

DESIGNING A NEW NORMAL:
DISPUTE RESOLUTION DEVELOPMENTS
ALONG THE BELT AND ROAD

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I. INTRODUCTION

President Xi Jinping of the People's Republic of China (PRC) first announced the Belt and Road Initiative (BRI) in September 2013 during a speech at Kazakhstan's Nazarbayev University.¹ Throughout the following months, President Xi and the government of the PRC provided details about the plan. The PRC rooted the BRI in the long history of the Silk Road and emphasized a desire to strengthen historical connections while economically and socially benefitting participating countries.² In a 2015 release, the government clarified its goal of carrying on a "Silk Road Spirit" of "peace and cooperation, openness and inclusiveness, mutual learning and mutual benefit."³ Since that time, the BRI has generated more than six hundred contracts and bolstered development across Asia and the Middle East.⁴

The BRI consists of a land-based "Belt" stretching from China through the Middle East and into Europe, and a maritime "Road" connecting China to the Mediterranean Sea.⁵ The PRC leans heavily on China's long history of trade and economic interaction with countries when presenting the BRI and advertises the project as a "21st-Century" version of the Silk Road.⁶ The undertaking is massive, ambitious, and com-

1. *President Xi Jinping Delivers Important Speech and Proposes to Build a Silk Road Economic Belt with Central Asian Countries*, MINISTRY FOREIGN AFF. CHINA (Sept. 7, 2013) [hereinafter *President Xi Speech*], https://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpfwzysiesgjtfhshzzfh_665686/t1076334.shtml.

2. *Visions and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, NAT'L DEV. & REFORM COMMISSION (Mar. 28, 2015) [hereinafter *Visions and Actions*], http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html.

3. *Id.*

4. James Rogers, Alfred Wu & Anita Fong, *Belt and Road Initiative Disputes: Bumps in the Road?*, INT'L ARB. REP. (Norton Rose Fulbright), Oct. 2018, at 23, 24.

5. Yu Cheng, *Public Opinions on the Belt and Road Initiative: A Cross-Cultural Study*, in THE BELT AND ROAD INITIATIVE IN THE GLOBAL ARENA: CHINESE AND EUROPEAN PERSPECTIVES 3, 3 (Yu Cheng, Lilei Song & Lihe Huang eds., 2017); see also Jane Perlez, *China Retools Vast Global Building Push Criticized as Bloated and Predatory*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/business/china-belt-and-road-infrastructure.html> ("China scored a substantial victory last month when Italy signed on to Belt and Road, the first major European country to do so.")

6. Cheng, *supra* note 5, at 3 ("The Belt and Road initiative also follows the same principles as the ancient Silk Road and thus keeps the heritage in a

plicated,⁷ with investors and other involved parties of vastly disparate sizes with different legal systems and expectations.

The complexities of contemporary international investment and economic development inevitably lead to conflict⁸ and increase the need for cross-border dispute resolution mechanisms. Gao Xiaoli, Vice President of the Fourth Civil Division of the Supreme People's Court (SPC) and a sitting judge on the China International Commercial Court (CICC), clarified the SPC's position and awareness of potential issues.⁹ She stated, "[t]he construction of 'Belt and Road' is mainly about economic cooperation, which inevitably leads to disputes in the field of trade and investment."¹⁰ Her statement indicates a larger understanding within China that BRI development leads naturally to conflict, and such conflict requires unique means of resolution.

With the Chinese judiciary and the international community actively aware of the need for dispute resolution systems,¹¹ in 2018 the PRC developed its own international commercial court—the CICC—for litigation, mediation, and arbitration of

new way."); see Jingzhou Tao & Mariana Zhong, *The Changing Rules of International Dispute Resolution in China's Belt and Road Initiative*, in CHINA'S BELT AND ROAD INITIATIVE: CHANGING THE RULES OF GLOBALIZATION 305, 305 (Wenxian Zhang, Ilan Alon & Christoph Lattemann eds., 2018) ("The concept of a Belt and Road was based on China's ancient land and maritime silk road routes . . .").

7. See *What Is China's Belt and Road Initiative?*, *ECONOMIST* (May 15, 2017), <https://www.economist.com/the-economist-explains/2017/05/14/what-is-chinas-belt-and-road-initiative> (highlighting the ambitious scale of the BRI); Rogers, Wu & Fong, *supra* note 4, at 24 (discussing the scope and complexity of the BRI).

8. See *Building the Judicial Guarantee of International Commercial Court "Belt and Road" Construction: An Exclusive Interview with Gao Xiaoli, Vice President of the Fourth Civil Division, The Supreme People's Court, PRC*, CHINA INT'L COM. CT. (Mar. 19, 2018) [hereinafter *Building the Judicial Guarantee*], <http://cicc.court.gov.cn/html/1/219/208/209/774.html> ("[W]ith the continuous promotion and deepening of the 'Belt and Road' initiative, the number of foreign commercial disputes in China will continue to increase.").

9. *Id.*

10. *Id.*

11. Deborah Chow, Note, *Development of China's Legal System Will Strengthen Its Mediation Programs*, *CARDOZO J. CONFLICT RESOL.* (2002), <https://cardozo.jcr.com/issues/volume-3-2/note-1> ("How China handles [international business] disputes continues to draw the attention of its international business partners.").

BRI disputes.¹² Reception of the court is mixed, with some practitioners and scholars concerned that the court's foundational documents prevent negotiation of substantive and procedural rules,¹³ and others concerned about the qualifications of presiding judges and practicing lawyers.¹⁴ This note explores the CICC as a BRI dispute resolution mechanism and analyzes its potential successes and challenges when addressing international and domestic concerns.

This note first presents the background of the BRI project, international responses and concerns, and unique legal challenges surrounding the initiative. It details concerns from the international community about the Chinese legal and dispute resolution systems and the circumstances leading to the creation of the new Chinese courts. In the next part, the note discusses the development of the CICC in depth, examining the structure of the court, choice of law questions, the judges and the Expert Committee,¹⁵ and geopolitical concerns. Finally, the note considers whether the CICC may develop into an effective mechanism in comparison with preexisting judicial fora and dispute resolution methods. As the CICC has yet

12. Wei Sun, *International Commercial Court in China: Innovations, Misunderstandings and Clarifications*, KLUWER ARB. BLOG (July 4, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications>.

13. Dezan Shira & Assocs., *Confusion Over Dispute Resolution at China's New Belt and Road Courts*, CHINA BRIEFING (Feb. 2, 2018), <https://www.china-briefing.com/news/bilateral-confusion-dispute-resolution-chinas-new-belt-road-courts> (“[T]he choice of arbitration venue and law, both procedural and substantive, should be left to negotiation between the concerned parties. As a general rule of thumb, third party jurisdictions with established rules and an experienced body of jurists are always preferable to those jurisdictions affiliated with one or the other of the parties to a contract.”).

14. See, e.g., Guilherme Rizzo Amaral, *Chinese Investments in Latin America: Disputes Along the Non-Conventional Belt and Road*, KLUWER ARB. BLOG (Dec. 14, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/12/14/draft-belt-road-initiative-latam> (criticizing lack of foreign judges and the requirement of Chinese qualified lawyers).

15. On August 9, 2019, the Office of the International Commercial Expert Committee in the SPC was renamed as the Coordination and Guidance Office for the CICC. *The Office of the International Commercial Expert Committee in the Supreme People's Court is Renamed as the Coordination and Guidance Office for the China International Commercial Court*, CHINA INT'L COM. CT. (Aug. 9, 2019), <http://cicc.court.gov.cn/html/1/219/208/210/1313.html>. For the sake of continuity and clarity, this note refers to the group of international experts as the Expert Committee throughout.

to decide a case about a BRI dispute,¹⁶ it is difficult to forecast the effectiveness of the Chinese judges and Expert Committee in practice as well as the reception of their decisions. It is also unclear and disputed if the award from the CICC is enforceable in all relevant jurisdictions.

Many questions surround the BRI and the CICC; the ambitious economic project continuously receives significant international interest and critique.¹⁷ Ultimately, the BRI and CICC clearly indicate China's growing interest in the global market and desire to draw international recognition and business. The CICC also signals China's interest in improving the international reputation of its judiciary and legal systems. The BRI is an ambitious project, and the CICC is an equally aspirational step forward into the international dispute resolution domain. This note provides a background for understanding the BRI and CICC and an optimistic glance into the future of the mechanism if it operates as intended.

II. THE BRI AND ITS UNIQUE LEGAL CHALLENGES

A. *Background and Development of the BRI*

The BRI is a large-scale economic project stretching across half the globe. It is “one of the largest infrastructure and investment projects in history, covering more than 68 countries, including 65 percent of the world's population and 40 percent of the global GDP as of 2017.”¹⁸ China's extraordinary development ambition accompanies a change in the existing international order—a potential “geo-strategic shift to-

16. The CICC held its first public hearing in late May of 2019. There is no judgment as of the date of this writing. *The First International Commercial Court of the Supreme People's Court Holds Its First Public Hearing*, CHINA INT'L COM. CT. (May 31, 2019), <http://cicc.court.gov.cn/html/1/219/208/210/1251.html>.

