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Operationalising the Social Licence to Operate along the Belt and Road: The Case for a Mediation-Focused Approach

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OPERATIONALISING THE SOCIAL LICENCE TO OPERATE ALONG THE BELT AND ROAD: THE CASE FOR A MEDIATION-FOCUSED APPROACH

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Abstract

This article examines the intricate dynamics of community representation and stakeholder influence in the realm of international investment law. More specifically, it considers the most effective method by which to operationalise the concept of the 'social licence to operate' when attempting to resolve investor-state disputes. By utilising disputes relating to China's Belt and Road Initiative as a case study, it is shown that the social impact of foreign investment projects is often a catalyst for arbitration claims. Community interests are insufficiently represented at the stage of procurement or admission of investment, which has led to violent clashes between investors and local residents and activists. The role of the 'social licence to operate' in mitigating this phenomenon is explored, as well as the possibility of crystallising the 'social licence' concept within an enforceable legal obligation. It is argued that the inherently context-dependent character of the concept makes it challenging to craft a treaty provision that will capture the core purpose of stakeholder engagement. As an alternative, it is proposed that there is a strong synergy between mediation and the 'social licence to operate', and that a stakeholder-focused mediation process may be an effective method of dispute prevention.

I INTRODUCTION

From the perspective of public international law, the concept of the 'State' as a stand-alone, unitary entity is a necessary abstraction.[1] Aside from limited exceptions for self-determination, the doctrine of territorial sovereignty

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1 See generally, James Crawford, *The Creation of States in International Law* (Oxford University Press, 2006).

decrees that States are indivisible.[2] For the purposes of attributing conduct, the behaviour by the lowest-ranking municipal official may be attributed to the State, just as the conduct of the President may be attributed to the State.[3] In practice, however, States are interconnected networks of institutions, organisations, interests, cultures, and individuals. The fiction of the unitary State belies the internal complexity and inconstancy inherent to different forms of governance. Consequently, the influence of stakeholders is unevenly distributed. Indigenous communities are often underrepresented, while the interests of local communities may diverge from the interests of the central government in certain circumstances.[4]

Indeed, the relationship nexus between local communities and foreign investors is a blind spot of international dispute settlement generally, and investment arbitration more specifically. In essence, the structure of investment treaties envisages a bundle of triangular rights and obligations among three interested parties: the home State, the host State, and the foreign investor.[5] Despite their absence from legal instruments, local populations — to whom investment projects have the greatest proximate effect — are persistently influential in the success or failure of large-scale mining or infrastructure projects.[6] Backlash from these communities in the form of social mobilisation has precipitated lengthy delays, the cancellation of concession agreements, and the revocation of licences. In short, local populations catalyse investor-state disputes and yet are absent from the mechanisms of international investment law and arbitration.

This is particularly problematic in the context of infrastructure projects relating to the Belt and Road Initiative ('BRI'). The BRI is a China-led global development initiative aimed at resurrecting the ancient overland and maritime trade routes across Asia and the Middle East by enhancing physical and digital connectivity.[7] A majority of the projects included in the initiative relate to large-scale infrastructure development — such as roads, railways, ports, and power plants. As such, there is a considerable physical footprint and a complex array of potential stakeholders. The primary stakeholders in

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2 Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11(4) *Human Rights Law Review* 609.

3 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) Article 4 provides that '[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State'.

4 S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004).

5 Anthea Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56(2) *Harvard International Law Journal* 353.

6 Nicolás M Perrone, 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?' (2016) 7(3) *Transnational Legal Theory* 383.

7 National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, 28 March 2015 (hereafter 'BRI Vision and Actions').

such projects are generally regarded as the Chinese investor (typically State-owned) and the government of the recipient host country. Given the underlying diplomatic relationship that supports BRI investment, the bar is raised for the viability of adversarial dispute settlement should there be a disagreement; insistence on litigation or arbitration by the host State could potentially endanger other BRI investments within the territory. Insistence on litigation and arbitration by the investor may also signal that supposedly beneficial financial commitments from Chinese enterprises are actually a precursor to protracted legal proceedings.[8] Given these disincentives, less adversarial forms of dispute resolution may have greater synergy with BRI projects.

The central argument of this article is that mediation may be an effective dispute resolution mechanism in the context of disputes that strongly engage local community interest. It is argued that Chinese enterprises, and indeed other foreign investors whose investments carry a considerable social footprint, should consider the importance of their 'social licence to operate' (SLO), in addition to the legal licences granted by the central government. The concept of a SLO was first developed in response to public concerns over the social and environmental impact of mining projects.[9] The notion suggests that investors have a duty to secure the trust and acceptance of relevant stakeholders in the communities in which they operate. Failure to do so may have implications for the reliance on otherwise-applicable legal protections. While the concept of a SLO has its roots in sociology, business ethics, and corporate social responsibility, it has gained some traction in recent years in international investment law.[10]

The argument of this article proceeds in three parts. Part II lays out the problem of societal engagement in international investment law and BRI projects. The two-party structural organisation of the investment regime obviates the need to consult local communities on the desirability of investment projects, which has resulted in greater tension and disruption in several investment arbitration cases. Part III considers the extent to which the concept of a SLO is viable within the current framework of international investment law. Its precise definition will be considered, as well as specific cases that have engaged in SLO-type analysis as part of their reasoning, particularly the cases of *Copper Mesa v Ecuador* and *Bear Creek Mining v*

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8 On this argument, see generally, Mark McLaughlin, 'Investor–State Mediation and the Belt and Road Initiative: Examining the Conditions for Settlement' (2021) 24(3) *Journal of International Economic Law* 609.

9 Jim Cooney, 'Reflections on the 20th Anniversary of the Term "Social Licence"' (2017) 35(2) *Journal of Energy & Natural Resources Law* 197.

10 Mihaela-Maria Barnes, 'The "Social License to Operate": An Emerging Concept in the Practice of International Investment Tribunals' (2019) 10(2) *Journal of International Dispute Settlement* 328.

Peru.[11] Part IV considers how to operationalise the SLO in practice through the utilisation of well-established mediation procedures along the Belt and Road.

II THE PROBLEM OF SOCIETAL ENGAGEMENT IN INTERNATIONAL INVESTMENT LAW

As a general matter, international law does not regulate relations between private persons.[12] These relationships fall within the purview of national private law, such as the laws of property, intellectual property, contracts, and corporations. Underpinning this compartmentalisation is the view that the regulation of these relationships involves nuanced trade-offs and policy choices that are wrought in a very particular national private law context. Doctrines of State sovereignty necessitate that the jurisdiction of dispute resolution bodies, such as international courts and tribunals, be limited only to those disputes to which States have expressed consent to be bound to participate in the particular process.[13] In such cases, the counterparty is most often another sovereign State. International investment law is somewhat of an outlier in international law in granting standing rights to non-State actors.[14] Outside the context of the European Court of Justice or European Court of Human Rights, it is rare for individuals or entities to be granted an individual right of action.[15] To that extent, the current investment regime requires more engagement with non-State actors than most other areas of international law.

