CONFLICTS ON THE BELT & ROAD: CHINA'S NEW DISPUTE RESOLUTION MECHANISM

Patrick M. Norton[*]

Abstract

In its recent Belt and Road Initiative, China has proposed an ambitious program of infrastructure investments in dozens of countries throughout Asia and beyond. This program will inevitably generate a dramatic expansion of international commercial disputes and the need for procedures and institutions to resolve them. China has recently adopted a number of measures designed to prepare Chinese institutions to handle a significant share of these disputes. This article examines China's new measures and the suitability of Chinese institutions for such an expanded role.

I. Introduction

In 2013, Chinese President Xi Jinping announced a "*Belt and Road*"[1] project of remarkable scale under which the People's Republic of China ["**PRC**"] plans to use the enormous financial reserves generated by its recent manufacturing successes to invest trillions of dollars in infrastructure projects in dozens of countries around the globe. Chinese investments, to date, may already exceed a trillion dollars in countries throughout Central and Southeast Asia, parts of East Africa and the

---

* Mr. Patrick M. Norton is an independent arbitrator resident in the Greater New York City area and affiliated with the Arbitration Chambers of Hong Kong and London. He wishes to thank Yuri Leite and Vikki Hui of Arbitration Chambers for their assistance in the preparation of this article.

1 The project is variously known as "*Belt and Road*," "*One Belt, One Road*" (*yidai, yilu* in Chinese) or by various acronyms for those names, e.g., "*B&R*," "*BAR*," "*BRI*", or "*OBOR*." The website of China's State Council (https://english.gov.cn/) provides a chronology of official developments in the "Belt & Road" initiative.

Middle East, and even Southern and Eastern Europe.[2] China has imaginatively modelled this project on the historic "*Silk Road*" – the complex of land and sea trade routes linking the economies of East Asia with Central and South-East Asia, the Middle East, and Eastern Europe since the days of the Han and the Roman Empires.[3] The "*belt*" of China's "*New Silk Road*" comprises of the overland routes from China through Central Asia to Europe; the various maritime routes from China around South and Southeast Asia to the Middle East and Africa make up the "*road*."

The scale of China's Belt and Road investments will inevitably have significant geopolitical and economic implications. Observers have expressed concerns that China's infrastructure investments may go hand-in-hand with the Chinese military and "*soft power*" ambitions. China's use of debt, not aid, to finance its projects has caused others to apprehend that China is establishing "debt traps" for unstable and developing economies. It is also feared that the injection of enormous amounts of capital into countries, where political corruption is already endemic, may aggravate political and corporate governance problems.[4]

---

2 Reliable statistics for the Belt & Road are elusive. The World Bank provides on its website (https://www.worldbank.org/) various studies on Belt & Road economics that may be considered reliable.

3 *About the Silk Road*, UNESCO (Sept. 24, 2019), *available at* https://en.unesco.org/silkroad/about-silk-road.

4 A summary of the broader political and economic issues may be found in Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN REL. (May 21, 2019), *available at* https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative; *See also How will the Belt and Road Initiative advance China's interests*, CHINAPOWER (May 08, 2017), *available at* https://chinapower.csis.org/china-belt-and-road-initiative; Simeon Djankov et. al., *China's Belt and Road Initiative: Motives, Scope and Challenges*, PETERSON INST. INT'L ECON. (Mar. 2016), *available at* https://www.piie.com/publications/piie-briefings/chinas-belt-and-road-initiative-motives-scope-and-challenges.

China's new infrastructure investments portend, in any event, a dramatic expansion of the need for effective international dispute resolution, particularly in Asia. China's investment projects will inevitably create complex, multi-party contractual arrangements among both private and governmental actors in China, host countries, and, in some instances, third party countries. The projects' international financing requirements will likewise involve public and private international banks and financing institutions in China and third-party countries. These complex contractual structures will last for years, in some cases decades, and will inevitably generate complex commercial disputes. Some of these disputes will be submitted to the host country's courts,[5] or to arbitration before existing international arbitral institutions.[6] This paper focuses on a set of new dispute resolution procedures and institutions that China has recently established with the express intention of providing new and flexible mechanisms for resolving Belt and Road disputes.

II. Existing Dispute Resolution Institutions in China

China's development of a modern commercial legal system[7] has included the establishment of a nationwide network of courts and a web of commercial arbitration institutions. These judicial and arbitral institutions are currently available to serve as venues for Belt and Road disputes. The new Chinese Belt and Road institutions are also governed, in many respects, by existing Chinese laws, and have institutional relationships with the existing system. To understand the new measures, it is helpful to summarize briefly, China's existing dispute resolution framework.

---

5 Some issues, for e.g., land use rights, may be subject to mandatory local laws or jurisdiction.

6 I have previously examined some of these alternatives, *see* Patrick M. Norton, *China's Belt and Road Initiative: Challenges for Arbitration in Asia*, 13 U. PA. ASIAN L. REV. 73 (2018).

7 In the People's Republic of China's (PRC) early years, a planned economy and very limited international trade and investment relations largely obviated the need for a commercial legal system. This changed dramatically with Deng Xiaoping's opening of the economy in 1979. Development of a modern commercial legal system followed in the wake of that opening.

