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ARTICLE

The Geoeconomics of Belt and Road Disputes: A Case Study on the China-Pakistan Economic Corridor

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Abstract

This article argues that the dovetailing economic, geopolitical, and security interests that underpin the Belt and Road Initiative demands a dispute resolution mechanism that focuses on broader interests and legal rights. Using the China-Pakistan Economic Corridor (CPEC) as a case study, it identifies the conditions in which Chinese investors could have initiated an investment arbitration but did not. This can be explained by the rights-based orientation of investment treaties failing to reflect the interests of multi-project initiatives. Instead, alternative methods of home state intervention, such as state-funded political risk insurance, are used to protect investors. In other words, the political economy of CPEC investments refuses to utilize hard law mechanisms. Given this context, mediation may be a viable alternative. These circumstances accelerate the trend towards “de-legalization”, which is often cited as an inevitable consequence of the emerging “geoeconomic order” but suggests that reasons other than national security are the cause.

Keywords: Belt and Road Initiative; geoeconomics; investor-state dispute settlement; investor-state mediation

Global governance has long been the theatre for expressing state power and influence. Proponents of the institutionalist perspective contend that the post-Second World War order remains robust.¹ A liberal trinity of the rule of law, democracy, and human rights continues to dominate global institutions.² Despite geopolitical shifts, international organizational forms, particularly those relating to financial transactions, retain their primacy.³ In this view, public international law is sufficiently mature to recognize the hierarchically supreme “constitutional principles” that bridle the will of states.⁴ However, realists

¹ G. John IKENBERRY, “The Future of the Liberal World Order: Internationalism after America” *Foreign Affairs* (1 May 2011), online: Foreign Affairs <<http://www.foreignaffairs.com/articles/67730/g-john-ikenberry/the-future-of-the-liberal-world-order>>.

² Mattias KUMM, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State” in Jeffrey L. DUNOFF and Joel P. TRACHTMAN, eds., *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) at 258, 258–325.

³ Liesbet HOOGHE, Gary MARKS, Tobias LENZ, Jeanine BEZUIJEN, Besir CEKA, Svet DERDERYAN, eds., *Measuring International Authority: A Postfunctionalist Theory of Governance, Volume III* (Oxford University Press 2017) at 70–82.

⁴ Orfeo FIORETOS, “Retrofitting Financial Globalization: The Politics of Intense Incrementalism after 2008” in Thomas RIXEN, Lora Anne VIOLA, and Michael ZÜRN, eds., *Historical Institutionalism and International Relations: Explaining Institutional Development in World Politics* (Oxford University Press 2016) at 68–96.

consider the liberal world order to be in a state of decay.⁵ The United Nations (UN) Security Council is paralysed in the face of humanitarian crises in Syria and Yemen; the Russian Federation has annexed Crimea and invaded Ukraine; the Doha round of trade negotiations has stalled; and the United Kingdom has withdrawn from the European Union.

While the extent of their disruptive influence is contested, developing countries are emerging as powerful players in the new world.⁶ But their progress in long-standing policy silos is stymied by the overwhelming power of the incumbents. Decades-old international treaties continue to act as girders for global economic governance, with the traditional rule-makers and rule-takers being largely unchanged.⁷ No more so than in the case of international investment law. Since the first bilateral investment treaty (BIT) was concluded in 1959, capital-exporting states have secured commitments from host countries not to expropriate investors' property without adequate compensation, discriminate against their investors, or treat them "unfairly". The introduction of investor-state arbitration granted standing to foreign companies to "sue" infringing host states in an international forum, effectively exporting liberalized economic policy around the world.⁸ From the 1960s to the early 2010s, the management of cross-border investment disputes shifted from the executive (or governmental) sphere to the adjudicative sphere.

The theory of "geoeconomics" advances the claim that this trend will reverse.⁹ Traditionally, it describes the "securitisation of economic policy and economisation of strategic policy".¹⁰ Several scholars have argued that the US-China rivalry is driving the conflation of economic and security issues, which has profound consequences for the efficacy of global economic governance.¹¹ In other words, the substantive rules and methods of dispute resolution in relation to which there has been a broad (but not universal) acquiescence can no longer be relied upon. The use of the law is necessarily informed by considerations of political economy, and political economy considerations inform the creation of law. The role of other states in this theory, beyond the Sino-American relationship, is largely untreated.

This article applies a geoeconomic lens to the China-Pakistan Economic Corridor (CPEC) to assess the implications of the new order for third-party states. Its central thesis is that dovetailing the economic, geopolitical, and security interests that underpin CPEC necessitates a dispute resolution process that focuses on interests and legal rights. It makes three related claims. First, security alone is too narrow a lens through which to examine the central features of the emerging geoeconomic order. Regardless of security concerns, socioeconomic issues remain a potent source of motivation and need not be

⁵ John J. MEARSHEIMER, "Bound to Fail: The Rise and Fall of the Liberal International Order" (2019) 43(4) *International Security* 7.

⁶ Mark WU, "The China, Inc. Challenge to Global Trade Governance" (2016) 57(2) *Harvard International Law Journal* 261 at 261-294.

⁷ Wolfgang ALSCHNER and Dmitriy SKOUGAREVSKIY, "Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice" (2016) 13 *Transnational Dispute Management (TDM)*.

⁸ Kenneth J. VANDELDE, "The Political Economy of a Bilateral Investment Treaty" (1998) 92(4) *The American Journal of International Law* 621.

⁹ Gyula CSURGAI, "The Increasing Importance of Geoeconomics in Power Rivalries in the Twenty-First Century" (2018) 23(1) *Geopolitics* 38; Anthea ROBERTS, Henrique Choer MORAES and Victor FERGUSON, "Toward a Geoeconomic Order in International Trade and Investment" (2019) 22(4) *Journal of International Economic Law* 655.

¹⁰ Michael WESLEY, "Australia and the Rise of Geoeconomics" (2016) *The Centre of Gravity Series* 1.

¹¹ Geraldo VIDIGAL, "A Really Big Button That Doesn't Do Anything? The Anti-NME Clause in US Trade Agreements Between Law and Geoeconomics" (2020) 23(1) *Journal of International Economic Law* 45 at 45-64; Robert D. BLACKWILL and Jennifer M. HARRIS, *War by Other Means: Geoeconomics and Statecraft* (Harvard University Press 2016) at 49-93.

assimilated with national security. Second, it is insufficient to examine only the *response* of other states to the US-China rivalry. This approach fails to consider the agency of these states and the unique conditions that mould their relations with the superpowers, which is entirely independent of the strategic rivalry. Finally, a tangible effect of these developments is the “re-politicization” of investment disputes. Despite the potential for legal recourse to investor-state arbitration, disputes over major infrastructure projects or sovereign debt are rarely adjudicated. Instead, they are subject to interest-based mechanisms such as political risk insurance.

This argument proceeds in four parts. Part I lays out the geoeconomic order theory and advances a critique based on third-party states’ apparent lack of agency. Part II demonstrates the agency of these states by examining China and Pakistan’s motivations for the Belt and Road Initiative (BRI) projects and the non-security drivers of the economic relationship. Part III argues that these conditions have engendered the “re-politicization” of investment disputes in Pakistan, exemplified by the shift of investment dispute settlement away from the adjudicative sphere. Finally, against this background, Part IV considers whether investment norms can retain their relevance, examines the non-arbitration mechanisms Chinese parties use to influence host state behaviour, and proposes mediation as a structured alternative.

I. The “Geoeconomic Order”, Economic Security, and Sino-American Centrim

A. The Emerging “Geoeconomic Order”

The interweave of state power, economic power, and global economic governance has been understood for centuries. From the European mercantilism of the 15th century to the economic warfare of two World Wars, states have long weaponized economic means for strategic ends.¹² Nevertheless, the term “geoeconomics” has a comparatively short history. Its origins are generally traced to American military consultant Edward Luttwak and French economist Pascal Lorot, the latter of which described geoeconomics as:

the analysis of economic strategies – notably commercial – decided upon by states in a political setting aiming to protect their own economies or certain well identified sectors of it, to help their national enterprises acquire technology or to capture certain segments of the world market relative to production or commercialization of a product. The possession or control of such a share confers to the entity – state or national enterprise – an element of power and international influence and helps to reinforce its economic and social potential.¹³

Contrary to neoliberal orthodoxy, geoeconomics places the state as the central pivot that supports corporations by various means. Many scholars attribute the geoeconomic turn in economic analysis primarily, though not exclusively, to the rise of China and its “socialist market economy”.¹⁴ Indeed, when the Global Agenda Council on Geoeconomics was tasked

¹² Csurgai, *supra* note 9 at 39–40.

¹³ Pascal LOROT, *Introduction à la géoéconomie* (Institut européen de géoéconomie 1999) at 62; Edward N. LUTTWAK, “From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce” (1990) 20 *The National Interest* 17.

¹⁴ See e.g., Xiaojun LI, “China’s Geoeconomic Strategy: China as a Trading Superpower” *LSE Research Online* (June 2012), online: LSE Research Online <http://eprints.lse.ac.uk/44204/1/China%27s%20Geoeconomic%20Strategy%20_China%20as%20a%20Trading%20Superpower%20%28LSE%29.pdf>.

with advising the World Economic Forum on the relationship between economic security and state power in the 21st century, they produced a report titled “Geo-economics with Chinese Characteristics: How China’s economic might is reshaping world politics”.¹⁵

Roberts, Moraes, and Ferguson argue that the geoeconomic order reflects a shift in the relationship between economics and security in legal investment and trade regimes.¹⁶ It has several notable features that can be part of our analytical framework. The first is the shift from absolute gains to relative gains. Rather than an approach that seeks to leverage economic interdependence for mutual advantage, the geoeconomic order involves a greater tendency for states to “weaponize interdependence” for strategic leverage.¹⁷ In other words, the win-win assumptions underpinning traditional neoliberal orthodoxy have given rise to a win-lose paradigm in which some states attempt to assimilate economic benefit and geopolitical influence at the expense of rival states. It follows that protectionist barriers to trade and investment have become a rational response to geopolitical rivalry.

The second notable feature of this geoeconomic model is that the economic and strategic rivalry between China and the United States (US) erodes the distinction between economic nationalism and national security.¹⁸ The struggle for technological and trade supremacy incentivizes and expands the hybrid “economic security” concept.¹⁹ On the Chinese side, the approach to global economic governance is driven by a twin-pronged strategy of cultivating domestic innovation and acquiring technology from international sources through commercial transactions or other means. Similarly, the US is incentivized to adopt a more protectionist approach to local innovation, erect barriers to trade and investment for Chinese enterprises, and pursue a more targeted industrial policy in key strategic areas, such as artificial intelligence.²⁰

Finally, these emerging trends will have consequences for global economic governance, including difficulties in agreeing on multilateral rules, the transition of investment and trade issues from the legal to the political area, the emergence of different (and opposing) spheres of influence, and the cross-fertilization of US and Chinese approaches to economic security.²¹ A twin-track approach with the US and China creates novel spheres of influence by creating new international legal obligations while escaping other obligations, such as accepting security-adjacent issues from third-party reviews.²²

B. Geoeconomics: “Twas Ever Thus”

This geoeconomic frame has been described as one way in which scholars have attempted to “rationalize an unstable reality”.²³ In doing so, the geoeconomic theory draws attention to the linkage between conceptions of national security, regional competition, and

¹⁵ “Geo-Economics with Chinese Characteristics: How China’s Economic Might is Reshaping World Politics”, World Economic Forum, Regional Forum, January 2016.

¹⁶ Roberts, Moraes and Ferguson, *supra* note 9 at 659.

¹⁷ Henry FARRELL and Abraham L. NEWMAN, “Weaponized Interdependence: How Global Economic Networks Shape State Coercion” (2019) 44(1) *International Security* 42.

¹⁸ Roberts, Moraes and Ferguson, *supra* note 9 at 660.

¹⁹ J. Benton HEATH, “The New National Security Challenge to the Economic Order” (2019) 129(4) *Yale Law Journal* 1020.

²⁰ See e.g., Scott LINCICOME and Inu MANAK, “Protectionism or National Security?: The Use and Abuse of Section 232” (2021) 921 *Cato Institute Policy Analysis* 1.

²¹ Roberts, Moraes and Ferguson, *supra* note 9 at 669.

²² Stephan SCHILL and Robyn BRIESE, “‘If the State Considers’: Self-Judging Clauses in International Dispute Settlement” (2009) 13 *Max Planck Yearbook of United Nations Law* 61.

²³ Xinyue LI, “Quantizing Geoeconomics: Emerging Geoeconomics In International Economic Law Through A Quantum Worldview” (2022) 17(1) *Asian Journal of WTO and International Health Law and Policy* 1 at 10.

international economic law. Moreover, it offers insights into how international economic law instruments necessarily interweave with state-level concepts of security and the problems that might arise. First, however, this article adds three small codas to an increasingly popular analytical frame.

