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ARTICLE

Conceptualising State-Centric Mediation: An Analysis of China's Foreign Investment Complaints Mechanism

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Abstract

This article argues that China's foreign investor complaints system constitutes 'state-centric investment mediation'. The *Rules on Handling Complaints of Foreign-Invested Enterprises*, which entered into force on 1 October 2020, place a state agency in the position of facilitating negotiations between a foreign investor and the agency being complained against. The prospects for this complaints system depend on how the state-as-mediator dynamic is perceived by foreign investors. To this end, it will be argued that settlement agreements reached pursuant to this system may be enforceable under the *Singapore Convention on Mediation* in certain circumstances. Investors and government entities operating similar systems worldwide should be cognisant of the broad drafting terminology of the Singapore Convention. Moreover, it is proposed that further clarification of the procedural rules and the inclusion of China's foreign-related dispute resolution institutions may enhance investor confidence and encourage use of the complaints system.

Introduction

In assigning responsibility for internationally wrongful acts, public international law recognises only the state.[1] This fictional state is comprised of several state organs or individuals exercising governmental authority, from local administrators to supreme court judges.[2] Every such entity can trigger a breach of an international treaty, as their behaviour *is* the state's behaviour. And for all such disputes, the dominant dispute resolution process has been investor-state arbitration.

In specific contexts, however, this abstraction may obscure a more complex factual and legal reality. The shifting sands of investor-state dispute settlement (ISDS), for example, reflect an increasing acceptance that the fictional unitary state obscures the potential for settlement. In practice, states and disputes are more nuanced. Recent reforms to the legal frameworks of ISDS are attuned to this reality, and reorient norms and institutions towards managing disputes with foreign investors. No more so is this the case than with investment mediation. The International Centre for the

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[1]International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Supplement No 10, ch IV.E.1, UN Doc A/56/10 (Nov 2001) (hereinafter 'ARSIWA').

[2]ARSIWA, art 4 provides that '[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State'.

Settlement of Investment Disputes (ICSID),[3] the Secretariat of the Energy Charter Treaty,[4] the United Nations Commission on International Trade Law (UNCITRAL) Working Group III,[5] and the International Bar Association have all published rules or guidance to support investment mediation.[6] At the treaty level, the conclusion of the United Nations *Convention on International Settlement Agreements Resulting from Mediation* (also known as the Singapore Convention on Mediation (SCM)) may also allow foreign investors to enforce mediated settlement agreements as *sui generis* legal instruments,[7] while recent investment treaties embed mediation within dispute settlement provisions.[8]

By contrast, efforts at the national level to establish alternatives to investor-state arbitration have taken the form of government agencies tasked with preventing and managing disputes.[9] Each model takes its own unique shape; agency functions can range from making investment policy recommendations to facilitating dispute resolution to adjudicating the legality of claims. Against this background, China has implemented a new system for handling complaints by foreign investors.[10] It comprises a network of complaint centres that are mandated to 'conduct sufficient communications with the Complainant and the Complainee, collect information, coordinate to handle complaints in accordance with law, and work for an appropriate solution.'[11]

This article argues that China's complaint-handling system can, in certain circumstances, be characterised as a form of state-centric investment mediation. The central claim is that the consent-based, facilitative role of the complaints agencies can be functionally equivalent to a mediator, notwithstanding their character as state organs. This may have practical consequences in terms of their

[3]World Bank Group, International Centre for Settlement of Investment Disputes (ICSID), 'Proposals for Amendment of the ICSID Rules' (Working Paper 6, Nov 2021) <https://icsid.worldbank.org/sites/default/files/documents/ICSID_WP_Six.pdf> accessed 6 Jan 2023. For the final proposals, see ICSID, 'Proposals for Amendment of the ICSID Rules' (Nov 2021) <https://icsid.worldbank.org/sites/default/files/documents/amended_rules_en.pdf> accessed 6 Jan 2023.

[4]International Energy Charter, 'Guide on Investment Mediation' (CCDEC 2016 12 INV) <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf> accessed 6 Jan 2023.

[5]UNCITRAL Working Group III (ISDS Reform), 'Initial Draft on Mediation and Other Forms of Alternative Dispute Resolution (ADR)' (Intersessional Meeting on the Use of Mediation in ISDS, 28–29 Oct 2021) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_clauses_on_mediation.pdf> accessed 6 Jan 2023.

[6]International Bar Association, 'IBA Rules for Investor-State Mediation' (4 Oct 2012) <https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C> accessed 6 Jan 2023 (hereinafter 'IBA Rules'); Frauke Nitschke, 'The IBA's Investor–State Mediation Rules and the ICSID Dispute Settlement Framework' (2014) 29 ICSID Review – Foreign Investment Law Journal 112.

[7]Convention on International Settlement Agreements Resulting from Mediation (signed 7 Aug 2019, entered into force 12 Sep 2020) (hereinafter 'Singapore Convention on Mediation' or 'SCM'). On the applicability of the SCM to investment disputes, see Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19 Pepperdine Dispute Resolution Law Journal 1, 22–23.

[8]For an overview of mediation clauses in investment treaties, see ICSID, 'Overview of Investment Treaty Clauses on Mediation' (Jul 2021) <https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf> accessed 6 Jan 2023; Kun Fan, 'Mediation of Investor–State Disputes: A Treaty Survey' [2020] Journal of Dispute Resolution 327, 327–336.

[9]Jonathan Bonnitcha & Zoe Phillips Williams, 'Investment Dispute Prevention and Management Agencies: Toward a more informed policy discussion' (International Institute for Sustainable Development (IISD) Report, Jan 2022) <www.iisd.org/system/files/2021-10/investment-dispute-prevention-management-agencies-policy-discussion.pdf> accessed 6 Jan 2023; Asia-Pacific Economic Cooperation (APEC), 'Best Practices Guidebook: Capacity-Building to Ensure Appropriate and Prompt Consideration of Investors' Complaints to Improve the Investment Climate Within APEC' (Jul 2015) <https://www.apec.org/docs/default-source/publications/2015/7/best-practices-guidebook-capacitybuilding-to-ensure-appropriate-and-prompt-consideration-of-investo/ieg_best-practices-guidebk-2015.pdf> accessed 6 Jan 2023; United Nations Conference on Trade and Development (UNCTAD), 'Investor–State Disputes: Prevention and Alternatives to Arbitration' (UNCTAD/DIAE/IA/2009/11) <https://unctad.org/system/files/official-document/diaeia200911_en.pdf> accessed 6 Jan 2023.

[10]Ministry of Commerce, People's Republic of China (MOFCOM), 'MOFCOM Order No. 3 of 2020 on Rules on Handling Complaints of Foreign-Invested Enterprises' (31 Aug 2020) <http://english.mofcom.gov.cn/article/policyrelease/aaa/202008/20200802997073.shtml> accessed 6 Jan 2023.

[11]ibid art 16.

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attractiveness to foreign investors, and legal consequences for the enforcement of the settlement agreements resulting from the process.

The argument proceeds in four parts. First, the article examines China's tentative embrace of consensual settlement in general, and investment mediation in particular. It then offers a descriptive account of China's complaints handling mechanism, notably its state-led institutional structure and emphasis on facilitating settlement. Thereafter, the article analyses the Chinese system against definitions of mediation in domestic legal systems and, most notably, the Singapore Convention on Mediation. The final section evaluates the prospects for the complaints system before concluding.

China's Relationship with Investment Mediation

Traditionally, the literature analysing where China and ISDS intersect is focused on investor-state arbitration, or more accurately, the absence of investor-state arbitration cases.[12] The abundance of inbound investment in China, considerable Chinese investment overseas, and an extensive network of international investment agreements (IIAs) appear to create ideal conditions for a proliferation of ISDS cases. Yet, as of December 2021, China has been involved in ten treaty-based cases as a claimant,[13] and seven as a respondent.[14] This 'disequilibrium' – the disparity between the high number of arbitration clauses and the few cases pursued – may not be as obvious as when the first case was brought under a Chinese BIT, but it persists nevertheless.[15]

While the relationship between the volume of investment and the number of investment claims is not necessarily linear, the relative lack of activity is noteworthy. Several reasons have been advanced to explain the phenomenon, including a cultural preference for harmonious settlement, limited access to arbitration in some Chinese IIAs, and the stymied 'depoliticisation' effect of investor-state arbitration when the investor is a state-owned enterprise (SOE).[16] Indeed, the 'paradox' or 'disequilibrium' of China's relationship with investment arbitration is a well-observed phenomenon.

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

[13]*Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6 (12 Feb 2007); *Ping An et al v Kingdom of Belgium,* ICSID Case No ARB/12/29 (19 Sep 2012); *Sanum Investments Ltd V Lao People's Democratic Republic*, UNCITRAL, PCA Case No 2013-13 (13 Dec 2013); *Sanum Investments Ltd V Lao People's Democratic Republic*, ICSID Case No ADHOC/17/1 (14 Apr 2017); *Beijing Shougang Mining Investment Company Ltd et al v Mongolia*, UNCITRAL, PCA Case No 2010-20 (30 Jun 2017); *Beijing Urban Construction Group Co Ltd V Republic of Yemen*, ICSID Case No ARB/14/30 (3 Dec 2014); *Jetion Solar Co Ltd and Wuxi T-Hertz Co Ltd V Hellenic Republic*, UNCITRAL Case No undisclosed (May 2019); *Fengzhen Min v Republic of Korea*, ICSID Case No. ARB/20/26 (3 Aug 2020); *Wang Jing, Li Fengju, Ren Jinglin and others v Republic of Ukraine* PCA Case No undisclosed *(5 Dec 2020)*; *Alpene Ltd v Republic of Malta*, ICSID Case No ARB/21/36 (3 Feb 2022). This does not included cases against Hong Kong SAR, which would be filed under Hong Kong IIAs.