A. Commercial Litigation in China

China has a civil law system[8] with a four-tier judiciary headed by the Supreme People's Court ["**SPC**"]. At the outset of China's redevelopment of its legal system, one of the judicial institutions' greatest challenges was a dearth of qualified judges and lawyers. Most experienced judges had been dismissed during the political campaigns of the 1950s and the Cultural Revolution, and the legal profession itself had effectively been abolished. Law schools and related legal education programs had been closed for more than a decade. These measures were reversed in the wake of Deng's 1979 opening, but re-establishing legal institutions and the legal profession was a challenge. Many of China's post-1979 judges had received no legal training; indeed, many had not even attended university.[9] China has addressed these judicial personnel shortages in the subsequent years with very intense legal education programs, including mandatory training classes for existing judges and encouraging students to study law abroad. As a result, judicial standards in China today are significantly higher than they were only 10 or 20 years ago.

A related challenge for China's judiciary has been a lack of specialist knowledge in fields related to foreign trade and investment. For many years, foreign parties found that their disputes in Chinese courts were being heard by judges with only limited familiarity with either rules of international trade and investment generally, or with more technically specialized fields of law such as intellectual property. China has addressed these problems aggressively too, establishing rules that vest jurisdiction for foreign-related disputes in designated intermediate or higher-level

---

8 In the 19th century, China's legal reformers modelled a civil law system on Japan's, which itself had largely been modelled on Germany's. During the republic, China's legal system continued this tradition, and to a more limited extent, the PRC has followed that approach.

9 Circa 2000, many of China's judges, particularly in the lower courts of first instance in the smaller cities and counties, were former officers of the People's Liberation Army (PLA) who were released during a downsizing of the PLA.

courts and, at least in the major cities, before panels of judges with training and experience in international or technically specialized areas.[10] The SPC itself has now established a Fourth Civil Division staffed with judges with the requisite training and experience. The SPC has also issued a number of directives providing guidance on how lower level courts are expected to handle cases of this nature.[11]

Several concerns nevertheless persist. First, communist dogma and the lingering effects of China's Confucian heritage are still felt. A recent study[12] has observed that Chinese judges are typically influenced in their decision-making by three, potentially inconsistent, factors: the legal, social, and political effects of their rulings. This importance accorded to social and political factors outside the scope of a given dispute is both Confucian and Marxist in origin, and results, as the Chinese say, in a "*rule of law with Chinese characteristics*."[13] Ideology still trumps legality, and the courts are repeatedly admonished to defer to the views of the Communist Party. It is probably fair to say that such factors play only a limited role in the majority of Chinese commercial cases these days, but the theoretical

---

10 See, e.g., Jerome A. Cohen, Settling International Business Disputes with China: Then and Now, 47 CORNELL INT'L L. J. 555, 565 (2014); Xiao Yongzhen, Chinese Methods for Settling Economic Disputes Concerning Foreigners and their Legal Bases, 1(2) PAC. RIM L. & POL'Y J. 363, 379 (1993).

11 Provisions on the Jurisdiction of Beijing No. 4 Intermediate People's Court over Cases (2018) and Provisions on the Jurisdiction of Shanghai Financial Court over Cases (2018) provide for the assignment of foreign-related and financial cases to specialized courts in those municipalities, *see* Xuehua Wang et al., *Annual Review on Commercial Arbitration in China (2019)*, *in* COMMERCIAL DISPUTE RESOLUTION IN CHINA: AN ANNUAL REVIEW AND PREVIEW 1, 5 (Beijing Arbitration Commission and Beijing International Arbitration Center eds., 2019) [*hereinafter* "Wang et al."].

12 Meng Yu & Guodong Du, *How Chinese Judges Think?*, CHINA JUST. OBSERVER (Jan. 04, 2019), *available at* https://www.chinajusticeobserver.com/insights/how-chinese-judges-think.html.

13 In Western jurisprudence, this might be characterized as an emphasis on the principles of distributive justice within society, over those of commutative justice between the parties.

possibility still gives a degree of uncertainty to Chinese judicial proceedings.[14]

Chinese judicial procedures also sometimes present surprises to foreign parties. China's procedural rules generally follow a civil law model in which the pre-trial disclosure of evidence is largely in the hands of the judge, and Chinese judges cannot always be expected to ensure pre-trial disclosure.[15] As a result, a foreign party may find itself facing the other party's principal evidence for the first time at trial.

Enforcement of Chinese judgments is also typically problematic. China has been participating in the negotiation of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. In addition, China has reportedly entered into a number of bilateral agreements providing for mutual judgment enforcement.[16] On the whole, however, Chinese judgments remain unenforceable outside China.

---

14 The interjection of policy into judicial contexts is not always a negative factor for foreign parties. The government and the Communist Party have a strong, ongoing interest in having foreign parties feel that they are receiving justice in Chinese courts.

15 Elizabeth Fahey & Zhirong Tao, The Pretrial Discovery Process in Civil Cases: A Comparison of Evidence Discovery between China and the United States, 37(2) B.C. INT'L & COMP. L. REV. 281, 287 (2014). See Li Huanzhi, China's International Commercial Court: A Strong Competitor to Arbitration?, KLUWER ARB. BLOG (Sept. 30, 2018), available at http://arbitrationblog.kluwerarbitration.com/2018/09/30/chinas-international-commercial-court-a-strong-competitor-to-arbitration/ [hereinafter "Li Huanzhi"].

