

## SYMPOSIUM ON GLOBAL LABS OF INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION

### THE INTERNATIONAL COMMERCIAL DISPUTE PREVENTION AND SETTLEMENT ORGANIZATION: A GLOBAL LABORATORY OF DISPUTE RESOLUTION WITH AN ASIAN FLAVOR

*Guiguo Wang*\* & *Rajesh Sharma*\*\*

The Second Belt and Road Forum for International Cooperation announced the establishment of the International Commercial Dispute Prevention and Settlement Organization (ICDPASO) in 2019. The ICDPASO was coordinated by the China Council for the Promotion of International Trade and the China Chamber of International Commerce, together with industrial and commercial organizations and legal service agencies from over thirty countries and regions including the European Union, Italy, Singapore, Russia, Belgium, Mexico, Malaysia, Poland, Bulgaria, and Myanmar.<sup>1</sup> It was launched on 15 October 2020. As its title indicates, ICDPASO's mandate to provide dispute resolution services is not confined to the Belt and Road Initiative (BRI) countries but includes resolving any disputes that the parties entrust to its jurisdiction. The ICDPASO aims to serve as a “legal hub” to resolve commercial and investment disputes effectively, efficiently, and practically.<sup>2</sup> Unlike other multilateral dispute resolution forums, it is intended to provide an Asian-centric multilateral dispute resolution forum. This essay, the first on the subject of the ICDPASO, discusses how the ICDPASO can serve as a global laboratory for experimenting and innovating in dispute resolution with the potential to impact the landscape of international law, in particular its innovative use of mediation, good offices, and appeal processes to prevent and resolve disputes arising from the BRI. As BRI projects aim to establish infrastructure and digital connectivity within BRI countries and regions for trade and development, this essay argues that the dispute resolution process under the ICDPASO should take into account the overall development of a country or region. The essay concludes that the ICDPASO will be a game changer by introducing an Asian way of resolving disputes.

#### *Background to the ICDPASO*

The ICDPASO aims to be a global legal hub providing “one-stop” dispute resolution services. China had already established the China International Commercial Court (CICC) to deal with potential BRI disputes, but

\* *President of the Academy of International Strategy and Law and University Professor of Zhejiang University, Hangzhou, China; President of International Academy of the Belt and Road, Hong Kong, China.*

\*\* *Senior Lecturer, RMIT University, Melbourne, Australia.*

<sup>1</sup> See the [List of Deliverables of the Second Belt and Road Forum for International Cooperation](#). This is the highest-level biennial forum where the heads of states of the Belt and Road countries meet and agree on the Belt and Road Initiatives and related cooperation.

<sup>2</sup> Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 228 (2020); Matthew Eric, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L L. 226 (2020).

it has limited jurisdiction and faces practical difficulties.<sup>3</sup> For instance, the CICC is authorized to resolve only civil and commercial disputes between equal parties.<sup>4</sup> As such, it has no jurisdiction over a dispute between a private investor (Chinese or foreign) and a foreign state or a foreign investor and the Chinese government because such disputes are not between equal parties. Needless to say, no foreign investor would wish to have its dispute with the host government be resolved by a local court like the CICC.<sup>5</sup> In contrast, the ICDPASO is intended to be an effective forum for commercial and investment disputes and has secured wide support from international business and legal circles. Although the ICDPASO will use creative techniques that are congruent with Asian cultures to prevent or resolve disputes, it must also adopt best practices in international commercial dispute resolution.

A group of experts (Expert Group) from ten countries and regions was appointed to draft dispute settlement rules for the ICDPASO to ensure that it fulfils its goal of being an efficient, effective, and practical dispute settlement mechanism. The Expert Group drafted four sets of rules: Mediation Rules for International Commercial and Investment Dispute Settlement, Rules on International Commercial Arbitration, Investor-State Arbitration Rules, and Appeal Procedures. In preparing the rules, the Expert Group recognized that the ICDPASO may resolve BRI and non-BRI disputes from around the world, including commercial disputes, investment disputes, and state-to-state disputes. The ICDPASO therefore provides procedures that cater to the needs of different disputants with diverse dispute resolution preferences including good offices, mediation, and arbitration with an option for appeal. The Expert Group submitted the rules (ICDPASO Proposed Rules) to the China Council for the Promotion of International Trade in July 2020. The following section highlights the unique and innovative features of the ICDPASO Proposed Rules.

