Multilateral Investment Court: The Gap Between the EU and China

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Abstract

The EU has now shifted from *ad hoc* investment arbitration to an envisaged Multilateral Investment Court. Its essential character is expected to be a two-instance standing court system, together with a random allocation of cases. This judicialized court system could address China's preference of correctness as to ISDS system to some extent, subject to the competence of judges, while at the same time it raises new problems and new concerns. Firstly, would the envisaged standing court, in the context of enhancing the regulatory powers of states, still be qualified as a neutral forum to strike the appropriate balance between the protection of investors' right and preservation of states' regulatory powers? Secondly, would the judicialized court system be effective and flexible enough to suit the current nature of ISDS? Thirdly, would the envisaged two-tier court system be put into efficient operation so as not to become a *de facto* bar to access of justice? In fact, a judicialized system has its pros and cons, and thus its successful establishment and operation would be subject to more detailed rules.

Keywords

Multilateral Investment Court – Investor-State Dispute Settlement (ISDS) – Belt and Road (B&R)

1 Introduction

With the entry into force of the Treaty of Lisbon,¹ the policymaking over foreign direct investment (FDI) has become an exclusive EU competence as part of the Union's Common Commercial Policy.² In 2013, the European Commission launched the first stand-alone EU bilateral investment treaty negotiation with China on behalf of its member states. As an established feature of international investment agreements, Investor-State Dispute Settlement (ISDS) system is a significant implication of investment protection.

However, the boom of ISDS cases have given rise to various concerns in recent decades.³ The EU's attitude is that the ISDS system should in principle be held onto, albeit that the reform is necessary to make it more effective.⁴ Further, since the consultation on ISDS in the framework of the Transatlantic Trade and Investment Partnership (TTIP),⁵ the EU decided to enhance the right to regulate and move from ad hoc arbitration towards Investment Court.⁶ Then, after this system has been enshrined in two signed bilateral treaties,⁷ the EU is now on the way to establish a Multilateral Investment Court (MIC).⁸ Once established, it would replace the bilateral investment court and may be incorporated into all following investment treaties negotiated by the EU with third countries.

1 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed 13 December 2007, OJ C306/01 of 17 December 2007.

2 Article 207 TFEU.

3 See UNCTAD, Reform of Investor-State Dispute Settlement: In Search of a Roadmap, IIA Issues Note, No. 2, June 2013. Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

4 See Commission Communication, Towards a comprehensive European international investment policy, 7 July 2010, COM (2010)343 final.

5 Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), Brussels 13 January 2015, Document SWD (2015)3 final. Available at: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (visited 22 July 2018).

6 European Commission Concept paper "Investment in TTIP and beyond—the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court", 5 May 2015. Available at: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

7 The revised version of the Canada-EU Comprehensive Economic and Trade Agreement (revised CETA) and EU-Vietnam Free Trade Agreement (EVFTA).

8 See European Commission—Fact Sheet: A future multilateral investment court, Brussels, 13 December 2016. Available at: http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm (visited 22 July 2018).

At present, details of the envisaged MIC have not been proposed yet. Nonetheless, the main structure of MIC is expected to be adjusted on basis of bilateral investment court and modelled on judicial institutions. In other words, it is highly likely that the essential characteristic and the core principle of MIC proposed by the EU would be a two-tier system of a standing court, together with the random allocation of cases. While from contemporary treaty making practice, it is evident that China is still in principle a supporter of traditional ISDS system. Then a question follows: would this judicialized adjudication system address concerns of China as to the reform of ISDS system? This article aims to explore the possible gap between the EU and China in relation to the EU's proposal of MIC (Section 3). Before doing any in-depth analysis and assessment of the EU's approach to the reform of ISDS system, it is essential to first identify the key concerns of China towards ISDS system (Section 2).

2 China's Key Concerns towards ISDS

Unlike the EU, there is rarely any public official document concerning the position of China towards ISDS system. However, concerns of China towards ISDS could be seen from its need of facilitating and protecting FDI, treaty-making practices and experiences in Investor-State Arbitration.

2.1 *The Rise of FDI and Its Implications for Policy Making*

China has emerged as one of the top FDI home countries and FDI host countries as well in recent years. In 2017, China was the second largest host country of FDI and the third largest home country in the world.⁹ It is also notable that in 2015 China became a net outward investing country for the first time, with the outward and inward FDI reached \$145.67 billion and \$135.6 billion respectively,¹⁰ and this trend continued in 2016, with the outward FDI \$183 billion compared to the inward FDI \$134 billion in 2016.¹¹ Particularly, ever since the Belt and Road initiative (B&R) in 2013, the growth of Chinese outward FDI has been obvious. As of the end of 2016, the direct investment in

9 UNCTAD, World Investment Report 2018, at 4, 6. Available at: http://unctad.org/en/PublicationsLibrary/wir2018_en.pdf.

10 Ministry of Commerce of PRC, Report on Development of China's Outward Investment and Economic Cooperation 2016. Available at: <http://fec.mofcom.gov.cn/article/tzhzcj/tzhz/upload/zgdwtzhzfzbg2016.pdf>.

11 UNCTAD, World Investment Report 2017, at 14. Available at: http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

stocks along the B&R countries reached \$129.41 trillion, accounting for 9.5% of total amount of outward investment in stocks.¹² Chinese outward investment to the EU increased rapidly in 2016, amounting to nearly \$10 billion (\$9.994 billion), 82.4% year-on-year increase, accounting for 5.1% of the total amount of the outward inflows.¹³ Besides, the establishment of Asia Infrastructure Investment Bank (AIIB) is expected to further facilitate investments in Asia.

