

Feldman, Mark

Research Report

An opportunity to reimagine investment arbitration in Beijing

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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Matthew Conte (msc2236@columbia.edu)

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An opportunity to reimagine investment arbitration in Beijing

by

Mark Feldman *

In recent years, some arbitration institutions in China have expanded their services to include international investment arbitration. Such expansion has been achieved by developing rules and arbitrator rosters focused specifically on investment arbitration, as well as through conclusion of cooperation agreements with relevant institutions, including the International Centre for Settlement of Investment Disputes (ICSID). In this area, institutions based in Shenzhen (Shenzhen Court of International Arbitration) and Beijing (China International Economic and Trade Arbitration Commission, Beijing Arbitration Commission) are noteworthy.

Two additional Beijing-based institutions—established, respectively, in 2015 and 2020—could further advance investment arbitration in China. The first—the Asian Infrastructure Investment Bank (AIIB)—has an opportunity, as the world’s second-largest multilateral development bank by membership, to play an important role in international investment dispute resolution, similar to the role that has been played by the world’s largest multilateral development bank, the World Bank, through its development of the ICSID Convention and establishment of ICSID. The second—the International Commercial Dispute Prevention and Settlement Organization (ICDPASO), according to its [Charter](#), “an international non-governmental and non-profit organization” (Art. 2)—includes international investment dispute resolution within the integrated dispute prevention and resolution services it will provide.

Since 2018, the AIIB has published an *AIIB Yearbook of International Law*. The 2019 *Yearbook* examined “the role of international organizations in promoting effective dispute resolution,” including whether the AIIB was “well placed” to serve as a “modern ICSID” for investment relating to [China’s Belt and Road Initiative](#).¹ More than 55 years after the conclusion of the ICSID

Convention, there is indeed an opportunity for a Beijing-based multilateral development bank with global membership to reimagine how a major bank of this kind might support international investment dispute resolution. In particular, the AIIB should consider developing one or more instruments that:

- are more ambitious in scope than the ICSID Convention by addressing not only investment dispute resolution, but also substantive investment law standards, including, in particular, the standard of sustainability;
- accord particular weight to dispute prevention (e.g., by establishing one or more offices to facilitate communications between investors and governments, such as the Office of the Foreign Investment [Ombudsman](#) in the Republic of Korea);
- accord particular weight to mediation (e.g., by providing detailed procedural guidance, as illustrated by the “Mediation Mechanism” attached as [Annex 6](#) to the EU-Singapore Investment Protection Agreement);
- address investment facilitation (not unlike, e.g., the Regional Comprehensive Economic [Partnership](#), which includes a detailed provision on investment facilitation (Art. 10.17)); and
- encourage regional diversity—in particular with respect to representation of Asia—when developing and updating rosters (whether for arbitrators, conciliators or mediators).

Regarding ICDPASO, in 2021 the organization finished drafting a set of Investor-State Arbitration [Rules](#) and committed to launching investor-state arbitration services “in a timely manner in response to the needs of the international business community.”² An ICDPASO framework for dispute prevention and resolution ultimately could place greater emphasis on alternatives to arbitration (through dispute prevention and mediation services) and offer greater institutionalization (through, potentially, appellate scrutiny of awards). Investment arbitration within such a framework would be innovative. Success on these fronts—dispute prevention, mediation, arbitration, appellate review—would require recruitment of world-class talent.

Regarding such recruitment, ICDPASO has launched a global recruitment process for [arbitrators](#). Through that process, ICDPASO can further develop a distinctive framework for resolving international investment disputes by developing a panel of arbitrators that reflects genuine regional diversity, with strong representation from Asia. ICDPASO ultimately could develop an innovative model for international investment dispute resolution by combining greater integration of services

(including dispute prevention, mediation, arbitration), greater institutionalization (with some form of appellate review) and greater regional diversity (especially greater representation from Asia).

The AIIB and ICDPASO ultimately could contribute to the development of a Beijing-based international investment dispute resolution hub along complementary, but not identical, paths. For the AIIB, any work in this area should closely consider the link between international investment and advancing infrastructure connectivity in Asia (the AIIB’s core mission), just as linkages between international investment and economic development informed the ICSID Convention’s design. In particular, the AIIB’s infrastructure connectivity mission could inform policy choices concerning the scope of covered “investors” and “investments.”

ICDPASO—which, at its core, is a dispute prevention and resolution organization—could focus instead on procedural innovations, in particular developing a novel investment dispute resolution framework that could offer an unprecedented combination of service integration, institutionalization and regional diversity.

* Mark Feldman (mfeldman@stl.pku.edu.cn) is Professor of Law at Peking University School of Transnational Law. The author wishes to thank Julien Chaisse, Wenhua Shan and an anonymous peer reviewer for their helpful peer reviews.

¹ pp. 1-3, chapter by Malik Dahlan, who argued that the AIIB could serve as a “modern ICSID” for Belt and Road disputes.

² Speech by Liu Chao, Secretary-General of the ICDPASO, at the World Law Congress Colombia 2021 (Dec. 3, 2021).

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