# ARBITRAL TRIBUNAL'S JURISDICTION IN CHINESE INVESTMENT TREATIES WITH THE BELT AND ROAD COUNTRIES: A BUMPY ROAD?

ZONGYAO LI*



## I. INTRODUCTION

It has been almost a decade since President Xi Jinping first announced the launch of the Belt and Road Initiative (BRI) during his visit to Kazakhstan in September 2013.[1] "Belt" and "Road" stand for "the Silk Road Economic Belt" and "the 21st-Century Maritime Silk Road," respectively.[2] In es-

* LL.M. candidate in the International Business Regulation, Litigation, and Arbitration Program, Hauser Global Scholar, NYU School of Law; Research Fellow, Center for International Economic Law and Policy, Law School, University of International Business and Economics. I would like to thank Professor José Alvarez and Professor Brian King for providing helpful comments and suggestions, and Professor Manjiao Chi for his long-standing support to my research. I am also grateful to Alex Mason Pazmiño and Colton Jackson for their comments and edits to my earlier drafts. Any and all errors are my own.

1. *President Xi Proposes Silk Road Economic Belt*, CHINA DAILY (Sep. 7, 2013), https://www.chinadaily.com.cn/china/2013xivisitcenterasia/2013-09/07/content_16951811.htm (last visited Nov. 11, 2022).

2. The Silk Road Economic Belt focuses on bringing together China, Central Asia, Russia and Europe (the Baltic); linking China with the Persian Gulf and the Mediterranean Sea through Central Asia and West Asia; and connecting China with Southeast Asia, South Asia and the Indian Ocean. The 21st-Century Maritime Silk Road is designed to go from China's coast to Europe through the South China Sea and the Indian Ocean in one route, and from China's coast through the South China Sea to the South Pacific in the other. For more information, see the National Development and Reform

sence, the BRI aims to build trade and infrastructure networks connecting Asia with Europe and beyond.[3] According to the World Bank, once completed, BRI transport projects could reduce travel times along economic corridors by 12%, increase trade between 2.7% and 9.7%, increase income by up to 3.4%, and lift 7.6 million people out of extreme poverty.[4] The BRI is open to any country that is interested in the Initiative.[5] As of October 2022, 149 countries have joined the BRI by concluding a Memorandum of Understanding with China,[6] which typically only acknowledges the Parties' willingness to advance the BRI and does not create binding obligations.[7] Chinese State-owned enterprises (SOEs) play a predominant role in the BRI. The contract value with Chinese SOEs reportedly accounts for more than 70% in the BRI infrastructure projects.[8] In 2020, for example, the major players for BRI investments were al-

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Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China's: *Action Plan on the Belt and Road Initiative,* STATE COUNCIL OF CHINA (Mar. 30, 2015), http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm, (last visited Nov. 11, 2022).

3. *Xinhua,9 years on, economic ties closer among Belt and Road countries*, XINHUA HEADLINES (Aug. 17, 2022), https://english.news.cn/20220817/bc85b76443b54e738fde9c2e952d835a/c.html.

4. *Belt and Road Initiative*, WORLD BANK (Mar. 29, 2018) https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative.

5. *China's Belt and Road plan 'open' to all nations*, CHINA DAILY (Apr. 18, 2015, 3:04 PM), http://english.www.gov.cn/news/top_news/2015/04/18/content_281475091262006.htm.

6. *Belt and Road Portal*, YIDAIYILU, https://www.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10037&cur_page=1, (last visited Nov. 11, 2022).

7. Huaxia Lai & Gabriel Lentner, *Paving the Silk Road BIT by BIT: An Analysis of Investment Protection for Chinese Infrastructure Projects Under the Belt & Road Initiative*, *in* THE BELT AND ROAD INITIATIVE, 250, 252 (Chaisse and Górski, eds. 2017); *see* Memorandum of Understanding on Cooperation within The Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative, Latvia-China, part. V, 2016 (providing an example that this Memorandum of Understanding between China and Latvia "*does not constitute legally binding obligations for the two Participants*").

