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ARTICLES

THE ESTABLISHMENT OF “BELT AND ROAD” INTERNATIONAL INVESTMENT DISPUTES SETTLEMENT INSTITUTION

Yang Lu



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ARTICLES

THE ESTABLISHMENT OF “BELT AND ROAD” INTERNATIONAL INVESTMENT DISPUTES SETTLEMENT INSTITUTION*

*Yang Lu***

ABSTRACT

In the context of the growth of regional international investment disputes (IIDs) caused by the Belt and Road (B&R) initiative, having a third-party settlement will play an important role in IIDs. Currently, the B&R countries have mostly selected the International Center for Settlement of Investment Disputes (ICSID) as the IIDs settlement institution in their Bilateral Investment Treaties (BITs), which requires cases where a B&R country is respondent to be handled by nationals of countries outside the B&R area. Therefore, it is necessary to establish a B&R IIDs Settlement Institution for the purpose of optimizing the current situation of IIDs settlement in the B&R region, dealing with the constantly-increasing regional IIDs, better protecting geographical investments, and facilitating China to participate in and further guide the reconstruction of international investment regulations. Moreover, the feasibilities in law, platform and resources for its establishment have been available. With respect to the path option, we should take the Asia Infrastructure Investment Bank as a platform to draft a convention, take the ICSID Convention as a reference for structure and

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system innovation, and devote great efforts to driving B&R countries to conclude the convention.

Keywords: Belt and Road, Investment Disputes Settlement, ICSID, Bilateral Investment Treaty.

INTRODUCTION

When Chinese President Xi Jinping visited Central Asia and Southeast Asia in September and October of 2013, he raised the initiative of jointly building the Silk Road Economic Belt and the 21st-Century Maritime Silk Road (hereinafter “the Belt and Road” or “B&R”), which have attracted close attention from all over the world.¹ The Belt and Road Initiative gives new meanings to the ancient Silk Road. It draws a beautiful blueprint for China’s deepening reform and opening-up policy as well as China’s full participation in global governance. It brings new vitality into the Asia-Europe regional cooperation, and also provides a new path for global prosperity and development.² With the progress and implementation of this initiative, there will be a tremendous growth of foreign direct investment (hereinafter “FDI”) in the B&R area. Additionally, due to many B&R developing countries’ urgent demands for improving their poor infrastructures through FDIs, China will more play an investor’s role in this region.³ International Investment Disputes (hereinafter “IID”) always come after international investment. Moreover, safety problems usually happen in the B&R area. Endless traditional and non-traditional security threats caused by ethnic, religious and territorial disputes, resource conflicts, drugs and organized crime, together with low trust among countries,⁴ constitute potential catalysts for IIDs.

IIDs, in the broadest sense, include the following disputes incurred in FDIs: (1) disputes between a foreign private investor and a host government (or its agency) and (2) disputes between a foreign private investor and an

¹ See THE NAT’L DEV. AND REFORM COMM’N, MINISTRY OF FOREIGN AFFAIRS, AND MINISTRY OF COMMERCE OF CHINA (WITH STATE COUNCIL AUTHORIZATION), *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, <http://zhs.mofcom.gov.cn/article/xxfb/201503/20150300926644.shtml> (last visited June 12, 2017).

² See Xintao Yuan, *Analysis of the National Strategic “One Belt One Road” Construction*, 2014 AROUND SOUTHEAST ASIA, 3, 3 (No. 8).

³ In 2015 and 2016, Chinese enterprises made direct investments in 49 and 53 countries along the Belt and Road, with a total investment of 14.82 billion U.S. dollars (up 18.2% on a year-on-year basis) and 14.53 billion U.S. dollars (down 2% on a year-on-year basis) respectively. See *Economic and Trade Cooperation between China and “Belt and Road” Related Countries in 2015*, <http://fec.mofcom.gov.cn/article/fwydyl/tjsj/201601/20160101239838.shtml> (last visited June 12, 2017), and *Economic and Trade Cooperation between China and “Belt and Road” Related Countries in 2016*, <http://fec.mofcom.gov.cn/article/fwydyl/tjsj/201701/20170102504239.shtml> (last visited June 12, 2017).

⁴ See Haiyun Wang et al., *The Background, Potential Challenges and Future Trends of the “Silk Road Economic Belt,”* 2014 RUSSIAN CENTRAL ASIAN & EAST EUROPEAN MARKET, 5, 9 (No. 4).

enterprise or individual of the host country.⁵ However, since the latter is not different from ordinary international commercial disputes, the so-called IIDs generally mean the former.⁶ This Article will only focus on resolutions to the former kind of disputes.⁷ Considering the uniqueness of IIDs between a foreign private investor and a host government (or its agency), it can be said that seeking settlement by a third-party dispute settlement institution (hereinafter “third-party institution”), which is independent from the host country and the investor’s home country, is the most effective and widely accepted method among many other solutions, such as consultation and conciliation, host state relief, home state diplomatic protection, foreign court litigation and international investment arbitration.⁸ In the context of the growth of IIDs brought by the Belt and Road initiative, it is foreseeable that IIDs settlement by third-party institutions will be widely used in the region and will play an important role in resolving intra-regional IIDs.

Compared to international commercial arbitration, the major difference of IID settlements is the exclusiveness of third-party institutions. Only a few special permanent institutions have states’ waiver of jurisdictional immunity in some particular foreign private investment disputes to carry out settlement procedures, while the number of commercial dispute settlement institutions is large.⁹ Therefore, in order to promote FDIs among countries along the Belt and Road (hereinafter “B&R countries”) and properly handle the resultant IIDs, is it necessary and possible to establish a special institution located in

⁵ See JINSONG YU, *INTERNATIONAL INVESTMENT LAW* 343 (2014).

⁶ See Guiguo Wang, *Dispute Settlement Mechanism of “Belt and Road” Strategy*, 2016 *CHINA L. REV.*, 33, 35 (No. 2).

⁷ As used herein, an international investment dispute or international investment arbitration refers only to a dispute between the investor and the host country arising from FDIs or an arbitration arising out of this dispute.

⁸ Some scholars believed that investment treaties allowing investors to choose between host state relief and international arbitration have actually made international arbitration nearly the only way to resolve IIDs. See, e.g., Sun Liu, *The Challenges of International Investment Arbitration to State Sovereignty: A Comment on the Response of the United States and Its Enlightenment*, 2008 *STUDIES IN LAW & BUSINESS*, 3, 4 (No. 3).

⁹ According to the statistics of UNCTAD, so far, the only third-party institutions that have actually accepted IIDs are the Cairo Regional Center for International Commercial Arbitration, the International Chamber of Commerce, the International Center for Settlement of Investment Disputes, the London Court of International Arbitration, the Moscow Chamber of Commerce and Industry, the Permanent Court of Arbitration, the Stockholm Chamber of Commerce. See INVESTMENT POLICY HUB, <http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution> (last visited June 12, 2017).

the B&R region and committed to settling intra-regional IIDs (hereinafter “Belt and Road/B&R IIDs Settlement Institution”)? If yes, how would it be established? This Article will study these questions based on empirical investigations.

