an ongoing relationship and evolve with changing circumstances. Combined with cultural difficulties, the restrictive provisions of Chinese IIAs with BRI countries limit investors' access to arbitration. Indeed, Chinese parties have proven reluctant to engage in an adjudicative process.

In contrast, a legal framework for investment mediation already exists in China's domestic law. While the confidentiality of proceedings leaves the precise nature of this activity obscured, there is a documented history of investment mediation in China. The process is supported by an emerging legal framework and the promotion by dispute resolution institutions. Chinese IIAs with BRI countries rarely reference mediation, but they provide the opportunity and obligation to attempt settlement. Reforms to practice and treaty drafting can encourage the settlement of investment disputes through non-binding mediation.

As the tectonic plates of ISDS continue to shift, international stakeholders are primed to reassess conventional methods of resolving investment disputes. Examining the conditions for settlement as a whole, mediation is comparatively well placed to grow in prominence along the Belt and Road.

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