[14]*Ekran Berhad v People's Republic of China*, ICSID Case No ARB/11/15 (24 May 2011); *Ansung Housing Co, Ltd V People's Republic of China*, ICSID Case No ARB/14/25 (9 Mar 2017); *Hela Schwarz GmbH v People's Republic of China*, ICSID Case No ARB/17/19 (21 Jun 2017); *Jason Yu Song v People's Republic of China*, PCA Case No 2019-39 (pending); *Macro Trading Co, Ltd V People's Republic of China*, ICSID Case No ARB/20/22 (discontinued 10 Sep 2021); *Goh Chin Soon v People's Republic of China*, ICSID Case No ARB/20/34 (discontinued 25 Aug 2021); *AsiaPhos Limited v People's Republic of China*, ICSID Case No. ADM/21/1 (16 Feb 2023).

[15]To explore reasons behind this evolution, see Mark McLaughlin, 'Global Reform of Investor–State Arbitration: A Tentative Roadmap of China's Emergent Equilibrium' (2018) 6 The Chinese Journal of Comparative Law 73.

[16]Thomas W Wälde, 'Improving the Mechanisms for Treaty Negotiations and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy', in Karl P Sauvant, *Yearbook on International Investment Law & Policy 2008–2009* (Oxford University Press 2009) 582; Luke Nottage & J Romesh Weeramantry, 'Investment Arbitration in Asia: Five Perspectives on Law and Practice' (2012) 28 Arbitration International 19, 24; J Romesh Weeramantry, 'Investor–State Dispute Settlement Provisions in China's Investment Treaties' (2012) 27 ICSID Review – Foreign Investment Law Journal 192; Ursula Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33 ICSID Review – Foreign Investment Law Journal 14.

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By contrast, China's relationship with investment mediation is in its nascent stages. A recent study of 136 IIAs concluded by China found that only 18 make any reference to mediation or conciliation.[17] This absence does not prevent the use of mediation or other forms of alternative dispute resolution, but it certainly does not suggest a particular affinity for such mechanisms for the settlement of investment disputes.[18] However, China's latest Model BIT (2010) reportedly provides that investment disputes should 'be settled amicably through negotiations between the parties to the dispute, which includes mediation'.[19]

Furthermore, the Mainland-Hong Kong Closer Economic Partnership Agreement (CEPA), which concluded in 2017, provides that investors from Hong Kong or the Mainland may submit investment disputes to mediation institutions of the other jurisdiction. A detailed explanation of the process of investment mediation under CEPA has also been published on the website of Hong Kong's Trade and Industry Department.[20] While the unique conditions of the Mainland-Hong Kong SAR relationship should elicit caution before drawing conclusions about future Chinese BITs, the detailed rules may support the legitimacy of mediation for future disputes. Whether this will translate into a shift in treaty drafting is yet to be seen.

Indications that mediation procedures are attuned with the Chinese approach to dispute settlement are also apparent from discussions on the reform of ISDS. In October 2019, China submitted recommendations to the UNCITRAL Working Group III on Investor-State Dispute Settlement Reform. It is worth restating the section of the submission on 'alternative dispute resolution' in full:

> In contrast with investment arbitration, investment conciliation emphasises the value of harmony and can offer the host country and investors a high degree of flexibility and autonomy. Conciliators also have more opportunities to adopt creative and forward-looking methods to promote the settlement of investment disputes, thereby helping the parties to achieve mutually beneficial results as well as avoiding lengthy arbitration processes and high litigation costs. From the broader perspective of practical dispute resolution experience, adopting alternative dispute resolution measures is more advantageous for maintaining long-term cooperative relationships between investors and host Governments. In addition, it helps host countries to protect foreign investment through appropriate measures, thus serving the purpose of averting disputes and avoiding intensification of conflicts. China believes that the establishment of a more effective investment conciliation mechanism should be actively explored.[21]

[17]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, 622.

[18]On whether IIAs encourage or inhibit settlement, see James Claxton, 'Faithful Friend and Flattering Foe: How Investment Treaties Both Facilitate and Discourage Investor–State Mediation' (Draft Working Paper, 13 Sep 2020) <https://papers.ssrn.com/abstract=3690682> accessed 6 Jan 2023.

[19]The latest Chinese Model BIT 2010 has not been published. Its content is quoted from Chunlei Zhao, 'Investor–State Mediation in a China–E.U. Bilateral Investment Treaty: Talking About Being in the Right Place at the Right Time' (2018) 17 Chinese Journal of International Law 111, 124–125, citing Xiantao Wen (温先涛), '《中国投资 保护协定范本》(草案)论稿(一) [Discussion on 'China Model Bilateral Investment Treaty' (Draft 1)]' (2011) 18 Guo Ji Jing Ji Fa Xue Kan (国际经济法学刊) 169; Xiantao Wen (温先涛), '《中 国投资保护协定范本》(草案)论稿(?) [Discussion on 'China Model Bilateral Investment Treaty' (Draft 2)]' (2011) 19 Guo Ji Jing Ji Fa Xue Kan (国际经济法学刊) 132; Xiantao Wen (温先涛), '《 中国投资保 护协定范本》 (草案)论稿(三) [Discussion on "China Model Bilateral Investment Treaty" (Draft 3)]' (2011) 19 Guo Ji Jing Ji Fa Xue Kan (国际经济法学刊) 57.

[20]Government of the Hong Kong Special Administrative Region, Trade and Industry Department, 'Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), Mechanism for Settlement of Investment Dispute' (28 Jun 2017) <https://www.tid.gov.hk/english/cepa/investment/mediation.html> accessed 6 Jan 2023.

[21]UNCITRAL Working Group III, 'Possible reform of investor-State dispute settlement (ISDS)', Submission from the Government of China, A/CN.9/WG.III/WP.177 (19 Jul 2019) <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/073/86/PDF/V1907386.pdf?OpenElement> accessed 6 Jan 2023.

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This submission leaves little room for ambiguity when examining the Chinese approach to investment mediation.[22] It explicitly places the pursuit of harmony and flexibility at the centre of a discussion of the merits of mediation *vis-à-vis* arbitration. The submission confirms the Chinese view that mediation can avert disputes and avoid the escalation of conflicts. Indeed, it contains almost all the traditional arguments for the introduction of investment mediation into the ISDS ecosystem: time, cost, and preserving existing relationships.[23]

In practice, the preference for amicable resolution becomes manifest in the pattern of selective engagement in the mechanisms of dispute settlement for economic issues at the international level.

Selective Engagement in Dispute Settlement for International Economic Issues

While China's involvement in investor-state arbitration has been limited, the same cannot be said of disputes at the World Trade Organisation (WTO). China has been a complainant in twenty-two cases, a respondent in forty-seven cases, and a third party in 190 cases before the WTO. It is worth noting the WTO Members against which China has initiated complaints: they are limited to the United States (sixteen), the European Union (five), and Australia (one). Particularly with the United States, it might be observed that maintaining 'harmony' with regard to economic relations has been relegated in favour of pursuing strategic rivalry.[24] Evidently, China is prepared to opt for an adversarial dispute resolution mechanism over attempts to reach consensual settlement on certain trade issues.

Nevertheless, the approach to dispute settlement in the WTO is not replicated elsewhere. For example, China has renegotiated and forgiven sovereign debt obligations. Despite the column inches being filled by the notion of 'debt trap diplomacy' or forced asset seizure to pay for sovereign debt,[25] several analyses have found that the vast majority of debt renegotiations result in either debt forgiveness, interest rate reduction, or maturity extension.[26] This is not to say that all Chinese loans are benign or that negotiations with Chinese authorities are easy and generous; only that mantra of enforced asset seizure is without evidence.[27] The salient point is that China and Chinese banks choose not to utilise the arbitration clauses in loan contracts in favour of consensual settlement.[28]

[22]The term 'mediation' is 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).

[23]Nancy A Welsh & Andrea Kupfer Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration' (2013) 18 Harvard Negotiation Law Review 71; Catherine Titi, 'Mediation and the Settlement of International Investment Disputes: Between Utopia and Realism', in Catharine Titi & Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (Oxford University Press 2019) 21, 37.

[24]Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22 Journal of International Economic Law 655, 668.

[25]For a recent example, see Lauren Lewis, 'China Is Forced to Deny Rumour That It Will Take Control of Uganda's International Airport Should the Country Default on $200 Million Loan from Beijing' (Mail Online, 30 Nov 2021) <https://www.dailymail.co.uk/news/article-10257897/China-forced-deny-rumour-control-Ugandas-international-airport.html> accessed 6 Jan 2023.

