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ENVISIONING FOUNDATIONS FOR THE LAW OF THE BELT AND ROAD INITIATIVE: RULE OF LAW AND DISPUTE RESOLUTION CHALLENGES

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Abstract: *China's Belt and Road Initiative ("BRI") is the largest transnational program of infrastructure investments in the world today. Works carried out under the rubric of BRI is expected to amount to several trillion United States ("U.S.") Dollars by the 2030s and to take place in over 65 countries. This raises the question of how project disputes that arise with works carried out under the BRI will be settled, and whether a multilateral legal regime will arise to affect those settlements as an alternative to the usual methods of resolving investment disputes and enforcing international arbitration clauses supported by intergovernmental investment treaties. This Essay examines the increasing challenges facing investors and states given the lack of an overriding BRI authority nor multilateral framework. It seeks to provide a deeper legal understanding of how dispute resolution is carried out now; it further argues that the BRI will in time give rise to new legal norms and institutions, the outlines of which are already visible. One essential development will be the creation of a dispute resolution regime that responds to the array of challenges posed by projects carried out under the BRI badge, which may not be compatible with traditional dispute resolution mechanisms—most notably, investor–state dispute settlement.*

INTRODUCTION

President Xi Jinping laid out the concept of the Belt and Road Initiative ("BRI") as a connector between cultures on the Eurasian landmass in 2013. The aim, he said, was to establish an "interest," a "destiny" and "liability" community

through existing bilateral or multilateral mechanisms and regional cooperation platforms. The goals were to promote bilateral cooperation, form collaborative relations with other developed countries, and utilize existing multilateral institutions in new ways.

To the best of our knowledge, no national nor international legal instrument has been established to indicate the legal nature of the BRI. One can trace some declaratory origins in the 2015 "Vision and Actions" to Promote the Co-Construction of a "Silk Road Economic Belt" and a "21st-Century Maritime Silk Road" (the "B&R Document") and working reports presented at the National People's Congress, and a series of related speeches delivered by Chinese authorities on occasions. However, the B&R Document is best seen as a kind of guidance,[1] as well as a form of proclamation paper. In 2017, at the inaugural Belt and Road Forum, another explanatory policy document, "Building the Belt and Road: Concept, Practice and China's Contribution" (the "B&R CPCC") was issued by the Office of the Leading Group for the BRI. The B&R CPCC is explicit in stating the cooperation goals, the focus on bilateralism, the importance of collaboration with other developed countries and the utilization of existing multilateral institutions, among other principles. In the words of one Chinese academic, the BRI is a "partnership-based approach," which puts the emphasis on bilateral cooperation. This is fundamentally different from the usual basis of international economic cooperation carried out under multilateral treaties or shared rule-of-law principles. Some have gone as far as to argue that the vague legal status of the BRI might be one of its strengths, since soft law common aims are much easier to negotiate and agree upon than hard law treaties. This may help to alleviate concerns of the BRI Participating Members about doing business with a partner with China's economic

1 "Soft law" refers to a quasi-legal instrument that doesn't carry any legally binding force, or whose legally binding force is weaker than that of traditional laws and regulations.

weight. It also suggests that China is learning by doing. How are disputes between contracting parties to BRI projects to be resolved? At present, the BRI is more a "grand strategy" than a coherent international program of investment overseen by overarching institutions. Rather, a particular program of Chinese investments in a particular country takes place as an *ad hoc* project or within the framework of an intergovernmental bilateral investment treaty ("BIT") that does not provide a granular conceptualization of a rule of law construction or say how exactly conflicts are to be resolved on individual projects funded by Chinese investments. In particular, the BRI lacks: (1) a multilateral treaty covering all participating nation states; (2) a secretariat or other central body to standardize projects and provide a forum for deliberation and development; or (3) a dispute resolution system that offers an acceptable level of legal certainty.

Thus far, China has not provided legal determinacy in any theoretical context familiar to Western academia. Nor has the question of whether the BRI can continue to rely on existing legal instruments, or whether it requires its own institutional or legal arrangements, received much attention in the legal literature.

