

THE DYNAMICS OF INTERNATIONAL DISPUTE RESOLUTION BUSINESS IN THE BELT AND ROAD

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I. INTRODUCTION

China's Belt and Road Initiative (BRI) ambitiously aspires towards expanding regional markets and facilitating economic integration across Asia and Europe.¹ It has been regarded as a game-changer on the landscape of dispute resolution market, triggering a proliferation of "adjudication business".² This report examines the dynamics of international dispute resolution in context of the BRI, discussed from the three following perspectives: (1) BRI investors and disputants; (2) three major means of dispute resolution on offer; and (3) institutions involved.

II. BRI INVESTORS AND DISPUTANTS

In context of increased investment among Belt and Road nations, it is expected that BRI disputes may involve participants from both states and private investors, and can broadly be classified in the form of (a) state-to-state disputes, (b) state-investor disputes, and (c) investor-investor.³ Such categorization is chosen to illustrate the significant combination of public and private investment forces driving and funding the BRI development. Different forum should be in place to cater to the different background of disputing parties.

As per May 2019, there is no specific forum to resolving state-to-state disputes under the BRI. State governments alongside the BRI roadmap which are members of the World Trade Organization (WTO) may resort to dispute settlement mechanism in WTO. According to the WTO Agreement, the general rule of settling state-to-state disputes is that the complainant state should "first seek to suspend concessions or other obligations" within the existing agreement.⁴ If not, the case shall be referred to arbitration carried by the WTO panel or an arbitrator appointed by the Director-General.⁵ Furthermore, China has entered into Bilateral Investment Treaties (BITs)

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¹ National Development & Reform Commission, People's Republic of China *Visions and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road*, (Mar. 28, 2015), at http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html.

² Pamela Bookman, *The Adjudication Business*, YALE J. INT'L L. (forthcoming 2019), Temple University Legal Studies Research Paper No. 2019-08.

³ Weixia Gu, *China's Belt and Road Development and A New International Commercial Arbitration Initiative in Asia*, 51(5) VAND. J. TRANSNAT'L L. (2018), 1305-1352, at 1317.

⁴ World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Art 22(3)(a).

⁵ *Id.*, Art 22(6).

with most of the BRI countries. Many BITs provide that states should follow an “amicable settlement through diplomatic channels”, but they might submit the dispute to an ad hoc arbitral tribunal after a reasonable period (usually 6 months).⁶ Yet, there has only been a limited number of investment arbitration cases for state-to-state disputes since the 2000s.⁷

State-investor disputes arise between a state government and a commercial party. The meaning of investors include state-owned enterprises (SOEs).⁸ Due to the growing influence of China in global economy, a proactive attitude in investor protection has been shown by inserting Investor-State Dispute Settlement (ISDS) provisions in BITs since the 2000s.⁹ Under the existing framework, state-investor disputes can be submitted to the institutional tribunal of the International Centre for Settlement of Investment Disputes (ICSID) or ad-hoc arbitral tribunals. China is suggested to establish its homegrown institutions for state-investor dispute resolution rather than relying on institutions such as ISDS and WTO.¹⁰ This sentiment has largely echoed with the current growth of homegrown Chinese adjudication bodies such as the establishment of China International Commercial Court (CICC) in 2018 and capacity-building activities of China International Economic and Trade Arbitration Commission (CIETAC).

For investor-investor disputes, parties have a wide range of options ranging from local courts, international commercial courts (ICCs) to arbitration institutions and mediation centers. This leads us to consider the three major means of dispute resolution for BRI cases as follows.

III. THREE MAJOR MEANS OF DISPUTE RESOLUTION IN BRI

Three major means of dispute resolution are available for BRI disputants: (a) litigation, (b) arbitration, and (c) mediation.

The traditional approach is to seek remedies from local courts. Alternatively, parties may opt for ICCs such as the newly-established CICC and Singapore International Commercial Court (SICC). One advantage of ICCs over traditional courts is its international expertise. Take the CICC as an example, the selection of judges is

⁶ Huaxia Lai and Gabriel Lentner, Paving the Silk Road BIT by BIT: An Analysis of Investment Protection for Chinese Infrastructure/Projects under the Belt and Road Initiative, in JULIEN CHAISSE & JEDRZEJ GÓRSKI (ed.) *THE BELT AND ROAD INITIATIVE: LAW, ECONOMICS AND POLITICS*, 276, (2018).

⁷ *Id.*, 276.

⁸ Wenhua Shan and Norah Gallagher, *China* in CHESTER BROWN (ed), *COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES* 160, (2013).