[26]Agatha Kratz, Allen Feng & Logan Wright, 'New Data on the "Debt Trap" Question' (Rhodium Group, 29 Apr 2019) <https://rhg.com/research/new-data-on-the-debt-trap-question> accessed 6 Jan 2023; Kevin Acker, Deborah Brautigam & Yufan Huang, 'Debt Relief with Chinese Characteristics' (China Africa Research Initiative, School of Advanced International Studies, Johns Hopkins University, Working Paper No 2020/39) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3745021> accessed 6 Jan 2023; Deborah Brautigam, 'Chinese Debt Relief: Fact and Fiction' (The Diplomat, 15 Apr 2020) <https://thediplomat.com/2020/04/chinese-debt-relief-fact-and-fiction/> accessed 6 Jan 2023; Gatien Bon & Gong Cheng, 'China's debt relief actions overseas: patterns, interactions with other creditors and macroeconomic implications' (EconomiX, Université Paris Nanterre, Working Paper 2020-27) <https://economix.fr/pdf/dt/2020/WP_EcoX_2020-27.pdf> accessed 6 Jan 2023.

[27]This claim is often based around the case of the Hambantota Port in Sri Lanka. For a detailed explanation of this project, see Lee Jones & Shahar Hameiri, 'Debunking the Myth of 'Debt-trap Diplomacy': How Recipient Countries Shape China's Belt and Road Initiative' (Chatham House Research Paper, 19 Aug 2020) 13 <https://www.chathamhouse.org/2020/08/debunking-myth-debt-trap-diplomacy/6-conclusion-and-policy-recommendations> accessed 6 Jan 2023.

[28]Acker, Brautigam & Huang (n 26) 5.

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This approach is equally apparent with projects along the Belt and Road. In Myanmar, a community-led anti-mining movement extracted concessions and a contract renegotiation from China North Industries Corporation (NORINCO), a Chinese SOE involved in military trade, after the intervention of Beijing.[29] In Malaysia, political controversy over the East Coast Rail Link provoked a renegotiation of construction costs and increased an local stake in the project.[30] In Sri Lanka, renegotiations over the Colombo Port City Project, spurred after a change of government, resulted in the removal of a contractual provision granting a subsidiary of the China Communication Construction Company twenty hectares of land on a freehold basis.[31] Time and again, a two-pronged effort of the Chinese State and Chinese SOE have settled instead of pursuing adversarial mechanisms, even when the replacement agreements contain less favourable terms for them.

These examples demonstrate China's and Chinese parties' preference for settlement, but not necessarily for mediation. They did not involve a third person (mediator) facilitating negotiations, but instead resulted from direct negotiations. However, taken together with the submission to Working Group III, there is a solid case that China will be an advocate of consent-based processes such as investment mediation.

Nevertheless, there are several cases where investment disputes in China resulted in mediation. Though the confidential nature of the process is not conducive to a comprehensive understanding, the Multilateral Investment Guarantee Agency (MIGA) has reportedly been a mediator in several disputes over investment projects in China.[32] One such mediation involved a dispute over payments to a power project.[33] Complaints Centres have also played a role. A dispute between German company Zibo Siemens and a local labour authority was resolved in 1998 after Zibo Siemens filed a complaint with the Zibo City Complaint Centre for Foreign-Invested Enterprises,[34] and a dispute between foreign investor Changchun Huijin Sewage Disposal and Changchun Municipal Government was successfully resolved through mediation by the Intermediate People's Court in 2005.[35] Indeed, the role of MIGA and complaint centres may be crucial (and largely neglected) pieces of the story of how investment disputes are resolved in China, and the role of mediation in these resolutions.

With that in mind, the legal basis of a National Complaints Centre was provided by the *Interim Measures on Complaints from Foreign-Invested Enterprises* in 2006 (the '2006 Rules').[36] The latest

[29]Debby Sze Wan Chan & Ngai Pun, 'Renegotiating Belt and Road Cooperation: Social Resistance in a Sino–Myanmar Copper Mine' (2020) 41(12) Third World Quarterly 2109; Embassy of the People's Republic of China in the Republic of the Union of Myanmar, 'Remarks on the Monywa Copper Mine Project' <https://web.archive.org/web/20220517043725/https://www.mfa.gov.cn/ce/cemm//eng/sgxw/P020121130031637704213.pdf> archived from the original 17 May 2022, accessed 6 Jan 2023.

[30]Giuseppe Malgeri, 'Malaysia and the Belt and Road Initiative: an Agency Perspective of the East Coast Rail Link (ECRL) Renegotiation Process' (MSc Thesis, University of Birmingham 2019) 35 <https://www.researchgate.net/publication/335724748_Malaysia_and_the_Belt_and_Road_Initiative_an_agency_perspective_of_the_East_Coast_Rail_Link_ECRL_renegotiation_process> accessed 6 Jan 2023.

[31]Dilini Pathirana, 'The Paradox of Chinese Investments in Sri Lanka: Between Investment Treaty Protection and Commercial Diplomacy' (2020) 10 Asian Journal of International Law 375, 378.

[32]Monika CE Heymann, 'International Law and the Settlement of Investment Disputes Relating to China' (2008) 11 Journal of International Economic Law 507, 521.

[33]World Bank Group, Multilateral Investment Guarantee Agency (MIGA), 'Agency Averts Claim for Power Project in China' (MIGA News 2002) 9 <https://www.miga.org/sites/default/files/archive/Documents/vol10no2.pdf> accessed 6 Jan 2023.

[34]Guiguo Wang, 'Chinese Mechanisms for Resolving Investor-State Disputes' (2011) 1 Jindal Journal of International Affairs 204, 211.

[35]ibid 217.

[36]Interim Measures of the Ministry of Commerce Concerning Complaints from Foreign-Invested Enterprises, Decree of the Ministry of Commerce of the People's Republic of China (1 Sep 2006) <http://www.asianlii.org/cn/legis/cen/laws/timotmocccffe1004/> accessed 6 Jan 2023.

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iteration of the *Rules on Handling Complaints of Foreign-Invested Enterprises* (the '2020 Rules' or the 'Rules'), which entered into force in October 2020, updates and builds upon the existing framework.

The Legal Framework of Investment Complaints in China

The *Foreign Investment Law* of the People's Republic of China entered into force on 1 January 2020 (hereinafter 'FIL').[37] It simplifies pre-establishment administration procedures, adopts a 'negative list' approach to admission, provides (limited) legal protections for foreign investors, creates a regime of post-establishment supervision, and finally, directs the establishment of a mechanism to handle investment complaints.[38]

The details of this mechanism are furnished by the 2020 Rules. Despite the 2006 Rules providing for the establishment of a National Complaint Centre,[39] this author can find no evidence to indicate the nature, even the existence, of any of its activities.[40] The 2020 Rules are comparatively detailed, providing a more expansive scope of application, more time to resolve complaints, additional principles to govern the process, and a reimagined facilitative role for complaint centres.[41]

The 2020 Rules apply to complaints by foreign-invested enterprises alleging that their legitimate rights or interests have been infringed by administrative actions, organisations, or their employees.[42] It also applies to reports or suggestions regarding the general investment environment.[43] The most distinct characteristic of the mechanism is its state-led institutional structure.

Two-Tiered, State-led Institutional Structure

A two-tiered, state-led institutional structure for handling complaints is established, with different institution assigned different tasks (see Figure 1). Two categories of institutions are designed to handle complaints: the National Complaint Centre, and Local Agencies Handling Complaints.

The National Complaint Centre is temporarily seated at the Investment Promotion Agency of the Ministry of Commerce (MOFCOM).[44] It is responsible for handling complaints or reports related to State Council departments, provincial governments, or autonomous regions.[45] The National Complaint Centre must also organise publicity campaigns about foreign investment laws and regulations, make policy recommendations, and conduct training on handling complaints.[46] It performs a supervisory role to oversee the handling of complaints at the local level and establish a regular supervision and inspection system.[47] There is no clarification of the nature of this inspection system, nor of the remedies available to it if malpractice is found.

[37]Foreign Investment Law of the People's Republic of China 2019 (adopted 15 Mar 2019).

[38]For an appraisal these reforms, particularly their limitations, see Yawen Zheng, 'China's New Foreign Investment Law and Its Contribution Towards the Country's Development Goals' (2021) 22 The Journal of World Investment & Trade 388.

[39]Interim Measures 2006 (n 36), art 5.

[40]Other commentors have concluded that 'the National Complaint Center and Local Coordination Office do not seem to have established it successfully' (Shu Shang, 'Implementing Investor-state Mediation in China's Next Generation Investment Treaties', in Julien Chaisse (ed), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (Oxford University Press 2019) 510).

[41]Hannah CL Ha & Xin Fang, 'The Past and Future of China's Foreign Investment Complaint Mechanism' (Mayer Brown Perspectives, 2 Apr 2020) <https://www.mayerbrown.com/en/perspectives-events/publications/ 2020/04/the-past-and-future-of-chinas-foreign-investment-complaint-mechanism> accessed 6 Jan 2023; Christina Gigler, 'Improved Rules on Handling Complaints of Foreign-Invested Enterprises' (Rödl & Partner, 16 Nov 2020) <https://www.roedl.com/insights/china-foreign-invested-enterprises-investment-fil-complaint-system> accessed 6 Jan 2023.

