

# China's International Commercial Courts for the 'Belt & Road': A gateway for Beijing's bigger role in global rules setting

Study for the European Parliament's Greens/EFA Group

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# List of abbreviations

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ACFTA	ASEAN–China Free Trade Area
AIIB	Asian Infrastructure Investment Bank
BAC	Beijing Arbitration Commission
BIT	Bilateral Investment Treaty
BRI	Belt and Road Initiative
CBIRC	China Banking and Insurance Regulatory Commission
CCPIT	China Council for the Promotion of International Trade
CETA	Comprehensive Economic and Trade Agreement
CGDS	Center for Global Development Studies
CICCs	China International Commercial Courts
CIETAC	China International Economic and Trade Arbitration Commission
CJEU	Court of Justice of the EU
CMAC	China Maritime Arbitration Commission
CPC	Communist Party of China
EC	European Commission
EU	European Union
FTA	Free Trade Agreement
HIPC	Heavily Indebted Poor Countries
HKCIAC	Hong Kong International Arbitration Centre
HKMC	Hong Kong Mediation Centre
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ISA	Investor-State Arbitration
ISDS	Investor-State Dispute Settlement
MES	Market Economy Status
MIC	Multilateral Investment Court
NAFTA	North American Free Trade Agreement
NDRC	National Development and Reform Commission
NME	Non-Market Economy
NPC	National People's Congress
OBOR	One Belt One Road
OFDI	Overseas Foreign Direct Investment
SCIA	Shenzhen Court of International Arbitration
SCMC	Shanghai Commercial Mediation Center
SHIAC	Shanghai International Economic and Trade Arbitration Commission
SIAC	Singapore International Arbitration Centre
SIMC	Singapore International Mediation Centre
SPC	Supreme People's Court
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
USMCA	United States-Mexico-Canada Agreement
WTO	World Trade Organization

# Foreword

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Since Xi Jinping in 2013 unveiled the Belt and Road Initiative (BRI), his signature foreign-policy, practitioners and academics have been trying to understand the extent to which China through this initiative attempts to promote its own model of development. BRI has been evolving over time. Until now, more than a hundred countries have in one way or another signed on to China's BRI strategy. But BRI has not been an unfettered success story for Beijing. Criticism, suspicion and open opposition have plagued China's leaders in the pursuit of their multi-trillion-dollar project to promote their hegemonic ambitions through economic integration, infrastructure and energy investment as well as digital connectivity.

Critics claim that Belt and Road creates financial dependencies, rigs competition, stokes corruption, has negative effects on the environment, relocates overcapacities, undermines multilateralism and, in general, extends Chinese global power and influence. Obviously flawed projects along the so-called New Silkroad resulted in some re-thinking. China has been struggling with difficult business environments in different developing countries and had to deal with countries suspending agreements previously struck. As a consequence, China established the China International Commercial Courts (CICCs) in 2018. It thereby paved the way for the first judicial institution designed to support and secure the BRI. This new court system raises questions: Does China instrumentalize CICCs in order to expand its judicial influence across Eurasia and beyond? If so, will China be successful in doing that?

The analysis of the CICCs system that Nora Saumikat and Daniel Sprick have carried out, contributes to answering these questions. It provides key insights on China's national, bilateral and multilateral approach in influencing a future system of investment protection. The authors give an overview over the different Chinese dispute resolution options, and identify opportunities and risks of the new CICCs, especially for structurally weak countries. In the second part of the study, the authors widen their focus and also consider China's participation in the multilateral discourse on the reform of the international economic legal order, for instance dealing with Investor-State Dispute Settlement (ISDS) standards. The authors underscore the fact that judicial policies cannot be decoupled from party policies in China. The establishment of the CICCs is therefore inevitably a tool to promote the Communist Party's goals including BRI. Thirteen concrete recommendations for EU institutions are consequently listed at the end of the study.

China's BRI strategy has led to an increasing demand for better understanding of China's strategic intentions and practices to strengthen its regional and global influence. I'm convinced this study will contribute to a fruitful discussion and encourage future cooperation between academics, political and business actors concerned.

Brussels, August 2019

**Reinhard Bütikofer, MEP**

*Reinhard Bütikofer*



# Executive Summary

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When China announced the establishment of International Commercial Courts (China International Commercial Courts – CICC) in 2018, commentators quickly concluded that these courts were a tool to protect Chinese business interests abroad and tweak the international economic legal order for China's benefit. The location of these courts at the respective ends / gateways of the new maritime and land-locked Chinese silk road in Shenzhen and Xian, and their mission statement to promote trade in the Belt and Road Initiative (BRI), made it abundantly clear that these courts are instruments of China's strategy to strengthen its regional and global influence. But can they achieve their goals? Is China using its judicial apparatus to influence international rules?

Since its foundation in 2013, the BRI has increasingly been criticized for being a far cry from the self-proclaimed win-win situation and has led to massive national debts in several participating countries, as well as raised serious concerns for local populations, work forces, and eco-systems. Five years into implementing BRI projects many experts question whether these projects are economically, socially, or ecologically viable. Growing contention over BRI may give rise to legal disputes along the new silk road. Chinese companies may face legal trouble abroad, where a weak judicial system may pose big challenges for their business interests.

For China, CICC provide an opportunity to repatriate such disputes into a familiar legal system. BRI project contracts backed by Chinese funding, are particularly well-positioned to include a model choice-of-court provision that designates the CICC as the exclusive court to decide BRI-related disputes. The Chinese Supreme People's Court (SPC) promises to safeguard fair and equitable adjudication as well as the integration of mediation and arbitration for BRI disputes so that amicable solutions can be reached under the auspices of the CICC. At the time of writing, the statutes of the three courts included in this research showed a clear home advantage for Chinese parties in BRI disputes, who clearly benefit from dealing with a familiar judicial system.

The Chinese judiciary is severely constrained by an authoritarian regime that substantially impedes judicial independence and the rule of law in China. Unlike other international commercial courts, the CICC are clearly designed to demonstrate dependency on the Chinese system: only Chinese judges from the Supreme Courts are eligible, no foreign judges are allowed, and hearings have to be conducted in Chinese.

Not every non-Chinese partner in a BRI project will be comfortable with adjudicating or arbitrating an arising dispute in Mainland China. Chinese institutions are increasingly cooperating with Hong Kong and Singapore as the most important dispute resolution hubs in the region. However, Hong Kong's long-standing reputation as a beacon for the rule of law is being challenged by Beijing's tightening grip.

The CICC were established at the same time that the EU and other countries have been trying to promote the idea of an International Commercial Court, thus competing for the vanguard position in a future global system for the resolution of commercial disputes. With the founding of the CICC, China is now actively participating in shaping a future order of dispute resolution for the ever evolving *lex mercatoria*. The Supreme People's Court (SPC) notably committed itself to shape the international legal discourse and actively participate in international economic rule-setting (Chapter 2).

A field initially erroneously associated with the CICC is currently a hotbed of global debate: Investor-State Dispute Settlement (ISDS) has been criticized as a business-friendly, special court system that benefits big corporations and stifles states' abilities to implement policies that would benefit its people or environment. The dire need to reform this system was exhibited by the prolific debate during the negotiations of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU. Accordingly, the United Nations Commission on International Trade Law (UNCITRAL) established a Working Group on the matter in 2017; and the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank initiated their reform in 2018.

That a window of opportunity for shaping a future investment protection system had opened was not lost on China. China's experience with ISDS is very limited. Rising Chinese investments abroad make it imperative that China addresses certain weaknesses with regard to ISDS provisions in older Bilateral Investment Treaties (BITs).

China uses national, bilateral, and multilateral approaches to influence rule-setting for a future system of investment protection. On the multilateral level, China has not only participated in the reform debates in the UNCITRAL Working Group and the ICSID on a future ISDS, but has also commenced to overhaul outdated BITs and amended ISDS clauses in these agreements. Additionally, on the national level, three arbitration

commissions that are integrated in the CICC's one-stop dispute resolution mechanism recently amended their arbitration rules to deal with investment protection and therefore compete in modelling a Chinese version of investor-state arbitration (ISA).

Issues of like transparency, consistency, and arbitration costs that dominate the international legal debate, are clearly also at the heart of China's rule-setting. International stakeholders should be aware that China's position entails some fluidity and may for now still be influenced by the global discourse.

As shown by the analysis of Chinese contributions to the UNCITRAL and ICSID debates, as well as China's recent BITs, one goal is to reaffirm states' ability to control the legal interpretation of their investment treaties. China's approach of state dominance also includes the state's competence to withhold classified information during formal dispute resolution, which could give Chinese dispute parties a strategic advantage because China's state secret regime is notoriously vague and can easily be misused by China's mighty State-owned Enterprises (SOEs). In China's view, international investment law is a matter of public policy and needs to be dealt with as a part of international public law. China's aspiration of setting new rules for international dispute settlement necessitates a need for close monitoring, especially if a cluster of Chinese bilateral review commissions for the interpretation of specific treaty clauses were to appear.

The BRI and its manifestations in China's legal and judicial system are clearly not only tools to promote trade and economic development. They are also an instrument to strengthen China's position in debates about a future economic legal order. China will try to frame matters as the International Commercial Courts in the context of the BRI and its underlying CPC policy. China may muster the support of BRI states for its approach in exchange for preferential BRI treatment. While the Commercial Courts are clearly in support of and in subordination to the BRI and the CPC, the investor-state dispute settlement discourse is still forming.

China's recent focus on shaping the international economic legal order relies on bilateral approaches, such as the architecture of the BRI and the efforts to (re-) negotiate BITs. This approach is complemented by an active engagement in multilateral settings as exhibited by China's participation in the ICSID reform and the UNCITRAL Working Group on ISDS reform. Hence, China is not entirely abandoning multilateral discourse on the reform of the international economic legal order.

It will require close monitoring of the degree to which China will use its increased bilateral power to shape the investment protection discourse. China may well be willing to approve a liberal economic model interna-

tionally, as long as it serves China's interests, including free flow of its exports, the creation of a Chinese version of an International Commercial Courts, or the protection of its foreign investments. At the same time, the WTO experience shows that China has ignored international trade norms whenever compliance produces a systemic conflict with China's form of state capitalism. To borrow the term coined by US scholar Pitman Potter, China applies a "selective adaptation" method to integrate into a globalized order by transforming it according to China's interests.

# Chapter 1:

## BRI and dispute settlements

On 29 June 2018, the Supreme People's Court (SPC) inaugurated two International Commercial Tribunals (国际商事法庭), translated as China International Commercial Courts (CICCs), to provide Belt and Road countries with legal services for disputes resolution. These tribunals -still under SPC- were advertised as the beginning of the establishment of a "new global dispute system". Is China using the BRI for global rule-setting and amendments to international standards, norms, and values according to China's needs?

### Why do Belt-and-Road countries need legal protection

The first five years of the Belt-and-Road Initiative (2013-18) seemed to be a trial balloon on how to develop a China-initiated globalization strategy. During the first years, the focus on infrastructure was strong. Investments in railways were the initial driver for BRI. But when rail investment over-expanded and *China Railway* quickly ran up huge debts,<sup>1</sup> the focus shifted to other industries. Experts suggest that investments are now focusing on projects such as ports to satisfy the thirst for logistical expansionism and a higher possibility for a turn for profit. As we describe below, a new phase that includes expansion to building a legal and institutional infrastructure has begun.

Massive international criticism of the Belt-and-Road Initiative (BRI) led to the announcement of a recalibration of BRI at the second BRI summit in Beijing in April 2019. Christine Lagarde, president of IMF, named it the "BRI 2.0". According to the *Financial Times* (July 2018), 234 large infrastructure investment projects out of a total of 1674 Chinese-invested infrastructure projects had encountered difficulties.<sup>2</sup> In her Beijing speech, Lagarde requested that China create a new debt sustainability framework "that will be utilized to evaluate BRI projects. BRI 2.0 can also benefit from increased transparency, open procurement

with competitive bidding, and better risk assessment in project selection."<sup>3</sup>

Currently in the EU, calls for defending the multilateral global order dominate the trade discussion. The development of an international rules-based economy and global governance over the past 50 years, however, has led to increasing inequality, impoverishment and indebtedness in the Global South. In the 1990s, the G8 states started the *Initiative for the Heavily Indebted Poor Countries* (HIPC). The Paris Club of major creditor countries provides debt treatments to debtor countries in the form of rescheduling or reduction in debt obligations. Fragile states, raw material exporting countries, small states, and states with precarious loans were identified as the four country groups of countries at risk of indebtedness.<sup>4</sup>

BRI has been criticized for worsening the situation. A study of the Center for Global Development Studies (CGDS) found that eight BRI countries will not be able to pay back their debts: Djibouti, Pakistan, Laos, Kirgizstan, Maldives, Mongolia, Montenegro, and Tajikistan. Scott Morris (CGDS) writes: "It is in these 'post-HIPC' countries where China's role as creditor has increased dramatically. This is particularly true when we consider that these data are comparing China as a single official creditor to categories of other creditors (multilaterals, bond holders, Paris Club). From this standpoint, China is almost certainly the largest single external creditor for all low-income countries, and its role is even more pronounced in the debt vulnerable countries."<sup>5</sup> Therefore, several countries have been trying to renegotiate their deals with the Chinese government or have canceled their loans: Since May 2018, the newly elected president of Malaysia has halted two major infrastructure projects by Chinese companies (in fact, the government tries to get a reduced price-tag for a \$20 billion rail project).<sup>6</sup> The Maldives, which booted out a pro-China administration in 2018, as well as Pakistan, have been cutting down debts and loans. Pakistan is facing a balance-of-payments crisis

1 The debt load of China Railway, which has been a perennial focal point for the state-owned behemoth, was 4.99 trillion yuan in 2017, for a debt-asset ratio of 65.21%. Long-term debt totaled 4.19 trillion yuan, accounting for 83.98% of total debt. CBIRC, <http://www.chinabankingnews.com/2018/05/02/china-railways-debt-load-exceeded-5-trillion-yuan-first-quarter/> (last visited 13 June 2019).