17. See Kerry Brown, *The PRC's Maritime Silk Road Initiative, Southeast Asia, and the United States*, in *SECURING THE BELT AND ROAD INITIATIVE* 101, 101 (Alessandro Arduino & Xue Gong eds., 2018) (“[T]he regional response to the [BRI] has been a mixture of applause and excitement alongside caution.”); Tanner Greer, *One Belt, One Road, One Big Mistake*, FOREIGN POL'Y (Dec. 6, 2018), <https://foreignpolicy.com/2018/12/06/bri-china-belt-road-initiative-blunder> (describing the United States' negative reaction to the BRI and expressing doubts about the viability of the investment structure).

18. Rogers, Wu & Fong, *supra* note 4, at 24.

wards a new regional order in East Asia.”¹⁹ Additionally, unsteadiness in the existing global economic system, highlighted by the 2008 economic downturn, led President Xi Jinping’s initiative to affirm China’s stabilizing presence at the forefront of global markets.²⁰ Along with boosting China’s ability to profit from its reserves and production capacity,²¹ investment in neighboring countries benefits the western provinces in China²²—leading to increased stability and economic opportunity in those territories.

PRC leadership asserts that the BRI not only benefits China, but is a “win-win . . . for all countries, with free trade agreements and opportunities for the excess production of each country to be sold, and free circulation of local currencies.”²³ The government further emphasizes that China is “ready to conduct equal-footed consultation with all countries along the Belt and Road to seize the opportunity provided by the Initiative.”²⁴ The investment of funds, introduction of technology, and cooperation offered by the Chinese investors and government in countries otherwise overlooked by international market players is another touted benefit of the initiative.²⁵ However, as discussed below, states receiving this aid and investment increasingly express concerns over their grow-

19. Chuanxing Wang, *Changing International System Structures and the Belt and Road Initiative*, in *RETHINKING THE SILK ROAD* 269, 272 (Maximilian Mayer ed., 2018) (“This shift is reflected in China’s attempt to rebalance the regional, and ultimately, global order by gathering pace on multiple fronts—via peaceful diplomacy through cooperation platforms such as . . . the Belt and Road Initiative . . .”).

20. *Id.* at 273 (“[The BRI] flows directly from the financial (economic) crisis in 2008.”).

21. *Id.*

22. *What Is China’s Belt and Road Initiative?*, *supra* note 7.

23. Cheng, *supra* note 5, at 3; *see also President Xi Speech*, *supra* note 1 (“Xi Jinping pointed out that the 2,000-plus-year history of exchanges had proved that countries . . . can absolutely share peace and development as long as they persist in unity and mutual trust, equality and mutual benefit, mutual tolerance and learning from each other, as well as cooperation and win-win outcomes.”).

24. *Visions and Actions*, *supra* note 2.

25. *See* Cheng, *supra* note 5, at 7 (“Countries that lack the required financial resources to improve the domestic infrastructure could take the opportunity to benefit from this support.”).

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ing debt and repayment terms,²⁶ including the potentially severe consequences of default. The BRI's costs weigh heavily against the benefits, a reality that the PRC addresses through positive messaging, restructuring, and reconsideration.²⁷

China's rhetoric concerning the development of the BRI is not purely economic. PRC leadership advertises the BRI as a cultural bridge between countries for the benefit of the international community.²⁸ The PRC pushes the construction of the Belt and Road as "in the interests of the world community. Reflecting the common ideals and pursuit of human societies, it is a positive endeavor to seek new models of international cooperation and global governance, and will inject new positive energy into world peace and development."²⁹ Some scholars believe that China's underlying intention is to "create a zone of greater security commonality and interest."³⁰

China's concentration on developing "friendly cooperative relations with the Central Asian countries" is neither contested³¹ nor surprising. However, as an incredibly vast initiative involving complicated international business endeavors, the BRI leads to concerns about administration and dispute resolution.³² President Xi's determination to develop organizations and structures designed specifically for resolving conflict arising from the BRI infrastructure projects further signals his interest in presenting China as a "responsible global power" on the international stage.³³ However, the reception of those

26. See James Griffiths, *Are the Wheels Coming Off China's Belt and Road Megaproject?*, CNN (Dec. 31, 2018), <https://edition.cnn.com/2018/12/31/asia/china-kenya-belt-road-bri-intl/index.html> (discussing concerns stemming from projects in Zambia, Kenya, Malaysia and Maldives).

27. See Perlez, *supra* note 5 ("Broadly facing criticism about overpriced and superfluous projects, China is reshaping and retooling [the BRI] But Beijing isn't retreating from its vision to build a network of ports, rails and roads that puts China at the center of global trade and enhances its geopolitical ambitions.")

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28. E.g., Cheng, *supra* note 5, at 3; *Visions and Actions*, *supra* note 2.

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29. *Visions and Actions*, *supra* note 2.

30. Brown, *supra* note 17, at 104.

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31. *President Xi Speech*, *supra* note 1.

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32. See *infra* Part II, Section B.

33. Helena Legarda & Marie L. Hoffmann, *China as a Conflict Mediator: Maintaining Stability Along the Belt and Road*, MERCATOR INST. CHINA STUD. (Aug. 22, 2018), <https://www.merics.org/en/china-mapping/china-conflict-mediator>.

measures by international leaders and potential business partners—and their willingness to participate—is a more complicated matter.

B. *International Concerns Raised by the BRI*

The BRI envisions massive and complex projects. Whether ports, railways, or pipelines,³⁴ the international undertakings present “a wide range of potential risks and challenges arising from the diversified and complex legal, political, economic, cultural, and religious systems across [BRI affiliated] regions.”³⁵ Responses to these risks range from refusals to work with China and the BRI to the development of new organizations tasked with problem-solving, including the CICC.

China’s significant investments lead to massive debt in affiliated countries along the Belt and Road.³⁶ Indebted states increasingly voice concerns over the consequences of accepting Beijing’s assistance and, in some cases, withdraw entirely from projects for fear of the consequences of failure to pay their debt in a timely manner.³⁷ These fears escalated following the 2018 Hambantota Port incident, in which China received ninety-nine years of control over the strategic port and the land surrounding it as a result of Sri Lanka’s default on its loans.³⁸ With increasing international reluctance about accepting Chinese investments, critics within the PRC fear that

34. Cheng, *supra* note 5, at 7.

35. Tao & Zhong, *supra* note 6, at 307.

36. See, e.g., Kentaro Iwamoto, *Singapore to be Dispute Resolution Hub for Belt and Road*, NIKKEI ASIAN REV. (Jan. 24, 2019), <https://asia.nikkei.com/Spotlight/Belt-and-Road/Singapore-to-be-dispute-resolution-hub-for-Belt-and-Road> (discussing debt in Sri Lanka and Malaysia).

37. *Id.* (“Beijing-led projects have generated concerns across Asia. Sri Lanka, for example, ceded control of a strategic port to Beijing because it was unable to repay massive debts to China. Last year, Malaysia’s new government said it would scrap the 688 km East Coast Rail Link project led by Chinese companies.”).

38. See Griffiths, *supra* note 26 (“Many countries that were initially willing to take Beijing’s money have expressed concern over what could happen should they default on debt payments, particularly after the Sri Lanka deal.”); see also Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html> (providing general background on the Hambantota Port incident).

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outbound loans without return “could leave China overextended, with billions of dollars wasted on projects that never pay off . . . [and] a host of white elephant investments that offer little benefit to China.”³⁹

Beyond concerns about the viability of infrastructure projects and their benefits for companies and states, the international community has significant worries about the actual administration and underlying strategic intention of the projects. For example, Britain’s former Prime Minister Theresa May refused to endorse the BRI, “suggest[ing] that it failed to meet international standards for transparency and fair competition.”⁴⁰ The United States expressed similar concerns, voicing apprehensions that the BRI “is an extension of efforts . . . to undermine the security and economic architecture of the international order.”⁴¹ Even states involved in BRI projects fear that Chinese investment and involvement may lead to their dependency on the PRC⁴²—or worse, loss of control of key strategic infrastructure.⁴³

Despite international criticism, China remains determined to ensure the BRI’s place “at the center of global trade” through continuing development and improvement.⁴⁴ The PRC must take tangible, visible, public steps to protect and improve its international business reputation and placate the concerns of involved countries and world leaders. If it fails to do so, its reputation as a business partner and sovereign will suffer. With these concerns in mind, Xi Jinping and the SPC developed the CICC—a special adjudicative body built to address the unique legal challenges of the BRI.⁴⁵

39. Griffiths, *supra* note 26.

40. Jonathan Hillman, *China Must Play Fair over BRI Contracts*, NIKKEI ASIAN REV. (Feb. 6, 2018), <https://asia.nikkei.com/Politics/China-must-play-fair-over-BRI-contracts>.