I. EMPIRICAL INVESTIGATIONS ON B&R COUNTRIES ACCEPTING THIRD-PARTY INSTITUTIONS’ IIDs SETTLEMENT

Conditioned upon a host country’s waiver of jurisdictional immunity, third-party institutions must obtain host countries’ consent to deal with IIDs. So far, in addition to traditional investment contracts as a form of consent, international investment treaties [including Bilateral Investment Treaties (BITs) and Multilateral Investment Treaties (MITs)] between investors’ home countries and the host country, and relevant provisions of the host country’s domestic law, have been important forms.¹⁰ Among these, international investment treaties are especially significant. By December 31, 2016, 3,324 international investment treaties had been reached all over the world, including 2,957 BITs and 367 MITs.¹¹ Given that BITs are more commonly demonstrated by their quantity, this Article will consider the BITs concluded by the B&R countries to examine their selection of third-party institutions.

A. Selection Preference of Third-Party Institutions in BITs Concluded by B&R Countries

The Belt and Road comprises of two regions, and although it is not a closed system that does not have absolute boundaries and spatial scope,¹² it is generally believed that it mainly covers or radiates to more than 60 countries, most of which are developing countries, on three continents—Asia, Europe and Africa. This empirical study will focus on these B&R countries.

¹⁰ See LUCY REED, JAN PAULSSON & NIGEL BLACKABY, *GUIDE TO ICSID ARBITRATION* 13 (2d ed. 2010).

¹¹ See U.N. Conference on Trade and Development, *World Investment Report 2017—Investment and the Digital Economy*, U.N. Doc. UNCTAD/WIR/2017, 111 (2017).

¹² See Weidong Liu, *Scientific Understanding of the Belt and Road Initiative of China and Related Research Themes*, 2015 *PROGRESS IN GEOGRAPHY* 538, 541 (No. 5).

1. Selection for International Center for Settlement of Investment Disputes (ICSID)

According to the data provided by the ICSID official website,¹³ among the BITs signed by 66 B&R countries, the status for selection of ICSID as a third-party institution is as follows:

Status of Selecting ICSID in BITs Signed by 66 B&R Countries

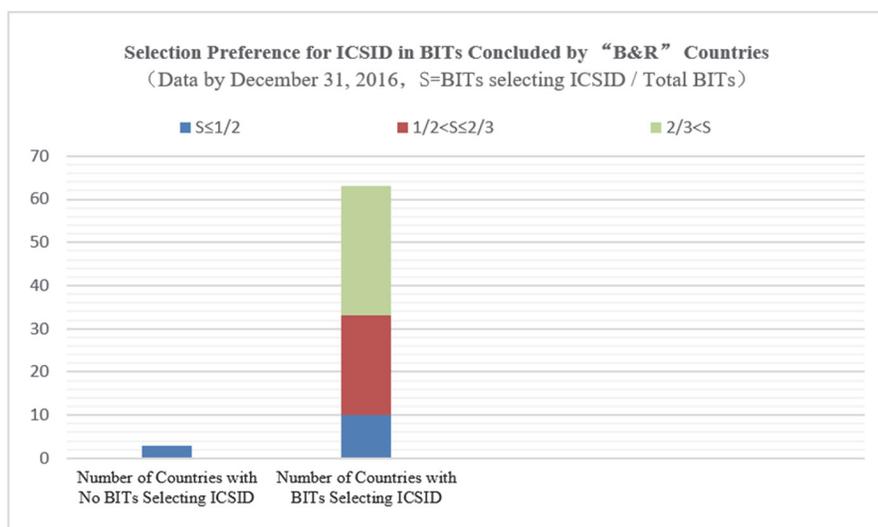
State	Total Number of BITs	Number of BITs Choosing ICSID	Percentage	State	Total Number of BITs	Number of BITs Choosing ICSID	Percentage
China	128	93	72.7%	Mongolia	37	32	86.5%
Singapore	42	36	85.7%	Malaysia	68	49	72.1%
Indonesia	59	44	74.6%	Myanmar	7	4	57.1%
Thailand	44	30	68.2%	Laos	26	15	57.7%
Cambodia	19	14	73.7%	Vietnam	53	28	52.8%
Brunei	4	3	75%	Philippines	36	28	77.8%
Iran	61	22	36.1%	Iraq	3	2	66.7%
Turkey	93	74	80%	Syria	31	14	45.2%
Jordan	56	31	55.4%	Lebanon	53	44	83%
Israel	45	39	86.7%	Palestine	0	0	-
Saudi Arabia	23	14	60.9%	Yemen	35	21	60%
Oman	32	19	59.3%	United Arab Emirates	43	39	90.7%
Qatar	35	20	57.1%	Kuwait	63	38	60.3%
Bahrain	31	24	77.4%	Greece	44	32	72.7%
Cyprus	25	14	56%	Egypt	109	65	59.6%
India	85	73	85.9%	Pakistan	52	34	65.4%
Bangladesh	31	25	80.6%	Afghanistan	3	2	66.7%
Sri Lanka	28	24	85.7%	Maldives	0	0	-
Nepal	6	6	100%	Bhutan	0	0	-
Kazakhstan	42	28	66.7%	Uzbekistan	45	27	60%
Turkmenistan	22	13	59.1%	Tajikistan	25	10	40%
Kyrgyzstan	25	13	52%	Russia	64	13	20.3%
Ukraine	70	34	48.6%	Belarus	62	22	35.5%
Georgia	32	17	53.1%	Azerbaijan	44	18	40.9%
Armenia	39	17	43.6%	Moldova	43	22	51.2%
Poland	68	54	79.4%	Lithuania	53	49	92.5%
Estonia	32	24	75%	Latvia	48	34	70.8%
Czech	113	82	72.6%	Slovakia	58	34	58.6%
Hungary	60	53	88.3%	Slovenia	42	23	54.8%
Croatia	66	44	66.7%	Bosnia and Herzegovina	36	20	55.6%
Montenegro	21	10	47.6%	Serbia	50	24	48%
Albania	39	27	69.2%	Romania	103	66	64.1%
Bulgaria	64	28	43.8%	Macedonia	34	27	79.4%

¹³ See Int'l Ctr. for Settlement of Inv. Disputes, *Database of Bilateral Investment Treaties*, ICSID, <https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a14> (last visited June 12, 2017).

The statistics in the above table state:

(1) 63 out of 66 countries signed at least one BIT to choose ICSID as a third-party institution, which means 95.45% of these countries do so.

(2) Considering all the BITs, the number of countries with over one-half and over two-thirds of BITs selecting ICSID as a third-party institution is respectively 52 and 31, accounting for 78.78% (52/66) and 46.96% (31/66) of all 66 countries.



The above high percentages show that the B&R countries prefer ICSID as an option for third-party institutions in their BITs, which implies that there is a high probability that IIDs arising out of the relevant BITs will be handled by ICSID.

