

## China's Solution of International Investment Dispute Arbitration Settlement Mechanism Under the "Belt and Road" Strategy

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**Abstract:** In order to avoid the aggravation of friction and conflict in the construction of "Belt and Road" Initiative, effectively resolve international investment disputes, and thus promote the smooth development of cooperation among countries. Under the background that the dispute settlement mechanism between investors and host countries still needs to be further explored, it is of great significance for our country to propose the construction of "Belt and Road" investment dispute settlement mechanism. Because international investment involves the particularity of the civil and commercial subject and the complexity of trading activities. Compared with resolving the conflicts in the field of investment through litigation, the parties often seek "arbitration" in the non-litigation solution which is more convenient and cost-saving. However, the problem is that countries along the "Belt and Road" have different legal concepts and cultural backgrounds. How to construct the "Belt and Road" investment dispute arbitration settlement mechanism will also face new challenges.

### Introduction

The initiative to build the "Belt and Road" has attracted close attention of the international community since it was first proposed by Chairman Xi Jinping in 2013. It has received positive responses from more than 140 countries and regions. From conception to action, we have achieved fruitful results in the course of more than five years of practice. As of March last year, China has established 75 overseas economic and trade cooperation zones in the "Belt and Road" countries. At the same time, in the past 40 years of reform and opening up, China has gradually changed from a capital-importing country to a capital-exporting country. The combination of dual identities has increased the risk of investment disputes in the internationally changing market. At present, there is a mismatch between the promotion speed of the "Belt and Road" and corporate risks. If this problem is not solved, Chinese overseas enterprises and even the promotion of "Belt and Road" will face great risks. Therefore, the construction of the "Belt and Road" dispute settlement mechanism requires a gradual process. In practice, the collision and game brought about by the cultural differences and inconsistent concept between countries will also need to be paid attention to and valued. Recently, the way for Chinese investors to defend their rights through international arbitration in overseas markets has not been smooth.

The "China Ping An v. Belgian government case" is a typical example. Whether it is the time cost or the final result, it shows that the drawbacks of the international arbitration solution are increasingly exposed, and it is not able to resolve the dispute in a timely and efficient manner. Ping An believes that the Belgian government's measures to divest non-performing assets and banking operations against Fortis Group violate the provisions of the *Bilateral Investment Agreement* (BIT) between China and Belgium, thereby undermining the legitimate rights and interests of Ping An as an investor. On September 21, 2012, in the absence of numerous negotiations, Ping An filed an arbitration with ICSID and asked Belgium to compensate for the losses it suffered. As a result, the first arbitration case of Chinese companies indicting the host government by ICSID kicked off. The arbitral tribunal made its final ruling on April 30, 2015. Ping An's arbitration request was rejected because the central arbitral

tribunal lacked jurisdiction over the case, and it was decided that both parties should equally bear the arbitral expenses. The case did not enter the substantive trial stage. The case also shows a trend that how Chinese companies can better defend their rights has become an important topic in the context of rising foreign investment.

The international arbitration solution is the most important solution in the current international investment disputes, especially the use of the ICSID mechanism. When a dispute between a Chinese investor and a host country seeks legal remedies for international arbitration under the BIT regulations, it often faces the dilemma of the arbitral tribunal being dismissed on the grounds of non-jurisdictional power. Coincidentally, in January 2010, three Chinese companies, including Heilongjiang International Economic and Technical Cooperation Co., Ltd. and Beijing Shougang Mining Co., requested a special arbitration tribunal in accordance with *the UNCITRAL Arbitration Rules* in relation to its mining investment dispute with the Mongolian government. The applicant believes that the Mongolian government's withdrawal of its mining license violates *the China-Mongolia Investment Protection Agreement* signed in 1991 and the relevant foreign investment laws of Mongolia. At the end of 2015, the arbitral tribunal heard the case in Hague, Netherlands. Until the end of June 2017, the arbitral tribunal ruled that it rejected all Chinese requests because it had no jurisdiction.

