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MEDIATE FIRST 調解為先

HONG KONG MEDIATION LECTURE

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Mediation and Sustainable Development along the Belt and Road

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Introduction[1]

Given Hong Kong's position as a gateway for financing and logistics in the Belt and Road Initiative (BRI), it plays a crucial role as a "super-connector" for international collaboration, bridging China and the global community. In this year's edition of the Mediation Lecture series, we will discuss Hong Kong's role and potential in the realm of mediation, particularly in the context of sustainable development along the BRI. We will navigate through five primary topics, by examining the principles of sustainable development related to the use of mediation, exploring their origins and the role China plays in their development alongside the global community. We will then review research on the role and contribution of mediation and early-stage consultation in mitigating disputes.

Through a series of case studies, we will then highlight the use of mediation in infrastructure disputes, focusing on the challenges faced, positive outcomes achieved, and lessons learned. We will also analyze the application of mediation in Investor State Dispute Settlement (ISDS). Lastly, we will discuss Hong Kong's role in advancing cross-border mediation practices.

1. The slides accompanying the lecture can be accessed at the following link https://marketing.hsf.com/136/33139/landing-pages/mediationlecture2024---final.pdf

I. Sustainable Development Principles in the Context of Infrastructure Development

Let us begin by considering the relationship between sustainable development principles on a global scale and within the BRI framework.

Sustainable Development Goal 16[2] emphasizes the importance of peace, justice, and strong institutions, reflecting a shared aspiration among nations for accessible resolution mechanisms when disputes arise.

In 2019, a collaborative project with the United Nations Development Programme (UNDP) was initiated to explore the harmonization of global investment and financing standards along the BRI. This project examined the similarities and differences in Environmental, Social, and Governance (ESG) practices between multilateral development banks and national banks, identifying areas of achievement as well as gaps that require further development.

Historically, the use of mediation in the context of sustainable infrastructure development can be traced back approximately 50 years, stemming from various challenging experiences. Prior to this period, there was limited attention paid to mediation or community consultation before infrastructure investments. A notable example was the hydropower project funded by the World Bank in the Narmada Valley, India, during the 1970s, which resulted in widespread community dislocation and public protests. In response, the U.S. Congress informed the World Bank that further funding would be contingent upon the establishment of an internal accountability mechanism. Subsequently, the World Bank established the Compliance Advisor Ombudsman (CAO) office, which offers grievance channels and mediation as forms of redress for community disputes, alongside compliance audits.

Over the past 30 years, this field has evolved significantly among multilateral development banks. Most now have internal accountability mechanisms akin to the CAO, providing communities with channels to raise issues early in the project lifecycle. The aim is to facilitate direct communication between financing bodies and affected communities, which represents a notable innovation and a wealth of learning.

Simultaneously, since the 1990s, increasingly robust ESG standards have emerged across multilateral banks. Key elements include:

1. Pre-project due diligence: This involves consulting with affected communities to identify, prevent, and mitigate actual and potential adverse impacts, in line with OECD guidelines.
2. Information disclosure: Transparency regarding project impacts is essential.
3. Grievance mechanisms: In many instances, mediation is employed to address community-investor issues as they arise.

China has played an important role in contributing to the development of sustainable development principles. The concept of "天人合一" (harmonious co-existence of humanity and nature) dates back to 700 BC, alongside the principle of "中庸" (moderation as optimal). On the basis of these principles, mediation has had a long standing history in the region.

More recently, the notion of ecological civilization was integrated into the 2018 Constitution, encouraging Chinese banks to adopt the UN Guiding Principles on Business and Human Rights in their policies. For instance, the Industrial and Commercial Bank of China (ICBC) adopted the Equator Principles, which provide access to grievance channels for communities and establish a Green Credit veto system, prohibiting loans to projects that do not meet the bank's environmental standards.

Among multilateral development banks, the majority have committed to the Paris Agreement, which raises environmental standards for infrastructure projects. This commitment is pivotal in preventing disputes from arising in the first place.

Within China, there has been progress in advancing sustainable development principles. As mentioned, the ICBC took a proactive approach in adopting and implementing the Equator Principles. In 2013, the Chinese banking industry also communicated the importance of community engagement initiatives aimed at facilitating information disclosure and enhancing communication with relevant social organizations. Domestic banks have been making commendable efforts to apply these principles, though the pace of implementation varies significantly among them. Domestic bank policy in many cases aligns with the national laws of the host states where investments are made. As we are aware, there is considerable variation in the stringency of these national laws, which directly impacts the level of due diligence required prior to project initiation.

2. The 17 Sustainable Development Goals were established by the United Nations in 2015 as part of the 2030 Agenda for Sustainable Development. See: https://sdgs.un.org/goals.