8. *Xinwei Zhen: Central SOEs' high-quality participation in the BRI is of great significance* (Apr. 22, 2019), https://www.yidaiyilu.gov.cn/xwzx/roll/86585.htm (last visited Nov. 11, 2022).

most exclusively Chinese SOEs, with the biggest non-SOE investor, Alibaba, ranking fifteenth in size of investment.[9]

The BRI is living up to its aim. It is reported that as of 2020, some 1,821 BRI projects had been announced, with a value of $2.3 trillion.[10] To put the number in context, if the BRI were a country, it would be ranked as the world's eighth-largest economy.[11] To carry out the BRI effectively, China needs a robust investment treaty regime with the BRI countries that protects the interests of the Chinese investors. This is necessary not only because of the size of the investment at stake, but also because many of the BRI countries have a low "ease of doing business" ranking—meaning that investing in those countries could engender significant risks[12]—and many BRI projects call for sizable up-front capital expenditures that require long-term horizons in order to generate returns.[13]

Investor-State arbitration has become a popular and powerful tool for foreign investors to resolve disputes with a host State, as it provides investors access to "an effective international remedy" outside the courts of the host State.[14] However, the jurisdiction of an arbitral tribunal is subject to the wording of the specific international investment agreement (IIA). This commentary seeks to present an empirical study of the Chinese IIAs with the BRI countries from the perspective of an arbitral tribunal's jurisdiction, taking into account the distinc-

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9. Christoph Nedopil, *China's Investments in the Belt and Road Initiative (BRI) in 2020*, GREEN BRI CTR., INT'L INST. OF GREEN FIN, 13-14 (Jan. 2021) https://greenfdc.org/wp-content/uploads/2021/01/China-BRI-Investment-Report-2020.pdf.

10. BRI Connect: An Initiative in Numbers, REFINITIV, at 7, https://www.refinitiv.com/content/dam/marketing/en_us/documents/reports/belt-and-road-initiative-in-numbers-issue-5.pdf (last visited Nov. 11, 2022).

11. *Id.*

12. For example, the BRI countries with the highest construction volume in 2021 were Iraq, Serbia, Indonesia, Tanzania, and Egypt, and their ease of doing business ranking according to the World Bank are 172, 44, 73, 141, and 114 respectively. Christoph Nedopil, *Countries of the Belt and Road Initiative*, GREEN FIN. & DEV. CTR., https://greenfdc.org/countries-of-the-belt-and-road-initiative-bri/, (last visited Nov. 11, 2022); *Doing Business 2020*, WORLD BANK GROUP, at 4, https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf, (last visited Nov. 11, 2022).

13. Dini Sejko, *Protecting Foreign Direct Investment in the Belt and Road Countries in* HKUST IEMS Thought Leadership Brief No. 33 (September 2019).

14. URSULA KRIEBAUM, ET. AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 340 (3d ed. 2022).

tive characteristics of the BRI investments. Section II provides a high-level review of Chinese IIAs with BRI countries by categorizing them into four generations. Section III explores the jurisdictional challenges that BRI investors may have to overcome before commencing an arbitration. Section IV concludes that since China is not very likely to conclude new IIAs or update existing ones with the BRI countries, it is important for BRI investors to plan their investments carefully to maximize their protection under the IIAs.

## II. Brief Overview of Chinese IIAs with the BRI Countries

China has one of the most expansive networks of IIAs, including stand-alone bilateral investment treaties (BITs), multilateral investment treaties, and other international agreements containing a chapter on investment protection, such as a free trade agreement (FTA). Among the 149 BRI countries, 93 have at least one IIA in effect with China.[15] It has been suggested that Chinese IIAs can be roughly divided into four generations,[16] with each generation having distinctive investor-State arbitration clauses as detailed below.

Following the adoption of the "open-door" policy in the late 1970s, China started its IIA program mainly to attract in-

15. The BRI countries that do not have an existing IIA with China are Afghanistan, Angola, Antigua and Barbuda, Benin, Bhutan, Botswana, Burundi, Central Africa, Chad, Comoros, Congo (RDC), Cook Islands, Cote d'Ivoire,, Djibouti, Dominica (Commonwealth of), Dominican Republic, Ecuador, El Salvador, Eritrea, Fiji, Gambia, Grenada, Guinea, Guinea-Bissau, Iraq, Jordan, Kenya, Kiribati, Lesotho, Liberia, Libya, Maldives, Mauritania, Micronesia, Montenegro, Namibia, Nepal, Niger, Niue, Panama, Rwanda, Samoa, Senegal, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Sudan, Suriname, Timor-Leste, Togo, Tonga, Uganda, Vanuatu, Venezuela, and Zambia. Some countries have multiple IIAs with China. For example, the 2001 China-Myanmar BIT and the 2009 China-ASEAM Investment Agreement is in effect between China and Myanmar. For the Chinese IIAs, see *Bilateral Investment Treaty*, Ministry of Commerce of China (Dec. 12, 2016), http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml; *China*, U. N. Conf. on Trade and Dev., https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china (last visited Nov. 11, 2022).