2 James Kyngé, "China's Belt and Road difficulties are proliferating across the world", *Financial Times* 9.7.2018; see also Qian Benli, "The domestic consequences of China's Belt and Road Initiative", 2 January 2019 (last visited 13 June 2019).

3 <https://www.imf.org/en/News/Articles/2019/04/25/sp042619-stronger-frameworks-in-the-new-phase-of-belt-and-road> (last visited 13 June 2019).

4 Jürgen Kaiser, «Verschuldete Staaten weltweit», in *Schuldenreport 2018*, [erlassjahr.de/](http://erlassjahr.de/) Misereor (Ed.), p. 16.

5 Scott Morris, "Yes, China's Lending Is a Problem for Debt-Vulnerable Countries", Center for Global Development, 1 November 2018, <https://www.cgdev.org/blog/yes-chinas-lending-problem-debt-vulnerable-countries> (last visited 13 June 2019).

6 Amanda Erickson, "Malaysia cancels two big Chinese projects", [https://www.washingtonpost.com/world/asia\\_pacific/malaysia-cancels-two-massive-chinese-projects-fearing-they-will-bankrupt-the-country/2018/08/21/2bd150e0-a515-11e8-b76b-d513a40042f6\\_story.html?utm\\_term=.0b4657a288da](https://www.washingtonpost.com/world/asia_pacific/malaysia-cancels-two-massive-chinese-projects-fearing-they-will-bankrupt-the-country/2018/08/21/2bd150e0-a515-11e8-b76b-d513a40042f6_story.html?utm_term=.0b4657a288da) (last visited 13 June 2019).

and has approached the IMF for yet another bailout, partly caused by BRI investments under CPEC.<sup>7</sup> Sierra Leone has criticized the lack of transparency in BRI deals between Chinese companies and local governments. Myanmar scaled back a port deal struck under its previous military regime.

China itself belongs to the heavily indebted countries: Total debt in China exceeds that of the US, and was estimated to be twice as high as the average debt of emerging market economies excluding China in 2015. Fueled by real estate and shadow banking, total debt has more than quadrupled since 2007, rising to 317 percent of Chinese GDP. Two thirds of this is made up of corporate debt (followed by governmental and private household debt).<sup>8</sup> Since 2007, regional governments have expanded unsafe financial operations and often resorted to off-the-counter loans or shadow banking. Furthermore, money urgently needed for local schools and hospitals is now invested in roads and railways. “Every province wants to become a significant hub in the national strategy and he [Guan Youqing, the head of Minsheng Securities Research Institute] believes this will reignite infrastructure spending by local governments. Guan estimates all provinces have earmarked just over a trillion renminbi for OBOR-related infrastructure projects.”<sup>9</sup> This strategy further increases the financial stability risk in China as the provinces mostly use rather non-transparent local government bonds to finance their infrastructure spending.

Yi Gang, China’s Central Bank governor, highlighted on the BRI summit 2019 that China should “strengthen its risk and debt management” and study the problems of small and developing countries to avoid BRI becoming a “debt trap” project.

Worried about the reputation of the BRI, the NDRC is now claiming that the “bad” projects were not “legitimate BRI projects” and is working on a list of “legitimate Belt and Road Initiative projects” officially acknowledged by the Chinese government.<sup>10</sup> Beijing uses BRI as an opaque term, thus nobody can reliably pinpoint which projects constitute “BRI” projects. Therefore, in this new recalibration phase of BRI, we will see that projects that encounter problems will suddenly not be

counted as “flagship” BRI projects any longer. Also, in 2018, the political dimension of the initiative was shifted away from NDRC to the Foreign Ministry, which underlines the global aspiration of the initiative. China’s Finance Minister Liu Kun promised to present a debt sustainability framework to “prevent the debt risks”. “Everything should be done in a transparent way and we should have zero tolerance for corruption,” President Xi said.<sup>11</sup>

In his speech on the second BRI forum in Beijing in April 2019, president Xi again promised to avoid any environmental damage by promoting “green” development. He called for adoption of ‘internationally acceptable standards’ in the tendering processes (Ibid.). Also, the private sector would be further integrated into the initiative and the amount of cheap loans for the BRI would be drastically reduced. To demonstrate the broad support for the BRI, China encouraged BRI investment recipients to publicly announce their support for this initiative (Mexico, Kenya). A minimum of ten Chinese ambassadors and diplomats published letters in local media outlets to counterbalance the massive critique on the BRI.

### Why China wants to change the rules

When looking back over the last 20-25 years, we can describe the interrelation of China with the old and new powers as a trajectory of increasing integration into world governance systems. At the same time, China was a latecomer and thus compelled to bring its laws and policies into accordance with the established rules that had primarily been developed by the dominant trading nations from the Global North (see chapter 3). With the accession to the WTO in 2001 and the simultaneously initiated “Going Out Policy”, the real struggle over rules and market access instruments started.

When China entered the WTO, most of the member states had a vision of economic and political transformation in mind. In the accession documents, it was envisioned that China’s transformation to a full market economy could be achieved in around 15 years’ time.<sup>12</sup> Since 2003, one of China’s major foreign policy objec-

7 Dipanjan Roy Chaudhury, “Beijing tries to woo India after BRI summit snub”, in *Economic Times*, [https://economictimes.indiatimes.com/articleshow/69066815.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/69066815.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst) (last visited 13 June 2019).

8 Alice Jotin Duceux, *An Overview of Chinese Debt*, 20 December 2018, <http://www.cadtm.org/An-Overview-of-Chinese-Debt> (last visited 13 June 2019) See also <https://www.statista.com/statistics/269684/national-debt-in-eu-countries-in-relation-to-gross-domestic-product-gdp/>

9 Peter Cai: *Understanding China’s Belt and Road Initiative*, 2017, p. 8.

10 “China Moves to Define ‘Belt and Road’ Projects for First Time”, in *Bloomberg News* 3. April 2019, <https://www.bloomberg.com/news/articles/2019-04-03/china-moves-to-define-belt-and-road-projects-for-first-time> (last visited 13 June 2019).

11 Dipanjan Roy Chaudhury, “Beijing tries to woo India after BRI summit snub”, in *Economic Times*, see FN 7.

12 Laura Puccio, *Granting Market Economy Status to China. An analysis of WTO law and of selected WTO members’ policy*. European Parliamentary Research Service, 2015: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_IDA\(2015\)571325](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2015)571325) (last visited 13 June 2019).

tives was to obtain earlier recognition of Market Economy Status (MES).<sup>13</sup> China has argued that, according to Section 15(d) of the WTO Accession Protocol, the Section 15 provision allowing for NME methodology in Anti-Dumping investigations expire after 11 December 2016, resulting in a legal obligation to grant MES to China after that date. This interpretation has met with a lot of opposition.

„Among the countries that have implemented the decision to grant MES to China, only Australia and South Africa are among the leading users of anti-dumping proceedings. Most of these countries granted MES as a condition for negotiating free trade agreements (FTA) with China. Australia, as an example, considered the benefit of an FTA with China to be greater than that derived from the use of NME methodology in anti-dumping proceedings against Chinese firms, (...).“<sup>14</sup>

Japan introduced a non-binding deadline to grant China MES by December 2016, but made no official commitment to automatically grant MES. In 2002, Canada introduced a similar legal deadline, but this was repealed in 2013. Canada, the EU, the US, India, Japan, and Mexico all hold the legal presumption that China is an NME. Nevertheless, as Laura Puccio pointed out “Legal procedures in these jurisdictions [...] do not prevent authorities from granting MES for political reasons, even when the criteria for MES are not fully met.”<sup>15</sup>

Over the past five to ten years, China has faced the highest number of anti-dumping investigations in the EU. To protect local markets, the instrument of launching dumping complaints with the European Commission is one important tool for trade defense and relates closely to the question of MES: Exporters from economies in transition (at present these countries are the People's Republic of China, Vietnam, Kazakhstan, Albania, Armenia, Georgia, Kyrgyzstan, Moldova and Mongolia) may also receive specific claim forms which they can fill in to show that they are operating under market economy principles.<sup>16</sup> In this specific trade-related policy, the EU Commission is responsible for all investigations in this area and has also become the sole decision-making body.

In light of the heated discussion on China's MES after the expiry of Article 15 (a)(ii) of its WTO Accession Protocol, its postponements, and the final quasi rejection of MES<sup>17</sup> China started to openly argue for the need to change international trade rules.<sup>18</sup> In June 2019, China halted a dispute on its MES, which it had brought forth at the WTO in December 2016 amidst the EU's latest reform of its Anti-Dumping regulation that abandoned the approach of explicitly determining non-market economies.<sup>19</sup>

### **ISDS as a threat to sovereignty**

Dispute settlement mechanisms have been part of the WTO system from the very beginning. Dispute settlements are usually regulated in Bilateral Investment Treaties (BITs). Advocacy groups for social and/or environmental protection were at the forefront of a growing public perception viewing ISDS as a threat to the national capacity to sovereignly address issues of public interest or welfare. Critics perceive ISDS as a vehicle for the protection of corporate interests, restricting the state's ability to regulate, and thus posing a serious threat to its legislative power. By circumventing national courts, multinational corporations are offered a special track for the protection of their invested interest. Growing discomfort with the current system found its most tangible manifestation in the protests and resistance against TTIP and CETA. While negotiations on the former were halted, public pressure compelled the EU and Canada to substantially address the criticism on ISDS and undertake considerable efforts to amend the respective parts of the latter treaty.

The EU-China investment and trade agreements had been underway since 2007, stopped in 2010, and were revived in 2013 at the EU-China summit. Since then, the investment agreement has been pending. In 2018, the trade negotiations abruptly ended because China requested a comprehensive Free Trade Agreement which was rejected from the European side. In July 2019, the general situation had changed and both sides aim to conclude the negotiations 2020. The main conflicts in the ongoing negotiations are owed to the differences between the respective economic systems: protagonists of the state-centered economy in China prefer purely in-

13 François Godement, *China's Market Economy Status and the European interest*, European Council on Foreign relations (ECFR), June 2016.

14 Ibid.

15 Ibid.

16 European Commission, *Investigations-What is an anti-dumping investigation?*, [https://trade.ec.europa.eu/doclib/docs/2013/april/tradoc\\_151022.pdf](https://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151022.pdf)

17 Commission staff working document, *On significant distortions in the economy of the People's Republic of China for the purposes of trade defense investigations*, SWD(2017) 483 final/2, 20.12.2017. The EU's shifted towards a methodology that does not primarily rest on the classification of the economic system but on significant distortions that result from the economy in question.

18 F.e.: China submits proposal for WTO reforms, *China Daily* 15.5.2019, <http://www.chinadaily.com.cn/a/201905/15/WS5cdb46b5a3104842260bb9a0.html> (last visited 13. June 2019)

19 China halts World Trade Organization fight over market economy status, *SCMP/Reuters* 17.6.2019.

ternational investment treaties between states, whereas the individual investor-focused European side pushes for a further liberalization of investment regime.<sup>20</sup> On the European side, some basic requests include the protection of intellectual property rights, as well as the abolition of industrial and non-tariff measures which discriminate against foreign companies.

ISDS has come into disrepute because corporations have been using it to oppose laws and regulations of industrialized countries that they found disagreeable. Therefore, in the framework of the CETA agreement, the EU introduced a new system, the so-called “Investment Court System” (ICS). The main features of this brand-new court system should be:

- ▶ a permanent court inspired by public international courts;
- ▶ made up of a Tribunal of First Instance and an Appeals Tribunal;
- ▶ not based on temporary ad hoc tribunals;
- ▶ professional and independent adjudicators appointed for long terms of office by both parties taking into account all interests at stake;
- ▶ held to the highest ethical standards through a strict code of conduct;
- ▶ transparently working by opening up hearings to the public; publishing documents submitted during cases; allowing interested parties (NGOs, trade unions, citizens’ representatives) to intervene in the proceedings and make submissions.

In April 2019, the Court of Justice of the EU (CJEU) concluded that the ICS is compatible with the EU Treaties and the EU Charter of Fundamental Rights. Kluwer arbitration blog highlights: “The EU ultimately aims to replace the bilateral investment courts of each FTA by a single multilateral investment court (“MIC”). International negotiations are currently ongoing at UNCITRAL Working Group III, where the reform of the Investor-State Dispute Settlement system is under discussion.”<sup>21</sup> This court shall be cheaper, more accessible for vulnerable users (medium sized enterprises). For the future, the Court also envisaged the setting up of a “multilateral investment tribunal”. Here we can see how a strong desire to form a political union entity ma-

terializes in a new institution which has the power to “speak for all member states”.