However, the rise of outward FDI by Chinese investors had caused some concerns in western countries, and some deals, particularly investments in sensitive industries made through mergers and acquisitions (M&A) and investments made by state-owned enterprises (SOEs) that are perceived as instrumental in the country's outward FDI expansion strategy,¹⁴ had been under more strict scrutiny and faced increasing restrictions and controls abroad.¹⁵ For instance, on 13 September 2017, the EC published a proposal for establishing a framework for screening FDI into the EU on the grounds of security or public order.¹⁶

Hence, it is necessary for China to overcome challenges from western value judge and establish a rules-based and non-discriminatory environment for its overseas investment. In the "Implementation Opinions on Encouraging and Guiding Private Enterprises in Actively Investing Abroad" promulgated in 2012, it refers to "make full use of the current BIT" to protect overseas investments.¹⁷

12 Ministry of Commerce of PRC, National Bureau of Statistics of PRC & State Administration of Foreign Exchange of PRC, *China Foreign Direct Investment Statistics Bulletin 2016*, at 22. Available at: <http://fec.mofcom.gov.cn/article/tjsj/tjgb/201709/20170902653690.shtml> (visited 22 July 2018).

13 Ibid, at 30.

14 However, China is not the only home country of SOEs. Instead, SOEs are present worldwide. According to UNCTAD, there were about 1,500 SOEs, with about 86,000 foreign affiliates in the world in 2017. 40 percent are headquartered in developed countries. Particularly, about 27 percent (over 400) are present in the EU, while only 18 per cent are present in China. See UNCTAD, above, n. 11, at 31.

15 See UNCTAD, above, n. 11, at 14, 105.

16 Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union, Brussels, 13.9.2017, COM (2017) 487 final. Available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF>.

17 Notice of the National Development and Reform Commission, the Ministry of Foreign Affairs, the Ministry of Industry and Information Technology, the Ministry of Finance, the Ministry of Commerce, the People's Bank of China, the General Administration of Customs, the State Administration for Industry and Commerce, the General Administration of Quality Supervision, Inspection and Quarantine, the China Banking Regulatory Commission, the China Securities Regulatory Commission, the China Insurance Regulatory Commission, and the State Administration of Foreign Exchange on Issuing the Implementation Opinions on Encouraging and Guiding Private Enterprises

In “Initiative on Promoting Unimpeded Trade Cooperation along the Belt and Road” promulgated in 2017, it provides that “The participants will continue to protect investors’ legitimate rights and interests and create an environment conducive to investments.”¹⁸

Besides, it is now still very important for China to attract and promote inward FDI, because FDI plays a vital role for sustainable development, especially for developing countries.¹⁹ On 16 August 2017, the Notice on Measures to Promote Foreign Investment was promulgated by the State Council of PRC.²⁰ According to this document, China will further facilitate and promote inward FDI and diminish restrictions and controls for the admission of FDI.

Therefore, on the one hand, it is in China’s interest to strike a balance between the right of investors to investment protection and the right of states to regulate due to the dual role of China as both a recipient of FDI and home country of outward investment, on the other hand, due considerations should also be paid to how best to foster an investment-friendly environment. Further, this investment policy may have some implications for dispute settlement. For instance, in the Guiding Principles for Global Investment Policymaking agreed during G20 Hangzhou Summit in 2016 hosted by China, it mentions that investment dispute resolution mechanisms should be effective and could ensure investors’ access to justice, while at the same time could prevent itself from being abused.²¹

2.2 *China’s Treaty-making Practice*

China’s status in the global economy has direct impacts on China’s treaty practice. It is generally held that Chinese BITs could be divided into three generations.²² The first generation of Chinese BITs were concluded after the

to Actively Conduct Overseas Investment, Document No. 1905 [2012] of the National Development and Reform Commission, 29 June 2012. Available at: <http://en.pkulaw.cn/display.aspx?cgid=178230&lib=law> (visited 22 July 2018).

18 Initiative on Promoting Unimpeded Trade Cooperation along the Belt and Road promulgated by Ministry of Commerce of PRC on 14 May 2017. Available at: <http://gjs.mofcom.gov.cn/article/al/aq/201705/20170502575822.shtml> (visited 22 July 2018).

19 See UNCTAD, World Investment Report 2014, at 140. Available at: http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf.

20 State Council of PRC, Notice on Measures to Promote Foreign Investment, 8 August 2017, No. 39. Available at: http://www.gov.cn/zhengce/content/2017-08/16/content_5218057.htm (visited 18 June 2018).

21 See G20 Guiding Principles for Global Investment Policymaking, Article III. Available at https://www.wto.org/english/news_e/news16_e/dgra_09jul16_e.pdf.

22 See Manjiao Chi, The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications: The Admissibility of Disputes for Investor-State Arbitration, (2015) 16 *Journal of World Investment & Trade* 869–898, at 871.

adoption of the 'Open Door' policy in the early 1980s, and they allowed no or limited access to ISDS system. The second generation of Chinese BITs, marked with the conclusion of China-Barbados BIT in 1998, provided broad ISDS clauses and with a 'friendly' attitude towards investors and investments, coinciding with the launching of the 'Going Global' policy. The third generation of Chinese BITs, emerging from 2008 when the global economic crisis outbreak, became more balanced. In a word, China has already shifted from a cautious to a proactive attitude towards ISDS.

Although there was once a heated debate over incorporation of broad investor-state arbitration clauses in Chinese BITs in the mid-2000s,²³ it is presumed that China has gained confidence in the international regime as a direct result of China's experience at the World Trade Organization (WTO), albeit that it is an inter-state dispute resolution mechanism only and as such does not involve investors.²⁴ With the initiative of B&R, China wants to integrate itself into the global economy. However, ever since the Trump government, there seems a new trend of anti-globalization which is disadvantageous to both international trade and international investment. Therefore, it is almost unlikely for China to adopt a more conservatory approach towards ISDS in near future.

2.3 *Experiences in Investor-State Arbitration*

Currently, China's involvement in ISDS cases is still limited. There have been three cases against China,²⁵ and eight cases involving Chinese investors.²⁶ Among them, five cases had been concluded by rendering a decision or an

23 Ibid, at 888.

24 See Norah Gallagher, *Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy*, (2016) 31-1 *ICSID Review*, 88–103, at 95.