41. Greer, *supra* note 17.

42. See Cheng, *supra* note 5, at 8 (referencing fears that the BRI will result in “an increasing dependency on an even stronger China” for China’s neighbors); Griffiths, *supra* note 26 (describing concerns that countries have over what will happen if they default on loans from China).

43. Griffiths, *supra* note 26 (discussing fear that “Chinese state-owned companies [are] ready to snap up ports, railways and other key infrastructure . . . should debtors default”).

44. Perlez, *supra* note 5.

45. *Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions*, CHINA INT’L COM. CT.

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C. *Unique Legal Challenges: Venue, Rule of Law & Judicial Qualifications, and Enforcement*

1. *Venue*

China's recent history in international business is relatively brief, and its experience as a forum for cross-border disputes is even shorter. Foreign direct investment in the PRC "began in earnest" in 1979⁴⁶ with the passage of the Law on Sino-Foreign Equity Joint Ventures.⁴⁷ At that time, "no [foreign companies] dreamed of submitting to PRC court jurisdiction but some investors were agreeable to working out arbitration in China under mutually acceptable rules."⁴⁸ For decades, PRC parties often, albeit with hesitation, submitted to the venue preferences of international business partners.⁴⁹ With time, however, PRC negotiators successfully included arbitration clauses tying disputes to arbitration bodies within China,⁵⁰ such as the China International Economic and Trade Arbitra-

(June 27, 2018) [hereinafter *CICC Establishing Opinion*], <http://cicc.court.gov.cn/html/1/219/208/210/819.html>.

46. Jerome A. Cohen, *The Belt and Road Initiative (BRI) Courts? China's Attitude Towards Dispute Resolution*, JERRY'S BLOG (Feb. 19, 2018), <http://www.jeromecohen.net/jerrys-blog/the-bri-courts>.

47. Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa (中华人民共和国中外合资经营企业法) [Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures] (promulgated by the Nat'l People's Cong., July 1, 1979, effective July 8, 1979, rev'd by the Standing Comm. Nat'l People's Cong., Apr. 4, 1990; Mar. 15, 2001; Sept. 3, 2016) 2016 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 775, translated in LAWINFOCHINA, <http://en.pkulaw.cn/display.aspx?cgid=279350&lib=law> (last visited Nov. 4, 2019).

48. Cohen, *supra* note 46.

49. CLIFFORD CHANCE, BELT AND ROAD DISPUTE RESOLUTION FROM A CHINESE PERSPECTIVE 2 (2018), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2018/06/belt-and-road-dispute-resolution-from-a-chinese-perspective.pdf> ("[I]n the early years, Chinese companies often did not pay close attention to dispute resolution clauses . . . Many simply accepted what their foreign business partners proposed—usually arbitration or court proceedings in the foreign company's home jurisdiction."); *id.* ("[After passing the 1979 law] PRC negotiators were usually under orders to try until the last moment to persuade the foreigners to accept PRC arbitration but not to lose the deal because of their efforts.")

50. CLIFFORD CHANCE, *supra* note 49, at 2.

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tion Commission⁵¹ within the China Council for the Promotion of International Trade (CCPIT).⁵²

Currently, the international community generally avoids relying on or resorting to dispute resolution in China, instead taking claims to the experienced courts and adjudicative organizations within the United Kingdom, the United States, or Singapore—primarily due to concerns about the experience and sophistication of Chinese judges.⁵³ The CICC attempts to answer these concerns by providing a unique forum with specialized expertise for BRI disputes.⁵⁴ Perhaps more significantly, the CICC provides a forum for enforcing judgments from arbitral awards given by other organizations.⁵⁵

With the development of arbitration enforcement mechanisms and the CICC, China apparently wishes to change current perceptions of the country as a venue for dispute resolution. The PRC did not create the CICC concurrently with the BRI. Recognizing that “high-value . . . multijurisdictional [BRI projects] create a demand for effective dispute resolution processes that address the expectations of all parties in-

51. For general background on the China International Economic and Trade Arbitration Commission, see *Introduction*, CHINA INT’L ECON. & TRADE ARB. COMMISSION, <http://www.cietac.org/index.php?m=page&a=index&id=34&l=en> (last visited Oct. 23, 2019).

52. For general background on the CCPIT, see *Arbitration*, CHINA COUNCIL FOR PROMOTION INT’L TRADE (Sept. 16, 2015), http://en.ccpit.org/info/info_8a8080a94fd37680014fd3d050340009.html.

53. See, e.g., Poomintr Sooksripaisarnkit & Sai Ramani Garimella, *Conclusion: Tackling Private International Law Issues for the Success of the OBOR*, in CHINA’S ONE BELT ONE ROAD INITIATIVE AND PRIVATE INTERNATIONAL LAW 253, 254 (Poomintr Sooksripaisarnkit & Sai Ramani Garimella eds., 2018) (“The fact remains that today most complex commercial litigations are brought before courts in [other countries]. It is unclear whether Chinese judges have required sophistication in handling complex commercial cases.”).

54. See *CICC Establishing Opinion*, *supra* note 45 (“[T]he Supreme People’s Court of PRC will establish international commercial courts, lead to establish a committee consisting of international commercial experts, support the resolution of commercial disputes arising in the course of the Belt and Road . . . and provide high-quality and efficient legal services for parties from the Belt and Road participating countries.”).

55. Amaral, *supra* note 14.

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volved,”⁵⁶ the CICC reflects a response from the Chinese government and judiciary to the demands of the BRI.⁵⁷

Initially, Chinese businessmen and the government relied on international arbitration and assurances of award enforcement. In this vein, on June 16, 2015, the SPC issued an opinion encouraging the use of international arbitration to address the specific concerns raised in BRI disputes and discussing improvements to the enforceability of arbitral and international awards within the PRC.⁵⁸ This opinion, an initial attempt to ease international concerns about China’s dedication to ensuring enforcement of awards against it, proved insufficient to calm fears stemming from China’s legal infrastructure and concerns about the complexity of choice of law and enforcement.⁵⁹ The SPC introduced the CICC just three years later, emphasizing their explicit commitment “[t]o build a fair, efficient, and convenient [BRI] dispute resolution mechanism.”⁶⁰ The development of the CICC indicates the PRC’s determination to create the international institutions necessary to play a large role in cross-border dispute resolution. China’s interest in the BRI is not purely economic—the initiative also serves as a signaling device to the international community about the country’s future geopolitical goals and desired legal influence.

However, for the BRI and China to flourish, China must change its national image.⁶¹ International law firms dealing with BRI transactions advise drafting contracts that guarantee dispute resolution by external international arbitration organi-

56. Lydia Ni et al., *Memorandum Signed to Develop Mediation Rules for Disputes over China BRI Projects*, JD SUPRA (Feb. 25, 2019), <https://www.jdsupra.com/legalnews/memorandum-signed-to-develop-mediation-99611>.

57. *CICC Establishing Opinion*, *supra* note 45.

58. Tao & Zhong, *supra* note 6, at 306.

59. See CATHERINE SMITH, HOLMAN FENWICK WILLAN LLP, *THE BELT AND ROAD INITIATIVE: DISPUTE RESOLUTION ALONG THE BELT AND ROAD 2* (2018), <http://www.hfw.com/downloads/HFW-The-Belt-and-Road-Initiative-Dispute-Resolution-along-The-Belt-And-Road-August-2018.pdf> (“The establishment of the CICC does not deal directly with the issue of enforcement of judgments in foreign jurisdictions. . . . It remains to be seen how successful the CICC is as a ‘one stop shop’ for efficient resolution of commercial disputes relating to BRI projects.”).

60. *Building the Judicial Guarantee*, *supra* note 8.

61. See Cheng, *supra* note 5, at 5 (“[W]hether China can change its national image will determine the country’s future, and the future of the initiative.”).

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zations, so as to ensure adjudicative fairness and cross-border enforceability.⁶² Many firms encourage reliance on dispute resolution venues outside China⁶³ and avoidance of less favorable courts and venues that might produce potentially unenforceable opinions.⁶⁴ As is, scholars and practitioners view Chinese mediation in general as a publicity tactic, with various Chinese dispute resolution mechanisms taking only high-profile disputes as a means of improving the country’s reputation.⁶⁵ One method of countering these perceptions of China as a venue is by creating trustworthy, efficient, impartial dispute resolution organizations.

As discussed below, if the CICC operates as designed, its decisions will be enforceable in almost all BRI states, its judges will consult international experts and rule impartially, and the law will be relatively stable and predictable.⁶⁶ The CICC may therefore mark the beginning of the transformation of China’s reputation as a venue for complex cross-border business conflict resolution.

2. *Rule of Law and Judicial Qualifications Concerns*

The Chinese government and the CICC assert that one of their primary goals is guaranteeing and advancing the international rule of law through the BRI.⁶⁷ The emphasis on rule of law and internationally recognized standards likely results from potential concerns that the cross-border projects of the BRI span too wide a variety of legal and political systems for enforcement by a singular body.⁶⁸ There are more than forty civil law countries within the BRI, approximately eleven common law countries, four Islamic law countries, and nine coun-

62. *E.g.*, SMITH, *supra* note 59, at 1.