An added complication is the increasingly polarized international trade relations, within which BRI projects are taking place, particularly in Asia and Africa, where they are often portrayed as an expression of China's attempts to gain influence, or even hegemony, over particular countries and regions. This polarization has, of course, been accelerated by the effects of the COVID-19 pandemic on the political economy of global trade and investment and has led to a further deterioration of relations between China and the United States ("U.S."), with the latter still developing a clear articulation of its policy towards China. The breakdown in multilateralism and cooperation between the U.S. and China, which has disrupted investment and global supply-chains, adds extra political risk to many projects. It also places yet more emphasis on the need for legal certainty through

dispute resolution.

At present, the designation of a project as "belonging" to the BRI does not have a great deal of substantive meaning beyond providing an incentive for China's banks to provide it with funding. BRI schemes do not have to relate to the improvement of Eurasian trade routes, since a number of schemes have been carried out in Latin America. On the other hand, some projects, such as the $64 billion China–Pakistan Economic Corridor ("CPEC"), relate to vital geopolitical needs. In the first section of this Essay we put forward some reasons why the BRI should develop a more cohesive identity, above all through the implementation of a common framework of rules to resolve disputes. In the two sections that follow, we look at what that framework will be. In section two we argue that the use of mediation will increasingly replace international arbitration as the dispute resolution method "written in" to BRI contracts—a significant change to present practices. In section three we detail and evaluate Beijing's attempts to establish an international commercial court system, following the example of the Delaware Court of Chancery and the London Commercial Court—but with Chinese characteristics.

I. THE URGENT NEED FOR AN OVERALL DISPUTE RESOLUTION MECHANISM

The previous considerations may help us understand what makes a dialogic process attractive and what makes it unworthy. More specifically, those considerations may help us recognize what kind of dialogue could result worth pursuing in the area of International Human Rights Law. In what follows, I shall briefly illustrate these claims through three examples taken from the *The Judicialization of Peace* article.

At present, there is no set terms of BRI global engagement (accession) nor the mechanism to resolve disputes that arise out of such engagement. The use of national courts is possible,

of course, but since BRI projects take place in countries with common law, continental, and Islamic hybrid legal traditions, many parties unfamiliar with these legal jurisdictions will be understandably nervous about allowing courts to safeguard their interests. The differences in Participating Members' political, economic, and cultural environments mean that disputes could be resolved through a variety of mechanisms, which may lead to different outcomes for the same kinds of disputes. There is also a question of how experienced national systems are in handling large and complex construction cases. Projects carried out under the BRI mainly take the form of large-scale infrastructure ventures, so disputes can arise from a number of routes, such as market entry, the construction and financing of projects, and the implementation and coordination of environmental standards. Complications arise from the scale of projects, their many stakeholders (which may include the parties to the construction contract, the lender, the guarantor, and the host government), the complex technical issues thrown up by the construction process, and the operation of trade and maritime rules once the asset has been commissioned.

Meanwhile, and aside from the ongoing U.S.–China "trade wars," challenges in establishing an effective dispute resolution mechanism are ever increasing with high stakes for wider conflict. These include time-consuming processes, a lack of transparency in decisions, dangers to state sovereignty, the high costs of international arbitration, and the inadequacy of the dispute resolution mechanism provided by the World Trade Organization ("WTO").[2] For example, the rules of the WTO provide a guide to resolving trade disputes

2 In accordance with the "Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road" (III. Framework), "The Belt and Road Initiative is a way for win-win cooperation that promotes common development and prosperity and a road towards peace and friendship by enhancing mutual understanding and trust and strengthening all-round exchanges." From the middle to long term perspective, disputes with respect to manufacture and trade of products and services will inevitably arise, under which situation the WTO rules will play a role.

but they are not always clearly applicable, partly because of sector coverage and the nature of the parties (i.e. states). This means that WTO rules cannot fully resolve disputes between Participating Members, especially those that are not members of the WTO.[3]

Another channel for dispute[4] resolution is provided by investor–state dispute settlement ("ISDS") provisions, which are found in BITs or free trade agreements ("FTAs"). However, to date, China has yet to sign investment agreements with 12 of the countries along the Belt and Road.[5] In the more than 30 BITs that China has concluded with Participating Members, the ISDS provisions only applied to compensation in the event of expropriation.[6] As a result, the investor–state arbitration mechanisms are not applicable if the host country violated other provisions of the BIT, such as the principle of fair and equitable treatment.