16. *See, e.g.*, Axel Berger, *Hesitant Embrace: China's Recent Approach to International Investment Rule-Making*, 16 J. of World Inv. & Trade 843, 844-845 (2015). On different approaches of categorizing Chinese IIAs, see, e.g., Wei Shen, Decoding Chinese Bilateral Investment Treaties 278-280 (2021).

ternational investors.[17] Unsurprisingly, China initially had reservations about the notion of arbitrating disputes with foreign investors. This is reflected in the first generation of Chinese IIAs (from 1982 to the early 1990s), which offer either no access to arbitration or only *ad hoc* arbitration confined to disputes as to the amount of compensation for expropriation. A typical example is the 1991 China-Hungary BIT, which provides that "[a]ny dispute between either Contracting State and the investor of the other Contracting State concerning the amount of compensation for expropriation, may be submitted to an arbitral tribunal."[18]

The second generation of Chinese IIAs (from the early to late 1990s) similarly confine the jurisdiction of an arbitral tribunal to matters concerning the amount of compensation for expropriation. However, these treaties provide the International Centre for Settlement of Investment Disputes (ICSID) as a readily available forum for arbitration. This is because China signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) on February 9, 1990, and ratified it three years later on January 7, 1993. As an example, Article 9(3) of the China-Iceland BIT provides that "a dispute involving the amount of compensation for expropriation. . . may be submitted. . . to the International Centre for Settlement of Investment Disputes (ICSID) or to an ad hoc arbitral tribunal."[19]

The third-generation treaties (from the late 1990s to the late 2000s) significantly expand the scope of arbitration by encompassing virtually all types of disputes between an investor and a host State. This fundamental shift is primarily due to the growth of Chinese outbound investment and the competition for inbound investment that necessitates liberalizing investment treaties.[20] For instance, the China-Barbados BIT provides

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17. NORAH GALLAGHER AND WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE ¶ 1.66 (2009).

18. Agreement China Concerning the Encouragement and Reciprocal Protection of Investments, Hungary-China, art. 10(1), 1991.

19. Agreement Concerning the Promotion and Reciprocal Protection of Investments, China-Iceland, art. 9(3), 1994.

20. GALLAGHER AND SHAN, *supra* note 17, ¶ 1.79.

that "[a]ny dispute concerning an investment" may be submitted to an ICSID or UNCITRAL arbitration.[21]

The fourth generation of Chinese IIAs, in line with recent IIAs concluded by other countries, takes a more balanced approach in terms of protecting the interests of investors and the host States. Some of these treaties contain extensive and in-depth provisions on investor-State arbitration, often limiting the jurisdiction of an arbitral tribunal to claims for breach of particular provisions of the IIA. For instance, the 2012 China-Canada BIT contains fourteen provisions on arbitration, regulating issues from prerequisites for submission of a claim to arbitration to qualifications of arbitrators and provisional relief.[22] Pursuant to Article 20 of the BIT, only claims for breach of certain provisions of the BIT may be submitted to arbitration.[23]

## III. Jurisdictional Hurdles for BRI Investors

Establishing the jurisdiction of an arbitral tribunal is critical in investor-State arbitration. Of the cases that were ultimately decided in favour of the State, about half were dismissed for lack of jurisdiction.[24] In addition to the common jurisdiction objections that may surface, the BRI-related disputes present unique jurisdictional challenges as discussed in this section below.

### A. *SOEs and the Definition of Investor*

In the two cases where Chinese SOEs sought protection under the applicable IIAs, the respondent States objected to the tribunal's jurisdiction on the ground that they were owned by the Chinese government and therefore not a national or investor of China.[25] In *BUCG v. Yemen*, Yemen argued that the

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21. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Barbados, art. 9, 1998.

22. Agreement for the Promotion and Reciprocal Protection of Investments, Canada-China, art. 19-32, 2012.

23. Agreement for the Promotion and Reciprocal Protection of Investments, Canada-China, art. 20, 2012.

24. *Investor-State Dispute Settlement Cases: Facts and Figures 2020*, IIA Issues Note, UNCTAD, at 4 (Sept. 6, 2021).