2. Selection of Other Third-Party Institutions

It has also been found that, in addition to ICSID, a few other third-party institutions have been selected. For example, the BITs between Kazakhstan and Turkey, Indonesia and Cuba, Uzbekistan and Austria, and Lebanon and South Korea chose the International Chamber of Commerce International Court of Arbitration (ICC) as a third-party institution; the BITs between Philippines and Russia, India and Cyprus, and Sri Lanka and Egypt chose the Arbitration Institute of the Stockholm Chamber of Commerce (SCC); the

BIT between Indonesia and Egypt chose the Cairo Regional Center for International Commercial Arbitration; and the BIT between Sri Lanka and Egypt chose the Kuala Lumpur Regional Centre for Arbitration.¹⁴

However, the frequency of selecting ICC and SCC in BITs is much lower than selecting ICSID, and the selection of other third-party institutions is even more rare.¹⁵ Thus, it can be said that the probability of B&R-country-related IIDs being handled by the ICSID is the highest, and it is likely the ICSID will have the most impact on the IIDs settlement in the Belt and Road area as well.

B. Status of the B&R Countries being Sued in ICSID and Their Nationals' Participation in Dealing with ICSID Cases

ICSID released *The ICSID Caseload Statistics (Issue 2017)* in 2017.¹⁶ This report provided authoritative statistics on the cases registered in ICSID and the personnel involved in handling ICSID cases by December 31, 2016.

By December 31, 2016, a total of 597 cases had been filed with the ICSID under the ICSID Convention and Additional Facility Rules (AFR). Among them, there were 534 (89.5%) ICSID Convention Arbitration Cases, 8 (1.3%) ICSID Convention Conciliation Cases, 53 (8.9%) ICSID AFR Arbitration Cases, and 2 (0.3%) ICSID AFR Conciliation Cases.¹⁷

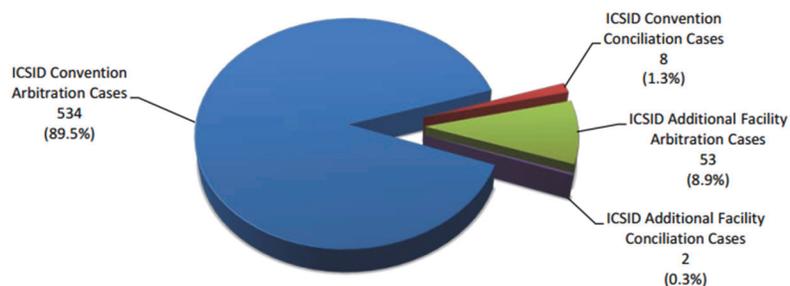
¹⁴ Wolters Kluwer, *Treaty Database*, www.kluwerarbitration.com (last visited June 12, 2017).

¹⁵ This conclusion is not only tenable in the BITs signed by B&R countries and examined by this Article, but also evidenced by the quantity of IIDs accepted by various institutions and counted by UNIDAID. See *Investment Dispute Settlement Navigator*, INV. POL'Y HUB, <http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution> (last visited June 12, 2017).

¹⁶ See ICSID, *THE ICSID CASELOAD STATISTICS (2017)*, [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf).

¹⁷ *Id.* at 8.

Type of Cases Registered under the ICSID Convention and AFR

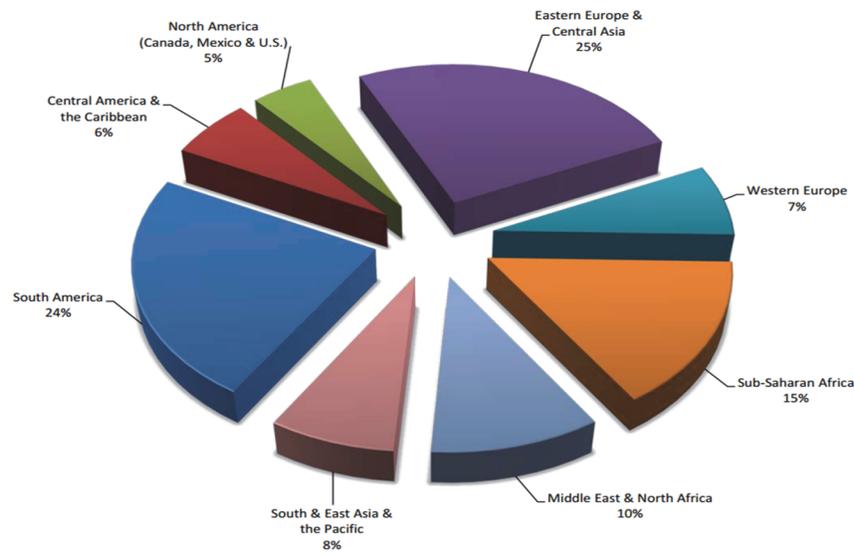


This chart is copied from *The ICSID Caseload—Statistics (Issue 2017-1)* p. 8.

The geographic distribution of all ICSID cases involving the state party was: Eastern Europe & Central Asia 25%, South America 24%, Sub-Saharan Africa 15%, Middle East and North Africa 10%, South and East Asia and the Pacific 8%, Western Europe 7%, Central America and the Caribbean 6%, and North America (Canada, Mexico & United States) 5%.¹⁸

¹⁸ *Id.* at 11.

Geographic Distribution of All Cases Registered under the ICSID Convention and AFR, by State Party Involved

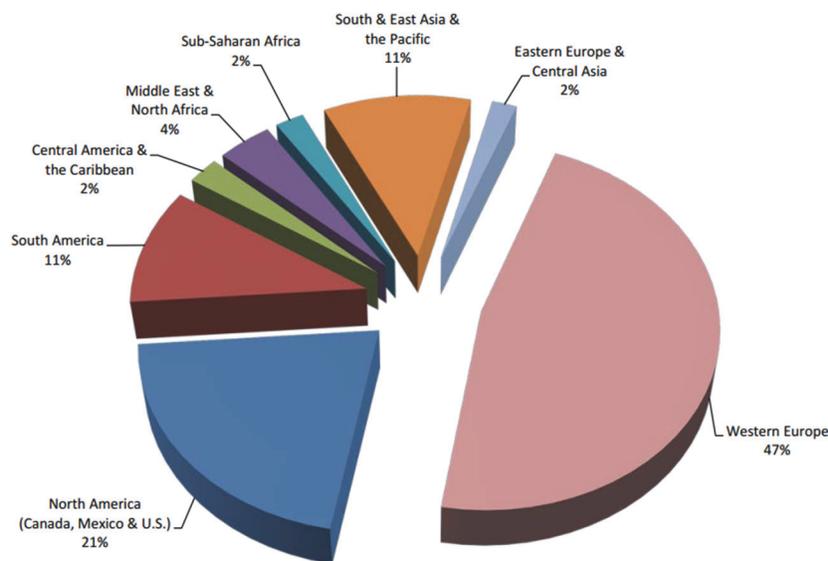


The chart is copied from *The ICSID Caseload—Statistics (Issue 2017-1)* p. 11.

