

A CHINESE PERSPECTIVE
ON THE INVESTMENT COURT SYSTEM IN THE CONTEXT
OF NEGOTIATING EU-CHINA BIT

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Abstract

Due to the EU's proposal of Investment Court System (ICS), it is necessary for China to evaluate the ICS and consider its own stance towards Investor-State Dispute Settlement (ISDS). Under the initiative of One Belt One Road (OBOR), whether and to what extent China would accept ICS require an in-depth analysis of the coherences and divergences between the EU and China, as well as the effect of core features of the ICS. It could be concluded that bilateral ICS is not more effective than traditional ISDS system, whereas in general Multilateral Investment Court (MIC) is more likely to ensure a fair and efficient adjudication, with some deficiencies and even severe challenges that need to be addressed. From a Chinese perspective, it is suggested that (a) MIC should integrate Chinese elements; (b) MIC should become friendly to developing countries; (c) MIC should become friendly to investors; (d) MIC should be replaced by a substantial Multilateral Investment Treaty gradually.

I. INTRODUCTION

Since 1 December 2009 when Lisbon Treaty¹ entered into force, foreign direct investment (hereinafter referred to as “FDI”) has formed part of the European Union (hereinafter referred to as “EU”)’s exclusive competence.² Hence, the EU is in the process of establishing itself as a new leading participant in concluding bilateral investment treaties (hereinafter referred to as “BITs”), as well as free trade agreements (hereinafter referred to as “FTAs”) with investment chapters with a third state.

In 2013, the EU initiated its BIT negotiation with China, the first ever investment agreement negotiated by the European Commission (hereinafter referred to as “EC”) on behalf of its 28 member countries.³ Because of the size and importance of the EU-China bilateral investment relationship and the leading roles both parties have played in the global spread of BITs, the negotiation of EU-

¹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

² Treaty on the Functioning of the European Union, Mar. 25, 1957, art. 207.

³ *EU investment negotiations with China and ASEAN*, EUR. COMM’N. (Oct. 18, 2013), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=975>.

China BIT will be a watershed event in global investment treaty practice, and the prospective EU-China BIT will have significant influence beyond China and the EU. Currently, the EU and China have already completed 16 rounds of negotiation, with the most recent one being held in mid-December 2017 in Brussels. The negotiation has already stepped into specific text-based phase, indicating a critical stage of negotiation. Investor-state dispute settlement (hereinafter referred to as “ISDS”), which has long been considered a crucial ingredient of effective investment protection,⁴ may be one of the key factors that would influence the outcome of negotiation.

Traditional ISDS system, originating from 1960s, is an international arbitration system where arbitrators appointed by an investor and the host state on *ad hoc* basis adjudicate the investment disputes arising between the two parties. The ISDS system is expected to provide a neutral forum for settling investor-state disputes fairly, in substitute for the national court system of the host state and diplomatic protection of the home state.

However, with the boom of ISDS cases since late 1990s, the ISDS system has given rise to heated debates and criticisms worldwide, and has been questioned within the EU. Main concerns relate to the legitimacy and transparency of the system, the inconsistent and erroneous arbitral decisions, independence and impartiality of party-appointed arbitrators, and the cost- and time-intensity of arbitrations.⁵ Thus the EU is determined to reform and reshape the ISDS system. In the draft text of Transatlantic Trade and Investment Partnership (hereinafter referred to as “TTIP”)'s investment chapter in 2015, the EU proposed a bilateral Investment Court System (hereinafter referred to as “ICS”) to the other contracting party, i.e. the US.⁶ A tribunal is composed of one or

⁴ August Reinisch, *The Likely Content of Future EU Investment Agreements*, (M. Bungenberg, J. Griebel, S. Hobe & A. Reinisch eds.), INTERNATIONAL INVESTMENT LAW: A HANDBOOK, at 1900 (2015).

⁵ See UNCTAD, *Investor-State Dispute Settlement*, UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2014.

⁶ See *Commission draft text TTIP – investment*, EUR. COMM’N (Sept. 2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf; *EU’s proposal for Investment Protection and Resolution of Investment Disputes(TTIP)* (the EU’s proposal), EUR. UNION (Nov. 12, 2015), http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

three judges selected on a rotation basis by the President, rather than the disputing party, from judges pre-appointed by the two treaty parties for a fixed term. The award issued by the tribunal may be subject to review in an appellate tribunal, the composition of which is similar to that of the first instance tribunal. In fact, bilateral ICS is only a transition. What the EU really intended is launching a Multilateral Investment Court (hereinafter referred to as “MIC”) system, which resembles the World Trade Organization (hereinafter referred to as “WTO”) Appellate Body. Details of MIC are still open for discussion, but the MIC is expected to be a permanent body with key features of domestic and international courts.⁷

The EU’s proposal of ICS has drawn a lot of attention from academics worldwide. Most of them assess the pros and cons of the bilateral ICS,⁸ discuss the suitability of a WTO-style dispute settlement mechanism in investment regime⁹ or challenges that the ICS would face,¹⁰ or focus on specific issues of ICS such as the enforceability of awards rendered by the court.¹¹ Some of them explore the compatibility of ICS with the EU judicial system.¹² These legal researches are beneficial to help analyze the potential effects of the envisaged ICS or MIC in general. However, each country’s policy priorities may be different due to various circumstances. Hence, the first and essential step to evaluate

⁷ See The Multilateral Investment Court project, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> (last visited Oct. 10, 2018).

⁸ Belen Olmos Giupponi, *Recent Developments in the EU Investment Policy: Towards an Investment World Court?* 26 J. OF ARB. STUD. 175, 175-230 (2016); Robert W. Schwieder, *TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication*, 55 COLUM. J. OF TRANSNAT’L L. 178, 178-227 (2016).

⁹ Stephen S. Kho, Alan Yanovich, Brendan R. Casey and Johann Strauss, *The EU TTIP Investment Court Proposal and the WTO Dispute Settlement System: Comparing Apples and Oranges?* 32(2) ICSID REV. 326, 326-345 (2017); Filippo Fontanelli et al., *Lights and shadows of the WTO-Inspired International Court System of Investor-State Dispute Settlement*, (Loukas Mistelis and Nikos Lavranos eds.), 1 EUR. INV. L. AND ARB. REV. 191, 191-263 (2016).

¹⁰ Eduardo Zuleta, *The Challenge of Creating a Standing International Investment Court*, (Jean E. Kalicki & Anna Joubin-Bret eds.), *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY* 403, 403-23 (2015).

¹¹ 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*, 19 J. OF INT’L ECON. L. 761, 761-786 (2016); Rob Howse, *Designing a Multilateral Investment Court: Issues and Options*, 36 Y. B. OF EUR. L. 209, 209-236 (2017).

¹² Dr. Laurens Ankersmit, *The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System*, 13 J. FOR EUR. ENVTL & PLANNING L. 46, 46-63 (2016).

ICS/MIC would be exploring China's policy preferences and concerns towards ISDS system, followed by assessing whether the function of ICS/MIC would address China's concerns.

It has not been long since China began to accept comprehensive jurisdiction of traditional ISDS. Although a more balanced approach is adopted in recent years, in principle, China is still a supporter of traditional ISDS. As one of the largest home countries of foreign investment in the world, especially under the initiative of One Belt and One Road (hereinafter referred to as "OBOR"), China would focus more on investment protection. Thus, there may be concern that whether ICS or MIC would benefit Chinese investors.

This article aims to give suggestions on China's stance towards the EU's proposal of ICS or MIC in the context of the negotiating EU-China BIT. Its analytical approach focuses on the compatibility of ICS/MIC with the development of China in a broader context. This article is structured as follows. It first focuses on the current negotiation of the EU-China BIT and tries to identify its implications for ISDS clauses (part II); then it examines the current standings of the EU and China on ISDS clauses, demonstrating their differences (part III); further, it makes an in-depth analysis of the coherences and divergences between the EU and China, to reveal the common grounds of cooperation and divergent demands that needs to be met as to the reform of ISDS system (part IV and V); afterwards, it assesses the core aspects of ICS/MIC in light of China's primary concerns toward the dispute settlement mechanism (part VI); on the basis of the comprehensive analysis, it gives suggestions from a Chinese perspective in relation to the envisaged MIC (part VII); finally it concludes in part VIII.