25 The first is *Ekran Berhad v. People's Republic of China*, ICSID Case No. ARB/11/15, discontinued on 16 May 2013, based on China-Israel BIT 1995 and Malaysia-China BIT 1988; The second is *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017, based on China-Korea BIT 2007; The third is *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19, it was registered on 21 June 2017 and is still pending, based on China-Germany BIT 2003.

26 1. *Tza Yap Shum v. the Republic of Peru*, ICSID Case No ARB/07/6; 2. *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No ARB/10/20; 3. *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No ARB/12/29; 4. *Beijing Urban Construction Group Co Ltd v. Republic of Yemen*, ICSID Case No ARB/14/30; 5. *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No ARB/15/41; 6. *China Heilongjiang International Economic & Technical Cooperative Corp, Beijing Shougang Mining Investment Company Ltd and Qinhuaangdaoshi Qinlong International Industrial Co Ltd v. Mongolia*, UNCITRAL, PCA; 7. *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No 2013-13; 8. *Sanum Investments Limited v. Lao People's Democratic Republic*, ICSID Case No. ADHOC/17/1.

award: one was in favour of China, two were in favour of Chinese investors, and two in favour of foreign state parties (see table 1 below). Regardless of the facts and evidences, there is no *prima facie* systemic bias. However, several cases had in China given rise to heated debate and serious questions about treaty interpretation.

TABLE 1

No.	Cases	BIT	Outcome
1	Ansung Housing Co., Ltd. v. China	China-Korea BIT 2007	In favour of China
2	Tza Yap Shum v. Peru	China-Peru BIT 1994	In favour of Chinese investor
3	Ping An v. Belgium	China-Belgium-Luxembourg BIT 1986; China-Belgium-Luxembourg BIT 2009	In favour of Belgium
4	CHIC and others v. Mongolia	China-Mongolia BIT 1991	In favour of Mongolia
5	Sanum Investments Limited v. Laos	China-Laos BIT 1994	In favour of Chinese investor

One aspect of the debate related to the scope of consent to arbitration in the first generation of Chinese BITs. In *Tza Yap Shum v. Peru*, the applicable China-Peru BIT 1994 contains restrictive clause relating to investor-state arbitration, namely, only disputes involving “the amount of compensation for expropriation” could be submitted to ICSID arbitration.²⁷ A question arose as to whether the determination of liability fall within the scope of arbitration. The tribunal relied on the fork in the road clause²⁸ and contended that if state courts have jurisdiction for the liability stage of the dispute, then the investor “may not under any circumstance make use of ICSID arbitration to settle the dispute

27 Article 8(3) of China-Peru BIT 1994 provides: If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Para. 1 of this Art., it may be submitted at the request of either party to the international arbitration of ICSID.

28 Article 8(3) of China-Peru BIT 1994 states that “the provisions of this Para. shall not apply if the investor concerned has resorted to the procedure specified in Para. 2 of this Art.”

involving the amount of compensation for expropriation”.²⁹ Thus, the tribunal gave a wider reading of the word “involving”:

the words ‘involving the amount of compensation for expropriation’ include not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT provisions and requirements, as well as the determination of the amount of compensation due, if any.³⁰

In *Sanum Investments Limited v. Laos*, and *Beijing Urban Construction Group Co. Ltd. v. Yemen*, tribunals took similar approaches as to the interpretation of the term “a dispute involving the amount of compensation for expropriation”.³¹ However, in *CHIC v. Mongolia*, tribunals took a restrictive approach as to the interpretation of a similar term and hence didn’t support the claim of Chinese investors.³²

Concerns of Chinese scholars are not related to the inconsistency of awards based on similar treaty provisions, but rather related to the correctness of interpretations given by arbitral tribunals. For instance, Professor Tong Qi argued that “for a long time, with regard to expropriation, China’s negotiators and scholars believed that arbitral panels should only be granted jurisdiction over one specific issue: the amount of compensation which should be paid to the investor in case of an expropriation claim”, “as for the legality of expropriation, this must be judged by a local court, rather than an international arbitration tribunal.”³³ Professor An Chen’s comments were “the Decision is incorrect, unreasonable and unacceptable”.³⁴ In addition, the target not only include the

29 *Tza Yap Shum v. the Republic of Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence, 12 February 2007, para. 159.

30 *Tza Yap Shum v. the Republic of Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence, 12 February 2007, para. 188.

31 See *Sanum Investments Limited v. Lao People’s Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, paras. 316–342; *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, paras. 59–109.

32 The award is not published, see IA Reporter. Available at: <https://www.iareporter.com/articles/mongolia-prevails-in-long-running-chinese-bit-arbitration-as-arbitrators-distinguish-their-reading-of-constricted-jurisdiction-clause-from-more-generous-readings-in-prior-cases/> (visited 22 July 2018).

33 Tong Qi, How Exactly Does China Consent to Investor-State Arbitration: On the First ICSID Case against China, (2012)5 *Contemporary Asia Arbitration Journal*, 265–292, at 274.

34 An Chen, Queries to the Recent ICSID Decision on Jurisdiction upon the Case of *Tza Yap Shum v. Republic of Peru*—Should China-Peru BIT 1994 Be Applied to Hong Kong SAR

outcome of interpretations, but also the include flawed approaches of interpretation—"even if the notification of intent serves 'purposes of information only', China may still claim that its 1993 Notification³⁵ was a supplementary means for the interpretation and elucidation of the specific consent under Article 25(1) of the ICSID Convention".³⁶

The treaty interpretation given by *Ping An v. Belgium* tribunal had been severely criticized by Chinese Scholars and lawyers. This case involved alleged expropriation and nationalization by the government of Belgium, but the focus was on *ratione temporis*.³⁷ The 2009 BIT provides that it applies to all investments whether made before or after the entry into force of this Agreement, but "shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before its entry into force."³⁸ In this case, the disputes between Ping An and Belgium arose before the entry into force of the 2009 BIT on 1 December 2009, but wasn't yet under any judicial or arbitral process at that time. Then, an issue was not expressly addressed in the 2009 BIT, namely, would disputes like Ping An case, namely, arose before 1 December 2009 but were not yet under any formal judicial or arbitral process, be covered by the new BIT? The tribunal's attitude was negative and thus denied its jurisdiction mainly on two grounds: the first was the general principle of non-retroactivity enshrined in Article 28 of the Vienna Convention on the Law of Treaties (VCLT),³⁹ the second was the non-inclusion by explicit words of disputes which had been notified but not matured into judicial or

under the "One Country Two Systems" Policy, (2010) 1 *Journal of International Economic Law* (Beijing University Press, 2010), 1–40, at 1.