CETA’s provisions on ISDS and the envisaged Investment Court System can be read as a kick-off for problem-oriented reforms beyond the confines of bilateral treaties. A step further in acknowledging ISDS’s problems, the recently signed Agreement between the United States of America, the United Mexican States, and Canada (USMCA) that shall supersede the NAFTA agreement, is phasing out ISA between the US and Canada. Disputes, for example, between US corporations that suffered losses due to Canadian environmental regulations will therefore not much longer be settled in arbitration but are diverted back to the national judicial systems.<sup>22</sup> This development can, however, not be heralded as the death of international ISA as we know it.

Against this background, we have to analyze and understand China’s current ambitions to simultaneously support the idea of a new global institution like ICS for state-investor disputes (see chapter 3 and 4), and on the level of company-to-company disputes develop its own international commercial courts (Chapter 2).

20 Klaus Fritsche, *Investitionsschutzabkommen mit China*, Stiftung Asienhaus, Blickwechsel 2016.

21 Guillaume Croisant, “Opinion 1/17 – The CJEU Confirms that CETA’s Investment Court System is Compatible with EU Law”, in Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2019/04/30/opinion-117-the-cjeu-confirms-that-cetas-investment-court-system-is-compatible-with-eu-law/> (last visited 13 June 2019).

22 NAFTA - Chapter 11 - Investment, Global Affairs Canada, Government of Canada, <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng> (last visited 23 May 2019).

## Chapter 2:

# New Chinese commercial courts for BRI

In January and February 2018, several Chinese state media proclaimed the need to establish BRI-related dispute settlement courts.<sup>23</sup> The reasons given illustrate the extent to which the Xi Jinping administration is emerging globally as a “defender of the interests of developing countries”. The Global Times cites four reasons why existing international arbitration courts do not protect either the interests of developing countries or Chinese companies:

1. BRI spans different legal systems which include the Continental law system, the Anglo-American law system, and the Islamic law system. Above all, many economies involved in the BRI have weak and slow domestic legal systems. When it comes to the litigation mechanism, the articles highlight the necessity to establish one-stop dispute resolution platforms rooted in the Chinese law system;
2. Providing a high-cost dispute settlement mechanism;
3. Based on bad experiences using ISDS mechanism against a European state (the rejection of the Ping’an claim in 2015 was one of the first very negative experiences with ISA on the Chinese side and caused the Chinese investor huge losses, see Chapter 3) it was claimed that power politics disadvantage developing countries in ISDS procedures and in the enforcement mechanisms for arbitration awards inside the WTO system. Quote from Global Times: “This demonstrates that the existing dispute settlement regime cannot adequately protect the legitimate interests of Chinese enterprises overseas, and that developing countries lack discourse power in international arbitration institutions.”
4. International tribunals would be based on the law of the sea, but the Chinese Silk Road Initiative would primarily concern continental-based trade disputes.

On 29 June 2018, the Supreme People’s Court (SPC) held ceremonies to mark the establishment of its International Commercial Tribunals (国际商事法庭), translated as China International Commercial Courts, CICC’s). These

courts are part of a larger network of institutions that also provide mediation and arbitration, which manifests the character of the CICC’s as a one-stop forum for international commercial dispute settlement in China.

China’s establishment of these new tribunals in Xian (for land-locked BRI cases) and Shenzhen (for maritime cases), which are branches of the Supreme People’s Court in Beijing, upholds China’s commitments to promote the BRI (see box 1 below). But, they are not new courts in the sense of a new dispute resolution mechanism. They are – like regular PRC tribunals – part of the judicial system under the SPC. The CICC’s are the first courts to explicitly serve the BRI as international commercial courts, although cases brought are not limited to BRI projects. They are not authorized to serve for state-investor disputes. Nevertheless, as highlighted by Prof David Yu of New York University Shanghai, since the EU-China investment treaty is still pending, the final decision on who is responsible for Chinese investment in Europe under the framework of Belt and Road has not been made yet.

As we can see in Graph 1, three existing arbitration institutions are part of this one-stop forum. While writing this study, new institutions are being rated and amendments are underway. We are dealing with a system in the making.

Additionally, the new courts are envisioned as New Legal Hubs that offer a one-stop solution which means they encompass adjudication, mediation and arbitration services. The latter are *inter alia* provided by CIETAC (China International Economic and Trade Arbitration Commission) and BAC (Beijing Arbitration Commission), which both recently published rules for investor-state arbitration (see Chapter 4). The SCIA (Shenzhen Court of International Arbitration) also just broadened its rules to accommodate investor-state arbitration. This means that the restriction to solely adjudicate commercial disputes has been weakened so that a future integration of investor-state disputes into the new courts may be possible.

The establishment of the new courts came without warning. Most Europeans were occupied with the dis-

23 He Quanlin, Chen Xiaochen, “Belt and Road requires new global dispute regime”, Global Times 1 February 2018, Emanuele Scimia, “Belt and Road and the battle for global investment standards”, Asia Times, February 6, 2018. See also “China To Establish International Courts To Deal With Belt And Road Initiative Cases”, Press Trust of India, January 27, 2018, <https://www.ndtv.com/world-news/china-to-establish-international-courts-to-deal-with-belt-and-road-initiative-cases-1805129> (last visited 13 June 2019); Sarah Grimmer, Christina Charemi, “Dispute Resolution along the Belt and Road”, Global Arbitration Review, 22 May 2017, <https://globalarbitrationreview.com/chapter/1141929/dispute-resolution-along-the-belt-and-road> (last visited 13 June 2019).

Figure 1: Chinese Dispute Resolution Network for Belt-and-Road Initiative (BRI)  
China's One-stop Diversified International Commercial Dispute Resolution Mechanism



**1 Investor-state arbitration**

-  Beijing: CIETAC (China International Economic and Trade Arbitration Commission)
-  Beijing: BAC (Beijing Arbitration Commission) (draft rules)
-  Shenzhen: SCIA (Shenzhen Court of International Arbitration)

**2 Courts**

-  Beijing: Supreme People's Court
- Shenzhen und Xi'an: China International Commercial Court (CICCs)

**3 Arbitration Commissions**

-  Beijing: CIETAC (China International Economic and Trade Arbitration Commission)
-  Beijing: BAC (Beijing Arbitration Commission)
-  Shanghai: SIAC (Shanghai International Economic and Trade Arbitration Commission)
-  Shenzhen: SCIA (Shenzhen Court of International Arbitration)
-  Beijing: CMAC (China Maritime Arbitration Commission)

**4 Mediation Centers**

-  Beijing: CCPIT (China Council for the Promotion of International Trade)
-  Shanghai: SCMC (Shanghai Commercial Mediation Center)

**Jurisdiction of CICCs in Shenzhen and Xian:**

1. first instance international commercial cases in 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.

tressed US-China trade relationship and the growing Chinese political and economic influence in Central and Eastern Europe. The fear that with these courts Beijing could create a powerful new mechanism to further enlarge its political and economic influence in favor of China was manifest. The courts' establishment was seen as China expanding its judicial influence with further ambitions for also influencing global governance. Some authors claimed that these courts were creating a "Sino-centric Belt and Road".<sup>24</sup> Others were more positive, even enthusiastic, that China would inspire other international courts by realizing innovative "multidoor court-houses".<sup>25</sup>

The timing could not have been better for China: In the midst of a fundamental credibility crisis of the WTO system, a pending EU-China Investment Treaty, and new momentum for the establishment of an International Investment Court as envisioned by CETA, internationally accepted willingness for the creation of new innovative, reformed institutions for international economic dispute settlement mechanism exists. The US' blockage of the appointment procedure to the WTO's Appellate Body had the "independence of the judges" as a core argument. Above all, Brussels and Ottawa are in the midst of planning and establishing a new permanent investment court system, which shall replace the old mechanisms that currently govern investor-state disputes. It will also newly define the ISDS mechanism and shape the entire landscape of investor-state disputes.

The CICC therefore comes timely and could shift the global order into a more pro-Chinese direction.

### **Which law is applied?**

The argument that in existing international arbitration courts "Western law" is applied and China needs mechanisms which include "Chinese law" (GT), is too simplistic. As the legal expert Susan Finder writes in her blog "Supreme People's Courts Monitor": "The political imperatives of establishing the CICC as a priority matter meant that the SPC was constrained by the realities of current Chinese law. Because judicial interpretations of the SPC cannot contravene the Civil Procedure Law and other national law (National People's Congress leg-

islation). This meant that the language of the court could not be English, the procedural law had to be Chinese Civil Procedure Law, and the judges had to be judges qualified under current Chinese law."<sup>26</sup>

This means, that in fact the judges are not obliged to practice solely national Chinese law to the substance of the dispute, but to the procedure. The new courts employ eight Chinese judges "who have been selected for their experience in handling international commercial disputes, their knowledge of conflicts of law, and their bilingual Chinese-English capabilities."<sup>27</sup>

However, an innovative step and different to other international commercial courts is the adjunct counseling body of International Commercial Expert Committee (12 Chinese and 24 Non-Chinese legal experts). This shows that the new courts are learning institutions. On 24 August 2018, the SPC published its decision to appoint the first 31 experts, who are well-established academics in commercial law or experienced arbitrators and mediators in this field. Only three experts hail from BRI countries, five are from the EU (including two from the UK), 10 come from strictly common law countries, and 11 are from Mainland China (3 from Hong Kong and 1 from Taiwan). Besides lending legitimacy to the CICC, this committee is probably an attempt to outweigh the competitive advantage of other international commercial courts like the Dubai International Financial Centre (DIFC) Courts or the Singapore International Commercial Courts, which both can appoint foreign judges (although they are not state courts). Given the strong representation of experienced arbitrators and mediators, the committee also raises CICC profile as a one-stop forum, at least for certain cases. Thus, mastering the tricky challenge of ascertaining foreign law will become much easier with the support of these experts.

### **Courts directly under the party**

How independent are these courts? According to the SPC the new courts shall play a central role for arbitration along the BRI and are "an integral part of the global international commercial dispute settlements mechanism".<sup>28</sup> SPC Vice-president Luo is quoted on the official website of the CCIC:

24 Jacob Mardell, "Dispute settlement on China's terms: Beijing's new Belt and Road courts. MERICS: 14.2.2018.

25 Matthew Erie, Update on the China International Commercial Court, in [opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court/](https://opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court/) 13. May 2019; Matthew Erie, "The China International Commercial Court: Prospects for Dispute Resolution for the Belt and Road Initiative", in *American Society of International Law*, Vol. 22, Iss. 11, 31.8.2018, <https://www.asil.org/insights/volume/22/issue/11/china-international-commercial-court-prospects-dispute-resolution-belt>

26 Susan Finder, "Comments on China's international commercial courts", Supreme Peoples Court Monitor July 9, 2018, <https://supremepeoplescourtmonitor.com/2018/07/09/comments-on-chinas-international-commercial-courts/> (last visited 13 June 2019).

27 Matthew Erie, 2018.

28 Opening speech by vice president of the SPC Luo Dongchuan on the 22nd of May 2019 on the occasion of a Sino-French Commercial Trial Exchange Seminar, documented on the Chinese language webpage of the CCIP, see <http://cicc.court.gov.cn/html/1/218/149/156/1227.html>. (last visited 13 June 2019).

“The establishment of the International Commercial Court of the Supreme People’s Court is a major reform and deployment made by the Party Central Committee with Comrade Xi Jinping as the core. It is of great significance to the people’s courts in fulfilling their duties and serving the “Belt and Road Initiative” initiative. (...) The Supreme People’s Court will support reform and innovation and give full play to the role of arbitration in providing judicial services in national strategies including the construction of the Belt and Road Initiative.”<sup>29</sup>

These courts are therefore first and foremost serving the president of China as the “core” and China’s national strategies. The Party is insisting upon its “absolute leadership” (绝对领导) over the courts, as explained by SPC president Zhou Qiang.<sup>30</sup> Susan Finder, who has been observing the SPC and legal development in China for many years, highlighted that in this year’s legal work report by Zhou Qiang to the NPC, the emphasis was on political study of Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era. We know that political control over society is being strengthened, from requiring more political study by people to the society-wide requirement of Party building also in arbitration centers.

European partners should be aware of this. The leading regulatory bodies of the courts and their chairmen represent the interest of the party and therefore the Chinese state.

Additionally, Chinese courts in general are not independent. China does not follow the principle of separation of powers. The courts have to report to the People’s Congresses at the various levels, which also appoint the courts leading judges. Chinese judges work on fixed-term contracts and are appointed by respective court presidents. The Judges Law explicitly provides that judges not only have to strictly adhere to the law but that they also have the duty to protect the state’s and the public’s interests. Therefore, the new courts also function as a protection for Chinese state companies and their BRI projects. Up to now, Chinese companies have strongly relied on individual contracts or the framework of the respective BIT/FTA. These courts produce an additional safety net for Chinese companies. Also, similar to the courts, there is no independence of key financial institutions in China. One example is the China Banking and Insurance Regulatory Commission (CBIRC, founded on 8 April 2018 as a merger of China Banking Regulatory Commission and China Insurance Regulatory Commission, the former was responsible to handle China’s swelling debt loads and non-transparent business practices). The newly appointed chairman

Guo Shuqing simultaneously serves as party secretary of the Peoples Bank of China.

### Box 1: China’s Supreme People’s Court and its Belt and Road Initiative (BRI)

On 16 June 2015, the SPC issued a normative document that explicitly outlined the role it envisioned for the Chinese judiciary in implementing the BRI. The main content of this document encourages the lower People’s Courts to adopt a service-oriented approach and facilitate fast and efficient dispute resolution for cases arising from BRI projects. At the same time, the SPC reminds the lower courts that they have study and implement the CPC’s and state’s policy of constructing the new silk road as outlined by Xi Jinping. The courts shall fully understand the “sacred duty (神圣职责)” they have to shoulder and take the initiative in assuming the “mission of this age (时代使命)” to actively serve the construction of the BRI.