II. THE NEGOTIATION OF EU-CHINA BIT AND ITS IMPLICATIONS FOR ISDS SYSTEM

China is now the EU's second biggest trading partner behind the United States, and the EU is China's biggest trading partner. However, the current FDI stock between the EU and China is very modest indeed: China accounts for only 2-3% of overall European investments abroad, whereas Chinese investments in Europe are

rising, but from an even lower base.¹³ Nonetheless, considering the size of the two economies, as well as the rapid growth of investment flow,¹⁴ there is great untapped potential. More importantly, the greater economic inter-dependence means that the EU's and China's interests become more solidly bound.¹⁵ Firstly, under the proper conditions, European investment, which is important in China's economic rise, can play an even more important role in the great re-balancing of the Chinese economy towards sustainable development due to the EU's leadership in environmental technologies, labor standards and other areas;¹⁶ secondly, in terms of the sheer size of the economy and market-opening possibilities, there is no greater possibility for trade and investment expansion than with China.¹⁷ The bilateral investment treaty is thus increasingly important for both parties. Beyond that, an EU-China agreement would raise the bar, setting the example for liberalization of investments at a global level and making another step towards a multilateral investment regime.¹⁸

Currently, China holds BITs with all EU member states except Ireland, but a prospective EU-China BIT with upgraded conditions and standards would play a more significant role in facilitating mutual investment in both the EU and China. Launched in November 2013, the negotiation of EU-China BIT has already moved on to a phase of specific text-based discussions. One of the EU's priorities in the negotiations will be to remove barriers against EU investors on the Chinese market¹⁹ and to provide a predictable and transparent legal framework to protect the EU investors. In the same vain,

¹³ According to EU-China FDI Monitor, EU investment in China increased from \$1.7 billion in 2016 Q4 to \$1.8 billion in 2017 Q1; the combined value of Chinese FDI transactions in the EU reached \$6.5 billion in 2017 Q1, a drop from the record \$20.6 billion in 2016 Q4 but is on par with quarterly average flows in the past two years, http://trade.ec.europa.eu/doclib/docs/2017/may/tradoc_155600.pdf.

¹⁴ According to a research report by Rhodium Group and Mercator Institute for China Studies, Chinese investment in the EU surged in 2016, reached Euro 35 billion, a 77% increase from last year, while the EU investment in China continued to decrease to only Euro 8 billion in 2016, <http://www.199it.com/archives/562159.html> (last visited Nov. 15, 2018).

¹⁵ Jeremy Clegg, Hinrich Voss, *The new two-way street of Chinese direct investment in the European Union*, 5 CHINA-EU L. J. 79, 85 (2016).

¹⁶ David O'Sullivan, *The EU-China investment treaty: challenges, themes, competence*, 5 CHINA-EU L. J. 5, 9 (2016).

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 10.

¹⁹ "EU and China begin investment talks", EUR. COMM'N. (Jan. 20, 2014), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1013&title=EU-and-China-begin-investment-talks>.

market access and investment protection are also key problems that China desires to address. Due to misunderstanding of China's state-capitalist structure, Chinese investments in Europe, especially by means of merger and acquisition (hereinafter referred to as "M&A"), have stirred intense public debates and concerns in the EU policy circles and have been facing significant barriers in entering and operating in the European market. Thus, China focuses on an indiscriminate environment and eliminating protectionism towards Chinese investment. Up to now, the EU and China have agreed in particular that the future deals should improve market access for their investors by establishing a genuine right to invest and by guaranteeing that both sides will not discriminate against their respective companies.²⁰ Besides, both parties would like to address the key challenge of providing sufficient protection for investors and their investments but striking a balance of various interests. For example, with the goal of sustainable development, the EU has to balance a high level of protection for investors with the integration of social concerns such as environmental protection, upholding labor standards, and corporate social responsibility principles,²¹ while China is generally sensitive to address social concerns in a BIT.

If investment treaties are to play a role in protecting and encouraging foreign investment, it is important not to lose sight of the fact that investment treaties need to provide an effective means for investors to exercise their rights.²² The ISDS mechanism, which serves as a significant enforcement tool for the core substantive provisions in investment treaties, has direct implication for the impact of a BIT. Without such a mechanism, the commitments undertaken by the state would be almost meaningless for investors. While some argue that ISDS is not necessary for OECD countries such as the US, the model could be rolled out for China, in light of the quality of the judicial system. Therefore, as part and parcel of existing International Investment Agreements (hereinafter referred to

²⁰ *EU and China agree on scope of the future investment deal*, EUR. COMM'N. (Jan. 15, 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1435>.

²¹ John P. Gaffney and Zeynep Akqay, *European Bilateral Approaches*, (Bungenberg, Griebel, Hobe & Reinisch eds.), INTERNATIONAL INVESTMENT LAW: A HANDBOOK, at 201 (2015).

²² Jonathan Ketcheson, *Investment Arbitration: Learning from Experience*, (Steffen Hindelang & Markus Krajewski eds.), SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW, at 127 (2016).

as “IIAs”), ISDS is a crucial issue in the negotiation of EU-China BIT, and failure on ISDS clauses could put the deal at risk. Now, the EU is changing from the current *ad hoc* arbitration system towards a permanent court system staffed by tenured adjudicators, working full-time on a fixed term.²³ Since ISDS system has direct implication for the impact of the IIAs on the awareness of potential and existing investors and thus plays an important role in encouraging and retaining investment, it should be scrutinized whether the EU’s approach could achieve the balance between protecting investors and safeguarding the nations’ right to regulate investment for public interest.

III. THE ATTITUDE EVOLUTION AND THE CURRENT POSITION ON ISDS ISSUE: THE EU VS CHINA

A. *The EU Shifting from ISDS to ICS*

The first BIT incorporating provisions for investor-state arbitration was concluded between a EU member state and a third country,²⁴ marking the genuine beginning of modern BIT practice.²⁵ After Lisbon treaty in 2009, the European Commission, as well as the European Parliament and the European Council have in principle expressed the solid view that investor-state arbitration should be maintained,²⁶ while at the same time, the EU is determined to improve ISDS to strike a balance between the power of states and the need to protect investors.²⁷

Even though many proposals have been made in response to the legitimacy crisis of the traditional ISDS mechanism, the optional paths of reform never attempt to overhaul the entire structure of

²³ With regard to the detail characteristics of ICS, please see part III.

²⁴ The first BIT providing for investor-state arbitration without prior consent was Netherlands-Indonesia BIT in 1968, and the first BIT involving prior consent to investor-state arbitration was Italy-Chad BIT in 1969, see Kenneth J. Vandevelde, *The liberal vision of the international law on foreign investment*, (C.L.LIM ed.), ALTERNATIVE VISIONS OF THE INT’L LAW ON FOREIGN INVESTMENT, at 59 (2016).

²⁵ John P. Gaffney and Zeynep Akay, *supra* note 16, at 190.

²⁶ Jörn Griebel, *The New EU Investment Policy*, (Bungenberg, Griebel, Hobe & Reinisch eds.), INTERNATIONAL INVESTMENT LAW: A HANDBOOK, at 319 (2015).

²⁷ See EC Fact sheet: *Investment Protection and Investor-to-State Dispute Settlement in EU agreements*, ITALAW (Nov. 2013), http://www.italaw.com/sites/default/files/archive/Investment%20Protection%20and%20Investor-to-State%20Dispute%20Settlement%20in%20EU%20agreements_0.pdf.

ISDS system until the negotiation of TTIP between the EU and the US. The negotiation triggered intensive public debate on the appropriateness of the whole ISDS system. Perhaps fearing that investors from the most powerful contracting partner may bring unexpected ISDS cases against the EU or a Member State, the EC held an online public consultation to collect opinions from various shareholders on investment protection and ISDS system in TTIP in 2014. The 150,000 responses indicate diversified views on ISDS, but the collective submissions reflect wide-spread opposition and concerns with ISDS in TTIP or in general.²⁸ Due to political pressure, the EU proposed bilateral ICS in the draft text of TTIP's investment chapter in 2015, and then incorporated it in the following EU-Vietnam FTA investment chapter in January 2016 and the revised version of Canada-EU Comprehensive Economic and Trade Agreement (CETA) in February 2016.²⁹

ICS is a permanent two-tier court system with random assignment of cases. It has three distinctive features. First, it's composed of the first instance tribunal and the appellate tribunal. The Award issued by a tribunal of first instance is not final and binding, and any party unsatisfied with it may appeal against the provisional award within certain time period on the grounds of errors of law, manifest errors in the appreciation of facts, or other grounds provided in Article 52 of the ICSID Convention.³⁰ Second, compared to *ad hoc* arbitrations, both the tribunal of first instance and the appellate tribunal are standing, i.e., an individual tribunal is composed of adjudicators selected from the pool of judges that serve for a fixed and long period pre-appointed by contracting states.³¹ Third, party autonomy in ICS is strongly limited. Members of a specific tribunal are

²⁸ Report-Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), EUR. COMM'N. (Jan. 13, 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

²⁹ EU-Vietnam Free Trade Agreement, <http://trade.ec.europa.eu/doclib/press/index.cfm?id%41437>; http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf; the revised version of the Canada-EU Comprehensive Economic and Trade Agreement (revised CETA) in February 2016, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

³⁰ See EU's proposal (TTIP), art. 29; EU-Vietnam FTA Investment Chapter art. 28; revised CETA art. 8.28.

³¹ See EU's proposal (TTIP), art. 9, 10; EU-Vietnam FTA Investment Chapter art. 12, 13; revised CETA art. 8.27, 8.28.

appointed by the President by lot, rather than by the disputing parties.³² And the President is drawn by lot by the Chair of Committee of the treaty among judges who are nationals of third countries and pre-appointed by the Committee of the treaty. Hence, the only “autonomy” of the parities lies in whether to initiate the proceeding or not.