16 *See* Jianli Song, *Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments,* CHINA INT'L COM. CT. (Aug. 30, 2018), *available at* http://cicc.court.gov.cn/html/1/219/199/203/1048.html. Supreme People's Court (SPC) Justice Song stated that 36 out of 39 recent bilateral treaties with other countries provide for mutual recognition and enforcement of judgments. None, however, is with a major trading partner of China. There have been several cases in China and the United States recently in which a judgment in the other country was recognized on the basis of reciprocity. *See* Kent

For these and similar reasons, foreign parties generally do not select Chinese courts as their first choice for the resolution of their disputes with Chinese counter-parties. Foreign parties typically choose Chinese judicial proceedings only when they have no jurisdictional alternative or their counter-party's principal assets are located in China, and a Chinese court judgment is the most promising method of enforcing a favourable ruling against those assets.[17]

B. Arbitration in China[18]

The PRC began developing arbitration institutions to handle international disputes shortly after Deng's 1979 opening of the economy. During the 1980s and the early 1990s, the forerunners of the China International and Economic Trade Arbitration Commission[19] ["**CIETAC**"] and the China Maritime Arbitration Commission[20] ["**CMAC**"] were established and authorized to hear international cases. Domestic arbitration also became more widespread during that era, generally administered by local arbitration commissions. The Arbitration Law of the People's Republic of China ["**1994 Arbitration Law**"][21] then consolidated international and

---

Woo, *Enforcement of Foreign Judgments in China*, ZHONG LUN (Jan. 08, 2018), *available at* http://www.zhonglun.com/Content/2018/01-08/1921190435.html.

17 For a generally positive view of Chinese courts in light of recent reforms, *see* Stephen O'Regan, *Understanding Legal Proceedings in China*, CHINA BUS. REV. (July 29, 2016), *available at* https://www.chinabusinessreview.com/understanding-legal-proceedings-in-china.

18 A summary of the current status of arbitration in China may be found in Wang et al., *supra* note 11.

19 The CIETAC's forerunner was the Foreign Trade Arbitration Commission which was established in April 1956. *See About us*, CHINA INT'L ECON. & TRADE ARB. COMM'N, *available at* http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en.

20 The CMAC was originally named the Maritime Arbitration Commission of the China Council for the Promotion of International Trade and was established in 1959. It was renamed CMAC on June 21, 1988; *See About us*, CHINA MAR. ARB. COMM'N, *available at* http://www.cmac.org.cn/?page_id=283&lang=en.

21 Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 01, 1995) (China) [*hereinafter* "1994

domestic arbitration and still provides the basic framework for all arbitration in China.[22] In subsequent years, additional Chinese arbitration commissions, most notably the Beijing Arbitration Commission ["**BAC**"], were authorized to hear international as well as domestic cases. In 2012, CIETAC's Shanghai and Shenzhen sub-commissions also broke off from the CIETAC's headquarters in Beijing to become independent.[23] The CIETAC continues to hear the majority of foreign-related cases in China, but the dockets of the BAC and the Shanghai International Arbitration Commission ["**SHIAC**"] and the Shenzhen International Court of Arbitration ["**SICA**"] are increasing.

Arbitration in China has been criticized for various shortcomings, including limitations in earlier years on the parties' ability to nominate non-Chinese arbitrators,[24] exceptionally low compensation for the arbitrators leading many candidates, particularly foreign arbitrators, to be unwilling to accept appointments and inducing those who do accept appointments to minimize their time spent on the cases; an unnecessary

---

Arbitration Law"]. The Arbitration Law was enacted in 1994 but did not come into force until 1995. As a result, it is sometimes also referred to as the "1995 Arbitration Law".

22 On the history of Chinese arbitration, *see* Will W. Shen & Iris H.Y. Chiu, *Arbitration in China: History and Structure*, *in* ARBITRATION IN CHINA: A PRACTICAL GUIDE 3 (J. Cohen et al. eds., 1st ed. 2004) [*hereinafte*r "Cohen"]; JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 8 (3d ed. 2012).

23 The confusion initially created by the split between CIETAC and its Shanghai and Shenzhen sub-commissions was eventually clarified by directives from the SPC. The sub-commissions are now wholly independent entities. *See* Jie Zheng, *Competition between Arbitral Institutions in China – Fighting for a Better System?*, KLUWER ARB. BLOG (Oct. 16, 2015), *available at* http://arbitrationblog.kluwerarbitration.com/2015/10/16/competition-between-arbitral-institutions-in-china-fighting-for-a-better-system.

24 The CIETAC established a panel of approved international arbitrators and loosened its rules to permit the appointment of foreign arbitrators, and other Chinese arbitration commissions have followed suit. In many instances, however, the listed arbitrators are simply well-known in other jurisdictions and rarely or never appear in Chinese cases, if only because, historically, the pay has been so poor. Chinese counsels sometimes also recommend appointing only Chinese arbitrators.

level of interference in individual cases by the arbitration institutions' secretariats, rules that permit arbitrators, on their own initiative, to switch from arbitration to mediation and back,[25] and, on occasion, questions as to the transparency and impartiality of the arbitration proceedings. The institutions and many practitioners and academics have made significant efforts in recent years to ameliorate these problems, and the institutions themselves have repeatedly amended their rules to correct at least some of the problems. Nevertheless, most lawyers, foreign and Chinese, remain cautious about invoking the jurisdiction of the Chinese institutions.