However, the class of actors with which States are bound to engage is limited to foreign investors. Foreign investors may bring cases pursuant to an investment treaty, or an investment contract which contains a binding international arbitration clause. It is beyond the scope of this article to provide a comprehensive set of grounds upon which investor-state disputes may be based. However, in general, investment treaties provide certain legal protections for foreign investors. For example, that they will not be discriminated against on the basis of nationality (that is, that alike domestic and foreign investors are not subject to different treatment); that they will not be treated unfairly (for example, being treated arbitrarily, denied due process or access to justice); and that they will not be the subject of expropriation

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11 *Copper Mesa Mining Corporation v Republic of Ecuador* (2016) UNCITRAL, PCA Case No 2012-2, Award; *Bear Creek Mining Corporation v Republic of Peru* (2017) ICSID Case No ARB/14/21, Award.

12 For an explanation of the importance of this distinction in an investment context, see Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113(1) *American Journal of International Law* 1.

13 Matthew Lister, 'The Legitimating Role of Consent in International Law' (2010) 11(2) *Chicago Journal of International Law* 663; Duncan B Hollis, 'Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law' (2005) 23(1) *Berkeley Journal of International Law* 137.

14 For an account of the development of these rights see Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press, 2018).

15 Roberto Mastroianni and Andrea Pezza, 'Striking the Right Balance: Limits on the Right to Bring an Action under Article 263(4) of the Treaty on the Function of the European Union' (2015) 30(4) *American University International Law Review* 743.

measures (for example, wholesale nationalisation) unless it is necessary for the public interest, in accordance with due process of law, and against adequate compensation.[16] The grand bargain of the investment regime is that host States offer these legal protections in the expectation of bolstering investor confidence and increasing flows of capital.[17] Notwithstanding this initial purpose, investment arbitrations have in practice engaged issues of broader public interest and wide societal implications, without the corresponding provision for these social issues in investment agreements.[18]

A *The Inevitable Social Impact of Belt and Road Disputes*

The BRI has not yet precipitated any investor-state disputes. However, the nature of BRI investment necessitates consideration of the social impact of infrastructure projects. Three factors make this a particularly potent concern in this context. Firstly, the legal and cultural diversity along the Belt and Road has the potential for the growth of investor-state disputes. It covers jurisdictions that implement a mix of civil law, common law, and Islamic law. The World Justice Project's Rule of Law Index and the Ease of Doing Business Index rank many BRI countries below the average.[19] Indeed, the States which are commonly subject to investor-state disputes are among the recipients of large-scale investment projects being carried out by Chinese State-owned enterprises.[20] Secondly, the types of investment with which the BRI is most concerned — building critical infrastructure, energy plants, and mining operations — are in those industries which are most readily subject to investor-state disputes.[21] This can be attributed to the comparatively large effect on local communities by extractive industries or construction works. Finally, the diplomatic underpinnings of the BRI, which require agreement between countries on the placement and funding of projects, are less attuned to an adversarial mechanism of dispute settlement than other forms of

16 Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International BV, 2009) 233.

17 Alan O Sykes, 'The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design' (2019) 113(3) *American Journal of International Law* 482.

18 Alessandra Arcuri and Francesco Montanaro, 'Justice for All: Protecting the Public Interest in Investment Treaties' (2018) 59(8) *Boston College Law Review* 2791; Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration' (2013) 4(1) *Journal of International Dispute Settlement* 197.

19 World Bank, 'Belt and Road Economics: Opportunities and Risks of Transport Corridors' (Web Page, 18 June 2019) <https://www.worldbank.org/en/topic/regional-integration/publication/belt-and-road-economics-opportunities-and-risks-of-transport-corridors>.

20 United Nations Conference on Trade and Development, 'Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (Web Page) <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

21 Ibid.

foreign investment.[22] As such, the protection of an individual project must be viewed in the context of the protection of BRI investments overall.

Sri Lanka is a high profile example of a country with disputed projects within the BRI. The Hambanthota Deepsea Port and Mattala International Airport are examples of major projects that subsequently became contested as economically inviable.[23] Reports suggest that the projects were insufficiently profitable to offset the loan repayments, and this became a central issue when the Sirisena-Wickremesinghe Government sought to defeat the Rajapaksa Government by criticising these deals as examples of bad governance.[24] But economic viability is only one example of issues that have affected Chinese investments in Sri Lanka.[25] Two major construction projects — the Colombo Lotus Tower and Grant Skyline Hotel — were plagued by issues of alleged procedural irregularity;[26] and the Colombo Port City Project became embroiled in controversy for its alleged impact on the marine environment.[27] These cases are examples of the tensions inherent to high-value, nationally-significant infrastructure projects. The interests of all stakeholders are rarely comprehensively considered, and even when they are, they do not always align. Consequently, taking account of the short-term social impact of BRI projects may help prevent the types of investment disputes that have occurred in other contexts.

B *The Social Impact of Foreign Investments and Investment Arbitration: Examples from Case Law*

The interaction between international investment law and social and environmental issues is ever-present.[28] It is in the nature of an investment obligation to constrain government action. In essence, such obligations are voluntarily assumed limitations on State sovereignty. Many of the investment treaties currently in force were designed with investment protection, and only

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22 On the nature of the BRI, see Heng Wang, 'China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability' (2019) 22(1) *Journal of International Economic Law* 29.

23 The Diplomat, 'China and Sri Lanka: Between a Dream and a Nightmare' (Web Page, 18 November 2016) <https://thediplomat.com/2016/11/china-and-sri-lanka-between-a-dream-and-a-night- mare>.

24 Iromi Dharmawardhane, 'Sri Lanka's Foreign Policy Under the Sirisena-Wickremesinghe Government' (ISAS Working Paper No. 250, Institute of South Asian Studies, 23 December 2016).

25 Dilini Pathirana, 'The Paradox of Chinese Investments in Sri Lanka: Between Investment Treaty Protection and Commercial Diplomacy' (2020) 10(2) *Asian Journal of International Law* 375.

26 Daily FT, 'Govt to Review Chinese-Funded Lotus Tower Project' (Web Page, 16 March 2015) <http://www.ft.lk/article/397249/Govt–to-review-Chinese-funded-Lotus-Tower-project>; Daily FT, 'CATIC Causes Chaos!' (Web Page, 7 July 2011) <http://www.ft.lk/article/69515/CATIC-causes-chaos>.

27 De Silva et al, 'The Contradiction between Sustainable Development and Economic Development: Special Reference to the Colombo Port City Project of Sri Lanka' (Conference Paper, Proceedings of International Research Conference, November 2015).

28 For a recent treatment of this topic see Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 26(2) *Journal of International Economic Law* 285.

investment protection, in mind. Historically, the investment treaty regime was a response to the wholesale expropriation of foreign assets by post-colonial States, and the focus of such treaties was on halting such expropriations.[29] As such, there is little, if any, provision for competing public interests in older investment treaties. In arbitrations under these treaties, the inclusion of such non-investor interests can only be read-in by means of interpretation. This cannot be guaranteed on a consistent basis.