In fact, a bilateral ICS is just a transitional arrangement. What the EU really intends is to launch a MIC. The EU’s proposal for TTIP, EU-Vietnam FTA and revised CETA all include a provision that foresees the transition from ICS to a future multilateral court system.³³ Besides, the EU has declared that it will work together with Canada to establish a multilateral investment court,³⁴ and is carrying the reform forward. In March 2018, the Council of the EU published the negotiating directives for MIC.³⁵ The distinction of the envisaged MIC from a bilateral ICS mainly lies in two aspects. First, the number of members or “users” of ICS is more than two parties, and subsequently, some relevant rules such as the composition of an individual tribunal, as well as the selection of the pool of judges would be different. Second, the legal basis of the envisaged MIC may no longer be a BIT, but a multilateral or plurilateral convention, like the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter referred to as “ICSID Convention”). Of course, as the initiative of the envisaged MIC would be subject to the discussion and negotiation with like-minded member states, the final features of the envisaged MIC may be distinct from those of bilateral ICS in many aspects.

B. China’s Evolving Stance on ISDS Clauses

China’s stance on ISDS has changed from negative to positive over the past three decades. Unlike the EU member states, initially

³² See EU’s proposal (TTIP), art. 9(7)(9), art. 10(9); EU-Vietnam FTA Investment Chapter art. 12(7)(9), art. 13(9); revised CETA art. 8.27 (6)(7)(9), art. 8.28(5).

³³ See EU’s proposal (TTIP), art. 12; EU-Vietnam FTA Investment Chapter art. 15; revised CETA art. 8.29.

³⁴ *Fact Sheet: A Future Multilateral Investment Court*, EUR. COMM’N (Dec. 13, 2016), http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm.

³⁵ Council of the EU, *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes*, 12981/17 ADD 1 DCL 1 (Mar. 1, 2018), <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>.

China was reluctant to accept international arbitration as a means of settling investor-state disputes. This position stems partly from the historical experiences of China being imposed of unequal treaties and exerted extraterritorial judicial jurisdiction by western countries in the 18th and 19th century. International law has long been regarded as western imperialism. Likewise, international dispute settlement may imply loss of sovereignty and control for Chinese Government.

Ever since the Agreement between the Government of the People's Republic of China and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments concluded in 1984 and took effect in 1985, investors have had access to ISDS even though it was limited to disputes involving the amount of compensation for expropriation. This attitude change could be attributed to the adoption of the 'Open Door' policy in the early 1980s when China began to observe and try to join international economic activities.

After more than a decade, much has changed on the FDI landscape for China. With the 'Going Abroad' strategy in 1998, both China's inward and outward investments began to increase. In addition, China acceded to the ICSID Convention in 1990 and ratified it in 1993. Thus, new BITs are expected to accommodate such developments.³⁶ It is commonly considered that ever since 1998 China has already shifted from narrow ISDS clauses to broad ISDS clauses addressing almost all investment disputes.³⁷

Up to now, it is generally believed that there are three generations of IIAs with different types of ISDS clauses, shifting from a restrictive approach to a proactive approach.³⁸ In recent years, ISDS has been criticized for lack of legitimacy worldwide and there is growing concern that the policy space for states is being squeezed.³⁹

³⁶ See Tong Qi, *How Exactly Does China Consent to Investor-State Arbitration: On the First ICSID Case against China*, 5-2 CONTEMP. ASIA ARB. J. 265, 265-91 (2012), <https://ssrn.com/abstract=2181451>.

³⁷ As symbols, China-South Africa BIT in 1997 permits ad hoc arbitration for all kinds of investor state disputes, China-Barbados BIT in 1998 allows for ICSID arbitration of all investment disputes.

³⁸ See Manjiao Chi & Xi Wang, *The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications: The Admissibility of Disputes for Investor-State Arbitration*, 16 J. OF WORLD INV. & TRADE 869, 869-98 (2015).

³⁹ See UNCTAD, *Reform of Investor-State Dispute Settlement: in search of a roadmap*, IIA ISSUES NOTE NO.2, (Jun. 2013).

And many countries begin to review and reconsider the ISDS system.⁴⁰ Following this world trend, it is argued that since 2008 China has gradually switched to a more balanced type of investment treaty – in the fourth phase,⁴¹ with more elaborate defenses to investor claims on procedural aspects, such as excluding MFN from ISDS clauses.⁴² In other words, despite some inconsistency due to its treaty partners,⁴³ China's current overall stance on ISDS is to endorse a balanced approach toward ISDS, rather than discard it completely.⁴⁴

C. *Chinese Scholars' Comments on the EU's ICS*

So far, there has not been any public official opinions on ICS by Chinese government, but concerns have been raised among academics ever since the EU's Draft Text for Investment Chapter in the TTIP was published. Professor Qing-lin Zhang views ICS as the most radical but systematic revolution to traditional ISDS system in general, while at the same time, leaving some issues unaddressed, such as the relationship between domestic courts and ICS.⁴⁵ Researcher Bin Ye asserts that (a) a court system may eliminate potential conflict of interests, while at the same time may become pro-state; (b) by taking away the parties' autonomy, it becomes a rigid court system; and (c) the appellate mechanism may lead to a higher level of consistency of awards, but it would also increase the cost, imposing pressure on small and medium enterprises (hereinafter referred to as "SMEs") and developing countries. Therefore, ICS should be refused if the similar section of investment court were on current EU-China BIT negotiations because a proper reformed ISDS should be based on the existing arbitration mechanism rather than

⁴⁰ Bolivia, Ecuador and Venezuela even withdrew from ICSID Convention in 2007, 2009 and 2012, respectively.

⁴¹ See Axel Berger, *Hesitant Embrace: China's Recent Approach to International Investment Rule-Making*, 16 J. OF WORLD INV. & TRADE 843, 843–68 (2015).

⁴² Such as China-Korea FTA, art. 12.4 and Australia-China FTA, art. 9.4.

⁴³ For instance, according to Australia-China FTA Chapter 9 Investment, art.12, only claims concerning breaches of national treatment can be submitted to ISDS.

⁴⁴ See Leon E. Trakman, *China and Foreign Direct Investment: Looking Ahead*, CHINA AND INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION, 148–149 (Qiao Liu & Wenhua Shan eds., 2015).

⁴⁵ See Qinglin Zhang, *Comment on EU Reform of ISDS Mechanism*, 3 STUD. IN L. & BUS. 143, 143–55, (2016).

abandon it.⁴⁶ Whereas Professor Shi-xi Huang believes that both traditional ISDS system and ICS fail to address the concerns and criticism of current ISDS system due to the lack of a multilateral investment treaty.⁴⁷ It could thus be seen that there is no consensus towards ICS among Chinese scholars.

Comparing the EU's stance towards ISDS with that of China, it can be seen that both the EU and China accept the comprehensive jurisdiction of investment tribunals rather than restrict it to certain kinds of disputes, and tend to adopt a neutral attitude towards ISDS system, rather than discard it completely. While at the same time, there is a novel divergence between China, a supporter of traditional *ad hoc* arbitration at present, and the EU, a leader of the innovative permanent adjudicatory system. In order to adopt an appropriate position on the EU's proposal of bilateral ICS and the envisaged MIC, it is essential to conduct in-depth analysis of the coherences and divergences between the EU and China in a broader context, including but not limited to dispute settlement mechanism.

IV. COHERENCES

A. The Same Status of Capital Importing and Exporting Country

The EU is evolved from European Coal and Steel Community, which was founded by 6 countries, namely, Belgium, Germany, France, Italy, Luxembourg and Netherlands in 1951, to a unique economic and political partnership regime among 28 member states.⁴⁸ Historically, the old 6 EU member states are usually home states of overseas investment. Mainly due to globalization, now the 28 EU member states, though with divergent level of economic development, gradually have dual roles as home state and host state of international investment. In 2015, Europe became the world's largest investing region and remained second of the top capital

⁴⁶ See Bin Ye, *EU's Proposal on ISDS for TTIP Negotiation: Challenges and the Way Forward*, 6 CHINESE REV. OF INT'L L. 71, 71–82, (2016).

⁴⁷ See Shixi Huang, *The Cause and Origin of Investment Court System Proposed by EU*, 4 STUD. IN L. & BUS. 162, 162–172, (2016).

⁴⁸ See *From 6 to 28 members*, EUR. COMM'N (Mar. 6, 2017), https://ec.europa.eu/neighbourhood-enlargement/policy/from-6-to-28-members_en; *EU member countries in brief*, EUR. UNION (Oct. 19, 2018) https://europa.eu/european-union/about-eu/countries/member-countries_en.

recipients accounting for 29 percent of global inflows.⁴⁹ In 2016, the EU became the largest source and destination of FDI in the world.⁵⁰

Because of the ‘Open Door’ policy that opened up the domestic market for foreign investment in mainland China, China gradually became one of the most favorable host states for foreign investors. In 2014, China became the largest FDI recipient in the world for the first time.⁵¹ Meanwhile, China has gradually transitioned to a substantial home state of outward investors due to the “Going Abroad” strategy launched in 1990s encouraging its enterprises to invest overseas. In 2016, Chinese outward FDI surged to \$183 billion, propelling the country to the position of the second largest home country for FDI for the first time.⁵² More importantly, Chinese outflows surpassed inflows for the first time, making it a net exporting country.

Currently both the EU and China have a dual status of capital exporting and importing country. Particularly, as the EU continues to suffer from sluggish growth and high unemployment, and China’s economy growth is slowing, support for foreign investment may be crucial for both the EU and China to boost economic growth.⁵³ By and large, investment treaty-making is prompted and even motivated by the need of economic growth, hence both the EU and China are well-positioned to strike a balance between maintaining investment protection and preserving the state’s right of regulation.