35 Notification of China, 7 January 1993. Available at: <http://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/MembershipStateDetails.aspx?state=ST30> (visited 22 July 2018).

36 Tong Qi, above, n. 33, at 279; Willems, Jane Y. The Settlement of Investor State Disputes and China New Developments on ICSID Jurisdiction, (2011) 8–1 *South Carolina Journal of International Law and Business*, 1–62, at 28. Available at: <http://scholarcommons.sc.edu/scjilb/vol8/iss1/2>.

37 This case involved two BITs, the 1986 BIT (Agreement between the Government of the People's Republic of China and the Belgium-Luxembourg Economic Union on the Encouragement and Reciprocal Protection of Investments dated June 4, 1984) and the 2009 BIT (Agreement between the Government of the People's Republic of China and the Belgium-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments dated June 6 2005). The 2009 BIT substitutes and replaces the 1986 BIT from 1 December 2009.

38 Article 10.2 of the 2009 BIT.

39 *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium*, ICSID Case No ARB/12/29, Award, 30 April 2015, paras. 167, 168.

arbitral proceedings in the 2009 BIT.⁴⁰ The legal reasoning and the approach of treaty interpretation by this tribunal was criticized to be formal, rigid, inappropriate, in violation of good faith and ignoring the intent of treaty parties for many details.⁴¹ For instance, according to Associate Professor Yong Liu, on the one hand, the tribunal contended that the state parties were unlikely to forget to address this issue, on the other hand, the tribunal asserted that such an issue was not within the scope of the 2009 BIT; More importantly, while awareness of the impact of such an interpretation would result in the impossibility of any relief sought by Ping An neither under the 1986 BIT nor under the 2009 BIT, the tribunal stated that this was beyond its responsibility.⁴² In addition, a Chinese lawyer argued that the tribunal failed to consider relevant treaty practice of China as a supplementary means of interpretation, and the conclusion drew by the tribunal was incorrect.⁴³

However, in cases involving territorial scope of Chinese BITs, namely, *Tza Yap Shum v. Peru* and *Sanum Investments Limited v. Laos*, the circumstances were different. Both the tribunals in the two cases reached a conclusion that the relevant Chinese BIT should be applied to the Special Administrative Region (SAR) of Hong Kong or that of Macao. Although this consistent conclusion was considered “wrong” by Chinese government, because of the “one country, two systems” policy and the Basic Laws in Hong Kong or Macao,⁴⁴ the two tribunals could hardly be blamed for such an interpretation not only due to the absence of explicit exclusions in most of Chinese BITs,⁴⁵ but also due to the complexity and uniqueness of the relationship between China and SARs

40 Ibid, para. 228.

41 See Yong Liu, On the Case *China Ping An v. Belgium*—From the Perspective of inter-temporal law in the application of treaties, (2016) 4 *Global Law Review*, 162–178.

42 Ibid, at 169, 171.

43 See Qing Ren, *Ping An v. Belgium: Temporal Jurisdiction of Successive BITs*, (2016) 31–1 *ICSID Review—Foreign Investment Law Journal*, 129–137.

44 The view of Chinese government is that “as a principle, the investment agreements between the central government and foreign countries do not apply to SARs, unless otherwise decided by the central government after seeking the views of the SAR governments and consulting with other contracting parties of the agreement.” See Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on 21 October 2016. Available at: http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1500122.shtml (visited 26 November 2017).

45 Only China-Russia BIT 2006 explicitly excludes the application of the BIT to SARs Hong Kong and Macao.

concerning investment treaties.⁴⁶ There is even no consensus among Chinese scholars regarding this problem.⁴⁷

In sum, the rapid growth of Chinese oversea investment, together with the remaining large volume of FDI inflow, calls for an effective and efficient ISDS system that could protect reasonable and legitimate rights of investors. In practice, the involvement of China in ISDS cases implies that the rights of Chinese investors are not always appropriately protected. Instead, flawed interpretation and poor reasoning in awards should be addressed in order to get more correctness and fairness. Therefore, from the standpoint of China, the reform of ISDS system, in the context of enhancing the regulatory power of states, should be aware of not becoming systemic hostile to investors. Recently, a Chinese government officer asserted that the object of reforms of ISDS system was to make it effective and efficient, keep balance between investment protection and the regulatory power of states.⁴⁸

46 See Tong Qi & Zhicheng Jiang, On PRC BITs Applicability in Hong Kong and Macau Special Administrative Regions: A Case Study from the Perspective of *Tza Yap Shum v. Peru* and *Sanum Investment v. Laos*, (2016) 4-4 *Journal of Fujian Jiangxia University*, 40-48, at 44.

47 See Zhipeng He & Liyu Liu, On the Applicability of China-Signed BITs to Hong Kong & Macao SARs—Thoughts under International Law Arising from the Case of *Mr. Tza Yap Shum v. the Republic of Peru* and the Case of *Sanum Investments Limited v. the Lao People's Democratic Republic*, (2015)1 *Journal of International Economic Law* (Beijing University Press, 2015), 113-136.

48 United Nations Commission on International Trade Law Fiftieth session Vienna, 3-21 July 2017, Settlement of commercial disputes, Investor-State Dispute Settlement Framework, Compilation of comments, Addendum, A/CN.9/918/Add.1. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/005/13/PDF/V1700513.pdf?OpenElement> (visited 22 July 2018).