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63. *E.g.*, *id.*

64. *E.g.*, *id.* (“Careful drafting . . . is the first way to minimize the risk of (1) resolving disputes in potentially less favourable local courts on the BRI and/or (2) being unable to enforce an award or judgment one obtained.”).

65. *See* Legarda & Hoffmann, *supra* note 33 (“This approach lets China present itself as a responsible global actor to a wider global public, allowing Beijing to take credit for trying to solve these conflicts . . .”).

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66. *See infra* Part II.

67. *Building the Judicial Guarantee*, *supra* note 8.

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68. *See* Tao & Zhong, *supra* note 6, at 307–08 (highlighting the significant breadth of political, cultural, and legal systems contained within the BRI and implying the resulting difficulties).

tries with mixed laws.⁶⁹ Differences in “legal systems, history, . . . jurisprudences,” and expectations about the law complicate BRI contract drafting and resolution following breach or default.⁷⁰

The BRI’s operation depends upon the rule of law⁷¹ and the development of systems to mitigate the differences between the existing legal structures of participating countries.⁷² Dr. Poomintr Sooksripaisarnkit, a legal scholar and mediator, describes the challenges of building the BRI and protecting party interests in absolute fairness and seamlessness. He states:

[The BRI’s] primary aim is to bring closer cooperation among countries in Asia, Africa, and Europe to enhance cross-border trade supported by seamless infrastructure. This dream is ideal only if countries along the [BRI] route have the same legal system and adopt the same laws. In reality, the world is far from ideal. Diverse legal systems and laws will impede a vision of the seamless economy.⁷³

China’s attempts to bridge the gap between countries using “grand, unilateral diplomatic ideas,”⁷⁴ include the introduction of the CICC as a means of resolving disputes landing within its jurisdiction.

However, the CICC faces cultural challenges of its own—specifically, worries about historical ambivalence towards legal culture and the role of courts in Chinese society.⁷⁵ Additional concerns include the alleged partiality of judges, government

69. *Id.* at 308.

70. *Id.*

71. See *Building the Judicial Guarantee*, *supra* note 8 (“To build . . . [the BRI] dispute resolution mechanism, it is necessary for all countries along the route to . . . advance international rule of law.”).

72. See Poomintr Sooksripaisarnkit, *Harmonisation of Choice of Law Rules in Commercial Contracts in the One Belt One Road Countries: Will the Hague Principles on Choice of Law in International Commercial Contracts Serve as a Good Model?*, in CHINA’S ONE BELT ONE ROAD INITIATIVE AND PRIVATE INTERNATIONAL LAW, *supra* note 53, at 19, 19 (observing that such systems are necessary, as it is not feasible to expect all countries participating in the BRI to have the same legal systems).

73. *Id.*

74. Brown, *supra* note 17, at 103.

75. See Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1206 (1966) (describing how historically, the Confucianists viewed the legal process as “a regrettable necessity. . . . [I]t was

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involvement in adjudication, and the opacity of laws and regulations.⁷⁶

The Chinese government’s current rhetoric challenges these conceptions. Decision makers’ stated desire for impartiality⁷⁷ reveals a country eager to change the perceptions of the international community. The CICC’s integration of apparently impartial international experts reflects this trend.⁷⁸

Nevertheless, a complication arises from the fact that the CICC operates under Chinese procedural law. International parties worry that the rules of the court are closed off from negotiation⁷⁹—effectively transforming the process from ensuring the rule of *international* law to enforcing the rule of *Chinese* law. The mediation organizations in China aim to amend the strict procedural structure concerns by working with other international institutions, including the Singapore International Mediation Centre, to create rules and procedures more appealing to the international community.⁸⁰

The CICC attempts to “try international commercial cases fairly and timely in accordance with the law . . . and create a stable, fair, transparent, and convenient rule of law [for the] international business environment.”⁸¹ It faces challenges stemming from the diversity of legal systems as well as the international perception of China’s judiciary. The future efficacy

usually considered disreputable to become involved in the law courts, even as a party with a legitimate grievance.”).

76. See Chow, *supra* note 11 (discussing the difficulty of locating laws and determining what applies in certain situations, as well as highlighting the lack of faith in the legal system—leading to an increased reliance on mediation); see also Rogers, Wu & Fong, *supra* note 4, at 24 (discussing risks of litigating in foreign courts generally).

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77. See *Building the Judicial Guarantee*, *supra* note 8 (discussing China’s commitment to enforcement and potential reconsideration of the New York Convention with a view towards China’s increasing international activities); *CICC Establishing Opinion*, *supra* note 45 (describing the introduction of “the Belt and Road international commercial dispute resolution mechanism and institutions to create a stable, fair, transparent, and predictable business environment under the rule of law.”).

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78. See *infra* Part III, Section C.

79. See Dezan Shira & Assocs., *supra* note 13 (urging that choice of arbitration venue and law should be left to negotiation between parties).

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80. Ni et al., *supra* note 56.

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81. *A Brief Introduction of China International Commercial Court*, CHINA INT’L COM. CT. (June 28, 2018), <http://cicc.court.gov.cn/html/1/219/193/195/index.html>.

of the court hinges on the enforcement of its decisions, its integration of feedback and input from the Expert Committee, and other factors, discussed in detail below.

3. *Enforcement of Awards*

In any cross-border dispute, whether the borders are internal or international, the enforcement of judgments is a pressing question. It is an extremely important factor for parties entering into an agreement as they consider the risks of potential foreign litigation.⁸² Parties often negotiate and carefully draft choice of forum and choice of law clauses—particularly considering the significant impact of these clauses on the disputes.⁸³ The complicated and high-value nature of BRI projects means higher stakes for negotiating parties, especially for arbitration and termination or breach clauses,⁸⁴ and increased international pressure for clarity of judicial outcome and expectations in specific venues.

Scholars present the enforcement of foreign judgments in China as “arguably the most important topic of all private international law issues as far as [BRI] dispute resolution is concerned.”⁸⁵ Without enforcement capability, parties may litigate disputes, receive an award from an adjudicative body, and find that their award is unenforceable and effectively useless.

The international legal and business communities traditionally knew China to be “relatively conservative in enforcing foreign judgments.”⁸⁶ Historically, and to some extent still to this day, “there is no definition of reciprocity under Chinese

82. Rogers, Wu & Fong, *supra* note 4, at 24.

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83. Choice of law clauses often determine jurisdiction. *Choice-of-Law Clause*, BLACK’S LAW DICTIONARY (10th ed. 2014). Depending on the issue at stake, jurisdiction may be outcome-determinative.

84. See Rogers, Wu & Fong, *supra* note 4, at 24 (“By their very nature, BRI projects are complex, high-value, high-public interest, long-term, capital intensive, multi-party, multi-contract and cross-border.”); SMITH, *supra* note 59 (“[The growth of the BRI] presents challenges and risks for investors, contractors and other service providers as performance of contracts will be carried in jurisdictions where litigating disputes, recognition and enforcement of court and arbitral awards may be complex.”).

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85. King Fung Tsang, *The Role of Hong Kong in the Dispute Resolutions of One Belt One Road*, in CHINA’S ONE BELT ONE ROAD INITIATIVE AND PRIVATE INTERNATIONAL LAW, *supra* note 53, at 199, 201.

86. CLIFFORD CHANCE, *supra* note 49, at 3.

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law.”⁸⁷ However, in 2015, with the beginning of the BRI and increased development of international business interests, the Chinese courts and government took steps towards change.⁸⁸ Chinese courts are now developing legal practice based on reciprocity, and emphasize the principle as one of the guarantees provided by dispute resolution mechanisms in China, including the CICC.⁸⁹

The first sign of change occurred when the SPC indicated in a 2015 opinion that it and other courts in China “would take proactive steps to promote enforcement of foreign judgments based on reciprocity.”⁹⁰ Reciprocity means that for countries along the BRI, enforcement of a Chinese judgment in their jurisdiction may give their own judgments power in return.

Later that year, the SPC followed through with its promise and enforced a judgment issued by the High Court of Singapore in *Kolmar Group AG*.⁹¹ In that case, the court explicitly justified its decision as being in accordance with Article 282 of the Civil Procedure Law of the People’s Republic of China⁹² based on the High Court of Singapore’s “recogn[ition] and enforce[ment of] a civil judgment rendered by the Intermedi-

87. Tsang, *supra* note 85, at 205.

88. CLIFFORD CHANCE, *supra* note 49, at 3.

89. *Building the Judicial Guarantee*, *supra* note 8 (“Chinese courts recognize and enforce civil and commercial judgments of foreign courts in accordance with the provisions of the Civil procedure Law and in accordance with international treaties or the principle of reciprocity.”).