However, the development path to the current position of both FDI recipient and source country is obviously different, namely, the EU shifted from a traditional home state of FDI and China transitioned from a host state of foreign investment. This may result in minor differences regarding policy considerations between the EU and China, because the EU had to deal with more about issues relating to FDI inflows and *vice versa*, China had to gradually target

⁴⁹ See UNCTAD, *World Investment Report*, 4-6 (2016), http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf.

⁵⁰ See UNCTAD, *World Investment Report*, 12-14 (2017), http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

⁵¹ UNCTAD, *World Investment Report*, at 5 (2015), http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

⁵² *Supra* note 50, at 14.

⁵³ Jeremy Clegg & Hinrich Voss, *The new two-way street of Chinese direct investment in the European Union*, 5 CHINA-EU L. J. 79, 79-100 (2016).

outward investments. In fact, the EU is now focusing more on the regulatory power, for instance, the ultimate goal of creating MIC is to eliminate regulatory chill by achieving fair and predictable legal environment. While China may place more emphasis on investment protection due to an opposite path from a host state to the dual role, it is argued that China's greater willingness to consent to international arbitration is a by-product of its emergence as a major home state of international investment.⁵⁴

B. The Same Need of an Effective ISDS System

With sharp increase of ISDS cases over the past decades, ISDS system is suffering from legitimacy crisis. Concerns of the current ISDS system relate, among others things, to a perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; independence and impartiality of arbitrators, and the costs and time of arbitral procedures.⁵⁵ Further, a key problem of the current ISDS is that the disputes involving public interests are resolved through a mechanism which is envisaged for resolving commercial disputes.⁵⁶ In line with the concerns, both the EU and China need to address the backlash against the traditional ISDS system.

The EU has expressed its determination to reform the traditional ISDS system for many times ever since the new competence for investment protection conferred by Lisbon Treaty. At first, the EU determined to improve "how the investor-state dispute settlement system operates", to find "a better balance between the right of states to regulate and the need to protect investors".⁵⁷ Then the EU pointed out that it will "enhance the right to regulate and move from current

⁵⁴ David Hallinan, *The EU-China Bilateral Investment Treaty: A Challenging First Test of the EU's Evolving BIT Model*, 5 CHINA-EU L. J. 31, 39 (2016).

⁵⁵ UNCTAD, *IIA Issues Note No.2, Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, (Jun. 2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

⁵⁶ IISD, *International Investment Law at a Crossroads: What role for China?*, <http://www.iisd.org/library/international-investment-law-crossroads-what-role-china>.

⁵⁷ Eur. Comm'n, *Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement in EU agreements*, ITALAW (Nov. 2013), https://www.italaw.com/sites/default/files/archive/Investment%20Protection%20and%20Investor-to-State%20Dispute%20Settlement%20in%20EU%20agreements_0.pdf.

ad hoc arbitration towards an Investment Court”.⁵⁸ Later, the EU declared that MIC is a more effective and efficient way to reform the ISDS system than bilateral reforms.⁵⁹

Though absent of any clear official position on ISDS, China’s need for a more effective ISDS could be seen from its involvement in ISDS cases. Up to now, debates on and criticisms to the ISDS system mainly relate to three issues. The first is alleged erroneous and inconsistent interpretation to the consent scope in investor-state arbitrations, i.e., ‘a dispute involving the amount of compensation for expropriation’ embodied in Chinese BITs of the early 1980s. In *Tza Yap Shum v. Peru*, the tribunal, relying on ‘fork in the road’ clause,⁶⁰ drew a conclusion that the consent scope includes not only the mere determination of the amount but also any other issues normally inherent to an expropriation, such as the occurrence of an expropriation.⁶¹ The tribunal contended that if state courts have jurisdiction for the liability stage of the dispute, i.e., whether a measure of the host state constitute expropriation, then the investor “may not under any circumstance make use of ICSID arbitration to settle the dispute involving the amount of compensation for expropriation”.⁶² Tribunals took similar interpretation approaches in *Sanum Investments Limited v. Laos*⁶³ and *Beijing Urban Construction Group Co. Ltd. v. Yemen*⁶⁴. But in *CHIC v. Mongolia*, the tribunal took a restrictive interpretation approach as to the same term and declined jurisdiction.⁶⁵ Obviously, the inconsistency of

⁵⁸ Eur. Comm’n, *Concept Paper: Investment in TTIP-the path beyond*, at 1, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf.

⁵⁹ See Eur. Comm’n, *A Multilateral Investment Court*, http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf.

⁶⁰ Art.8 of PERU-CHINA BIT provides that a dispute involving the amount of compensation for expropriation could be submitted to ICSID center. However, if the investor had resorted to a competent court of the host state, such dispute cannot be submitted to ICSID center any more.

⁶¹ *Tza Yap Shum v. the Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, Feb. 12, 2007, para.188.

⁶² *Tza Yap Shum v. the Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, Feb. 12, 2007, para.159.

⁶³ *Sanum Inv. Ltd. v. Lao People’s Democratic Republic*, UNCITRAL, PCA Case No. 2013–13, paras. 316–42.

⁶⁴ *Beijing Urban Constr. Grp. Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, May 31, 2017, paras. 59–109.

⁶⁵ *China Heilongjiang Int’l Econ. & Tech. Coop. Corp., Beijing Shougang Mining Inv. Co. Ltd. and Qinguangdaoshi Qinlong Int’l Indus. Co. Ltd. v. Mongolia*, UNCITRAL, PCA No.2010–20 (unpublished), See IA REPORTER, <https://www.iareporter.com/articles/mongolia-prevails-in-long-runni->

arbitral awards should be addressed. One of the goals the envisaged MIC is to resolve this issue. But admittedly, despite the *ad hoc* nature of investor-state arbitration, to some extent, this controversy is attributable to the misleading treaty language.

The second criticism is about the interpretation of the territorial scope of Chinese BITs in *Tza Yap Shum v. Peru* and *Sanum Investments Limited v. Laos*, namely, whether investors from Hong Kong or Macao could invoke Chinese BITs to protect their rights. Both tribunals in the two cases concluded that the relevant Chinese BIT was applicable. However, this consistent conclusion was considered “wrong” by Chinese government.⁶⁶ Nonetheless, the two tribunals and the ISDS system could hardly be blamed. After all, it is particularly difficult for arbitrators to ascertain the application or non-application of Chinese BITs to Special Administrative Region due to the paucity of factual elements and the absence of express exception in Chinese BITs. Rather, it is the Court of Appeal of Singapore that should be blamed. It held that the 1993 China-Laos BIT applies to Macao, irrespective of the fact that the contracting party had jointly denied such an effect by submitting to it two diplomatic notes during the judicial review procedure, posing an ultimate query that who should be the highest authoritative interpreter concerning the scope of treaty coverage in the investor-state dispute settlement.⁶⁷ Obviously, an effective ISDS system, including the envisaged MIC, should respect and accommodate subsequent joint interpretation and clarification of treaty provision by contracting parties, if any.

The third issue relates to the rigid interpretation as to *ratione temporis* of a Chinese BIT in *Ping An v. Belgium*. The Belgium-

ng-chinese-bit-arbitration-as-arbitrators-distinguish-their-reading-of-constricted-jurisdiction-clause-from-more-generous-readings-in-prior-cases/ (last visited July 22, 2018).

⁶⁶ The view of Chinese government is that “as a principle, the investment agreements between the central government and foreign countries do not apply to the 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 Oct. 2016*, MINISTRY OF FOREIGN AFFAIRS OF THE PRC (Oct. 9, 2017), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1500122.shtml (last visited Dec. 15 2018).

⁶⁷ See JUDGMENT OF THE COURT OF APPEALS OF SINGAPORE [SGCA] 57, (Sept. 26, 2016), <http://www.dwww.italaw.com/sites/default/files/case-documents/italaw7600.pdf>.

Luxembourg Economic Union-China BIT that took effect in 2009 (hereinafter referred to as “2009 BIT”) provides that it substitutes and replaces the Agreement between the Government of the Peoples’ Republic of China and the Belgium-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments signed in 1984 and took effect in 1986 (hereinafter referred to as “1986 BIT”), and 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.” In this case, the dispute between Ping An and Belgium arose before the entry into force of the 2009 BIT, but wasn’t yet under any judicial or arbitral process at that time. The tribunal denied its jurisdiction mainly on two grounds: the first being the general principle of non-retroactivity in international law,⁶⁸ the second being the silence of the 2009 BIT on the disposition of disputes which had been notified but not matured into judicial or arbitral proceedings.⁶⁹ While knowing the impact of such an interpretation would deprive Ping An of an effective remedy under 2009 BIT, the tribunal took no position on whether remedies may remain available to the Claimants either under the 1986 BIT or through Belgium’s domestic courts.⁷⁰ 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.⁷¹

Therefore, although the inconsistent and unintended interpretation in these cases can sometimes be attributable to the ambiguity of treaty language, it cannot be denied that the ISDS system lack rules and mechanisms to guarantee the fairness and correctness.