The reluctance of parties to submit their disputes to national courts has led to a preference for writing arbitration clauses into international investment contracts. In terms of enforcement, among all the Participating Members of the BRI, around 60 are contracting parties of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (the "New York Convention"). This allows arbitration awards from a tribunal in a signatory state to be enforced in any of the others, and some 92% of states involved with BRI projects are members of the New York Convention. As a result, international arbitration is the resolution mechanism of choice for many parties with complex, high-cost, high-risk projects. The question is whether international

3 For example, Turkmenistan, Uzbekistan, Afghanistan, Azerbaijan, Bahrain, Iran, Iraq, Lebanon, and Syria are not member states of the WTO.

4 Please note that the "dispute" here refers to that between foreign investor(s) and the host country.

5 The 12 countries include East Timor, Bangladesh, Afghanistan, Nepal, Maldives, the Kingdom of Bhutan, Iraq, Jordan, Pakistan, Latvia, Bosnia and Herzegovina, and the Republic of Montenegro.

6 The more than 30 countries include some of the most important host countries for Chinese investors, such as the People's Republic of Mongolia, the United Arab Emirates, Turkey, and Kazakhstan.

arbitration will remain so in the future, or whether BRI will lead to the rise of another legal system, with more pronounced Chinese characteristics.

Today, the legal protection for foreign direct investment ("FDI") under public international law is guaranteed not by a multilateral framework but by a network of more than 3,000 BITs. Most of these legal instruments provide foreign investors with substantive legal protection (including the right to "fair and equitable treatment," "full protection and security," "free transfer of means," and the right not to be directly or indirectly expropriated without full compensation) and access to ISDS for redress against Host States for breaches of such protection. But what about the protections for the Host States that sit across Chinese investors at the negotiation table?

Firstly, problems arise if the Host State wishes to have a foreign judgment enforced in a Chinese court. Until July 2019, in practice, there were only two ways for the Chinese people's courts to recognize and enforce such rulings: namely, bilateral judicial assistance treaties or the application of the reciprocity principle.[7] In the case of the former, China has signed BITs with almost 40 countries.[8] However, these do not include some of those with which it has the close economic relationships, such as the U.S., Singapore, and South Korea. Among the more than 65 Participating Members of the BRI, fewer than 10 have signed civil (commercial) judicial assistance treaties with China. In other words, domestic judgments or decrees will neither be recognized nor enforced by other BRI Participating Members in most circumstances. As for the latter, only a few foreign judgments have been

7 Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended June 27, 2017, effective July 1, 2017), art. 280.

8 China has signed civil and commercial judicial assistance BITs with 39 countries, 37 among which have come into effect. As for the 37 effective BITs, four do not have provision with respect to recognition and enforcement of foreign judgements, which are those signed between China and Singapore, Korea, Thailand, as well as Belgium.

recognized and enforced in accordance with the reciprocity principle,[9] because of the "factual reciprocity" requirement. This means that Chinese courts only consider recognizing and enforcing foreign judgments when courts from the applying country have previously recognized and enforced judgement made by Chinese courts. With the deepening and evolution of the BRI, these two methods are clearly unable to the meet the requirements of the Chinese economy.[10] In the future, parties may also have recourse to the Hague Choice of Court Convention, which would allow for the recognition and enforcement of court decisions in a way analogous to the New York Convention. At present, China, like the U.S., has signed but not ratified the convention. This is discussed in more detail below.

Secondly, Participating Members of the BRI institutionalize and explain international rules differently. Normative and practical approaches to the legal and regulatory frameworks are often divergent and mismatched. Therefore, it is becoming clear that current dispute resolution mechanisms cannot match the distinct development and nature of the BRI and its diverse composition. We also note

9 For example, the Intermediate People's Court of Nanjing recognized and enforced judgement made by the High Court of Singapore in *Kolmar v. SUTEX* in 2016, since the High Court of Singapore recognized and enforced a Chinese judgement regarding the case *Giant Light Metal Technology (Kunshan) Co Ltd v. Aksa Far East Pte Ltd* in 2014. In 2017, the Intermediate People's Court of Wuhan recognized and enforced a U.S. judgement with respect to the case *Liu Li v. Tao Li and Tong Wu*. Jie (Jeanne) Huang, *Reciprocal Recognition and Enforcement of Foreign Judgments in China: Promising Developments, Prospective Challenges and Proposed Solutions*, U. SYDNEY L. SCH. LEGAL STUD. RES. PAPER SERIES, Mar. 2019, at 3–5.