II. Contribution of Mediation and Early-Stage Consultation and Dispute Mitigation

There is some research which highlights the evolution of grievance mechanisms, a topic that gained prominence approximately ten years ago. There has been a heightened emphasis on ensuring that robust grievance systems are accessible to individuals and communities before the commencement of any project. This underscores the necessity for community consultation mechanisms and grievance procedures to be established.

One key question explored in this research was whether the introduction of grievance mechanisms leads to an increase or decrease in the number of grievances reported. The study, which encompassed many of the world's multilateral banks, revealed that there was an initial spike in grievances at the onset of strengthening these protocols. However, this was followed by a significant decline.[3]

It is important to note that more recent research, conducted from 2019 to the present, indicates a resurgence in the number of grievances. While this may seem concerning, it is not inherently negative; rather, it suggests that greater access to resolution channels provides more opportunities for stakeholders to engage meaningfully with the project. Without these mechanisms, there is a substantial risk of projects stalling or becoming non-operational, as we will discuss through various examples.

In summary, grievance mechanisms serve as a crucial channel for addressing disputes and have proven to be effective in numerous instances.

3. Ali, S. (2024), The Seeming Paradox of Prevention: Dispute Mitigation by Multilateral Development Banks. Civil Justice Quarterly, 43(2), 142-168.

III. Case Studies Highlighting the Use of Mediation in Infrastructure Disputes

Some illustrative case examples that highlight both the successes and challenges of grievance mechanisms in project implementation are worth emphasizing. One notable case involves a power plant project in Bangladesh. In this instance, prior consultation with the community was deemed advisable but not mandatory, resulting in a lack of effective community engagement. Consequently, the project led to significant environmental impacts, including water depletion and pollution, which were not adequately addressed. The local community organized protests in response to their grievances, and ultimately, the power plant remains suspended due to these unresolved issues. This case exemplifies the potential pitfalls when mechanisms for addressing community concerns are absent.

In the wake of such challenges, we have observed an increasing trend among domestic banks to adopt their own heightened standards and principles, particularly in the absence of a cohesive national policy. This shift is seen as essential to preventing disputes from arising in the first place.

Let us now consider two cases recently handled by the Beijing International Commercial Court (BICC) that illustrate effective mediation post-conflict. The first case involved a coal-fired power station in Africa, where a dispute arose concerning purchase contracts for equipment parts among three parties. Quality issues with the equipment led to the intervention of the BICC, which facilitated mediation through joint fact-finding and information disclosure. The case was successfully resolved through this collaborative approach.

Similarly, in a dispute in Botswana concerning a defective part and associated repair costs, the BICC again played a crucial role. Early information sharing and multiple rounds of evidence exchange allowed for a thorough joint fact-finding process, ultimately leading to an effective mediation outcome.

IV. Emerging Trends in Investor-State Mediation

The fourth area of discussion is related to investor-state mediation, a broader field encompassing disputes between states and investors. Traditionally, for the past 40 to 50 years, arbitration has been the primary mechanism for resolving such disputes. The over 3,000 international investment agreements now in place define the approach to resolution. Now increasingly many of these agreements incorporate mediation as a dispute resolution option, marking a significant development. Notably, Hong Kong has emerged as a leader in innovating treaty language that encourages mediation.

For instance, Hong Kong developed a bilateral investment treaty with the UAE, which mandates that states encourage mediation as a preliminary step before pursuing any other dispute resolution mechanism. This provision is initiated at the discretion of the state, not the investor, but it serves as a strong incentive to utilize mediation. Similar language has been incorporated into the Hong Kong-Australia BIT and various other bilateral investment treaties worldwide.

In terms of supportive structures and rules, there has been a growing confidence in the use of mediation within ISDS over the past four to five years. Previously, hesitation existed due to concerns regarding enforceability and authority to act on behalf of either party. However, these concerns have been addressed through the development of a comprehensive set of rules. UNCITRAL has long-standing conciliation rules, and in 2012, the International Bar Association (IBA) established a set of investor-state mediation rules, which I had the pleasure of contributing to as part of the drafting committee. These rules emphasize joint mediation, which is particularly beneficial for complex cases, and require mediator disclosure of any conflicts of interest, similar to arbitration standards.

The International Centre for Settlement of Investment Disputes (ICSID) has also introduced facilities for mediation and conciliation, alongside global dispute resolution institutions. Best practices for investor-state mediation have emerged, including early information sharing, which was crucial in the BICC cases. Effective resolution often hinges on joint fact-finding and a neutral assessment of the situation, allowing for a clearer understanding of the issues at hand. Additionally, it is vital that individuals at the negotiation table possess the authority to make binding decisions.

Recent studies indicate a growing utilization of mediation in ICSID and other investor-state cases. A 2023 study reported 13 cases effectively resolved through conciliation under ICSID, while another ICSID report identified the resolution of 30 investment mediations in 2022, with durations ranging from eight months to two years. The average dispute amount was around $8 million, with mediation costs averaging $25,000—significantly lower than typical investor-state arbitration costs.