This authoritative political mission also highlights that it should not be understood as a simplistic protection measure for Chinese interests along the silk road. The SPC makes it abundantly clear that this mission entails the equal protection of Chinese and foreign interests, that the choice of court and choice of law of disputing parties shall be safeguarded and that the policies, laws, cultures and religions of the different BRI states should be respected.

Such an affirmation does however not prevent the SPC from encouraging the lower courts to strengthen the cooperation in criminal matters along the BRI with the purpose of severely crack down inter alia on terrorism, separatism and religious extremism, so that BRI can also be a tool to export China’s “People’s War on Terror” that produced massive human rights violations and the re-emergence of labor camps for China’s Muslim minority in Xinjiang province.

Chinese courts are also explicitly ordered to actively participate in international rule-setting and continuously raise their international discursive power. Fields of particular interest in this regard are international financial, commercial and investment law as well as maritime law. The Chinese judiciary shall actively participate and advance international rule-setting in these areas. China’s newly established International Commercial Courts and its efforts in steering the discourse on the reform of the current ISDS system should be understood exactly from this perspective. Chinese courts fulfill their “sacred duty” to shape the international legal order and try to bring it in line with Chinese interests manifest in the BRI.

29 Chinese website of the CICC, *ibid*.

30 Susan Finder, “Signals in the 2019 Supreme People’s Court work report to the NPC”, April 22, 2019, <https://supremepoplescourtmonitor.com/2019/04/22/signals-in-the-2019-supreme-peoples-court-work-report-to-the-npc/> (last visited 13 June 2019).

## Shift of jurisdiction

The new courts evidently function as a better protection of Chinese interests in general and of Chinese companies involved in BRI projects in particular. The latter may very well benefit from the establishment of the CICC, as it gives them the possibility to bring their disputes abroad back to a familiar legal environment, hence giving them home-court advantage. China has signed (though not yet ratified) the Hague Choice of Court Convention in 2017, which is another piece of the puzzle and further strengthens the protection of Chinese companies that may want to avoid litigation in BRI states with a weak legal system and introduce choice of court provisions in their contracts that designate the CICC as exclusive courts for deciding future disputes. The creation of the CICC therefore first and foremost gives Chinese state-owned enterprises and private companies much more security since they can handle disputes much more easily at home. Especially BRI project contracts, which are backed by Chinese money, could very well include a model choice-of-court provision that designates the CICC as exclusive court to decide on BRI-related disputes.

But, the overall key question remains which cases will end up with the new courts. How and when do the CICC assume jurisdiction? Has any new jurisdiction been established here? First of all, jurisdiction is given if parties to a contract choose so, based on their free will. Among the five types of cases of jurisdiction shown in chart 1, only the last one is new and at the same time extremely vaguely defined. It leaves room for the new tribunals to “grab” jurisdiction. All the other four items only refer matters up to the SPC within the existing court system and existing rules. Only, they can go up. This could mean that higher courts consider some cases too “sensitive” or difficult and want to avoid decision making (thanks Susan Finder for this thought). Similarly, commercial first instance cases that have a “nationwide significant impact” may also be decided by the CICC. While a clear definition of this provision is still missing, the SPC will probably decide ad-hoc if it is interested to hear a first instance case that could be considered of “nationwide significant impact”.

Another far-reaching problem is the enforcement regulation: The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is an internationally accepted instrument that has been ratified by China as early as 1987, but it only concerns arbitration awards, not judgements. Experience and studies show, however, that the actual enforcement of

foreign arbitral awards in China is extremely difficult. The non-enforcement rate is 30 percent.<sup>31</sup> One of the main arguments for non-enforcement is the violation of public policy or, as it is termed in the Chinese Civil Procedure Law, the “violation of social and public interest”. This makes enforcement decisions extremely arbitrary. Despite some efforts by the SPC to establish a more coherent procedure, Chinese courts have prevalently used this extremely vague provision in their decisions not to enforce foreign arbitral awards. The CICC can also hear cases on enforcement and setting aside of foreign arbitral awards, which can provide far more predictability in such matters.

## Time-efficient and low cost: Belt and Road infrastructure covers 64 languages

One of the aims of the new courts is to foster efficient and low-cost trials. Similar to other “innovations” we see, e.g. in the complaint mechanisms for affected communities of large-scale infrastructure investments financed by loans of the Asian Infrastructure Investment Bank (AIIB), that digital procedures shall support “low cost and efficient” trials. The arbitration institutions are encouraged to “integrate online arbitration into the diversified dispute resolution platform, using information technology to achieve coordinated development of online and offline dispute resolution mechanisms and to improve the overall effectiveness of social governance.”<sup>32</sup>

Similar to the slogans of the AIIB, which is supposed to be innovative because it is “lean, green and clean”, these innovations could come with the decline of governance quality.<sup>33</sup> As highlighted by Finder’s “SPC Monitor”, the resources to support the operation of the courts are scarce (“lean”) although the translation of the judgement material into English is very time consuming. There is the danger that material will be poorly or insufficiently translated which again shifts information power to the Chinese side.

## Linking Asian Dispute Resolution Hubs

Not every non-Chinese partner in a BRI project will be comfortable with having an arising dispute decided in Mainland China. Though the CICC integrated several arbitration and mediation centers in its one-stop forum mechanism, all of these institutions are in Mainland China. At the same time, two well-established dispute resolution hubs are available in the greater region. Singapore and Hong Kong have a high reputation for their

31 GTAI, 60th anniversary of New York Convention, Nov. 2018, pp. 21ff.

32 English website, 16.4.2019, Luo Dongchuan, Improve Arbitration-Related Judicial Review System, <http://cicc.court.gov.cn/html/1/219/208/209/1225.html> (last visited 13 June 2019).

33 Korinna Horta, The Asian Infrastructure Investment Bank (AIIB): A Multilateral Bank Where China Sets the Rules, Berlin 2019.

(commercial) rule of law, both have a footing in common law and can offer legal proceedings in English, all of which Mainland China cannot provide. Additionally, both Singapore and Hong Kong can easily cater to the needs of a Chinese party to a dispute, including language support and a deep understanding of the Chinese legal culture.

It is therefore not surprising that both Singapore and Hong Kong are expecting rising numbers of BRI disputes to be mediated and arbitrated in their respective facilities. Mainland institutions have sought to integrate their services with partner institutions in Hong Kong and Singapore.

Some measures of integration can be seen in the chart above. Especially the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of Mainland China and of the Hong Kong Special Administrative Region must be seen as a key project of this kind. Even though it is to date unclear which establishments from Hong Kong will be the designated arbitral institutions under this agreement, arbitration on disputes involving China in Hong Kong will greatly benefit from the possibility to obtain recognition and enforcement of interim measures by Mainland courts.

As mentioned above, the newly established courts will also be able to provide a similar service for international commercial arbitration, but Hong Kong's offer in this regard may be even more attractive. For those who can afford arbitration in Hong Kong, it may therefore be a viable solution for BRI disputes.

In the long run, however, Hong Kong's dependence on China and Beijing's growing influence nevertheless pose systemic risks to fair and impartial dispute settlement for cases involving core Chinese interests such as BRI disputes. The most recent draft of Hong Kong's extradition bill raises questions about Hong Kong's commitment to the rule of law and could therefore have a strong impact on the future of Hong Kong as Asia's leading international dispute resolution center. Although protests against the extradition bill by civil society have been strong, and even if the bill has been recalled due to the protests, this serves as a warning. Arbitrators themselves, regardless of nationality, could have been subject to extradition to China, if they for example are involved in divulging information during arbitration that falls within the unclear scope of state secrets in China (see Chapter 4).

The integration of Hong Kong is also visible in the field of mediation. The Hong Kong Mediation Centre (HKMC) and the Shenzhen Court of International Arbitration (SCIA) have agreed to collaborate on cross-border disputes. Based on a mediated settlement agreement from

the HKMC, the SCIA can henceforth issue a consent award that is enforceable in Mainland China. This arrangement addresses the same issue of enforceable mediation as the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), which has not yet come into force. Just as this convention, it may however be contradictory that a mediated consensus between two parties should be enforceable, as the need of enforcement only arises if one party does not consent to the settlement.

The cooperation between Singapore and Mainland institutions can best be highlighted by the establishment of a joint panel of mediators specifically for BRI disputes by the China Council for the Promotion of International Trade (CCPIT) and the Singapore International Mediation Centre (SIMC). Additionally, the Chinese Economic Trade and Arbitration Commission (CIETAC), the Xian Arbitration Commission, and the Shenzhen International Court of Arbitration (SCIA) signed memoranda of understanding with the Singapore International Arbitration Centre on a cross-institution consolidation protocol for arbitration. This mechanism would allow related issues to be resolved in a single arbitration proceeding, which would offer a very efficient and cost-effective consolidated dispute resolution.

The structural connection between Singapore and Hong Kong may be offering multiple services for the resolution of BRI disputes. The dynamic of China providing the disputes and Singapore or Hong Kong offering resolution mechanisms that are linked back to China is nevertheless not unproblematic. Hong Kong and Singapore lend their legitimacy as impartial and professional dispute resolution hubs to China in exchange for certain privileges that bolster their respective dispute resolution services. At the same time, their enhanced cooperation is likely to evolve into a co-dependency so that the fear of losing these privileges granted by China may entail an aversion against harming Chinese interests in, for example, BRI project disputes.

## Chapter 3:

# Chinese Practices in the International Economic Legal System

China's position in the integration into the global economy has always been that of a latecomer that was compelled to bring its laws and policies into accord with the established rules that were primarily developed by the dominant trading nations from the Global North. But as China's economic power has risen and its underlying legal system has matured, it has been able to gradually overcome its receiving role and has started to co-shape the international economic legal order. China is using WTO rules whenever its interests in the free flow of global trade are impeded, but has never comprehensively complied with the liberal WTO regime if this would have created a conflict with its regulatory framework of state capitalism. While China's turn towards a more assertive approach has already occurred in the realm of the WTO, it is highly likely that China will also harness its slowly growing experiences with Investor-State Dispute Settlements (ISDS) for the purpose of engaging more proactively in this area of the international economic legal order.

### China and the WTO

Ever since its accession to the World Trade Organization (WTO) in 2001, China has demonstrated a steep learning curve in utilizing this membership for its own purposes. Over the years, China has gradually transformed from a cautious observer and tacit participant to an active player in the WTO's dispute settlement mechanism.

▶ In the first phase of its membership in the WTO, China made ample use of its newly gained access to WTO dispute proceedings and participated as an observant third party in numerous cases.<sup>34</sup> After an extended honeymoon period, Chinese eco-

nomics became the target of several claims brought forth by its major trading partners, which ended in significant defeats (such as the *China-Auto Parts DS 339, 340, 342* case<sup>35</sup>).

- ▶ WTO rules proved, however, to be ineffective in reigning in certain aspects of the Chinese regulatory system. The US were fairly unsuccessful in challenging trade-related aspects of the Chinese censorship system,<sup>36</sup> China's governmentally ordered restructuring of its Rare Earth sector that significantly distorted international trade was completely unimpeded by a respective WTO dispute.<sup>37</sup>
- ▶ In the following years, China was able to use WTO rules to *inter alia* successfully challenge the EU's Anti-Dumping Regime by questioning the EU's treatment of Chinese exporters (such as in the *EC – Fasteners (DS 397)* case). Even in the subsequent compliance procedure, the Appellate Body sided with China on several procedural issues while not overturning the EU's general approach of third-country methodology in Anti-Dumping investigations concerning China.<sup>38</sup>
- ▶ In June 2019, China retracted an unpromising complaint<sup>39</sup> against the latest EU Anti-Dumping Regime based on significant distortions of the Chinese economy.<sup>40</sup>
- ▶ Between April and August 2018, China used the WTO system to request consultations in five different cases in its trade conflict with the US Trump-Administration.<sup>41</sup>

34 In the first five years of its membership, China only participated only once as complainant in a case against US safeguard measures on a wide range of steel products along with other strong parties such as the EC, Japan or Brazil (WTO – DS248, 249, 251, 252, 253, 254, 258, 259).

35 A 25% import tariff on auto parts (including CKD (completely knocked down) and SKD (semi-knocked down) kits) imposed by China was in December 2008 ultimately found as not in compliance with rules of GATT and China's Accession Documents by an Appellate Body Report. [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds339\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds339_e.htm) (last visited 07 May 2019).

36 *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (DS 363).

37 *China – Measures Related to the Exportation of Various Raw Materials* (DS394, 395, 398).

38 China's first request for Consultations was submitted in July 2009, the final Appellate Body Report was circulated in July 2011 and the EU [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds397\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds397_e.htm) (last visited 07 May 2019).

39 WTO – DS516.

40 [http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc\\_156474.pdf](http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf) (last visited 12 June 2019).

41 WTO – DS543, 544, 562, 563, 565.

Figure 2: China's Integration with Dispute Resolution Mechanism in Asia



Interim Measures for Arbitration between Hong Kong and Mainland China



Joint panel of mediators for BRI projects



Enforceable mediation settlements



MoU on consolidation protocol for arbitration



Its record as a respondent in WTO disputes indicates China's lack of comprehensive compliance and in consort with its use of WTO rules as complainant demonstrates the instrumentalist nature of China's engagement in the WTO.