The full text is as follows:

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper?

China notices the growing calls to reform the investor-State arbitration regime, and appreciates the efforts made by CIDS in providing some policy options. We are still making in-depth study on those options and our point of departure is that the investor-State arbitration regime shall be an effective and efficient one striking the proper balance between investor protection and government's right to regulate. This is one of the guiding principles G20 adopted for global investment policymaking this July, and China welcomes and also keeps an open mind on any option that is conducive to the above-mentioned goal.

Without prejudice to China's position on the possible options discussed in the paper, we suggest starting from conducting fact-based analysis with a view to seeking consensus on certain overarching issues before launching any discussion on reform to the current regime. First, what are the main shortcomings of the current ISDS system? Second, what are the underlying causes of the problems? Third, based on the first two steps, we should

3 The Potential Gap between the MIC and China's Concerns

According to the above-mentioned concerns, this part will try to explore the possible gap between the core principles of the EU's proposal of MIC and China's key concerns towards ISDS system.

3.1 *Appellate Mechanism*

As mentioned above, one of the concerns of China about ISDS is about the fairness and correctness of each award, rather than the consistency of different awards.⁴⁹ Meanwhile, the interpretation of an applicable BIT is a fundamental element of international adjudication as it forms the entire basis of a judgement. Therefore, such a concern of China is in essence about the correctness of treaty interpretation and the appropriate application of interpretation approaches.⁵⁰

Compared to the set-aside procedure in a national court and annulment procedure set out in Article 52 of ICSID Convention, which are usually available to serious procedural flaws or obvious formal defective awards, appellate review could in theory contribute to more substantive correctness of decisions because it provides a chance to reconsider the merits of a case.⁵¹ Besides, the availability of appeal might create an additional incentive for tribunals to

carefully examine the pro and cons of any proposal in a pragmatic but cautious manner in order to find the most appropriate solution to address such problems without bringing any new systemic challenges. In this process, we should pay special attentions to a few important issues, such as how to ensure the future mechanism to be flexible enough and adapted to the nature of investor-to-state dispute, how to reconcile the future mechanism with the existing system and how to ensure enforcement of the award in the future mechanism.

In addition, China also believes that the procedural shortcomings should not undertake the entire responsibility of the criticism on the current system, and we should take concrete steps to have clearer and more precise substantive obligations in the treaties so that meaningful guidance could be given to the tribunal.

49 Maximilian Clasmeyer, *Arbitral Awards as Investments: Treaty Interpretation and the Dynamics of International Investment Law* (Wolters Kluwer, 2017), at 108.

50 This is line with the sense of fairness traditionally held by Chinese people towards a judicial system. Notably, Present Jinping Xi proposed that one of the goals of China judicial reform was to "strive to let every citizen feel fair and justice in each case" on 23 February 2018 during the 4th study of Advancing the Rule of Law in All Perspectives.

51 In history, the ICSID annulment proceeding sometimes functioned as a *de facto* appeal mechanism, but this was criticized by stakeholders, so nowadays ad hoc committees are aware of the distinction between the annulment and the appeal.

properly apply methodologies of treaty interpretation.⁵² Thus, an appellate mechanism might function as a quality control mechanism.⁵³

In fact, from a Chinese perspective, the finality of arbitration is not a substantial barrier to the establishment of an appeal mechanism as long as it could contribute to greater correctness and fairness of awards, but such an appeal mechanism should not reduce the efficiency of ISDS system.⁵⁴ For instance, China-Australia FTA 2015 foresees the possibility of the establishment of an appellate mechanism.⁵⁵ This idea is also shared by many stakeholders and commentators and is said to be in line with the public nature of ISDS system.⁵⁶ Considering the far-reaching impact of an investment award on a nation and its population, a quality control mechanism seems necessary. In fact, an appellate mechanism has already existed in a limited number of commercial arbitral institutions, albeit not universally accepted.⁵⁷

However, when bring it into practice, whether and to what extent the appeal system could really lead to more correctness need in-depth analysis and assessment. The first step should be finding the underlying causes for incorrect interpretations. In some cases, the difficulty of treaty interpretation could be attributable to the ambiguity of treaty texts, such as *Tza Yap Shum v. Peru* and *Sanum Investments Limited v. Laos*, both of which concern the issue of geographical scope of Chinese BITs. In such circumstances, the appeal mechanism could hardly ensure a more accurate interpretation. The case *Sanum Investments Limited v. Laos* is a good example: the interpretations given by the

⁵² See Maximilian Clasmeier, above, n. 49, at 191.

⁵³ However, whether an appellate mechanism is superior than other quality control mechanism, such as the scrutiny of awards by the ICC court, needs in-depth comparative research.

⁵⁴ See Jun Xiao, Research on the Feasibility of An Appellate Mechanism in International Investment Arbitration, (2015)2 *Studies in Law and Business*, 166–174, at 166.

⁵⁵ Article 9.23 of Chapter 9 (Investment) of the Free Trade Agreement between the Government of the People's Republic of China and the Government of Australia (signed in June 2015) provides that: "Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law."

⁵⁶ See Gabriel Bottini, Reform of the Investor-State Arbitration Regime: The Appeal Proposal, in Jean E. Kalicki and Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff, 2015), 455–473, at 473.

⁵⁷ For instance, GAFTA (Grain and Feed Trade Association), CTF (Coffee Trade Federation).

Court of Appeal of Singapore⁵⁸ was considered incorrect, while the interpretations given by the first instance court—the High Court of Singapore⁵⁹ was deemed right by the Chinese government. Therefore, the first step for state parties is to make sure that the treaty text is clear and precise as far as possible, rather than question the ability and neutrality of arbitrators and blame the ISDS mechanism.