The geographic distribution of arbitrators, conciliators and ad hoc committee members appointed in ICSID cases was: Western Europe 47%, North America (Canada, Mexico & United States) 21%, South & East Asia and the Pacific 11%, South America 11%, Middle East and North Africa 4%, Central America and the Caribbean 2%, Eastern Europe and Central Asia 2%, and Sub-Saharan Africa 2%.¹⁹

¹⁹ *Id.* at 19.

Arbitrators, Conciliators and ad hoc Committee Members Appointed in Cases Registered under the ICSID Convention and AFR—Distribution of Appointments by Geographic Region



This chart is copied from *The ICSID Caseload—Statistics (Issue 2017-1)* p. 19.

According to the geographical classification criteria of *The ICSID Caseload Statistics (Issue 2017)*, the regions covered or radiated by the Belt and Road principally include South and East Asia and the Pacific, Middle East and North Africa, Eastern Europe, and Central Asia. In these regions, the distribution of cases involving state parties reached 43% in total, but the distribution of arbitrators, conciliators and ad hoc committee members was only 17% altogether.

The above data show that, under the ICSID IIDs settlement mechanism, the proportion of B&R countries being sued is relatively high, while the proportion of B&R countries' nationals participating in adjudicating cases is relatively low. In other words, since the B&R countries frequently chose ICSID as the third-party institution, the IIDs with a B&R country as the respondent are handled more by nationals of countries in other regions (especially developed North America and Western Europe).

II. NECESSITY AND FEASIBILITY OF ESTABLISHMENT OF THE BELT AND ROAD IIDS SETTLEMENT INSTITUTION

Any institution innovation or organization establishment should first evaluate the necessity and feasibility. For the creation of the B&R IIDS Settlement Institution, there has to be a solid foundation of necessity and feasibility.

A. Necessity of the Establishment of Belt and Road IIDS Settlement Institution

1. A Need for Optimizing the Current Situation of IIDS Settlement by Third-Party Institutions

As international investment becomes increasingly active in the 21st century and the number of international investment treaties increases constantly, the number of IIDSs filed with third-party institutions rises steadily.²⁰ While third-party institutions have, to a certain extent, helped promote IIDSs settlement and maintained international investment order, they also receive a lot of criticism. For example, the main criticisms regarding International Investment Arbitration include: arbitral tribunals usually interpret investment treaty provisions in favor of investors; arbitral tribunals make different interpretations on the same treaty provisions which result in a lack of consistency and predictability of the awards; arbitral proceedings lack transparency; arbitrators lack independence and neutrality; and arbitrators have formed some “elite” group.²¹ Particularly, some arbitral tribunals put too much emphasis on the protection of investors, which leads to an imbalance between the interests of investors and host countries; therefore

²⁰ The number of known investor-state dispute settlement cases per year has risen from 17 in 2001 to 62 in 2016. Given the confidentiality of some investment arbitration cases under certain circumstances, the actual amount should be higher. In the meantime, although the annual acceptance of the case fluctuated, the overall growing trend was quite obvious. See UNITED NATIONS CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2017: INVESTMENT AND THE DIGITAL ECONOMY 114–15 (2017), https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

²¹ See Gloria Maria Alvarez et al., *A Response to the Criticism Against ISDS by EFILA*, 33 J. INT'L ARB. 1, 2–36 (2016).

aggravating the conflicts between them.²² Because international investment arbitration is more commonly raised by investors from developed countries against developing host countries, the above-mentioned problems have also been reasons why many developing countries in Asia, Africa and Latin America withdrew from the current international investment legal system.²³

It is generally considered that a need exists for improvement of the present IIDs settlement mechanism, although there are many negative views toward the above criticism.²⁴ For example, one scholar suggested that an Investment Arbitration Appellate Court should be created and authorized to review all awards granted under international investment treaties.²⁵ Nonetheless, any revolution for a long-running dispute settlement mechanism will face instinctive rejection due to the long-standing dependence and custom. Furthermore, the changes of IIDs settlement mechanism require revisions of existing treaties, which will multiply the difficulty in enforcing the reform.²⁶ Therefore, having the historic opportunity of the Belt and Road Initiative, it would be more realistic and feasible to achieve the goal of optimizing the regional IIDs settlement mechanism through the establishment of the B&R IIDs Settlement Institution.

2. *A Need for the Settlement of IIDs in the Belt and Road Region*

It is foreseeable that the fast increase of global FDIs²⁷ and the implementation of the Belt and Road Initiative will boost enormous growth

²² See Jinsong Yu, *Study on the Balance of Rights and Interests Protection Between Investors and Host States in International Investment Treaty Arbitrations*, 2011 CHINA LEGAL SCI. 132, 132 (No. 2).

²³ See Ruiping Deng & Yaguang Zhou, *Game and Coordination: China's Strategy for the Construction of Multilateral Investment Rules*, 2015 MOD. L. SCI. 159, 162 (No. 5).

²⁴ Alvarez et al., *supra* note 21, at 2–36.

²⁵ See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1617–25 (2005).

²⁶ See, e.g., The ICSID Convention can only be amended after all States Parties have ratified, accepted, or approved the amendments, thus it is not hard to understand that the Convention has not been amended so far. ICSID SECRETARIAT, POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION 2, <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>.

²⁷ The global FDIs flows reached 1.76 trillion U.S. dollars in 2015, increase by 38% over 2014. See UNITED NATIONS CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2016: INVESTOR NATIONALITY: POLICY CHALLENGES 2 (2016). Although the global FDIs flows in 2016 was US \$1.75

of FDIs in the B&R region. The consequent growth of IIDs will certainly produce demands for IIDs settlement in this region. Properly resolving these disputes is of great significance to the smooth implementation and steady development of the Belt and Road Initiative. Though the existing international institutions like ICSID and ICC, as well as national institutions like SCC, can function to a certain extent, their advantages in both geographical convenience and psychological acceptance of regional users are weaker than a specialized IIDs Settlement Institution within the B&R area. Thus, built on the quality of disputes settlement, a professional institution located in the B&R region and committed to the settlement of intra-regional IIDs can better realize the aim of properly resolving the fast-growing IIDs in the B&R region.

3. A Need for Protecting Geographical Investments in the Belt and Road Region

As one of the Chinese initiatives to promote international economic cooperation and development based on Asia-Europe geography,²⁸ the construction of a Belt and Road Initiative should also be consistent with the purpose of geographic investment protections. This purpose should not only emphasize the promotion and protection of international investments in this region, but also take into consideration the geographical features that B&R countries are mainly developing countries to balance their demands for the right of development²⁹ as far as possible. However, the global IID settlement mechanism represented by ICSID, due to its global perspective, usually ignores the specificity of geopolitical investment protections determined by

trillion, a slight decrease from 2015, the absolute value is still huge. See UNITED NATIONS CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2017: INVESTMENT AND THE DIGITAL ECONOMY 2 (2017), https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

²⁸ See Deng & Zhou, *supra* note 23.