25. On this point, see Ming Du, *The Status of Chinese State-owned Enterprises in International Investment Arbitration: Much Ado about Nothing?*, 20 Chinese J. Int'l L. 785 (2021).

Claimant, a construction company owned by the government of Beijing Municipality is not "a national of another Contracting State" under the ICSID Convention because it is "an agent of the Chinese Government and discharges governmental functions."[26] On that basis, Yemen alleged that the Tribunal lacked jurisdiction under the ICSID Convention. The Tribunal disagreed, finding that the evidence does not establish that the Claimant "was acting as an agent of the Chinese State" and that the Claimant "was clearly not exercising a Chinese government function on the airport in Yemen."[27]

In *China Heilongjiang v. Mongolia*, Mongolia asserted that two of the Claimants, both Chinese SOEs, were not covered by the definition of "investor" under the bilateral investment treaty between China and Mongolia. Specifically, Mongolia argued, among other things, that the two Claimants were "in fact 'quasi-instrumentalities of the Chinese government.'"[28] The Tribunal rejected this objection because it "d[id] not find any evidence to support. . . a conclusion that [the Claimants] acted under the Chinese Government's 'express instruction to invest abroad in order to serve China's foreign policy goals.'"[29]

While the SOE objection was denied, it is crucial to note that in both instances, the objections were turned down on factual grounds. In other words, it is possible that the objection would be upheld if there was greater proof that the Claimants were truly acting at the instruction of the Chinese government. This can be particularly relevant in the context of BRI disputes where there is potentially a stronger argument that the SOEs' investments are motivated, not by commercial objectives, but by policy considerations. For example, it has been observed that the E.U. is concerned that China is using BRI investment led by SOEs to advance its 'divide and rule' policy and to increase its influence in Europe.[30] Therefore, the risks of considering a Chinese SOE investor in BRI as "*an*

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26. Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, ¶ 29 (May 31, 2017).

27. *Id.* ¶¶ 39, 43.

28. China Heilongjiang International Economic & Technical Cooperative Corp., et. al. v. Mongolia, PCA Case No. 2010-20, Award, ¶ 408 (Jun. 30, 2017).

29. *Id.* at ¶ 418.

30. Wei Yin, *The Role of Chinese State-Owned Investors and OBOR-Related Investments in Europe: the Implication of the China-EU BIT, in* THE BELT AND ROAD

*agent*" or "*quasi-instrumentalities*" of China can be more significant.

A number of the recent Chinese IIAs expressly state that SOEs are protected investors, likely in recognition of this difficulty. For instance, the 2009 China-ASEAN Investment Agreement declares that its protection extends to any duly constituted legal entity, "whether for profit or otherwise, and whether privately-owned or governmentally-owned."[31] Such definition, which only appears in a limited number of treaties,[32] may be able to guarantee that the Chinese SOEs participating in the BRI are covered by the relevant treaties.

### B. *Limited scope of arbitration in earlier IIAs*

As discussed above, one important feature of the first- and second- generations of Chinese IIAs is that they only allow disputes as to the amount of compensation for expropriation to be submitted to international arbitration. Similar provisions, some of which are also found in IIAs of former Soviet countries, have given rise to primarily three lines of cases.[33]

The first line of cases interprets these clauses expansively, to the effect that the tribunal may determine, not only the amount of compensation for expropriation, but also other issues pertaining to it, such as the occurrence or the legality of the expropriation. *Tza Yap Shum v. Peru* is a representative example. The tribunal in that case found that the term "involving the amount of compensation for the expropriation" must be interpreted to cover both the amount and the other issues normally inherent in an expropriation, including whether an

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INITIATIVE: LAW, ECONOMICS, POLITICS 284, 299 (Chaisse and Górski, eds., 2018).

31. Agreement on Investment of the Framework Agreement on Comprehensive Economic Co- Operation, China-Association of Southeast Asian Nations, art. 1(f), 2009.

32. *See, e.g.*, Agreement on the Promotion and Protection of Investments, China-Uzbekistan, art. 1(2)(b), 2011 ("[t]*he term 'enterprise' means any entities. . . irrespective of whether or not for profit and whether it is owned or controlled by private person or government or not*").