Besides, the direct cause for controversial or even flawed treaty interpretation is that interpretative approaches taken by arbitral tribunals were sometimes inconsistent with interpretative methodologies in public international law.⁶⁰ The defective application of interpretative cannons, reliance on alleged arbitral precedent and short reasoning in the process of treaty interpretation is not only an issue in cases involving China, but also a common problem in international investment law. According to an empirical study, the application of VCLT rules of treaty interpretation in the awards by investment arbitral tribunals is often inadequate, inconsistent, and sometimes flawed.⁶¹ About one-thirds of the awards do not cite expressly the VCLT.⁶² Even when VCLT rules of interpretation are invoked, they are often not effectively applied, but be put into an apparent, partial or incorrect use.⁶³ In some cases, the analysis seem irrelevant to the mentioned guidelines.⁶⁴ More notably, VCLT rules are sometimes relied upon respectively by the majority and dissenting opinions to justify different conclusions.⁶⁵ According to another empirical study, the way in which ICSID tribunals, as well as other tribunals, interpret treaty provisions in practice often depart from VCLT rules.⁶⁶ Therefore, the primary measure to address this problem is to enhance capacity building to guarantee a more effective application of VCLT rules.⁶⁷ This is at the core of a sustainable

58 See *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic*, [2016] SGCA 57.

59 *Government of the Lao People's Democratic Republic v. Sanum Investments Ltd*, [2015] SGHC 15.

60 Maximilian Clasmeier, above, n. 49, at 172.

61 Andrea Saldarriaga, Investment Awards and the Rules of Interpretation of the Vienna Convention: Making room for Improvement, (2013) 28–1 *ICSID Review—Foreign Investment Law Journal*, 197–217, at 203–204.

62 Ibid, at 204.

63 See *ibid*, at 204.

64 Ibid, at 204.

65 Ibid, at 206.

66 Ole Kristian Fauchald, The Legal Reasoning of ICSID Tribunals—An Empirical Analysis, (2008) 19–2 *The European Journal of International Law*, 301–364, at 358–359.

67 Andrea Saldarriaga, above, n. 61, at 213.

development of investment arbitration.⁶⁸ In this vein, an appeal mechanism doesn't necessarily ensure more compliance with interpretative methodology. Instead, the well-functioning of an appellate mechanism would depend upon more qualified and more competent expertise familiar with the content and application of rules of interpretation.

Thus, an appellate body can't be regarded as a panacea for all ills, the profits of such an arrangement can't be overestimated.⁶⁹ At the same time, challenges to the efficiency of ISDS system brought by an appellate mechanism should not be ignored. Generally, an appellate mechanism could result in longer procedures and more costs, when comparing with one-shot arbitration. Hence, access to appeal mechanism may only be available to large multinational and developed countries, instead of small and medium-sized Enterprises (SMEs) and developing countries. However, when comparing with ICSID annulment procedure, an appeal mechanism is more efficient in the sense that it may modify an incorrect award directly and the parties need not to resubmit the dispute to a new tribunal. In addition, If the whole period of the two instances could be properly controlled in practice so that it was no longer than the current one-shot arbitration, the efficiency of dispute settlement system would not become worse. In a long term, were the appellate mechanism able to generate consistently correct awards and establish a predictable interpretation, possibilities of appeal would be reduced to a significant extent.⁷⁰

3.2 *A Permanent Court System with Random Allocation of Cases*

There is a widespread perception that party-appointed arbitrators are biased in favour of those who appoint them, either pro-investor or pro-state, in order to gain reappointment in the future, thus their independence and impartiality should be questioned and doubted.⁷¹ By contrast, tenured judges are viewed as meeting the standards of impartiality and independence that are an intrinsic part of judicial decision-making, because security of tenure would insulate the adjudicator from influence by powerful private interests.⁷² One of the pro-

68 See Maximilian Clasmeier, above, n. 49, at 172.

69 See Andrea K. Bjorklund, The Continuing Appeal of Annulment: Lessons from Amco Asia and CME, in Todd Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005), Chapter 14, 471–521, at 515.

70 See Gabriel Bottini, above, n. 56, at 471.

71 See Brooks Daly, The Abyei Arbitration: Procedural Aspects of an Intra-State Border Arbitration, (2010) 23 *Leiden Journal of International Law*, 801–823, at 811.

72 See Van Harten, Gus, A Case for an International Investment Court (June 30, 2008). Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper. Available at SSRN: <https://ssrn.com/abstract=1153424> or <http://dx.doi.org/10.2139/ssrn.1153424>.

posed solutions to this perceived problem is the creation of a standing court, together with the random allocation of arbitrators in a specific case.

However, whether this perception is a real problem needs further research. It is argued that in practice the appointment of arbitrators by parties do not depend primarily on arbitrator's viewpoints on specific issues because series of control mechanism do exist in reality.⁷³ Particularly, the reputation of impartiality and independency is of primary importance to an arbitrator, which in turn, would bring more appointment in the long term.⁷⁴ By contrast, if an arbitrator was apparently biased towards the party who appoint him, he would lose the reputation and consequently the influence within tribunals, and this could undermine his attractiveness to any party.⁷⁵ This argument seems plausible. However, on the other hand, such a soft control factor couldn't guarantee justice in each case.

By contrast, a standing court and the random allocation of cases do have the effect of cutting off the potential commercial link between arbitrators and the parties.⁷⁶ Besides, a permanent court with full-time judges could avoid conflicts of interest caused by switching between different roles.⁷⁷ In this sense, it could contribute to more independence and impartiality of adjudicators. While at the same time, it would raise a new problem, namely, could the pre-selected and random allocated judges be immune from political influence? It is contended that judges, like arbitrators and all other human beings, carry their personal experiences, cultural background, and political preferences with them.⁷⁸ Furthermore, the calling for establishment of the envisaged MIC is in the context of enhancing the state's right to regulate. Thus, doubts may arise as to whether the appointment of judges by states would free the decision-making process from political influences and would assure that the judges would not consider, when making the decision, that the standing court itself

73 Charles N. Brower & Stephen W. Schill, Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law, (2009) 9 *Chicago Journal of International Law*, 471–498, at 491.

74 See *ibid*, at 491.

75 See *ibid*, at 493.

76 This point is indeed important in some exceptional circumstance, such as repeated appointment of an arbitrator by one party.