Indeed, this inherent tension between private and public interests is a recurring theme throughout the jurisprudence of investor-state arbitration. The dearth of community engagement mechanisms built into the process of establishing and maintaining foreign investment shines through clearly in several cases that pit the economic objectives of foreign investors (and, occasionally, the central government of host States) against the social and environmental needs of local populations. These populations are notable for their absence in the subsequent proceedings, which involve disputes between central governments and investors.

Crystallex v Venezuela was a dispute that turned on the refusal of a permit for gold mining.[30] Crystallex International Corporation, a Canadian mining company, acquired exploration and exploitation rights for gold deposits in the Las Cristinas gold mine, which is located within the Imataca National Forest Reserve in Venezuela. However, the necessary permits were denied by the Venezuelan Ministry of Environment in light of the potential impact on the environment and local communities.[31] President Hugo Chavez and other government ministers had also made several public statements indicating their intention to nationalise all gold deposits in Venezuela.[32] When the permit was terminated, Crystallex initiated an arbitration case, claiming that the decision-making process had not been transparent. The tribunal found that the denial letter to Crystallex 'presents significant elements of arbitrariness and evidences a lack of transparency and consistency.' This was because references to climate change 'had not been raised a single time in the innumerable occasions of exchanges (that) occurred between the claimant and the Venezuelan authorities throughout the four-year review process'.[33] As a result of this arbitrary conduct, the tribunal awarded USD 1.2 billion compensation to Crystallex.

A similar fact pattern can be seen in the case of *Tecmed v Mexico*.[34] Tecmed was a company incorporated in Spain that acquired property and assets relating to a landfill for the disposal of hazardous waste in Mexico.

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29 For an account of the development of investment law during the colonial encounter see, Kate Miles, 'International Investment Law: Origins, Imperialism and Conceptualizing the Environment' (2010) 21(1) *Colorado Journal of International Environmental Law and Policy* 1.

30 *Crystallex International Corporation v Bolivarian Republic of Venezuela* (2016) ICSID Case No. ARB(AF)/11/2, Award.

31 Ibid [44]-[46].

32 Ibid [14].

33 Ibid [592].

34 *Tecnicas Medioambientales TECMED SA v The United Mexican States* (2003) ICSID Case No. ARB(AF)/00/2, Award.

While initially granted the licence in 1996, renewal of the licence was denied in 1998 on the basis of allegedly minor infractions relating to the operation of the landfill.[35] The investor alleged that the real reason for the refusal to extend the licence was political; there had been a change in administration in the Municipality of Hermosillo, where the landfill was located. Tecmed alleged that the authorities had encouraged citizens to protest against the landfill on health grounds, and this public outcry was the true reason for the cancellation.[36] Opposition to the landfill was vocal, including public protests and appeals to authorities. In the ensuing arbitration, the tribunal found that Mexico had acted disproportionately in permanently refusing the permit, and had acted ambiguously and in a contradictory manner.[37] While the concerns of the local community were considered legitimate, the government was under a duty to act in accordance with objective criteria. The tribunal awarded compensation of USD 5.5 million to Tecmed.[38]

The role of community considerations is equally apparent in the case of *Bilcon v Canada*.[39] Bilcon was an American company seeking to invest in a property on which a quarry and marine terminal would be developed. Approvals were required for the blasting operations that would be necessary to establish the quarry. After the project received preliminary approval, widespread public concern about the environmental impact of the project resulted in the establishment of a Joint Review Panel ('JRP') between Canada's federal government and the province of Nova Scotia in accordance with the *Canadian Environmental Assessment Act* (2012). The JRP was mandated to assess objectively the environmental impact, as well as to consider the effect on traditional values and culture. It recommended rejection of the project as a result of potential harm to marine species in the area and to what it termed 'core community values'.[40] In the subsequent tribunal hearing under the North American Free Trade Agreement ('NAFTA'), Canada was found liable for a flawed process, as the term 'core community values' was found to be ambiguous. The JRP also did not consider any potential mitigations. Consequently, the tribunal awarded Bilcon USD 7 million in compensation.

In each of these cases, there is a clear and unambiguous role for community stakeholders in relation to the failure of the investment and the resulting investor-state arbitration. The social impact of large-scale foreign investments inevitably engages a broad range of affected parties. Three aspects of these cases are notable for our purposes. Firstly, there is an initial divergence in interests between the position of the central government of the host State and the position of the local communities proximate to the investment. While the central government, at the outset, sees only the

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35 Ibid [148].
36 Ibid [145].
37 Ibid [149].
38 Ibid [197].
39 *Bilcon of Delaware, Inc v Government of Canada* (2015) PCA Case No. 2009-04, Award on Jurisdiction and Liability.
40 Ibid [120]-[121], [447]-[451].

economic calculation, local communities make a more holistic assessment, with abstract ‘public interests’ crystallising into concrete factors, such as clean air, access to water, and the tangible effects of climate change. Secondly, investors rely on initial commitments from central governments rather than widespread community engagement. From a purely legalistic perspective, no more may be required. However, foreign investors might consider whether this practice is efficient and effective, in light of the problems that arise after the initial approval has been granted. Thirdly, investment tribunals are rarely empowered to view community interests in a way other than as non-legal motives that inform governmental decision-making. The awards against host States reflect this reality. There is no special status given to the voice of local communities in investment law specifically, including indigenous communities, that would afford the particular protections or, indeed, even a seat at the table of the dispute resolution process.[41] To that extent, the current organisation of international investment law contains a two-party solution to a multi-party problem.

C *A Two-Party Solution to a Multi-Party Problem: The Structural Elements*

The structural organisation of international investment law is oriented towards a dispute between two parties: an investor and a host State. This is embedded in the foundational documents that comprise the investment regime, and indeed the entirety of the treaty process from negotiation to dispute settlement. Investment treaties, whether bilateral or multilateral, are negotiated in a State-centric manner, exclusively by representatives of departments responsible for international trade or foreign investment. Within the wording of the treaties, contracting parties are defined as the signatory States, with the concept of an investor given its own separate definition.[42]

The obligations contained in these agreements comprise obligations on host States to offer protections to foreign investors from the other contracting party, including protection against expropriation without adequate compensation, fair and equitable treatment, full protection and security, and the right to transfer funds. Such protections are framed in the context of the investor-state relationship. The State, in this context, represents the central government that is concluding the agreement. Reliance on investment obligations is often predicated upon access to investor-state arbitration. At every stage, the legal relationship being created is between the investor and the State, with little to no input from third parties such as affected interest groups or non-governmental organisations.[43]

[41] Although it may be possible to incorporate it from other areas of international law, see below at Part III.

[42] Barton Legum, ‘Defining Investment and Investor: Who is Entitled to Claim?’ (2006) 22(4) *Arbitration International* 521.

[43] For an exception to this position see Gary Born and Stephanie Forrest, ‘Amicus Curiae Participation in Investment Arbitration’ (2019) 34(3) *ICSID Review - Foreign Investment Law Journal* 626.