[42]2020 Rules (n 10), art 2(1).

[43]ibid art 2(2).

[44]ibid art 6.

[45]ibid arts 6(1), (2), and (3).

[46]ibid art 6.

[47]ibid.

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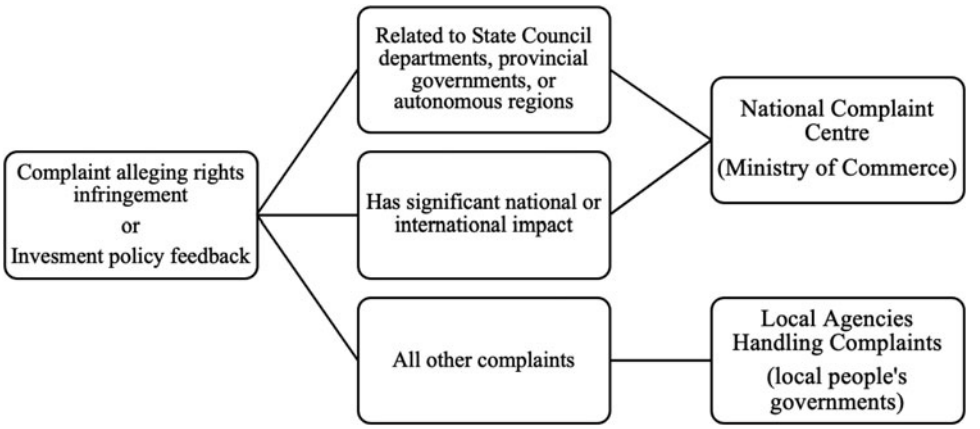

Figure 1. Institutional responsibility for complaints

Local Agencies Handling Complaints are departments or institutions designated by local people's governments to handle complaints.[48] The 2020 Rules provide that they shall improve working rules for complaint handling, including expanding channels for complaints to be submitted, and establish the scope and time limits of the mechanism.[49] However, their discretion is not unfettered, as the Rules also stipulate that complaints related to administrative actions, agencies, or staff in their region 'shall be accepted' by these local agencies.[50]

The 2020 Rules provide that MOFCOM and other State Council departments establish an interministerial joint meeting system (see Figure 2).[51] The Department of Foreign Investment Administration of the MOFCOM serves as Office of Joint Meeting, responsible for the daily activities of the joint meeting system.[52] The role of this system is to coordinate and facilitate the handling of complaints at a central level, and 'guide and supervise' their handling at a regional level.[53] The Office of Joint Meeting is responsible for 'guiding and supervising' the work of the National

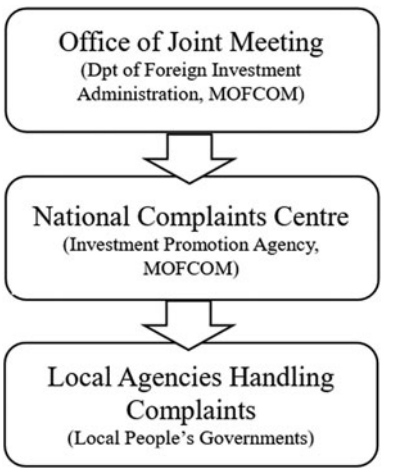

Figure 2. The supervisory hierarchy of China's Investment Complaints Handling Mechanism

[48] ibid art 7.
[49] ibid.
[50] ibid.
[51] ibid art 5.
[52] ibid.
[53] ibid.

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Complaint Centre.[54] However, the meaning of 'guide' in this context is unclear. Given its role, it may be the case that the Office of Joint Meeting is involved in recommending or facilitating settlement for complaints with particular importance to State Council ministries.

Settlement-Oriented Process, No (Express) Authority to Impose Settlement

After a complaint has been submitted, the 2020 Rules prescribe a process that is oriented toward settlement. The process can only be terminated if the foreign investor, by absence or by notification, withdraws from the process, agrees to a settlement, or if the legal or factual basis of the complaint cannot be established.[55]

One of two agencies may handle the complaint: the National Complaints Centre or the local complaints agency. The agency handling the complaint (hereinafter the 'Agency') communicates with both parties, collects information, 'handle[s] complaints in accordance with the law', and 'work[s] for an appropriate solution to the complaint'.[56] It is unclear from the drafting whether the phrase 'in accordance with the law' is a qualifier to 'appropriate solution'. The relationship between the law and the solution is not specified. The 2020 Rules expressly refer to an investor's 'legitimate rights'; that Agencies must handle the complaints 'lawfully'; that the National Complaints Centre organises 'publicity campaigns on laws, regulations, and policies relating to foreign investment'; and that 'normative documents inconsistent with laws' may be reported to the National Complaints Centre. These elements of the 2020 Rules indicate considerable reliance on legal rules when discussing settlement.

To the contrary, other elements of the 2020 Rules hint at non-legal considerations. For example, their scope extends not only to investors' rights, but also their 'interests'.[57] An 'appropriate solution' is not necessarily the legally correct solution. Moreover, it may be the case that complaints that fall within the purview of the National Complaints Centre will simply be subject to a greater level of scrutiny, that the elevated level of government reflects merely a desire to ensure that legal rights are negotiated appropriately. However, the reference to 'significant national or international impact' suggests a potentially broader scope of enquiry.

There is an obligation on both complainer and complainee to cooperate with the Agency in offering further information or documentation.[58] Indeed, the most mediation-like aspect of the 2020 Rules is present in this section on complaint handling. It provides that the Agency 'may organise meetings, and invite the Complainant and the Complainee to state their opinions and discuss possible solutions', and is empowered to seek expert opinions as part of the process.[59] It should be noted that the Rules only empower the Agency to 'invite' the parties to the meeting; there is no corresponding obligation of acceptance.

The Agency may handle complaints in four ways: promote mutual understanding (including a settlement agreement), coordinate with the administrative body alleged to have infringed the investor's rights, submit policy recommendations, and 'other methods that [the Agency] deems appropriate'.[60] There is no express authority to impose settlement on the parties. However, the second and fourth provisions of this quartet are disconcertingly vague. The nature of the coordination with the complainee and the extent of 'other methods' leave considerable ambiguity. While the broader context of the 2020 Rules would suggest that 'other methods' do not include the imposition of settlement terms, this is not provided for explicitly.

[54]ibid.
[55]ibid arts 20(1)–(6).
[56]ibid art 16.
[57]ibid art 1, art 2(a), art 28.
[58]ibid art 17.
[59]ibid.
[60]ibid arts 18(1)–(4).

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Any settlement agreement signed between the complainant and the complainee must contain the contents of the settlement, which are binding on both parties.[61] If the administrative agency complained against fails to implement the terms of the settlement, 'the governments and their relevant departments and their employees' will be held liable.[62] There is no equivalent penalty for the investor.

Selective Transparency and Confidentiality

While the 2020 Rules necessitate communication between the Agency and the disputing parties, there is a mixed approach to the dissemination of information outside the loop of the complaints handling process. Some provisions of the 2020 Rules encourage a limited degree of transparency, both to foreign investment laws and the complaints handling process, whereas others protect confidentiality.

Firstly, Local Agencies Handling Complaints are required to expand the channels through which foreign investors can submit complaints, and all agencies handling complaints must publish their contact information, such as an address, telephone and fax number, e-mail address, and website to assist complainants.[63] But the picture is more mixed for statistical information about outcomes. An administrative system is established when the National Complaints Centre circulates records to other government agencies, but it will only publish such records 'as it deems appropriate'.[64] As yet, it is unclear how much information will be deemed appropriate.

Other aspects of the 2020 Rules protect confidentiality. The most significant confidentiality provisions are Articles 23 and 29 of the Rules. The former mandates that agencies take effective measures to protect trade secrets, confidential business information, and personal data collected as part of the complaints handling process.[65] The latter provides that if an agency or their staff illegally disclose protected information, 'a penalty will be opposed on him/her in accordance with the law', which may include criminal penalties.[66] The Rules do not stipulate the nature of penalties faced by infringing individuals.

Safeguards, Enforcement, and Quasi-Appeals

Alongside data protections, other clauses safeguard the rights of foreign investors, facilitate the implementation of settlement agreements, and create a system of quasi-appeals for unsatisfactory outcomes. At the outset, Agencies handling complaints must adhere to principles of 'fairness, impartiality, and lawfulness'.[67] Effective settlement agreements must be implemented, or the responsible individuals are held 'accountable in accordance with the law'.[68] The 2020 Rules also contain a no-retaliation clause, stating that no entity or individual may suppress or retaliate against complainants.[69]

If foreign investors are dissatisfied and/or object to the rejection of their complaint or how it was handled by a Local Agency Handling Complaints, they may submit the original complaint to a

[61] ibid art 18.