C. Common Interests of Establishing A New Mechanism ?

The EU is not sure whether the MIC would be an independent institute. It is stated that “the multilateral court would need to be a

⁶⁸ Ping’an Life Ins. Co. of China, Ltd. and Ping’an Ins. (Grp.) Co. of China, Ltd. v. Kingdom of Belgium, ICSID Case No ARB/12/29, Award, paras. 167-68 (Apr. 30, 2015).

⁶⁹ *Id.* para. 227.

⁷⁰ *Id.* para. 232.

⁷¹ See Yong Liu, *On the Case China Ping An v. Belgium-From the Perspective of Inter-temporal Law in the Application of Treaties*, 4 GLOBAL L. REV. 162, 162-78 (2016).

legal entity under international law, but it is too early to say whether it would be a new stand-alone body or be docked into an existing international organization".⁷² But indeed, such a court system can hardly be embedded into any existing multilateral dispute settlement body without fundamental reform. At present, MIC is incompatible with the WTO, an inter-state dispute settlement body on trade disputes, as well as the ICSID Center, an institute for *ad hoc* arbitration without appealing procedures. Though the EU intentionally refers to ICSID Secretariat for managing fees and disputes,⁷³ as well as procedural rules of ICSID Convention,⁷⁴ the applicability of ICSID Convention is doubtful.⁷⁵ In the same vein, an ICS award would not be automatically deemed in conformity with the New York Convention by third states.⁷⁶ Therefore, as a clear departure from the traditional ISDS system, MIC is doomed to be a self-standing mechanism, unless radical changes occur within the current dispute settlement body.

As China is on its way to implement its initiative of OBOR, a unique dispute settlement body that cater for the needs of OBOR countries seems desirable.⁷⁷ Existing dispute settlement systems, is far-less competent to facilitate this ambitious project calling for collaboration and cooperation among many states, due to the adversarial procedures as well as the expensive and lengthy proceedings that can be a heavy burden for SMEs and developing countries.⁷⁸ More importantly, there are fewer arbitrators from

⁷² *Supra* note 34.

⁷³ Arts. 9(13) (16), 10(13) (15), sub-sec.4, the EU's proposal (TTIP); Arts. 8.27(13) (16), CETA; Arts. 12(15) (18), 13(15) (18), sec. 3, EVFTA Investment Chapter.

⁷⁴ Art. 6(2)(a)-(b), sub-sect.3, the EU's proposal (TTIP); Art. 8.23(2)(a)-(b) CETA; Art. 7(2)(a)-(b), s. 3, EVFTA Investment Chapter.

⁷⁵ See Freya Baetens, *The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges*, 43 LEGAL ISSUES OF ECON. INTEGRATION 367, 367-84 (2016), <http://www.kluwerlawonline.com/LEIE2016020>.

⁷⁶ *Id.* at 383.

⁷⁷ On April 21 2017, in the meeting with WTO Director-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*, <http://www.top-news.top/news-12868162.html> (last visited Apr. 22, 2017).

⁷⁸ A report indicates that the average length of investment proceedings is three years and eight months, See EFILA, TTIP Consultation Submission 2014; it is estimated that the overall average costs

developing countries among panels of arbitrators. According to an empirical research, with the exception of four arbitrators, all those listed on the top 25 international investment arbitrators by appointments are nationals of Western states. Yet, even these four are not particularly representative of the rest of the world.⁷⁹ Thus it is asserted that an independent and effective dispute settlement mechanism that has an appellate facility, encompasses both trade and investment disputes, and combines mediation with arbitration, would benefit to ensure a fair, coordinated and amicable settlement of disputes arising from OBOR.⁸⁰ More importantly, such an independent mechanism would help developing countries in OBOR integrate into the mainstream of the world economy.⁸¹ In practice, the Supreme People's Court (hereinafter referred to as "SPC") has taken measures to provide judicial safeguards for OBOR,⁸² and Shenzhen Court of International Arbitration⁸³ is ready to accommodate investor-state disputes by updating its rules.⁸⁴ Nonetheless, an effective transnational dispute settlement body resolving disputes arising from the OBOR, such as disputes concerning investment by Asian Infrastructure Investment Bank (hereinafter referred to as "AIIB"), is still absent.

In summary, both the EU and China have a dual role of capital exporting and importing country, and are in the same need of a balanced and well-functioning ISDS system. Therefore, if the envisaged MIC could accommodate and integrate divergent demands and benefit SMEs and OBOR countries, it would be a win-win

paid by both parties is appropriately \$10 million for a typical investment claim, with the median cost being at around \$6 million, *see* M.Hodgson, *Cost in Investment Treaty Arbitration: The Case for Reform*, <http://www.allenoverly.com/SiteCollectionDocuments/Costs%20in%20Investment%20Treaty%20Arbitration.pdf> (last visited Dec. 15, 2018).

⁷⁹ Malcolm Langford, Daniel Behn & Runar Hilleren Lie, *The Revolving Door in International Investment Arbitration*, J. OF INT. ECON. L. 9, 9-10 (2017).

⁸⁰ *See* Gui-guo Wang, *Dispute Settlement Mechanism of One Belt and One Road*, 2 CHINESE L. REV. 33, 33-38 (2017).

⁸¹ *Id.* at 37.

⁸² *See* Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts (promulgated by Sup. People's Ct., Jun. 16, 2015) (chinalawinfo).

⁸³ SCIA, also known as the South China International Economic and Trade Arbitration Commission.

⁸⁴ *See* Shenzhen Centre Welcomes Investor-state Disputes, SCIA (Nov. 1, 2016), <http://www.scia.com.cn/web/news/detail/1653.html> (last visited Dec. 15, 2018).

solution and would more likely be accepted and supported by China, as the OBOR is open and inclusive, with no intent of any exclusive arrangement of institution or mechanism.⁸⁵ In the Third Vienna Investment Arbitration Debate held on 22 June 2018, Colin Brown, an officer of the EU, proposed several features of the envisaged MIC to care for developing countries and SMEs, such as ensuring geographical representation, the creation of an Advisory Center for developing countries, differential treatment on cost allocation for developing and least developed contracting countries, and guaranty access of SMEs to the court.⁸⁶ Suppose these ideas were truly realized, the envisaged MIC would be likely echoed by China.

V. DIVERGENCES

Despite the common grounds and interests, distinct experiences and legal cultures with regard to ISDS system must not be ignored.

A. Divergent Experiences with ISDS Practices

Legal practitioners in the EU are generally not unfamiliar with international law, given that a number of nationals from EU Member States have served as arbitrators, conciliators or *ad hoc* committee members in ICSID cases. In total, about 43% of all appointments made in ICSID cases involved nationals from an EU member state.⁸⁷ Besides, the civil society is also well-equipped with knowledge and sense of international law. It was the public debate that led the EC to engage in a public consultation when drafting proposal for Investment Protection and Resolution of Investment Disputes for TTIP and make final adjustments.⁸⁸

⁸⁵ See Yangshi Fabu Quanwei "Yidaiyilu" Bantu (央视发布权威“一带一路”版图) [CCTV Issues the Authoritative "Belt and Road" Map], GUANCHA.CN (Apr. 14, 2015), <http://news.163.com/15/0414/06/AN5490VE0001124J.html> (last visited Dec. 15, 2018).

⁸⁶ See Eur. Comm'n., *The European Union's approach to investment dispute settlement*, The 3rd Vienna Investment Arbitration Debate, http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf (last visited Oct. 12, 2018).

⁸⁷ The ICSID Caseload - Statistics Special Focus-European Union (Apr. 2017), at 26, [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20EU\(English\)April%202017.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20EU(English)April%202017.pdf).

⁸⁸ See EC Report on the Online Public Consultation on Investment Protection and Investor-to-state Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement, (Jan. 13 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

As mentioned above, some EU Member States have taken leading roles in the history of ISDS. Now the EU is attempting to lead the world again in reforming the ISDS by launching a MIC.⁸⁹ Despite that each individual EU Member State's exposure to ISDS cases may vary, they are still generally considered experienced with ISDS practices. As of April 30, 2017, ICSID has registered 608 cases under the ICSID Convention and Additional Facility Rules. 17% of these cases (105 cases) involved a state party from the EU.⁹⁰ Where the tribunal rendered a final award, 22% of the awards declined jurisdiction, 47% dismissed all claims, and 31% upheld the claims in part or in full.⁹¹ Spain, Czech Republic and Poland are among the most frequent respondent states from 1987 to 2017.⁹²

At the same time, EU investors, particularly investors from "old" EU Member States, are active users of the ISDS mechanism.⁹³ Investors from EU Member States were involved in 58% of the registered ICSID cases.⁹⁴ Where the tribunal rendered a final award, 26% of the awards declined jurisdiction, 25% dismissed all claims, and 49% upheld the claims in part or in full.⁹⁵ Netherlands, United Kingdom, Germany, France, Spain, Luxembourg, Italy and Cyprus are on the list of the most frequent home states from 1987 to 2017.⁹⁶

Particularly, arbitrations initiated by an investor from an EU Member State against another EU Member State accounted for about one-quarter of all investment arbitrations initiated in 2016 and one-fifth in 2017. The total number of intra-EU disputes amounted to 168 by the end of 2017, i.e. 20% of the total number of ISDS cases in the world.⁹⁷ In sum, the EU Member States are experienced with ISDS from both defensive perspective and offensive perspective.