²⁹ *The United Nations Declaration on the Right to Development* Art. 1, paragraph 1 stipulates: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." G.A. Res. 41/128(I) ¶ 1 (Dec. 4, 1986). Art. 4, paragraph 2 stipulates: "Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development." G.A. Res. 41/128(IV) ¶ 2 (Dec. 4, 1986).

the characteristics of development in different regions. For example, because ICSID generally favors the protection of investors' interests, it neglects the public interests of host countries, and undermines developing countries' right of development,³⁰ causing some developing countries' dissatisfaction and even a desire to withdraw from it.³¹ Additionally, in third-party institutions outside the B&R area, the authority of designating dispute resolution personnel is often vested in nationals of extra-regional countries.³² Regardless of their subjective national standpoint or their objective cultural structure and growing environment, it is questionable whether they can fully understand the need for geographic investment protections in the B&R region when they designate the relevant dispute settlement personnel. Therefore,

³⁰ Deng & Zhou, *supra* note 23, at 161.

³¹ *E.g.*, Venezuela submitted a notice of denunciation of the ICSID Convention pursuant to Art. 71 of the convention in 2012. *See Int'l Ctr. for Settlement of Inv. Disputes, Venezuela Submits a Notice under Article 71 of the ICSID Convention*, ICSID (Jan. 26, 2012), <https://icsid.worldbank.org/en/Pages/News.aspx?CID=47>.

³² Take the authority for arbitrator's appointment under the ICSID mechanism as an example. Art. 5 of the ICSID Convention stipulates:

The President of the Bank shall be ex officio Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.

ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. V, Oct. 14, 1966. Art. 38 stipulates:

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. XXXVI, Oct. 14, 1966. Under such arrangements, the arbitrator's appointments are exercised by the President of the ICSID Administrative Council, who is also the President of the International Bank for Reconstruction and Development, when either party does not appoint an arbitrator or both parties fail to appoint the chief arbitrator by consensus. In practice, however, the possibility of the consensual appointment of the chief arbitrator who has a decisive influence on the case, by negotiation between both parties after the dispute, is very low. Therefore, the chairman has great powers in determining the chief arbitrator. This leads to the possibility for the chairman to designate, if necessary, the chief arbitrator who holds same or similar position to him or her, so as to affect the final outcome of the award. On the other hand, all IBRD presidents previous and present (who are also the Chairman) are all American nationals. *See Past Presidents*, WORLD BANK, <http://www.worldbank.org/en/about/archives/history/past-presidents> (last visited June 12, 2017). This makes the authority for the arbitrator's appointment to actually be vested in the hands of U.S. nationals.

there is indeed a need to establish the B&R IIDs Settlement Institution for geographical investment protections and, through it, to create an IIDs Settlement Mechanism in line with the B&R geographical features.

iv. A Need for China to Participate in and Further Guide the Reconstruction of International Investment Regulations

Currently, the readjustment and diversion of economic and trade strategies of Europe and the United States, as well as the emerging new generation of international trade and economic rules, not only make China face a more complicated international environment to promote trade and investment, but also provide China a good opportunity to exert influence in global economic governance.³³ In the implementation of the Belt and Road Initiative, China, as an advocate and major force, should play a guiding role in reconstructing regional investment regulations, including rules on IIDs settlement. Facing the reality that B&R countries frequently select ICSID as a third-party institution while ICSID more often appoints non-B&R-regional personnel (represented by nationals of North American and Western European states) to deal with IIDs, China should facilitate the establishment of B&R IIDs Settlement Institution and construct relevant rules for IIDs settlement through it. This accords with the need for Chinese participation and guidance in reconstructing international investment rules.

B. Feasibility of the Establishment of the Belt and Road IIDs Settlement Institution

i. Feasibility in Law

The sources of legitimacy for the IIDs settlement institution's establishment include domestic law and international law. National institutions are those created under national laws while international institutions are those created under international laws.³⁴ Resolving IIDs relates to sovereign states' abandonment of their relevant institutions'

³³ See Jingxia Shi, *The Reconstruction of Investment Rules in International Trade and the Chinese Response*, 2015 SOC. SCI. CHINA, 128, 140 (No. 9).

³⁴ See RUIPING DENG ET AL., *LEGAL SCIENCE OF INTERNATIONAL COMMERCIAL ARBITRATION* 133 (2010).

jurisdictional immunity. Thus, except for a very few historic and prestigious national institutions (such as SCC), it is hard for national institutions to obtain universal trust from states to waive their jurisdictional immunity (no national institutions have the universal trust in the B&R region currently). Therefore, the establishment of the B&R IIDs Settlement Institution should be based on international law, which means the B&R countries should conclude an international treaty for the purpose of establishing the B&R IIDs Settlement Institution (hereinafter “*the B&R IIDs Settlement Convention*”) to achieve this goal.³⁵ Obviously, this is fully feasible in theory. But the difficulty lies in the willingness of the B&R countries to conclude such convention, that is, whether it is realistically feasible. To this question, the Article provides a positive answer: First, due to the impact of economic globalization and the stagnation of multilateral negotiations represented by the Doha round, many countries have shifted their interest in regional economic and trade agreements.³⁶ The conclusion of such Convention by the B&R countries confirms to the above tendency. Second, as many developing countries are dissatisfied with, and in some cases even exiting, the present IIDs settlement mechanism represented by ICSID, building a new convention to create the B&R IIDs Settlement Institution has become a necessity. Moreover, as evidenced by B&R countries’ participation and support in the Belt and Road Initiative and the Asian Infrastructure Investment Bank (AIIB), China is very influential in this region. It is highly probable to gain support if China promotes the process.

ii. Feasibility in Platform

It is a matter of choice whether we should establish the B&R IIDs Settlement Institution on an existing organization’s platform or establish it by building a new platform. Throughout the process of creating and developing ICSID, the International Bank for Reconstruction and Development (IBRD) has played an important role in its formation,³⁷

³⁵ ICSID Convention Art. 1, paragraph 1 stipulates: “There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).” (Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966). It can be seen that the creation of ICSID is also realized by the conclusion of ICSID Convention.

³⁶ See Shi, *supra* note 33.

³⁷ See ICSID, *History of the ICSID Convention (Volume I)*, ICSID PUB. 2, 2–11 (1970).

operation,³⁸ and the settlement of disputes and the voluntary performance of awards.³⁹ The better choice is to rely on an existing platform to create the B&R IIDs Settlement Institution. The AIIB, which was formally established on December 25, 2015, is undoubtedly the best choice among existing platforms. Therefore, AIIB has provided the most feasible platform for establishing the B&R IIDs Settlement Institution.

iii. Feasibility in Resources

In addition to feasibility in law and platform, establishing the B&R IIDs Settlement Institution cannot go without the feasibility in various resources, such as funds, human resources and case resources. Funds will meet the requirements for its creation and operation, in the form of the member countries' subscription, AIIB's initial support or loan, and the subsequent income after establishment. Regarding human resources, the hardest issue is the employment of proper dispute resolution personnel. However, in general, this difficulty is surmountable. There are not only some persons engaged in IIDs settlement in ICSID and other third-party institutions, but also many people dedicated to commercial disputes settlement in the B&R region. Provided they have or will gradually develop appropriate knowledge and practical experiences, they may become candidates to work for the B&R IIDs Settlement Institution. Furthermore, selecting a certain percentage of dispute settlement personnel from outside the B&R area is also an option. Regarding case resources, the growth of IIDs brought by the Belt and Road Initiative can provide cases for this Institution. To sum up, it is also feasible to establish the B&R IIDs Settlement Institution in the aspects of various resources.