[62] ibid; Regulations for the Implementation Measures for the Foreign Investment Law (promulgated on 26 Dec 2019) <https://www.gov.cn/zhengce/content/2019-12/31/content_5465449.htm> accessed 6 Jan 2023. Art 41 of the *Implementing Regulations* provides that '[w]here governments and relevant departments or their staff have any of the following circumstances, their responsibility is to be pursued in accordance with law: … (4) Not fulfilling the policy commitments made to foreign investors or foreign-invested enterprises and the various types of contracts concluded in accordance with law, or making policy commitments beyond the scope of authority or that have content which does not comply with the provisions of laws and regulations.'

[63] 2020 Rules (n 10), art 10.

[64] ibid art 27.

[65] ibid art 23.

[66] ibid art 29; Foreign Investment Law (n 37), art 38.

[67] 2020 Rules (n 10), art 3.

[68] ibid art 18.

[69] ibid art 30.

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complaints agency at a higher level, who will consider it according to their working rules.[70] It is not an appeals process as such, and it does not envisage re-examining the process of the initial decision-maker. However, it gives complainants another opportunity to be heard. As with other aspects of the 2020 Rules, the scope of this quasi-appeals process will depend upon the working rules adopted by complaints agencies. Moreover, it does not appear to have an equivalent system for complaints submitted to the National Complaints Centre.

Taken together, these measures are aimed at curtailing excesses of authority, removing deterrents to the process, and creating confidence in the system. Complaints filed while there are ongoing administrative proceedings or litigation will be rejected by Agencies when these proceedings concern the same matter.[71] Therefore, the mechanism is not intended to occur concurrently with other processes. However, the 2020 Rules explicitly provide that filing such a complaint will not adversely affect the complainant's rights in relation to other processes, including in relation to time limits.[72]

China's Complaints Mechanism as State-Centric Investment Mediation

The consensual nature of China's complaints handling mechanism differs significantly from investor-state arbitration: the Agency handling the complaint has no authority to impose a settlement upon the parties. However, it also departs in material respects from abstract notions of an archetypal mediation process. After all, the Agency may be impacted by the outcome, particularly if failure to settle results in investor-state arbitration. Whether the process described in the 2020 Rules constitutes investment mediation might therefore be contested. Some scholars have described it as 'quasi-mediation',[73] others as having a similar function to an Ombudsman.[74]

Conceptual definitions of mediation draw from the perceived aims and values of the process.[75] For example, Article 4 of the *Mediation Ordinance of Hong Kong* provides that mediation is

> a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following – (a) identify the issues in the dispute, (b) explore and generate options, (c) communicate with one another, and (d) reach an agreement regarding the resolution.[76]

China's investment complaints-handling mechanism can satisfy most elements of this conceptual definition. It is consistent with the nature of the process described in the Hong Kong Ordinance and

[70]ibid art 22.

[71]ibid art 11(5).

[72]ibid art 8.

[73]Zhao (n 19) 126.

[74]Yulia Levashova, 'Prevention of ISDS Disputes: From Early Resolution to Limited Access', in Julien Chaisse, Leïla Choukroune & Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 625; Chen Yu, 'Towards a Three-Tiered Ombuds System for Investment Dispute Prevention: Principles and Challenges' (2022) 30 Asia Pacific Law Review 401.

[75]Nadja Alexander, Shouyu Chong & Vakhtang Giorgadze, *The Singapore Convention on Mediation: A Commentary* (Kluwer Law International 2022) 87.

[76]An Ordinance to provide a regulatory framework in respect of certain aspects of the conduct of mediation and to make consequential and related amendments (LN 167 of 2012, Cap 620 of the Laws of Hong Kong, effective as of 1 Jan 2013) (hereinafter 'Hong Kong Mediation Ordinance'). This ordinance was adopted in 2012 with the purpose of promoting, encouraging, and facilitating the resolution of disputes by mediation in Hong Kong. It contains provisions relating not only to the definition (art 4), but also to the confidentiality of mediation communications (art 5) and third party funding (art 7A).

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requires many of the same prescribed activities. For example, the 2020 Rules provide that the Agency may 'organise meetings, and invite the Complainant and the Complainee to state their opinions and discuss possible solutions to the complaint matter'.[77] They confer no authority to impose settlement but do refer to a 'settlement agreement' throughout, and explicitly distinguish the complaints handling mechanism from adjudicative processes. Consequently, the Agency does not adjudicate the dispute. The more complex question is whether the Agency, ostensibly a party to a dispute under the rules of attribution in public international law, can be described as an 'impartial individual'. While the 2020 Rules require Agencies to 'adhere to the principles of … impartiality', it is uncertain whether 'impartiality' requires legal independence, or whether functional impartiality would suffice. Even in the latter case, can a state agency properly be described as 'impartial' during an investor-state dispute?

This 'impartiality' requirement is not consistent across jurisdictions. The *Uniform Mediation Act* in the United States defines mediation as merely 'a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute', and a mediator as 'an individual who conducts a mediation'.[78] Impartiality is relevant only in relation to obligations of disclosure.[79] The EU *Directive on Mediation* has a similarly broad definition of mediation as a 'structured process' in which parties attempt to reach a settlement agreement on a voluntary basis, with the assistance of a mediator.[80] However, a mediator is 'any third person who is asked to conduct a mediation in an effective, impartial and competent way'. This formulation has two relevant elements: that the mediator be a 'third person', and that mediation is conducted in an impartial way. The second of these criteria dovetails with the impartiality requirements of 2020 Rules. To meet the first criterion, the Agency handling the complaint would have to be characterised as a 'third person'.

At the domestic level, whether the Agency is an 'impartial individual' or a 'third person' is unlikely to be a relevant legal consideration for foreign investors. In China, it is not necessary to characterise the process as mediation, as mediated settlement agreements do not attain special legal status. Investors would likely have to rely on enforcing settlement agreements as contracts.[81] Moreover, the voluntary nature of settlement in the complaints handling process should mean that recourse to enforcement should be limited. As a matter of domestic law, therefore, the question of whether the process constitutes mediation may be moot.

An exception to this position arises in the context of the Singapore Convention on Mediation. Once ratified, the SCM confers new status on international mediated settlement agreements as *sui generis* enforceable legal instruments.[82] China has signed the SCM in 2019, but has not ratified it at the time of writing.[83] Settlement agreements over investment disputes will only be enforceable if the process by which it was reached is considered mediation, carried out by a mediator. To that end, it is prudent to assess how the standards of the SCM would be applied to China's investment complaints handling mechanism.

[77]2020 Rules (n 10), art 17.

[78]Uniform Mediation Act in the United States (4 Feb 2002), s 2.

[79]ibid s 9.

[80]Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3, art 3.

[81]Eunice Chua, 'Enforcement of International Mediated Settlements without the Singapore Convention on Mediation' (2019) 31 Singapore Academy of Law Journal 572.

[82]Clemens Treichl, 'The Singapore Convention: Towards a Universal Standard for the Recognition and Enforcement of International Settlement Agreements?' (2020) 11 Journal of International Dispute Settlement 409.

[83]MOFCOM, 'China Signs the United Nations Convention on International Settlement Agreements Resulting from Mediation' (Press Release, 8 Aug 2019) <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201908/20190802891357.shtml> accessed 6 Jan 2023.

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Enforcing Agreements Resulting from the Complaints Mechanism under the Singapore Convention on Mediation

The Singapore Convention on Mediation applies to

> an agreement [1] resulting from mediation and [2] concluded in writing by parties to resolve [3] a commercial dispute ("settlement agreement") which, at the time of its conclusion, [4] is international.[84]

Complaints Handling as 'Mediation' and Complaints Agency as 'Mediator'

Article 2(3) of the SCM defines mediation as

> a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

The fact that the 2020 Rules do not expressly refer to mediation is not a barrier to its inclusion under the SCM, which applies 'irrespective of the expression used'. There is no requirement of structured meetings or institutional rules, but settlements arising from pure negotiation are not included. The SCM does not apply to agreements reached by pure negotiation, nor to settlements resulting from an adjudicative process. Parties, therefore, must be assisted in reaching settlement. To this end, the 2020 Rules provide that complaint agencies may 'organise meetings, and invite the Complainant and the Complainee to state their opinions and discuss possible solutions to the complaint matter', as well as 'promot[e] mutual understanding (including reaching a settlement agreement) between the Complainant and the Complainee'.[85] The absence of a prescriptive definition of mediation in the SCM is reflective of the diversity of mediation practice. This means that it is also sufficiently broad to encompass the process described in the 2020 Rules. Of course, the crucial test will be how the Rules work in practice, and how they are implemented in cases where an investor is seeking enforcement.

The assistance must be provided be a 'third person'. Within the internal logic of the 2020 Rules, there are clearly three entities: the foreign investor, the administrative agency complained against, and the agency handling the complaint. But the rules of international law do not distinguish between state organs for the purpose of attributing conduct.[86] In finding an internationally wrongful act, the administrative agency complained against and the agency handling the complaint would be regarded as the same entity: the state. Consideration of an internationally wrongful act is a precondition for applying the rules of attribution. While the investment dispute may involve complaints related to the breach of an investment treaty, this is not the matter addressed by the SCM. For a court before which an investor is seeking enforcement, state obligations relate only to enforcement of the settlement agreement. There is no consideration of an internationally wrongful act. The settlement agreement between the foreign investor and the agency complained against does not constitute an international legal obligation.[87] Therefore, in some instances, the Agency handling the complaints may be regarded as

[84]Singapore Convention on Mediation (n 7), art 1(1) (numbering added).