First, the theory of the geoeconomic order underplays the role of international security in constructing the neoliberal order it supposedly supplants. This is particularly the case concerning the historical roots of the General Agreement on Tariffs and Trade (GATT).²⁴ Proponents of the geoeconomic theory argue that “security tended to operate as a justification for and [an] exception to the neoliberal order, rather than affecting its day-to-day operations”.²⁵ It is not immediately clear whether this is a useful distinction. For example, the International Trade Organization (ITO) is commonly described as being a product of the Cold War. The research of Mona Pinchis-Paulsen traces the origins of the national security exception and demonstrates that strategic and economic considerations profoundly shaped GATT Article XXI.²⁶ Officials from the US were successful in embedding this language within the ITO Charter.²⁷ While these officials ultimately opted for a model privileging free trade over self-judging or non-justiciable security clauses, this was not because national security was irrelevant. On the contrary, it was expressly decided that national security would coexist with free trade. In this author’s view, this is not entirely dissimilar to the geoeconomic order to which we have “shifted”. As these exceptions inevitably shaped how states behaved and how instruments were crafted, it is questionable whether the use of security as a “justification” can be separated from day-to-day operations. The more salient change is the transformation of the security concept rather than its oscillating relationship with trade and investment.²⁸

Secondly, the geoeconomic theory centres the US and China as the pivot around which the rest of the world will bend. This is insufficient to capture the nuances of the global order, regional divergences, and the local politics that inevitably inform trade and investment law and policy. The geoeconomic theory presupposes that third states will necessarily “react” to the US-China relationship rather than be driven by a unique set of motivations wrought in their distinctive domestic contexts. The case study of BRI projects in Pakistan argues that a very particular set of factors inform the approach to managing the relationship between China and Pakistan, which is rooted in a web of domestic issues ranging from economics to culture to terrorism. Therefore, this article extends the scope of enquiry beyond the US-China relationship.

Third, its proponents claim that one of the consequences of the emerging geoeconomic order is the “de-legalization” of international economic law.²⁹ The examples used from the US perspective are undoubtedly valuable, such as including the concept of “economic security” within national security, making security clauses non-reviewable, increasing executive power to reject investment through the Committee on Foreign Investment in the US (CFIUS), and avoiding adjudicative mechanisms in any US-China trade deal. However, examples to support the argument from the Chinese perspective include a reluctance to accept new international rules for sensitive policy areas and “modes of engagement predominantly based on significant economic ties and private law ordering

²⁴ Michael J HAHN, “Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception” (1991) 12 Michigan Journal of International Law 64.

²⁵ Roberts, Moraes and Ferguson, *supra* note 9 at 657.

²⁶ Mona PINCHIS-PAULSEN, “Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions” (2020) 41(1) Michigan Journal of International Law 109.

²⁷ *Ibid.*, at 139.

²⁸ Heath, *supra* note 19.

²⁹ Roberts, Moraes and Ferguson, *supra* note 9 at 672.

rather than strong legal obligations under public international law”.³⁰ As with the changing role of security, it is unclear whether any substantive shift has occurred regarding the Chinese position. The comparative reluctance of China and Chinese parties to engage in adversarial dispute resolution processes – more specifically, investor-state arbitration – is well documented.³¹ Indeed, the long history of Confucianism-rooted mediation in China would suggest that de-legalization (to the extent that mediation centres upon interests instead of rights) is not a new approach for China nor alien to Chinese parties.³²

Against this background, investment disputes along the BRI should be considered. However, rather than being considered an incidental consequence of the US-China rivalry, the inquiry should be tailored to the specific conditions of the relationship between China and Pakistan. In doing so, it extends a geoeconomic analysis beyond the Sino-American prism.

II. “Third State” Agency in Geoeconomic Analysis: Socioeconomic, Geopolitical, and Security Drivers of the China-Pakistan Economic Corridor

CPEC is a flagship project of the BRI.³³ Chinese Premier Li Keqiang proposed it in May 2013 as a plan to connect the city of Kashgar in western China to the Gwadar port on Pakistan’s southwestern coastline.³⁴ The underlying vision was that Chinese-funded physical infrastructure – roads, railways, pipelines, energy plants, and fibreoptic cables – would facilitate the free flow of goods, services, capital, technology, and people between China and Pakistan. CPEC was formally launched on 20 April 2015 with fifty-one Memorandums of Understanding (MOUs) relating to a diverse array of projects, from a feasibility study for the Gwadar Hospital to concessional loans for upgrading motorways to establishing a joint biotech laboratory.³⁵ Initial financial commitments equalled \$46 billion (US).

Since then, several such projects have broken ground. The Port of Gwadar on the Arabian Sea is perhaps the most conspicuous and the most contested.³⁶ It is in Phase II of construction and includes deep-sea dredging, port development, and several other high-value construction projects, such as the new Gwadar International Airport. Reconstruction of the Karakorum Highway, linking China and Pakistan, was partially completed in March 2020.³⁷ In addition, coal-based power plants are being constructed in the Baluchistan, Punjab, and Sindh provinces at a cost of \$5.8 billion (US).³⁸ In 2017, the total

³⁰ Gregory SHAFFER and Henry GAO, “A New Chinese Economic Order?” (2020) 23(3) *Journal of International Economic Law* 607.

³¹ Chinese parties have initiated 13 investor-state arbitration cases; US parties have initiated 204 investor-state arbitration cases.

³² WANG Guiguo and HE Xiaoli, “Mediation and International Investment: A Chinese Perspective” (2017) 65(1) *Maine Law Review* 215.

³³ S. Mahmud ALI, *China’s Belt and Road Vision: Geoeconomics and Geopolitics* (Springer Nature Switzerland: Springer Nature 2020) 175.

³⁴ “Visit of H.E. Mr. Li Keqiang, Premier of the State Council of the People’s Republic of China from May 22-23, 2013” *Ministry of Foreign Affairs Government of Pakistan* (21 May 2013), online: Ministry of Foreign Affairs Government of Pakistan <<https://mofa.gov.pk/visit-of-h-e-mr-li-keqiang-premier-of-the-state-council-of-the-people%2a2a%2a%2a%2a2s-republic-of-china-from-may-22-23-2013/>>.

³⁵ “List of Pakistan-China MOUs Signed under the CPEC Initiative in April 2015” (2014) 34/35(4) *Strategic Studies* 255.

³⁶ Hasan YASER MALIK, “Strategic Importance of Gwadar Port” (2012) 19(2) *Journal of Political Studies* 57.

³⁷ “KKH Phase II (Havelian - Thakot Section) | China-Pakistan Economic Corridor (CPEC) Authority Official Website” *CPEC Authority Ministry of Planning, Development, and Special Initiatives*, online: CPEC Authority Ministry of Planning, Development, and Special Initiatives <<https://cpec.gov.pk/project-details/28>>.

³⁸ Qurat ul AIN ALI, Umer KHAYYAM and Umair NAZAR, “Energy Production and CO2 Emissions: The Case of Coal Fired Power Plants under China Pakistan Economic Corridor” (2021) 281 *Journal of Cleaner Production* 124974.

cost of CPEC projects reached \$62 billion (US). In 2019 Deloitte estimated that implementing CPEC would contribute 2.5% to Pakistan's gross domestic product (GDP) growth rate.³⁹ In reality, GDP growth was slower than anticipated, but investments in energy correlated with a dramatic increase in the reliability of Pakistan's energy infrastructure.⁴⁰

However, CPEC has not been without difficulties; projects have been cancelled and delayed, substantial loan repayments have prompted fraught renegotiations, and India has been vocal in its opposition.⁴¹ In crafting the economic relationship that flows from CPEC, Pakistan is not a passive supplicant, nor is China a generous benefactor. Instead, China and Pakistan are motivated by factors that overlap and dovetail, with mutually reinforcing needs and capacities combining to pursue agreed-upon ends. It is a relationship of transaction. To the extent that CPEC was intended to harness interdependence for mutual advantage, the relationship is not dissimilar to aspects of neoliberal orthodoxy. Of course, a key difference in this instance is that the state drives the economic activity, consistent with a geoeconomic frame. Crucially, both parties have agency. Factors driving this activity can be expressed in three categories: socioeconomic drivers, geopolitical drivers, and security drivers. For the purposes of this section, "security" is construed narrowly as relating to military activities, circumstances of an armed attack, and civil unrest.

A. Socioeconomic Drivers

Over the past four decades, socioeconomic enrichment has been a central pillar of China's foreign and economic policy.⁴² The socialist orthodoxy of domestic protectionism that was prevalent before 1979 now sits alongside a comparatively liberalized approach to investment and trade law and policy.⁴³ Indeed, to the extent that instruments of international economic law ensconce capitalist norms in participating economies, China's oscillation between protectionism and economic liberalism remains a delicate balancing act. Nevertheless, pursuing socioeconomic development is at the heart of this endeavour. In 2014, this was articulated by President Xi Jinping as part of the "Chinese Dream", a vague concept aimed at restoring China's status as a leading global power.⁴⁴ It comprises two "Centennial Goals" – to "build a moderately prosperous society in all respects" by 2021 and to achieve complete "modernization" by 2049, which includes becoming a superpower in science and technology, rejuvenating Chinese cultural and soft power, and establishing the pre-eminence of the Chinese military.⁴⁵ These goals energize the material aspects of the modern China-Pakistan relationship.

From the Pakistani side, general macroeconomic instability and a comparatively underdeveloped economy create powerful incentives to permit, facilitate, stimulate, and protect large-scale investment from any quarter. Key economic indicators suggest considerable

³⁹ "How Will CPEC Boost Pakistan Economy? – Deloitte – Readkong online: Readkong <<https://www.readkong.com/page/how-will-cpec-boost-pakistan-economy-7814859>>.

⁴⁰ Ali, *supra* note 33 at 177.

⁴¹ Muzaffar HUSSAIN, "China Pakistan Economic Corridor (CPEC): Challenges and the Way Forward", Naval Postgraduate School, Dudley Knox Library, Thesis and Dissertation Collection, June 2017.

⁴² Robert Lawrence KUHN, "Xi Jinping's Chinese Dream" *The New York Times* (4 June 2013), online: *The New York Times* <<https://www.nytimes.com/2013/06/05/opinion/global/xi-jinpings-chinese-dream.html>>.

⁴³ Qingjiang KONG, "Bilateral Investment Treaties: The Chinese Approach and Practice" (1998/99) 8 *Asian Yearbook of International Law* 105; Susan L. SHIRK, *The Political Logic of Economic Reform in China* (University of California Press 1993).

⁴⁴ Zheng WANG, "The Chinese Dream: Concept and Context" (2014) 19(1) *Journal of Chinese Political Science* 1.

⁴⁵ "CPC Q&A: What Are China's Two Centennial Goals and Why Do They Matter?" *Xinhua* (17 October 2017), online: *Xinhua* <http://www.xinhuanet.com/english/2017-10/17/c_136686770.htm>.

frailty in Pakistan's economy.⁴⁶ Widening trade deficits and limited foreign exchange reserves demonstrate the precarity of the position, a concern exacerbated in 2022 by global inflationary pressures and the energy crisis resulting from the war in Ukraine.⁴⁷ This precarity is reflected by poor performance in human development indicators such as education, poverty, income, and gender inequality. Indeed, Pakistan ranks 161 out of 191 countries in the Human Development Index, compiled by the UN Development Programme, and is one of the worst-performing nations in Asia.⁴⁸ Data from the World Bank indicates that 39.8% of Pakistan's population, or around 90 million people, lives on less than \$3.20 per day.⁴⁹ The successful implementation of CPEC is expected to address these challenges. In 2017, CPEC's Long-Term Plan (LTP) affirmed the project as "a growth axis and a development belt" aimed at "socio economic development, prosperity and security".⁵⁰

Beyond broad-brush inferences about the pursuit of economic growth, there is a more granular dovetailing of economic interests for China and Pakistan that support the implementation of CPEC. These will be discussed in four categories: energy security, digital connectivity, transport infrastructure, and regional inequalities.

Energy insecurity has beset Pakistan since its founding in 1947.⁵¹ Despite early advances in energy capacity, a lack of investment in energy infrastructure, ageing energy distribution systems, and an overreliance on fossil fuel imports (despite large untapped recoverable oil and gas reserves) have rendered shortages commonplace.⁵² In 2018, a World Bank report found Pakistan to have one of the most unreliable power supplies in the world, with an ever-widening gap between supply and demand necessitating scheduled power outages (or load shedding) that lasted six to fourteen hours a day.⁵³ Energy-intensive industries, such as metal, wood, and paper manufacturers, are particularly stymied by the unreliability of supply, with an ensuing deleterious effect on firm productivity and levels of unemployment.⁵⁴

Against this background, CPEC authorities list nineteen individual energy projects, including the Port Qasim coal-fired power plants in Karachi, the Suki Kinari Hydropower Project in the Khyber Pakhtunkhwa, a solar park in Punjab, and several wind farms across the Sindh province.⁵⁵ Over 60% of the expenditure on CPEC projects

⁴⁶ World Bank, "Pakistan Development Update: Inflation and the Poor", The World Bank, October 2022.