10 What's worth mentioning is that, against the background of the BRI, there is a trend in facilitating recognizing and enforcing foreign judgements by Chinese people's courts. For example, in accordance with Article 7 of the Nanning Declaration at the 2nd China-ASEAN Justice Forum, "[i]n countries that have not yet concluded international treaties of recognizing and enforcing foreign civil and commercial judgments, if there is no precedent for refusing to recognize and enforce civil commercial judgments on the grounds of reciprocity in the judicial process of recognizing and enforcing the country's civil and commercial judgments, within the scope permitted by the law in China, it can be presumed that there is a reciprocal relationship between each other." *The Nanning Declaration at the 2nd China-ASEAN Justice Forum*, CHINA INT. COM. CT., http://cicc.court.gov.cn/html/1/219/208/209/800.html (last visited July 26, 2020).

that, given the nature of the BRI and the cultural and sociopolitical characteristics of the Chinese approach to dispute resolution, any approach that does not include soft dispute resolution mechanisms such as mediation or dispute boards will be problematic.

The absence of an institutionally established dispute resolution system, soft or hard, will pose problems for the overall success of the BRI and its underlying *raison d'être*. Without a neutral means to resolve disputes, and a way of integrating that with a coherent set of legal principles accepted by the Participating Members, any decision reached by Chinese courts, or by courts in the country where the project is located, risks being seen as prejudiced by national interests or the interests of national companies.

II. THE RISE OF MEDIATION

For international construction projects, arbitration is presently seen as the best available process for resolving disputes. As a recent report by Queen Mary University London and Pinsent Masons puts it, the combination of "neutrality, confidentiality, flexibility and [the] commercial nature of the process along with the facility to choose who will determine their dispute are paramount factors that continue to influence their selection of arbitration." As a result, 71% of the survey's sample of international disputes went to arbitration. Nevertheless, this dispute resolution method is inevitably lengthy, expensive, and just as adversarial as a court case.

It is likely that if the BRI gives rise to a global facilitative method of dispute resolution, it will include the incorporation of mediation, rather than arbitration, clauses. This is partly because mediation implies mutual compromise rather than maximal evaluative claims, so there is a cultural "fit" with Chinese notions of restoring "harmony." More practically, mediation is quick compared with arbitration and offers a better chance of preserving commercial relationships than

arbitral awards, which are often winner-take-all and may have the added sting of a costly award.

This likelihood is also suggested by recent developments in China: the Chinese People's Court has promoted mediation in its "Opinions of the Supreme People's Court ("SPC") on Further Deepening the Reform of the Diversified Dispute Resolution Mechanism of the People's Courts" and "Provisions of the SPC on Invited Mediation by the People's Courts" promulgated in June 2016.

This is further evidenced by the speed with which the Chinese government signed the United Nations Convention on International Settlement Agreements resulting from Mediation (the "Singapore Convention"), which is due to enter into force in September 2020. China was one of the first countries to sign, in August 2019, along with the U.S., India and Singapore. The convention will provide a legal basis for the right to invoke and enforce settlement agreements resulting from mediation and may give greater confidence to the parties that mediation offers them a sufficiently robust alternative to arbitration.

A third indication is the memorandum of understanding that was signed on January 24, 2019 by the Singapore International Mediation Center and the China Council for the Promotion of International Trade. This established a panel of mediators tasked with the resolution of BRI disputes. The International Chamber of Commerce ("ICC") has also established a commission and published mediation guidance specifically for the BRI.

Finally, the wider legal environment is becoming more accepting of mediation as a way of handling large, complex claims. For example, the International Bar Association ("IBA") Rules on Investor–State Mediation now provides a legal framework for mediation in the investor–state ("IS") context. Mediation has also been included in free trade and

investment agreements,[11] such as the EU–Canada Comprehensive Economic and Trade Agreement and the Trans-Pacific Partnership, and it also features in some BITs.[12] In July 2016, the intergovernmental Energy Charter Conference ("ECT") published a Guide on Investment Mediation to lead governments and companies in the energy sector through the mediation process, and the International Center for Settlement of Investment Disputes ("ICSID") has also embraced mediation as part of its dispute resolution process, recognizing that its traditional conciliation process too closely mirrors arbitration and that a more pragmatic approach is needed.[13]

Putting all this together, it seems advisable for participants and consultants involved in BRI-badged schemes to familiarize themselves with the mediation process and the strategies that parties can adopt when they undergo it. However, unlike arbitration, there is no guarantee that the process will lead to a definite result, so there has to be a hard law process to deal with unresolved cases. This is where China's domestic court system may play an increasingly important role.