77 See AIV (Advisory Council on International Affairs), International Investment Dispute Settlement: From Ad Hoc to A Standing Court, No. 95, April 2015, at 36.

78 Susan D. Frank, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, (2005) 73 *Fordham Law Review*, 1521–1625, at 1600.

was a creation of states.⁷⁹ Suppose so, it would hardly lead to more legitimacy in international investment relations, but rather to chill in the global economy that is not in the interest of host states or their populations.⁸⁰

Even from the viewpoint of state parties, the geographical composition of judges is also a big challenge to a fair dispute settlement system. Notwithstanding the rapid growth of ISDS cases in recent years, currently the annual and total volume of ISDS cases is still limited.⁸¹ This means needed number of full-time judges are not too many. Then how to distribute such limited number of judges in order to make the court system seems fair and representative, rather than the perception of a EU-dominated court, might be primarily important. When concerning a specific dispute, a standing court system with a random allocation of cases would not only constrain investors' freedom to select arbitrators, but also leave the state parties with little autonomy in a specific case.⁸² In other words, both the investor and the state would lose control in a specific dispute. In this sense, it seems balanced and fair.

With regard to the outcome of the adjudication, a standing court system with a random allocation of cases is neither good nor bad. A standing body that has the opportunity and mandate to develop a coherent jurisprudence could make valuable contributions to the law of state responsibility, much as the Iran-U.S. Claims Tribunal has done.⁸³ However, coherence and consistency don't necessarily mean correctness.⁸⁴ In fact, a standing court system with a random allocation of cases is a double sword. On the one hand, it tends to make the system rigid. It eliminates the flexibility of the process that permits the inclusion of technical expertise, which facilitates perceptions of fairness and permits parties to psychologically "buy-in" to the arbitration.⁸⁵ In addition, a permanent court with tenured judges that are not removable

79 Eduardo Zuleta, The Challenge of Creating a Standing International Investment Court, in Jean E. Kalicki and Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff, 2015), 403–423, at 422.

80 Charles N. Brower & Stephen W. Schill, above, n. 73, at 498.

81 As of 31 July, 2017, the total number of known cases is 817; the number of known cases for 2016 was 69. See UNCTAD, Special Update on Investor-State Dispute Settlement: Facts and Figures, IIA Issue Note, No. 3, 2017, at 1.

82 As a principle, judges that hold the same nationality as that of the parties, including the state party, should be recused from hearing the case.

83 Andrea K. Bjorklund, above, n. 69, at 514–515.

84 Unlike WTO dispute settlement system that is based on series of uniform treaties, investment dispute settlement system is based on a myriad of investment treaties. Though similar provisions exist universally, different treaties do sometimes have significant differences.

85 Susan D. Frank, above, n. 78, at 1600.

might result in the creation of an institution that potentially restricts state sovereignty more significantly than arbitrators allegedly do today.⁸⁶ On the other hand, despite the opportunities it offers, the process of selecting an arbitrator also represents significant challenges and risks.⁸⁷ Not every claimant-investor or respondent-state has the expertise to choose the most appropriate arbitrator. Instead, if the standing court was constituted by a pool of high-qualified adjudicators, it could generally guarantee the quality of awards.⁸⁸

Generally speaking, China does not object to a standing court relating to economic disputes, for example, the WTO dispute settlement system. However, the WTO dispute settlement mechanism is not a pure judicial mechanism, rather, it is a myriad creature of political, arbitral and judicial elements.⁸⁹ The Panel proceeding looks like an arbitration procedure, allowing party autonomy. Moreover, the WTO dispute settlement mechanism is a well-functioned inter-state dispute settlement system based on multilateral treaties; the adjudicators are generally representative; and more importantly, the awards rendered by WTO dispute settlement system, especially the Appellate Body are generally convincing. These different backgrounds and the flexibility of WTO dispute settlement mechanism should also be taken into consideration. However, it is also notable that currently the WTO dispute settlement system, particularly the Appellate Body, is experiencing serious crisis due to the block of (re)appointment of judges by U.S.⁹⁰ Therefore, how to avoid the politicization of the envisaged MIC and ensure that the independence and impartiality of adjudicators would not be undermined by powerful member states may be a common concern.

Regarding the efficiency of a dispute settlement system, a standing court system with a random allocation of cases has several inherent advantages. Firstly, as there is no need for the parties to spending time in selecting and

86 Charles N. Brower & Stephen W. Schill, above, n. 73, at 495.

87 Gary B. Born, *International Commercial Arbitration*, Volume II, *International Arbitration Procedures*, (Wolters Kluwer, 2nd edition, 2014), at 1641.

88 In fact, most institutional rules provide for the institution to automatically select arbitrators when the parties agree so. A few institutional rules, such as the 2014 LCIA Arbitration Rules, provide that the institution itself (rather than the parties) is responsible for appointing arbitrators.

89 Lingliang Zeng, *WTO: A Self-Contained Model of International Rule of Law*, (2010)4 *Journal of International Economic Law* (Beijing University Press, 2010), 36–64.