⁴⁷ Syed Raza HASSAN, "Pakistan Raises Power Prices amid Energy Crisis despite Rampant Inflation" *Reuters* (26 July 2022), online: Reuters <<https://www.reuters.com/business/energy/pakistan-raises-power-prices-amid-energy-crisis-despite-rampant-inflation-2022-07-26/>>.

⁴⁸ "Human Development Report 2021/2022: Uncertain Times, Unsettled Lives: Shaping Our Future in a Transforming World", United Nations Development Programme, 2022.

⁴⁹ World Bank, "Poverty and Equity Brief, South Asia – Pakistan" *World Bank* (October 2022), online: World Bank <https://databankfiles.worldbank.org/data/download/poverty/987B9C90-CB9F-4D93-AE8C-750588BF00QA/current/Global_POVEQ_SAR.pdf>.

⁵⁰ "Long Term Plan for China-Pakistan Economic Corridor (2017–2030)" *Government of Pakistan Ministry of Planning, Development and Reform*, online: Government of Pakistan Ministry of Planning, Development and Reform <<https://www.pc.gov.pk/uploads/cpec/LTP.pdf>>.

⁵¹ Siegfried O. WOLF, *The China-Pakistan Economic Corridor of the Belt and Road Initiative: Concept, Context and Assessment* (Pakistan's Ministry of Planning Development and Reform, and PRC's National Development and Reform Commission: Springer 2019) at 74.

⁵² *Ibid*; Michael KUGELMAN, "The China-Pakistan Economic Corridor: What It Is, How It Is Perceived, and Implications for Energy Geopolitics", The National Bureau of Asian Research, NBR Special Report No. 68, 2 November 2017.

⁵³ Fan ZHANG, "In the Dark: How Much do Power Sector Distortions Cost South Asia?", *World Bank South Asia Development Forum*, 2019 at 171.

⁵⁴ Corbett A GRAINGER and Fan ZHANG, "The Impact of Electricity Shortages on Firm Productivity: Evidence from Pakistan", *World Bank, Policy Research Working Paper*, June 2017 at 11.

⁵⁵ "Energy Projects Under CPEC | China-Pakistan Economic Corridor (CPEC) Authority Official Website" *CPEC Authority Ministry of Planning, Development, and Special Initiatives*, online: CPEC Authority Ministry of Planning, Development, and Special Initiatives <<https://cpec.gov.pk/energy>>.

are commercial contracts geared toward improving capacity in generating and transmitting electricity.⁵⁶ One of China's dovetailing interests with these energy projects is the absorption of its excess capacity in the production of raw building materials such as cement, steel, and aluminium, as well as energy-specific products such as solar panels.⁵⁷ A CPEC-supported Pakistan is also intended to contribute to the diversification of markets available to Chinese firms and counter the traditional reliance on current economic partners.⁵⁸ To a material extent, therefore, China intends to benefit economically from a more stable and productive trading partner on China's western border.

Second, digital connectivity projects also reflect these mutually reinforcing means and aims. Establishing China as a leading exporter of international standards has been an unfulfilled policy goal of China's development initiatives. Typically, the technological leadership of the US and the European Union curtailed the possibility of Chinese products dominating new markets.⁵⁹ However, rapid technological advances through upskilling and technology acquisition have strengthened China's ability to develop market-leading network technologies. More than ever, standard settings where novel technologies such as 5G, the Internet of Things, smart cities, and data centres are vehicles by which China is emerging as a norm-setter for countries where it exports network infrastructure.⁶⁰ Erie and Steinz described this as the "Beijing Effect".⁶¹

The "Digital Silk Road" is a key aspect of the BRI generally, and the development of "information network infrastructure" is expressly enumerated as a key area of cooperation in the 2017 CPEC Long-Term Plan. More specifically, the Plan envisions the construction of fibre optic cables, a national data centre, and industrial IT parks, as well as facilitating Pakistani personnel exchange programs in China. Notably, it provides that Pakistan will adopt the Digital Terrestrial Multimedia Broadcasting standard, which is a digital TV standard developed by the ZTE Corporation in China. The Chinese enterprises tasked with implementing this standard in Pakistan highlighted in a press release that they had been chosen "after evaluating alternatives including the European DVB-T standard and the Japanese ISDB-T standard".⁶² While Chinese companies are permitted entry to greenfield markets and establish their status as norm-setters in global data governance, Pakistan benefits from accelerated digitalization. Given that it ranks seventy-fifth out of seventy-nine countries on Huawei's Global Connectivity Index, Pakistan has much to gain from upgrading its network infrastructure.⁶³ With a population of 212 million people and a rapidly increasing number of internet users, creating an e-commerce infrastructure is a potent means of stimulating economic exchanges between China and Pakistan. Several CPEC projects aim at facilitating these exchanges – including the construction of terrestrial fibreoptic cables between the Khunjerab Pass on the China-Pakistan border to the city of Rawalpindi – reducing the costs and reliance on an alternative subterranean

⁵⁶ Arif RAFIQ, "The China-Pakistan Economic Corridor: Barriers and Impact", United States Institute of Peace, Peaceworks No. 135, 2017 at 9.

⁵⁷ "Chinese Industry: Ambitions in Excess" *Financial Times* (16 June 2013), online: Financial Times <<https://www.ft.com/content/4d5528ec-d412-11e2-8639-00144feab7de>>.

⁵⁸ Wolf, *supra* note 51 at 49.

⁵⁹ Dan BREZNITZ and Michael MURPHREE, "The Rise of China in Technology Standards: New Norms in Old Institutions", Research Report Prepared on Behalf of the U.S.-China Economic and Security Review Commission, 16 January 2013 at 42.

⁶⁰ Alex HE, "The Digital Silk Road and China's Influence on Standard Setting", Centre for International Governance Innovation, CIGI Papers No. 264, 4 April 2022, 39.

⁶¹ Matthew S ERIE and Thomas STREINZ, "The Beijing Effect: China's 'Digital Silk Road' as Transnational Data Governance" (2021) 54(1) *New York University Journal of International Law and Politics* 1.

⁶² "ZTE and Pakistan Sign Digital Terrestrial Television Agreement" *ZTE* (15 May 2017), online: ZTE <<https://www.zte.com.cn/global/about/news/0515ma.html>>.

⁶³ "Global Connectivity Index" *Huawei*, online: Huawei <<https://www.huawei.com/minisite/gci/en/>>.

cable passing through India.⁶⁴ CPEC's digital connectivity projects advance China's aims of diversified markets and expanded influence over standard-setting, and Pakistan intends to benefit from advanced network technology.

Third, the funding and construction of transport infrastructure is a central component of CPEC. Roads, railways, seaports, and airports are the bedrock of a nation's economic health and one of the fundamentally important determinants of a healthy investment environment. As well as a correlation between poor infrastructure and poverty, research has indicated that a 10% increase in road network density produces a 1% increase in trade.⁶⁵ For developing countries, higher quality port infrastructure also directly impacts seaborne trade, yielding greater economic growth.⁶⁶ Unfortunately, Pakistan performs very poorly in key benchmarks measuring the sufficiency of infrastructure.

Against this background, constructing an integrated transport system is identified as a key area of cooperation in the 2017 CPEC Long-Term Plan. For China, the complementary interests include the absorption of excess industrial capacities in cement, steel, and aluminium for use in constructing roads, railways, ports, and airports. Overcapacity issues are not unfamiliar to many Chinese state-owned enterprises (SOEs). CPEC's transport infrastructure projects provide an outlet for this oversupply and an opportunity for additional liquidity from state banks. As well as direct investment, funding for large-scale projects can also take the form of concessional loans, which redirects forex reserves from low-yield US Treasury Bills towards CPEC projects with a higher rate of return. Reports indicate that the Export-Import Bank of China provides concessional loans with an interest rate of around 2–2.5% below the market rate.⁶⁷ However, one report cites interest rates as high as 5%, higher than that offered by the World Bank and the International Monetary Fund.⁶⁸ Moreover, only around 1% of CPEC funding comes from grants to the Gwadar Port City and international airport projects, to which we will return below.⁶⁹ Therefore, China and Chinese investors seek economic returns by implementing major transportation infrastructure projects such as the Karakoram Highway, which connects Islamabad in Northeastern Pakistan to Kashgar in western China.

Finally, China and Pakistan have a shared interest in balancing regional inequalities within their respective countries. In China, successful regional development initiatives have created a trade and investment boom in cities in the east, such as Beijing, Shanghai, and Shenzhen. However, concerns in the late 1990s about developmental asymmetries between the east and west of China resulted in the adoption of the Great Western Development Strategy to improve socioeconomic conditions and alleviate inter-ethnic tensions between non-Han minorities.⁷⁰ Xinjiang, the region that borders Pakistan, is among the provinces targeted by this strategy due to its difficult geographic conditions

⁶⁴ Erie and Streinz, *supra* note 61; "Pak-China Fibre Optic Cable to Start Functioning by Year-End" *The Express Tribune* (15 September 2018), online: The Express Tribune <<https://tribune.com.pk/story/1804386/pak-china-fibre-optic-cable-start-functioning-year-end>>.

⁶⁵ Normaz Wana ISMAIL and Jamilah Mohd MAHYIDEEN, "The Impact of Infrastructure on Trade and Economic Growth in Selected Economies in Asia", Asian Development Bank Institute, ADBI Working Paper Series No. 553, December 2015 at 16.

⁶⁶ Ziaul Haque MUNIM and Hans-Joachim SCHRAMM, "The Impacts of Port Infrastructure and Logistics Performance on Economic Growth: The Mediating Role of Seaborne Trade" (2018) 3(1) *Journal of Shipping and Trade* 1.

⁶⁷ John HURLEY, Scott MORRIS and Gailyn PORTELANC, "Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective" (2019) 3 *Journal of Infrastructure, Policy and Development* 139 at 19.

⁶⁸ "Pakistan's \$100B Deal with China: What Does It Amount to?" *Devex* (24 August 2017), online: Devex <<https://www.devex.com/news/pakistan-s-100b-deal-with-china-what-does-it-amount-to-90872>>.

⁶⁹ Rafiq, *supra* note 56 at 10.

⁷⁰ Zheng LU and Xiang DENG, "China's Western Development Strategy: Policies, Effects and Prospects", MPRA Paper 35201, University of Library of Munich, 1 December 2011; Michael CLARKE, "China's Internal Security

and anaemic industrial development. Yet, despite major infrastructure investments and legal reforms intended to stimulate growth in the region, China remains one of the world's most unequal societies.⁷¹ Indeed, Chinese authorities have regarded asymmetric development between the east and the west regions in China as a barrier to national stability. CPEC is intended to boost the underdeveloped western regions by integrating Pakistan with Xinjiang and the surrounding provinces. Therefore, road and rail projects also aim to stimulate cross-border trade and act as a conduit through which western China can develop supply chains throughout South and Central Asia.

Similarly, interregional inequality is a driver of CPEC for Pakistan. Economic inequality has historically created political instability and has led to unrest, including the rise of separatist movements.⁷² Hafiz Pasha, an economist, former Minister of Finance, and author of the UNDP National Human Development Report for Pakistan, talks of “two different Pakistans” contrasting the richest and poorest.⁷³ In particular, the region of Balochistan in the southwest lags behind other areas in its Human Development Index value – which considers life expectancy, years of education, and family income – and is the only region in Pakistan not to have improved this value since 2006.⁷⁴ By contrast, Central and Northern Punjab outperform the national average in key development-related indicators.⁷⁵ Hopes for socioeconomic development are not limited to the border region between China and Pakistan but are intended to be achieved through the equitable allocation of CPEC projects.

With these dovetailing interests in mind, Chinese authorities consistently stress that CPEC – indeed the entirety of the BRI – is primarily an economic project. One analysis has concluded that the BRI is “geared toward advancing key Chinese economic goals”, with its geostrategic component “likely overstated by foreign observers”.⁷⁶ To the contrary, Garlick has argued that the overland connection between China and Pakistan is “beset with difficulties because of geographical, economic and security problems”; thus, Chinese motivations for CPEC are “chiefly geopolitical”.⁷⁷ In either case, geopolitical drivers play a role in shaping CPEC.

B. Geopolitical Drivers

Much of the commentary on CPEC focuses on China's geopolitical interests. This is unsurprising given the BRI's scale and its attempt to reshape the international order. At a macro-level, the BRI represents an effort to weaken dependence (especially Asian dependence) on western-led rules and institutions by promoting Chinese influence in Asia. The Asian Infrastructure Investment Bank, the funder of many BRI projects arising from the

Dilemma and the ‘Great Western Development’: The Dynamics of Integration, Ethnic Nationalism and Terrorism in Xinjiang” (2007) 31 *Asian Studies Review* 323.

⁷¹ “Bertelsmann Stiftung's Transformation Index (BTI) 2022 Country Report: China” (2022), online: BTI <https://bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2022_CHN.pdf> at 15.

⁷² Muhammad MUSHTAQ and Zahra Shakil MIRZA, “Understanding the Nexus Between Horizontal Inequalities, Ethno-Political Conflict and Political Participation: A Case Study of Balochistan” (2022) 21(3) *Ethnopolitics* 221.