Related to the two-party orientation of investment treaties is the historical focus on investment protection in international agreements. The regime emerged in a post-war economic context, in which legal protections were granted in the hope of attracting private capital.[44] In essence, the purpose was to reassure investors that their factories and mines would not be nationalised without adequate compensation. Investment arbitration is still an effective bulwark against this practice.[45]

Nevertheless, there has been somewhat of a mission-creep for foreign investment when compared to its original purpose. This can be attributed to two aspects of modern investment treaties. The first is the shift in emphasis in investment cases from 'direct expropriation', a term that generally requires wholesale transfer of ownership or destruction of value to be established, to more ambiguous standards. 'Indirect expropriation' is more difficult to clearly demarcate, as it can be precipitated by a change in legislation that incidentally affects the viability of an investment, while leaving ownership unchanged.[46] This has brought potential public interest regulation into the sphere of investment arbitration, as opposed to nationalisation. Secondly, the standard that requires investors to be granted 'fair and equitable treatment' is infinitely elastic.[47] Intended as a good faith provision, it has come to encompass claims relating to the transparency of procedures and whether the legitimate expectations of investors have been frustrated. Consequently, the focus on investment protection in investment agreements frames such disputes around the investor-state obligation, even though the dispute is more complex, both in relation to the substantive issues and the parties involved. Public policy issues are routinely engaged, without representation from non-State actors.

Over the past decade, attempts have been made to redress this imbalance by the introduction of exceptions clauses for public policy.[48] These clauses provide that States may derogate from investor obligations if necessary for the protection of relevant public policy. While the incidence of these clauses is on the rise, they continue to represent a significant minority. Moreover, some scholars describe exceptions clauses as 'missing in action', due to the failure of parties to invoke them, the failure of tribunals to independently consider them, and arbitrators failing to correctly separate primary obligations from exceptions clauses for the purposes of accommodating

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44 James Thuo Gathii, 'War's Legacy in International Investment Law' (2009) 11(4) *International Community Law Review* 353.

45 Christoph Schreuer, 'The Concept of Expropriation under the ETC and Other Investment Protection Treaties' (2005) 2(3) *Transnational Dispute Management* 1.

46 Prabhash Ranjan, 'Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v Uruguay' (2019) 9(1) *Asian Journal of International Law* 98.

47 Rudolf Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39(1) *International Lawyer (ABA)* 87.

48 Caroline Henckels, 'Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law' (2020) 69(3) *International & Comparative Law Quarterly* 557.

public interest claims.[49] Therefore, the social impact of investment is increasingly recognised as a valid concern in investment arbitration, but the mechanisms to adequately address this concern remain in their formative stages.

One response to this concern is that the State itself is representative of the public interest; international investment law and policy cannot expect to account for circumstances in which the central government is insufficiently cognisant of the views of its citizens. There is undoubtedly validity to this view. However, some caveats are necessary. This position assumes that investment agreements are necessarily a negotiation between equals. In practical terms, there is some question over the bargaining imbalance that a small island nation might have in negotiations with the European Union, for example. Indeed, textual analysis of investment agreements shows EU investment treaties to be remarkably consistent, suggesting little room for negotiation with recipient host States.[50] Furthermore, the fact pattern described in the aforementioned arbitration cases, whereby pressure from local communities resulted in the cancellation of a licence or revocation of a permit, is a relatively persistent feature of cases in the jurisprudence.[51] As such, there is evidently a disconnect between central government and local communities at least in fact, if not in law.

In addition, there is no direct role for third parties in investor-state arbitration. However, third parties may participate by submitting amicus curiae briefs. In the cases of *Methanex Corporation v United States*[52] and *United Parcel Service of America Inc v Canada*,[53] non-disputing parties were permitted to contribute to the arbitration process. Provision for such submissions is now embedded within institutional rules. For example, since their amendment in 2006, the *ICSID Arbitration Rules* allow for submissions by non-disputing parties that would 'assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight'.[54] Similar provisions can be found in the *UNCITRAL Rules on Transparency*,[55] the *Arbitration Rules of the Singapore International Arbitration Centre*,[56] and the *Arbitration Rules of the Arbitration Institution of the Stockholm Chamber of Commerce*.[57] In all cases, third parties

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49 Wolfgang Alschner and Kun Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties' in Lisa Sachs, Jesse Coleman and Lise Johnson (eds), *Yearbook on International Investment Law and Policy* (Oxford University Press, 2018).

50 Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements' (2016) 19(3) *Journal of International Economic Law* 561.

51 Barnes (n 10).

52 *Methanex Corporation v United States of America* (2001) UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae' (15 Jan 2001).

53 *United Parcel Service of America Inc v Government of Canada* (2003) ICSID Case No. UNCT/02/1.

54 *ICSID Arbitration Rules* (2006) Rule 37(2)(a).

55 *UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2014) Article 4.

56 *Singapore International Arbitration Centre Investment Arbitration Rules* (2016) Article 29.2.

57 *Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce* (2017) Appendix III 'Investment Treaty Disputes' Article 3.

may make submissions but are not full participants in the dispute resolution process.

Aside from the hierarchy of participants, reliance upon amicus curiae briefs presupposes that a dispute has arisen and reached the stage of adjudication before a panel of arbitrators. From a practical perspective, it appears insufficient and inefficient to allow input from community stakeholders at this phase alone, without having a prior consultation process. Moreover, adopting an adversarial stance would jar with the diplomatic underpinnings of many investment projects along the Belt and Road. For example, characterisations of the BRI tend to lean into its partnership-focused, win-win dynamic.[58] A requirement for prior consultation would obviate concerns about undercutting the partnership-focused paradigm. One approach to designing a system of prior consultation is through the concept of the SLO, but this is not without its difficulties in an investment law context.

III THE VIABILITY OF THE SOCIAL LICENCE TO OPERATE IN INTERNATIONAL INVESTMENT LAW

The concept of the SLO fundamentally concerns the relationship between a business operator and the expectations of the community in which they operate. Relevant stakeholders are generally limited to those who are impacted by, and have the corresponding ability to impact, the relevant business operations. In the context of BRI disputes, this is likely to apply to the communities in which the infrastructure projects are being constructed. While the central government is inevitably a stakeholder in such projects, the proximate effect of blasting for a quarry or dredging for a port is most acutely felt by the residents of the areas in which the project takes place. There is no broadly accepted definition for an SLO in international law, nor are there unambiguous definitions in domestic legislation. As such, an SLO fails to rise to the level of a legal obligation and is, at most, considered 'soft law'.[59]

The roots of the concept of an SLO can be traced to the literature on business ethics and corporate social responsibility.[60] Jim Cooney first referenced the term in 1997 at the World Bank's Extractive Industries Review, as a way to encapsulate the need for mining companies to manage the socio-political risks inherent in certain mining projects.[61] Since then, it has been developed to describe a dynamic process of earning and maintaining societal approval for an investor's operations, which is a continuous process of nurturing responsible business practices.