11 Anna Joubin-Bret & Barton Legum, *A Set of Rules Dedicated to Investor–State Mediation: The IBA Investor–State Mediation Rules*, 29 ICSID REV. FOREIGN Inv. L.J. 17 (2014).

12 For example, the Thailand Bilateral Investment Treaties.

13 ICSID has joined the ECT and the Center for Effective Dispute Resolution ("CEDR") in running mediation programs for IS Mediators, recognizing that special knowledge and skills are needed for mediation in the ISDS context. Wolf von Kumberg, Jeremy Lack & Michael Leathes, *Enabling Early Settlement in Investor–State Arbitration, The Time to Introduce Mediation Has Come*, 29 ICSID REV. FOREIGN Inv. L.J. 133, 136 (2014) ("Conciliation is a non-binding form of arbitration."); 2 ICSID, HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 413 (1968, reprt. 2009) ("conciliation [under the ICSID Convention] could in certain cases be a disguised form of arbitration."); Frauke Nitschke, *The ICSID Conciliation Rules in Practice*, *in* MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES 3, 4–5 (Catharine Titi & Katia Fach Gómes eds., 2018).

III. THE CHINA INTERNATIONAL COMMERCIAL COURT ("CICC")

On January 23, 2018, the Communist Party's Leading Group for Deepening Overall Reform proposed the establishment of a BRI Dispute Resolution Mechanism and Institution by means of international commercial courts. These have since been set up in Xi'an and Shenzhen and have commenced operation. The court in Xi'an deals with disputes involving the "silk economic belt," and Shenzhen handles disputes arising from the "maritime silk road."

Following the example of the Singapore International Commercial Court, among others, the aim is to establish a mechanism that offers a choice between litigation, arbitration and mediation—a "one-stop-shop" dispute resolution mechanism that will work with international commercial mediation and arbitration institutions such as the WTO, the Asia International Arbitration Center, and so on.[14] The general aims is to bring a new internationalism and openness to the Chinese domestic legal system; the specific goal is to devise a Chinese mechanism for the mutual recognition and enforcement of judgments, thereby helping, it is hoped, to achieve the paramount aim of laying the foundations of a legal system throughout the BRI area.

The CICC hears cases that have "significant nationwide impact," such those that involve the unification of international adjudication standards, have great social impact, or are significant in interpreting international treaties and rules. To increase the capacity of the courts, the system includes five international commercial arbitration institutions and two international commercial mediation institutions, including:

- The China International Economic and Trade Arbitration Commission ("CIETAC")

14 As regards what international dispute resolution institutes have been included, please find more details below.

- The Shanghai International Economic and Trade Arbitration Commission
- The Shenzhen Court of International Arbitration
- The Beijing Arbitration Commission
- The China Maritime Arbitration Commission
- The Mediation Center of China Council for the Promotion of International Trade, and
- The Shanghai Commercial Mediation Center

We should note that these institutions are essentially Chinese, located in China and act as branches of the Supreme People's Court in Beijing. In order to enhance the international appeal of this nascent system, it would be advisable to include international commercial mediation and arbitration institutions from other jurisdictions when this list is expanded in the future.[15]

Although the CICC has been described as "China's Belt and Road court," the jurisdiction of the CICC is not limited to disputes related to BRI. The CICC will deal with any trade and investment disputes over a threshold value of about $50 million,[16] but may only hear commercial cases when one or both parties are foreigners, stateless persons, foreign

15 Mark Feldman, *A Belt and Road Dispute Settlement Regime*, remarks at the United States Department of State on Belt and Road Dispute Resolution 14–17 (June 13, 2019).