### *Emphasizing Mediation in Dispute Settlement*

Designed to be a dispute resolution body with an Asian flavor, the ICDPASO must adopt processes that largely reflect Asian traditions in dispute resolution, such as mediation. For example, in China, mediation has survived many sociopolitical and economic reforms over several centuries.<sup>6</sup> The Chinese practice of combining mediation with litigation or arbitration has also begun to serve as a model beyond Chinese borders.<sup>7</sup> This growing acceptance of mediation around the world prompted the Expert Group to propose mediation as the first—albeit not compulsory—step in resolving commercial and state-to-state disputes before the ICDPASO.

Mediation has also begun to be emphasized in investment disputes, though its potential is yet to be fully realized.<sup>8</sup> Alternative dispute resolution processes in bilateral investment treaties and other treaties with investment provisions show that only 1 percent of treaties use mediation and 3 percent use conciliation.<sup>9</sup> Even assuming

<sup>3</sup> Li Huanzhi, *China's International Commercial Court: A Strong Competitor to Arbitration*, KLUWER ARB. BLOG (Sept. 30, 2018).

<sup>4</sup> Wei Shun, *International Commercial Court in China: Innovations, Misunderstandings and Clarifications*, KLUWER ARB. BLOG (July 4, 2018).

<sup>5</sup> To say the least, the CICC faces challenges of “legitimacy, jurisdiction, and enforceability” as highlighted by Pamela Bookman. Pamela K. Bookman, *Arbitral Courts*, VA. J. INT'L L. (forthcoming).

<sup>6</sup> Guiguo Wang, *Mediation in the Globalized Business Environment*, 17 ASIA PAC. L. REV. 47 (2009).

<sup>7</sup> For example, Commercial Arbitration Act 2010 No.61 of the New South Wales, Article 27D allows an arbitrator to act as a mediator in the same dispute if (a) the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not the parties intend to continue with the arbitration), or (b) each party has consented in writing to the arbitrator so acting.

<sup>8</sup> Catherine Kessedjian, et al., *Mediation in Future Investor-State Dispute Settlement* (Academic Forum on ISDS Concept Paper 2020/16, Mar. 5, 2020).

<sup>9</sup> *Id.*

that there is no significant difference between mediation and conciliation,<sup>10</sup> a combined 4 percent use of these processes shows an alarmingly low percentage of uptake. According to the UN Commission on International Trade Law (UNCITRAL), many countries have indicated that the increased use of mediation and conciliation instead of arbitration and national courts would mitigate the current concerns regarding costs and length of proceedings in investor-state dispute settlement (ISDS).<sup>11</sup> In China's view, the use of mediation allows "the preservation of long-term relationships and the protection of foreign investment through appropriate measures, thus serving the purpose of averting disputes and avoiding intensification of conflicts."<sup>12</sup> The International Center for the Settlement of Investment Disputes (ICSID) recently also expanded its conciliation rules and added mediation to the Additional Facility rules.<sup>13</sup> The emphasis on mediation—for both commercial and investment disputes—in the ICDPASO Proposed Rules thus also comports with the global trend. Of course, the real test of ICDPASO will involve an assessment of how the rules are enforced in practice.

The ICDPASO Proposed Rules do not make mediation a precondition for arbitration. The parties must nonetheless inform the tribunal whether they have attempted mediation and, if not, they will be encouraged to do so. In this regard, arbitration tribunals must refrain from exerting pressure on the parties so as to not make the process mandatory.<sup>14</sup> Under the Proposed Rules, the parties may choose to mediate at any stage of the dispute settlement process; they can switch back and forth from mediation to arbitration and arbitration to mediation. However, this may lead to difficulties in practice. For instance, the Proposed Rules require mediators not to serve as arbitrators and vice-versa unless the parties agree otherwise. One issue to be resolved is who should serve as mediator(s) if the parties decide to switch back to mediation during the arbitration process? The easiest option would be to resort to the original mediator(s). One may question whether this second attempt at mediation will be successful, given the fact that it was not successful originally.