⁸⁹ See Stephan W. Schill, *Editorial: US versus EU Leadership in Global Investment Governance*, 17 J. OF WORLD INV. & TRADE 1, 1-6 (2016).

⁹⁰ The ICSID Caseload - Statistics Special Focus-European Union (Apr. 2017), at 6.

⁹¹ The ICSID Caseload - Statistics Special Focus-European Union (Apr. 2017), at 13.

⁹² UNCTAD, World Investment Report 2018, at 92.

⁹³ See UNCTAD, IIA Issues Note No.2, Investor-State Dispute Settlement: An Information Note on the United States and the European Union, Jun. 2014, at 1.

⁹⁴ The ICSID Caseload -Statistics Special Focus-European Union (Apr. 2017), at 17.

⁹⁵ The ICSID Caseload -Statistics Special Focus-European Union (Apr. 2017), at 21.

⁹⁶ UNCTAD, World Investment Report 2018, at 93.

⁹⁷ *Id.*

By comparison, China is still a beginner. There are inadequate qualified legal professionals, particularly in the international arena. For instance, in the limited pool of ICSID arbitrators, a few Anglo-European arbitrators are repeatedly appointed to investor-state arbitral tribunals, while to date, only five Chinese investment arbitrators have been appointed in five different ISDS cases.⁹⁸ Moreover, the knowledge and sense of law of the general society at large are also obviously inadequate.

Chinese investors have made limited utilization of the ISDS system. Among the six cases known to have been initiated by investors from China against other states, only three cases were initiated by mainland Chinese investors,⁹⁹ and two of them failed. In some cases, such failure could be attributed to limited access to ISDS under the second generation of Chinese BITs. Nonetheless, mainland Chinese investors are much less acquainted with international law than investors from developed countries such as those in the EU, and similarly less familiar than those from Hong Kong or Macau.¹⁰⁰ In fact, having only been exposed to international market for a remarkably short span of time, most Chinese investors know little about the ISDS system.

B. Divergent Cultures Towards the Model of Dispute Settlement

The rule of law is one of the founding principles stemming from the common constitutional traditions of all Member States, and is one of the fundamental values upon which the EU is based.¹⁰¹ It demands that disputes should be resolved in a visible manner. Thus, given that several EU Member States, such as Germany, France, and Italy, were the early forerunners of the civil law system, they have a long history of rule of law and a well-established tradition of using

⁹⁸ See ICSID, *Arbitrators, Conciliators and Ad Hoc Committee Members*, <https://icsid.worldbank.org/en/Pages/arbitrators/CVSearch.aspx> (last visited Dec. 15, 2018).

⁹⁹ Ping An Life Ins. Co. of China, Ltd. and Ping An Ins. (Grp.) Co. of China, Ltd. v. Kingdom of Belgium, ICSID Case No. ARB/12/29; Beijing Urban Construction (Grp.) Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30; China Heilongjiang International Econ. & Tech. Cooperative Corp. Beijing Shougang Mining Inv. Co. Ltd and Qinhuaodaoshi Qinlong Int. Industrial Co. Ltd. v. Mongolia.

¹⁰⁰ Tong Qi, *ISDS Cases Initiated by Chinese Oversea Investors*, 3 *Oriental L.* 89, 89-96 (2014).

¹⁰¹ See Eur. Comm'n., *Rule of Law*, https://ec.europa.eu/neighbourhood-enlargement/policy/policy-highlights/rule-of-law_en (last visited Nov. 1, 2018).

adversarial processes, including the use of litigation that is generally open to the public, and full debate on every legal and factual facet possible, emphasis on transparency and amicus participation, and thus favor a formalistic, contested method of dispute settlement.¹⁰² Particularly in administrative proceedings, the constraint for alternative dispute resolution (hereinafter referred to as “ADR”) lies in the fact that the decisions and actions of administrative authorities must be to the benefit of the public interest based on the competences awarded to it by the legislator and in conformity with the law.¹⁰³

In contrast, confidential mediation as a means of ADR may seem to be in conflict with the EU’s legal culture. This is because in mediation, the dispute between a private party and the government is basically resolved on the basis of mutual compromise in a manner unknown to the public, instead of relying upon provisions of law. However, this does not mean that mediation is impossible. Practically, in the Netherlands, Austria, Germany, and several others countries, mediation, mediation techniques, and informal communication could result in a significant effect on the number of court proceedings that are avoided.¹⁰⁴ Approximately 2% of the cases registered under the ICSID Convention and Additional Facility Rules involving an investor from EU Member State were conciliation proceedings under either the ICSID Convention or the Additional Facility Rules.¹⁰⁵ It is said that many European companies are naturally hesitant to employ existing ISDS mechanisms, for fear of potential reprisals that could damage their positions in foreign markets.¹⁰⁶

Unlike the EU, Chinese tradition shows a preference for mediation rather than adversarial litigation, and for amicable

¹⁰² See Tillmann Rudolf Braun, *Investor-State Mediation: Is There a Future?* Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 374, 374-88 (2009).

¹⁰³ K.J. De Graaf, A.T. Marseille & H.D. Tolsma, *Mediation in Administrative Proceedings: A Comparative Perspective*, ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN ADMINISTRATIVE LAW 569 (Dacian C. Dragos & Bogdana Neamtu eds., Springer 2015).

¹⁰⁴ *Id.* at 602.

¹⁰⁵ ICSID, *The ICSID Caseload, Statistics Special Focus-European Union* (Apr. 2017), at 18, [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20EU\(English\)April%202017.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20EU(English)April%202017.pdf) (last visited Nov. 6, 2018).

¹⁰⁶ David Hallinan, *The EU-China Bilateral Investment Treaty: A Challenging First Test of the EU’s Evolving BIT Model*, 5 CHINA-EU L. J. 31, 36 (2016).

ambiguity rather than a sharp distinction between right and wrong.¹⁰⁷ Confucianism, a dominant political philosophy in pre-Communist China, with its emphasis on harmony, has far-reaching influence on amical dispute resolution that avoid direct confrontation, in both history and contemporary practice.¹⁰⁸ Under this tradition, litigation was viewed as disgraceful conduct because it signaled the total breakdown of social harmony, whereas mediation afforded people a socially acceptable method of resolving disputes in light of Confucian morals, and it therefore became the main method of dispute resolution.¹⁰⁹ At present, the paucity of investor claims against China and by Chinese investors could be partly attributed to the foregoing legal culture despite various explanations.¹¹⁰ Another example is the mechanism for coordination in the handling of complaints, stipulated in the Foreign Investment Law of the People's Republic of China (Draft for Comment).¹¹¹ Institutions for Coordination in the Handling of Complaints would function as *de facto* mediation bodies responsible for handling disputes between foreign investors and administrative organs to resolve foreign investment disputes timely and effectively.

Hence, it is obvious that the EU is more interested in the reform of ISDS system, while Chinese investors are currently in lack of both the ability and willingness to make full use of the ISDS system. Despite the difference in terms of permanence and judicialization, the envisaged MIC is similar to ISDS mechanism because it is also an adversarial dispute settlement mechanism. The different position on ISDS may thus have significant implications for the negotiation of the envisaged MIC. The arrangement of the envisaged MIC should be inclusive enough to cater to the needs and preferences of China.

¹⁰⁷ See Thomas W. Wäde, *Improving the Mechanisms for Treaty Negotiation and Investment Disputes*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008/2009, 582 (Karl P. Sauvant ed., Oxford Univ. Press 2009).

¹⁰⁸ See Gabrielle Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China*, 25 J. INT'L ARB 479-92 (2008).

¹⁰⁹ *Id.* at 480-81.

¹¹⁰ See Trakman, *supra* note 44, at 135- 37; Wang Guiguo, *Chinese Mechanisms for Resolving Investor-State Disputes*, 1 JINDAL J. OF INT'L AFF. 204-33 (2011).

¹¹¹ Waiguo Touzi Fa (Caoan Zhengqiu Yijian Gao) [外国投资法(草案征求意见稿)] [Law on Foreign Investment (Draft for Comment)] (promulgated by Ministry of Com., Jan. 19, 2015) (Chinalawinfo).

On the other hand, the distinctions between the EU and China should not be exaggerated. Firstly, it is argued that China has gained confidence in the international adjudication fora due to its experiences at the WTO, albeit being an inter-state trade dispute resolution mechanism which does not involve investments and investors *per se*.¹¹² Secondly, ADR is also acceptable to the EU. In other words, these divergencies should be addressed, but they do not constitute substantial obstacles to the cooperation between the EU and China.

VI. ASSESSMENT OF THE CORE ASPECTS OF ICS/MIC

As the establishment of envisaged MIC would require widespread consensus among member states, it may encounter considerable difficulty. A fundamental flaw of the envisaged MIC lies in the fact that it fails to unify the substantial rules of international investment.

Throughout history, several attempts to conclude a multilateral investment treaty have all failed. In the 1940s, the proposed International Trade Organization (hereinafter referred to as “ITO”), encompassing competences regarding both trade and investment, was not established due to significant resistance from developing countries who were also capital-importing countries and the lack of support from the US. Then, the 1967 Organization for Economic Co-operation and Development (hereinafter referred to as “OECD”) Draft Convention on the Protection of Foreign Property failed to gain sufficient support from OECD Members due to the North–South conflict on the appropriate principles of foreign investment protection.¹¹³ Starting in 1996, the OECD launched a new round of negotiations for the Multilateral Agreement on Investment (hereinafter referred to as “MAI”). Despite its close similarity to existing international investment treaties, the MAI ultimately failed

¹¹² See Norah Gallagher, *Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy*, 31 ICSID REV. 95, 95 (2016).