33. On this point, see, e.g., Juan Du, *Restrictive ISDS clauses under Chinese BITs: interpretations and implications for China,* 30 ASIA PAC. LAW REV. 382 (2022).

expropriation has taken place.[34] Other cases reaching a similar conclusion include *BUCG v. Yemen*,[35] *Sanum v. Laos*,[36] and *Rent4 v. Russia*.[37]

The second line of cases interprets these clauses restrictively, finding that the tribunal's jurisdiction is limited to the amount of compensation, and does not include any other issues. For instance, in *Heilongjiang v. Mongolia*, the tribunal was asked to interpret Article 8(3) of the China-Mongolia BIT, which provides that "a dispute involving the amount of compensation for expropriation. . . may be submitted. . . to an ad hoc tribunal."[38] The tribunal drew a distinction between "a dispute involving the compensation for expropriation" and "a dispute involving the amount of compensation for expropriation," and found that the latter only covers disputes as to whether the compensation is "equivalent to the value of the expropriated investments."[39] The tribunals in *Berschader v Russia* and *Austrian Airlines v Slovakia* also adopted such view.[40]

The third line of cases shares the restrictive interpretation of the second category, but sought to expand the tribunal's jurisdiction by reference to the most-favoured-nation (MFN) clause. The *RosInvestCo v Russia* tribunal, for example, after finding that it "has no jurisdiction as to the occurrence and validity of an expropriation" under the investor-State arbitration provision in the UK-USSR BIT,[41] proceeded to consider the scope of its jurisdiction in light of the MFN provision in that treaty, which provides that "[n]either Contracting Party

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34. Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 188 (Jun. 19, 2009).

35. Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, ¶ 109 (May 31, 2017).

36. Sanum Investments Limited v. Lao People's Democratic Republic, PCA Case No. 2013-13, Award on Jursidction, ¶ 342 (Dec. 13, 2013).

37. Renta 4 S.V.S.A. et. al. v. The Russian Federation, SCC No. 24/2007, Award on Preliminary Objections, ¶ 67 (Mar. 20, 2009).

38. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Mongolia, art. 8(3), 1991.

39. Heilongjiang v. Mongolia, *supra* note 28, ¶¶ 443-5.

40. Vladimir Berschader and Moise Berschader v. The Russian Federation, SCC Case No 080/2004, Award, ¶ 153 (Apr. 21, 2006); Austrian Airlines AG v The Slovak Republic, UNCITRAL, Final Award, ¶¶ 107-8 (Oct. 9, 2009).

41. RosInvestCo UK Ltd. v. the Russian Federation, SCC Case No. V079/2005, Award on Jurisdiction, ¶ 123 (Oct. 1, 2007).

shall in its territory subject investors of the. other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investors of any third State."[42] According to the tribunal, this provision allowed RosInvestCo to incorporate a broader investor-State arbitration provision in the BIT between Denmark and Russia, and the tribunal's jurisdiction therefore extended beyond the issue of the amount of compensation.[43]

A quick survey of these cases reveals the inconsistent approaches adopted by arbitral tribunals when dealing with substantially similar treaty provisions. The second approach can be particularly concerning for BRI investors as it practically limits the jurisdiction of an arbitral tribunal to the circumstance where an expropriation has been formally proclaimed by the host State,[44] which typically only occurs in direct expropriations that have become rare in modern times.[45] Therefore, BRI investors investing in countries with first- and second- generations of Chinese IIAs may face a significant jurisdictional hurdles when it comes to arbitrating disputes with the host State.

### C. *The Pre-arbitration Administrative Review Requirement*

While the third- and fourth- generations of Chinese IIAs expand the jurisdiction of an arbitral tribunal, the majority of them also incorporate a pre-arbitration administrative review requirement that imposes a higher threshold for initiating arbitration. Such clauses can be divided into two categories depending on the obligation imposed on investors.[46] First, most of these provisions provide States the freedom to decide whether to subject foreign investors to administrative review procedures. For instance, the 2006 China-Pakistan FTA stipulates that arbitration may be submitted "provided that the

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42. Agreement for the Promotion and Reciprocal Protection of Investments, U.K.-U.S.S.R., art. 3(2), 1989.