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58 Michael Dunford and Weidong Liu, 'Chinese Perspectives on the Belt and Road Initiative' (2019) 12(1) *Cambridge Journal of Regions, Economy and Society* 145.

59 Jean-Michel Marcoux and Andrew Newcombe, 'Bear Creek Mining Corporation v Republic of Peru: Two Sides of a "Social License" to Operate' (2018) 33(3) *ICSID Review - Foreign Investment Law Journal* 653.

60 Geert Demuijnck and Björn Fasterling, 'The Social License to Operate' (2016) 136(4) *Journal of Business Ethics* 675.

61 Cooney (n 9).

A common description of the SLO is the unwritten social contract that subsists between companies and the communities in which they operate, to the extent that it is not in the gift of formal or governmental authorities. It is endogenous — arising out of the community, rather than being imposed upon the community.

An alternative view of the SLO takes a more formalistic approach wherein community values and interests are crystallised within legislative or regulatory frameworks.[62] In practice, this view leans on social and environmental impact assessments in place of comparatively amorphous community consent. An example can be found in the reference to 'community confidence' which appears in the 'Best Practice Regulation' of the Government of South Australia, whose guidance on energy and mining projects includes the provision that 'it is critical that communities can have confidence in the industry's overall performance and tenement holders demonstrate commitment to best practice environmental management'.[63] To that end, the Ministerial Council on Mineral and Petroleum Resources has developed 'Principles for Engagement with Communities and Stakeholders' with the following five principles and elements: communication, transparency, collaboration, inclusiveness and integrity.[64] Embedding these principles within regulatory frameworks reflects a different role for governmental authorities in the management of the SLO.

Nevertheless, participation in a consultation, even in a formalised process, holds no guarantee that the views of the community and the business operator are necessarily reconcilable. Creating space to provide different groups with seats at the table is, on its own, insufficient to bridge a palpable value-gap. The asymmetrical power dynamic and various conflicting goals and perspectives remain a challenge even in the most well-designed participatory processes. Notably, the distinction between a national and local issue is neither static nor always simple to maintain. Mining or forestry projects, for instance, may achieve national prominence due to the historical role of resource extraction in a nation's economy, or the nationality of the business operator.[65] While far from being a silver bullet to the tensions between economic, social, and environmental interests, the SLO is an influential conceptual framework aimed at requiring stakeholder engagement as a form of dispute prevention.

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62 For an in-depth discussion of this distinction see Kieren Moffat et al, 'The Social Licence to Operate: A Critical Review' (2016) 89(5) *Forestry: An International Journal of Forest Research* 477.

63 Government of South Australia, 'Best Practice Regulation' *Energy & Mining* (Web Page, 8 April 2022) <https://www.energymining.sa.gov.au/industry/minerals-and-mining/exploration/best-practice-regulation>.

64 Ministerial Council on Mineral and Petroleum Resources, 'Principles for Engagement with Communities and Stakeholders' (Web Page, 2005) <https://www.energymining.sa.gov.au/__data/assets/pdf_file/0008/684260/mcmpr_principles_nov05.pdf>.

65 Moffat et al (n 62) [483].

The closest analogy to the SLO in international law is the duty to consult with indigenous peoples. A duty of consultation is a fundamental aspect of modern international human rights law and is contained in two international law instruments. [66] Firstly, Article 6(1) of the International Labour Organisation's *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* ('*Indigenous and Tribal Peoples Convention*') provides that governments shall 'consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly', which must be conducted 'in good faith and in a form appropriate to the circumstances'.[67]

However, there is a more specific duty of consultation with respect to mineral or sub-surface resources, which requires that:

> …governments shall establish or maintain procedures through which they shall consult these peoples … before undertaking or permitting any programmes for the exploration or exploitation of such resources…. The peoples concerned shall wherever possible participate in the benefits of such activities. [68]

A general duty to consult can also be found in the *United Nations Declaration on the Rights of Indigenous Peoples*. [69] Article 19 requires consultation to obtain 'free, prior, and informed consent' before enacting legislation or administrative measures that may affect indigenous peoples.[70]

This duty to consult with indigenous peoples, as provided for in international agreements, shares some conceptual foundation with the SLO. It is rooted in an ethical and legal right to engage in participatory decision-making. Underpinning both concepts is the necessity of an inclusive approach to communities directly affected by operations or actions, particularly when issues of environmental impact or resource exploitation are prominent. In both cases, there is an attempt to evolve towards more sustainable business practices that reflect a more holistic and nuanced understanding of the relationship between the State, the business community, and local or indigenous peoples. However, while the duty to consult is legally mandated, the concept of the SLO has retained a distinctly voluntary, non-legal hue. It remains, however, vital for operational and reputational viability. To this end, there is limited recognition of the SLO concept in international investment law.

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66 S James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017) 67(4) *University of Toronto Law Journal* 435.

67 *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* Article 6(1) (adopted 27 June 1989); 72 *ILO Official Bulletin* 59 Article 6(1) (entered into force 5 September 1991).

68 Ibid Article 15.

69 *United Nations Declaration on the Rights of Indigenous Peoples*, UN GAOR. Res. 61/295 Article 19.

70 Ibid.

A *Limited Recognition of the SLO in Investment Law: Copper Mesa and Bear Creek Mining*

As the investment arbitration cases discussed above demonstrate, the objection of local communities to the activities of foreign investors can be a catalyst for a breakdown in investor-state relations and a precursor to investor-state disputes. Two cases have directly addressed the concept of the SLO in this context.

The tribunal in *Copper Mesa v Ecuador* (‘*Copper Mesa’*) was the first to assess the SLO in the context of arguments relating to contributory fault.[71] Copper Mesa Mining Corporation was a Canadian company that acquired a concession to explore and exploit copper deposits in the Manabi Province of Ecuador. They took several steps in the furtherance of this exploration, including commissioning a geological report, commissioning and submitting an environmental impact assessment, and recruiting a workforce for community outreach. However, following violent protests that involved confrontations between employees of Copper Mesa Mining Corporation and anti-mining protestors, the concession was cancelled by the Ecuadorian government, pursuant to legislation.[72] In the ensuing arbitration, the tribunal found that Copper Mesa Mining Corporation was entitled to compensation for the cancelled concession, but had contributed 30% to their losses by ‘recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands’.[73] While an extreme example, this reasoning demonstrates the willingness to consider a social licence to operate as part of a tribunal’s consideration of damages.