Enforcement is the one area in which arbitration in China retains clear advantages over domestic litigation. China is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, as a consequence, arbitral awards rendered in China are generally enforceable throughout the world[26] (China's own record in enforcing foreign arbitral awards has had a mixed history, but has improved considerably in recent years).[27]

---

25 This "med-arb" or "two-hat" approach is controversial internationally. It is also common in the German-speaking countries of Europe, but many foreign parties feel that it compromises their positions in arbitration; if they are compelled to disclose their bottom-line positions in mediation and the case then reverts to arbitration. Chinese arbitrators say that they generally go to mediation only with the agreement of the parties, but few parties are likely to oppose a tribunal's proposal of this sort. Moreover, at this point in the arbitration, the parties are still uncertain of the outcome of the arbitration and may be willing to mediate in order to avoid the risks of an arbitral award from a tribunal that has shown a preference for a mediated result.

26 *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I, June 10, 1958, 330 U.N.T.S. 38.

27 In the 1980's and early 1990's, a number of local Chinese courts, wishing to protect local economic interests, refused to enforce foreign arbitral awards on various spurious grounds. In 1995, the SPC adopted rules requiring that judicial rulings refusing to enforce foreign awards be referred to higher-level courts, and eventually to the SPC, for review, before they can be enforced. *See* Notice of the Supreme People's Court on the Handling by People's Courts of Issues Concerning Foreign-related Arbitration and Foreign Arbitration,

China's 1994 Arbitration Law has resisted a number of efforts at amendment,[28] and continues to present at least two general problems for international arbitration. First, Article 16 of the Arbitration Law requires that arbitration in China only be conducted under the auspices of a "*designated arbitration commission.*"[29] This effectively bans *ad hoc* arbitration. Interpretations of this ambiguous statutory term by the SPC have also suggested that it may limit arbitrations in China to those conducted under the auspices of a *domestically* authorized "*arbitration commission*". The validity of arbitrations under the auspices of any non-Chinese arbitration institution may, therefore, be questioned.[30]

(promulgated by the Sup. People's Ct., effective Aug. 28, 1995, rev'd Dec. 16, 2008, effective Dec. 31, 2008) FAFA [1995] 18, *available at* http://cicc.court.gov.cn/html/1/219/199/201/701.html (China). This system of review has sometimes resulted in long periods of delay before negative lower court rulings can be reversed and the foreign awards actually enforced. Reliable statistics are difficult to obtain, but the record seems to be improving.

28 A current effort to amend the Arbitration Law focuses on adopting the UNCITRAL Model Law to Chinese circumstances. It remains uncertain whether and when such statutory changes might be adopted. *See* Wang et al., *supra* note 11, at 23-24.

29 1994 Arbitration Law, *supra* note 21, art. 16 (China).

30 The SPC vacated an ICC Award in 2003 that had been rendered in a case heard in Shanghai. *See* Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case concerning the Application of Züblin International GmbH and Wuxi Woco General Engineering Rubber Co., Ltd. for Determining the Validity of the Arbitration Agreement, Sup. People's Ct., July 08, 2004 (China) [*hereinafter* "Züblin International"]. (The author was the sole arbitrator in that case and in two others that were effectively moot by the time of the *Züblin International* decision). The *Züblin International* decision was widely interpreted as construing Article 16 to bar arbitrations in China held under the auspices of foreign arbitration institutions. In 2013, however, the SPC validated an ICC award, also heard in Shanghai, leading some observers to conclude that *Züblin International* had been invalidated because the arbitration clause in that case, unlike the clause in the *Züblin International*, failed to name an arbitration institution, not because it named the rules of a foreign institution. *See* Tietie Zhang, *Enforceability of Ad Hoc Arbitration Agreements in China: China's Incomplete Ad Hoc Arbitration System*, 46 CORNELL INT'L L. J. 361, 377-78 (2013); Jessica Fei et al., *The Longlide Case and its Impact, or Non-Impact, on Sino-Foreign Arbitration Clause Drafting*, HERBERT SMITH FREEHILLS ARBITRATION NOTES (July 24, 2014), *available at*

Second, most foreign companies do business in China through a Foreign Invested Entity ["**FIE**"] – a Sino-foreign joint venture or a wholly-owned foreign enterprise ["**WFOE**"] organized under Chinese law that qualifies as a Chinese legal entity. The SPC has generally considered contracts between an FIE and a Chinese party that are performed in China as being between Chinese legal entities, and not "*foreign-related*" It has ruled on a number of occasions that disputes of this nature must be arbitrated within China.[31] Since Article 16 of the 1994 Arbitration Law permits arbitration in China only under the rules of a Chinese arbitration commission, this interpretation effectively requires that all cases between FIEs or between FIEs and local Chinese businesses, at least to the extent that they are performed in China, be arbitrated in China before a Chinese commission.[32]

---

https://hsfnotes.com/arbitration/2014/07/24/the-longlide-case-and-its-impact-or-non-impact-on-sino-foreign-arbitration-clause-drafting. Subsequent decisions have not clarified the issue, and the most common view remains that only arbitrations before domestic arbitral institutions are clearly authorized; *See also* Michael J. Moser & John Choong, *China and Hong Kong*, *in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 239, 248 (Frank-Bernd Weigand ed., 2009).