Both of the above cases are investment arbitration requests filed by mainland Chinese investors. Although they were rejected by the arbitral tribunal without jurisdiction, they also revealed that Chinese enterprises that “go global” must strengthen their investment protection and awareness of rights protection when investing overseas. The current “Belt and Road” initiative has entered a stage of comprehensive promotion. Facing the shortcomings of the original dispute settlement mechanism, it is necessary to follow the “Belt and Road” concept to explore new investment dispute settlement mechanism, and it can also adapt to the changes in the present market environment. Therefore, the research question to be proposed in this paper is how to solve the legal problems faced in the process of gradually establishing the investment dispute arbitration mechanism between the “Belt and Road” investors and the host country.

## **Legal Issues Facing the Construction of the “Belt and Road” Investment Dispute Arbitration Settlement Mechanism**

**Conflict of laws under different legal Systems.** The “Belt and Road” has spanned several major legal systems, including civil law countries, common law countries, there are also countries that are heavily influenced by Islamic law system, as well as countries with different legal characteristics. At the same time, unlike the Western countries, which widely agree with the rule of law, countries and regions along the “Belt and Road” have different attitudes and standards toward the rule of law. Especially in the judicial system and legal application. Conflicts between different legal systems and different systems are also inevitable. Under the different legal systems, countries are often unable to reach agreement on the same issue based on safeguarding their own interests. The first and foremost is the conflict of jurisdiction. When there is a dispute between the investor and the host government, how to determine the jurisdiction ownership is a prerequisite for resolving disputes reasonably. In the original dispute settlement, “Exhaustion of Local Remedies” and “seeking ICSID international arbitration” often lead to games between foreign investors and host countries. Investors fear that the results will be unfair and exclude the jurisdiction of the local arbitration institutions. However, the host country takes safeguarding national sovereignty as the starting point and advocates its jurisdiction. Before the establishment of the “Belt and Road” dispute settlement mechanism, the irreconciliation of jurisdictional conflicts has already been the case. Moreover, China has now proposed and practiced the establishment of a diversified dispute settlement mechanism. Therefore, in the current process of promoting the “Belt and Road” investment dispute arbitration settlement mechanism in our country, how to reduce the legal obstacles caused by conflicts of jurisdiction is the focus of urgent attention.

**Execution issues of arbitral awards.** Because of its enforcement power, arbitration itself has been favored by countries to resolve disputes through the choice of non-litigation settlement. At present,

most of the 64 countries along the route that have reached the “Belt and Road” initiative with our country are members of the ICSID. Only 10 countries are not members of ICSID, such as Iraq, Turkmenistan, Iran, Maldives, Poland, Yemen and other countries have not joined *the New York Convention*, so there is great uncertainty about the recognition and enforcement of arbitral awards made by the ICSID arbitral tribunal. At the same time, among the 64 countries along the route, 53 countries have signed investment agreements with China, while the rest of the countries have not had agreements with our country to determine the jurisdiction and other content. Even members of *the New York Convention*, some countries have made “reciprocal” reservations when they join, and only recognize and enforce arbitral awards made by countries that are parties to the Convention, such as Russia. Therefore, the recognition and enforcement of arbitral awards in some countries along the “Belt and Road” lacks effectiveness. The lack of this legal system will seriously restrict the functions that China is expected to achieve in establishing the “Belt and Road” dispute settlement mechanism, and hinder the timely resolution of international investment disputes.

**Lack of relevant provisions of China’s arbitration system.** Compared with Western countries, there is a major voice in arbitration in the field of international investment. The influence and competitiveness of China’s arbitration system in the world need to make up for the shortcomings. The arbitration systems of countries along the “Belt and Road” have significant differences in important issues, such as applicable rules, temporary arbitration and evidence systems. Unlike most countries’ arbitration legislation, which adopts the “dual track system” model, China’s legal provisions for arbitration are pursued in a single system. From articles 65 to 73 of *the Arbitration Law of the people's Republic of China*, only nine articles make special provisions on foreign-related arbitration. The absence of foreign-related arbitration legislation makes it difficult to improve the international discourse power of China’s arbitration system. At present, the United States, the United Kingdom, Singapore and other countries have confirmed the temporary arbitration system. But today, there are still many arbitration institutions in our country that do not recognize temporary arbitration. Temporary arbitration is a special arbitration system in which the parties form an arbitral tribunal in accordance with the agreement or authorize the arbitral tribunal to choose their own procedures. In 2016, the Supreme people’s Court of China issued *the opinions on providing Judicial guarantee for the Construction of Free Trade Test Zone*, which has taken action for the provisions and establishment of the temporary arbitration system. However, the document does not state the specific connotation of the “three specific” conditions, the scope of application of the temporary arbitration, and the dispute over the validity of the temporary arbitration agreement requires the Supreme Court to make a ruling, which obviously does not meet the original intention of the temporary arbitration system to pursue efficiency.