³⁸ *E.g.*, according to ICSID Convention, the seat of the Centre shall be at the principal office of the IBRD (Art. 2), the President of the Bank shall be ex officio Chairman of the Administrative Council (Art. 5). (ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966.) Many other aspects such as the functioning of the ICSID (like the nomination of the Secretary-General and any Deputy Secretary-General) and the operational level of dispute settlement (like the appointment of arbitrators) are authorized to the Chairman (Arts. 10 and 38).

³⁹ See generally REED ET AL., *supra* note 10, at 17.

III. SPECIFIC PATHS FOR THE ESTABLISHMENT OF BELT AND ROAD IIDS SETTLEMENT INSTITUTION

The key to establishing the B&R IIDS Settlement Institution lies in the formulation and conclusion of *the B&R IIDS Settlement Convention*. Given that ICSID is a successful example of the similar institution in the current international community, it is wise to learn from and refer to the ICSID Convention.

A. *The Formulation of the B&R IIDS Settlement Convention*

1. *The Formulating Process of the B&R IIDS Settlement Convention*

The creation convention of ICSID, which is one of the World Bank Group's five major organizations,⁴⁰ cannot be formulated without the positive promotion of IBRD, another organization of the World Bank Group. Its drafting and negotiating had been lasting for five years, from Mr. Eugene R. Black, the then President of the World Bank Group, formally proposed the idea of ICSID Convention in his address to the Annual Meeting of the Board of Governors of the Bank in Vienna in September 1961 to the twentieth ratification of the Convention being delivered to the Bank, triggering the convention to be effective in September 1966.⁴¹ The formulation of the ICSID Convention benefited not only from the global

⁴⁰ *About the World Bank*, WORLD BANK, <http://www.worldbank.org/en/about> (last visited June 12, 2017) (naming the five organizations of the World Bank Group to be the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID)).

⁴¹ See ICSID, *History of the ICSID Convention (Volume I)*, *supra* note 37, at 2–11.

expectations of establishing an IIDs settlement institution to boost international investments,⁴² but also from the platform and efforts of IBRD.⁴³

In the B&R region, because of the growth of regional IIDs and the negative impact arising from the high-frequency selection of ICSID or other extra-regional third-party institutions, B&R countries have the expectations to create the B&R IIDs Settlement Institution for promoting regional FDIs. The establishment of the AIIB has also provided a platform for drafting and consulting opinions about the relevant convention. Therefore, it can be said that, like the formulation of ICSID Convention, driving the formulation of the B&R IIDs Settlement Convention has been well prepared. The only thing needed now is an “east wind,” that is, “a formal proposal for formulating this convention.” Thus, as the advocate and momentum of the Belt and Road Initiative, China may take the lead in submitting relevant proposals to the president of the AIIB, so that the president can ask for discussions in the board of governors.⁴⁴ If agreed to by the board of governors, the work of drafting, reviewing, amending and finalizing the convention may be carried

⁴² On August 28, 1961, a paper transmitted to the Bank’s Administrative Council by Aron Broches, IBRD general counsel, said:

The many studies which have been undertaken in recent years concerning ways and means to promote private foreign investment have almost invariably discussed the problem of the settlement of disputes between foreign private investors or entrepreneurs and the Government of the country where the investment is made. In many cases these studies have recommended the establishment of international arbitration and/or conciliation machinery.

See ICSID, *History of the ICSID Convention (Volume II-1)*, ICSID PUB. 1 (1968). Mr. Eugene R. Black accepted the comments made by Mr. Aron Broches and formally proposed the idea of formulating the ICSID Convention at the subsequent Annual Meeting of the Board of Governors of the Bank in Vienna. See ICSID, *History of the ICSID Convention (Volume I)*, *supra* note 37, at 4. So, at that time, the international community’s desire to create an IIDs settlement institution to promote international investment was an important reason for the IBRD to formulate the ICSID convention.

⁴³ IBRD has done a great deal of work in the formulation of the ICSID Convention, including but not limited to: proposing the idea of the convention and submitting it to the Board of Governors for discussion, drafting the articles of the Convention and parsing them one by one, organizing the bank’s member countries to comment on the articles of the Convention and amending the draft according to their comments many times, and opening the convention for signature by member states. See ICSID, *History of the ICSID Convention (Volume II-1)*, *supra* note 42. Thus, another important reason for the successful formulation of the convention is the platform and the efforts made by IBRD.

⁴⁴ According to Art. 22 of the Asian Infrastructure Investment Bank Articles of Agreement, each member shall be represented on the Board of Governors and shall appoint one Governor and one Alternate Governor. So, the Board of Governors is constituted by representatives of member states. See ASIAN INFRASTRUCTURE INV. BANK, ARTICLES OF AGREEMENT 13 (n.d.), https://www.aiib.org/en/about-aiib/basic-documents/_download/articles-of-agreement/basic_document_english-bank_articles_of_agreement.pdf.

out gradually and in a series, pursuant to the constitution and related rules of the AIIB.

2. *Innovations of the Structure and Systems of the B&R IIDs Settlement Convention*

It is important to focus on what structure and systems should be adopted for *the B&R IIDs Settlement Convention*. It relates to whether the convention will obtain broad support and whether the new B&R IIDs Settlement Institution will achieve its due value. In this regard, it will be more productive by making beneficial innovations based on the existing structure and systems of the ICSID Convention.

a. Innovations of the Structure

From the structural point of view, besides the preamble and regular matters of treaties such as signing, entry into force, amendment, exiting, dispute resolution provisions, etc., the structure of the ICSID Convention can be summarized into three main parts: (1) institution creation and organizational authorities; (2) conciliation procedures; (3) arbitration procedures. Part (1) stipulates the legal ground for the creation of ICSID and its organizational structure and administrative authorities; part (2) stipulates the procedures for ICSID to conduct IIDs conciliation; and part (3) stipulates the procedures for ICSID to conduct IIDs arbitration.⁴⁵

Provisions with respect to the institution creation and organizational authorities, as the “Organization Act” of the B&R IIDs Settlement Institution providing the legal basis for the establishment and management of this institution, are indispensable in *the B&R IIDs Settlement Convention*. Conciliation and arbitration, as the two main methods of dispute settlement, should also be undoubtedly stipulated in the convention. What needs to be considered is whether, apart from conciliation and arbitration, other third-party IIDs settlement methods can be incorporated to make it more diversified. For example, can the Fact-Finding procedures stipulated in the

⁴⁵ Part (1) mainly involves the provisions of Chapter 1 of the ICSID Convention; Part (2) mainly involves the provisions of Chapter 2, 3, 5, 6 and 7 of the ICSID Convention; Part (3) mainly involves the provisions of Chapter 2, 4, 5, 6, 7.