[85]2020 Rules (n 10), art 18(1).

[86]ARSIWA (n 1), art 4.

[87]Umbrella clauses in investment treaties may elevate contract breaches to treaty breaches, but the international legal obligation remains in the treaty, not in the contract. On the distinction between the proper law of contract and the rules of attribution in international law, see James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review – Foreign Investment Law Journal 127, 134.

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a third person for the purposes of the SCM. The internal logic of the 2020 Rules clearly envisages a three-party process.

Moreover, interventions by China and France during sessions of UNCITRAL Working Group II indicated that the purpose of the phrase 'assistance by a third person' is to differentiate between a mediation process and a negotiated settlement or contract.[88] From this premise, whether the complaint agency is a 'third person' will turn on the facts of the dispute. For example, if a foreign investor has been granted a water concession by a municipal government with its own legal personality, complaint handling by the National Complaint Centre under the Ministry of Commerce – hitherto not involved in the relationship – would in effect represent a 'third person' involvement. Again, this three-person dynamic is apparent throughout the 2020 Rules.

The 'third person' must also lack the authority to settle the dispute. This is the outermost bounds of the concept of mediation; the process must not be adjudicative. In relation to the foreign investor, this condition is satisfied. The agency handling the complaint does not have the authority to force the investor to settle. There are elements of compulsion – for example, there is an obligation on the complaining foreign investor to provide evidence and 'actively assist' the Agency in handling the complaint – but these do not constitute the authority to impose settlement.[89]

The relationship with the complaint agency and the complainee is less clear. No provision of the 2020 Rules expressly permits the agency handling the complaint to force a settlement. However, they do stipulate that this agency will 'coordinate with the complainee' and use 'other methods' that it 'deems appropriate'.[90] These provisions do not expressly limit the authority of the complaints agency, but do not provide for authority to force settlement either. Apart from that, whether the National Complaints Centre, within MOFCOM, has the authority to instruct the local complainee to settle as a matter of constitutional law is beyond the scope of this article. If answered affirmatively, a state may advance this argument in attempting to defeat enforcement. Nevertheless, on the basis of the rules alone, there is no express authority to impose settlement nor adjudicate the dispute.

Agreement Concluded in Writing

In order to fall within the scope of the SCM, the settlement agreement must have been concluded in writing, which includes electronic communication.[91] The 2020 Rules provide that 'the settlement agreement signed between the [c]omplainant and the [c]omplainee shall specify the matters and contents of the settlement'.[92] The requirement of a signature presupposes a written agreement within the meaning of the SCM.

Synergy of Material Scope: Investment Disputes as 'Commercial'

Disputes relating to consumer rights, family, inheritance, and employment law are expressly excluded from the SCM.[93] Conversely, the SCM is silent on its applicability to investment disputes. The term 'commercial' was not furnished with a definition in the Convention. However, the UNCITRAL *Model Law on International Commercial Mediation*, adopted alongside the SCM, defines commercial as 'matters arising from all relationships of a commercial nature, whether

[88]Intervention of China, UNCITRAL Audio Recordings, Working Group II (Dispute Settlement), 65th Session, 12 Sep 2014, 14:00–16:00; and Intervention of France, UNCITRAL Audio Recordings, Working Group II (Dispute Settlement), 67th Session, 3 Oct 2017, 14:00–17:00.

[89]2020 Rules (n 10), art 4.

[90]ibid art 18(4).

[91]Singapore Convention on Mediation (n 7), art 2(2).

[92]2020 Rules (n 10), art 18.

[93]Singapore Convention on Mediation (n 7), art 1(2).

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contractual or not', including 'investment'.[94] Indeed, a proposal to limit the scope of 'commercial' to agreements between businesses was rejected.[95] Based on these arguments, several scholars have concluded that the SCM can, in the abstract, apply to investor-state disputes.[96]

The scope of the 2020 Rules extends to 'applications by foreign-invested enterprises … alleging that administrative actions … have infringed … [their] legitimate rights and interests'.[97] This wording is broad enough to incorporate investment treaty disputes and contractual disputes between the state and foreign investors. To the extent that changing regulations or conflicts of contracts impact upon commercial relationships, it may be a 'matter arising' from a commercial relationship and therefore within the scope of the SCM.

An International Dispute

The dispute must be international in nature, in that 'at least two parties to the settlement agreement have their places of business in different States'.[98] As the mechanism at issue concerns foreign investors, this requirement should be relatively easy to satisfy. To have an agreement resulting from the complaints handling mechanism, the Chinese State must have considered the other party a 'foreign-invested enterprise' or 'foreign investor' within the context of their domestic law. Article 2 of the Foreign Investment Law stipulates that 'foreign investment refers to the investment activity directly or indirectly conducted by a foreign natural person, enterprise or other organisation'. Other entities in China cannot utilise the mechanism. Therefore, the two parties to a settlement agreement will be 'international' within the meaning of the SCM.

Lingering Issues: Evidence of Mediation and Refusing Enforcement on Grounds of Mediator Partiality

The foregoing analysis has demonstrated that there are circumstances in which settlement agreements signed as a result of China's investment complaints handling mechanism will fall within the scope of the SCM. However, two obstacles to enforcement remain: one related to the requirements for relying on settlement agreements, the other to the grounds to refuse enforcement.

Article 4(1) of the SCM requires that a party relying on a settlement agreement shall supply the agreement itself and 'evidence that the agreement resulted from mediation'. This can include a mediator's signature, attestation by a mediation institution, and 'any other evidence acceptable to the competent authority'.[99] There is no provision in the 2020 Rules requiring the complaint agency to sign the settlement agreement, nor attest that a mediation has taken place. Investors may, therefore, be reliant on the interpretation of 'any other evidence' in courts in which they seek enforcement. At a practical level, the complaints process may leave a trail of communications that could

[94]UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation 2002) (adopted by UNGA Res 73/199, 20 Dec 2018), A/73/17, annex II, n 1.

[95]United Nations Commission on International Trade Law, Working Group II, 'Note by the Secretariat on Comments received from States on the Settlement of commercial disputes: Enforceability of settlement agreements resulting from international commercial conciliation/mediation – Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (New York, 2–6 February 2015)', A/CN.9/WG.II/WP.188, 3.

[96]Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19 Pepperdine Dispute Resolution Law Journal 1, 22–23; Nadja Alexander & Shouyu Chong, 'The Singapore Convention on Mediation: Origins and Application to Investor-State Disputes', in Mahdev Mohan & Chester Brown (eds), *The Asian Turn in Foreign Investment* (Cambridge University Press 2021) 340; Romesh Weeramantry, Brian Chang & Joel Sherard-Chow, 'Conciliation and Mediation in Investor–State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis' (2023) 37 ICSID Review – Foreign Investment Law Journal, 201, 208; Mark McLaughlin, 'Investor-State Mediation and the Belt and Road Initiative' (2021) 24 Journal of International Economic Law 609.

[97]Singapore Convention on Mediation (n 7), art 2(1).

[98]ibid art 1(1)(a).

[99]ibid art 4(1)(b)(iv).

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be submitted at this stage. For example, the 2020 Rules require Agencies to notify the complainer of the existence of the complaint and to notify the complainant of the result of the process three days after its termination.[100] Whether the contents of these notifications will be sufficiently detailed to be evidence of mediation will be decided by the court in which a party is attempting to enforce the settlement.

Furthermore, Article 5 of the SCM provides the grounds on which a court may refuse to grant relief. Two grounds related to mediator standards are relevant for our purposes. Firstly, where there is a serious breach of mediator standards (specifically, Article 5(e) of the SCM) and secondly, where a failure to disclose circumstances raise doubts as the mediator's impartiality or independence (specifically, Article 5(f) of the SCM). The central question is whether the state-as-mediator dynamic constitutes a breach of mediator standards.

With respect to the obligation to disclose circumstances (Article 5(f) of the SCM), the state-centric nature of the complaint agency would not, as a matter of principle, be a violation. No investor could reasonably claim to be unaware of the potential conflict of interest. A breach of the standards would only arise as a result of a failure to disclose circumstances. A foreign investor would expressly demonstrate their knowledge of the potential conflict at several points in the dispute, not least when notifying the complaint agency at the beginning of the process. This is not to say that a breach of impartiality or independence cannot occur due to a failure to disclose circumstances within the complaint mechanism, only that the mechanism itself does not mandate it.