## **China and ISDS**

Similar to its engagement in the WTO, China came late to the arena of formal Investor-State Dispute Settlement (ISDS) and has so far only limited (yet growing) experience in this field, albeit China had ratified the ICSID Convention as early as 1993. Until today, a total of eight cases involved either a Chinese claimant or China as a respondent state. Notably, two of the five Chinese claimants were subsidiaries of state-owned enterprises (Beijing Shougang and Beijing Urban Construction) and two claimants were residents of Hong Kong or Macao, while the only privately-owned company from Mainland China was Ping'an Insurance, which is closely tied to the network of former Premier Wen Jiabao.<sup>42</sup>

The limited number of cases involving Chinese claimants may be explained by the fact that Chinese outbound investments only substantially started to rise in the late 2000s and gained significant momentum after the BRI was introduced. Thus many disputes may still be dormant or in the process of being resolved through other means than formal ISDS mechanisms. At the same time, the trajectory of Chinese outbound investments certainly warrants greater attention to ISDS and its reform by the Chinese government.

On the other hand, Foreign Direct Investments in China had been a significant driving force for China's economic boom at least since the early 1990s, so that the first case of China as the respondent state in 2011 and the tiny number of overall just three cases suggest that until recently, foreign investors sought other means to solve disputes with the state.

Until now, only three claims had been brought forth under the current ISDS regime.

- a. One 2011 case was hastily settled within one month after the notification of arbitration by a Malaysian Investor.
- b. One decision concerned the alleged infringement on the investment of a Korean developer for a golf and country club in Jiangsu province, which was decided in favor of China in 2017.

- c. The last case is still pending and involves the German spice and condiment manufacturer HELA, which claims an undue expropriation of its investment in Shandong.

Whereas the Malaysian claimant was successful in using ISDS as leverage for reaching a settlement, China felt comfortable in pursuing the arbitration as respondent to the Korean investor's claim, which was subsequently dismissed as meritless.

## **One-Country-One-Systems enters ISDS**

Several cases indicate that it is possible for claimants from Hong Kong and Macao to fall under the protection of BITs concluded by China, which is certainly echoing China's doctrine of „One-Country-Two-Systems“. This doctrine is enshrined in both the Hong Kong and Macao Basic Laws and gives international investors a viable option to use Hong Kong or Macao as a hub for their investments and thereby getting under the umbrella of China's BITs.

In a still pending claim, Sanum Investment Ltd, which was incorporated in Macao but owned 100% by a Dutch enterprise, claimed breach of a settlement agreement reached with the Laotian government in a previous arbitration on the establishment and operation of several casinos and slot clubs in Laos. In a landmark case, the Singapore Court of Appeals decided that the China-Laos BIT was applicable in this case, so that the arbitration tribunal could assert jurisdiction and start its proceedings at Maxwell Chambers, the integrated dispute resolution complex in Singapore in January 2019. The court did not question the nationality of Sanum Investment, even though it was wholly owned by a Dutch investor, and only considered the territorial scope of application of the China-Lao BIT for entities from Macao, dismissing Laos *nota verbal*, which explicitly stated that it was not in its intention to extend the 1993 China-Laos BIT to the territory of Macao, which was returned to China in 1999.

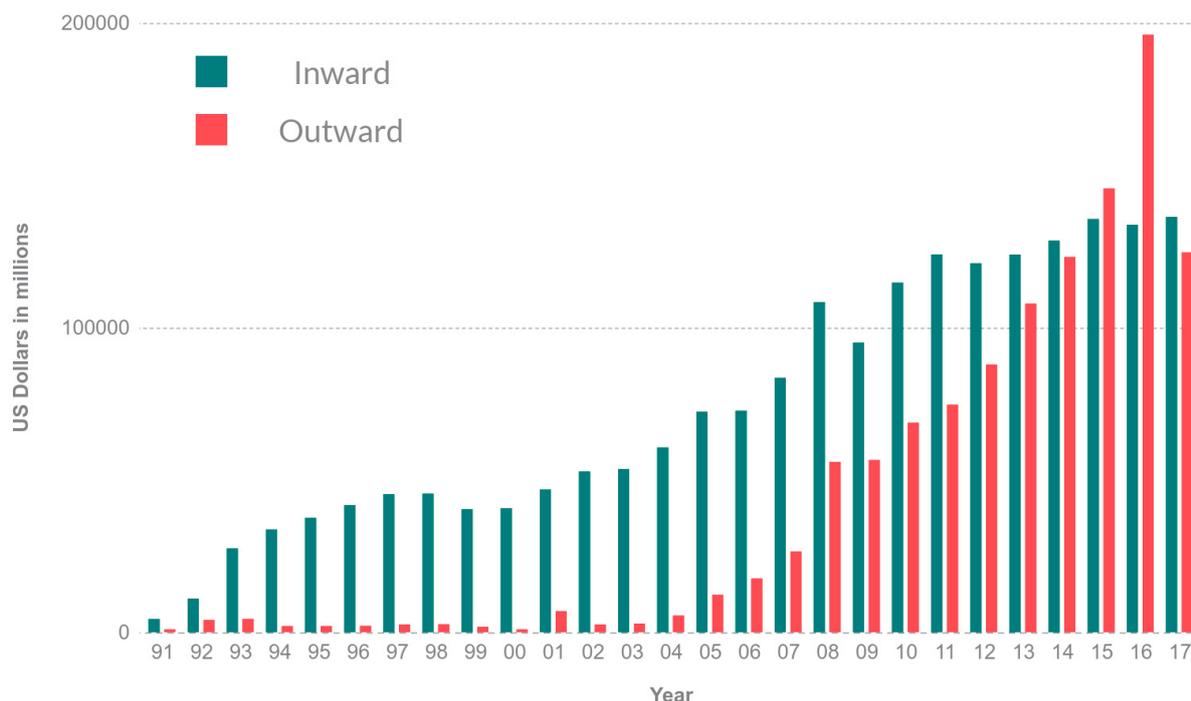
### *Airport in Yemen- State-enterprises as "investor" under ISDS*

Given the fact that Chinese SOEs and their subsidiaries are the major contractors in BRI projects, these decisions clearly indicate that securing their investments abroad through ISDS is a feasible option for China's SOEs.

One indicator for this is China's experience in the claim of Beijing Urban Construction against Yemen on alleged forced deprivation of assets and contract concerning the

<sup>42</sup> <https://archive.nytimes.com/www.nytimes.com/interactive/2012/11/25/business/ping-ans-hidden-shareholders-friends-and-family-of-wen-jiabao.html?smid=tw-share> (last visited 08 May 2019).

Graph 1: China: Foreign Direct Investment  
Source: UNCTAD



construction of an airport terminal in Sana'a in 2014. While this case was settled before an award could be issued, in the proceedings on jurisdiction, the tribunal determined that the Chinese state-owned enterprise involved could still put forward a claim under the China-Yemen BIT of 1998. A comparable finding had already been reached in another case, when the state-owned enterprise Beijing Shougang had claimed expropriation after its license for the Tumurtei iron ore had been cancelled by Mongolia in 2012.

Nevertheless, not every Chinese SOE investing abroad may be able to pass the Broches-test<sup>43</sup> that **excludes SOEs from being a protected investor** if it is either acting as an agent of the government or exercising an essentially governmental function. Given the lack of consistency in the legal interpretation of ISA tribunals, SOEs and their subsidiaries may very well face the risk of being excluded from the protection of an international investment treaty. China will therefore certainly promote the **explicit inclusion of its SOEs as protected investors** in future BITs as it has already been done, for example, in the China-Tanzania BIT of 2013.

Lessons learned: China is pushing BRI countries on more liberal Investor-state dispute settlement (ISDS)

Chinese investors primarily struggle to uphold their claim because of the narrow scope of the dispute resolution clauses in the so-called first generation Chinese BITs. In its first roughly hundred BITs until the late 1990s, China followed the extremely cautious approach of a host country that is aware of its staggering attractiveness for foreign investors and at the same time intends to limit its exposure to liabilities in light of its only slowly developing rule of law. Subsequently, the dispute resolution clauses in China's first generation BITs generally limited the jurisdiction of dispute resolution arbitration to *disputes involving the amount of compensation for expropriation*, unless both parties would specifically agree to submit another type of dispute to an arbitration tribunal.

China's core lessons from the experiences with their first ISDS cases (see below) are certainly that there is a high volatility of arbitration tribunal findings, which renders their decisions far more unpredictable than those in a formal court of law. It has been learned that an effective protection of its outbound investments can only be achieved, if more of the outdated first generation

43 Aron Broches was a World Bank official and deeply involved in the establishment of the ICSID.

BITs are reformed and brought in line with more liberal approaches of international investment protection.

In the Chinese literature on the topic, especially the 55 BITs that China has already concluded with BRI states are identified as in dire need of broadening their scope of protection.<sup>44</sup> As a large number of these treaties are still stemming from the early days of Chinese BITs, it is highly likely that China will use the BRI to renegotiate these treaties.<sup>45</sup> Even though weaker states may not be interested in adopting a liberal approach to international investment protection in general and specifically with regard to ISA, China's lure of BRI projects may very well entice these states to overcome their reservation and open up for a wide range of possible ISDS.

## Box 2: Three Generation of Chinese BITs<sup>46</sup>

China started to conclude Bilateral Investment Treaties (BITs) in the early 1980s as a means to promote foreign investments in the nascent period of its Reform and Opening-up policy since 1978. The first BITs were signed with developed European countries. A BIT with Sweden was concluded in 1982, Germany followed in 1983, France, Belgium and Luxembourg, the Netherlands, Finland, and Norway in 1984 respectively.

This first generation of BITs can be characterized as fairly restrictive. The BITs had no or just very limited national treatment clauses and allowed investor-state disputes only on the matter of the amount of expropriation compensation.

The second generation of BITs started to emerge with the China-Barbados BIT of 1998. This generation of BITs broadened the scope of national treatment and most notably allowed ISDS for any disputes, so that this generation of BITs opened China up for ISDS even though the first case was still more than a decade away.

The third generation of Chinese BITs follows the principle accord covered investments fair and equitable treatment and full protection and security, in accordance with international law further opens the national treatment. They further broaden national treatment to the extent that foreign investors shall be treated no less favorable than domestic investors, in like circumstances. A similar approach is taken with regard to the Most Favored Nations Treatment (MFN). The scope of ISDS is however slightly curtailed as a violation of MFN cannot be claimed under the respective provisions.

44 See e.g. Gu Wangshu (谷望舒): Improvements of the Indirect Expropriations Provisions in China's Bilateral Investment Treaties from the Perspective of the "Belt and Road" Initiative ("一带一路"视角下中国双边投资条约中间接征收条款的完善), *Journal of Customs and Trade* (海关与经贸研究), Vol. 40 (1), 2019, 108.

45 First generation Chinese BIT along the BRI are *inter alia* still in force with: Ukraine, Moldovan, Belarus, Thailand, Singapore, Kuwait, Sri Lanka, Malaysia, Pakistan (a far more liberal FTA was concluded in 2006), Turkey, Kyrgyzstan, Armenia, The Philippines, Kazakhstan, Turkmenistan, Vietnam, Laos, Tajikistan, Georgia, United Arab Emirates, Azerbaijan, Indonesia, Oman, Saudi Arabia and Lebanon.

46 This characterization follows Alex Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements*. German Development Institute, Discussion Paper No.7, 2013.

Figure 3: China BRI Investment Treaties



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### Box 3: Chinese Investor-Peru: China as winner

The first Chinese claimant in an Investor-State Arbitration (ISA) case was not from Mainland China but Tza Yap Shum, a Hong Kong resident. The claimant had been born in Fujian during the Chinese Civil War in 1948 but was a Hong Kong resident since 1972.<sup>47</sup> The Peruvian government had frozen his assets due to outstanding tax debts. The Tribunal asserted that the China-Peru BIT was applicable in this case, based on the nationality of the investor, even though he was a Hong Kong resident long before the return of Hong

Kong to China in 1997. The China-Peru BIT of 1994 belongs to the first generation of Chinese BITs that only provided for ISDS on the amount of compensation after an expropriation. Ultimately, the tribunal held an extremely wide understanding of said clause and also asserted competence on deciding cases involving not only the mere determination of the amount but also any other disputes arising from expropriation including whether the investment had actually been expropriated. The conservative approach to ISA embedded in one of China's first generation BITs had thereby been thwarted for the benefit of a Chinese Investor.

47 <https://www.italaw.com/sites/default/files/case-documents/ita0881.pdf> (last visited 09 May 2019).

#### Box 4: China-Belgium/ China-Mongolia: China as loser

A considerable different experience with the same generation of dispute solution clauses were made by the Chinese insurance giant Ping'an in its case against (investor) from Belgium and by three Chinese SOE subsidiaries operating around a mining project in their case against Mongolia. Unfortunately, for the Chinese investors, both disputes arose shortly before the so-called third generation of Chinese BIT<sup>48</sup> came into effect. The nationalization of the Belgian company Fortis after the 2008 financial crisis and the re-alignment with Russian interests in its iron ore mining by the Mongolian Government since the mid 2000s fell within the time frame of China's first generation BITs. In both cases<sup>49</sup>, the arbitration tribunals did not go beyond the wording of the conservative dispute resolution clauses in the respective instruments so that Ping An was ultimately not compensated for its near 2 Billion Euro loss in Fortis and the Chinese SOEs had to write off their investments in Mongolia.