90. CLIFFORD CHANCE, *supra* note 49, at 3.

91. Gao’er Jituan Gufen Youxian Gongsi Shenqing Chengren He Zhixing Xinjiapo Gaodeng Fayuan Minshi Panjue An (高尔集团股份有限公司申请承认和执行新加坡高等法院民事判决案) [*Kolmar Group AG, A Case of an Application for the Recognition and Enforcement of a Civil Judgment of the High Court of Singapore*], *B&R Typical Case 13*, STAN. L. SCH. CHINA GUIDING CASES PROJECT (Oct. 9, 2017) [hereinafter *Kolmar Group AG*], <http://cgclaw.stanford.edu/belt-and-road/b-and-r-cases/typical-case-13> (Nanjing Intern. People’s Ct. May 15, 2017).

92. Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991, rev’d by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2007; Aug. 31, 2012; June 27, 2017) 2017 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 508, translated in CHINA INT’L COM. CT. (June 27, 2017), <http://cicc.court.gov.cn/html/1/219/199/200/644.html>.

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ate People's Court of Suzhou Municipality, Jiangsu Province."⁹³

The significance of this decision cannot be overstated. At the time of the decision, China “ha[d] signed treaties . . . [for] mutual recognition and enforcement of civil and commercial judgments with fewer than one-third of the countries along the Belt and Road.”⁹⁴ The *Kolmar* decision elucidates the viability of reciprocity of international judgments in the courts of the PRC, and may ease concerns of potential international business partners or states with whom China does not have explicit agreements.

While the *Kolmar* case sets a lower standard of reciprocal recognition than explicit treaty agreements, *Kolmar* does not guarantee that the court will enforce the international judgment. It indicates a willingness by the Chinese courts to consider reciprocal enforcement, rather than a bright-line rule that they must. Consequently, international partners concerned about the enforcement of foreign judgments in China may rely on jurisdictions with strong enforcement records, such as Hong Kong,⁹⁵ when choosing venues for dispute resolution.

Moreover, for parties concerned about enforceability, the CICC has definite and particular appeal. As a branch of the SPC,⁹⁶ CICC awards will be enforceable in China. Parties who opt for dispute resolution—whether adjudication, mediation, or arbitration—in CICC courtrooms may feel comfortable about the enforceability of their award against a Chinese party

93. *Kolmar Group AG*, *supra* note 91.

94. *Id.*

95. Tsang, *supra* note 85, at 210 (“Comparatively, while the lower standard under the *Kolmar* case can theoretically benefit judgments from the courts of [BRI] countries to enforce their judgments directly in China, it is suggested that they generally do not have the positive enforcement record that Hong Kong does. . . . [I]t appears that Hong Kong judgments will generally be enforced in China, and this clearly motivates parties in commercial transactions under the [BRI] to choose Hong Kong as the place of dispute resolution.”).

96. *Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Criminal Court*, CHINA INT'L COM. CT. (June 27, 2018) [hereinafter *Provisions of the Supreme People's Court*], <http://cicc.court.gov.cn/html/1/219/199/201/817.html> (“The International Commercial Court is a permanent adjudication organ of the Supreme People's Court.”).

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or assets. This benefit, among others, makes the creation of the CICC a groundbreaking step towards BRI long-term success. Parties to BRI development projects should consider whether they want to risk judicial enforcement issues of an award arbitrated or granted elsewhere or if they feel comfortable submitting to the jurisdiction of the new court.⁹⁷

III. THE CHINA INTERNATIONAL COMMERCIAL COURT (CICC)

Multiple potential benefits inspired the SPC’s creation of the CICC in early 2018. First and foremost, Beijing forecasts that a court system within China dedicated specially to the complex and time-consuming disputes arising from BRI matters will “streamline proceedings, cut costs, and make settlement more convenient.”⁹⁸ Additional goals include “protect[ing] the lawful rights and interests of the Chinese and foreign parties equally, creat[ing] a stable . . . rule of law [for the] international business environment,” and protecting the BRI construction.⁹⁹ The CICC answers these objectives and also responds to internal public concern that preexisting mechanisms inadequately protected Chinese enterprises and investments along the BRI.¹⁰⁰ As a branch of the SPC, the CICC navigates the rules imposed by the Chinese civil procedure regulations as well as the expectations and needs of international parties.¹⁰¹ It issues binding and final decisions and rulings based on these factors.¹⁰² As a dispute resolution mechanism, it walks a line between a potential overstretch of Chinese

97. See generally Tsang, *supra* note 85 (describing Hong Kong judgments and their enforceability in China and other countries, and implying that parties should think carefully before deciding a venue).

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98. Jacob Mardell, *Dispute Settlement on China’s Terms: Beijing’s New Belt and Road Courts*, MERCATOR INST. CHINA STUD. (Feb. 14, 2018), <https://www.merics.org/en/blog/dispute-settlement-chinas-terms-beijings-new-belt-and-road-courts>.

99. *Provisions of the Supreme People’s Court*, *supra* note 96.

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100. Mardell, *supra* note 98 (recounting a Chinese scholar’s pre-CICC criticisms and concerns about the BRI and protection for Chinese investments: “The *Global Times*, a state media tabloid under the *People’s Daily*, explicitly states that, ‘the existing dispute settlement regime cannot adequately protect the legitimate interests of Chinese enterprises overseas”).

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101. *CICC Establishing Opinion*, *supra* note 45.

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102. *Id.*

authority in BRI matters¹⁰³ and a forum uniquely situated to answer the needs of the BRI.¹⁰⁴

The CICC comprises three courts, one in Beijing, one in Xi’an specifically for commercial disputes arising from the Belt, and a third in Shenzhen for conflicts arising from the maritime Road.¹⁰⁵ The structure of the courts accommodates litigation, mediation, and arbitration,¹⁰⁶ and draws from other international dispute resolution mechanisms to increase its international acceptability as a forum.¹⁰⁷

The following section discusses the structure, jurisdiction, applicable laws, judges and experts, model cases, and geopolitical impact of the court. As an extremely new international dispute resolution organization, only time will tell the true efficacy of the court.

A. Structure of the Court

After the announcement of its development, observers wondered whether the CICC would follow examples set by other international adjudicative bodies, such as the Singapore International Commercial Court, by integrating international judges.¹⁰⁸ A similar question emerged over what law the courts would apply.¹⁰⁹ The structure of the court shows China’s difficulty in meeting international expectations and standards, as well as its determination to follow through and create a “one stop” forum for parties to BRI disputes.¹¹⁰

The court’s different locations focus on resolving different types of disputes—land-based in Xi’an and maritime in

103. Mardell, *supra* note 98 (“Focusing Belt and Road litigation within Chinese borders is unlikely to please investors and politicians who share a sense that BRI is already negotiated too much on Beijing’s terms.”). R

104. See *CICC Establishing Opinion*, *supra* note 45 (describing the goals of the CICC, including “[e]stablishing a widely accepted mechanism and institutions for international commercial dispute resolution, which suits the unique characteristics of Belt and Road participating countries.”). R

105. Dezan Shira & Assocs., *supra* note 13. R

106. *A Brief Introduction of China International Commercial Court*, *supra* note 81. R

107. *CICC Establishing Opinion*, *supra* note 45. R

108. Sooksripaisarnkit & Garimella, *supra* note 53, at 254. R

109. *Id.*

110. *A Brief Introduction of China International Commercial Court*, *supra* note 81. R

Shenzhen.¹¹¹ The eight presiding judges, in accordance with Chinese law, must be qualified according to Chinese standards¹¹² and cannot be international.¹¹³ This raises concerns for international scholars and potential business partners who doubt the judges’ experience in handling BRI-type cases.¹¹⁴ Additionally, the language of the court must be Chinese, and the CICC must adhere to China’s procedural laws.¹¹⁵ Foreign attorneys may not appear at court without the assistance of a Chinese-certified lawyer, and even then may only appear as an “agent.”¹¹⁶ Structurally, the CICC is overwhelmingly China-centric.

Despite the somewhat rigid requirements of Chinese procedural laws, the CICC nevertheless models itself after other international courts through unique measures, including an Expert Committee and the integration of alternative dispute resolution mechanisms.¹¹⁷ After examining other international courts, the CICC presented key characteristics as:

Overall, . . . international commercial courts have shown the following characteristics: 1. Fast; Low cost 3. [sic] The procedure is simple; 4. Elastic; 5. Adjudicating high quality; 6. Applicable laws are fair and predictable; 7. The synchronization of law and market development; 8. Maintain the vitality and vitality [sic] of the legal framework.¹¹⁸

111. Dezan Shira & Assocs., *supra* note 13.

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112. Susan Finder, *Comments on China’s International Commercial Courts*, SUPREME PEOPLE’S CT. MONITOR (July 9, 2018), <https://supremepeoplescourtmonitor.com/2018/07/09/comments-on-chinas-international-commercial-courts>.

113. Susan Finder, *China International Commercial Court & the Supreme People’s Court Monitor*, SUPREME PEOPLE’S CT. MONITOR (Aug. 31, 2018), <https://supremepeoplescourtmonitor.com/2018/08/31/china-international-commercial-court-the-supreme-peoples-court-monitor>.