16 *Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court,* CHINA INT. COM. CT., http://cicc.court.gov.cn/html/1/219/208/210/817.html (last visited July 26, 2020), art. 2 ("The International Commercial Court accepts the following cases: (1) first instance international commercial cases in which the parties have chosen the jurisdiction of the Supreme People's Court according to Article 34 of the Civil Procedure Law, with an amount in dispute of at least 300,000,000 Chinese yuan; (2) first instance international commercial cases which are subject to the jurisdiction of the higher people's courts who nonetheless consider that the cases should be tried by the Supreme People's Court for which permission has been obtained; (3) first instance international commercial cases that have a nationwide significant impact; (4) cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards according to Article 14 of these Provisions; (5) other international commercial cases that the Supreme People's Court considers appropriate to be tried by the International Commercial Court.").

enterprises, or other organization.[17] That said, they will perform a number of important functions for the BRI projects. As noted by Mark Feldman, the CICC will provide fair and impartial dispute resolution services by pursuing a party consent-based model,[18] thereby advancing the CICC's ambition to build a reputation for impartiality and to extend its international influence, as well as establishing the International Commercial Dispute Prevention and Settlement Organization.[19]

From the point of view of Chinese investors, the CICC offers a way to avoid the involvement of the courts in the country in which the project takes place, particularly if the host country has not yet developed a sophisticated commercial legal code. Rather, they will have access to

17 *Id.* art. 3 ("A commercial case with one of the following situations can be regarded as an international commercial case under these Provisions: (a) one or both parties are foreigners, stateless persons, foreign enterprises or other organizations; (b) one or both parties have their habitual residence outside the territory of the People's Republic of China; (c) the object in dispute is outside the territory of the People's Republic of China; (d) legal facts that create, change, or terminate the commercial relationship have taken place outside the territory of the People's Republic of China."); *The State Council Information Office Held a Press Conference on the "Opinion on the Establishment of The Belt and Road International Commercial Dispute Settlement Mechanism and Institutions*, CHINA INT. COM. CT., http://cicc.court.gov.cn/html/1/219/208/210/769.html (last visited July 26, 2020) ("[I]nternational Commercial Courts will primarily accept international commercial disputes that arise between equal commercial entities … we have excluded two other types of cases: the trade or investment disputes between countries, and investment disputes between the host country and the investor. These two categories are settled in accordance with existing international dispute settlement rules.").

18 Feldman, *supra* note 15, at 19–30. Feldman observes that "Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court" "sets out both consent-based and compulsory forms of jurisdiction." To be more specific, in accordance with Article 11(2), "[t]he International Commercial Court supports parties to settle their international commercial disputes by choosing the approach they consider appropriate through the dispute resolution platform on which mediation, arbitration and litigation are efficiently linked."

19 *List of Deliverables of the Second Belt and Road Forum for International Cooperation*, MINISTRY FOREIGN AFF. CHINA, https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1658767.shtml (last visited July 26, 2020), ¶ III(11) ("The China Council for the Promotion of International Trade, China Chamber of International Commerce, together with the industrial and commercial organizations and legal service agencies from over 30 countries and regions including the European Union, Italy, Singapore, Russia, Belgium, Mexico, Malaysia, Poland, Bulgaria and Myanmar jointly established the International Commercial Dispute Prevention and Settlement Organization (ICDPASO).").

proceedings carried out in accordance with Chinese civil law and in the Chinese language, with judges drawn from Chinese courts. The judgments will have the status of SPC judgments and be final, subject to an appeal to the Number Four Civil Division for a retrial.

From the point of view of the Chinese authorities, the CICC offers a means to establish the reputation of Chinese dispute resolution among foreign litigants, thereby providing an alternative to Western arbitral tribunals. It also provides a training ground for the Chinese personnel in the application of international legal principles,[20] both from contact with the International Commercial Expert Committee ("ICEC"), set up to offer advice to the CICC, international commercial arbitration institutions, international commercial mediation institutions, and from the SPC's issuing of judicial interpretations and its disclosure of the details of significant individual cases.[21]

However, from the point of view of foreign litigants, what certainty do they have that the CICC will not give Chinese parties some kind of "home team advantage?" A recent report from President Trump's Whitehouse included a number of criticisms of China's "predatory" commercial practices, including a claim that Beijing is "seeking to arbitrate One Belt, One Road-related commercial disputes through its own specialized courts, which answer to the [Chinese Communist Party ('CCP')]." To some extent, perceived bias is a problem faced by all international commercial court systems, of which there are more than 10 around the world at the time of writing, and probably reflect the general opinion held about

20 Such as neutrality, fairness, justice, and transparency. The principle of party autonomy is a core principle in party-centered commercial activities. Parties are free to choose to submit disputes to a national court or an international platform.