#### China reforms international arbitration courts

Experiencing first-hand the lack of consistency in ISA had probably a huge impetus on China's position in reforming the ICSID. In its first comment to said matter, China suggests that the ICSID arbitration rules should require the tribunal to adopt the rules as codified in Article 31 and 32 of the Vienna Convention on the Law of Treaties in treaty interpretation.<sup>50</sup> Including such a well-established instrument as a basis for the legal interpretations of a tribunal has certainly the potential to bring more stability to the current framework of ISA. Furthermore, China is not hostile to the idea of an International Investment Court, which would surely alter the entire outlook of ISDS and presumably bring an end to the long-standing international criticism regarding the lack of consistency in ISA.

#### Chinese land-use rights and ISDS: different concepts of ownership

The track record of Chinese claimants in ISDS is far from perfect. One of its SOEs and also the politically very well-connected Ping'an lost their cases (see Chapter 2). One SOE had to settle its case. Only the private Hong Kong resident had won his case, while the Dutch-Macao claimant at least won its battle over jurisdiction in a Singapore court. As a respondent, China has even less experience but still maintains a fairly clean sheet against claims of foreign investors.

Every single claim of a foreign investor so far was related to the fairly unique system of land ownership in China. Takings of land-use rights are not only one of the most prolific problems of social injustice in China for Chinese citizens. Foreign investors face the same risks of expropriation vis-à-vis an insatiably hungry land development industry. Local authorities are eager to promote this kind of fast economic growth and sustain a weak system for the protection of land rights.

At the core of the issue lies a legal system of property rights that only recognizes public ownership of land in the forms of municipal state land and rural collective land. While the property rights cannot be transferred, land-use rights for specific land usage can be obtained for a certain limited amount of time. Expropriation of

48 Under this latest third generation BIT, any disputes may now be submitted for arbitration. This annihilated the very narrow approach seen in the first generation of BITs, which allowed –as mentioned above- arbitration only for disputes involving the amount of compensation for expropriation. In the second generation BITs since 1998, China did not limit the scope of disputes that may be submitted for arbitration anymore and in third generation BITs since 2007 China modeled its approach on NAFTA, albeit some variation concerning the fair and equitable treatment and still rejecting national treatment for the pre-establishment phase.

49 The China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia case is the only Chinese ISA case registered with the Permanent Court of Arbitration in The Hague and the content of the award remains confidential, <https://pca-cpa.org/en/cases/48/> (last visited 18 May 2019); Ping An Insurance v. Belgium followed ICSID rules with a published award: <https://www.italaw.com/sites/default/files/case-documents/italaw4285.pdf> (last visited 18 May 2019).

50 [https://icsid.worldbank.org/en/amendments/Documents/China\\_Comments\\_12.28.18.pdf](https://icsid.worldbank.org/en/amendments/Documents/China_Comments_12.28.18.pdf) (last visited 19 May 2019).

land in China is therefore rather to be understood as a revocation of land-use rights. Even though such a measure requires public interest, a legal procedure and compensation for the rights holder, the hurdle to revoke a use right is probably less high for Chinese authorities than to appropriate an ownership right. In the end, as fiduciaries of the public's ownership, state institutions are just taking back what is theirs anyway.

### Box 5: China-Malaysian Investor

The first case of China as a respondent state arose in 2011 after the Malaysian investor Ekran Berhard's land use rights had been revoked due to an alleged failure to develop the land as stipulated under relevant regulations. Less than two months after the ICSID Secretary-General registered this case, the proceedings were already suspended after the parties reached an agreement.<sup>51</sup> The case was settled, without making the outcome known to the public. It appears as if China was not yet ready for this kind of dispute and actively sought to avoid the involvement of an arbitration tribunal.

### Box 6: China-Korean Investor

Only as late as 2014 did China engage for the first time as respondent in an arbitration proceeding of an investor-state dispute, when the Korean Ansung Housing sought relief after its golf and country club development had obviously been torpedoed by local authorities, which had limited Ansung's access to essential land use rights and allegedly protected a neighboring project of a Chinese investors for the same kind of leisure facilities.<sup>52</sup> In its original statement of its claim, Ansung had however indicated that the losses of its investments had indeed occurred *before* October 2011, so that the registration of this claim *in* October 2014 and therefore *more* than three years later rendered this claim time-barred pursuant to the relevant provision on temporal limitations in the China-Korea BIT.

The only pending ISA case with Chinese participation also concerns the revocation of land-use rights by Chinese authorities. In 2001, the German spice and condiment producer HELA had obtained a 50-years land-use right for their business operations from the city of Jinan in Shandong. This right was revoked in September 2014 as a result of a municipal renovation project of the greater area with the purpose of improving environmental and living conditions,<sup>53</sup> which is in line with the provincial policy of establishing an overall management and environmental protection system for the adjacent Xiaoqing River.<sup>54</sup> HELA challenged the revocation decision by administrative review and in administrative court with the Shandong High Court as last instance upholding the authorities' decision in December 2016. In March 2017, the municipal government requested HELA to vacate its buildings and accept a compensation of close to 33 Million RMB (ca. 4,2 Million Euro).

In May 2017, HELA submitted a request for arbitration to the ICSID and in June 2017, a Chinese court issued an enforcement order, which finally resulted in another eviction notice and the demolition of HELA's buildings in December 2017, while the parties were still in the process of determining the president of the tribunal. When the tribunal finally decided on HELA's request for provisional measures for the protection of its investment in August 2018, the buildings in question had already been demolished, or, in the words of tribunal: "There is at present no right that requires interim protection pending a determination on the merits of the case".

While the outcome of this case is yet undetermined, it still points to the importance of provisional measures in ISA. It must be noted here that Chinese courts are not recognizing or enforcing interim measures in arbitration so far, which again highlights the significance of the aforementioned agreement between Hong Kong and Mainland China to ensure the enforceability of interim measures from arbitration in Hong Kong in Mainland China. If applicable to ISA, Hong Kong would become much more attractive as a forum for ISDS.

51 <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/11/15>, (last visited 12 May 2019).

52 <https://www.italaw.com/sites/default/files/case-documents/italaw8538.pdf> (last visited 12 May 2019).

53 [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C6447/DS11402\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C6447/DS11402_En.pdf) (last visited 20 May 2019).

54 Shandong Province Environmental Protection and Development Plan (2014-2020) (山东省生态保护与建设规划 (2014-2020年)).

## Chapter 4:

# Reform of the Investor-State Dispute Settlement System: Chinese Rule-Setting?

Besides the creation of China-focused commercial dispute settlement mechanisms, China is also an eager participant in the reform of the existing Investor-State Dispute Settlement system.

### Chinese approaches to ISDS: Shaping the Reform in Multiple Fora

Recent years have seen the emergence of a growing criticism of the current status of ISDS Mechanisms in general and of ISA in particular. The return to national courts and phasing out of ISA or ISDS instruments (see Chapter 1) is however not always a feasible option for foreign investors in states, which are not fully committed to the rule of law or lack an efficacious and independent judicial system. While China may very well be perceived as such a state, Chinese Investors certainly realize that many of their host countries – including numerous BRI-states – fall within this category.

Phasing out ISA would jeopardize many Chinese investments along the BRI. Consequently, China has an enormous interest in maintaining the general rationale of the current system while at the same time actively participating in its reform. Additional to establishing its own BRI courts it is therefore vital to China's economic interests along the BRI that it is able to shape the international discourse on ISDS and secure an active role in multilateral efforts for its reform. China's late arrival at the stage of ISDS as mentioned above coincided with global reform efforts so that China is now able to seize this opportunity and work towards addressing several issues that proved to be problematic in the first few ISDS cases with Chinese involvement.

The need for a new form of ISDS has been articulated across the globe and found its way into the political process in multilateral, bilateral and national reform projects. China is no exception to this phenomenon and employs all of these channels to shape the international discourse and advance its own agenda.

### Multilateral Approaches: UNCITRAL and ICSID

On the international arena, China is foremost involved in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on Investor-State Dispute Settlement Reform that had its constituting session at the end of 2017 in Vienna. In its initial comments pertinent to the agenda of this working group, China stressed that the current system should not be questioned because of some procedural shortcomings and that a future system should still maintain flexibility and be reconcilable with the current system.<sup>55</sup> Hence, China is not necessarily interested in completely overhauling the current system of ISDS but rather aims at amending certain procedural matters.

To find enough support for a China-initiated reform, China supported a statement on behalf of the Group 77, which is a coalition of now 134 developing states, at the Working Group III that stressed the individual state's right to regulate and protect legitimate public welfare objectives.<sup>56</sup> China hereby reiterates its alignment with other developing states from the Global South that fear to become victims or already were victims of what they perceive as an unfair and non-transparent ISDS. Even though China is in a different position than most of the G77 countries, it will certainly portray itself as a state that has more to lose than to gain if the current ISDS system is not substantially reformed.

A second multilateral approach can be seen in the specific Chinese approach towards ISDS amendments. They are well-placed inside the ICSID amendment procedures that commenced late 2016. China submitted a substantial proposal on diverse issues such as the protection of confidential information, treaty interpretation, on the integrity of arbitrators, on the possibility to allow more than one round of written submissions, on parallel proceedings third-party funding, on bifurcation and consolidation, and on the protection of confidential information.<sup>57</sup>

China thereby proved to be very receptive of international criticism on the matter of ISDS and at the same

55 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/005/13/PDF/V1700513.pdf> (last visited 24 May 2019).

56 [http://www.uncitral.org/pdf/english/workinggroups/wg\\_3/UNCITRAL\\_WGIII\\_-\\_35th\\_session\\_-\\_G77\\_Statement.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_3/UNCITRAL_WGIII_-_35th_session_-_G77_Statement.pdf) (last visited 28 May 2019).

57 [https://icsid.worldbank.org/en/amendments/Documents/China\\_Comments\\_12.28.18.pdf](https://icsid.worldbank.org/en/amendments/Documents/China_Comments_12.28.18.pdf) (last visited 28 May 2019).

time raises issues deeply connected with China's very own approach.

### Bilateral Approaches: Reforming BITs

China has also been undertaking a systematic overhaul of its BITs and their respective ISDS clauses in recent years.

The following key features describe the new generation of Chinese BITs:

- a. One key feature of the latest BITs China concluded is that the competency to interpret the respective treaty provisions is retained by the contracting states.<sup>58</sup> This mechanism guarantees the sovereignty of a state and curtails the arbitration tribunals in their interpretation of international treaties. The trend to incorporate reformed ISDS mechanisms can also be seen in Chinese BITs along the BRI. The latest investment treaty with a BRI country had been the China-Uzbekistan BIT that is also safeguarding the interpretive authority of the contracting parties over the treaty text (Articles 15 & 16).<sup>59</sup>
- b. China is also committing itself to the establishment of permanent review mechanisms for ISA. The China-Australia FTA of 2015 commits both parties to the creation of a future appeals mechanism for arbitration awards.<sup>60</sup> While the state of such negotiations is unknown to the public, the stipulated intention reflects China's firm belief that the need of a review mechanism is a core issue in the ISDS reforms.
- c. An important matter with regard to BRI projects is also the aforementioned question whether State-Owned Enterprises may be regarded as investors in dispute cases. Previously, Chinese BITs did not address this issue. The latest generation of BITs, such as the China-Uzbekistan BIT, explicitly incorporates State-owned enterprises in the definition of investors under such treaties.<sup>61</sup> This provision guarantees now that Chinese SOEs fall within the

scope of application of these treaties and therefore have the right to submit a claim for arbitration in cases of investment disputes.

It is very important to closely observe China's future activities in amending its BITs with regard to the reform of ISDS. Especially the possibility of a divergent approach with regard to BITs with developed and developing states has to be monitored. Furthermore, China may expand on its approach to establish bilateral review commissions or appeals mechanisms, which could ultimately impede the development of a corresponding multilateral system.

We have to be aware that in the Chinese academic literature there are two different solutions for ISDS clauses in Chinese BITs: one promotes mechanisms with "defensive capabilities (防御性功能)" for treaties with developed states and mechanisms with "offensive capabilities (攻击性功能)" for treaties with developing states.<sup>62</sup> Such a notion would entail a stronger protection for Chinese investments in developing countries and a weaker protection in developed countries.

### National Approaches: Three Chinese courts writing new ISA rules

Chinese arbitration institutions strengthen their efforts to become venues for ISA. In 2016 the SCIA amended its Arbitration Rules and gave itself the ability to provide arbitration in investment disputes between investors and states under the UNCITRAL rules. CIETAC and the BAC have recently written their own original rules on ISA, which incorporate many aspects that are at the heart of China's concerns on the matter. It is worth noting that the Chinese Arbitration Law does however only allow arbitration in China between equal subjects, so that an arbitration between a state and an investor would not fall within the scope of application of this law and should therefore be unlawful in China. The Chinese literature on this matter simply proposes to amend the Arbitration Law and is eager to allow ISA in China.<sup>63</sup> Accordingly, the State Council submitted the Arbitration Law to the Legislative Plan of the NPC's Standing

58 This approach can be seen in Article 18 of the China-Canada BIT from 2012, which stipulates that the contracting parties shall have the authority to *inter alia* jointly review the interpretation and application of this treaty. <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3476> (last visited 28 May 2019). A similar provision can be found in Art. 16 China-Tanzania BIT of 2014, <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/5488> (last visited 28 May 2019).