⁹ *supra* note 7, 277

¹⁰ Matthew Erie, *Indo-Pacific Infrastructure: A China Perspective*, ASIL PROCEEDINGS REPORT (forthcoming, 2019), 3.

based on their experience in adjudicating disputes with international commercial elements, bilingual capability and knowledge on private international law. One more breakthrough of the CICC is the introduction of the International Commercial Expert Committee, which consists of twelve Chinese and twenty foreign legal professionals who offer advice on foreign law which may in turn make impact on the court's judgment.¹¹ On top of that, the CICC aspires to provide a "one-stop" dispute resolution service by linking mediation, arbitration and litigation.¹² This unique characteristic mitigates the traditionally rigid and adversarial nature of court procedures and provides an "organically integrated" approach which is comparable to arbitration and mediation.¹³

International arbitration has been regarded as the most dominant dispute resolution mechanism.¹⁴ Its dominance is attributable to the wide applicability of New York Convention (NYC), which has a total of 159 contracting states.¹⁵ The NYC is the foundational instrument which allows the judicial recognition and enforcement of arbitral awards granted in the arbitral tribunals within the member states. The advantages of arbitration include flexibility of procedures, confidentiality, expertise and neutrality.¹⁶ However, the International Bar Association Report in 2015 identified the increasing cost and prolonged length of arbitral proceedings as factors hindering the growth of international arbitration, a phenomenon which is shared in Asia Pacific and Europe.¹⁷ As we have seen an emergence of ICCs in terms of both the number of institutions and the variety (including the locality, legal system, and innovation on court procedures), one can envisage that the monopoly of arbitration in BRI may be severely challenged.

As for mediation, the UNCITRAL Working Group II's Convention on the Enforcement of Mediation Settlement Agreement (the Singapore Convention) and its corresponding Model Law is open for membership in August 2019.¹⁸ This forthcoming

¹¹ China International Commercial Court, *The Supreme People's Court Established the International Commercial Expert Committee*, at <http://cicc.court.gov.cn/html/1/219/208/209/981.html/>.

¹² Matthew Erie, *The China International Commercial Court: Prospects for Dispute Resolution for the "Belt and Road Initiative"*, ASIL Vol. 22, Issue 11, 2018; Chinese International Commercial Court, *Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court*, Art.12.

¹³ *Id.*

¹⁴ International Bar Association (IBA Arb 40 Subcommittee), *The Current State and Future of International Arbitration: Regional Perspectives*, August 2015, 8.

¹⁵ Anselmo Reyes, *ASEAN and The Hague Conventions*, 21 ASIA PAC. L. REV., 25-44 (2016).

¹⁶ International Bar Association (IBA Arb 40 Subcommittee), *The Current State and Future of International Arbitration: Regional Perspectives*, August 2015, 9.

¹⁷ *Id.*, 10.

¹⁸ Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements* 19 Pepp. Disp. Resol. L.J. 1 (2019), 8; U.N. Comm'n on Int'l Trade Law, Report on the Work of Its Fifty-First Session, U.N. Doc. A/73/17, ¶ 44 (2018).

Convention will be a pioneer of international convention in the realm of mediation for facilitating the recognition and enforcement of settlement agreements.¹⁹ With such a framework in place, it is foreseen that the Convention can incentivize cross-border mediated settlements and provide an alternative for parties who are reluctant to resort to either litigation or arbitration.²⁰

In the BRI context, confidentiality may remain an important factor in choosing arbitration and mediation over litigation, especially in investor-state disputes where trade secrets and state information might be disclosed in public courts. However, it is argued that ICCs and arbitration can be seen as companions rather than competitors, as their functions are complementary and non-exclusive.²¹

IV. DISPUTE RESOLUTION INSTITUTIONS INVOLVED

A major impact of BRI is on courts and arbitration institutions since the scheme has largely reshaped the landscape of adjudication business, leading to a blossom of adjudication market.²²

(i) *Homegrown Institutions in China*

The CICC was established in 2018 in response to the BRI development, with two branches set up in Shenzhen and Xi'an. As indicated by Judge Gao of China's Supreme People's Court, the two courts focus on the Maritime Silk Road and the land-based Silk Road Economic Belt respectively.²³ The features of CICC have been reviewed above.

The leading Chinese homegrown arbitration institutions are the CIETAC, the Beijing Arbitration Commission (BAC) and the Shenzhen Court of International Arbitration (SCIA). Specifically, CIETAC has issued the Investment Arbitration Rules in October 2017, which are designed to govern investor-state arbitrations along the Belt and Road region.²⁴ In September 2017, CIETAC established the Silk Road Arbitration Centre in Xi'an, the starting point of the ancient Silk Road. On the other hand, the BAC and the Nairobi Centre for International Arbitration collaborated in setting up the China-Africa Joint Arbitration Centre (CAJAC) in Beijing and Nairobi. Similarly,

¹⁹ Rachel Chiu, Li Hsien, *A World Without Borders; A New World Order: Navigating Cross-Border Insolvencies Through Arbitration*, ASIAN INT'L ARB. J., 2018, Vol 14 Issue 2, 117-142, 120.