⁷³ “Pakistan National Human Development Report 2020: The three Ps of inequality: Power, People, and Policy”, United Nations Development Programme, Pakistan, 16 April 2021.

⁷⁴ *Ibid.*, at 44

⁷⁵ *Ibid.*, at 45.

⁷⁶ Christopher K JOHNSON, “President Xi Jinping's ‘Belt and Road’ Initiative: A Practical Assessment of the Chinese Communist Party's Roadmap for China's Global Resurgence”, Center for Strategic and International Studies, 1 March 2016.

⁷⁷ Jeremy GARLICK, “Deconstructing the China–Pakistan Economic Corridor: Pipe Dreams Versus Geopolitical Realities” (2018) 27(112) *Journal of Contemporary China* 519.

Bretton-Woods system, is at the forefront of China's strategy to provide alternatives to global financial organizations. In addition, the standard-setting functions of Chinese technology companies, driven by the investments above in network infrastructure, establish China's role in setting international norms.⁷⁸ At the same time, a new dispute resolution institution – the China International Commercial Court – seeks to challenge traditional dispute resolution methods and hubs.⁷⁹ In the latter case, criticism of the Chinese orientation of institutions, such as the China International Commercial Court, has given rise to doubt over their impartiality.⁸⁰ By extension, whether foreign parties will have confidence in the system remains to be seen.

Beyond the specific policy areas of finance, norm-setting, and dispute resolution, CPEC is part of the broader task of promoting Chinese soft power by establishing a model of win-win cooperation in international development. Zhao describes the engagement process as “public diplomacy” that focuses on building international support and political legitimacy.⁸¹ This manifests in Chinese-led forums for international cooperation, such as the Belt and Road Forum,⁸² and engagement in international institutions. For example, China sought to have the BRI recognized as a “regional development initiative” in UN Resolution 2344 and embed BRI principles within other UN initiatives.⁸³

By contrast, the geopolitical interests of recipient BRI states are rarely remarked upon. Pakistan's unique historical and strategic conditions support the overarching goal of CPEC to reduce dependence on the West. While Pakistan has historically been a recipient of foreign aid from the US, the World Bank, the IMF, several countries within the European Union, and the Asian Development Bank, financial and economic ties have oscillated according to policy differences. For example, US aid and military assistance have been suspended at various points in the last seventy years in response to disagreements over the pursuit of nuclear capabilities, and US claims that Pakistan continues to sponsor cross-border terrorism.⁸⁴ The future of Afghanistan also remains a source of contention, which is likely to be exacerbated by the exit of US troops in August 2021.⁸⁵ Similarly, the European Union's Generalized Scheme of Preferences in Trade (GSP+) – a system permitting zero duties on a range of goods – is under review to assess compliance with international treaties.⁸⁶ This expires in 2023, and it is unclear whether it will be renewed.⁸⁷ For these reasons, some in

⁷⁸ HE, *supra* note 60.

⁷⁹ Zachary MOLLENGARDEN, “One-Stop Dispute Resolution on the Belt and Road: Toward an International Commercial Court with Chinese Characteristics” (2019) 36(1) *UCLA Pacific Basin Law Journal* 65.

⁸⁰ Wei CAI and Andrew GODWIN, “Challenges and Opportunities for the China International Commercial Court” (2019) 68(4) *International & Comparative Law Quarterly* 869.

⁸¹ Kejin ZHAO, “The Motivation Behind China's Public Diplomacy” (2015) 8(2) *The Chinese Journal of International Politics* 167.

⁸² “Joint Communiqué of the Leaders Roundtable of the Belt and Road Forum for International Cooperation” *Belt and Road Forum for International Cooperation* (16 May 2017), online: Belt and Road Forum for International Cooperation <<http://www.beltandroadforum.org/english/n100/2017/0516/c22-423.html>>.

⁸³ Security Council Resolution 2344, 17 March 2017, UN Doc. S/RES/2344; see further at Heng Wang, “China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability” (2019) 22(1) *Journal of International Economic Law* 22, at 38.

⁸⁴ Murad ALI, *The Politics of US Aid to Pakistan: Aid Allocation and Delivery from Truman to Trump* (New York: Routledge 2019).

⁸⁵ Akmal DAWI, “US-Pakistan Relations Ebb After Afghanistan Withdrawal” VOA (16 March 2022), online: VOA <<https://www.voanews.com/a/us-pakistan-relations-ebb-after-afghanistan-withdrawal/6488429.html>>.

⁸⁶ Shahroo MALIK, “EU-Pakistan Trade Relations: The Role of GSP Plus Status and Pakistan's Enhanced Access to EU Markets” (2020) 40(1) *Strategic Studies* 1 at 20–38.

⁸⁷ “European Union GSP+ Mission Arrives to Assess Progress in Implementation of International Conventions” EEAS (22 June 2022), online: EEAS <https://www.eeas.europa.eu/delegations/pakistan/european-union-gsp-mission-arrives-assess-progress-implementation_en?s=175>.

the West view aid to Pakistan as ineffective at securing policy goals, while some in Islamabad consider western economic support unreliable.

China has stepped into the breach.⁸⁸ Indeed, CPEC might be described as merely a rebranding of a relationship established in the mid-twentieth century.⁸⁹ The partnership has developed from establishing diplomatic relations in May 1951 through the increase in trade and investment accompanying the Sino-Pakistan entente of 1964 and Chinese loans in the 1970s to military assistance to counter India in the 1990s and 2000s.⁹⁰ Although not without difficulties,⁹¹ the partnership is commonly described as an “all-weather friendship”.⁹² Pakistan is China’s conduit to the rest of the Islamic world and occupies a strategically important geographical position in the region. Investments in land infrastructure may bypass the Straits of Malacca – a narrow water passageway used for sea transport to and from China.⁹³ Security analysts have long regarded the Straits of Malacca as one of China’s strategic weaknesses due to the potential damage that a blockade could inflict. Relatedly, Garlick describes China’s interest in CPEC as one of “geo-positional balancing”, which is manifest in the establishment of a non-military presence at sites such as commercial ports with a view to “keeping a powerful rival geopolitically honest” – in this case, India.⁹⁴ However, public statements from Pakistani officials seek to downplay this aspect of CPEC, emphasizing instead its intent to shift the China-Pakistan relationship “from geopolitics to geo-economics”.⁹⁵

Despite these pronouncements, the “India factor” must be considered a relevant element of CPEC. Pakistan and India have a long history of conflict and animosity, driven by antagonism between political movements powered by religious antagonism, being on opposing sides in strategic alliances (such as with the US and Russia) and live flashpoints, such as the status of Kashmir. Pakistan’s military continues to view India with intense suspicion, and strategic competition between the nations underpins Pakistan’s military spending.⁹⁶ China has long supported Pakistan’s conventional military and nuclear capabilities, with some analysts arguing that these investments are intended “to help keep India off balance and focused on threats emanating from Pakistan”,⁹⁷ which is contested by China in public statements, state media, and articulated BRI principles. Whether by cause or effect, many CPEC projects have security aspects.

⁸⁸ For an in-depth account of China-Pakistan relations, see Ghulam ALI, *China-Pakistan Relations: A Historical Analysis* (Karachi: Oxford University Press 2017).

⁸⁹ Jeremy GARLICK, “Deconstructing the China-Pakistan Economic Corridor: Pipe Dreams Versus Geopolitical Realities” (2018) 27(112) *Journal of Contemporary China* 519.

⁹⁰ Matthew S ERIE, “A Brief History of Pakistan-China Legal Relations” *Made in China Journal* (8 November 2021) 6, online: *Made in China Journal* <<https://madeinchinajournal.com/2021/11/08/a-brief-history-of-pakistan-china-legal-relations/>> 2 at 147–151.

⁹¹ For example, Pakistan voted against a seat at the United Nation for the People’s Republic of China after 1953 while in receipt of US aid, see Anwar H. SYED, *China and Pakistan: Diplomacy of an Entente Cordiale* (Amherst: University of Massachusetts Press 1974) at 54.

⁹² Rudra CHAUDHURI, “The Making of an “All Weather Friendship” Pakistan, China and the History of a Border Agreement: 1949–1963” (2018) 40(1) *The International History Review* 41.

⁹³ Richard GHIASY and Jiayi ZHOU, “The Silk Road Economic Belt: Considering Security Implications and EU-China Cooperation Prospects”, Stockholm International Peace Research Institute, February 2017.

⁹⁴ Jeremy Garlick, “Deconstructing the China-Pakistan Economic Corridor: Pipe Dreams Versus Geopolitical Realities” (2018) 27(112) *Journal of Contemporary China* 519 at 529.

⁹⁵ “China Expands Influence in “economic Colony” Pakistan” *Deutsche Welle* (20 April 2015), online: *Deutsche Welle* <<https://www.dw.com/en/china-expands-influence-in-economic-colony-pakistan/a-18393881>>.

⁹⁶ Shane MASON, “Military Budgets in India and Pakistan: Trajectories, Priorities, and Risks” *The Stimson Centre* (2016), online: *The Stimson Centre* <<https://www.stimson.org/wp-content/files/file-attachments/Military-Budgets-India-Pakistan-Trajectories-Priorities-Risks-Oct2016.pdf.pdf>>.

⁹⁷ Lisa Curtis and Derek Scissors, “The Limits of the China-Pakistan Alliance”, *The Backgrounder* No. 2641, *The Heritage Foundation*, January 19th 2012.

C. Security Drivers

Perhaps the most prominent investment with security-related elements is in ports, which might more accurately be described as being at the intersection of economic, geopolitical, and security drivers of CPEC. For example, the Gwadar Port is often cited as one of China's "String of Pearls" – a series of naval bases on the Indian Ocean from which it seeks to establish a naval presence.⁹⁸ India particularly advances the theory and is consistent with concepts developed by US naval historian Alfred Thayer Mahan, who argued that naval power was innately connected to great power status.⁹⁹ China, by contrast, stressed in 2012 that it had no plans to establish a military presence in the Indian Ocean.¹⁰⁰ Nevertheless, it was acknowledged in November 2015 that China's first overseas military base was to be established on the Indian Ocean in Djibouti.¹⁰¹ In addition, the US has asserted evidence suggesting that attempts to establish other military bases in Cambodia and the United Arab Emirates had been made.¹⁰² Given this context, India, Japan, and the US consider Gwadar Port to be a security driver.

Beyond regional issues, CPEC investments are also aimed at addressing significant internal security issues, including separatism, terrorism, and religious fundamentalism.¹⁰³ Critics accuse Pakistan's government of failing to effectively address terror threats for fear of provoking confrontation with powerful regional jihadist factions.¹⁰⁴ One strategy is to improve socioeconomic conditions as a route to decreasing radicalization.¹⁰⁵ In July 2015, Army Staff General Raheel Sharif commended the "noteworthy effects" of development projects in former terrorist sanctuaries.¹⁰⁶ Chinese motivations for stabilizing Pakistan mirror fears of the influence of jihadist elements, notably in Xinjiang.¹⁰⁷ The authorities link militant operations by the Uyghur minority to terrorist training and activity in Pakistan and Afghanistan. This is the justification offered in response to claims of human rights abuses in Xinjiang. CPEC projects, as well as being intended to bolster Pakistan's political stability, gives China the political capital to demand counter-terrorism activities in return for contributions to economic development.

⁹⁸ David BREWSTER, "Beyond the "String of Pearls": Is There Really a Sino-Indian Security Dilemma in the Indian Ocean?" (2014) 10(2) *Journal of the Indian Ocean Region* 133.

⁹⁹ James R. HOLMES, Andrew C. WINNER, and Toshi YOSHIHARA, *Indian Naval Strategy in the Twenty- First Century* (London: Routledge 2010); Toshi YOSHIHARA and James R. HOLMES, *Red Star Over the Pacific: China's Rise and the Challenge to U.S. Maritime Strategy* (Annapolis: Naval Institute Press 2010).

¹⁰⁰ "China Has No Plan for Indian Ocean Military Bases" *The Hindu* (4 September 2012), online: The Hindu <<https://www.thehindu.com/opinion/interview/china-has-no-plan-for-indian-ocean-military-bases/article3855313.ece>>.

¹⁰¹ "Transcript of PRC FM Spokesman News Conference" *Ministry of Foreign Affairs of the People's Republic of China* (26 November 2015), online: Ministry of Foreign Affairs of the People's Republic of China <http://www.fmprc.gov.cn/web/fyrbt_673021/t1318725.shtml>.

¹⁰² Craig Singleton, "Beijing Eyes New Military Bases Across the Indo-Pacific" *Foreign Policy* (7 July 2021), online: Foreign Policy <<https://foreignpolicy.com/2021/07/07/china-pla-military-bases-kiribati-uae-cambodia-tanzania-djibouti-indo-pacific-ports-airfields/>>.

¹⁰³ On 17 June 2004, President Hu Jintao described separatism, terrorism, and religious fundamentalism as the 'three evils'; Elizabeth Van Wie DAVIS, "Uyghur Muslim Separatism in Xinjiang, China" (2008) 35(1) *Asian Affairs: An American Review* (2008) at 18.