¹¹³ The 1967 OECD Draft Convention on the Protection of Foreign Property provided for fair and equitable treatment, protection against direct and indirect expropriation and so on. However, there was no consensus on the obligation to compensate foreign investors regarding the expropriation or nationalization at that time. Some of the OECD Member States, such as Greece, Portugal, and Turkey, were reluctant to support such high level of investment protection. See STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 38 (Cambridge Univ. Press, 2014).

as a result of the difficulty to strike the balance between investment protection and a state's legitimate right to regulate, rather than a general opposition of multilateralism in investment relations.¹¹⁴ Oppositions to the negotiation mainly relates to concerns about the potential impact of comprehensive investment protection on states' ability of sustainable development. Considering the multilateral achievements in the WTO and numerous BITs concluded in this period, the general desirability of the protection of foreign investment by international law could not be denied. More recently, renewed efforts to launch negotiations on a multilateral investment treaty in the WTO ended without success, due to factors outside the investment realm.¹¹⁵

Only two multilateral conventions in the investment realm succeeded: the ICSID Convention and the Convention Establishing the Multilateral Investment Guarantee Agency (hereinafter referred to as "MIGA Convention"). Both do not contain substantive treatment of foreign investments. The multilateral framework of ICSID Convention concluded in 1965 only provides procedural rules for conducting investment arbitrations. However, the OECD failures in 1998 and the WTO failures in the early 2000s for multilateralism could not be simply attributed to the lack of a consensus on substantive provisions. Instead, the similarity of BITs and other international instruments could represent a basic consensus on the appropriate level of protection of investments by international law.¹¹⁶ Therefore, there are two paths to move the negotiation of MIC forward, one is by launching a comprehensive multilateral investment treaty, the other is the current way proposed by the EU, by mirroring the establishment of ICSID center, which may be simpler but imperfect. Without unified substantive rules, how could the problem of inconsistency could really be resolved? In the latter case, countries would first consider whether the legitimacy crisis of ISDS could be eliminated within the arbitration system. Then, it

¹¹⁴ *Id.* at 54-58.

¹¹⁵ The resistance of developing countries to multilateral investment rules at the Cancun Summit was primarily attributable to the fact that their interests in agriculture sector were not fully addressed during the trade negotiation. To avoid distributive compromises, investment issues were removed from the negotiation agenda. *See id.* at 59-60.

¹¹⁶ *Id.* at 60.

would assess whether the envisaged MIC would be an effective and efficient one that strikes a proper balance between investor protection and a government's right to regulate.

Before analyzing the pros and cons of ICS/MIC, it is essential to clarify that details of MIC have not been determined yet, whereas the key features are relatively clear. In the Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, the Council of the EU expressed that (i) the MIC should be composed of a tribunal of first instance and an appeal tribunal; (ii) members of the court should enjoy security of tenure; and (iii) members to a particular case should be appointed by a transparent and objective method.¹¹⁷ Secondly, when assessing the core aspects of ICS/MIC, the most significant point to bear in mind is that the purpose of establishing an ISDS system was to provide a neutral and depoliticized forum to settle investor-state disputes, which was deemed as a prerequisite to reach a fair award. Time and cost efficiency is also an important factor to ensure a well-functioning of dispute settlement system; justice delayed may be justice denied, and high costs may be a substantial bar to the ISDS system and constitutes a *de facto* denial of justice. Therefore, the core aspects of ICS/MIC would be scrutinized for the neutrality of the adjudicators, and the fairness and efficiency of the entire dispute resolution mechanism.

A. The Independence and Impartiality of Adjudicators in ICS/MIC

Independence and impartiality are the cornerstones of the legality of a third-party dispute settlement, and act as preconditions to reaching a fair award. To be judicially independent, ISDS would need to incorporate the conventional institutional safeguards that alleviate concerns about unacceptable judicial dependence, especially the direct economic interest of arbitrators arising from the

¹¹⁷ See Council of the EU, *Negotiating Directives For A Convention Establishing A Multilateral Court For The Settlement Of Investment Disputes*, 12981/17 ADD 1, Brussels, (Mar. 1 2018), <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> (last visited Nov. 6, 2018).

nomination by a disputing party.¹¹⁸ Historically, traditional ISDS allows a for-profit model of adjudication: i.e. party-appointed arbitrators have no security of tenure and thus may have an increased interest in obtaining a later further engagement. This incentivizes some arbitrators to act as advocates for the party who has appointed them, neglecting their role as administrators of justice.¹¹⁹ In this respect, the mechanism of objective appointment ensures that there is no link between the tribunal members and the disputing parties.¹²⁰ In addition, a tenured position would eliminate to a large extent conflict of interests arising from their switch between the conflicting roles of arbitrator and counsel. Therefore, the appointment of adjudicators with permanent and full-time positions would provide more safeguards of independence and impartiality than the *ad hoc* appointment of (commercial) arbitrators.¹²¹

However, there may be concern about whether the appointment of judges by states would free the decision-making process from political influences. When making decisions, judges may also consider the fact that the standing court itself is a creation of states.¹²² Indeed, it would be unreasonable to expect that a nominating or appointing state would not put forward a candidate who shares (in general terms) the value systems of the nominating state.¹²³ In a bilateral ICS, the composition of the tribunal means that one adjudicator is a national of the respondent state and another adjudicator is a national of the claimant investor's home state. Because both are perceived to be biased, only the chairperson of the tribunal, as a third country national, is perceived to be fully

¹¹⁸ Gus Van Harten, *The European Union's Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA*, 1 U. OF BOLOGNA L. REV. 138, 142 (2016).

¹¹⁹ See AIV (Advisory Council on International Affairs), *International Investment Dispute Settlement: From Ad Hoc to A Standing Court*, No. 95, Apr. 2015, at 29-30.

¹²⁰ Stefanie Schacherer, *TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor-State Disputes Under Mega-regionals*, 7 J. OF INT'L DISP. SETTLEMENT 628, 632 (2016).

¹²¹ AIV, *International Investment Dispute Settlement: From Ad Hoc to A Standing Court*, No.95, Apr. 2015, at 36.

¹²² Eduardo Zuleta, *The Challenge of Creating a Standing International Investment Court*, *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY* 422 (Jean E. Kalicki & Anna Joubin-Bret eds., Brill Nijhoff, 2015).

¹²³ Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 278 (2003).

neutral.¹²⁴ In the context of a MIC, as a general principle, an adjudicator should not sit in on a case involving his own country. This is usually sufficient to prevent derogation of his independence and impartiality. Nonetheless, because there may still be perceived bias against investors due to the pre-appointment of adjudicators by states, it is advisable for the arrangement to become more flexible and allow party autonomy to the extent possible.¹²⁵

B. The Fairness of Dispute Resolution in ICS/MIC

The most significant indicator of a fair trial is to render a fair award in a specific case. Accuracy in fact-finding and application of law is prioritized over finality. An appeal facility would allow a second bite at the apple: i.e. an opportunity to review the case and rectify wrongful decisions, especially obvious erroneous or even absurd awards. In principle, this could contribute to increased fairness and justice. One of the reasons that Bolivia denounced the ICSID Convention is due to the concern about the lack of an appeals mechanism. Of course, if the appellate mechanism were expected to function more effectively, adjudicators of the appeal system should be better qualified than that of the first instance, as is the case in the WTO system. This precondition is particularly important where there are complex cases or ambiguous legal arguments that need innovative legal reasoning.

Furthermore, by avoiding inconsistent interpretations of similar or identical provisions, the appeal mechanism could ensure greater consistency and improve the fairness of the ISDS system as a whole. By rectifying wrong interpretations and upholding the right, an appeal mechanism would contribute to more consistent awards in the long term. Compared to the *ad hoc* constitution of arbitral tribunals, the personnel and institutional continuity of a permanent court system could also result in increased consistency to some extent. However, the effect of coherence and consistency should not be overstated. It is widely accepted that discrepancies and

¹²⁴ Schacherer, *supra* note 120, at 637.

¹²⁵ For instance, first, state parties designate adjudicators to a “pre-approved” list, then in a specific case each party is allowed to appoint an adjudicator from the list in the first instance, just like circumstances in the WTO panel proceeding, could be considered.

contradictions in investor-state arbitration can be attributed to fragmentation of international investment law (which has more than 3,000 bilateral treaties), the lack of binding precedent, gaps in the content of customary rules of international law, and other factors, jointly or severally.¹²⁶ More importantly, states have no intention to concede too much power to permanent institutions; instead, states would prefer to act as normative law makers and clarify vague provisions themselves.¹²⁷

Besides institutional safeguards against possible wrongful awards in either fact-finding or application of law, the qualifications of adjudicators, including both first instance and appellate adjudicators, is a precondition for ensuring the excellent quality of awards. Would the legal understanding of a selected group of permanent members, particularly adjudicators of an appellate tribunal, on average be better than that of *ad hoc* arbitrators? The practice of predominantly appointing members of a restricted ‘club’ in a traditional ISDS system allows for the appointment of arbitrators with experience, expertise and legal shrewdness.¹²⁸ In contrast, the severe system of incompatibility described in the ICS Code of Conduct and the relatively low amounts of remuneration proposed as professional retainers might undermine the requirements of professionalism and expertise.¹²⁹ For this reason, the amount of revenue for adjudicators should be improved and the occupational restriction for adjudicators to keep their original professions should be eliminated as long as there is no conflict of interests.