²⁰ *Id.* note 18, 4.

²¹ Michael Hwang, *Commercial courts and international arbitration—competitors or partners?* ARB. INT'L 2015, 31, 193-212, in which the author argues that the two are both competitors and partners.

²² Pamela Bookman, *The Adjudication Business*, Yale J. INT'L L. (forthcoming 2019), Temple University Legal Studies Research Paper No. 2019-08.

²³ China International Commercial Court, *A Brief Introduction of China International Commercial Court*, at <http://cicc.court.gov.cn/html/1/219/193/195/index.html>.

²⁴ CIETAC, International Arbitration Rules 2017, at <http://www.cietac.org/Uploads/201709/59c8d60367bb5.pdf>.

SCIA published its new Rules in December 2018 and its new Guideline for Administration of Arbitration under the UNCITRAL Arbitration Rules took effect in February 2019, where parties can choose Hong Kong as the seat of arbitration and use UNCITRAL Rules to resolve disputes.²⁵ The SCIA new Rules also cover investor-state disputes in light of the growing demand along the Belt and Road.

(ii) *Response from Foreign Institutions to BRI*

A Memorandum of Understanding was signed between the International Court of Arbitration of the International Chamber of Commerce (ICC Arbitration) based in Paris and the SCIA in October 2017. As revealed by Alexis Moure, President of ICC, the new agreement serves “in particular the context of the BRI”.²⁶

In Asia, the SICC serves as a court for adjudicating international commercial disputes arising from the growth of cross-jurisdiction investment and trade. In other words, its establishment is largely “market-driven” for the Asian adjudication business. One unique feature is that the SICC accepts “offshore” cases, where the only connection to Singapore is the parties’ choice of law and submission of jurisdiction to the SICC.²⁷ Additionally, Singapore’s Supreme Court and China’s Supreme People’s Court (SPC) signed a Memorandum of Guidance (MoG) for the recognition and enforcement of monetary judgments in commercial disputes in August 2018. The MoG covers judgments delivered by the SICC.²⁸ As such, BRI parties can enforce an SICC judgment in Chinese courts.²⁹

In the same vein, the Singapore International Arbitration Centre (SIAC) issued the SIAC Investment Arbitration Rules to tailor-make arbitration market for resolving investor-state disputes arising out of the BRI.³⁰ The Singapore International Mediation Centre (SIMC) also caught up with the trend of BRI by signing an agreement with the China Chamber of International Commerce (CCOIC) for assisting the mediation of BRI disputes in October 2017.³¹

²⁵ SCIA, Arbitration Rules, at http://www.sccietac.org/web/doc/rules_list.html

²⁶ International Chamber of Commerce, *ICC MoU with Shenzhen Court of International Arbitration extends facilities to arbitration users*, 2017, at <https://iccwbo.org/media-wall/news-speeches/icc-mou-with-shenzhen-court-of-international-arbitration-extends-facilities-to-arbitration-users/>

²⁷ Man Yip, *Resolution of Disputes before the Singapore International Commercial Court* Int’l & Comp. L.Q. (2016), 65, 439-473.

²⁸ *Memorandum of Guidance between the Supreme People’s Court of the People’s Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases*, Art 5.

²⁹ *Id.*

³⁰ SIAC, Investment Arbitration Rules 2017, at <http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf>.

³¹ Ministry of Law Singapore, *Singapore and China Mediation Centres Work Together to Help Businesses Resolving Disputes along the Belt and Road*, 2017, at <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-and-china-mediation->

Last but not the least, the Asian International Arbitration Centre (AIAC) in Malaysia collaborated with the BAC to set up the Belt and Road Arbitration Initiative in May 2017, with an aim to enhance the harmonization of arbitration law by formulating a set of universal arbitral rule across the BRI region.³²

V. CONCLUSION

Since the launch of the BRI, the dispute resolution market has flourished, resulting in a proliferation of institutions with different niches and position. As scholars have argued, one must not overlook the “business” aspect of dispute resolution mechanism.³³ With closer economic ties and cooperation, the dynamics and constant evolution of dispute resolution market can be seen as a positive development in the provision of diverse and high-quality adjudication services to parties.

centres-work-together-to-help-busi.html.

³² Lin Zhiwei, *Belt and Road a turning point for arbitration in China?* CHINESE BUS L. J., 16 Oct 2017.

³³ Anselmo Reyes, *The Business of International Dispute Resolution*, 4 J. Int'l & Comp. L. 69 (2017); Pamela Bookman, *The Adjudication Business*, YALE J. INT'L L. (forthcoming 2019).