31 *See*, *e.g.*, Reply to Inquiry regarding Validity of an Arbitration Clause between Jiangsu Astronautics Wanyuan Wind Power Equipment Manufacturing Co., Ltd. and LM Wind Power (Tianjin) Co. Ltd., (2012) Min Si Ta Zi No. 2 (Aug. 31, 2012) (China), (a contract between a joint venture and a wholly-owned foreign enterprise performed in China and concerning products manufactured and installed in China was not "foreign-related" and dispute could not, therefore, be arbitrated outside China.

32 *See* Sabrina Lee, *Arbitrability of China Disputes Abroad: A Changing Tide?*, KLUWER ARB. BLOG (Apr. 07, 2016), *available at* http://arbitrationblog.kluwerarbitration.com/2016/04/07/arbitrating-chinese-disputes-abroad-a-changing-tide.

III. China's New Specialised Dispute Resolution Mechanism for the Belt and Road Initiative

On January 23, 2018, a joint committee of the Chinese Communist Party and the State Council[33] issued an Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions ["**Opinion**"].[34] The Opinion called for the establishment of a "*dispute resolution mechanism for the BRI*" ["**Mechanism**"][35] consisting of: (i) a newly established Chinese International Commercial Court ["**CICC**"]; (ii) an International Commercial Expert Committee ["**Expert Committee**"]; and (iii) a selected group of international commercial dispute resolution institutions.

A. "One-Stop Shop"

The Opinion envisions the Mechanism as a "*one-stop centre for dispute resolution*." In many ways, this is its most intriguing feature. Once having agreed to refer a dispute to this "*one-stop centre*," parties are able to choose among various linked institutions to resolve their disputes through mediation, litigation, arbitration, or a combination thereof.

---

33 The Central Leading Group for Comprehensively Deepening Reform.

34 Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions, CHINA INT'L COM. CT. (June 27, 2018), *available at* http://cicc.court.gov.cn/html/1/219/208/210/819.html [*hereinafter* "Opinion"]; The online version of the Opinion is updated as of June 27, 2018, the same date as the implementing Provisions issued by the SPC. The original Opinion, however, was promulgated on January 23, 2018. *See* Wang et al., *supra* note 11, at 7.

35 "Mechanism" is an awkward English title for a set of institutions, but it is the one used by Chinese authorities in the Opinion and often in other translations. Hence, I will use it here. "Platform" might be a better translation of the concept and is used in the published English version of Article 11 of the Provisions, and by many Chinese lawyers, to describe the Belt & Road institutions collectively.

China's Mechanism and, in particular, the CICC is inspired by the success of similar international commercial courts in Singapore and Dubai,[36] and well-publicized plans to establish such courts in Abu Dhabi, Belgium, and elsewhere.[37] China's new institutions differ most strikingly from the Singapore and Dubai models in what might be called their Sino-centrism. The Singapore and Abu Dhabi courts are "*international*" in the sense that each maintains a panel of judges from various countries, their rules do not require a nexus with the host country as a jurisdictional prerequisite. The Singapore and Dubai courts also permit qualified international lawyers from other jurisdictions to argue cases. As discussed in sub-section B below, China's new CICC differs in all these respects: only Chinese judges hear cases; only Chinese lawyers may argue them; and a nexus with China is a jurisdictional requirement.

China has sought to mitigate this Sino-centrism by authorizing the use of English in documents that may be filed, without Chinese translations, in CICC proceedings and requiring judges of the CICC to be fluent in English.[38] The CICC procedures are also facilitated by electronic filings,

---

36 Justice Zhang Yongjian, Chief Judge of the SPC's Fourth Civil Division, acknowledged in a speech in 2018 that the inspiration for the CICC was the international commercial courts in these jurisdictions. Zhang Yongjian, Member of Adjudication Committee of the Supreme People's Court, Chief Judge of the Fourth Civil Division of the Supreme People's Court, Towards a Fair, Efficient and Convenient Dispute Resolution Mechanism for B&R-Related International Commercial Disputes: China's Practice and Innovation, at the Forum on the Belt and Road Legal Cooperation (July 02, 2018).

37 *See* Nicholas Lingard et al., *China establishes international commercial courts to handle Belt and Road Initiative disputes*, OXFORD BUS. L. BLOG (Aug. 17, 2018), *available at* https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/china-establishes-international-commercial-courts-handle-belt-and.

38 Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, (promulgated by the Sup. People's Ct. on June 25, 2018, effective July 01, 2018), FA SHI [2018] 11, art. 4 [*hereinafter* "SPC Provisions"]. This article requires the judges of the CICC to be "*capable of using Chinese and English proficiently as working languages*".

video-conferencing, and other forms of information technology,[39] and by maintaining a website in English as well as Chinese. It remains to be seen to what extent these measures will succeed in convincing non-Chinese parties to agree to proceedings that must be argued by Chinese lawyers before Chinese judges.