21 *See, e.g.*, *Typical Cases Released by the People's Courts for Providing Judicial Services and Guarantee to the Construction of the "Belt and Road Initiative,"* SUP. PEOPLE'S CT., http://www.court.gov.cn/zixun-xiangqing-14897.html (last visited July 26, 2020); *Second Batch of Typical Cases Concerning the Construction of the "Belt and Road Initiative,"* SUP. PEOPLE'S CT., http://www.court.gov.cn/zixun-xiangqing-44722.html (last visited July 26, 2020).

a political system (as in the above quote). To counter this, the CICC has set up the ICEC, made of up to 31 legal practitioners or academics chosen by the SPC from 14 foreign countries as well as Hong Kong, Macao, and Taiwan. The aim has been to choose leading figures in the areas of international trade and investment law with records of professionalism and neutrality. The panel will preside over mediation cases, provide advice on specialized legal issues, and offer policy advice to the SPC and the CICC. To reassure litigants of the court's competence, the SPC chose 14 of its own judges based on their familiarity with international treaties, international practices, and international trade and investment practices, as well as their ability to hear testimony in English.[22]

The question to be answered is whether foreign parties will choose to write clauses into their contracts providing for any disputes to be resolved in the CICC system rather than relying on international arbitration clauses. Furthermore, a weakness of the CICC is the question of whether their awards are enforceable outside China. While there are, as yet, only some 10 agreements on judicial cooperation, it is not clear if any BRI documents contain provisions requiring other governments to respect or enforce decisions from the CICC.

There are, however, some mechanisms that already exist: for example, in the Hong Kong Special Administrative Region of the People's Republic of China ("P.R.C."), domestic Chinese judgments could be enforced under the Mainland Judgments (Reciprocal Enforcement) Ordinance as well as **t**he Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region, a measure that was passed in 2019. China could also apply the Hague Convention on the Recognition and Enforcement of Foreign Judgments, of which

22 *See, generally*, Xiangzhuang Sun, *A Chinese Approach to International Commercial Dispute Resolution: The China International Commercial Court*, 8 CHINESE J. COMP. L. 45 (2020).

it is a signatory. It has been reported that China is considering ratifying the Hague Convention on the Choice of Court Agreements, which it signed in September 2017. The problem here is that the Hague Convention only includes 29 states, less than 20% of the New York Convention, which means court decisions cannot be enforced between some B&R countries. China has signed bilateral judicial assistance agreements or treaties with 39 countries, of which 37 have entered into force. Among these, four do not provide for the recognition and enforcement of judgments of foreign courts: Singapore, South Korea, Thailand, and Belgium. Nevertheless, reciprocal agreements or bilateral agreements, to some extent, help to realize the mutual execution of court judgments. The enforceability of CICC judgments is likely to be an important criterion of international commercial parties when deciding which dispute resolution clauses to include in their contracts. Here, the Chinese system is indirectly competing with the New York Convention, which facilitates arbitration recognition and enforcement in more than 150 states and regions.

Meanwhile, a development that is likely to reassure parties is the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "2019 Hague Convention"), which was adopted by the delegates of the 22nd Diplomatic Session of the Hague Conference on Private International Law ("HCCH") on July 2, 2019. "[B]y offering certainty and legal security in cross-border transactions and litigation," the 2019 Hague Convention "will inspire confidence in civil court judgments handed down in other member states." "[A]n important gap in the landscape of private international law has finally been filled by the HCCH," which has been signed by China, as noted by the Secretary General of the HCCH, Dr. Christophe Bernasconi. Nevertheless, it will take time for China to join the convention officially.

CONCLUSION

In the absence of a multilateral legal framework, an institutional organization (secretariat), and uncertainty regarding dispute resolution under the BRI, the rule of law is hardly visible. However, there are some promising signals made on the third front. On the one hand, there is visible progress in the Mainland and Hong Kong Closer Economic Partnership Arrangement ("CEPA") which is the first free trade agreement ever concluded by the Mainland of China and Hong Kong. The main text of CEPA was signed on June 29, 2003 and, as of 2019, the Hong Kong Government has committed to train mediators and State officials under CEPA. This is key to this discussion as it demonstrates that China is already engaged in resolving investment disputes through mediation. BRI Participating States could equally make use of mediation in its B&R Agreements with China.