The tribunal in *Bear Creek Mining v Peru* (‘*Bear Creek*’) was the first to address the concept of the SLO in any depth, and has been the subject of considerable scholarly attention.[74] Bear Creek Mining, a Canadian mining company, had been granted a legal licence to operate the Santa Ana mining project by an order passed by the Peruvian Council of Ministers. Several years later, relations between Bear Creek Mining and local indigenous communities had disintegrated, with violent confrontations between employees of the company and anti-project protestors. The issues raised ranged from the environmental impact of the project to the gains not being evenly distributed. As a consequence of the resultant social unrest, Peru effectively revoked the concession granted to Bear Creek Mining, which precipitated the arbitration.[75]

Unlike in *Copper Mesa*, the issue of the SLO was central to the tribunal’s reasoning with respect to liability. Peru argued that Bear Creek was directly responsible for the social unrest that made the cancellation of the concession

71 *Copper Mesa Mining Corporation v Republic of Ecuador* (2016) PCA Case No 2012-2, Award.
72 Ibid [4.72], [4.91], [4.157].
73 Ibid [6.99].
74 *Bear Creek Mining Corporation v Republic of Peru* (2017) ICSID Case No ARB/14/21, Award.
75 Ibid [152]-[159], [162]-[169].

necessary. The tribunal's analysis noted that there were actions that Bear Creek could have taken to obtain an SLO, but they chose not to do so.[76] They also considered the duty to consult as contained in the *Indigenous and Tribal Peoples Convention*. However, the tribunal came to the conclusion that the requirements must focus on the legal obligations of the investor, and not what may be most suitable in the circumstances:[77]

> While the Claimant could indeed have gone further in its outreach activities, the relevant question for the tribunal is whether the Respondent can claim that such further outreach was legally required and its absence caused or contributed to the social unrest.

The tribunal concluded that the government of Peru had been aware of, and tacitly approved, the community engagement activities undertaken by Bear Creek Mining until the discontent had become more prominent. As such, the investor had fulfilled its SLO obligations.

In a dissenting opinion, Philippe Sands KC considered the applicable SLO obligations to be more substantial.[78] Relying on the *Indigenous and Tribal Peoples Convention*, he argued that the legal obligation to consult applies equally to investors as to States, noting that in the *Urbaser v Argentina* case the tribunal held that an investment treaty 'has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights'.[79] Under this view, Bear Creek Mining had materially contributed to the disruption that induced the revocation of the concession, and damages should be reduced by half. The majority disagreed. In their rejoinder to Sands' dissent, the majority stressed that '[t]he Indigenous communities, irrespective whether they were in favour of or against the Project, are not a respondent party in this arbitration. Rather, the State of Peru and its Government are respondents and it is their conduct which the Tribunal has to decide upon.'[80] Consequently, the arguments that played out in *Bear Creek* represent, in microcosm, the challenges of incorporating the SLO within investment law.

B *Challenges in Incorporating the SLO in Investment Treaties*

Whatever the utility of the SLO in the context of business ethics or corporate social responsibility, translating its key tenets into a legal investment obligation is a challenge. Neither China, nor other BRI countries, have demonstrated a willingness to renegotiate their Bilateral Investment Treaties ('BIT') with this in mind, thus far. Even if they attempted to do so, there remain three primary challenges.

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[76] Ibid [402]-[405].

[77] Ibid [408].

[78] *Bear Creek Mining Corporation v Republic of Peru* (2017) ICSID Case No ARB/14/21, Partial Dissenting Opinion.

[79] Ibid [10].

[80] *Bear Creek Mining v Peru* (n 74) [666].

The first is the inherently non-legal character of an SLO. An SLO is a concept focused on an outcome — the attainment of the SLO — rather than a process which can be particularised into a series of steps. This outcome is dependent on agreement by at least two parties, but the prospective obligation would only apply to one party: the investor. The legalisation relating to SLOs requires some inspiration from contract law to the extent that it necessitates a meeting of minds or expectations between investors and the local community. But unlike contractual obligations, clear legal parameters (in the abstract) are absent from the SLO. The codification of a fluid and context-dependent concept into, for example, a treaty obligation may result in an SLO losing its essential character. The second challenge is the inclusion of relevant actors. In the realm of environmental harm, the demarcation of stakeholders based upon distance from the project is likely to be arbitrary and ineffective. National politics and local politics are rarely compartmentalised; instead, one influences the other. Any obligation requiring an investor to obtain an SLO would have to winnow a general duty to consult down to a specific duty to consult specific groups. Thirdly, the attainment and maintenance of an SLO is necessarily a moving target – does the obligation change if there is a change of government? If terms of agreement are reached, would subsequent dissatisfaction with the project require additional consultation? In short, it is unclear whether an SLO is a concept that can be meaningfully translated as a legal obligation that could be embedded within investment agreements. However, it is submitted that this could be incorporated within the investment regime alongside recent developments in relation to the introduction of mediation.

IV OPERATIONALISING THE SOCIAL LICENCE TO OPERATE ALONG THE BELT AND ROAD: THE INCORPORATION OF MEDIATION

The use of mediation for the settlement of investor-state disputes is a relatively recent development in the history of international investment law.[81] However, the use of conciliation for such disputes was envisaged by the drafters of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (‘*ICSID Convention*’) in 1965. Articles 28-35 of the ICSID Convention affirm that the jurisdiction of the International Centre for the Settlement of Investment Disputes (‘ICSID’) extends to conciliating disputes between States and investors. Many of its terms are mediation-like, stipulating ‘[i]t shall be the duty of the [conciliation] Commission to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms’.[82] In practice, however, the process of conciliation has developed such that a Conciliation Commission issues non-binding proposals

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81 Frauke Nitschke, ‘Amicable Investor-State Dispute Settlement at ICSID: Modernizing Conciliation and Introducing Mediation’ (2019) 6(2) *BCDR International Arbitration Review* 381.

82 Article 34 ICSID Convention.

for settlement. It is generally considered to be a rights-based process, as opposed to the interest-based focus of pure, facilitative mediation.[83]

Little is known about the cases that have proceeded to conciliation. Empirical research by Kessedijan et al has found there to be at least thirteen ICSID-based conciliations, and at least eight non-ICSID conciliations.[84] Given the comparative number of arbitrations during the same period — around 1300 — it cannot be said to be a system in which parties have confidence, or for which there is substantial demand. Nevertheless, the 2019 United Nations Conference on Trade and Development ('UNCTAD') Report found that around a quarter of all investor-state dispute cases between 1987 and 2019 were settled, and around a tenth were discontinued.[85] Consequently, there appeared to be an inclination from parties to engage in consensual settlement, but no avenue to facilitate parties to do so.

To that end, the International Bar Association ('IBA') formulated rules for the development of dedicated *IBA Rules for Investor-State Mediation* in 2012.[86] They established a procedural framework for investor-state mediation, including provisions for early management processes, co-mediation, and concurrent mediation and arbitration. These rules were a significant landmark in the gestation of support for the mediation of investor-state disputes, one that has continued apace. Other contributing institutions include the Secretariat of the Energy Charter Treaty, which published a *Guide on Investment Mediation* to offer a step-by-step process for appraising the suitability of the process for particular disputes, and how mediation should be conducted.[87] More directly, a limited number of States have begun to include detailed mediation provisions directly in their investment agreements.[88]

In 2022, ICSID made its own significant contribution to this effect by establishing institutional rules designed specifically for the mediation of investment disputes, the *ICSID Mediation Rules*.[89] It is just one aspect of a broader reform agenda in investment law that stems from dissatisfaction with the time, costs and consequences of investor-state arbitration for host States. The United Nations Commission on International Trade Law ('UNCITRAL') Working Group III on Investor-State Dispute Settlement Reform has developed

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83 Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2015) 406.