43. RosInvestCo v. Russia, *supra* note 41, ¶¶ 130-33.

44. Heilongjiang v. Mongolia, *supra* note 28, ¶ 448.

45. KRIEBAUM, *supra* note 14, at 153.

46. *See* Manjiao Chi and Zongyao Li, *Administrative Review Provisions in Chinese Investment Treaties: 'Gilding the Lily'?*, 12 J. OF INT'L DISPUTE SETTLEMENT 125, 142-143 (2021) (classifying pre-ISA administrative review provisions in Chinese IAAs).

Party involved in the dispute may require the investors concerned to go through the domestic administrative review procedures specified by the laws and regulations of that Party."[47] Second, and exceptionally, some provisions are "obligatory," meaning that foreign investors must go through the relevant procedures before commencing an arbitration. As an example, the 2009 China-Malta BIT provides that investors "shall submit the dispute to a domestic court, tribunal or arbitration so as to exhaust the local procedures before proceeding to international arbitration."[48]

In practice, the effect of these provisions in Chinese IIAs has not been tested before an arbitral tribunal. The failure to comply with the "*obligatory*" provision or the host State's request to resort to an administrative review process may well deprive an arbitral tribunal of jurisdiction. In other words, these provisions may be considered as a condition precedent to the State's agreement to arbitration.

Arbitral decisions dealing with the local remedy provision in many Argentine IIAs may provide some guidance in this respect.[49] In *Wintershall v. Argentina*, the applicable treaty required prior submission of the dispute to the Argentine courts during an eighteen-month period before initiating arbitration, which was considered by the tribunal as requiring "the submission of the dispute to an International Arbitral Tribunal [be] conditioned upon prior fulfillment of this provision."[50] Other tribunals have reached a contrary conclusion, on the basis that resorting to domestic courts would have been "incredibly burdensome" and unable to "effectively solve the dispute,"[51] or that this requirement may be bypassed through incorporating

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47. Free Trade Agreement, Pakistan-China, art. 54(2), 2009.

48. Agreement on the Promotion and Protection of Investments, China-Malta, art. 9(3)(b), 2009 (this provision is also exceptional in that it requires exhaustion of remedies from "*a domestic court, tribunal or arbitration*").

49. On this point, see, e.g., Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 LAW & PRACT. IN INT. COURTS & TRIB. 1, 4 (2005).

50. Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, ¶ 122 (Dec. 8, 2008).

51. Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 585, 587 (Aug. 4, 2011).

another treaty without such requirement on the basis of the MFN guarantee.[52]

This highlights, again, the uncertainty surrounding the jurisdiction of an arbitral tribunal hearing disputes arising out of BRI projects. First, the exact requirement and effect of the administrative review clauses may vary depending on the precise wording, calling on investors to exercise caution when fulfilling the pre-arbitration administrative review requirements in accordance with the applicable treaty. Second, while resorting to domestic remedies may take time,[53] failing to do so can have serious consequences, such as losing the ability to resort to arbitration.

Notably, a pre-arbitration administrative review requirement is absent from several of the most recent Chinese IIAs, namely the 2015 China-Australia FTA, the 2018 China-Singapore FTA, and the 2019 China-Mauritius FTA.[54] This seems to suggest that China has started to eliminate the administrative review provision from its treaty-making practice, which could be advantageous to investors.

## IV. Conclusion

The number of investor-State arbitrations brought by Chinese investors has surged in the past few years. Statistics show that only three arbitrations had been brought by investors from Mainland China as of 2017. In comparison, Mainland Chinese investors have filed at least seven arbitrations in just the four years since 2018.[55] Interestingly, the Ministry of Commerce of China published Guidelines for Enterprises on Mak-

52. Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 109 (Aug. 3, 2004).

53. To address this issue, some (but not all) IIAs set forth a time limit for administrative review procedures. For instance, Article 3 of the Protocol to the Agreement on the Promotion and Reciprocal Protection of Investment, Russia-China, 2006, stipules that "*domestic review procedures. . . shall not in any case take a period of more than 90 days from the date when the administrative review body accepts the investor's application for administrative review procedures*".

54. Free Trade Agreement, Australia-China, 2015; Protocol to Upgrade the Free Trade Agreement, China-Singapore, app. 4, 2018; Free Trade Agreement, China-Mauritius, 2019.