114. *E.g.*, Sooksripaisarnkit & Garimella, *supra* note 53, at 254 (“It is unclear whether Chinese judges have required sophistication in handling complex commercial cases.”).

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115. Finder, *supra* note 113.

116. *Building the Judicial Guarantee*, *supra* note 8.

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117. *CICC Establishing Opinion*, *supra* note 45 (describing the SPC’s intended international commercial court—the CICC—as “integrat[ing] litigation, mediation and arbitration, [and] creat[ing] a convenient, expeditious and low-cost ‘one-stop’ centre for dispute resolution”).

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118. *Building the Judicial Guarantee*, *supra* note 8.

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The structure of the court reveals the CICC’s desire to integrate these characteristics. They set stringent character requirements for their judges and for the experts on the Expert Committee.¹¹⁹ The very creation of the Expert Committee signals China’s desire to gain international recognition and acceptance of its dispute resolution and adjudication mechanisms for complex commercial disputes by structurally ensuring a means of international input.

Additionally, the court provides access to alternative dispute resolution mechanisms such as mediation and arbitration. With the goal of “promoting advanced and convenient trades and investments and the establishment of an open global economy,” the CICC works to create a just environment for dispute resolution.¹²⁰ In the interest of convenience, expediency, and money, the court “[p]romote[s] connectivity of litigation, mediation, and arbitration.”¹²¹

The exact structure of the mediation and arbitration functions of the court is currently unclear.¹²² However, there is some indication—implied by the practices of other Chinese dispute resolution bodies—that the court may look to other countries and preexisting organizations for assistance.¹²³ Chinese judges and adjudicative mechanisms playing multiple roles is not unprecedented,¹²⁴ although it may appear unusual

119. See *Working Rules of the International Commercial Expert Committee of the Supreme People’s Court (For Trial Implementation)*, CHINA INT’L COM. CT. (Dec. 5, 2018) [hereinafter *Expert Committee Working Rules*], <http://cicc.court.gov.cn/html/1/219/208/210/1146.html> (“The members of the International Commercial Expert Committee . . . shall have the character of integrity and fairness . . .”); *CICC Establishing Opinion*, *supra* note 45 (describing the specialization requirements of internal legal experts for the Expert Committee).

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120. *CICC Establishing Opinion*, *supra* note 45.

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121. *A Brief Introduction of China International Commercial Court*, *supra* note 81.

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122. Finder, *supra* note 112 (“The mechanism to link mediation, arbitration and litigation is an important part of the judicial reform measures . . . Which mediation and arbitration institutions will link to the CICC are unclear . . .”).

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123. See generally Ni et al., *supra* note 56 (discussing the Memorandum of Understanding between the Singapore International Mediation Centre and the CCPIT, which agreed to work together to develop rules and procedure for mediating BRI disputes).

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124. See Cui Qiang & Li Qishi, *China*, in LITIGATION & DISPUTE RESOLUTION 55, 59 (Michael Madden ed., 7th ed. 2018) (“[I]t is unique that the

to international business partners accustomed to judges and courts dedicated to one purpose through one method.

1. *Jurisdiction of the Court*

There are five methods by which a BRI dispute may go before the CICC. As a preliminary manner, the cases must be “international commercial cases.”¹²⁵ Painted with broad strokes when defined by the CICC, international commercial cases are those involving situations where:

[O]ne or both parties are foreigners, stateless persons, foreign enterprises or other organizations[;] one or both parties have their habitual residence outside the territory of the People’s Republic of China[;] legal facts that create, change, or terminate the commercial relationship have taken place outside the territory of the People’s Republic of China[;] the subject matter in dispute is outside the territory of the People’s Republic of China[.]¹²⁶

The five means for establishing CICC jurisdiction are:

1. Selection—first instance international commercial cases where the parties submit to the court’s jurisdiction in accordance with Article 34 of the *Civil Procedure Law*. The amount in dispute must be at least 300,000,000 yuan.¹²⁷

2. By permission of the SPC—“[f]irst 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”¹²⁸

3. Cases with “nationwide significant impact.”¹²⁹

4. Cases involving “preservation measures in arbitration”¹³⁰ or for enforcement of arbitral awards.

arbitral tribunal may act as the mediator or conciliator in the mediation and conciliation under Chinese arbitration rules.”).

125. See *A Brief Introduction of China International Commercial Court*, *supra* note 81 (describing the jurisdictional requirements of the CICC, all of which contain the phrase “international commercial cases”).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

5. “Other international commercial cases that the Supreme People’s Court considers appropriate to be tried by the International Commercial Court[.]”¹³¹

The jurisdiction of the court as established by these circumstances is simultaneously extremely broad—ultimately left to the discretion of the SPC under the fifth catch-all clause—and uncertain. Not only do the five potential situations not clearly establish rules for determining jurisdiction, they also do not take into consideration the existence of bilateral or multilateral treaties that may provide their own dispute resolution procedures and rules. In a situation where the jurisdiction of the CICC overlaps with an external agreement, it is unclear which will prevail.¹³²

Furthermore, cases not connected with China may not be heard by the CICC.¹³³ Although a staggering, but unsurprising, eighty-nine percent of BRI projects involve Chinese companies,¹³⁴ this means that for eleven percent of the BRI projects, the CICC is unavailable as a venue. Some observers question whether the CICC is truly an “international” court—with its “Chinese law-qualified lawyers,” “no foreign judges,” and the “threshold of RMB 300 million (approximately USD 42 million) for a case to be heard.”¹³⁵ The CICC’s clear and structurally inescapable links to China work against the court in the eyes of critics, making it appear even less international.

If cases cannot appear before the CICC, then the international reputation of the CICC and China will not change. As a court specializing in complex cross-border commercial transactions, the decision to limit jurisdiction to high-value disputes makes sense. However, with international firms preferring arbitration to CICC adjudication,¹³⁶ the court will not produce

131. *Id.*

132. Dezan Shira & Assocs., *supra* note 13.

133. SMITH, *supra* note 59, at 2.

134. Mardell, *supra* note 98.

135. Amaral, *supra* note 14 (discussing the difficulties of accessing the Chinese judiciary and providing reasons why parties might opt for arbitration or other dispute resolution methods instead of relying on the CICC).

136. While a broad survey is beyond the scope of this note, for views that the author believes to be generally representative, see Rogers, Wu & Fong, *supra* note 4, at 26. (“International arbitration, with its many benefits and advantages, unquestionably should be at the top of parties’ minds as a preferred choice of dispute resolution mechanism.”).

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results necessary to influence the international community’s perceptions. On the other hand, international concerns about the geopolitical consequences of the CICC supervising Chinese disputes with other countries along the BRI present a picture where significant reliance on the CICC may *damage* China’s international reputation by making the Chinese government’s intentions appear coercive and overreaching.¹³⁷

B. *Laws of the Court*

As with any court, the law applied by the judges is extremely important.¹³⁸ The choice of law options available to parties litigating, mediating, or arbitrating their disputes within the CICC on substantive matters are generally comprehensive. Parties may “choos[e] the domestic or foreign laws familiar with them,” and the CICC will respect their autonomy, rights, and dispute resolution preferences.¹³⁹

On substantive matters, the CICC operates like many other international conflict resolution mechanisms, including those in Hong Kong.¹⁴⁰ With this freedom to choose the substantive law governing the dispute, typical concerns of determining and applying the laws emerge.¹⁴¹ The CICC attempts to mitigate concerns over its Chinese-judge, Chinese-lawyer system—which implies a lack of consideration or representation of other judicial systems—by forming an Expert Committee with internationally trained attorneys who may testify on specific subjects to educate the court.¹⁴²

Procedural law “is always the matter for the *lex fori* (law of the forum).”¹⁴³ The CICC’s seat in mainland China is new for

137. See *infra* Part III, Section C; Dezan Shira & Assocs., *supra* note 13 (“[I]t could be argued that the Chinese government is trying to force other sides to accept Chinese mediation and arbitration through its proposal to have these three courts rule on all BRI disputes.”).

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138. Sooksripaisarnkit & Garimella, *supra* note 53, at 254 (“While courts are important in international litigation, the law the courts are to apply is equally important.”).

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139. *CICC Establishing Opinion*, *supra* note 45.

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140. Tsang, *supra* note 85, at 215 (“Hong Kong’s choice of law rules generally respect party autonomy in their choice of governing law.”).

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141. Sooksripaisarnkit & Garimella, *supra* note 53, at 255.

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142. *Expert Committee Working Rules*, *supra* note 119 (describing the role of experts in advising the court on legal matters and providing impartial opinions to assist in adjudication); see *infra* Part III, Section C.

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143. Sooksripaisarnkit & Garimella, *supra* note 53, at 255.

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the international community, which is accustomed to presenting international disputes in the United Kingdom, United States, Singapore, Hong Kong, and elsewhere. For that reason, critics of the CICC call out the peculiarities of the Chinese procedural system but fail to consider the broader structure of the CICC in mitigating their concerns. International mistrust of Chinese Communist Party (CCP) involvement with the court and judges is an additional hurdle.