ICSID AFR⁴⁶ also be adopted by *the B&R IIDs Settlement Convention*? Is it also possible to adopt the pure case registration and pure dispute resolution personnel designation services which have been widely practiced already?

Due to the limitations of the types of dispute settlement methods and the lack of relevant knowledge and practices at those days, the ICSID Convention only adopted the conciliation and arbitration. However, since the kinds of dispute settlement methods have increased, and some new methods for dispute settlement have been applied successfully, we should keep pace with the times and absorb new beneficial forms of dispute settlement when we design the provisions of *the B&R IIDs Settlement Convention*, so as to take the full advantage of diversity. Therefore, in terms of structural design, *the B&R IIDs Settlement Convention* may supplement a new part of “other methods for dispute settlement” compared to the ICSID Convention, including provisions on fact-finding, pure case registration and pure dispute resolution personnel designation services.

b. Innovations of the Systems

After functioning for more than half a century, the ICSID has exposed some drawbacks though it plays an important and active role in the settlement of IIDs. It attempted to self-improve by amending conciliation or arbitration rules,⁴⁷ but institutional deficiencies in the ICSID convention can hardly be changed. Therefore, *the B&R IIDs Settlement Convention* should take full account of institutional innovations while it continuously follows some parts of the ICSID Convention. Such institutional innovations should confirm the

⁴⁶ The Administrative Council of the Centre has adopted AFR authorizing the Secretariat of ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention. The AFR applies to the following disputes: (1) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State; (b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and (c) fact-finding proceedings. *See Int'l Ctr. For Settlement of Inv. Disputes, Additional Facility Rules: Introduction and Art. 2* (Apr. 10, 2006), <http://icsidfiles.worldbank.org/icsid/StaticFiles/facility/iii.htm>.

⁴⁷ *See* ICSID SECRETARIAT, SUGGESTED CHANGES TO THE ICSID RULES AND REGULATIONS (2005), <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>.

essential objectives of promoting international investment developments in the B&R region and facilitating a just and reasonable settlement of intra-regional IIDs. Meanwhile, such institutional innovations should also take account of the geographical features that B&R states are mainly developing countries.

Firstly, institutional innovations for promoting international investment developments in the B&R region. The establishment of the B&R IIDs Settlement Institution must initially coincide with the overall circumstances surrounding the Belt and Road Initiative. Promoting the developments of intra-regional FDIs is naturally a basic objective. By stipulating in the treaty that a dispute can be submitted to international arbitration, the host governments' action standards for foreign investments under the treaty will become clearer.⁴⁸ Hence, it can be said that the mechanism of dispute settlement by third-party institutions itself plays a positive role in facilitating FDIs. Of course, it is still necessary to adopt systems that are more beneficial to investment promotion. Such systems should make it easier for investors to seek IID settlements from third-party institutions. For example, according to Article 25, paragraph 1 of the ICSID Convention, even though both the host country and the investor's home country are parties to the convention, ICSID does not have jurisdiction in the absence of a written consent between the host state and the investor to submit their disputes for settlement. The ICSID Convention's restriction on its jurisdiction has specific historical reasons: at the time that dispute settlement between sovereign states and private investors provided by third-party institutions had not been universally accepted, such restriction could avoid the dystocia or premature-death of the ICSID caused by not giving the countries a right to agree separately.⁴⁹ However, given that settlements of IIDs provided by third-party institutions have been widely recognized all over the world today and have been actually

⁴⁸ See DOAK R. BISHOP ET AL., *FOREIGN INVESTMENT DISPUTES: CASES MATERIALS AND COMMENTARY 1* (2d ed. 2014).

⁴⁹ This conclusion can be perceived from the conservative attitude of the IBRD when formulating the ICSID Convention. For example, the ICSID Convention very carefully excludes any provisions relating to the substantive obligations of the host state and investor and any specific law on which the substantive decision is based. Some scholar thought that bank did so in order to avoid any discussion meeting becoming “a diplomatic conference or even a world-wide preparatory conference” and “they did not want this effort to replicate the experience of the United Nations” on the dispute settlement mechanism for investment. The subaudition is that if the attitude is radical, the convention will be difficult to get through. See Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. L. 47, 51–52 (2009).

introduced by several regional treaties such as the Energy Charter Treaty and the North American Free Trade Agreement, the jurisdiction system in *the B&R IIDs Settlement Convention* may consider a waiver of further written consent by host states and investors. The conclusion of the Convention means consent to its jurisdiction. On the one hand, by doing this countries that are open to the Convention can be exempt from the cumbersome signing of BITs or MITs separately, which will simplify the procedures for investors seeking settlement of disputes. On the other hand, the obligations of countries that are conservative to the Convention do not increase because they can either exercise their right of reservation under the Convention or refuse to sign the Convention to exclude its jurisdiction (the actual effect is the same as the lack of written consent after the conclusion). In addition, *the B&R IIDs Settlement Convention* may also bring such scenario into its jurisdiction that at least one of the host states and the investor's home state is not a signatory party, but the host state and the investor have agreed in writing to submit their disputes to the B&R IIDs Settlement Institution (regardless of it being agreed by contracts between the host state and the investor or by other treaties between the host state and the investor's home state). Its theoretical basis is that party autonomy should reasonably be one of the sources for jurisdiction. The existing practice is that ICSID has long provided conciliation and arbitration services to similar parties under its AFR.⁵⁰

Secondly, institutional innovations for facilitating a just and reasonable settlement of intra-regional IIDs. Resolving disputes justly and reasonably is a fundamental goal for all dispute settlement institutions and is undoubtedly a principle which should be upheld when formulating *the B&R IIDs Settlement Convention*. To realize this goal, balancing the interests of both parties as far as possible within the boundary permitted by laws and rules in addition to managing procedures and judging substantial issues pursuant to appropriate laws or rules, is of the utmost importance. This depends not only on the dispute resolution personnel's superb legal application skill and sophisticated interest trade-off technique, but also on the institutional guarantees of the Convention. It is undeniable that the ICSID Convention had also made great efforts to pursue this goal. However, as circumstances changed over time, some measures, which are favorable to a just and

⁵⁰ See INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, ADDITIONAL FACILITY RULES 10–11 (2006), https://icsid.worldbank.org/en/Documents/icsiddocs/AFR_English-final.pdf.