¹⁰⁴ Vanda FELBAB-BROWN, "Why Pakistan Supports Terrorist Groups, and Why the US Finds It so Hard to Induce Change" *Brookings* (5 January 2018), online: Brookings <<https://www.brookings.edu/blog/order-from-chaos/2018/01/05/why-pakistan-supports-terrorist-groups-and-why-the-us-finds-it-so-hard-to-induce-change/>>.

¹⁰⁵ "Pakistan 2025: One Nation, One Vision" *Ministry of Planning Development and Reform, Government of Pakistan*, online: Ministry of Planning Development and Reform, Government of Pakistan <<https://www.pc.gov.pk/uploads/vision2025/Pakistan-Vision-2025.pdf>> at 29.

¹⁰⁶ Mateen HAIDER, "Operations to Continue till Pakistan Is Terror Free, Says General Raheel" *DAWN* (3 July 2015), online: DAWN <<http://www.dawn.com/news/1192103>>.

¹⁰⁷ Wolf, *supra* note 51 at 107.

This account of dovetailing interests demonstrates Pakistan's agency in forming and designing CPEC projects and the variegated motivating factors behind Chinese investments. Undoubtedly, China is the more powerful international actor, but dismissing Pakistan's role in shaping its economic, geopolitical, and security elements would be inadequate and inaccurate.

However, the motivating factors behind CPEC offer only good intentions; how individual projects function in practice is more complex. Sweeping, generous statements of cooperation must be distilled into contractual terms; diplomatic overtures unavoidably give way to commercial transactions; and imagined utopia must survive to contact with the realities of repayment difficulties, environmental impacts, international opposition, and local community concern. Moreover, the scale of the investment and the nature of the investment climate is likely to create – indeed, it has created – disputes over these investments. Given the state-driven nature of CPEC investment, such disputes are of a distinctly political hue.

III. The “Re-Politicization” of CPEC Investment Disputes

Shifting investment disputes from the governmental to the adjudicative sphere was a driving concern behind creating the International Centre for the Settlement of Investment Disputes (ICSID). Aron Broches, General Counsel of the World Bank, described it as an attempt to “eliminate the risk of a confrontation of the host country and the national State of the investor”. At the same time, ICSID Secretary General Ibrahim Shihata stressed the intent to “balance the interests and requirements of all the parties involved” and “depoliticize” the settlement of investment disputes.¹⁰⁸ The ICSID Convention was conceived as an antidote to the “gunboat diplomacy” practised by colonial states to protect their economic interests, and is consistent with the adoption of the Charter of the UN which prohibits the use of force, except in the case of self-defence.¹⁰⁹ This development was intended to shield recipient host states from military invasion and unburden home states from the popular pressure to exercise diplomatic protection.¹¹⁰

At the outset, it should be acknowledged that the “depoliticising” effect of investor-state arbitration is an uncertain hypothesis. In one view, the depoliticizing aim of the ICSID Convention has been achieved.¹¹¹ This conclusion flows from the analysis that diplomatic protection has shifted from the norm to the exception in investor-state disputes, and there is limited host-state involvement during an investor-state arbitration.¹¹² On the other hand, consistent with Lauterpacht's position that every international law dispute is political, Paparinskis suggested that depoliticization has minimal utility for elucidating modern challenges in investment arbitration.¹¹³ In this argument, the concept played a historically significant role in justifying the peaceful settlement of disputes in the 1960s but is of little use today. At worst, it embeds “assumptions about hidden systemic teleology” and misleads decision-makers.¹¹⁴ A third view is that extravagant claims to a

¹⁰⁸ Ibrahim SHIHATA, “Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA” (1986) 1(1) ICSID Review Foreign Investment Law Journal 1, 4.

¹⁰⁹ Kenneth J. VANDEVELDE, “A Brief History of International Investment Agreements Symposium: Romancing the Foreign Investor: BIT by BIT” (2005) 12 UC Davis Journal of International Law & Policy 157.

¹¹⁰ See Noel MAURER, *The Empire Trap: The Rise and Fall of U.S. Intervention to Protect American Property Overseas, 1893–2013* (Princeton: Princeton University Press 2013).

¹¹¹ Ursula KRIEBAUM, “Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes” (2018) 33(1) ICSID Review - Foreign Investment Law Journal 14, at 27.

¹¹² *Ibid.*

¹¹³ Martins PAPARINSKIS, “The Limits of Depoliticisation in Contemporary Investor-State Arbitration” SSRN (1 October 2010), online: SSRN <<https://papers.ssrn.com/abstract=1716833>>.

¹¹⁴ *Ibid.*, at 5.

bright-line separation of law and politics have always failed to capture the inherently political nature of investment obligations and arbitrator discretion.¹¹⁵ Gradations of opinion, therefore, follow from different interpretations of common facts and diverse views on the concept of depoliticization itself. Appraisals of success determine whether it is measured by the absence of military intervention in investment disputes, the limited exercise of diplomatic protection in investment arbitration cases, or that investment disputes are not resolved with “lowly” politics but by “higher” law.¹¹⁶

This paper adopts a definition of depoliticization that reflects the removal of the home state from the process of investor-state arbitration: decision-making authority shifts from a governmental body to an adjudicative body. This shift is crystallized in Article 27 of the ICSID Convention, which provides that no home state may give diplomatic protection regarding a dispute about which one of its nationals and another state have consented to arbitration. Scholars of geoeconomics describe it as a “movement towards highly legalized dispute resolution”.¹¹⁷

However, investors implementing CPEC projects, despite their diverse character and considerable scale, have not used this default adversarial mechanism. Despite robust investment protection obligations supported by accessible and enforceable dispute resolution processes in investment treaties, CPEC stakeholders have not exercised the option to pursue adversarial mechanisms. To that extent, the geoeconomic aspects of CPEC investments directly impact the suitability of dispute settlement procedures that focus on adjudicating “hard law”. The following sections explore the character of dispute resolution available to Chinese investors and the potential circumstances giving rise to investment claims.

A. Robust International Dispute Resolution Frameworks for Chinese Investments in Pakistan

Two international investment agreements have been concluded between China and Pakistan: the 1989 China-Pakistan BIT and an investment chapter in the 2006 Pakistan-China free trade agreement (FTA). The 2006 agreement was updated in 2019. They exist concurrently.¹¹⁸ Both provide Chinese investors with legal protections in Pakistan and facilitate recourse to international arbitration to enforce them. Given that the agreements were concluded before CPEC was devised, it is obvious that they were not drafted with this project in mind. Nevertheless, they remain in force and are theoretically viable routes for Chinese investors. The following sections will appraise the access to arbitration afforded by each agreement.

While the 1989 BIT and 2006 FTA provide some access to investor-state arbitration, it is much more limited in scope in the 1989 agreement. Article 10 provides:

If an investor challenges the amount of compensation for the expropriated investment assets, he may file a complaint with the competent authority of the Contracting Party taking the expropriatory measures. If it is not solved within one year after the complaint is filed, the competent court of the Contracting Party taking the expropriatory measure or an international arbitral tribunal may, upon the request of the investor, review the amount of compensation.

¹¹⁵ David SCHEIDERMAN, “Revisiting the Depoliticization of Investment Disputes” (2010–2011) Yearbook on International Investment Law and Policy 693.

¹¹⁶ *Ibid.*

¹¹⁷ Roberts, Moraes and Ferguson, *supra* note 9 at 658.

¹¹⁸ The second phase of the China-Pakistan FTA took effect in July 2007.

At first instance, several aspects of this clause limit access to Chinese investors. First, the scope of the clause refers only to the amount of compensation relating to expropriation. Fair and equitable treatment, most-favoured-nation treatment, and obligations to permit asset transfer are notable by their absence. By contrast, the scope of state-state dispute settlement provision refers to disputes “concerning the interpretation or application” of the agreement. Second, there is a precondition that investors must wait a year after filing a notice of complaint before proceeding to court or arbitration. There is neither a suggestion nor a compulsion for negotiation, conciliation, or mediation during this period. Third, the clause permits the investor to request a court or an international arbitral tribunal to review the amount of compensation. This is commonly referred to as a “fork in the road” clause, which permits an investor to pursue one avenue for redress but not both.¹¹⁹

Despite the apparently restrictive wording, clauses that limit access to arbitration to review the amount of compensation for expropriation have been interpreted broadly by some arbitral tribunals. In *Tza Yap Shum v Peru*, the tribunal understood a clause containing the words “involving the amount of compensation” to include “whether the property was actually expropriated”.¹²⁰ It reasoned that the fork in the road nature of the dispute resolution clause meant that an investor might only go to a domestic court or international arbitration. Thus, if an investor had first to submit the dispute to a domestic court to obtain a finding that an expropriation occurred, this would foreclose the possibility of international arbitration, save for an admission of an expropriation by the host state. Consistent with the principle of *effet utile*, or effective interpretation, the tribunal considered that determining the existence of an expropriation was also permitted by the BIT, not merely the amount of compensation. Similarly, the tribunal in *BUCG v Yemen* held that a narrow interpretation – excluding the determination of the existence of an expropriation – would undermine the BIT’s object and purpose.¹²¹

Applying this approach to the 1989 BIT makes it possible to conceive more expansive access to arbitration for Chinese investors in Pakistan. However, differences in drafting should provoke caution before transposing the reasoning from *Tza* and *BUCG* onto this BIT. Unlike the 1994 China-Peru BIT and 1998 China-Yemen BIT, the 1989 China-Pakistan BIT does not contain the phrase “involving the amount of compensation” or “relating to the amount of compensation”. Instead, it refers only to the “amount of compensation”. Interpreting “involving” or “relating” was central to the tribunal’s expansive interpretive approach in the previous cases. However, the fork in the road argument remains. Investors are permitted to take requests relating to the amount of compensation to court or arbitration, but not both. A tribunal may consider this sufficient to determine the existence of an expropriation and the amount of compensation to be paid.

However, this broader interpretation is by no means uncontested. In the case of *China Heilongjiang v Mongolia*, the tribunal came to the opposite view.¹²² It reasoned that the phrase “involving the amount of compensation” was to restrict an arbitral tribunal’s jurisdiction.¹²³ The relevant clause referred not only to a “dispute involving the compensation for expropriation” but a “dispute involving the amount of compensation for

¹¹⁹ Serena LEE and Myron PHUA, “Supervisión y Control v Costa Rica: Developing the Pantechniki v Albania Standard for ‘Fork in the Road’ Provisions in Investment Treaties” (2019) 34(1) ICSID Review - Foreign Investment Law Journal 203.

¹²⁰ *Tza Yap Shum v. Republic of Peru*, Decision on Annulment of 12 February 2015, ICSID Case No ARB/07/6.

¹²¹ *Beijing Urban Construction Group Co Ltd v. Republic of Yemen*, Decision on Jurisdiction of 31 May 2017, ICSID Case No ARB/14/30; *Sanum Investments Limited v. Lao People’s Democratic Republic*, Award on Jurisdiction of 13 December 2013, UNCITRAL, PCA Case No 2013-13.

¹²² *Ibid.*, at para 423.

¹²³ *Ibid.*, at para 439.

expropriation” (*emphasis added*).¹²⁴ This was interpreted as referring to a particular category of compensation. “Involving” was considered by the tribunal to be a neutral term, neither expanding nor contracting the tribunal’s jurisdiction.¹²⁵ Finally, the proposition that the investor would be denied recourse if the tribunal adopted a restrictive view was dismissed.¹²⁶ Arbitration would remain available where an expropriation had been formally proclaimed. Therefore, whether Chinese investors would be able to seek a determination that Pakistan committed expropriation remains uncertain. The jurisprudence is inconsistent.

By contrast, the dispute settlement provisions in the 2006 Pakistan–China FTA, retained in the 2019 version, present a far clearer path to international arbitration. Article 54 provides that “any legal dispute” that cannot be settled through negotiations within six months of the date it was raised can be submitted to either a domestic court or ICSID. This expanded scope facilitates access to arbitration for a broad range of potential disputes relating to the investment obligations contained within the treaty. It does not fall foul of the ambiguities accompanying the 1989 BIT. Nevertheless, access remains conditional. A six-month “cooling off” period is required from the notification of the dispute, and the investor must have exhausted administrative review procedures in the host country. Accordingly, Chinese investors seeking to assert a breach of investment obligations and initiate arbitration would be readily able to do so.

B. CPEC Project Disruption and Investment Claims

A Chinese investor has yet to submit a CPEC project to investor-state arbitration. Evidence from a survey by the China Institute of Corporate Legal Affairs (CICLA) suggests that this is not attributable to an aversion to legal mechanisms by Chinese enterprises investing in developing countries.¹²⁷ Fifty per cent of respondents to the 2015 survey stated that they had been involved in civil lawsuits or arbitration.¹²⁸ However, many of these disputes were related to penalties imposed on Chinese investors. Several events and disruptions to CPEC projects could give rise to an investment claim or may do so in the future. These will be explored with reference to specific investment obligations in China–Pakistan investment treaties: that is, full protection and security (FPS), fair and equitable treatment (FET), and expropriation.