The CICC acknowledges that Chinese procedural law requires the use of Chinese instead of other languages in the international commercial court, the appointment of foreign attorneys alongside Chinese lawyers,¹⁴⁴ and that judges be qualified in China.¹⁴⁵ With the inclusion of the Expert Committee, the legal requirements do not indicate that the CICC will be ineffective in interpreting and applying laws of multiple jurisdictions—but rather that the SPC thoughtfully considered its structural options available under legal and political constraints and made the most of the situation to ensure a “stable, fair, transparent, and convenient rule of law [for the] international business environment.”¹⁴⁶ The inclusion of international experts and their important functions, discussed below, also signals a decision-making distance from CCP influence.

As far as the actual laws applied to decisions, the CICC compiled and promulgated a number of model cases indicating the court’s willingness to listen to and consider foreign aspects of cases and apply international law.¹⁴⁷ As China is not a common law system and does not abide by the doctrine of *stare decisis*, the model cases are not *binding precedent* as understood

144. *Building the Judicial Guarantee*, *supra* note 8.

145. Finder, *supra* note 112 (“[T]he political imperatives of establishing the CICC as a priority matter meant that the SPC was constrained by the realities of current Chinese law. . . . 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 so qualified under current Chinese law.”).

146. *A Brief Introduction of China International Commercial Court*, *supra* note 81.

147. *Model Cases Regarding Providing Judicial Services and Safeguards by the People’s Courts for the Construction of the “Belt and Road,”* CHINA INT’L COM. CT. (May 15, 2017), <http://cicc.court.gov.cn/html/1/219/199/204/812.html>; *Second Group of Model Cases Involving Building of the “Belt and Road,”* CHINA INT’L COM. CT. (May 15, 2017), <http://cicc.court.gov.cn/html/1/219/199/204/880.html>.

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in common law rhetoric.¹⁴⁸ Rather, the models provide insight into rulings “decided or endorsed by the SPC [and] are generally expected to be followed by Chinese courts.”¹⁴⁹

C. *Judges and the Expert Council*

1. *Judicial Requirements*

The CICC is a “part-time responsibility for the judges involved, who have their ongoing responsibilities at the SPC, either at one of the Circuit Courts, the new Intellectual Property Court, or SPC headquarters.”¹⁵⁰ In fact, some judges—such as Judge Zhang Yongjian—hold as many as three administrative positions.¹⁵¹ The fact that the judges on the CICC bench are not full-time is unlikely to placate observers concerned about judicial expertise.

However, the judges appointed by the SPC are familiar with international commerce and can work in both English and Chinese.¹⁵² These experienced judges are by no means underqualified. Moreover, the SPC explicitly acknowledges the general practice of using “judges of other nationalities like those in Singapore and Dubai” and the usefulness and necessity of involving “foreign professional talents.”¹⁵³ This recognition led to the development of the Expert Committee within the CICC.

2. *The Expert Committee*

Almost immediately following the announcement of the court, the SPC sought ways to mitigate the potential geopolitical challenges to its legitimacy. Their primary method of doing so was by establishing the Expert Committee—a body of “foreign professional talents”¹⁵⁴ to answer questions and provide

148. *Binding Precedent*, BLACK’S LAW DICTIONARY (10th ed. 2014) (describing binding precedent as precedent “that a court must follow”).

149. Tsang, *supra* note 85, at 206.

150. Susan Finder, *China International Commercial Court Starts Operating*, SUPREME PEOPLE’S CT. MONITOR (Jan. 14, 2019), <https://supremepoplescourtmonitor.com/2019/01/14/china-international-commercial-court-starts-operating>.

151. *Id.*

152. Sun, *supra* note 12.

153. *Building the Judicial Guarantee*, *supra* note 8.

154. *Id.*

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their insight on challenging international legal situations. These international experts and judges also may mitigate concerns about the CCP’s influence on the CICC rulings—as the other courts within China are significantly influenced by party politics and the international community questions their judicial decision-making independence.¹⁵⁵

Expert Committee members play a large number of roles in the CICC. They may “preside over mediations . . . ; provide advisory opinions on specialized legal issues concerning international treaties, international commercial rules, finding and applying foreign laws involved in cases . . . ; provide advice and suggestions on development . . . [and] the formulation of judicial interpretations and judicial policies.”¹⁵⁶ The enumerated working rules of the Committee also include a catch-all provision, permitting their participation in “other matters entrusted by the International Commercial Court.”¹⁵⁷

By establishing the thirty-two person committee¹⁵⁸ and enumerating broad and non-exhaustive powers, China leaves open the possibility for further development of the influence of the Expert Committee on the court. The actual expert members of the Committee come from a variety of backgrounds.¹⁵⁹ Each joins the court with significant international legal expertise and personal “internationally recognized authority”—a requirement under the Article 2 of the Working Rules.¹⁶⁰ The rules also require that the experts have “the character of integrity and fairness.”¹⁶¹ This factor explicitly an-

155. *Judicial Independence in the PRC*, CONG.-EXECUTIVE COMMISSION CHINA, <https://www.cecc.gov/judicial-independence-in-the-prc> (last visited Oct. 22, 2019) (“[W]hile the Chinese Constitution provides that the courts are not subject to interference by administrative organs, social organizations, or individuals, judges are expected to adhere to the leadership of the Party and submit to the supervision of the people’s congresses and the procuratorate.”).

156. *Expert Committee Working Rules*, *supra* note 119, arts. 3(1)–(4).

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157. *Id.* art. 3(5).

158. Finder, *supra* note 113.

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159. *Judges*, CHINA INT’L COM. CT., <http://cicc.court.gov.cn/html/1/219/193/196/index.html> (last visited Oct. 22, 2019).

160. *Expert Committee Working Rules*, *supra* note 119, art. 2(1) (“[T]hey shall have expertise in international trade law, international investment law, and other fields of international commercial law, with internationally recognized authority.”).

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161. *Id.* art. 2(2).

swers criticisms of the court’s impartiality and implications that its close connection to the government may lead to corrupt or biased adjudication. Whether, as the United States worries, the PRC’s rhetoric will not match reality,¹⁶² its intention to create an impartial and fair committee is clear.

One critique of the Expert Committee is the significant control that the CICC exercises over it. The SPC and CICC determine which experts would be appropriate to preside over a case and invite them to do so—giving the Committee members only the option to accept or reject the invitation.¹⁶³ This system is potentially problematic. On the one hand, the court knows its experts and their practice. The SPC or CICC may be able to appoint experts with special skills or understanding. On the other, SPC control of who the experts are and what they do undercuts the Committee’s appearance of impartiality and independence.

Ultimately, the Expert Committee is a carefully crafted strategic method for China to incorporate foreign legal experts and professionals into the CICC. Nevertheless, the CICC receives significant international backlash concerning outstanding legal issues, the CICC and PRC’s perceived or potential geopolitical influence, and China’s potentially monopolistic control of BRI projects and resulting disputes.¹⁶⁴

D. *Geopolitical Concerns*

Despite the careful construction of the CICC and its Expert Committee, the international community continues voicing concerns over the true significance of the court if it does not accept jurisdiction over *all* BRI cases.¹⁶⁵ Susan Finder, a member of the Expert Committee herself, expresses concern that “[t]he small team of judges and limited jurisdiction of the court are likely to mean that overall trends in Belt & Road dispute resolution are unlikely to be significantly affected by [the CICC’s] establishment.”¹⁶⁶

162. See Brown, *supra* note 17, at 116 (noting U.S. concerns about PRC rhetoric with respect to the BRI generally).

163. *Expert Committee Working Rules*, *supra* note 119, arts. 5, 9.

164. See discussion *supra* Part II, Sections B, C.

165. Finder, *supra* note 112.

166. *Id.* (forecasting the future of the court and describing outstanding challenges).

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Although it is true that there are few judges on the court, and that they have other responsibilities, the CICC has a unique task which makes it a groundbreaking organization with the potential to significantly impact China’s interactions with international business partners. The CICC has jurisdiction to “hear cases ‘involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards.’”¹⁶⁷ This provides parties seeking enforcement of their awards from arbitral decisions a dedicated forum and may mitigate some concerns of international parties when working with China along the Belt and Road.

Another cause of significant international concern is the perceived monopolization of BRI issues or otherwise improper attempts by China to bring everything before its international court rather than other potential venues. Observers note general international discomfort among investors and politicians “who share a sense that BRI is already negotiated too much on Beijing’s terms.”¹⁶⁸ Observers and critics also worry that the CICC represents a bold move by the PRC to move jurisdiction of international disputes into its home fora¹⁶⁹ and thereby gain control. Notably, this concern contradicts the previous worry that the CICC’s reach is too small to impact the BRI.