## **Principles For the Construction of the “Belt and Road” Investment Dispute Arbitration Settlement Mechanism**

**The principle of achieving shared growth through discussion and collaboration.** To build the “Belt and Road” Initiative, we need to adhere to the global governance concept of “achieving shared growth through discussion and collaboration” and use “building a community with a shared future for mankind” as the guiding ideology. Based on the national conditions of each country, we will promote and improve the “Belt and Road” dispute settlement mechanism.

As a primary requirement, the principle of achieving shared growth through discussion and collaboration was emphasized that the “Belt and Road” investment dispute arbitration mechanism must follow this and always implement the cultural concept of “A bad compromise is better than a good lawsuit”. As a sponsor of the “Belt and Road” Initiative, China is well known to the international community for its cultural traditions of “harmony” and “combination”. Therefore, considering that the “Belt and Road” is an initiative to promote mutual benefit and win-win cooperation along the route. When constructing the “Belt and Road” investment dispute arbitration settlement mechanism, it is necessary to equally protect the parties. Taking into account the interests and concerns of all parties

along the route, reflecting the legal traditions and habits, historical culture and social values of all parties, also reflecting the wisdom and creativity of all parties. Taking the essence of the existing international dispute settlement mechanism and making up for its shortcomings. All the way, the dispute settlement mechanism is more reasonable and fairer, providing security for multilateral trade in the region and achieving mutual benefit and win-win results for all parties.

**The principle of fairness and transparency.** As far as the current international situation is concerned, fairness and transparency are also the goals pursued by the international investment dispute settlement mechanism.

The “Belt and Road” is a path of peace and the achievement of common development. When proposing the establishment of the “Belt and Road” dispute settlement mechanism and institutions, the reform team required to create a stable, fair, transparent and predictable legalized business environment, serving the construction of the “Belt and Road”. The demand for resolving differences with the principle of fairness and transparency. In fact, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in 2014 and the United Nations Trade Convention on Transparency in Treaty-based Investor-State Arbitration, which entered into force in 2015. To a certain extent, both emphasize the significance of the principle of fairness and transparency in resolving international investment disputes. Therefore, the establishment and improvement of China's “Belt and Road” investment dispute arbitration settlement mechanism is inseparable from the pursuit of the principle of fairness and transparency, conforms to international trends, protects the legitimate interests of countries along the route and provides them with more development opportunities and good investment surroundings.

### **Improve the Specific Path of China’s “Belt and Road” Investment Dispute Arbitration Settlement Mechanism**

**The arbitration center can be located in China to facilitate dispute settlement.** It is true that the settlement of disputes can not only be through litigation, but because the countries along the “Belt and Road” cross different legal systems, the legal system is too different, and the cost of law enforcement is high, so there is a huge demand for non-litigation solutions. At this stage, China has proposed a relatively mature foundation for exploring and constructing the new type of dispute settlement mechanism. In particular, there are many arbitration institutions along the “Belt and Road” countries, and the legal provisions on arbitration are relatively comprehensive, which will provide new development directions and ideas for the gradual establishment and improvement of the “Belt and Road” investment dispute arbitration settlement mechanism. But the question is how to determine the choice of arbitration place by different countries after the dispute. In order to avoid bottlenecks in the dispute settlement process due to the uncertainty of choice, China can rely on the establishment of Asian infrastructure investment banks and the provisions of the current Pilot Free Trade Zone reform to introduce the international arbitration institution. The arbitration center can be attractively located in China to facilitate the settlement of disputes. In particular, in the case of China’s arbitration in a relatively weak position, the introduction of overseas arbitration institutions or organizations is undoubtedly a shortcut to rapidly enhance the international influence and attractiveness of arbitration in the “Belt and Road” dispute settlement mechanism. In this way, creating a stable, fair and transparent legal business environment, and attracting more countries and foreign parties to choose China as the “final arbitration place”. Resolving the “Belt and Road” trade and investment disputes in accordance with the law properly, and equally protecting the legitimate rights and interests of Chinese and foreign parties.