1. Terror attacks on Chinese workers and the FPS obligation

Both the 1989 China–Pakistan BIT and the 2006 China–Pakistan FTA provide for the physical protection of investors. The 1989 BIT provides that investors “shall enjoy protection in the territory of the other contracting party”. In contrast, the 2006 FTA stipulates that investors “shall enjoy the constant protection and security in the territory of the other Party” (*emphasis added*).

Arbitral jurisprudence indicates that this imposes an obligation on host states to provide for the physical protection of investors. However, protection is not absolute; states must only exercise due diligence and take reasonable measures.¹²⁹ The standard “cannot

¹²⁴ *Ibid.*, at para 443.

¹²⁵ *Ibid.*, at para 446.

¹²⁶ *Ibid.*, at para 448.

¹²⁷ Matthew S. ERIE, “Chinese Law and Development” (2021) 61(1) *Harvard International Law Journal* 51, at 82.

¹²⁸ “Zhongguo gongsifawu yanjiuyuan 中国公司法务研究院” [China Institute of Legal Corporate Affairs]; “Zhongguo qiye ‘zouchuqu’ diaoyan baogao 中国企业‘走出去’调研报告” [Survey Report on Chinese Companies “Going out”] 2015–16, 2016–17, and 2017–18.

¹²⁹ *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, Award of 27 June 1990, ICSID Case No. ARB/87/3, at para 53; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Award of 29 May 2003, ICSID Case No. ARB (AF)/00/2, at para 177.

be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed”¹³⁰ Relevant factors in assessing due diligence include the scale of the civil disorder and the resources available to the state to counter the disorder.¹³¹ In the ICSID case of *Ampal v Egypt*, Egypt was held liable for attacks by insurgents on a gas pipeline between 2008 and 2011.¹³² The pipeline had been attacked thirteen times, but the tribunal reasoned that the first four attacks were not foreseeable and, therefore, the state could not be held responsible. Egypt was liable for every attack after the fourth attack, notwithstanding the disrupted environment of the Arab Spring. While this decision has been subject to considerable criticism,¹³³ it demonstrates that host states are under an obligation to prevent terror attacks in certain circumstances.

CPEC projects, and the Chinese nationals implementing them, have suffered numerous terror attacks in Pakistan. An insurgency in Balochistan, domestic terrorism, and international jihadism contribute to a volatile security situation.¹³⁴ Indeed, Small argues that “instead of being known as China’s gateway to the Gulf, Pakistan has developed a reputation as the most dangerous country to be an overseas Chinese, with kidnappings and killings taking place with disturbing regularity”.¹³⁵ The separatist groups – the Baluchistan Liberation Army (BLA) and the Baluchistan Liberation Front (BLF) – oppose CPEC. They are thought to be responsible for a series of attacks on Chinese nationals. Prominent examples include the 2018 high-profile attack on the Chinese Consulate in Karachi and the kidnap and killing of two Chinese language teachers in Quetta in 2017.¹³⁶ As of July 2022, the attacks continue. In July 2021, a bus carrying Chinese engineers and construction workers in the western province of Khyber-Paktunkhwa was bombed, killing nine Chinese nationals.¹³⁷ In August 2021, a suicide bomber targeted a bus carrying Chinese nationals, with the BLA claiming responsibility for the attack.¹³⁸ Finally, in April 2022, three Chinese nationals were killed in a bombing at the University of Karachi, including the Director of the Confucius Institute.¹³⁹ Again, the Baloch Liberation Army claimed responsibility for the attack.¹⁴⁰ While former CPEC Project Director Hassan Daud Butt established a force of ten thousand security personnel

¹³⁰ *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, [1989] I.C.J. Rep. 15 at para 108

¹³¹ *Pantehniki S.A. Contractors & Engineers v. Republic of Albania*, Award of 30 July 2009, ICSID Case No. ARB/07/21, at para. 77.

¹³² *Ampal-Am. Isr. Corp. v. Arab Republic of Egypt*, Decision on Liability and Heads of Loss of 21 February 2017, ICSID Case No. ARB/12/11, at paras. 289–90.

¹³³ Robert Howse and Amin Yacoub, “Litigating Terror in The Sinai after the Egyptian Spring Revolution: Should States be Liable to Foreign Investors for Failure to Prevent Terrorist Attacks?” (2022) 43(3) *Michigan Journal of International Law* 595.

¹³⁴ Wolf, *supra* note 51 at 107.

¹³⁵ Andrew Small, *The China-Pakistan Axis: Asia’s New Geopolitics* (New York: Oxford University Press 2014).

¹³⁶ Yelena BIBERMAN and Jared SCHWARTZ, “China and Pakistan Have Struck a Devil’s Bargain With Militants” *Foreign Policy* (5 April 2019), online: <https://foreignpolicy.com/2019/04/05/china-and-pakistan-have-struck-a-devils-bargain-with-militants/>; “Pakistan Confirms Death of 2 Kidnapped Chinese Nationals” *China Daily* (31 October 2017), online: https://www.chinadaily.com.cn/world/2017-10/31/content_33929197.htm.

¹³⁷ Asif SHAHZAD, “Pakistan Says Attack That Killed Chinese Was a Suicide Bombing” *Reuters* (12 August 2021), online: <https://www.reuters.com/world/asia-pacific/pakistan-foreign-min-says-bus-attack-that-killed-9-chinese-workers-was-suicide-2021-08-12/>.

¹³⁸ Gul YOUSAFZAI, “Two Killed in Suicide Bombing Targeting Chinese Nationals in Pakistan” *Reuters* (20 August 2021), online: <https://www.reuters.com/world/asia-pacific/two-killed-suicide-bombing-targeting-chinese-nationals-southwest-pakistan-2021-08-20/>.

¹³⁹ Jack LAU, “China Calls for “Resolute” Action from Pakistan against Terror Attacks on Chinese Nationals” *South China Morning Post* (12 May 2022) *South China Morning Post* <https://www.scmp.com/news/china/diplomacy/article/3177532/china-calls-resolute-action-pakistan-against-terror-attacks>.

¹⁴⁰ *Ibid.*

to ensure the successful completion of CPEC projects, it is uncertain whether this would meet the due diligence standard required in investment arbitration if it cannot prevent attacks.¹⁴¹ Nevertheless, Chinese representations to the Pakistan government have remained diplomatic, not legal, in character. This is also true of Pakistan's sovereign debt obligations to China.

2. Political upheaval and contract "renegotiation" of power projects: FET and expropriation

When Imran Khan came to power in 2018, he promised to renegotiate contracts concluded with Chinese independent power producers (IPPs), citing their pro-China orientation.¹⁴² Unfortunately, the position was taken without meaningful consultation with the Chinese parties. Nevertheless, the Khan administration persuaded Chinese companies to accept lower interest rates.¹⁴³ However, in March 2022, payments owed to these providers were not forthcoming, so the operators closed operations, citing cash flow difficulties. This prevented the necessary import of fuels. Operations were only restarted after payment was made. A former Minister of State involved in industrial negotiations with Chinese parties offers an account of the mood:

The Chinese [companies] have been absolutely upset for a very long time ... The Chinese stance is that it's a commercial agreement. No IPP is obliged to listen to the [Pakistani] government because the agreements were drawn under the law.¹⁴⁴

Other unfulfilled commitments included renegeing on a promised escrow account to ensure smooth payments to Chinese providers.¹⁴⁵ After Imran Khan was removed from power by a no-confidence vote, the new administration of Prime Minister Shehbaz Sharif vowed again to renegotiate power-related contracts with Chinese providers. This request was driven by requirements of the IMF, which reportedly urged Pakistan to extend the duration of the bank loans from ten to twenty years or reduce the markup on arrears owed to Chinese power providers from 4.5% to 2%.¹⁴⁶

The lack of transparency typical of financing for CPEC projects leaves considerable uncertainty about Pakistan's sovereign debt obligations.¹⁴⁷ A 2022 IMF report estimates that Pakistan owes \$30 billion (US) to China, a third of its total debt obligations.¹⁴⁸ The IMF explicitly states that contingent liability arising from investments through CPEC "pose a risk to debt sustainability".¹⁴⁹ Economic and political crises mean that, in the near term, "financing risks remain elevated", and thus "authorities are seeking additional

¹⁴¹ Hidayatullah KHAN, Nasrudin Md. AKHIR, and Geetha GOVINDASAMY, "China-Pakistan Economic Corridor: A Chinese Gateway to the Indian Ocean Region" (2021) 58 (Autumn/Winter) Hong Kong Journal of Social Sciences 457.

¹⁴² "Pakistan's Imran Khan Travels to China to Renegotiate Terms of CPEC" *Foreign Brief* (1 November 2018), online: Foreign Brief <<https://www.foreignbrief.com/daily-news/pakistans-imran-khan-travels-to-china-to-renegotiate-terms-of-cpec/>>.

¹⁴³ "Pakistan and China Hail "brotherhood" but IMF Terms Spell Friction" *Nikkei Asia* (17 September 2022), online: Nikkei Asia <<https://asia.nikkei.com/Politics/International-relations/Pakistan-and-China-hail-brotherhood-but-IMF-terms-spell-friction>>.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ Rafiq, *supra* note at 33.

¹⁴⁸ "Pakistan: Seventh, and Eighth Reviews of the Extended Arrangement under the Extended Fund Facility, Requests for Waivers of Non-Observance of Performance Criteria, and for Extension, Augmentation, and Rephasing of Access-Press Release; Staff Report; Staff Statement; and Statement by the Executive Director for Pakistan", International Monetary Fund, IMF Staff Country Reports, 1 September 2022.

¹⁴⁹ *Ibid.*, at 50.

financial support from their traditional bilateral partners”.¹⁵⁰ Indeed, a recent meeting on the sidelines of the Shanghai Cooperation Organization took place in September 2022, where it was reported that debt renegotiation was high on the agenda. Moreover, the US urged China to engage in debt renegotiations in response to the devastating floods that killed at least 1,600 people by the end of September 2022.¹⁵¹

A readout from the meeting in September 2022 between Prime Minister Shehbaz Sharif and President Xi Jinping hints at some of the tumults: “China hopes that Pakistan will provide solid protection for the security of Chinese citizens and institutions in Pakistan as well as the lawful rights and interests of Chinese businesses”.

Could investment treaties be used to enforce these rights? In short, it depends on the nature of the contract renegotiations between the Pakistani and Chinese power producers. If legislation unilaterally alters contractual terms with Chinese parties, this may constitute an uncompensated expropriation, contrary to 1989 BIT Article 4 and 2006 FTA Article 49. The expropriation of contractual rights was recognized in arbitral jurisprudence as early as 1903. A member of the US-Venezuela Mixed Claims Commission in the *Rudloff* case articulated the position: “The taking away or destruction of rights acquired, transmitted, and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property”.¹⁵² Several subsequent investment tribunals have confirmed this.¹⁵³ Nevertheless, legislative measures that merely reduce interest rates are unlikely to meet the “substantial deprivation” standard required for a breach.¹⁵⁴

However, in this case, it appears that the renegotiation concerns merely bilateral negotiation. There is no external evidence of executive or legislative action. To that end, two features of FET may prove relevant: contractual commitments may form part of an investor’s legitimate expectations and investors are afforded freedom from coercion.

A minority of tribunals, such as those in *Mondev v US* and *SDS v Paraguay*, found that failing to observe contractual obligations would violate the FET standard.¹⁵⁵ More commonly, tribunals consider that exercising sovereignty is necessary to breach FET. For example, in *Impregilo v Pakistan*, the tribunal found that liability under the treaty could only be activated through the misuse of public power.¹⁵⁶ The second element of FET is the freedom from coercion and harassment. For example, in *Total v Argentina*, an investor had been forced to acquiesce to less favourable contractual conditions under which it had to give up receivables in return for shares.¹⁵⁷ The tribunal found that:

¹⁵⁰ *Ibid.*

¹⁵¹ “US Asks Pakistan to Seek Debt Relief from China After Floods” *Bloomberg* (27 September 2022), online: Bloomberg <<https://www.bloomberg.com/news/articles/2022-09-27/us-asks-pakistan-to-seek-debt-relief-from-china-after-floods>>.

¹⁵² *Rudloff Case*, Decision on Merits, [1959] IX RIAA 244, 250.

¹⁵³ *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award of 8 December 2000, ICSID Case No. ARB/98/4, at para 98; *CME Czech Republic v. The Czech Republic*, Partial Award of 13 September 2001, at para 591; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Decision on Jurisdiction of 14 November 2005, ICSID Case No. ARB/03/29, at para 255; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction of 22 April 2005, ICSID Case No. ARB/03/3, at para 274;

¹⁵⁴ *Société Générale v. Dominican Republic*, Award of 19 September 2008, LCIA Case No. UN 7927, at para 64; *Alpha Projektholding GmbH v. Ukraine*, Award of 8 November 2010, ICSID Case No. ARB/07/16, at para 408.