B. The Chinese International Commercial Court

In June 2018, the SPC implemented the Opinion by issuing Provisions of the Supreme People's Court on Several Issues regarding the Establishment of International Commercial Courts ["**SPC Provisions**"].[40] The SPC Provisions formally established the CICC as an organ of the SPC under the direction and administration of the SPC's Fourth Civil Division. The CICC functions through two subordinate courts or tribunals,[41] each drawing from the same panel of 15 SPC judges.[42] Each is also typically referred to, somewhat confusingly, as a "CICC". The first CICC was established in Shenzhen ["**Shenzhen CICC**"] to handle disputes concerning the "*Maritime Silk Road*." The second CICC was established in Xian, the Chinese terminus of the ancient Silk Road ["**Xian**

39 *Id.*

40 SPC Provisions, *supra* note 38.

41 The English translations of the Opinion and related documents generally refer to the CICC as a "court," but they also generally refer to the individual operational tribunals in Xian and Shenzhen, discussed below, as "courts." This can be confusing. Chinese texts do not always clearly distinguish between singular and plural, and the SPC, in any case, has clear authority only to establish "tribunals" (*fating*), rather than "courts" (*fayuan*). *See* Matthew S. Erie, *Update on the China International Commercial Court*, OPINIO JURIS (May 13, 2019), *available at* http://opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court%EF%BB%BF.

42 The first eight judges were appointed in July 2018, the remaining seven in December. *See* Wang et al., *supra* note 11, at 8, 9.

CICC"], to handle disputes concerning the "*Land Silk Road*".[43] It remains uncertain whether China intends to establish additional CICC courts.

In December 2018, the SPC issued procedural rules for the CICC ["**CICC Rules**"].[44] Article 1 of the CICC Rules provides that the CICCs are to "*[provide] an international commercial dispute resolution mechanism that integrates litigation, mediation and arbitration for the parties to resolve disputes fairly, efficiently, conveniently and economically.*"[45] In addition to its litigation functions, the CICC, thus serves as the central administrative organ for the Mechanism generally. Further, Article 7 requires that each of the individual CICC courts maintain its own case management system to administer its own docket.[46]

i. Jurisdiction

The CICC's jurisdiction is set out in Article 2 of the SPC Provisions. The CICC may accept cases that are:

(i) International commercial cases with an amount in dispute of at least RMB 300 million (approximately US$ 45 million);

(ii) International commercial cases subject to the jurisdiction of a PRC higher people's court that determines that a case should be tried by the SPC, and that what the SPC decides is appropriate for the CICC;

(iii) International commercial cases that have a "nationwide significant impact";

---

43 *See* Ben Bury, *China's International Commercial* Courts, LEXOLOGY (Sept. 13, 2018), *available at* https://www.lexology.com/library/detail.aspx?g=ee271656-1145-4ab5-b2dd-4d55967c77c1.

44 Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation) (promulgated by the Sup. People's Ct.), FA FA BAN [2018] 13 (China). [*hereinafter* "Procedural Rules"].

45 *Id.* art. 1.

46 *Id.* art. 7.

(iv) Cases involving applications for preservation measures in arbitration, or for setting aside or enforcement of international commercial arbitration awards according to Article 14 of the Regulations;

(v) Other international commercial cases that the SPC considers appropriate to be tried by a CICC.[47]

Article 3 of the SPC Provisions provides that a dispute may be considered an "*international commercial case*" if:

(i) One or both parties are foreign nationals, stateless persons, foreign enterprises, or other organisations;
(ii) One or both parties [reside outside China (even if they are both Chinese nationals)];
(iii) The object in dispute is outside the territory of China; and/or
(iv) "Legal facts" that create, change or terminate the commercial relationship have taken place outside China.[48]

Investor-state disputes are not included in the CICC's jurisdiction.

There are a number of questions about the terms of this jurisdiction. The requirement for the amount in dispute to be at least RMB 300 million narrows the range of potential cases. Moreover, it may be difficult for many commercial parties to predict the likely amount in dispute when they are drafting the dispute resolution clauses of their contracts, or even when an actual dispute arises.[49] Considerable discretion is also vested in the CICC to determine, for example, what cases have a significant

47 SPC Provisions, *supra* note 38, art. 2.
48 *Id.* art. 3.
49 *See* Li Huanzhi, *supra* note 15.

nationwide impact,[50] or are otherwise "appropriate" for resolution by the CICC.[51] All of these issues remain to be worked out.

ii. Applicability of Chinese Judicial Laws and Procedures

The CICC is an integral part of China's court system and thereby subject to China's judicial laws and procedures. This is significant in several respects:

(i) Judges for the CICC must be current judges of the Chinese courts and must be Chinese nationals. Under Article 4 of the SPC Provisions, the judges of the CICC are appointed by the SPC and must be senior judges who are experienced "*with international treaties, international usages, and international trade and investment practices, and capable of using Chinese and English proficiently as working languages.*"[52]

(ii) The CICC courts are Chinese courts, and Article 263 of the Chinese Civil Procedural Law only permits Chinese-admitted lawyers to act as legal representatives in cases before Chinese courts.[53]

(iii) The CICC courts are to sit as courts of first instance, and the tribunal in each case is to be comprised of a "*panel of three or more judges*."[54] Like the rulings of other organs of the SPC, the CICC's judgments are final and legally binding.[55] Parties may apply to the

---

50 SPC Provisions, *supra* note 38, art. 2(3).
51 *Id.* art. 2(5).
52 SPC Provisions, *supra* note 38, art. 4.
53 Civil Procedure Law of the People's Republic of China (promulgated by Nat'l People's Cong., Apr. 09, 1991, effective July 01, 2017), art. 263 (China).
54 SPC Provisions, *supra* note 38, art. 5.
55 *Id.* art. 15.

SPC, however, for a rehearing. If the SPC grants the rehearing, it will be heard before the SPC itself.[56]

C. The International Commercial Expert Committee

The SPC established the Expert Committee envisioned by the Opinion in December 2018.[57] It is to be comprised of 20 foreign experts and 12 Chinese experts.[58] Working rules for the Expert Committee were issued in November 2018.[59] Members of the Expert Committee may participate in Belt and Road dispute resolution procedures in three ways.