Perhaps one reason for mediation's previous unpopularity was the lack of enforceability of settlement agreements resulting from mediation. With the coming into force of the UN Convention on International Settlement Agreements Resulting From Mediation (the Singapore Convention), however, such concerns should be resolved.<sup>15</sup> Under the Singapore Convention, even a party from a non-signatory state can enforce a mediation settlement agreement in a country that is a signatory, as there is no connection between the seat of mediation and the application of the Singapore Convention.<sup>16</sup> In the context of mediation of investment disputes, some argue that investors may still prefer not to mediate because a state may make a reservation to not apply the Singapore Convention with respect to the state or state entities.<sup>17</sup> Such concerns may not be well founded. Out of fifty-three states that have signed the Convention so far, only three (Belarus, Iran, and Saudi Arabia)

<sup>10</sup> UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of 2018, art. 1.3 does not distinguish between conciliation and mediation.

<sup>11</sup> Note by the Secretariat, [UNCITRAL Working Group-III \(Investor-State Dispute Settlement Reform\), Thirty-Ninth Session](#), UN Doc. A/CN.9/WG.III/WP.190, at para. 30 (Mar. 30-Apr. 3, 2020) [hereinafter Note by Secretariat].

<sup>12</sup> [Submission from the Government of China](#), UN Doc. A/CN.9/WG-III/WP.177 at 5, as mentioned in the [Note by the Secretariat](#), *supra* note 11, at para. 30.

<sup>13</sup> [Proposals for Amendment of the ICSID Rules, Working Paper #4](#) (Feb. 2020).

<sup>14</sup> In a survey on ISDS, 30% of respondents "strongly favoured" and 34% of respondents "somewhat favoured" mandatory mediation before commencing arbitration. See [Kessedjian et al.](#), *supra* note 8.

<sup>15</sup> [UN Convention on International Settlement Agreements Resulting from Mediation](#), Dec. 20, 2018, effective on Sept. 12, 2020.

<sup>16</sup> Timothy Schnabel, [The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements](#), 19 PEPPERDINE DISP. RESOL. L.J. 1 (2019); Rajesh Sharma, [The Singapore Convention and its Impact on Domestic Courts](#), 1 ASIA PAC. MED. J.1 (2019).

<sup>17</sup> [Kessedjian et al.](#), *supra* note 8.

have made such reservations.<sup>18</sup> Mediation has the potential to contribute significantly to the resolution of disputes relating to international trade, commerce, and investment.<sup>19</sup> In this regard, the ICDPASO Proposed Rules and, in particular, the experience of Asian countries in mediation will contribute to the increasing openness towards the use of mediation for amicable resolution of disputes.

### *Preventing Disputes Through the Good Offices/Grievance System*

The good offices/grievance system is mainly directed to foreign investors' disputes with the host state. A foreign investor aggrieved by a host state might be compelled to resort to ISDS. If an ISDS system had a mechanism to bring the investor and the state to the table, many investment claims could potentially be resolved without full-blown investment arbitration.<sup>20</sup> The ICDPASO Proposed Rules contain a clear, transparent, and well-structured system in this regard, incorporating the experience of China, Singapore, and other Asian countries, which emphasize dispute prevention.

Under the Proposed Rules, the Secretary-General discharges the duty of good offices of the ICDPASO. In this role, the Secretary-General must first hold a preliminary meeting with the investor to understand the grounds for the complaint and then fix an appointment with the relevant host government entity to gather information on its position and how it proposes to deal with the complaint. The Secretary-General must then inform the investor about the host government's proposal. If the investor accepts the proposal, the case will be closed. If not, the investor can choose another means of resolving the dispute, such as mediation or arbitration. The Secretary-General may also consult with both parties to assess if they might want to reconsider the proposal. If the parties agree to another consultation, the Secretary-General will repeat the process.

Bilateral Investment Treaties, Free Trade Agreements, and other multilateral dispute resolution fora do not traditionally use a good offices system. Even if they include good offices, they refrain from providing a step-by-step process to be followed which has the effect of discouraging parties from using good offices. The ICDPASO Proposed Rules can help develop the model of a well-structured good offices system as a dispute prevention mechanism, though it will face some operational hurdles. The traditional non-use of good offices may also relate to the trust and authority enjoyed by the entity in charge of conducting the process. Thus, whether the host country trusts the Secretary-General will be crucial for the system to function smoothly. Difficult as it is to gain the trust of one host state, it will be still more challenging for the Secretary-General to secure the trust of multiple host states, which will be consequential for the success of the system.

### *Enhancing Predictability Through the Permanent Appeal Tribunal*

In investment arbitration, the lack of an appeals mechanism breeds inconsistent decisions, which create uncertainty. The World Trade Organization (WTO) Appellate Body has ensured consistent interpretation of legal provisions leading to enhanced certainty and predictability, thereby reducing the possibility of a multiplicity of similar claims being made before the panels.<sup>21</sup> Taking the WTO Appellate Body as a model, the ICDPASO Proposed

<sup>18</sup> See the [Status Report of the Singapore Convention](#).