The issue of China bringing BRI disputes under its influence reflects a set of larger international worries about China’s entrance onto the global commercial dispute resolution stage. Scholars watching international power trends explain that shifts in power structures upset the norm and may impede realization of China’s goals.¹⁷⁰ As Professor Chuanxing Wang, a researcher at Tongji University and deputy director of its Center of Polar and Oceanic Studies, notes, “the international structures under change, the origins of the [BRI], can also be-

167. Amaral, *supra* note 14 (quoting *A Brief Introduction of China International Commercial Court*, *supra* note 81).

168. Mardell, *supra* note 98.

169. *See* Dezan Shira & Assocs., *supra* note 13 (“[I]t could be argued that the Chinese government is trying to force other sides to accept Chinese mediation and arbitration . . .”).

170. *See* Wang, *supra* note 19, at 274 (“[C]hanging international system structures can also become the obstacles of the realization of the [BRI].”).

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come the origins of the resistance to such institutional innovation.”¹⁷¹

In an attempt to prove its dedication to transparency and clear communication, China presents its intentions at annual summits and plans.¹⁷² Their reception by international leaders varies, and mistrust of the CICC, PRC, and BRI more generally continues.¹⁷³ There are very few ways China can actively change international perceptions. It has the greatest likelihood of success if the CICC begins issuing rulings that are fair, impartial, and objective.

For now, China must operate within its existing institutions and continue pursuing impartial and fair administration of the BRI. Change of international opinions will be gradual.

IV. ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

Firms advise that international businesses along the BRI include clear contract terms establishing forum and applicable law in the event of breach and resulting adjudication, mediation, or arbitration.¹⁷⁴ The CICC is an exciting development and may prove to be an excellent alternative to preexisting mechanisms. This section provides a brief examination of existing mechanisms in Hong Kong and Singapore and discusses the international perceptions of these venues and their benefits and potential issues. Current arbitration centers within China, although still available, offer litigants an experience less tailored to their BRI dispute. Moreover, the CICC theoretically offers a variety of services not available through other organizations as well as the routine and predictability of court procedure.

A. *Alternative Dispute Resolution Mechanisms and Methods*

Observers predict that parties to BRI disputes will rely heavily on preexisting international dispute resolution mecha-

171. *Id.* at 277.

172. *See, e.g.*, Ben Blanchard & Brenda Goh, *China Puts Gentler Face on Belt and Road, Hits Back at Critics*, REUTERS, Apr. 27, 2019, <https://www.reuters.com/article/china-silkroad/rpt-china-puts-gentler-face-on-belt-and-road-hits-back-at-critics-idUSL3N22909E> (describing Xi’s efforts at a summit to portray the BRI positively).

173. *Id.*

174. SMITH, *supra* note 59, at 2.

nisms, specifically “Singapore arbitration, the Hong Kong International Arbitration Center or some other neutral, prestigious institution located in a place with a credible judicial system for enforcement of awards and interpretation of relevant law.”¹⁷⁵ Until the CICC gains a more robust and positive international reputation, law firms and lawyers working with businesses and investors may hesitate to select that venue in their agreements.

Mediation and arbitration offer different advantages. Mediation centers primarily on the dispute between the parties and emphasizes party-generated and party-controlled solutions. Arbitration, on the other hand, generally involves a decision maker who may issue a binding result.¹⁷⁶ Arbitration “is perhaps the only stable and predictable framework for solving disputes involving so many different nationalities and geopolitical interests.”¹⁷⁷ However, mediation is an extremely popular method of dispute resolution within China,¹⁷⁸ and may be mixed with arbitration and litigation to create hybrid procedures.¹⁷⁹ The CICC reflects this practice and may be able to utilize existing popular means of dispute resolution more effectively than external organizations.

Aside from the CICC, a significant number of organizations, arbitration centers, and other dispute resolution mechanisms exist that may handle disputes arising from the BRI.¹⁸⁰ With numerous alternatives available within and outside China, some commenters note that the CICC “appears to have little *raison d’etre*.”¹⁸¹

175. Cohen, *supra* note 46.

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176. *Difference Between Arbitration and Mediation*, B.C. INT’L COM. ARB. CTR., <http://bcicac.com/about/what-is-mediationarbitration/difference-between-arbitration-and-mediation> (last visited Oct. 22, 2019).

177. Amaral, *supra* note 14.

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178. Chow, *supra* note 11 (“China’s mediation system is the most popular method for dispute resolution across a broad range of disputes, both domestically and internationally. Mediation is primarily used as a non-judicial dispute resolution method, but it is also routinely implemented during arbitration and trial processes.”).

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179. *Id.*

180. Mardell, *supra* note 98 (“Procedures vary according to the nature of the dispute and the parties involved, but broadly speaking, local courts and international arbitration centres are well equipped to handle contractual disputes.”).

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181. *Id.*

1. *External Dispute Resolution: Hong Kong & Singapore*

a. *Hong Kong*

The international community recognizes Hong Kong’s dispute resolution systems as very transparent and trustworthy.¹⁸² Parties with concerns about judicial experience and impartiality may consider going before a Hong Kong mechanism.

However, Hong Kong judgments do not count as Chinese judgments, and are therefore subject to civil procedure—including the complicated reciprocity issue accompanying award enforcement.¹⁸³ However, following *Kolmar*, Hong Kong judgments have an increased likelihood of enforceability. Proponents of Hong Kong mechanisms emphasize their “positive enforcement record . . . [and] historical advantage.”¹⁸⁴

For parties with concerns about the relative inexperience of the CICC and the judicial impartiality of Chinese judges examining Chinese investors or the government itself, Hong Kong is an attractive venue option. However, those selecting the venue must keep in mind the potential judgment enforcement challenges.

b. *Singapore*

Singapore interacts with PRC and BRI in multiple ways. The International Mediation Centre and Singapore International Commercial Court provide potential venues. The Mediation Centre is also a partner for the CCPIT in developing procedures and rules for examining conflicts and assisting disputing parties.¹⁸⁵

However, in the future, Singapore may find itself a competitor to Chinese dispute resolution mechanisms.¹⁸⁶ With the

182. See, e.g., SMITH, *supra* note 59, at 1 (describing the benefits of dispute resolution in Hong Kong). R

183. Tsang, *supra* note 85, at 201. R

184. *Id.* at 210.

185. See Ni et al., *supra* note 56 (describing the Memorandum of Understanding establishing this partnership); Iwamoto, *supra* note 36 (discussing the “BRI Mediator Panel” and its benefits). R
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186. Brown, *supra* note 17, at 111 (“Singapore continues to see its role [as of 2016] as a facilitator and partner for China with others in terms of projects and investments. The main risks it faces, however, are the increased competition that China will offer its own services sector industries as it continues to shift from a manufacturing and export based model to a high R

continued prospective development of the CICC’s three services—litigation, mediation, and arbitration—Singapore may already be a *competitor* rather than a *partner*.

International businesspeople and firms looking for a robust, well-developed international commercial court well known for its judiciary and decisions may want to consider selecting Singapore as their venue. However, as with Hong Kong, issues of enforcement of judgments against Chinese corporations and the PRC government remain. For reasons identical to those discussed above, parties may wish to reconsider the usefulness of the CICC as a forum—particularly as it begins operation with the Expert Committee.

V. CONCLUSION

Parties preparing for negotiation of contracts along the BRI should take care when choosing the venue for dispute resolution. They should first consider whether they prefer mediation, popular within China;¹⁸⁷ arbitration, popular among international law firms and an extremely common form of dispute resolution under bilateral treaties and multilateral agreements;¹⁸⁸ or litigation.

Choosing a venue for whatever dispute resolution mechanism the parties select is another crucial step. Parties should consider the ease with which they will be able to enforce judgments, the experience of the judges and the court, and their own willingness to venture into new dispute resolution territory. Parties working with the CICC may be pleasantly surprised by the process—or may have negative experiences.

Ultimately, China’s international business reputation rides on the success of the BRI and the CICC. Positive outcomes in either or both will improve China’s reputation in

value-added one. Singapore has to prepare perpetually for the day when China shifts from being a partner to a direct competitor.”).

187. Chow, *supra* note 11.

188. See Amaral, *supra* note 14 (citing examples of treaties that call for arbitration); Tao & Zhong, *supra* note 6, at 310 (“[I]nternational commercial arbitration, which has gained wide popularity among the international business community . . . is apparently a much more appealing dispute resolution mechanism to foreign investors, because, among other things, it offers better clarity and certainty in its procedure. It is therefore reasonable to expect that a large proportion—if not all—of international commercial contracts signed under the BRI would have adopted an arbitration clause.”).

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complex international commercial transactions. “Trade might not bring love—but it does bring a certain level of pragmatic, albeit grudging loyalty.”¹⁸⁹ The circumstances surrounding the Belt and Road, including its reception and design, are complex. However, it is a promising step forward for China within the international community and signals a possible shift in global power. The project constantly undergoes transformation—but “boosters for the BRI remain plentiful, and the project is not on the verge of failing any time soon.”¹⁹⁰

189. Brown, *supra* note 17, at 104.

190. Griffiths, *supra* note 26.