Article 5(e) of the SCM address series breach of mediator standards. It provides that there can be a refusal to grant relief when

> [t]here was a serious breach by the mediator of standards applicable to the mediator or the mediation *without which breach that party would not have entered into the settlement agreement*.[101]

It is important to read both halves of this provision together. Establishing a serious breach of mediator standards is not enough; the threshold is higher. It must be a breach without which the party would not have entered into the agreement. The duty of impartiality is wide-ranging and a well-recognised mediation standard around the world. Impartiality generally refers to a mediator being free of personal bias, and not making judgements or taking sides. In the *European Code of Conduct for Mediators*, the term 'impartiality' refers to mediator conduct.[102] As previously discussed, the Uniform Mediation Act does not impose an obligation of transparency, only the obligation to disclose potential conflicts. An influential commentary on the Singapore Convention finds that 'this approach may be aligned with that of the Singapore Convention', as it imposes a comparatively loose standard, leaving the option for parties to deviate in imposing a stricter standard.[103]

To the extent that the 2020 Rules clearly disclose a potential conflict of interest, the lack of impartiality arising from its status as a state agency would not automatically be a breach of mediator standards. The rules expressly provide for the impartiality of the complaint agency. While the operation of an agency in the context of a particular complaint might violate Article 5(e) of the SCM, the state-as-mediator dynamic is not, as a matter of principle, a ground to refuse enforcement. However, this dynamic has other consequences, not least for foreign investors.

[100]ibid art 20.

[101]Emphasis added.

[102]European Code of Conduct for Mediators (CEPEJ(2018)24, adopted 4 Dec 2018), art 2.2 <https://e-justice.europa.eu/63/EN/eu_rules_on_mediation> accessed 7 Jan 2023. The European Code of Conduct for Mediators is a set of voluntary guidelines and ethical principles developed by the European Commission to support the professionalisation of mediation. It contains provisions relating to the competence, appointment and fees of mediators (art 1), mediator independence and impartiality (art 2), the mediation agreement, process and settlement (art 3) and confidentiality (art 4).

[103]Alexander, Chong & Giorgadze (n 75) 214.

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China's State-Centric Investment Mediation: Prospects and Reform

Notwithstanding its designation under the Singapore Convention, the prospects for China's complaints handling mechanism will be determined by its legitimacy and utility from the perspective of foreign investors. In this regard, it is necessary to consider the effect of the state-as-mediator dynamic on investor confidence in the process.

Will Foreign Investors Use the System?

Although the 2020 Rules entered into force in October 2020, this author has been unable to find any published figures relating to the work of the complaint centres, at either national or local levels, whether in Chinese or English. This paucity of information is not atypical amongst government agencies mandated to prevent and manage investment disputes. A seven-country study of such mechanisms in Brazil, Colombia, Costa Rica, the Dominican Republic, Myanmar, Korea, and Peru found, with one exception, very little published evidence of their activities.[104] As a result, it is difficult to assess objectively the extent to which foreign investors have been prepared to engage with a state-led mechanism.

The one exception is South Korea's Office of Foreign Investment Ombudsman and grievance settlement body.[105] The mandate of the Korean Office of Foreign Investment is to

> collect and analyse information concerning the problems foreign firms experience, request cooperation from and recommend implementation thereof to relevant administrative agencies, propose new policies to improve the foreign investment promotion system, and carry out other necessary tasks to assist foreign-invested companies in resolving their grievances.[106]

There is some overlap between the functions of South Korea's Office of Foreign Investment Ombudsman (OFIO) and China's system of complaints agencies, most notably in terms of assisting in the resolution of grievances. It is beyond our scope to offer a comprehensive comparative analysis of the Chinese and Korean models. However, they are analogous to the extent that they represent non-adjudicative, state-led dispute resolution processes for the resolution or prevention of disputes with foreign investors. From 2011 to 2021, South Korea's OFIO resolved 367 cases per year on average by improvements to legislation, administrative intervention, or coordination with specialists in particular areas such as taxation, labour, environment, and finance.[107] Data from the OFIO does not include the rate of success of grievances, but one study placed the rate of success at 90% between 2007 and 2011.[108]

At the very least, this example demonstrates that foreign investors are not averse to state-led processes to resolve grievances with host governments. The comparison with China's model is imperfect; the OFIO has a broader range of competences than Chinese complaints centres, and the OFIO is centralised whereas China's model is decentralised.[109] Most significantly, South Korea is not

[104]Bonnitcha & Phillips Williams (n 9).

[105]Established by art 15-2 of the Foreign Investment Promotion Act 1998; Françoise Nicolas, Stephen Thomsen & Mi-Hyun Bang, 'Lessons from Investment Policy Reform in Korea' (OECD Working Papers on International Investment 2013/02) <https://doi.org/10.1787/5k4376zqcpf1-en> accessed 2 August 2022.

[106]Korea Trade-Investment Promotion Agency (KOTRA), 'Foreign Investment Ombudsman Annual Report 2021' (2022) 10 <https://ombudsman.kotra.or.kr/ob-en/bbs/i-2654/detail.do?ntt_sn=3> accessed 7 Jan 2023.

[107]ibid 22. This is not to suggest that all 367 disputes could have crystallised into ISDS cases against Korea. Indeed, 'few of the grievances handled by the OFIO could plausibly have been framed as ISDS claims under an investment treaty', see Bonnitcha & Phillips Williams (n 9) 28.

[108]Nicolas, Thomsen & Bang (n 105) 24.

[109]Chen Yu, 'Towards a Three-Tiered Ombuds System for Investment Dispute Prevention: Principles and Challenges' (2022) 30 Asia Pacific Law Review 401.

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China. Different investment and cultural environments prevail; the analysis from one cannot simply be transposed to the other. However, the Korean example does support the very limited claim that foreign investors are prepared to engage with state-led investment complaints processes.

Beyond this, the pertinent question is whether foreign investors in China are prepared to engage with an investment complaints process led by the Chinese state. Foreign investors have generally been reluctant to engage with domestic arbitration institutions in China due to their historic relationship to the government. Prior to the 1994 *Arbitration Law*, domestic arbitration institutions were not legally independent entities.[110] Even now, legal safeguards to ensure their independence are not always considered to be effective, in part because of continued reliance on government funding for their operations,[111] and the overlap between their officers and employees of the Chinese Communist Party.[112]

What separates China's complaints handling mechanism from these domestic arbitration institutions is no less than the difference between an adjudicative model of dispute settlement and a facilitative model of settlement. In an arbitration, the tribunal has the authority to impose an outcome. This is not possible within the logic of the complaints mechanism. Participation with the process and agreements to settle are based upon consent. For this reason, misgivings about the state-led process may be less acute in the context of the complaint mechanism.

Nevertheless, the looming state may continue to deter the participation of some foreign investors. In this regard, one solution would be to borrow from the realm of commercial disputes and engage foreign-related dispute settlement institutions in China.

What Role for Foreign-Related Dispute Settlement Institutions?

Foreign-related arbitration institutions were established by the China International Chamber of Commerce specifically to administer foreign-related disputes within China.[113] They can appoint 'foreigners with special knowledge in the fields of law, economy and trade, science and technology, etc'.[114] Foreign-related arbitrations were once monopolised by the China International Economic and Trade Arbitration Commission (CIETAC), and it remains by far the most commonly chosen institution for foreign-related disputes. In 2020, 739 foreign-related cases were administered by CIETAC.[115]

At present, neither CIETAC nor other foreign-related arbitration institutions have a role in the investment complaints handling process. This article has argued that elements of the system

[110]Weixia Gu, 'Piercing the Veil of Arbitration Reform in China' (2017) 65 The American Journal of Comparative Law 799, 809.

[111]A survey in 2007 found that 42.5% of arbitration commissions relied on government funding for their expenses. See Han Yonghong (韩永红), '仲裁机构体制改革意见评析——一种文化的视角 [Comments and Analysis on the Reform of Arbitration Institution System – A Cultural Perspective]' [2009] Arbitration Research (仲裁研究) 14, as cited in Guodong Du & Meng Yu, 'Chinese Arbitration Institutions Encouraged to Be More Independent' (China Justice Observer, 22 Jun 2019) <https://www.chinajusticeobserver.com/a/chinese-arbitration-institutions-encouraged-to-be-more-independent> accessed 7 Jan 2023.

[112]A survey in 2009 found that two-thirds of arbitration institution personnel are concurrently employed or retired from the Communist Party of China. See Chen Fuyong (陈福勇), '我国仲裁机构现状实证分析 [An Empirical Analysis of the Current Situation of Arbitration Institutions]' (2009) 31 Law Research (法学研究) 81, as cited in Guodong & Meng (n 111).

[113]Arbitration Law of the People's Republic of China (adopted 31 August 1994), art 66 provides that 'Foreign-related arbitration commissions may be organized and established by the China Chamber of International Commerce. A foreign-related arbitration commission shall be composed of one chairman, a certain number of vice chairmen and members. The chairman, vice chairmen and members of a foreign-related arbitration commission may be appointed by the China Chamber of International Commerce'..

[114]ibid art 67.

[115]CIETAC, '2020 Work Report and 2021 Work Plan' <https://www.acerislaw.com/wp-content/uploads/2021/05/cietac.org-CIETAC-2020-Work-Report-and-2021-Work-Plan-Work-Report-China-International-Economic-and-Trade-Arbitra.pdf> accessed 7 Jan 2023.

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represent state-centric investment mediation. However, it remains uncertain whether a complaint agency is regarded as a 'third person' under the SCM. Similarly uncertain is whether some foreign investors might be dissuaded by the state-as-mediator dynamic. This could be remedied if China's foreign-related arbitration institutions took the lead in facilitating a mediated settlement agreement.