First, foreign experts may be appointed to mediate disputes.[60] The use of these experts in mediation is discussed in sub-section D below. Second, the Expert Committee is to advise "*the people's courts*" – apparently all Chinese courts, not just the CICC panels – on issues of international or foreign law. Article 3 of CICC Rules, more specifically, anticipates that a CICC panel may arrange to "*consult*" with an expert on certain "*specialised legal issues*" by making a request to the Office of the International Experts Committee.[61] Article 8 of the SPC Provisions requires that parties to a

---

56 *Id.* art. 16.

57 Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For Trial Implementation) (promulgated by Sup. People's Ct., Nov. 21, 2018) FABANFA [2018] 14 (China) [*hereinafter* "Working Rules"]; *See* Sun Hang, *The Supreme People's Court Established the International Commercial Expert Committee*, CHINA INT'L COM. CT. (Aug. 26, 2018), *available at* http://cicc.court.gov.cn/html/1/219/208/209/981.html. For a summary of the Expert Committee and its operations, *see* Ning Fei et al., *Annual Review on Commercial Mediation in China (2019)*, *in* COMMERCIAL DISPUTE RESOLUTION IN CHINA: AN ANNUAL REVIEW AND PREVIEW 33, 36-38 (2019) [*hereinafter* "Fei"].

58 The SPC published the initial list of experts in August 2018. See People's Court News Media Association, The Supreme People's Court Issued the Supporting Documents for the "Belt And Road" International Commercial Dispute Settlement Mechanism, CHINA INT'L COM. CT. (Dec. 05, 2018), available at http://cicc.court.gov.cn/html/1/218/149/156/1128.html. The foreign experts on the list are all well-known international arbitration experts.

59 Working Rules, *supra* note 57.

60 *Id.* art. 3(1).

61 Procedural Rules, *supra* note 44, art. 31.

CICC case be informed of this consultation and be given the opportunity to comment on or dispute the expert's views. Expert views, however, are only one of eight methods authorized for use when a CICC court must apply foreign law in a case.[62] No guidance has been issued as to how this kind of advice will be provided. It is also unclear what weight is to be accorded to an expert member's views.

It remains to be seen how these expert consultations will operate in practice. It will obviously not be possible to include experts from all of the numerous Belt and Road host countries, and one may doubt the expert qualifications of an Expert Committee member with respect to the laws of any country other than his or her own even if its country's legal system resembles the jurisdiction at issue – for e.g., an expert from one Islamic law country will not necessarily be qualified to opine on the laws of another country with an Islamic law-based system.

D. Mediation

Mediation under the Belt and Road Mechanism is administered by the International Commercial Mediation Centre for the Belt and Road.[63] Offices of this Centre have recently been established in various locations in China.[64] The documents implementing the Mechanism, to date, emphasize mediation in the broader platform of dispute resolution methods. Article 12 of the SPC Provisions directs that, with the consent of the parties, the CICC may, within seven days of accepting a case, submit the case to mediation either *with one or more Members of the Expert Committee or with a designated mediation institution.*[65] The SPC approved two

---

62 *Id.* art. 8.

63 *Qianhai Court Mediation Office of International Commercial Mediation Center for the Belt and Road was Unveiled*, DEHENG L. OFF. (Sept. 05, 2018), *available at* http://www.dhl.com.cn/EN/socialcontent/0007/008653/5.aspx?MID=0900.

64 Fei, *supra* note 57, at 41-42.

65 Procedural Rules, *supra* note 44 , art. 12.

commercial mediation institutions for this purpose in the "Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the '*One-stop' Diversified International Commercial Dispute Resolution Mechanism*" ["**December 2018 Notice**"]:[66] first, the Mediation Centre of China Council for the Promotion of International Trade and, second, the Shanghai Commercial Mediation Centre.

Article 17 of the CICC Rules modifies and clarifies these procedures somewhat, providing that the case management office of the relevant CICC court "*will convene a case management conference (in person or via video conference) within seven days of the date of service of the litigation documents on the defendant*" to discuss mediation. The parties may then choose to mediate before either a panel of up to three members of the Expert Committee or before one of the approved commercial mediation institutions. The time limit for the mediation is generally not to exceed twenty days. These time limits may be optimistic for cases between parties located far from the CICCs, even with video-conferencing. If the parties do not consent to pre-trial mediation at the initial case management conference, the case management committee is directed to proceed directly to the preparation of a time schedule for a trial. According to Article 21 of the CICC Rules, the mediation is not open to the public.[67] If the mediation is successful, Article 24 states that the CICC may issue a judgment incorporating the parties' agreement.[68]

---

66 Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the "One-stop" Diversified International Commercial Dispute Resolution Mechanism (promulgated by the Sup. People's Ct.), FABAN [2018] 212 (China) [*hereinafter* "Notice"].

67 Procedural Rules, *supra* note 44, art. 2.

68 *Id.* art. 24.

These mediation proceedings may be an attractive feature of the CICC procedures for foreign parties in general. They provide the parties an opportunity, at the outset, to avoid costly adversarial proceedings before Chinese judicial or arbitral institutions. Moreover, if successful, the parties can turn their agreement into an enforceable SPC judgment.