In addition, a breakthrough announcement, known as the Beijing Joint Declaration of BRI Arbitration Institutions, was made during the November 6–7 2019 Belt and Road Arbitration Institutions Roundtable Forum organized by CIETAC. In 2020, during the COVID-19 pandemic, CIETAC supplemented the declaration with the "Working Mechanism under the Beijing Joint Declaration" to expedite mediations. The Beijing Joint Declaration is a compact that states that the 47 undersigned institutions will work to speed up the construction of a sound legal and business environment for international arbitration services against the background of the BRI, establishing a platform for innovative legal cooperation and promoting the fusion and development of both legislation and enforcement in various jurisdictions, so as to construct the road towards the rule of law for the BRI and guarantee the steady and orderly advancement of the BRI.

Despite the widespread cynicism over its motives and criticisms of the indeterminacy of its rules and practices, the BRI offers little substantive challenges to the international

order as we know it, because it is orientated towards increased trade and market access. In fact, what China seeks to capture are the twin benefits of improving its international environment through infrastructure and the employment of surplus capital in the form of FDI. In other words, Western scholars may have been essentializing a legal adversity with China without perhaps understanding or indeed defining other dimensions of challenges in China's investment law and policy. The undefined BRI rules of engagement and other notions emanating from the Chinese national governance system may challenge rule of law notions accidentally, and this may have unintended consequences.

This notion is best explained by Lee Jones of Queen Marry University of London, who asks "Does China's Belt and Road Initiative Challenge the Liberal, Rules-Based Order?" He states, "China seeks a way to cooperate across value divides by setting aside ideological and cultural differences and focusing on shared material gains." He suggests that "the essence of the BRI as a spatial fix for Chinese capitalism, and party-state's governance regime, will inevitably generate challenges to existing global rules, irrespective of the intentions of the authors of [the B&R Document] and [Building the Belt and Road: Concept, Practice and China's Contribution (the "B&R CPCC")] . . ."

This is not the end of the regionalism debate. It is not even the beginning of the end. Ever since it was put forward for the first time in 2013, the BRI has attracted attention, not just regionally, but all over the world. The BRI has been difficult to comprehend not only as a new kind of economic and political ordering created by the emergence of China as a regional hegemon, but also in terms of its classification within a spectrum of trade categories with a specific and technical meaning. The BRI is *sui generis* initiative, focused mainly on infrastructure. It is governed, so far, by bilateral agreements and treaties backed up by a set of principles and guidelines that do not have an overall body of governing law or a coherent set of institutions to formulate, interpret, or

enforce them.

The jurist John Jackson, who played a key role in the creation of the WTO, has argued that the international economic legal system can accommodate a multiplicity of systems and economic modalities. If this is so, then it can be argued that what the BRI would like to achieve is more than a free trade area but less than a common market. By providing an open, inclusive and balanced investment and trade cooperation platform, the BRI aspires to achieve a community of "common destiny." During the construction process; investment, commercial, or trade disputes between individuals, undertakings, institutes, authorities, and states engaging within the BRI cannot be avoided. However, there is no simple dispute resolution mechanism that could efficiently resolve the above-mentioned conflicts.

Against the background of continuous controversy and massive investment flows, at a minimum, the BRI clearly requires an international dispute resolution mechanism. This could be affiliated with the Asian Infrastructure Investment Bank ("AIIB"), one of the few multilateral institutions within the BRI ecology, thereby giving it an international organization credibility, international law standards, and a form of governance that is not entirely Chinese.[23] Mediation may provide the model form of dispute resolution for the BRI and the BRI Participating Members, deriving a spirit of access to justice and rule of law to accommodate their tremendous diversity, sensitivities, and peculiar political and legal complexities.

For the sake of renewed and enhanced *internationalism*, we should not expect that China will not remain the driver and engine behind the BRI. The time has come to define *terms of engagement* for this new spirit of pluralism even if anchored on the foreign-ness of traditional Chinese notions of "harmony" as long as they are smart, transparent, fair, and

23 *See, generally*, Steven Wang, *Is the AIIB a Challenger or Harmonizer*, *in* OXFORD CHINA L. DEV. RES. BRIEF, JULY 10, 2019.

efficient. This needs to be premised on international standards and rules that allow for harmonization and the efficient resolution of disputes that arise along the BRI. Ultimately, grand strategies and visions must never jeopardize the long and promising road ahead for the future of a rule of law global order.