90 See Manfred Elsig et al., *The U.S. is causing a major controversy in the World Trade Organization. Here's what's happening.* 6 June 2016. Available at: https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/?noredirect=on&utm_term=.c3ee3dc8444 (visited 22 June 2018).

appointing adjudicators, the process will speed up; Secondly, since the tenured judges are generally refrained from affording several jobs at the same time, they could concentrate on the allocated cases; Thirdly, the random allocation mechanism could guarantee that every judge has a reasonable workload so that the adjudication period will be generally ensured. The WTO dispute settlement mechanism is on average more efficient than investment arbitration may be partly due to its standing nature.⁹¹ Of course, the daily cost of judges in a standing court can't be overlooked, especially when annual volume of ISDS declined, which is not impossible.⁹²

In addition, the judicialized Multilateral Investment Court, departing fundamentally from traditional arbitration, would be a revolutionary step, hence it might pose systemic challenges, particularly the worldwide enforceability of awards, which is an essential element of an effective dispute settlement.⁹³ Therefore, whether the benefit outweigh the cost through such a radical reform need to be assessed carefully and cautiously. Comparison with other progressive alternative options in order to find the most appropriate is necessary. In this aspect, the recent trend of enhancing the role of state parties is worthwhile to be taken into account. A typical example is the joint interpretation mechanism,⁹⁴ which states can use to limit the power of future tribunals in the interpretation of treaty terms.⁹⁵ By compliance with the intention of

91 WTO proceedings (including appeals) last approximately 14 months on average, while the average length of investment proceedings is three years and eight months. See Filippo Fontanelli, Koorosh Ameli, Ilias Bantekas, Horia Ciurtin, Nikos Lavranos and Mauro Rubino-Sammartano, Lights and Shadows of the WTO-Inspired International Court System of Investor-State Dispute Settlement, in Loukas Mistelis and Nikos Lavranos (eds.) (2016)1 *European Investment Law and Arbitration Review* (Brill/Nijhoff, 2016), 191–263, at 258.

92 In WTO proceedings, all the legal expenses are sustained by state parties, but this may be unfeasible in investment dispute settlement involving private entities.

93 See August Reinisch, Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration, (2016)19–4 *Journal of International Economic Law*, 761–786; Freya Baetens, The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges, (2016)43 *Legal Issues of Economic Integration*, 367–384. Available at: <http://www.kluwerlawonline.com/LEIE2016020>.

94 For example, the 2012 China-Canada BIT, Article 18 provides in paragraph 2 that the parties may take any action as they may jointly decide, including making and adopting rules supplementing the applicable arbitral rules under Part C of this Agreement and issuing binding interpretations of this Agreement.

95 Norah Gallagher, Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy, (2016)31–1 *ICSID Review—Foreign Investment Law Journal*, 88–103, at 97.

state parties that are rule-makers of investment treaties, the interpretation of treaties by arbitral tribunals could be correct and accurate to the largest extent. That's why in Laos case, Chinese government was unsatisfactory with the ruling made by the Court of Appeal of Singapore—"The geographical scope of application of the China-Laos investment agreement is a question of fact concerning acts of a state, which is up to the contracting parties to decide. China has confirmed twice in diplomatic notes that the China-Laos investment agreement does not apply to Mao SAR. The ruling made by the Singapore court on this question of fact is incorrect."⁹⁶

4 Conclusion

At present, China has neither proposed any clear and mature options to the reform of ISDS system, nor any official opinions as to the routes proposed by other states, such as the MIC proposed by the EU, because China is still making in-depth research of various policy options. The basic goal of China towards the reform of ISDS system is that the Investor-State Arbitration regime shall be an effective and efficient one striking the proper balance between investor protection and government's right to regulate, without any inherent pro-investor or pro-state bias. Any option that is really conducive to this goal would be considered and welcomed by China. As to the function of ISDS system, from limited experiences of China, it could be seen that correctness, rather than coherence and consistency, is highlighted by Chinese scholars and the government. In addition, special attentions should be paid to a few important issues, such as the flexibility of the system and the enforceability of the award in the future mechanism.

While the EU's proposal of a two-tier court system could to some extent address the concern of correctness, its main purpose is to achieve coherence and consistency. Ultimately, despite the fundamental importance of treaty text, correct interpretations mainly depend upon competent and qualified adjudicators that effectively comply with interpretative cannons. Therefore, the key factor to a successful MIC would be to attract sufficient expertise. In other words, detailed rules and procedures of appointment, reappointment and assessment of judges are of vital importance to gain confidence from both states and investors. Moreover, the judicialization of ISDS would cut off the potential commercial link between the arbitrator and the appointing party,

96 Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 21 October 2016, above, n. 44.

but could also raise a series of other concerns. Furthermore, the effect of the envisaged MIC depends on specific arrangement and real operation in the future. Finally, as a bold step towards a judicial system, MIC would face systemic challenges, particularly regarding the recognition and enforcement of awards. Therefore, gaps remain between the EU’s proposal and China’s concern (see Table 2).

TABLE 2

		China’s Concern				
		Fairness	Efficiency	Correctness	Flexibility	Enforceability
MIC	Appellate System	Mixed/ Not Sure	Mixed/ Not Sure	Positive to some extent	Mixed/ Not Sure	Negative to some extent
	Standing Court	Mixed/ Not Sure	Positive to some extent	Mixed/ Not Sure	Totally Negative	Totally Negative
	Random Allocation	Totally Positive	Totally Positive	Mixed/ Not Sure	Totally Negative	Totally Negative
	of Cases					

In a broader sense, the current adversarial and costly dispute settlement mechanisms can hardly satisfy the need of China who prefers amical dispute settlement and facilitate the initiative of B&R that aims at cooperation and co-development. Thus, the establishment of a B&R dispute settlement mechanism that incorporates Chinese elements such as mediation is suggested by some Chinese scholars,⁹⁷ and is being taken into serious consideration by Chinese government.⁹⁸ However, whether this envision would have any impact on China’s standpoint towards the MIC remains to be seen.

97 See Wang Gui-guo, Dispute Settlement Mechanism of One Belt and One Road, (2016)2 *Chinese Law Review*, 33–38; Huang Liping & Tong Qi, On the Establishment of “The Belt and Road Center for Dispute Settlement”, (2017)4 *Journal of One Country Two Systems*.

98 On April 21 2017, in the meeting with WTO Direct-General Roberto Azevêdo, Mr. Zhou Qiang, the Chief Justice of the People’s Republic of China and the president of the Supreme People’s Court of China, said China is willing to establish and improve the ‘one way’ investment dispute settlement mechanism, protect the rights and interests of investors and promote the legalization of investment dispute settlement mechanism. See Zhou Qiang: to provide protection for the promotion of international trade and protection of intellectual property rights. Available at <http://www.top-news.top/news-12868162.html> (visited 22 July 2018).

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