E. Arbitration

Finally, the Mechanism also anticipates allowing the parties to refer their dispute to Chinese arbitration institutions. In its December 2018 Notice, the SPC named five domestic arbitration institutions for this purpose: CIETAC, SHIAC, SCIA, the BAC, and the CMAC.[69] The CICCs are authorized to assist the arbitration institutions by issuing judicial orders for the "*preservation of property, evidence or conduct*" before or after an arbitration proceeding.[70] The Civil Procedure Law, 1994 Arbitration Law and other relevant statutes of the People's Republic of China govern such applications.[71] It remains unclear why parties wishing to submit their dispute to arbitration before a Chinese arbitration institution would not submit it directly to one of the five institutions, rather than submitting it first to the CICC. A direct submission would appear to be procedurally simple. The principal attraction for some parties may be the ready availability of interim relief to preserve important assets or evidence.

IV. First Cases

In 2019, the CICC courts in both Shenzhen and Xian heard their first cases. Five related cases concerning shareholder disputes, involving the Thai manufacturer of the Red Bull energy drink were consolidated in

---

69 Notice, *supra* note 66.

70 SPC Provisions, *supra* note 38, art. 14. It is uncertain what "conduct" means in this context. One does not ordinarily "preserve" conduct. Presumably the intention is to allow enforceable interim orders concerning the parties' conduct pending the outcome of the arbitration.

71 Procedural Rules, *supra* note 44, art. 34.

Xian.[72] A product liability dispute against Italian pharmaceutical company, Bruschettini S.R.L., brought by its Chinese distributor, Guangdong Bencao Medicine Group Co. Ltd.,[73] was referred to the Shenzhen CICC, where CICC procedural rules were followed. Both cases were initially submitted to mediation, which, in both cases, was apparently unsuccessful. The CICC hearings were then held in both cases in May. As of September 2019, no results have been announced.[74]

V. Prospects for China's One-Stop Shop Dispute Resolution Mechanism

China's attempts to site many of the Belt and Road disputes before Chinese institutions and legal procedures is not surprising. Chinese parties to Belt and Road transactions will feel more comfortable dealing with disputes on their home turf, particularly since many of the Chinese entities will have limited international experience, and the dispute resolution mechanisms and laws of the host countries may, thus, be unfamiliar.

In establishing Chinese institutions to manage and resolve Belt and Road disputes, however, China faces a significant challenge from the outset. The predominant consideration in choosing a venue for most international dispute resolution, is finding a neutral venue and neutral rules. Most parties to international disputes are reluctant to site their dispute in the home country of their counter-party, under the rules and procedures of the counter-party's institutions. This will surely be true of most host country and third-party countries to Belt and Road contracts,

---

72 Helen Tang et al., *China's International Commercial Courts hear first cases*, HERBERT SMITH FREEHILLS ARBITRATION NOTES (June 06, 2019), *available at* https://hsfnotes.com/arbitration/2019/06/06/chinas-international-commercial-courts-hear-first-cases; *China's int'l commercial court tries first case,* XINHUA (May 30, 2019), *available at* http://www.xinhuanet.com/english/2019-05/30/c_138100724.htm.

73 *Id.*

74 *Id.*

particularly where at least the judicial option of the CICCs will require all the uncertainties of litigation before Chinese judges, using Chinese lawyers, resulting, at best, in a Chinese judgment, difficult to enforce outside China. Chinese parties will, of course, have significant negotiating leverage in infrastructure investments that China is financing. But one may question how effective that leverage will be in light of the ready availability in Hong Kong and Singapore of respected international arbitration and litigation venues that China itself has publicly endorsed.

One may ask then, what China's purpose is in establishing the Belt and Road Mechanism. To some extent, it may simply reflect China's general ambitions of establishing leading institutional frameworks that parallel and reflect China's undeniable economic and military accomplishments. More particularly, China may hope that by establishing a flexible institution, it may be able to induce host country parties to Belt and Road projects to accept a broader, more diffused Chinese jurisdiction over any potential disputes. By accepting a choice-of-forum clause that stipulates the Belt and Road Mechanism, a host country corporation is not just accepting in advance the jurisdiction of a Chinese court or a Chinese arbitration institution. It is, rather, accepting a more flexible, more general process that emphasizes mediation at the outset and provides a range of litigation or arbitration options at some point in the indeterminate future. If host country and third country parties are willing to accept dispute resolution clauses for these designedly flexible institutions, it may prove a foot in the door for China's Belt and Road Mechanism to establish a significant docket of cases.

Another possibility may be to furnish predominantly Chinese entities with more flexible options for resolving their intra-Chinese disputes. Chinese companies engaged in Belt and Road projects in other countries may do so through locally incorporated subsidiaries or joint ventures that contract with other Chinese-owned entities to perform or finance a project. Article 3 of the SPC Provisions expressly provides for jurisdiction over disputes

when either or both of the parties, even if Chinese, are resident outside China. This clause may be aimed at disputes between Chinese-owned entities incorporated in the host countries and their Chinese partners or financial institutions. An institution that regularly handles such disputes may be a welcome option for many of these Chinese businesses operating well outside familiar territory.

China's Belt and Road dispute resolution institutions are, in any event, nascent, and their goals largely aspirational. Progress will be incremental, hindered by foreign parties' reservations, but enthusiastically supported by many Chinese parties and the Chinese Government.