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Dispute resolution mechanism in  
the Belt and Road Initiative

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# Introduction

In 2013 Chinese President Xi Jinping announced a new project that would influence the economic, political, and cultural shape of the Asian country and the rest of the world in the years to come. Called the Belt and Road Initiative (BRI), the project intends to link Asia, Africa, and Europe through a maritime and land route made up of infrastructures, roads, ports, and common development programs. Connecting the world through “One Belt One Road” requires a huge investment and the active participation of financial institutions. Thus, the Chinese administration set up specific BRI credit institutions such as Silk Road Fund and Asian Investment Infrastructure Bank and ensured the involvement of the main Chinese banks like the Export-Import Bank of China (EXIM) and China Development Bank (CDB). The investment projects take place in about 149 countries<sup>1</sup> located on different continents. According to a report of the Green Finance Development Centre, since 2013, total BRI engagement has reached USD962 billion, approximately USD573 billion in construction contracts, and USD389 billion in non-financial investments<sup>2</sup>.

Large infrastructure projects have been initiated and different cooperation agreements have been concluded<sup>3</sup>. Most of the investment had been made based on soft law instruments such as joint communiqués, joint statements, letter of intents, Memorandum of Agreement (MOA), Memorandum of Understanding (MOU), consensuses, and initiatives or bilateral agreements that were concluded before the BRI. This country-to-country approach represents one of the key elements of the Chinese Programme, meaning that the government concludes a different legal instrument with every country involved, adapting the content, principles, substantive and procedural provisions, and even the nature of the agreement to the contracting party. China was blamed for attempting to overturn the international

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<sup>1</sup> See a complete list at: <https://green-bri.org/countries-of-the-belt-and-road-initiative-bri/>

<sup>2</sup> Christoph Nedopil Wang, “China Belt and Road Initiative (BRI) Investment Report 2022”, *Green Finance & Development Center*, February 3, 2023  
<https://greenfdc.org/china-belt-and-road-initiative-bri-investment-report-2022/>

<sup>3</sup> *Ibid*

order by imposing itself as a new hegemon<sup>4</sup>. Certainly, a unique characteristic of the Belt & Road is that opposed to other similar initiatives, the Chinese Programme lacks a multilateral agreement. This characteristic implies the absence of a founding treaty, rules for the adherence of new members, long-term objectives, and uniform rules applying to all contracting members. As a matter of fact, the BRI can be classified more as a strategy, a partnership between the parties, and a massive and large infrastructure project to promote East-West connection, increase regional collaboration, and facilitate commerce and investment.

This institutional framework creates a legislative void in the policies' implementation as suppose differentiated rules based on the project involved. This absence of common policies implies a lack of common instruments such as a dispute resolution mechanism. Considering the impressive number of countries involved, the financial contribution, the massive infrastructure and investment plans, disputes between the investors and states, or between the private parties are unavoidable and may become very common along the Route. Still, the BRI as a partnership based on soft law instruments barely deals with dispute settlement. This aspect may increase the fears of the economic world in the Initiative, in particular the investors. The latter operates in an uncertain business environment as they know that in case of a dispute, the award is unpredictable and depends on the chosen resolution mechanism and of the host state.

This dissertation aims to understand how the arising disputes along the Belt and Road Initiative are currently settled. It tries to analyze the compatibility of the traditional resolution methods commonly employed in foreign investments with the Belt and Road Initiative. It shows the limitations of applying these methods to the disputes arising along the Route and underlines the need for a BRI-specific dispute resolution mechanism. After analyzing the institutional framework and the cases treated, the dissertation turns down the idea that such a specific method can be identified in the Chinese International Commercial Court.