59 <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3357> (last visited 29 May 2019).

60 <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3454> (last visited 28 May 2019).

61 In this treaty an Investor is either a national or an enterprise of the contracting parties, while the term "enterprise" means any entities incorporated or constituted under the applicable laws and regulations of either contracting party and have their seats and substantial business activities in that contracting party, irrespective of whether or not for profit and whether it is owned or controlled by private person or government or not (Article 1.2).

62 Wang Yan (王燕): The Conflict between the US and the European System of the International Investment Dispute Mechanism Reform (国际投资仲裁机制改革的美欧制度之争), *Global Law Review* (环球法律评论) 2017, No. 2: p. 191.

63 Xue Yuan (薛源): Reforming the Chinese Legal System to Accomodate Investor-State Arbitration Mechanisms (投资者与东道国争端仲裁与我国法律机制的衔接), *Global Trade* (国际商务) 2017, No. 5: 125.

Committee so that it can be expected that the formally unlawful ISA rules of SCIA, CIETAC and BAC will subsequently be healed by legislative fiat.<sup>64</sup> Obviously, drafting ISA rules by the three commissions was not necessarily an act to immediately provide such arbitration in China, but it should predominantly be understood as a means to move the political agenda in China and advance China's standing in the global discourse on ISA

In October 2017 the CIETAC International Investment Arbitration Rules (for Trial Implementation)<sup>65</sup> (CIETAC Rules) went into effect and the draft BAC Rules for International Investment Arbitration (BAC Rules) were published for inviting comments in February 2019.<sup>66</sup> It is however remarkable that within a timespan of one and a half years, two sets of Chinese rules for investor-state arbitration have emerged. China had obviously allowed these two heavy weights of its arbitration landscape to enter in an intra-Chinese competition for the most promising reform agenda in the field of ISA.

As no cases so far have been accepted at CIETAC and the BAC Rules are not even yet in force, their practical implementation and their effect on ISDS cannot yet be determined. At the current situation, these investor-state arbitration rules should mostly be understood as a contribution to the global discourse on the ISDS reform. Both institutions participate in the UNCITRAL Working Group III on the reform of investor-state dispute arbitration and are therefore important stakeholder whose activities certainly have an impact on the international arena. As stakeholders in the UNCITRAL Working Group III, CIETAC and BAC will surely be heard on the international stage and their respective rules be considered as possible models for the envisioned consensus on a reformed ISDS system. Having two - competing - sets of rules at hand that ad-

dress some of the most prolific criticism from developing countries on the current ISDS system certainly allows China to frame its approach from a strengthened position.

### Being lean: Tailored solutions for China's BRI friends

To generate support for the two Chinese institutions of ISA an appetizer certainly are the low costs. One key component of the ISA rules of CIETAC and BAC are remarkably low costs for arbitration. China obviously wanted to demonstrate that the heavily criticized arbitration fees of the current investor-state dispute system, which easily exceed 5 Million USD,<sup>67</sup> could be significantly lowered so that less affluent claimants were able to ISA in protecting their investments. CIETAC and BAC are offering rates that are evidently very attractive for investors (or states) without abundant financial means and which can certainly not be easily matched by arbitration venues outside of China.

Especially for the developing countries along the BRI and investors from these countries, such low fees are an enticing offer to pursue their future ISDS in Beijing or at the Hong Kong subsidiary of CIETAC. It is therefore not surprising that both Chinese arbitration commissions in their explanatory notes that accompanied the publication of their respective rules are mentioning their intention to provide ISDS services explicitly for disputes arising from the BRI.<sup>68</sup>

As exhibited by the table below, a claim of 100 Million RMB (ca 13 Million EURO) can only trigger costs of slightly over 100.000 EURO (up to 340.000 EURO) at CIETAC or ca. 360.000 EURO at BAC respectively.

Table 1: Overview of CIETAC and BAC Fees for ISDS

Amount in Dispute (RMB)	CIETAC		BAC	
	Administrative Fee (RMB)	Arbitration Fee (RMB) Tribunal of 3 Arbitrators	Administrative Fee (RMB)	Arbitration Fee (RMB) Tribunal of 3 Arbitrators
1.000.000	27.900	79.500 – 307.500	25.000	180.000
10.000.000	72.900	265.500 – 1.168.500	78.000	1.170.000
50.000.000	136.900	511.500 – 1.963.500	15.0000	1.950.000
100.000.000	190.900	604.500 – 2.428.500	206.000	2.550.000
500.000.000	420.900	994.500 – 4.438.500	456.000	4.800.000

64 [http://www.npc.gov.cn/npc/xinwen/2018-09/10/content\\_2061041.htm](http://www.npc.gov.cn/npc/xinwen/2018-09/10/content_2061041.htm) (last visited 4 June 2019.)

65 <http://www.cietac.org.cn/index.php?m=Page&a=index&id=390&l=en> (last visited 23 May 2019).

66 <https://www.bjac.org.cn/news/view?id=3369> (last visited 24 May 2019).

67 <http://arbitrationblog.kluwerarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/> (last visited 26 May 2019).

68 <http://www.cietac.org.cn/index.php?m=Article&a=show&id=14467>; <https://www.bjac.org.cn/news/view?id=3369> (last visited 24 May 2019).

### Innovation: One-stop courts also for ISA

In many regards, several innovative provisions and mechanisms are encompassed in both the CIETAC Rules and BAC Rules. Both entail the combination of arbitration and mediation, as it is not uncommon in Chinese commercial arbitration, both encourage consolidated proceedings, both provide for interim as well as emergency relief, both introduce the principle of good faith, which is part of China's civil law tradition, both address the question of transparency, especially with regard to third-party funding, and both allow for third-party submissions. BAC Rules additionally provide an appeal procedure, if the disputing parties agreed to such a review of the arbitral award.

### Reform of ISDS: National sovereignty comes first

China's concerns about the current system of ISDS are generally consistent with the main criticism that has been frequently reiterated by states, academics and advocacy groups. Core categories of this criticism from the perspective of legal scholars can be identified as lack of consistency, lengthy and expensive procedures, lack of an effective review mechanism, and lack of transparency.<sup>69</sup> China does however stress certain aspects of these issues and proposes solutions that sometimes differ at least from those of most developed states.<sup>70</sup> These are so-to-say Chinese-style innovations.

Most of the following Chinese reform proposals, however, stem from the unshakeable dictum of national sovereignty that determines China's entire approach to every area of International Law and focusses on the state's capability to retain (or regain) its authority in the field of ISDS.

### Arbitrator Selection: Who shall decide on Chinese Investment Disputes?

The global criticism of the current ISDS system frequently focuses on the independence of the arbitrators. It is argued that arbitrators have a vested interest in perpetuating the current system and granting high compensations because investors, as the initiating party, would thereby be incentivized to use ISA for settling their disputes, which in return could entail future appointments for the arbitrators.

This problem could be solved by an International Investment Court (ICS), as the EU and Canada proposed in CETA, with professional judges who could serve for a fixed term after a member states' appointment. In its statements before the UNCITRAL Working Group III, the Chinese representative generally supported such an approach but also stressed the advantages of party agreement in the appointment of arbitrators. It was also indicated that China may support a model that resembles the WTO's dispute settlement mechanism with a party appointed panel of arbitrators, whose decision could then be reviewed by a permanent body. Arbitrators would therefore be bound even more by the self-interpretation of the respective treaty parties and their intended purpose for concluding the treaty in question. Evidently, China wants the parties to an investment treaty to retain their authority to interpret its rules and thereby shape potential investment disputes.

China supports the idea of the WTO scheme and party appointed arbitrators because of:

- ▶ Lack of capable arbitrators on Chinese side: One reason for this approach is probably that China could, from its perspective, not be adequately represented in an International Investment Court simply because it still lacks a sound body of qualified arbitrators in the field of ISDS.<sup>71</sup>
- ▶ Language barrier: The Chinese representative at the UNCITRAL Working Group III meetings also raised the issue that the process of party agreement could safeguard that some of the arbitrators have sufficient language abilities. It would be beneficial to appoint arbitrators with Chinese language proficiency in cases with Chinese involvement. Furthermore, it would help that the tribunal has a substantial understanding of the Chinese legal culture. By pointing this out, China is indicating that it supports the widespread distrust against commercial lawyers from the West as decision-makers in ISA.
- ▶ Therefore, the question of independence of arbitrators remains with the Chinese proposals.

69 Gabrielle Kaufmann-Kohler, Michele Potestà: Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or Appeal Mechanism?, CIDS-Geneva Center for International Dispute Settlement, 2016.

70 It is, for example, a long-held belief of China that arbitration rules should include the possibility to shift the entire dispute towards mediation and, if this fails, back to arbitration so that an intermitting mediation could help avoid unnecessary lengthy and costly arbitration procedures.

71 Of the currently 660 arbitrators listed by the ICSID, only seven are from China and only Teresa Cheng from Hong Kong has substantial experience in ISA. Five of the Chinese arbitrators were not yet been appointed to a dispute, while only Zhang Yuejiao, China's first member of the WTO's Appellate Body, is currently arbitrating in an ICSID case. While being an excellent jurist, at the age of 74 she is most certainly not eligible for a seat of a future International Investment Court.

### International Investment Law is Public Law and not Commercial Law

The Chinese representative at the UNCITRAL Working Group II meetings frequently stressed that China believes ISDS to be an issue of public international law and not primarily of commercial law. The CIETAC Rules still stipulate in Article 11.2 that the arbitrators shall have a background in law and investment but the more recent BAC Rules in Article 8.1 explicitly state that the arbitrators should have an expertise in public international law, which brings the BAC rules probably closer to China's official position on the matter. China obviously wants to prevent the appointment of business lawyers as arbitrators, who may have a vested interest in the outcome of arbitration, and prefers scholars of public international law, who can safeguard a consistent interpretation of International Investment Agreements.

CIETAC Rules (Article 44) and BAC Rules (Article 36) also provide for the possibility of a third-party submission, meaning that the non-disputing party has the right to be heard by the tribunal. This mechanism ensures that the home state of the claimant, of the investor, is granted a seat at the table when an arbitration tribunal interprets the investment agreement. Such an approach would bring ISA cases much closer to the realm of formal public international law as both states in question can now ascertain an active role in the respective proceedings. China wants to regain control over its International Investment Treaties and prevent commercial lawyers from interpreting such agreements on their own terms.

### Review Mechanism: How to Control the Correctness of Arbitral Award

Highly pertinent to the question of consistency is also the issue of establishing a mechanism for the review of an arbitral award. As mentioned above, the representative of China at the UNCITRAL meetings indicated that China would favor a system that institutionalizes an Investment Court System (ICS) as a permanent appellate body for investor-state disputes. CIETAC Rules and BAC Rules are however not necessarily following this route so that China can offer different models for a future ISDS system.

While CIETAC Rules do not provide for an appeals procedure, BAC Rules establish a mechanism that still follows the model of an ad-hoc arbitration tribunal. In the relevant provisions, BAC Rules stipulate that the parties to the dispute must have agreed to the possibility of an appeal (Article 46.1). While it is not explicitly stated at

what stage this agreement must be reached, it is however noteworthy that this review mechanism demands the expressive consent of both parties.

If a party wishes to appeal an award, it has to notify BAC no later than the expiration of the time limit fixed by the arbitral tribunal for the filing of comments on the draft of the award. The appeals tribunal has to consist of three arbitrators whose selection follows the model for a three-arbitrator tribunal at the first instance. Both parties shall nominate one arbitrator and jointly nominate or entrust the Chairman of BAC to appoint the presiding arbitrator (Article 2 BAC Rules Appendix E). The scope of an appeal is limited to errors in the application or interpretation of the applicable rules, manifest and material errors in the appreciation of the facts or in cases if the arbitral tribunal lacked jurisdiction, or if the arbitral tribunal has otherwise exceeded its powers (Article 3 BAC Rules Appendix E). An appeals award has to be issued 90 days (with a possible extension of 30 days) after the appeals tribunal was constituted.

With these rules, the BAC tries to strike a balance between the need for finality of an award while still safeguarding the parties' desire for an effective review mechanism. As an untested proposition, it is not yet possible to determine if the BAC Rules have accomplished this goal. By avoiding to make the appeals procedure mandatory and leaving it to the disputing parties to agree on the possibility to appeal, the BAC Rules however provide a flexible structure that appears to be worth exploring as a possible model for the future ISDS system.

### Transparency: Shedding Light on the ISDS

Investor-state arbitration is frequently characterized as secret or obscure trade courts that render their decisions deliberately hidden from the gaze of the public's scrutiny. Solving this problem is probably the most important issue for reestablishing legitimacy of ISDS. The significance of transparency in judicial proceedings is not lost on China. Recent reforms of the judicial system in China focused exactly on this issue and created a remarkably accessible courts with live broadcasts and a fairly comprehensive online database for court decisions at every level. China has however not yet adopted the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)<sup>72</sup> but it has referenced it already several times.<sup>73</sup>

It is interesting to see that CIETAC Rules and BAC Rules each have a slightly different approach to transparency.

<sup>72</sup> <http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf> (last visited 30 May 2019).

<sup>73</sup> E.g. Article 9.2c China-Turkey BIT of 2015.

- a. CIETAC Rules provide that hearings shall be conducted publicly unless the parties have agreed otherwise. Additionally, core documents shall be made publicly available, unless the parties agreed otherwise, which would safeguard a very high degree of transparency for ISA under CIETAC rules.
- b. BAC Rules on the other hand stipulate that hearings are only public if both parties agreed to this.<sup>74</sup>
- c. On the other hand, BAC Rules stipulate that the parties can agree to the application of the Mauritius Convention, which would guarantee a similar degree of transparency with regard to the publication of documents as in the CIETAC Rules.