¹⁵⁵ *Mondev v. United States*, Award of 11 October 2002, ICSID Case No. ARB(AF)/99/2; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, Decision on Jurisdiction of 12 February 2010, ICSID Case No. ARB/07/29.

¹⁵⁶ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction of 22 April 2005, ICSID Case No. ARB/03/3, at paras. 266–70; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, Award of 21 June 2011, at paras 293–310.

¹⁵⁷ *Total S.A. v. Argentina*, Decision on Liability of 27 December 2010, ICSID Case No. ARB/04/01; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012) at 159.

This scheme must be considered as a kind of forced, inequitable, debt-for-equity swap, not due to unfavourable market conditions or a company's crisis ... but due to governmental policy and conduct by Argentina. As such, in the view of the Tribunal it represents a clear breach of the fair and equitable treatment obligation.¹⁵⁸

In pushing for the renegotiation of contracts with Chinese entities, particularly where the impetus for renegotiation is rooted in popular pressure, Pakistan should be wary of actions that could be viewed as coercive. Why do Chinese parties renegotiate instead of relying on their legal rights in these circumstances? Despite the potential for investment claims over terror attacks, failure to pay dues, renegeing on a commitment to establish an escrow account, and renegotiating debts, the Chinese party has yet to initiate arbitration over a CPEC investment. One answer is that the rights-based orientation of investment arbitration fails to capture the interests of CPEC stakeholders.

IV. The Belt and Road, CPEC, and Waning Influence of Investment Norms: From Rights to Interests

Despite China's recent emergence as a major source of outbound investment, utilization of the adversarial investment arbitration system is starkly lower than investors from Europe or North America. Nottage and Weeramantry have noted that the phenomenon is not unique to China; it can also be seen in the practice of other Asian investors.¹⁵⁹ It is improbable that the absence of arbitral activity can be attributed to the host countries' faultless, disinterested treatment of these investors. In the context of CPEC, this is certainly not the case. Therefore, the question arises: what is driving Chinese investors to forego their legal rights? Why are there not more CPEC – indeed, more BRI – investment claims?

Proponents of the emerging geoeconomic theory in international economic law contend that this process of de-legalization is a consequence of the conflation of economic and national security concerns. And the trend of redirecting decision-making vertically (from international to domestic) and horizontally (from adjudication to executive determination), described as the central aspect of de-legalization, is apparent in the context of CPEC. However, it is unclear whether it is explained by reference to US-China rivalry or whether national security is necessarily its centrepiece. Adopting an interest-based approach to investment dispute settlement instead of rights-based investment arbitration is more consistent with China's soft-law ordering of the Belt and Road.

The following section makes three arguments: China and Pakistan's dovetailing of economic, geopolitical, and security interests requires a shift from a rights-based lens to an interest-based lens; CPEC's investors are utilizing political risk insurance as an alternative to investment protection; and mediation may be a suitable process for the resolution of disputes arising from CPEC projects.

A. State-Driven Investment and the Necessity of an Interest-Based Lens

Two competing conceptions about its function underpin the variegated opinions on the future of ISDS.¹⁶⁰ The first considers the investment regime a system of transnational

¹⁵⁸ *Ibid.*, at 338.

¹⁵⁹ Luke NOTTAGE and J. Romesh WEERAMANTRY, "Investment Arbitration in Asia: Five Perspectives on Law and Practice" (2012) 28(1) *Arbitration International* 19.

¹⁶⁰ For a comprehensive account of this debate, see Julie A. MAUPIN, "Public and Private in International Investment Law: An Integrated Systems Approach" (2014) 54(2) *Virginia Journal of International Law* 54.

public governance or “international public law”.¹⁶¹ In this view, obligations in investment treaties are designed to establish global standards for treating foreign investment worldwide. Societal interests are weighed alongside an investor’s private rights. For legitimacy, an arbitral tribunal or some adjudicative body enforces these emerging norms and develops a related body of jurisprudence. In the second conception, ISDS is primarily a system of private dispute settlement. Notwithstanding its role in developing jurisprudence, an arbitral tribunal is a way to settle a dispute between an investor and a state party. Decisions have little regard for the impact on third parties or the public interest. Its closest analogue is international commercial arbitration, oriented towards holding parties to contractual commitments and respecting party autonomy.

Neither approach captures the essence of investor-state disputes under CPEC. The prevalence of SOEs and the state-driven character of Chinese investment makes it difficult to characterize the dispute along the public/private dichotomy. Concerning the “arbitration as private dispute settlement” model, party autonomy is the centrepiece of international commercial arbitration. The entire system is oriented towards holding both parties to the obligations to which they have contracted. In an investor-state dispute, the disputing parties (investor-state) are, by design, not the contracting parties (state-state). Despite many CPEC investors being state-owned, they are not the state itself. This distinction between SOEs and their home state for investment arbitration was confirmed in *CSOB v Slovakia* and *BUCG v Yemen*.¹⁶² Neither the 1989 China-Pakistan BIT nor the 2006 Pakistan-China FTA confers obligations upon investors, only states. The tribunal’s enquiry is, therefore, asymmetrical. Moreover, unlike carefully drafted contractual terms, the open-textured nature of investment obligations in these agreements has significant consequences for third parties.¹⁶³ For example, in its preamble, the 2006 Pakistan-China FTA expressly references “promoting sustainable development in a manner consistent with environmental protection and conservation”. This should guide arbitrators’ interpretation of substantive obligations in accordance with the rules of interpretation in the Vienna Convention on the Law of Treaties. The purely “private dispute settlement” frame is, therefore, inappropriate.

Dominant conceptions of investor-state arbitration sit uncomfortably alongside CPEC investment because the projects have hybrid public-private elements. Characterizing Chinese investors in CPEC as purely “private” actors obscure the intensely public aspects of much of the investment. For example, Chinese investments in Pakistan are funded primarily through the EXIM Bank of China; procurement is limited to Chinese companies, and Chinese labour and equipment are generally used for the projects. Unlike orthodox private investments, both the home state and the host state have specific economic, geopolitical, and security interests that need to be protected by stewarding CPEC projects to successful completion. Given this context, the home state’s role in resolving disputes will be greater. Conversely, Chinese companies implementing these projects must operate on a commercial basis and achieve an adequate rate of return.¹⁶⁴ The managers of SOEs can face sanctions for failing to do so, including pay cuts, disciplinary action, or full judicial hearings.¹⁶⁵ This is

¹⁶¹ Gus Van HARTEN, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press 2008); Stephan W. SCHILL, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press 2010).

¹⁶² For an in depth discussion on the public/private elements of SOEs, see Mark MCLAUGHLIN, “Defining a State-Owned Enterprise in International Investment Agreements” (2019) 34(3) ICSID Review - Foreign Investment Law Journal 595.

¹⁶³ Maupin, *supra* note 164, 396

¹⁶⁴ Tania GHOSSEIN, Bernard HOEKMAN, and Anirudh SHINGAL, “Public Procurement in the Belt and Road Initiative”, MTI Global Practice Discussion Paper No. 10, December 2018.

¹⁶⁵ “When Deals Go Bad: China State Firm Managers Spooked by New Liability Rules” *Reuters* (26 September 2016), online: Reuters <<https://www.reuters.com/article/us-china-soe-m-a-idUSKCN11W2LW>>.

why the transnational public governance model is similarly problematic in CPEC context. For example, ordinary contract breaches and failure to make payments are difficult to conceive as being purely of governance. Thus, Chinese investors in CPEC maintain a commercial imperative and fulfil a public policy role.

Perhaps most significantly, the rights-based ordering of investment treaties is oriented towards resolving one dispute. Even when multiple disputing parties file cases in similar circumstances – for example, in response to the Argentinian economic crisis – each claimant investor has distinct rights and interests.¹⁶⁶ BRI projects, by contrast, are innately connected not by law but by politics and diplomacy. CPEC, like other BRI projects, is dependent on governmental cooperation and a reasonable degree of public support. How would the initiation of an investor-state arbitration impact this support? Would domestic public reaction turn against *all* CPEC projects? Would the contagion spread to other BRI countries? Reliance on an investor's legal rights for one project, even if the case is decided in favour of the Chinese party, may be a pyrrhic victory. Even if awarded in the billions of dollars (US), compensation for one project would pale in comparison to the cost of undermining the economic, geopolitical, and security interests supporting CPEC and the broader BRI.

In short, the legal rights afforded by BITs fail to capture the interests engaged by Pakistan and Chinese parties in designing and implementing CPEC projects. Dispute settlement will require an interest-based lens. Without submitting the dispute to a dispute settlement process, Chinese investors have sought, or have been required as part of their financing arrangements, to obtain political risk insurance (PRI).

B. The China Export & Credit Insurance Corporation (Sinosure) and the Role of PRI in De-Legalization

PRI is a type of investment guarantee against:

actions which deny or restrict the right of an investor/owner i) to use or benefit from his/her assets; or ii) which reduce the value of the firm. Political risks include war, revolutions, government seizure of property and actions to restrict the movement of profits or other revenues from within a country.¹⁶⁷

These guarantees are far more likely to be sought for investment in developing countries. Therefore, the institutions able to impose conditions before granting PRI would considerably influence investment flows in those countries.¹⁶⁸ In many ways, the functions of PRI and investment treaties overlap. By compensating investors for a host state's regulatory interference, they seek to promote investment by shaping host-state behaviour. With that in mind, Gordon argues that one of the behavioural effects of PRI is to shift the dynamics of the investor-state relationship, particularly when the insuring institution is the investor's home state.¹⁶⁹ For example, a host state may be cautious of breaching an investment contract with a PRI-backed investor, not because of normal private law

¹⁶⁶ Jürgen KURTZ, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis" (2010) 59(2) *International & Comparative Law Quarterly* 325.

¹⁶⁷ Political Risk Insurance Centre, cited in Kathryn GORDON, "Investment Guarantees and Political Risk Insurance: Institutions, Incentives and Development", *The Organization for Economic Co-operation and Development, OECD Investment Policy Perspectives*, 2008 at 92.

¹⁶⁸ Xueyan WU, "China's Political Risk Insurance for Outward FDI Within the Context of Belt and Road Initiative" in Giuseppe Martinico and Xueyan WU, eds., *A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road?* (Switzerland: Springer International Publishing 2020).

¹⁶⁹ Gordon, *supra* note 171, at 94

reasons (legal action in response to a contractual breach) but because of the potential for home state involvement (exercising diplomatic protection).

It is clear how this effect would contribute towards an aversion to reliance on the investor's legal rights in a BRI context. Not only are many projects designed at the diplomatic level, the implementing investors are Chinese SOEs mandated to obtain PRI from a state-funded insurer. In China, that insurer is the China Export & Credit Insurance Corporation, also known as Sinosure. Sinosure is a state-funded, policy-oriented insurance company which, in its General Manager's view, "plays an irreplaceable role in supporting the construction of the Belt and Road Initiative". It has an overt role in "performing policy functions".¹⁷⁰ As the home state, China is incentivized to adopt an advocacy role in situations that may give rise to an insurance claim.¹⁷¹

Sinosure is central to all CPEC projects. Financing is conditional on obtaining insurance, and Sinosure is the only insurer approved by Chinese lenders. For this reason, it has been argued that it plays a distortive role in the regulatory frameworks of Pakistan. Miller provides a critical account of the influence of Sinosure on regulators in Pakistan (relating to an energy project in 2015).¹⁷² In June 2015, Pakistan's National Electric Power Regulatory Authority (NEPRA) rejected Sinosure as the insurer for a wind energy project. This decision rejected the additional costs; the insurance cost would be added to the upfront tariff. In addition, reports suggest that Sinosure charges a maximum fee of 7% for debt servicing, whereas 5.5% is the maximum international norm for debt-related interest rates.¹⁷³ NEPRA reasoned that earlier projects had been successful without such arrangements and were unnecessary for this project.

Within weeks, in late June and early July 2015, NEPRA received sixteen petitions from stakeholders urging that it agree to the demand to pay the requested Sinosure fees.¹⁷⁴ NEPRA typically received a single petition per issue. Five of the petitions, which came from different wind energy firms, contained an identically worded request:

Plea: Sinosure Insurance is a contingent requirement of Debt from China. It is approved by NEPRA for other Projects (Coal etc.). It is a mandatory cost for Chinese Debt and should be incorporated as a pass-through cost by NEPRA.¹⁷⁵

Similar language is contained in a petition from the Government of Sindh Energy Department. In addition, Harbin Electric International, a Chinese SOE, also submitted a petition urging NEPRA to accept Sinosure as the insurer. These elements suggest a high degree of coordination across Pakistan's public and private sectors.¹⁷⁶

¹⁷⁰ "In Overseas Ventures, Insurance Gives Firms a Sure Footing" *China Daily* (28 April 2019), online: Chinadaily <<https://www.chinadaily.com.cn/a/201904/28/WS5cc4ec64a3104842260b8cde.html>>.

¹⁷¹ For a discussion of home state intervention as "commercial diplomacy" see Dilini PATHIRANA, "The Paradox of Chinese Investments in Sri Lanka: Between Investment Treaty Protection and Commercial Diplomacy" (2020) 10(2) *Asian Journal of International Law* 375.