With this in mind, the thesis is divided into three main chapters. Firstly, the key elements of the Initiative including its objectives, routes, and legal instruments will

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<sup>4</sup> Simone McCarthy, "China's Belt and Road is facing challenges. But can the US counter it?", *CNN*, August 22, 2022  
<https://edition.cnn.com/2022/08/22/china/china-belt-and-road-us-infrastructure-overseas-development-intl-hnk-mic/index.html>

be thoroughly analyzed. Secondly, the current dispute resolution mechanism in the international investment field will be explained. The first chapter provides a brief overview of litigation, international arbitration, and the mediation process. The procedural provisions concerning dispute settlement have changed from the first International Investment Treaties (IITs)<sup>5</sup>. Precisely, the State-to-State Dispute Settlement (SSDS) was the predominant resolution mechanism in the early agreements, meaning that an investor in a foreign country had to resort to his home state to protect the investment<sup>6</sup>. In the first stage, the investors had to apply to local national courts of the foreign state where the investments were located, which very often did not enjoy impartiality of judgment nor sufficient technical knowledge. Only after local remedies had been exhausted, they could ask for diplomatic protection. Through this process, the state took over the claims of its investor against the other state, while running the risk of creating political tensions at the international level<sup>7</sup>. As foreign investments grew, investors started to ask for a more direct and comprehensive protection which led to treaties that provide certain protections and benefits to foreign investors, including recourse to Investor-State Dispute Settlement (ISDS) to resolve disputes with host countries. In this case, the investor can directly sue a host state in case of an alleged violation of the treaty through arbitration, without the need for diplomatic protection of the home state (it may however intervene if the host state refuses to comply with the award). The parties can decide on ad hoc tribunals or apply to the International Centre for Settlement of Investment Disputes (ICSID). Along with arbitration, which was recently revealed to be the preferred method for investors, there are other traditional dispute resolution methods such as litigation before national courts and meditation. The World Trade Organization (WTO) has as well its resolution mechanism, however, it applies only to commercial disputes, and it only allows states to raise claims, not private parties.

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<sup>5</sup> Also called International Investment Agreements, the IIAs are bilateral or multilateral treaties that require state-parties to face specific standards of treatment to foreign investors from the other state-parties.

<sup>6</sup> Won-Mog Choi, "The Present and Future of The Investor-State Dispute Settlement Paradigm", *Journal of International Economic Law* 10, no. 3, (2007): 730-731  
<https://doi.org/10.1093/jiel/jgm024>

<sup>7</sup> *Ibid*

The second chapter will focus on the Chinese attempt to create a dispute resolution mechanism for the BRI cases: the Chinese International Commercial Court (CICC). International Commercial Courts (ICommCs) aim is to facilitate specific large-scale commercial development projects, the success of which is heavily reliant on foreign investment<sup>8</sup>. They have a hybrid nature, as being settled by the national legislators but dealing with international cases. Over time, national legislators appear to have understood that regular national courts do not provide an adequate forum for the resolution of potential transnational disputes arising from such projects. Therefore, they opted for the establishment of International Commercial Courts. Their main aim then, is to become a forum for the dispute settlement of international commercial cases, meanwhile overcoming a weakness of the international courts: the impossibility of private parties to find recourse<sup>9</sup>. The Chinese International Commercial Court, however, deviates from the classical commercial courts, going from its nature, specifically linked to the BRI, to some practical aspect as its members, language, and proceedings. Apart from the description of the CICC, the chapter will trace all the characteristics a case must hold to be accepted by the CICC's jurisdiction. In addition, a detailed narrative of the Court's proceedings, going from the submission of the disputes to the emission of the award will be provided.

In the third chapter, an analysis of the results will be presented. Specifically, the success and criticism of the Chinese International Commercial Courts will be examined, with a focus on its effectiveness in resolving BRI cases. Some possible interpretations of the reasons for its lack of attractiveness to foreign investors will be explained. Additionally, its weaknesses in comparison to other ICommCs will be highlighted.

Then, the conclusion will be drawn. Once again, the functioning of the dispute settlement in the Belt and Road Initiative will be presented. The need of finding a new resolution method that conforms to Chinese traditions and can fit the peculiar

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<sup>8</sup> Andrew Myburgh and Jordi Paniagua, "Does International Commercial Arbitration Promote Foreign Direct Investment?" *The Journal of Law & Economics* 59, no. 3 (2016): 597–599

<sup>9</sup> Georgios Dimitropoulos and Stavros Brekoulakis, "International Commercial Courts: The Future of Transnational Adjudication – An Introduction", *International commercial courts the future of transnational adjudication*, ed. Stavros Brekoulakis and Georgios Dimitropoulos (Cambridge: Cambridge University Press, 2022), pp. 1-26  
DOI: 10.1017/9781009023122

nature of the Initiative and the multi-cultural, political, and economic aspects of this massive infrastructure Project will be stressed once again.