BAC Rules therefore give party autonomy much more weight than the CIETAC Rules, which rather stress the imperative of rather extensive transparency. CIETAC Rules are therefore also in contradiction to the Arbitration Law, which stipulates that arbitration should be in principle confidential. Similar, however, are rules on the requirement to comprehensively disclose third-party funding in both CIETAC Rules and BAC Rules, which are more or less in line with the state of the international discourse on the matter.

### **ISDS and China's Broad Approach to State Secrets**

Another issue of transparency is confidential information that shall not be made public. The Mauritius Convention grants extensive exceptions to transparency in case of confidential or protected information, or if the integrity of the arbitral process would be jeopardized because of the publication of relevant information. Probably most important to China is Article 7.2c of the Mauritius Convention, as it provides an exception to transparency for information that is protected against being made available to the public under the law of the respondent State.

Given the authoritarian nature of the Chinese regime, despite its efforts to enhance judicial transparency, it is not surprising that the protection of state secrets can frequently and rather arbitrarily be invoked by the authorities.

#### **BOX 7: Stern Hu, SOEs and China's State Secret Regime**

The Chinese State Secret Law deliberately provides a vague legal footing for such an approach as it encompasses in Article 9 *inter alia* matters of "national economy and social development".<sup>75</sup> In China's state capitalism, commercial secrets and state secrets are systemically intertwined as exhibited by the case of Stern Hu, who was arrested in 2010 for stealing state secrets while negotiating with a Chinese SOE for his employer the Australian Rio Tinto corporation. In these negotiations Hu had used extremely detailed background information about the Chinese steel industry, which had apparently angered his SOE counterpart. Although he was ultimately convicted for only stealing commercial secrets and sentenced to 10 years imprisonment, the blurry line between state secrets and commercial secrets in China remains.

This issue is especially relevant if SOEs are involved, which still can maintain the practice to classify their commercial secrets as state secrets even though the underlying regulations do not explicitly grant SOEs this right.<sup>76</sup> It may therefore be imperative to prevent this highly problematic interconnection of SOEs and state secrets from bleeding into the international discourse on the reform of ISDS.

In a comment to the amendment of ICSID Arbitration Rules China already proposed that the respondent (state) shall not be required to disclose information involving national secrets, the disclosure of which the respondent considers contrary to its essential security. Such a clause would open the door for a systematic circumvention of transparency provisions and may ultimately also effect disclosure requirement of SOEs as claimants in ISA proceedings, which may give them a strategic advantage in the fact-finding of an arbitral tribunal. Exceptions to transparency should therefore not go beyond the relevant provisions of the Mauritius Convention.

<sup>74</sup> If the parties do not agree to this, BAC Rules only provide that the notice of arbitration, notice of appeal, orders, decisions and the award of the arbitral tribunal and the appellate tribunal shall be made public (Article 50.2).

<sup>75</sup> [http://www.gov.cn/jfjg/2010-04/30/content\\_1596420.htm](http://www.gov.cn/jfjg/2010-04/30/content_1596420.htm) (last visited 30 May 2019).

<sup>76</sup> Susan Finder, How China Classifies State Secrets. *The Diplomat*, 23 December 2014, <https://thediplomat.com/2014/12/how-china-classifies-state-secrets/> (last visited 31 May 2019).

# Conclusion and recommendations

Judicial policies in China cannot be decoupled from superordinate party policies of the CPC. Establishing International Commercial Courts is therefore inevitably a tool to promote a party policy in general and the BRI in particular. The SPC calls this its “sacred duty” and the “mission of its generation” and identifies the need to establish a sound legal framework for disputes that arise along the BRI as its core task.

Given the nature of BRI as an instrument to predominantly provide Chinese corporations with opportunities to build infrastructure projects that shall give rise to a new form of silk road, disputes will not be limited to solely commercial or trade issues but will also very likely bring forth investor-state disputes between Chinese investors and their host countries along the BRI. A comprehensive protection of Chinese interests by legal means along the BRI therefore necessarily encompasses solutions for commercial and investment disputes. The overarching goal for both matters is obviously the possibility to avoid local courts in BRI states, which are frequently rather weak and may even be expected to be biased against a Chinese party to a dispute as well as based on a legal system that is unfamiliar to Chinese nationals. Our core findings are therefore as follows:

## International Commercial Law

The new Chinese International Commercial Courts offer dispute resolution, which is especially attractive to Chinese corporations wanting to solve their BRI disputes in the familiar environment of the Chinese legal system. Non-Chinese parties to potential BRI disputes may be easily compelled to concede to a corresponding choice of court agreement in their respective contracts within the bigger BRI framework of promises and commitments. Additionally, features of the new courts such as a (partially foreign) expert committee and the flexibility to combine mediation, arbitration and adjudication as well as the authority of these courts as formal chambers of the SPC can contribute to their perception as fairly rational choice for BRI disputes.

The new courts also put China in the developing landscape of International Commercial Courts. Several states compete for the best model of cross-border dispute resolution in commercial matters that will ultimately certainly leave a significant imprint of a future *lex mercatoria*. Based on its commitment to the CPC’s Belt and Road strategy, the SPC explicitly promised accordingly to engage in global rule-setting *inter alia*

in International Commercial Law. The new courts evidently take part in shouldering this responsibility so that their decisions to come have to be read not only as mere judgments on commercial matters, but also as contributions to a global discourse on International Commercial Law.

## Investor-State Dispute Settlement

Just as the new courts in Xian and Shenzhen are stakeholders in the continuously developing field of International Commercial Law, three of the arbitration commissions (SCIA, CIETAC, BAC), that form part of their integrated one-stop dispute resolution forum, are no less actively participating in shaping the global discourse on ISDS. With the CIETAC Rules of 2017 and the BAC Draft Rules of 2019, China is offering two similar but distinctly different approaches to investor-state arbitration. China is also engaging in the multilateral UNCITRAL Working Group Meetings on the matter and successively overhauls its bilateral investment agreements including the relevant provisions on ISDS. While the competing investor-state arbitration rules from China indicate a certain degree of adjustability in China’s position, the concerted efforts to participate in the respective global debate is certainly intended to raise China’s discursive power in a field in which China holds only limited experience and which has not yet yielded many successes for Chinese parties.

China’s core position on a future ISDS may however be summed up by three distinctive aspects:

1. China is not categorically opposing the current system but supports efforts to enhance consistency and predictability. This includes in principle the establishment of a permanent dispute resolution body without sacrificing the flexibility of party-nominated arbitrators in first instances of the respective dispute. It should however be closely monitored if China’s efforts to establish bilateral review and appeals mechanisms in investment matters would interfere with such a multilateral approach or just complement it as supplementary bodies for the interpretation of IIAs.
2. China firmly believes that investment law is a matter of public policy and should not impede the state’s ability to regulate. This also includes fairly idiosyncratic areas of law such as China’s opaque and arbitrary state secrets regime. This position also touches upon China’s system of land use rights,

which is not only pertinent to every single ISDS case with China as respondent state so far, but is also highly prevalent in many social conflicts within China. The supremacy of public policy over investment law therefore not only encompasses the ability of states to maintain their regulatory capacity, it also reaffirms China's authoritarian and instrumental approach towards the rule of law.

3. China also holds the conviction that ISDS should be treated first and foremost as a part of public international law. A future ISDS system should therefore reaffirm the state's authority to interpret their investment instruments and not forfeit this prerogative to an arbitration tribunal of business lawyers behind closed doors. This goal shall be achieved by several measures such as the aforementioned specialized review committees set up by the contracting states or the indirect participation of the investor's home state during arbitration.

Both the new courts and China's efforts in shaping a future ISDS system have two common features. Both are directly intended to protect Chinese business interests abroad in a BRI environment that is increasingly prone to produce a significant degree of contestation and numerous disputes. China is starting to build a safety net for its vested interest in unreliable or even renegade BRI states, whose legal and judicial system may not be a viable option for Chinese corporations for multiple reasons.

Furthermore, both the new courts and China's ISDS reform engagement come at a time that offers a window of opportunity for Chinese influence on the international economic legal order. The mushrooming of International Commercial Courts and the global consensus that the current ISDS system needs significant overhaul both indicate the inevitability of imminent development in these two legal fields. China is jumping on the bandwagon and is trying to increase its discursive power so that it will be able to shape the rule-setting in both areas.

#### **Recommendations for the European Commission and the European Parliament:**

1. The EU institutions have to be aware that the judges at the new commercial courts are obliged to practice national Chinese law and first and foremost serve China's national strategies and the "absolute leadership" of the Chinese Communist Party. The new courts evidently function as a means of protection for Chinese interests in general, and of Chinese companies involved in BRI projects in particular.
2. The close connection of the courts to the party in a state where it is not possible to report freely

makes it necessary to request the full absence of any coercive measures that could force BRI member states to choose the new Chinese courts as dispute resolution courts.

3. The European Parliament should request a clear distinction between the stakeholders in new investment protection treaties and request transparency concerning state-backed companies. Also, new treaties need to integrate additional pro-people and pro-climate politics.
4. In formulating an investment policy towards China in the context of the BRI, the European Commission should carefully observe China's future activities in amending its BITs with regard to the reform of ISDS. Especially the possibility of a divergent approach with regard to BITs with developed and developing states has to be monitored. The latest generation of BITs, such as the China-Uzbekistan BIT, explicitly incorporates State-Owned Enterprises (SOE) in the definition of investors under such treaties. China will therefore certainly promote the explicit inclusion of its SOEs as protected investors in future BITs.
5. The European Commission has to closely monitor and critically assess bilateral review and appeals mechanisms in China's future BITs and determine their impact on the international legal discourse against the background of China's engagement in multilateral reform undertakings regarding ISDS. The European Parliament must be aware that these approaches may globally serve as alternatives to the envisioned CETA mechanisms.
6. The European Commission as the responsible institution for international trade consultations should regularly request information on the main positions of CIETAC and BAC as stakeholders in the UNCITRAL Working Group III. Both commissions will surely be heard on the international stage and their respective rules will be considered as possible models for the envisioned consensus on a reformed ISDS system.

7. Push/Pull-mechanisms: The European Parliament should be aware of the mechanisms behind the competition between arbitration courts. Especially the discounted fees of the Chinese ISA models are an extremely attractive offer for less affluent investors such as small and medium enterprises from the Global South. China could thereby become a champion for states that feel shut out by the agenda- and rule-setting of the Global North. Support for Chinese proposals from the Global South may therefore grow significantly and increase China's

- discursive power in the current round of rule-setting on ISDS.
8. Future ISDS: The European Parliament must be aware that China will persistently stress that ISDS is a matter of public policy (vis-a-vis investment laws) and has to be dealt with in the realm of international public law. China's proposals on safeguarding consistency in the interpretation of investment treaties would certainly strengthen the role of the states. This would also mean that China's authoritarian regime and state capitalism need to be factored in as independent variables of China's behavior in the field of ISDS.
  9. The European Parliament need to carefully monitor China's efforts to introduce broad exceptions for state secrets in a future ISDS regime as China repeatedly and rather arbitrarily invokes such privileges domestically and consistently blurs the line between state secrets and commercial secrets.
  10. In all their interaction with China, the European Commission should insist on utilizing the Basic Law in Hong Kong. They should be aware of the risk that China uses Hong Kong's reputation as highly effective dispute resolution hub for the protection of its own interests. Developments in the field of ISDS as well as in the area of International Commercial Law in Asia may very well serve as an indicator for Mainland China's approach towards Hong Kong's autonomy in general and the independence of Hong Kong's legal system. Hong Kong's dependence on China and Beijing's growing influence nevertheless pose a systemic risk for fair and impartial dispute settlement for cases involving core Chinese interests such as BRI disputes. Singapore and Hong Kong are expecting rising numbers of BRI disputes to be mediated and arbitrated in their respective facilities.
  11. The EU Commission should be aware that China is eager to include Alternative Dispute Resolution mechanisms for its Belt and Road projects within the framework of the envisioned One-Stop-Forum under the CICC. On 7th of August 2019, China signed the new Singapore Convention on Mediation (新加坡公约), which now allows mediated settlements to be enforced by courts. The Convention was prepared in collaboration with China and is intended to promote the use of mediation in resolving cross-border commercial disputes. While the legal and institutional framework for international business mediation in China still needs to be further developed, the European Commission should be prepared to see a rising number of mediated settlements in disputes concerning Belt & Road projects with Chinese involvement.
  12. The European Commission should be aware of the fact that the status of Hong Kong is dealt with in an arbitrary way: the case of the recently disputed extradition law demonstrates China's encroachment on Hong Kong's independence. Several cases indicate that it is possible for claimants from Hong Kong and Macao to fall under the protection of BITs concluded by China, which is certainly echoing China's doctrine of „One-Country-Two-Systems“.
  13. The European Commission should be aware of the fact that financial institutions build in the framework of the BRI (like the AIIB, were the Euro Area Constituency -EAC- with 15% voting power is the second largest regional constituency on the Board of Directors) has a responsibility to ensure high environmental, social and governance standards. If substantive complaints are raised in this regard they are not eligible when they are also subject of an arbitral proceeding. Also, free press coverage on any case dealt with in Chinese courts will not be possible.

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