55. Manjiao Chi and Qing Ren, Annual Observations on China Investment Arbitration, UNCITRAL Law Library, 22-3 (2022), http://www.bjac.org.cn/page/data_dl/中国国际投资仲裁年度观察.pdf, (last visited Nov. 11, 2022).

ing Use of Investment Treaties on June 28, 2021,[56] aimed at raising the awareness of investor-State arbitration among Chinese investors and providing them guidance in resorting to investment arbitration. As a result of the BRI and Ministry of Commerce's new guidelines, there will likely be even more Chinese investors seeking to protect their investment through arbitration.

Against this background, the above analysis demonstrates that the Chinese IIAs do not offer sufficient protection to BRI investors in terms of an arbitral tribunal's jurisdiction. BRI investors will be exposed to considerable jurisdictional hurdles. First, Chinese SOEs, forming the majority of BRI investors and arguably investing following the Chinese government's foreign policy, will likely be accused of being instrumentalities of the Chinese government as opposed to a national of China that is protected by the IIAs. Second, the limited scope of investor-State arbitration in earlier Chinese IIAs creates uncertainties and hurdles. A debate about whether a tribunal's jurisdiction extends to issues beyond compensation for expropriation is almost inevitable when the earlier IIAs are invoked and there is no definite answer to that. Third, the administrative review provisions impose additional burden on investors before commencing an arbitration. The failure to follow these investor-State arbitration provisions may defeat the jurisdiction of a tribunal.

One may envisage efforts to be taken by the Chinese government in order to protect the existing BRI investors and draw in new investors to advance the BRI. An obvious choice is to conclude new IIAs and update older ones which could, as some existing IIAs do, explicitly cover SOEs, broaden the scope of investor-State arbitration, and eliminate the pre-arbitration administrative review requirement. Indeed, one of the action points identified in the Chinese government's 2015 Action Plan on the BRI was to "push forward negotiations on bilateral investment protection agreements. . . to protect the lawful rights and interests of investors."[57] Such attempts, however, have turned out to be largely fruitless. Since 2015, only one IIA

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56. *Guidelines for Enterprises on Making Use of Investment Treaties*, MINISTRY OF COMMERCE OF CHINA (Jun. 28, 2021), http://www.mofcom.gov.cn/article/zcfb/zczh/202106/20210603162407.shtml.

57. *Action Plan on the Belt and Road Initiative*, *supra* note 2, § IV.

between China and a BRI country has been signed and ratified, namely the 2015 China-Turkey BIT.[58] In fact, considering the strategy of resorting to "soft law" and avoiding creating binding treaty obligations in implementing the BRI,[59] it is doubtful that the landscape of IIAs with the BRI countries will substantially change in the coming years.

On a practical level, it is advised that BRI investors use prudence when navigating along the Belt and Road. Given the varieties of the IIAs, the chances of successfully resorting to investor-State arbitration can be improved by careful "treaty-shopping" at the outset in order to obtain most preferential treatment under the IIAs available. For instance, a BRI investor investing in a country with no existing IIA or with a first- or second- generation IIA with China may consider structuring investment through a third state such that it is protected under the more favorable IIA between the third state and the BRI country.[60] However, it should be noted that treaty-shopping has become increasingly subject to criticism[61] and some IIAs have made that option much more burdensome.[62] It is therefore important for a BRI investor to utilize a treaty that allows treaty-shopping.

In addition to the remedies available under the treaties, it is also important for BRI investors to make use of contractual dispute resolution mechanisms. As opposed to resolving the disputes locally within the jurisdiction of a host State, international commercial arbitration is widely considered as most attractive for resolving BRI disputes givens its high degree of procedural flexibility, neutrality, and enforceability.[63]

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58. Agreement Concerning the Reciprocal Promotion and Protection of Investments, Turkey-China, 2015.

59. Heng Wang, *The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges*, 20 World Trade Rev. 282, 289-91 (2021).

60. Such "*treaty shopping*", subject to provisions of the IIA and certain exceptions, is accepted in practice. *See* JORUN BAUMGARTNER, TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW 234-6 (2016).

61. *See id.* at 39-64 (2016).

62. For example, only companies with "*substantial business activities*" in a Contracting Party qualify as a protected investor under some IIAs. *See, e.g.,* Turkey-China BIT, *supra* note 58, art. 1(2)(b).

63. Michael Moser et. al., *Endgame*, in MANAGING 'BELT AND ROAD' BUSINESS DISPUTES: A CASE STUDY OF LEGAL PROBLEMS AND SOLUTIONS 435-6 (Moser and Bao eds., 2021).