¹⁷² Dan Taninecz MILLER, "The China Pakistan Economic Corridor: Indicator of Chinese Strategic Energy Goals and a Challenge to the Open Procurement Status Quo", Jackson School of International Studies, University of Washington, 5 June 2017.

¹⁷³ *Ibid.*, at 26.

¹⁷⁴ *Ibid.*, at 22.

¹⁷⁵ Indus Wind Energy Limited, "Filing of Review Petition Up-Front Tariff for Wind Power Generation Projects" (3 July 2015), online: NEPRA <https://nepra.org.pk/tariff/Tariff/Petitions/2015/Review%20Petition%20-%20Upfront%20Tariff%20for%20Wind%20Power%20Generation%20Tariff%20filed%20by%20Indus%20Wind%20Energy%20Ltd..pdf>

¹⁷⁶ Miller, *supra* note 176, at 23.

One green energy firm in Pakistan stressed the need to acquiesce to these mandatory conditions because the capital required to develop the wind power sector would be unobtainable through local or international financing.¹⁷⁷ Another put the case in starker terms: “an exclusion of Sino Shore [sic] premium will effectively shut the door for project financing from China”.¹⁷⁸ There is an express link between the adoption of these mandatory terms and the implementation of CPEC. In October, NEPRA reversed their decision, stating that “for wind power projects having foreign financing, an appropriate adjustment in the benchmark project cost will be allowed on account of Sinosure or other credit insurance fees”. The numerous petitions were cited as one of the reasons for the reversal.

In light of these dynamics, there is another reason Chinese investors involved in CPEC do not utilize investor-state arbitration: private law ordering and in-country networks are more effective ways to shield their interests and influence host-state behaviour. The regulatory framework gave way to the interests of stakeholders. While a rights-based arbitration may not be attuned to these circumstances, investor-state mediation may be a structured alternative.

C. Interest-Based Mechanisms Within ISDS – Mediation as a Structured Alternative?

Should other mechanisms be considered if the adversarial model of investor-state arbitration is inappropriate within CPEC context? Do international dispute settlement processes have any role to play? This section proposes that investor-state mediation may be capable of accommodating the interest-based lens of some CPEC disputes. Its focus on the parties’ interests instead of their stated legal positions is more consistent with the strategic initiative’s inherent geoeconomic orientation than the dispute’s submission to a disinterested third party for settlement.

At first instance, both Pakistani and Chinese parties appear content to attempt to resolve their disputes through bilateral negotiations or reliance on PRI. However, mediation may be a viable – perhaps preferable – option. It has been argued elsewhere that mediation sits more comfortably alongside the soft-law norms of the BRI than the adversarial nature of investor-state arbitration.¹⁷⁹ The various policy documents and memorandums comprising the legal infrastructure of the BRI emphasize the partnership between China and recipient host countries and the flexibility of proclaimed norms.¹⁸⁰ Investment treaties’ “hard law” norms are incongruent with the principles underlying how the BRI is constructed. The same logic can be applied to CPEC.

Chinese support for introducing investor-state mediation is explicit in its submission to Working Group III on ISDS reform. It argues that mediation “emphasizes the value of harmony and can offer the host country and investors a high degree of flexibility and autonomy”.¹⁸¹ This principle has also been translated into practice. A detailed mediation process was included in the 2017 China-Hong Kong Closer Economic Partnership Agreement and is supplemented by a 2018 agreement incorporating mediation at the

¹⁷⁷ *Ibid.*, at 24.

¹⁷⁸ *Ibid.*, at 25.

¹⁷⁹ Mark McLaughlin, “Investor-State Mediation and the Belt and Road Initiative: Examining the Conditions for Settlement” (2021) 24(3) *Journal of International Economic Law* 609.

¹⁸⁰ Jiangyu WANG, “China’s Governance Approach to the Belt and Road Initiative (BRI): Relations, Partnership, and Law” (2019) 14(5) *Global Trade and Customs Journal* 222.

¹⁸¹ “Submission from the Government of China to UNCITRAL Working Group III”, 19 July 2019, A/CN.9/WG.III/WP.177; The term “mediation” was not used in the submission. Independent analysis by the Singapore International Dispute Resolution Academy reveals that the same Chinese characters “调解” (*Tiáojiě*) are being translated as “mediation” in some IIAs and “conciliation” in others, suggesting that the terms are used interchangeably [on file with author].

China International Economic and Trade Arbitration Commission (CIETAC).¹⁸² In 2020, a new system of investment complaints was introduced in China, which has been described as “state-centric investment mediation”,¹⁸³ while the China Council for the Promotion of International Trade and the China Chamber of International Commerce Mediation Centre are collaborating with the Singapore International Mediation Centre to establish a Belt and Road Mediator Panel.¹⁸⁴ These developments do not necessarily translate to support for the use of mediation by Chinese parties. Still, the apparent approval of mediation processes for investment disputes by the central government is likely to be noted by SOEs.

While there are several ways that this may come to fruition, perhaps the most likely is through investor-state mediation at CIETAC. It already holds a prominent role in settling foreign-related disputes with Chinese parties. Moreover, in 2018, CIETAC published rules that would apply to investment disputes under CEPA.¹⁸⁵ They include a structured approach to requesting and carrying out the mediation of an investment dispute. There is no evidence that Chinese parties have adopted this mechanism as a default. However, it would allow Chinese parties to enter into a formal legal process to resolve the dispute (unlike negotiations) that does not empower a third party to impose an outcome (unlike arbitration).

There are also some signals that Pakistan might be amenable to using mediation for investor-state disputes. Most notably, the China-Pakistan FTA provides for mediation conducted by a Free Trade Commission comprised of representatives from China’s Ministry of Commerce and Pakistan’s Ministry of Commerce.¹⁸⁶ Other Pakistani investment agreements reference conciliation.¹⁸⁷ The 2014 Pakistan-Bahrain BIT presents conciliation as an equally viable dispute resolution option to arbitration, with the investor choosing either process. A similar provision is contained in BITs with Bosnia-Herzegovina, Morocco, Belgium, Australia, Sri Lanka, Switzerland, Singapore, and the Netherlands.¹⁸⁸ These are in the minority; most of Pakistan’s forty-six BITs refer only to the aspiration that a dispute be settled “amicably” or “through negotiations” before providing concrete routes to arbitration. However, this is not a barrier to using mediation to resolve such disputes.¹⁸⁹ Moreover, a 2021 statement by the Pakistan delegation, in a report on the work

¹⁸² “Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA)”, Online: Trade and Industry Department, the Government of the Hong Kong Special Administrative Region <<https://www.tid.gov.hk/english/cepa/investment/mediation.html>>.

¹⁸³ Mark MCLAUGHLIN, “State-Centric Investment Mediation”, *Asian Journal of Comparative Law* (forthcoming).

¹⁸⁴ “SIMC and CCPIT Mediation Center Establish International Mediator Panel to Resolve BRI-Related Disputes” SIMC (2019), online: SIMC <<https://simc.com.sg/blog/2019/01/25/simc-and-ccpit-mediation-center-establish-international-mediator-panel-to-resolve-bri-related-disputes/>>.

¹⁸⁵ “CIETAC Mediation Rules for Investment Disputes under the CEPA”, online: lawinfochina <<https://www.lawinfochina.com/display.aspx?id=33395&lib=law>>.

¹⁸⁶ China-Pakistan Free Trade Agreement (entered into force 7 July 2007), art. 61.

¹⁸⁷ 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, although 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.

¹⁸⁸ Bosnia-Herzegovina BIT (entered into force 2 July 2002); Morocco-Pakistan BIT, 16 April 2001; Belgium-Luxembourg Economic Union-Pakistan BIT (entered into force 7 August 2015); Australia-Pakistan BIT (entered into force 14 October 1998); Pakistan-Sri Lanka BIT (entered into force 5 January 2000); Switzerland-Pakistan BIT (entered into force 6 May 1996); Singapore-Pakistan BIT (entered into force 4 May 1995); Netherlands-Pakistan BIT (entered into force 1 October 1989).

¹⁸⁹ James CLAXTON, “Faithful Friend and Flattering Foe: How Investment Treaties Both Facilitate and Discourage Investor-State Mediation” SSRN (2020), online: SSRN <<https://papers.ssrn.com/abstract=3690682>>.

of the United Nations Commission on International Trade Law (UNCITRAL), noted that the ISDS system “raises myriad concerns and merits reform”.¹⁹⁰ In particular, the statement notes Pakistan’s view that the measure of damages is the primary focus of ISDS reform. By having control over the process, mediation may obviate concerns about the imposition of excessive damages imposed by a third party. While there are no publicly known instances of Pakistani parties using conciliation or mediation to settle investment disputes, mediation is a process that Pakistan has been prepared to engage with in its relationship with India.¹⁹¹

Alongside the traditional arguments of time and cost, which are advanced as reasons to opt for mediation over arbitration, institutions involved in the settlement of investor-state disputes have developed a legal and regulatory framework for use in mediation.¹⁹² For example, ICSID and the International Bar Association have published their own sets of Mediation Rules;¹⁹³ the Energy Charter Secretariat has produced a Guide on Investment Mediation and a Model Instrument for the management of investment disputes;¹⁹⁴ and UNCITRAL Working Group III has crafted a model dispute settlement clauses to embed mediation in investment treaties.¹⁹⁵ All these reforms are intended to promote and support investment mediation. Combined with the individual positions of China and Pakistan, the emergence of this international legal infrastructure offers CPEC investors a structured, interest-based alternative to arbitration.

V. Conclusion

This article has argued that the dovetailing economic, geopolitical, and security interests that underpin CPEC necessitate a dispute resolution process that focuses on interests and legal rights. However, CPEC investment projects in Pakistan are agreed upon in broad terms at the diplomatic level, implemented primarily by Chinese SOEs, funded by

¹⁹⁰ “Statement by Pakistan on Agenda Item 80: “The Report of the United Nations Commission on International Trade Law (UNCITRAL) on the work of its fifty-fourth session” (18 October 2021), online: <https://estatemnts.unmeetings.org/estatemnts/11.0060/20211018/J4m4NpmTavxl/nPJW3HB6nmHN_en.pdf> at 2.

¹⁹¹ Kishala SRIVASTAVA, “The Future of India-Pakistan Relations: The Declining Role of Mediation between These Rival States Note” (2019) 34 Ohio State Journal on Dispute Resolution 34(1) [i].

¹⁹² 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; the average length of ICSID conciliations, from registration to termination, is one and a half years, David GAUKRODGER and Kathryn GORDON, “Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community”, OECD Policy Papers 2012/03, 2012, at 71; Excluding legal fees and expenses, the average cost of an ICSID tribunal is \$920,000 (US), whereas the average cost of ICSID conciliation proceedings is \$182,000 (US). See Matthew HODGSON and Alistair CAMPBELL, “Damages and Costs in Investment Treaty Arbitration Revisited” *Allen & Overy* (14 December 2017), online: Allen & Overy <<https://www.allenoverly.com/en-gb/global/news-and-insights/news/damages-and-costs-in-investment-treaty-arbitration-revisited>>; Frauke NITSCHKE, “ICSID Conciliation Rules in Practice” in Catharine TITI and Katia FACH GOMEZ, eds., *Mediation in International Commercial and Investment Disputes* (New York: Oxford University Press, 2019), 121 at 139. To the contrary, see Against Settlement

¹⁹³ International Centre for Settlement of Investment Disputes Mediation Rules and Regulations; International Bar Association Rules for Investor-State Mediation.

¹⁹⁴ “Guide on Investment Mediation” *Energy Charter Secretariat* (2016), online: Energy Charter Secretariat <<https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>>; “Energy Charter Model Instrument on Management of Investment Disputes” *International Energy Charter* online: International Energy Charter <<https://www.energychartertreaty.org/model-instrument/>>.

¹⁹⁵ UNCITRAL Working Group III (ISDS Reform), “Possible reform of investor-State dispute settlement (ISDS) Draft provisions on mediation” (5–16 September 2022), online: <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/221/047/0E/PDF/2210470E.pdf?OpenElement>>; UNCITRAL Working Group III (ISDS Reform), “Intersessional Meeting on the Use of Mediation in ISDS” (28–29 October 2021), online: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_clauses_on_mediation.pdf>.

Chinese state-owned banks, and insured by a Chinese state-owned insurer. Therefore, it is sophistry to contend that CPEC disputes are purely commercial. However, Chinese investors are tasked with achieving a rate of return and succeeding on their commercial terms.

These public/private elements sit uncomfortably alongside an investment arbitration system that focuses on investments on a case-by-case basis. This fails to capture the broader, more potent suite of interests engaged by Pakistan, China, and the companies tasked with implementing CPEC projects. Instead, bilateral negotiations are the preferred method of dispute resolution, alongside the additional protection of PRI. It has been argued that investor-state mediation may provide a structured alternative to bilateral negotiations, particularly considering growing institutional support among traditional ISDS institutions. To that end, CPEC investment disputes are further evidence of the trend towards de-legalization in the emerging geoeconomic order.

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