**Strengthening a fair and reasonable judicial security system.** China's proposal to establish the “Belt and Road” dispute settlement mechanism and institution is an innovative measure. With the continuous development of the “Belt and Road”, international civil and commercial disputes will increase simultaneously, we must be soberly aware that commercial risks and non-commercial risks

caused by political and legal factors have become an important yardstick restricting the success of overseas investment of Chinese enterprises.

As an important path to coordinate the two major domestic and international situations, the “Belt and Road” initiative is committed to building a new global economic and trade governance rule and a new system of opening up to the outside world. Its effective implementation is inseparable from the guarantee of the rule of law. The carrier relied on by the dispute settlement is mainly a bilateral investment agreement between the state and the state. Therefore, the recognition and enforcement of arbitral awards, due to the “failure” of the signing of agreement and accession to the New York Convention, causing a major uncertainty problem. As a proponent of establishing the “Belt and Road” dispute settlement mechanism and institution, China should strengthen a fair and reasonable judicial security system. Countries along the line that have not signed an investment agreement with China should make relevant content in a timely manner, depending on the specific situation, or put the signing of bilateral and multilateral free trade and investment arrangements on the agenda, for example, through the formation of a free trade agreement and so on. At the same time, the arbitration mechanism was clearly placed in a prominent position, emphasizing the use of arbitration to resolve disputes, improving and making up for judicial guarantees in order to enforcing rulings.

**Perfecting the provisions of China’s arbitration system.** To build a domestic arbitration institution and improve China’s arbitration system, it is necessary to refer to and draw lessons from the system experience and legislative practice of advanced foreign arbitration institutions, and rely on international organizations to establish a dispute settlement mechanism to make China’s arbitration system better integrated with the international arbitration system. In order to facilitate the settlement of disputes, taking into account the idea of setting up an investment dispute arbitration settlement center in China. Our country must enhance the competitiveness of arbitration institutions and improve the construction of arbitration systems. Otherwise, it will not be able to effectively solve the increasingly various complex international civil and commercial disputes, and provide services for the construction of the “Belt and Road” Initiative. At the same time, with the popularization of Internet technology, it is possible to promote the use of online arbitration and other methods, develop online arbitration, and resolve conflicts online through the Internet. Cultivating internationally excellent arbitration talents is another aspect of improving China’s relevant arbitration system. According to the official website of the International Center for Settlement of Investment Disputes, there are nine legal experts in China have been appointed as arbitrators and mediators of international investment arbitration institutions. And the international requirements for the arbitration team will be further improved in the future. Finally, about the preliminary study of the “temporary arbitration” system in the Pilot Free Trade Zone, for the content that is not specified, the future legislation needs to be enriched and improved in reference and actual operation.

## Conclusion

With the further strengthening of comprehensive strength and the ability to explore the construction of a new type of dispute settlement mechanism, the establishment of investment dispute arbitration settlement mechanism under “Belt and Road” Initiative put forward by China shows our country’s institutional confidence. However, due to the disunity of the national legal system that joined the “Belt and Road” initiative together with our country at present. It will pose certain challenges to the formation of the diversified dispute settlement mechanism. The main legal problems faced are legal conflicts under different legal systems, which are concentrated in the determination of jurisdiction; there are also the implementation of arbitral awards and the lack of relevant provisions of the arbitration system in China. Based on the shortcomings of the above three aspects, on the guidance of the principle of achieving shared growth through discussion and collaboration, also the principle of fairness and transparency, the paper analyzes and improves the specific path of China’s “Belt and Road” investment dispute arbitration mechanism. First, the arbitration center can be located in our country to facilitate dispute settlement; second, strengthening a fair and reasonable judicial security

system; third, perfecting the provisions of China's arbitration system. The establishment and improvement of China's "Belt and Road" investment dispute arbitration settlement mechanism is inseparable from the integration of the international community. Learning from the experience of the original dispute resolution mechanism, thus building a rule of law environment that guarantees the construction of the "Belt and Road".

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