C. The Efficiency of Dispute Resolution in ICS/MIC

There is a widespread concern that the appeal procedure could result in delays and increased costs, compared with one-off arbitration in which the award is final and binding. However, the

¹²⁶ See Luis González García, *Making Impossible Investor-State Reform Possible*, in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY* (Jean E. Kalicki & Anna Joubin-Bret eds. 2015).

¹²⁷ This idea is enshrined in many investment treaties, see EU Proposal (TTIP), art. 13.5; EVFTA, art.16.4; revised CETA, art. 8.31.3.

¹²⁸ Filippo Fontanelli, *Lights and Shadows of the WTO-Inspired International Courts System of Investor-State Dispute Settlement*, 1 *EUR. INVESTMENT L. & ARB. REV.* 191, 254 (Loukas Mistelis & Nikos Lavranos eds. 2016).

¹²⁹ *Id.* at 257.

functioning of a permanent institution could render the adjudication process much more rapid. Adjudicators with tenure would refrain from incompatible professions, such as lawyer and counsel. This would allow them to concentrate on adjudicating cases, with less interference than arbitrators who work several jobs. Moreover, rather than repeatedly appointing a small group of arbitrators who adjudicate the majority of the cases, which would probably lead to delays, the objective appointing mechanism could manifestly shorten the length of the procedure by ensuring that each adjudicator has an equal workload and thus has sufficient time on a specific case. The fact that WTO panel proceedings are, on average, much shorter than investment arbitral proceedings could be part of the reason for its permanent nature.¹³⁰ Therefore, the total time of the first instance and the appeal may not necessarily exceed the current length of ISDS system.

When compared to ICSID annulment proceedings and set aside proceedings in national courts, the appeal mechanism is more efficient. Although finality is one of the principles of the modern system of international arbitration, there is still a genuine role for national courts and other bodies to assess the correctness of awards, despite the fact that annulment actions tend to focus on asserted procedural deficiencies. Once annulled or set aside, the parties must reconstitute a panel of arbitrators and go through the arbitration proceeding again, which wastes money and time. In contrast, an appellate tribunal could modify or reverse the original award directly in a final and binding award, and thus would be more efficient.

Nonetheless, it must be recognized that a permanent court system would increase the cost to state parties due to its daily operation. In the context of a bilateral ICS, for instance, there are only two cases between the EU and China;¹³¹ one could reasonably doubt whether it is worth operating. Even in the context of MIC, it is very hard to imagine state parties (particularly developing countries) who would be willing to afford the huge budgets if there are insufficient cases.

¹³⁰ The average time to complete panel proceedings was about 19.8 months in 2013; *See WTO dispute settlement—long delays hit the system*, LEXOLOGY (Jun. 23, 2014), <http://www.lexology.com/library/detail.aspx?g=13fe0fa8-2e4c-45ca-b619-c4609ae96797>.

¹³¹ One is Ping An case, the other is a newly registered case in ICSID Center, *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19.

MIC should make itself attractive and competitive both to states and to investors.

In conclusion, bilateral ICS has benefits and drawbacks from the perspective of neutrality and fair and efficient adjudication; it is difficult to argue that the drawbacks are outweighed by the benefits. In contrast, MIC is generally in a better position to contribute to the independence and impartiality of adjudicators, a relatively fair award and an efficient dispute resolution process. Of course, MIC has its own shortcomings and challenges that need to be addressed during the negotiation process, such as worldwide recognition and enforcement of awards. In addition, the success and proper functioning of the prospective MIC should also be subject to coordinated rules, measures and conditions.

VII. SUGGESTIONS FOR MIC

A. MIC with Chinese Characteristics

It is widely accepted that mediation/conciliation can promote long term cooperation between investors and the host state. For this reason, it is already included in almost all investment treaties and administered by some institutions. However, in practice, the role of mediation/conciliation is very limited and is currently far from a meaningful alternative to the ISDS system for various reasons.¹³² In this regard, China, with its unique culture in mediation/conciliation, could cooperate with the EU on integrating mediation/conciliation with formal/binding proceedings. China could also contribute toward making ICS more flexible and distinct from the existing dispute settlement system, through institutional reform as well as capacity building.

B. A Developing Country-Friendly MIC

First, given that the endorsement of developing countries has been essential for the conclusion of multilateral treaties throughout history, the composition of this permanent structure should

¹³² See Margrete Stevens & Ben Love, *Investor-State Mediation: Observations on the Role of Institutions*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION - THE FORDHAM PAPERS 2009, 389-417 (Arthur W. Rovine ed. 2010).

adequately reflect the interests of both developed and developing countries.¹³³ Hence, the geographical distribution of adjudicators is of great importance. Increasing the number of adjudicators from developing countries and strengthening the mechanisms of exchange and training would be particularly attractive qualities for developing countries. Second, the structuring of a permanent body should allow such fairness considerations, i.e., differential treatment as regards costs vis-à-vis less equipped states.

C. An Investor-Friendly MIC

It should not be forgotten that the initial purpose of the ISDS system is to provide investors with a neutral forum to settle disputes with host states, leading to good governance by eliminating arbitrary treatment of foreign investment. After all, investors are the main initiators and customers of the ISDS system. Since the envisaged MIC may be coexistent with existing ISDS system, if MIC seems unsound and unattractive, investors could still choose traditional ISDS either according to treaty arrangement or by forum shopping.¹³⁴ First, it is vital to ensure that the adjudicators are without pro-state bias; the selection of judges should allow for party autonomy to the greatest possible extent. Second, the MIC system must be devised so as to secure timely and inexpensive settlement of disputes, in order to facilitate the access of SMEs. Promptness of the proceeding should not be undermined for the sake of having an appellate mechanism; rather, any appeals should be introduced in a way that does not necessarily delay the final disposition of the dispute.¹³⁵

¹³³ See Gabriel Bottini, *Reform of the Investor-State Arbitration Regime: The Appeal Proposal*, in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY*, 462 (Jean E. Kalicki & Anna Joubin-Bret eds. 2015).

¹³⁴ For example, despite the existence of the Arab Investment Court, an Oman investor filed an ISDS case against the Republic of Yemen to ICSID tribunal in 2006 (*Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No.ARB/05/17).

¹³⁵ Jaemin Lee, *Introduction of an Appellate Review Mechanism for International Investment Disputes: Expected Benefits and Remaining Tasks*, in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY*, 493 (Jean E. Kalicki & Anna Joubin-Bret eds. 2015).

D. From MIC to a Substantial Multilateral Investment Treaty

It is now widely accepted that improvements to the ISDS system should go hand in hand with the progressive development of substantive international investment law, which is currently characterized by a multi-layered and multi-faceted network of agreements.¹³⁶ Since treaty-based investment arbitration involves the application of the substantive provisions of IIAs, it is difficult to envisage how discrepancies and contradictions between awards can be addressed without a single investment agreement. Therefore, the EU should become more ambitious by launching a multilateral investment agreement with both substantive provisions and procedural provisions, including MIC and recognition and enforcement clauses. Despite the two failed attempts on multilateral investment agreement by the OECD and one by the WTO, the conclusion of G20 Guiding Principles for Global Investment Policymaking may cause a new effort in the near future to become feasible.

VIII. CONCLUSIONS

Since the primary goal of the negotiation of the EU-China BIT is to facilitate and protect two-way investment, a balanced and effective ISDS system is essential to fulfill this function and make the negotiation of the treaty meaningful. Moreover, with the OBOR initiative, a fair, efficient and binding transnational ISDS system is crucial to protect Chinese outbound investment when ADR methods fails. Due to the deficiencies of *ad hoc* investor-state arbitration, as well as the common interests between the EU and China, it is advisable for China to cooperate with the EU on the design and establishment of the envisaged MIC.

Moreover, assessment of the core aspects of ICS/MIC reveals that a bilateral ICS has fundamental flaws – the composition of the tribunal could undermine the independence and impartiality of adjudicators. In comparison, MIC is more likely to provide institutional safeguards regarding the neutrality of adjudicators, the

¹³⁶ UNCTAD, IIA Issues Note No. 2, Investor-State Dispute Settlement: An Information Note on the United States and the European Union, at 13.

correction of errors and efficient resolution of investment disputes, subject to coordinated rules, measures and conditions. Therefore, the bilateral ICS, as a transitional mechanism, should be disregarded in the negotiating of an EU-China BIT.

Nonetheless, the divergences between the EU and China should also be addressed when negotiating the envisaged MIC. It is in the EU's interest to establish a MIC system due to its leading role in international arbitration, while China currently lacks both the ability and the willingness to make use of the rule of law model of dispute resolution. Therefore, the envisaged MIC should be inclusive enough to accommodate diverse interests and preferences. In other words, allowing MIC to cater to the needs of SMEs and developing countries and integrating MIC with non-adversarial dispute resolution means are crucial ways to distinguish it from traditional ISDS systems.