reasonable settlement under historical conditions at that time, have now had space for improvements. In this regard, *the B&R IIDs Settlement Convention* should, by virtue of its backward advantages, innovate systems that can better achieve the goal of just and reasonable disputes settlement. For example, the transparency of IIDs arbitration proceedings, which have drawn much attention in recent years. Enhancing transparency requires the publicity of awards and plea materials and certain procedural entitlements to non-parties (such as Amicus Curiae).⁵¹ In other words, enhancing the intensity of external supervisions is helpful to promote just and reasonable dispute settlements. The question is how to treat “confidentiality,” the traditional feature of arbitration. Article 48, paragraph 5 of the ICSID Convention provides that “The Centre shall not publish the award without the consent of the parties.” This is essentially a confidentiality requirement for the awards, that is, awards shall not be public, but may, as an exception be public after mutual consent. However, as international investment arbitration is involved with public interests of the host state and thus has a public nature, the transparency should be given more attention than confidentiality.⁵² This is also demonstrated by the practices of ICSID.⁵³ Therefore, the system about the publicity of awards in *the B&R IIDs Settlement Convention* may make awards public as a principle and not public after either party’s explicit objection as an exception. It may stipulate, “the award should be published unless either party raises an objection in writing” to increase its transparency, broaden the channels of supervisions, and be more conducive to realizing fairness and rationality.

⁵¹ See Christina Knahr & August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration—The Biwater Gauff Compromise*, 6 LAW & PRAC. INT’L CTS. & TRIBUNALS 97, 99 (2007).

⁵² See William Kenny, *Transparency in Investor State Arbitration*, 33 J. INT’L ARB. 471, 489 (2016).

⁵³ Although Art. 48, paragraph 5 of the ICSID Convention requires ICSID not to publish the award without the consent of the parties, ICSID always actively seeks and is often granted permission to publish the awards. If the ICSID fails to be granted, one of the parties will often unilaterally make the award public through other ways. If the ICSID fails to be granted permission to publish the whole award and has no other ways for it to be public, ICSID will make a summary of the legal reasoning of the award and publish it pursuant to Art. 48, paragraph 4 of the Arbitration Rules. Visibly, regarding the publicity of the award, ICSID is actively improving the transparency of arbitration. See ICSID SECRETARIAT, POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION 8–9 (2004), <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>.

Thirdly, institutional innovations taking account of the geographical feature that B&R states are primarily developing countries. The B&R countries are primarily developing countries. They not only desire to attract FDIs but also fear that their right to development will be harmed by the dispute settlement. This characteristic is inherently contradictory because attracting investments requires putting the focus of protection on the investor's side while safeguarding the right to development requires the focus on the host country's side. Regarding such contradiction, this Article argues that creating a system to best balance both is a good option. For example, many developing countries complain that ICSID tribunals tend to make awards in favor of investors, and ever since awards are made, they are final and enforceable. Thus, if an appeal mechanism can be set up to provide a relief approach for the lost host state, it will balance the host state's rights and interests. This has been considered by the ICSID secretariat. Nevertheless, due to Article 53, paragraph 1 of the ICSID Convention, it is nearly impossible to create an appeal mechanism because it requires revisions of the Convention.⁵⁴ In contrast, the geographical characteristic that B&R states are primarily developing countries has provided suitable context for setting up an IIDs appeal mechanism. Therefore, it is not impossible to create this mechanism in *the B&R IIDs Settlement Convention*.

B. The Conclusion of the B&R IIDs Settlement Convention

The conclusion of a treaty will not be accomplished in a single step and will face a long process of compromise and gaming. It is predictable that different countries, based on their respective positions, have different attitudes toward the conclusion of *the B&R IIDs Settlement Convention* and the establishment of the B&R IIDs Settlement Institution. These attitudes mainly include: (1) whether to agree for submitting IIDs to third-party institutions for settlement; (2) whether to agree for submitting IIDs to the new B&R IIDs Settlement Institution for settlement; and (3) whether to be willing to accept the concrete systems of *the B&R IIDs Settlement Convention*.

Considering item (1), we can see from the empirical findings in the preceding part of this Article that there are very few B&R states that

⁵⁴ *Id.* at Annex.

completely reject third-party institutions. Thus, this does not constitute a real problem. As far as items (2) and (3) are concerned, this Article is also optimistic. Because the insurmountable drawbacks of the wide selection of the ICSID mechanism by the B&R countries have been criticized by many developing countries, the new B&R IIDs Settlement Institution will provide these countries with new options and will demonstrate its natural attractions from its geographical advantages brought by its location in the B&R area and from its professional advantages brought by its commitment in resolving B&R IIDs. On the other hand, as one of the most important powers in the Belt and Road region, China has a considerable influence, which will facilitate the conclusion of the Convention. Of course, appropriately solving the above issues is not an easy task which will require continuous negotiations and comprehensive considerations of the Convention among B&R countries. However, signing a treaty always needs superb wisdom and sufficient patience, so it is normal to have a hard process. We can reduce the resistances and increase the probability of success if we push the process forward by starting from states in the same or similar standpoint and gain enough contracting parties to make the convention go into effect. The next step will be to persuade other countries to join gradually.

CONCLUSION

In the context of the implementation of the Belt and Road Initiative, there will be a large increase of IIDs in the region. Taking full advantage of disputes settlement by third-party institutions and handling the ever-growing IIDs properly are of great significance to the smooth implementation and steady development of the Belt and Road Initiative.

Currently, the common decisions of the ICSID to be an IIDs settlement institution in BITs signed by B&R states will result in a relatively large proportion of cases involving the B&R countries to be handled by ICSID, as well as a relatively small proportion of dispute resolution personnel in ICSID cases to be nationals of B&R states. This means that under the present situation of frequent selection of ICSID as a third-party institution, IIDs with B&R states as respondents are more dealt with by nationals of countries in other regions, especially the developed Western Europe and North America.

Therefore, from the perspectives of optimizing the status quo of IIDs settlement provided by third-party institutions, coping with the ever-growing IIDs in the B&R region, establishing a dispute settlement mechanism

conducive to geographical investment protections, and from the perspective that China should participate and further even guide the reconstruction of international investment regulations, it is fully necessary to establish the B&R IIDs Settlement Institution. By concluding a convention to provide legal basis, making AIIB a platform, and solving issues of fund, human and case resources gradually, it is also sufficiently feasible in law for the platform and resources to establish this institution.

With respect to the specific paths, we should use the platform of the AIIB to facilitate the formulation of *the B&R IIDs Settlement Convention*. China may play a proactive role in this process. Moreover, based on the ICSID Convention, *the B&R IIDs Settlement Convention* should, on the one hand, innovate the structure by adopting new dispute settlement methods to make a good use of its advantages in diversity. On the other hand, it should innovate the systems which are conducive to promoting the developments of B&R regional international investments and to facilitating a just and reasonable settlement of regional IIDs. These systems should also take account of the geographical feature that the B&R states are primarily developing countries. In the process of concluding the Convention, we should anticipate both positive results and difficult processes, and invest with great wisdom and patience. In order to reduce resistances and increase the probability of success, we should push the process forward by starting from countries in the same or similar standpoint and gain enough contracting parties to make the convention go into effect, then mobilize other countries to join gradually.