84 Catherine Kessedjian et al, 'Mediation in Future Investor–State Dispute Settlement' (2023) 14(2) *Journal of International Dispute Settlement* 192.

85 United Nations Conference on Trade and Development, *UNCTAD World Investment Report 2019* (Final Report, 9 August 2018) 102.

86 International Bar Association, 'IBA Rules for Investor-State Mediation' (Web Page, 4 October 2012) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx>; Frauke Nitschke, 'The IBA's Investor–State Mediation Rules and the ICSID Dispute Settlement Framework1' (2014) 1 *ICSID Revue - Foreign Investment Law Journal* 29 112.

87 International Energy Charter Secretariat, *Guide on Investment Mediation* (2016).

88 Kun Fan, 'Mediation of Investor–State Disputes: A Treaty Survey' (2010) 2 *Journal of Dispute Resolution* 10.

89 International Centre for the Settlement of Investment Disputes (ICSID), 'ICSID Mediation Rules', (Web Page, 2022) <https://icsid.worldbank.org/sites/default/files/ICSID_Mediation_Rules.pdf>.

draft provisions for mediation for inclusion in investment agreements,[90] and draft guidelines for the use of mediation intended to encourage institutional reform to ready State organs for a more consent-based approach to investment disputes.[91] Moreover, China's submission to this Working Group stated support for a consent-based mechanism in investor-State dispute settlement ('ISDS'): 'investment conciliation emphasises the value of harmony and can offer the host country and investors a high degree of flexibility and autonomy'.[92] However, this is not yet reflected in China's investment treaties. It may signify a direction of travel with respect to investment disputes generally and, by extension, Belt and Road disputes. Incorporation of SLO principles during a mediation may be preferable to the current post-hoc model of assessing investor-community relations.

To demonstrate how this process might function in practice, a useful example can be found in the mediation provisions contained within the 2018 *European Union-Singapore Investment Protection Agreement* ('*EU-Singapore IPA*'). With respect to party consent (parties being defined as the investor and the State involved in the dispute), Article 3.4 stipulates that 'disputing parties may at any time, including prior to the delivery of a notice of intent, agree to have recourse to mediation'.[93] No provision is made for mandatory mediation; it remains based upon party consent. There is an obligation for 'sympathetic consideration', but no more.[94] To that end, no community stakeholders have a direct right to initiate a mediation. They would remain reliant on the State to provide this platform.

However, there are procedural elements of the mediation provisions that would be relevant to any attempt to operationalise a SLO as proposed. There is a requirement to submit a detailed description of the problem to the mediator and other disputing party. In response, the mediator 'may decide on the most appropriate way of bringing clarity to the measure concerned' including to 'seek the assistance of or consult with relevant experts and stakeholders' in consultation with the parties.[95]

Two elements of these provisions are noteworthy for our purposes. Firstly, should community stakeholders be the primary catalyst for the instigation of an investment dispute, it is prudent for both States and investors to allow such community stakeholders to participate in the mediation in some way. The

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90 UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Mediation' A/CN.9/WG.III/WP.226 (45th Session, 27-31 March 2023, New York).

91 UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Guidelines on Investment Mediation' A/CN.9/WG.III/WP.227 (45th Session, 27-31 March 2023, New York).

92 UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of China' A/CN.9/WG.III/WP.177 (38th Session, 19 July 2019, Vienna).

93 *EU-Singapore Investment Protection Agreement,* EU-Singapore, signed 15 October 2018 Article 3.4.

94 *EU-Singapore Investment Protection Agreement*, EU-Singapore, signed 15 October 2018 Annex 6 Article 2.

95 Ibid Article 4(2).

most effective method may be to permit direct attendance at the mediation — which is the gift of the mediator, after consultation with the parties. Secondly, an alternative approach would be to permit the mediator to liaise with community stakeholders and to build on their interests as part of the mediator's process of reality-testing. This is a process by which mediators reality-test the parties by asking them probing questions about the practical viability of their respective positions.

In accordance with the provisions of Annex 6 of the *EU-Singapore IPA*, mediators are prohibited from offering substantive judgments about the consistency of affected measures. However, this does not prohibit the mediator from reality-testing solutions through questioning. Therefore, even if the ideal solution of direct stakeholder participation cannot be met, stakeholder interests may still be represented in some form, should the parties consent.

Given the consent-based nature of any settlement, there appears little downside to permitting this procedural variety, aside from cost. To that end, as 'disputing parties shall share jointly and equally the expenses derived from organisational matters', then the apportionment of costs would have to be decided at the outset.[96] The specifics about how costs should be apportioned may depend on the circumstances, the relevant question being which party is most under an obligation to consult with these stakeholders.

Both mediation and the SLO principles emphasise the need for risk identification and mitigation, which offers a useful dispute prevention framework through which to view an SLO. The aim would be to intervene with a facilitated form of negotiation before community discontentment devolves into violent interactions. Rule 6 of the *ICSID Mediation Rules* provides that a party seeking to institute mediation without prior party agreement shall file a request with the ICSID Secretary-General.[97] As such, a pivot towards the use of mediation for the purposes of dispute prevention would not require cumbersome treaty reform, unlike any attempts to codify an SLO as a legal obligation. Relatedly, both mediation and SLOs emphasise stakeholder engagement and relationship management. Unlike arbitration, where non-State interests are relegated to third party submissions, Rule 20 of the *ICSID Mediation Rules* also provides for the participation of other parties in the mediation.[98] Therefore, local communities could be involved as full participants in the dispute resolution process.

At least as important as the procedural rules under which mediation might be conducted is when the mediation takes place. For example, were

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96 *EU-Singapore Investment Protection Agreement*, EU-Singapore, signed 15 October 2018, Annex 6 Article 8(2).

97 Rule 6(1) provides that: 'If the parties have no prior written agreement to mediate pursuant to these Rules, any party wishing to institute a mediation shall file a Request with the Secretary-General and pay the lodging fee published in the schedule of fees'.

98 Rule 20(3)(f) provides that: 'At the first session, the mediator shall determine the protocol for the conduct of the mediation ("Protocol") after consulting with the parties on procedural matters, including … the participation of other persons in the mediation'.

mediation to be embedded within an investment screening procedure — in essence forming one aspect of the approval or licensing process — it may head off disputes before they arise and build a form of 'social licensing' process within the legal system. Some Chinese enterprises have received an increasingly rigorous standard of review before approval is granted.[99] At the same time, it is comparatively rare for Chinese investment treaties to afford investment protection before a project is approved and established.[100] An integrative mediation process as part of investment screening may be a useful dispute prevention measure outside adversarial ISDS processes.