This is not an alien concept. In December 2018, CIETAC published the *CIETAC Mediation Rules for Investment Disputes under the CEPA* [Closer Economic Partnership Arrangement] *Investment Agreements*. The CIETAC Mediation Rules establish a framework for the mediation of investment disputes between investors from Hong Kong and the Chinese government. The framework includes a procedural framework and principles for handling complaints.

To make the system more attractive to foreign investors, the investment complaints handling system could incorporate reference to CIETAC within their provisions. In this way, the voluntariness of the process is maintained, the impartiality of the person facilitating settlement is guaranteed, and it remains a Chinese process. Additionally, investor confidence can be supported by utilising existing legal and institutional frameworks to fill gaps in the complaint handling rules.

Filling the Gaps in the Rules

Two elements of the complaints systems might be revised to bolster investor confidence in the process: procedural rules and the role of confidentiality.

As to the former, Agencies are permitted to 'organise meetings' and 'invite' the parties to state their opinions and discuss possible solutions'.[116] It is unclear what role the Agency plays in these discussions. There is also no indication of how the discussion will be conducted or by whom it will be conducted. The Agency is expressly permitted to seek expert opinion on 'professional issues'; there is no role for party input.[117] By entering this process, foreign investors are, to some extent, 'flying blind'. It may be the case that procedural gaps will be filled when Local Agencies Handling Complaints develop their own set of working procedures. To this end, the *ICSID Mediation Rules* can play a role in filling the gap.

Rule 19 of the ICSID Mediation Rules provides that both parties shall file an initial written statement prior to the first session, which shall be shared with the other party.[118] The date of the first session of the mediation is decided by the mediator after consulting with the parties.[119] During that first meeting, the mediator establishes a protocol for the conduct of the mediation after consulting with the parties on procedural matters, including language, method of communication, place of meetings, next steps, treatment of information used in the proceedings, participation of other persons, the extent to which the settlement agreement may be disclosed, persons authorised to negotiate a settlement, and the process for concluding and implementing that settlement.[120] Therefore, by the end of the first meeting, the conduct of the rest of the process is known to both parties, and they have had input in designing it. A similar emphasis on party autonomy can be observed in the rules on the role of the mediator and expert witness. The mediator may only request expert evidence with the consent of parties, and they may also request oral or written recommendations for settlement.[121] Finally, it is explicitly provided that information gathered or positions taken during the

[116]2020 Rules (n 10), art 17.

[117]ibid.

[118]ICSID Mediation Rules (effective as of 1 Jul 2022), rule 19 provides that 'Each party shall file a brief initial written statement with the Secretary-General describing the issues in dispute and its views on these issues and on the procedure to be followed during the mediation. These statements shall be filed within 15 days after the date of the transmittal of the Request pursuant to Rule 15, or such other period as the mediator may determine in consultation with the parties, and in any event before the first session'.

[119]ibid rules 20(1) & (2).

[120]ibid rules 20(3) & (4).

[121]ibid rules 21(3) & (4).

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process cannot be used as part of other procedures.[122] This is a significant safeguard to give foreign investors' confidence that they are not prejudicing future legal action. Introducing these elements into China's system of handling investment complaints would boost investor confidence.

Moreover, China's 2020 Rules could better explain the balance between confidentiality and transparency. Traditionally, confidentiality has been a cornerstone of the mediation process.[123] It enables disputing parties to communicate with candour, absent the risk that sensitive information will prejudice their position in other legal proceedings or be leaked to competitors. This challenge is even more acute in the context of investment disputes.[124] There are considerable public interest implications of investor-state disputes, not least because of the awards rendered by investment tribunals.[125] Increasingly, arbitrators are tasked with striking a balance between an investor's right to non-interference and the sovereign autonomy to regulate the environment, human rights, and national security.[126] Indeed, there is an observable trend towards transparency in international investment treaties that culminated in the *Mauritius Convention on Transparency*, which entered into force in 2017.[127] In the context of mediation proceedings, the central challenge is how to maintain the efficacy of the process while ensuring that the public interests are sufficiently protected.

The 2020 Rules relating to confidentiality primarily address 'trade secrets, confidential business information, and personal privacy'.[128] Agencies handling complaints must establish internal management systems to protect this information, and illegal disclosure is punishable under Article 39 of the Foreign Investment Law.[129] This is insufficiently broad to cover all of the information that might be disclosed in the course of the complaints handling process. Moreover, there is no provision addressing the disclosure of the fact that the complaints handling process is taking place, nor the terms of the settlement agreement. The administrative system of complaint handling requires for the number of complaints, updated procedures, and detailed information about terminated complaints to be circulated among complaint centres and government bodies.[130] These will only be published by the National Complaints Centre 'as it deems appropriate'.[131] However, there is no rule barring the foreign investor from disclosing information about the process. On the whole, the 2020 Rules are a patchwork of limited confidentiality obligations and even more limited transparency obligations, with significant gaps.

[122]ibid rule 11.

[123]Lawrence R Freedman & Michael L Prigoff, 'Confidentiality in Mediation: The Need for Protection' (1986) 2 Ohio State Journal on Dispute Resolution 37.

[124]Chester Brown & Phoebe Winch, 'The Confidentiality and Transparency Debate in Commercial and Investment Mediation', in Catharine Titi & Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (Oxford University Press 2019) 321; August Reinisch & Christina Knahr, 'Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise' (2007) 6 The Law & Practice of International Courts and Tribunals 97.

[125]Alessandra Asteriti & Christian J Tams, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration', in Alessandra Asteriti & Christian J Tams, *International Investment Law and Comparative Public Law* (Oxford University Press 2010); Esmé Shirlow, 'Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures' (2017) 8 Goettingen Journal of International Law 73; Daniel Barstow Jr Magraw & Niranjali Manel Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration' (2008) 15 ILSA Journal of International & Comparative Law 337.

[126]Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration' (2013) 4 Journal of International Dispute Settlement 197; Katia Fach Gómez, 'Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest' (2011) 35 Fordham International Law Journal 510.

[127]United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 Dec 2014, entered into force 18 Oct 2017).

[128]2020 Rules (n 10), art 23.

[129]ibid art 29; Foreign Investment Law (n 37), art 29.

[130]2020 Rules (n 10), art 27.

[131]ibid.

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A more systematic approach to balancing confidentiality and transparency is contained in the *International Bar Association Rules on Investor-State Mediation* (hereinafter 'IBA Rules').[132] Under these rules, three different categories of information relate to investment mediation: information obtained during the mediation, the existence of the mediation, and the terms of the mediated settlement agreement. In relation to the first – information obtained during the mediation – this is private and confidential.[133] No one other than the parties, their representatives, and the mediator can attend the mediation proceeding, nor be permitted to access documents or communications related to the mediation.[134] It is made explicit that documents prepared and communications made in relation to the mediation cannot be used for any other purpose, particularly legal proceedings.[135] This is a more comprehensive treatment than the confidentiality provisions in the 2020 Rules. Conversely, these obligations do not apply to the fact that the mediation is taking place, nor the terms of a settlement.[136] This reflects the additional public interests involved in investor-state disputes. Incidentally, the recently concluded ICSID Mediation Rules depart from this approach; the existence of the mediation is confidential by default.[137] However, in both the IBA Rules and the ICSID Mediation Rules, parties can alter the rules of confidentiality by agreement.

In developing a balance between transparency and confidentiality, states may wish to emphasise one over the other for a variety of reasons. The IBA Rules are marginally oriented towards transparency when compared with other models, but the role of party autonomy leaves ample room for course correction if parties so desire. Consequently, future iterations of the complaints handling process might consider adopting the provisions contained in the IBA rules to strengthen confidence in the process.

Conclusion

China's 2020 Rules on Handling Complaints of Foreign-Invested Enterprises reflect many of the insights from international organisations that have lent their support to investor-state mediation. However, it remains a distinctly state-led process. By placing other state agencies as 'mediators', the 2020 Rules recognise that different parts of the state will interact with foreign investors in their own way.

It has been argued that this process can be characterised as investment mediation. Of course, there will be occasions when foreign investors have a grievance with national government policy that cannot be overcome by any consensual process; this is the nature of investment law and investment disputes. But in other instances, inviting a different government agency to facilitate dialogue and attempt to reach an amicable resolution may be able to break an impasse, just as an orthodox mediator does. It reflects the multi-faceted, multi-polar nature of a state.

Challenges remain, both from the perspective of foreign investors and regarding the relationship between the complaint mechanism and the SCM. The state-as-mediator dynamic upsets the orthodoxy of traditional ISDS processes. While it may be possible to succeed as currently constituted, confidence in the system can be supported by a number of reforms, notably the introduction of foreign-related arbitration agencies and elements of other frameworks from ICSID and the IBA. In short, the system would benefit from 'leaning in' to the emerging mechanisms of investment mediation.

[132]IBA Rules (n 6).

[133]ibid art 10(1).

[134]Except by prior agreement, or as evidence of a settlement if disputed by the other party, or to comply with a court order, or to prevent a serious crime or an imminent threat to public safety, or where the information has become public knowledge through no direct or indirect breach of confidentiality, see ibid art 10(3)(c).

[135]ibid art 10(2).

[136]ibid arts 10(3)(a) and (b).

[137]ICSID Mediation Rules (n 118), rule 10.

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