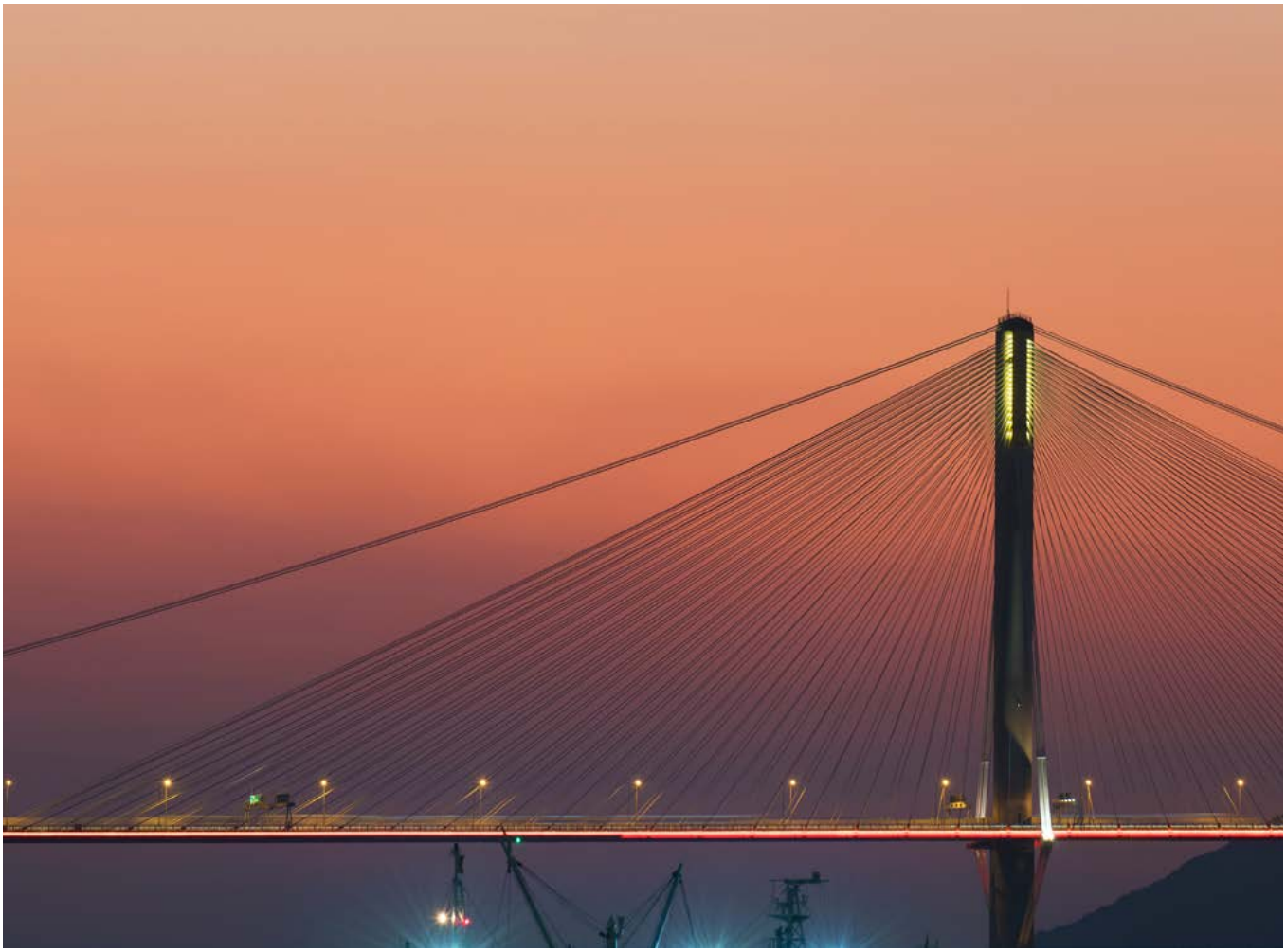
One notable example of successful investor-state mediation involved Odebrecht and the Dominican Republic in a case concerning thermoelectric generation.

V. Hong Kong's Role in Facilitating Mediation of Cross-Border Disputes

What role can Hong Kong play in facilitating mediation for cross-border infrastructure disputes? Notably, China is a signatory to the Singapore Convention on Mediation and discussions among colleagues in China indicate ongoing progress in aligning domestic mediation systems and laws for eventual ratification. This development is promising for the enforcement of international mediated outcomes.

Building on the existing experience of utilizing mediation in investment agreements, particularly exemplified by the CEPA Investment Agreement between China and Hong Kong, the recent establishment of the International Organization for Mediation in Hong Kong will offer new avenues for resolution. A signing ceremony for this organization is anticipated in 2025.

In conclusion, there is a positive outlook on the potential for the increased use of mediation in complex infrastructure cases. This approach not only serves the interests of the parties involved by reducing costs but also promotes sustainable outcomes through collaborative early planning.



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