One of the most significant developments in the growth of the use of cross-border mediation is the advent of the *United Nations Convention on International Settlement Agreements Resulting from Mediation*, also known as the *Singapore Convention on Mediation* ('*Singapore Convention*').[101] This Convention elevates international mediated settlement agreements to *sui generis* enforceable legal instruments. Where once parties were reliant on enforcing such agreements as contracts, the Singapore Convention introduces a new scheme whereby such agreements are enforced in a similar way to court judgments (as per the 2019 Hague Convention) or arbitral awards (as per the 1958 New York Convention).[102] As such, any commitments made about the specific project would be enforceable as a *sui generis* legal instrument in countries where the Singapore Convention has been ratified. This should be distinguished from the idea that the SLO *itself* is a legal obligation. In the case of mediated settlement agreements, the commitments would relate to a specific project, for example, an agreement to distribute profits. Each of these factors suggests that mediation could be used to operationalise, rather than judicialise, the SLO.

At present, China has signed the Singapore Convention, but has not yet ratified it. Despite being one of the first signatory States, there is some hesitance to embrace the Convention in its entirety due to the unique history of mediation in China.[103] Community-based mediation has a long and proud history, and is woven into the fabric of China's Confucianism-based society.[104] Provisions for commercial mediation are somewhat lacking in Chinese legislation, with brief reference made to judicial mediation in China's Civil

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99 Andrew Stephen Campion, 'From CNOOC to Huawei: Securitization, the China Threat, and Critical Infrastructure' (2020) 28(1) *Asian Journal of Political Science* 47.

100 However, this trend may be changing, see Qianwen Zhang 'Opening Pre-Establishment National Treatment in International Investment Agreements: An Emerging "New Normal" in China?' (2016) 11(2) *Asian Journal of WTO & International Health Law & Policy* 437.

101 See further, Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1.

102 Eunice Chua, 'Enforcement of International Mediated Settlements without the Singapore Convention on Mediation' (2019) 31 *Singapore Academy Law Journal* 572.

103 Carrie Shu Shang and Ziyi Huang, 'Singapore Convention in Light of China's Changing Mediation Scene' (2020) 2(1) *Asia Pacific Mediation Journal.*

104 Jerome Alan Cohen, 'Chinese Mediation on the Eve of Modernization' (1966) 54(3) *California Law Review* 1201.

Procedure Law and Arbitration Law.[105] Some commentators have considered that more clarity is required in China's domestic legislation for commercial mediation before embracing the Singapore Convention in its entirety. Nevertheless, its role in boosting confidence in the use of mediation may prove useful in the context of multiple stakeholders.

However, even within the context of a mediation with a clear set of procedural rules, with the appropriate parties around the table, the fuzzy contours of the SLO obligation may still interfere with a meaningful participatory process. The extent to which parties are willing to come to an accommodation is dependent upon how they perceive their own role in the process.

In this regard, Anaya and Puig have identified three distinct approaches to the right to consult, which can inform our context.[106] The first is the instrumentalist approach.[107] This approach views any consultation process as essentially a means to an end. The motivations of the central government are driven by common social goals, such as the building of critical infrastructure or broad targets of economic growth. The result is a process that privileges procedural formalism over a focus on substantive outcomes. Fulfilment of the legal SLO obligations would, in this context, be satisfied by participation in a series of procedural steps during the course of the mediation. This is likely to produce sub-optimal outcomes in the long term as the primary stakeholders remain the State and the investor. Merely satisfying procedural obligations is likely to fall short of the substantive goals of SLO discourse.

The second approach is the 'consent-veto power' approach.[108] The theoretical foundation of this approach lies in the conception of indigenous sovereignty, and, in essence, grants local communities ultimate control over matters that affect their people or territory. In our context, this is unlikely to be a sustainable position, given the role of central governments in facilitating inward foreign investment. Moreover, the goal of this approach is not the safeguarding of rights for local or indigenous people, but instead control over the process. The benefit of the mediation process from the perspective of the SLO is to aid in the balancing of interests, which may be undermined by an absolute ceding of control.

Thirdly, investors may consider it preferable to follow a minimalist approach.[109] This is described as a 'check-the-box' exercise, which views SLO obligations as a bureaucratic obstacle. In our context, the approach reduces the consultation process to a 'take-it-or-leave-it' proposition in which the State is receiving input before making a decision.

While these three approaches are stances that the respective parties may adopt in an SLO-focused mediation, none are conducive to a meaningful

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105 Meng Chen, 'Commercial Mediation in Mainland China: Pitfalls and Opportunities' (2023) 23(2) *Pepperdine Dispute Resolution Law Journal* 167, 175.

106 Anaya and Puig (n 66) [447].

107 Ibid.

108 Ibid [449].

109 Ibid [450].

engagement that would fulfil the purpose of obtaining an SLO. By contrast, a pluralist approach may encourage a more holistic analysis that balances the interests of the parties with a view to maintaining their human rights. The process should be genuinely iterative and reflective, establishing systems to preserve the socio-economic benefits of foreign investments where possible, protecting the property rights of foreign investors, and respecting the autonomy of indigenous peoples and the rights of local communities. Substantive outcomes, not procedural formalism, should be the focus of any SLO-focused mediation, with a mutual incorporation of feedback by the parties to the dispute.

Much of the responsibility for establishing an atmosphere conducive to this pluralist approach will fall to the mediator. Cross-cultural communication is a necessity, as are the skills to design a process tailored to the particulars of each party, allowing for the evolution in positions and the integration of new information. Maintaining a focus on sustainable outcomes will be crucial to any degree of success in establishing the process. Carefully managed, the nature of mediation, and the consensus-building expertise of mediators, can be potent tools in operationalising the SLO along the Belt and Road.

V CONCLUSION

Large-scale foreign investment projects relating to construction, mining, and oil exploration typify the kinds of disputes often the subject of investor-State arbitration. This article has emphasised the intrinsic complexity of these disputes, particularly in a BRI context. There is an intersection of community, State, and investor interests. For investment arbitration, the central issue is that foreign investment projects with clear social impact have no corresponding mechanism for local communities to have meaningful, constructive input before a dispute crystallises into a full-blown arbitration case. The concept of the SLO has the potential to bridge the expectation gap between the community, State and the investor. However, the content of a SLO is unclear, both to the investors who are tasked with obtaining it, and arbitrators tasked with interpreting it.

The operationalisation of the SLO through investor-state mediation is in line with the broader trends within the development of international investment law. Sustainable development concerns are increasingly prominent in the text of treaties, analysis of arbitrators, and work of scholars, while investor-state mediation has received considerable support from the institutions of investor-state arbitration. Combining these two approaches represents a holistic approach to proactive dispute prevention, as opposed to post hoc dispute settlement. This is more attuned to the organisational structure of the BRI, and the preference for avoiding adversarial mechanisms therein.

As international investment law continues to develop, the incorporation of the SLO within the formative stages of an investment may help prevent a proliferation of investment disputes, by creating a process that better integrates the rights of all stakeholders. Inevitably, there are limitations to any consensual mechanism. However, the incorporation of SLO principles through mediation contributes to the broader goal of harmonising economic growth with social and environmental stewardship.