

CHINA'S PROPOSITION FOR BELT AND ROAD DISPUTE RESOLUTION: ASSESSING THE ROLE AND VALUE OF MEDIATION IN MULTIPLE DISPUTE RESOLUTION MECHANISM



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RESEARCH QUESTION ?

- What role can mediation play in Belt and Road dispute resolution?
- What is China's proposition on the Belt and Road dispute resolution?
- What is China's attitude towards the mediation mechanism?



1. THE NECESSITY OF A SUITABLE DISPUTE RESOLUTION MECHANISM FOR BRI

- a. The complex web of the BRI
- b. Characteristics of the BRI projects
- c. Types of investment disputes
- d. Pros and cons of existing dispute resolution mechanisms
- e. Long-term and sustainable development and cooperation





1. THE NECESSITY OF A SUITABLE DISPUTE RESOLUTION MECHANISM FOR BRI

- China's claim for BRI dispute resolution



Multiple Dispute Resolution Mechanism

Litigation

Arbitration

Mediation

Plus: Dispute Prevention

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Mediation is a process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreement

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— United Nation Guidance for Effective Mediation

- * To clarify: 'mediation' and 'conciliation'
- * Mediation gives States and investors an opportunity to reach practical solutions in a less constrained process, which permits and even facilitates the their investment relationship and move towards cooperation.

2. The Status Quo of Mediation in Investment Dispute Resolution

- The values and comparative advantages of the mediation:



Mediation vs. Litigation & State-to-State

- Domestic Litigation:
It depends on the legal environment of the host country
- State-to-State:
A more political-oriented approach – diplomatic protection

Mediation vs. Arbitration

- Investment Treaty Arbitration: rights-based (while mediation is interests-based)
The criticism and concerns of investment arbitration:
Expenses, delays, challenges associated to 'the right to regulate' etc.



2. The Status Quo of Mediation in Investment Dispute Resolution

- Many institutions and State parties have expressed their growing interests in the mediation mechanism for dispute resolution.

The development footprint of the mediation mechanism in investment dispute

IBA Investor-
State
Mediation
Rules

International Mediation
Institute's Competency
Criteria for Investor-State
Mediators

Energy
Charter's Guide
on Investment
Mediation

Canada-EU Free
Trade
Agreement &
EU-Vietnam FTA

Trans-Pacific
Partnership
Agreement –
Article 9.18

3. The Role of Mediation in China

a. The traditional role of the mediation in China's domestic legal system

Mediation in litigation and arbitration;

People's mediation;

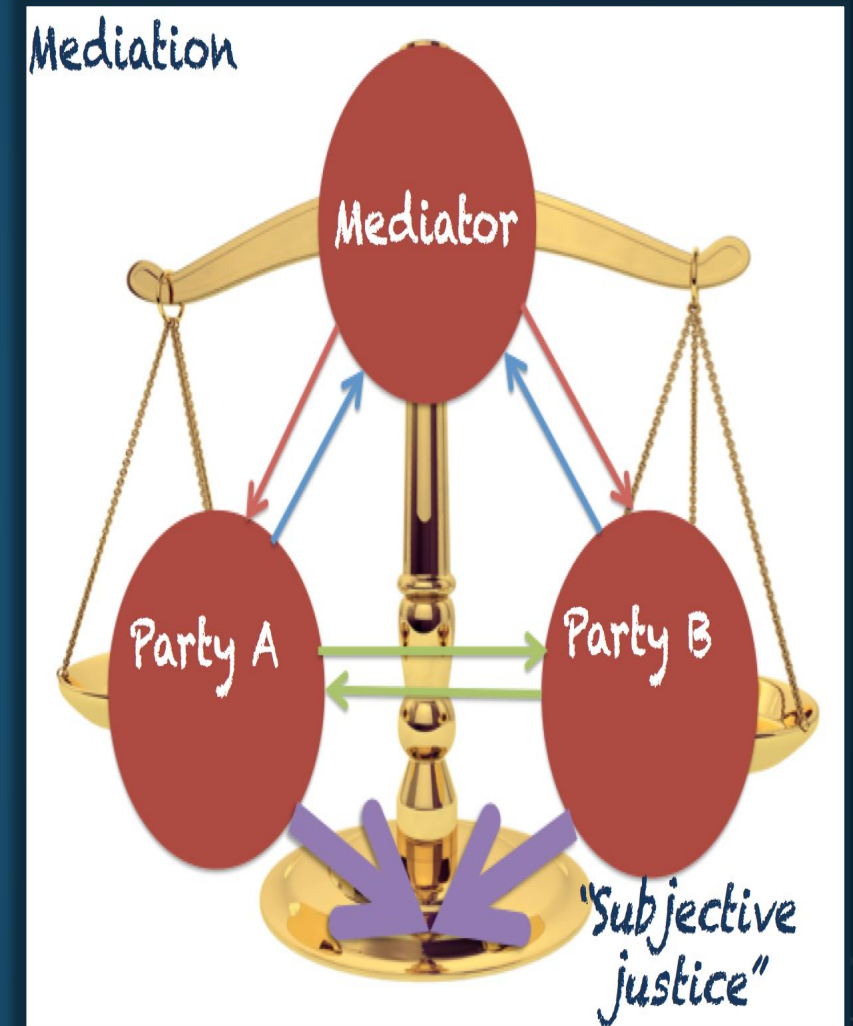
Independent commercial mediation

b. Recent development

Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions (The Opinion);

The establishment of China International Commercial Court;

Investment agreement between Mainland and Hongkong on Closer Economic Partnership Arrangement



4. Limitations and Obstacles



- Enforcement of settlement agreement – what role can 'Singapore Mediation Convention' play?
- The common culture for the use of mediation? – only for Asia area?
& the stakeholders appetite for mediation ?
- Fragility of the current investment
- The involvement of a sovereign state – national security issues, economic policy issues, and domestic political accountability etc.
- Non-transparent use of mediation in the ISDS may have implications on the legitimacy of settlement agreements. (The important gains in respect of transparency in investor-state arbitration – The Mauritius Convention on Transparency)

Question:

Mediation – a replacement or supplement

5. Conclusion and Way Forward



- Promoting the use of mediation and offering other options are not contradictory. The function of them can be realised concurrently.

Approach:

1. The use of mediation during the 'cooling off' period – compulsory or alternative
2. Providing the 'opt out' by either the investor or the state
3. Providing the 'opt in' during the whole process of dispute resolution
4. Promoting the cooperation among mediation institutions (and arbitration institutions) along BRI

- The viewpoints of this research
 - * Mediation is a necessary supplement to other dispute resolution mechanism for building a comprehensive architecture of the investment dispute resolution (in particular for BRI dispute settlement); its unique function and value cannot be substituted by other mechanisms.
 - * Cooperative actions between China and other participating countries are necessary and important
 - * Further reforms in China's domestic system



Thank You !

Comments are warmly welcomed!
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