<sup>19</sup> Wang, *supra* note 6.

<sup>20</sup> Locknie Hsu, *Policy Paper on National Good Offices*, in YIDAIYILU ZHENGDUAN JIEJUE JIZHI (一带一路争端解决机制) [Dispute Resolution Mechanism for the Belt and Road Initiative] 357 (Wang Guiguo (王贵国) et al. eds., 2016). The book was published by Zhejiang University Press, and was subsequently translated into Russian and English.

<sup>21</sup> Guiguo Wang, [The Belt and Road Initiative in Quest for a Dispute Resolution Mechanism](#), 25 ASIA PAC. L. REV. 1 (2017).

Rules recommend establishing an appellate tribunal that may also cover commercial arbitration if the parties so agree.

In the proposed system, an appeal against an award can be made on the ground that the arbitral tribunal has: (a) erred in the interpretation or application of the applicable law; (b) manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or (c) departed from a fundamental rule of procedure in handling a case. The ICDPASO appellate tribunal is authorized to conduct appeals on a de novo basis so that, unlike ICSID's annulment committee, the appellate tribunal may reach its own legal conclusions rather than simply analyzing the validity of the arbitral tribunal's application and interpretation of the law. In order to satisfy concerns about legal legitimacy, it is important that in interpreting the applicable treaties, agreements, and any other international instruments, the appellate tribunal is mindful of its international character and the need to promote uniformity and certainty in the application of international instruments.<sup>22</sup> Since establishing a permanent appeal tribunal will be costly, the decision to establish an appellate body and the details of its administrative framework are left to the judgment of the participating states.

#### *Including Broader Public Impact in Decision-Making*

The BRI projects are intended to connect countries and regions to facilitate trade and commerce in a way that is ultimately beneficial for their overall development. In the typical case of dispute settlement through arbitration, arbitrators are expected to reach a decision based on the facts in dispute and the applicable law, and are generally not concerned with any wider impact their decision may have on the overall development of the country or region.<sup>23</sup> The very existence of a dispute related to a development project may cause the project to stall, posing problems for the community that is expected to benefit from its completion. The economic and social difficulties in connection with the Myitsone Dam project in Myanmar, the China-Pakistan Economic Corridor in Pakistan, the Hambantota Port in Sri Lanka, and the Railway Projects in Kenya are examples in this regard. The proposed ICDPASO rules are sensitive to these issues in requiring the decision-makers, i.e., arbitrators, to consider the developmental needs of the country and the region concerned in applying the rules while making a decision. Arbitrators and mediators must also consider the culture and traditions of the countries concerned, specifically in terms of their practices in interpreting contracts, rules, laws, or treaties.<sup>24</sup> By keeping these factors in mind, arbitral tribunals' decisions could help to promote strong, sustainable, balanced, and inclusive growth to improve people's quality of life.<sup>25</sup>

#### *ICDPASO—A Game Changer?*

The ICPASO is a new and different type of forum with modern rules drafted by international experts and with support from multiple nations. It aims at developing a multilateral dispute resolution body with progressive rules grounded in Asian culture and tradition. It provides an opportunity for Asian and other countries to participate in and develop the international commercial dispute settlement system. It is hoped that this new body will encourage parties to work towards preventing disputes from occurring and to resolve them amicably when they do in fact occur. The ICDPASO decision-makers must bear in mind the broader development goals of BRI projects in

<sup>22</sup> [Bookman](#), *supra* note 5.

<sup>23</sup> Joost Pauwelyn, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators are from Venus* (Oct. 1, 2015).

<sup>24</sup> *Id.*

<sup>25</sup> See [Joint Communique of Leaders' Round Table of the 2nd Belt and Road Forum for International Cooperation](#).

reaching a solution and ensure efficient and effective enforcement of decisions for the benefit of the community at large and not simply for the winning party. Whether the ICDPASO will be able to achieve these goals will depend on a number of factors. In our view, building, maintaining and developing professionalism, impartiality, multilateralism and openness will be key to the success of the ICDPASO. An efficient, effective, and practical ICDPASO dispute settlement mechanism will be key to the successful completion and operation of the BRI projects and the public benefits they are intended to secure.