As regards the consulted sources, one of the main problems in the redaction of this dissertation was the difficulty in finding materials. A lack of transparency and sources available in English made difficult the process of collecting information. Among the consulted books and articles an important contribution to this thesis was extracted from investment law specialized websites, and Chinese government official pages. For instance, the UNCTAD website, the Belt and Road Portal, Harvard International Law Journal, and the official page of the CICC and of the Supreme People's Court of the PCR provided an essential database for the legal instrument and documents BRI-related. Indeed, the most important findings of this work were obtained through the analyses of the CICC and SPC articles. In some cases, no evidence was tracked on the Chinese official website and some reports provided by the US Commission facilitate the process. The obtained results will be presented and discussed in the following chapters.





# Chapter I: Overview of the BRI

## 1.1 The Belt and Road Initiative

The Belt and Road Initiative (BRI) is an economic and diplomatic strategy that through economic agreements aims to enhance cooperation and connectivity among the parties and link China with other countries in the region and beyond. It was launched by Chinese President Xi Jinping and it is considered the country's major foreign policy initiative of the last few years. The project consists of an overland and a maritime route that runs through three continents (Asia, Africa, and Europe) and embraces developed and developing countries. The land route was first addressed by Xi Jinping during a speech to Kazakhstan's Nazarbayev University in September 2013<sup>10</sup>. A month later, the need for a maritime route, a sea-based network of shipping, was expressed by the Chinese president during a visit to Indonesia<sup>11</sup>. The Silk Road Economic Belt and the 21st century Maritime Silk Road were confirmed and combined into Belt and Road strategy in the Third Plenary Session of the 18th Central Committee of the Communist Party of China. More in detail, this cooperation is based on six economic corridors<sup>12</sup>:

*China - Mongolia - Russia Economic Corridor*: this area is characterized by huge investments in highway connectivity, construction, and transport facilitation to connect China's Economic Belt with Russia's Land Bridge and Mongolia's Prairie Road in win-win cooperation that aims to increase trading between the partners;

*New Eurasian Continental Economic Corridor*: the project involves different railway routes, extended over large geographical areas, starting from various parts of the country, running through Xinjiang, and ending in European countries;

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<sup>10</sup> Wu Jiao and Zhang Yunbi, "Xi proposes a "new Silk Road" with Central Asia", *China Daily*, September 8, 2013

[https://www.chinadaily.com.cn/china/2013xivisitcenterasia/2013-09/08/content\\_16952228.htm](https://www.chinadaily.com.cn/china/2013xivisitcenterasia/2013-09/08/content_16952228.htm)

<sup>11</sup> Wu Jiao and Zhang Yunbi, "Xi in call for building of new "maritime silk road"", *Usa China daily*, October 04 2013

[https://usa.chinadaily.com.cn/china/2013-10/04/content\\_17008940.htm](https://usa.chinadaily.com.cn/china/2013-10/04/content_17008940.htm)

<sup>12</sup> Henry Chan Hing Lee "Prospect of Chinese Rail Export Under "One Belt One Road"", in *China's One Belt One Road Initiative*, ed. Lim Tai Wei, Henry Chan, Hing Lee, Katherine Tseng Hui-Yi, Lim Wen Xin (London: Imperial College Press, 2016) pp.197-235.

*China - Central Asia - Western Asia Economic Corridor:* originating from Xinjiang, this route crosses Central Asia's countries (Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan, and Turkmenistan) and passes over the Persian Gulf, the Mediterranean Coast, and the Arabian Peninsula;

*China - Pakistan Economic Corridor:* a series of highways, railways, optical fiber networks, and oil and natural gas pipelines will connect the city of Kashgar in Xinjiang to Gwadar Port in Pakistan, this corridor is considered to be one of the biggest Chinese investments overseas;

*Bangladesh - China - India - Myanmar - Economic Corridor:* the countries involved reached an agreement on transport infrastructure, trade, and people connectivity in a south-south cooperation framework that will enhance the economies of the members;

*China - Indochina Peninsula Economic Corridor:* the cooperation has to be put in force through joint transportation networks, industrial projects, and fundraising to promote sustainable economic development;

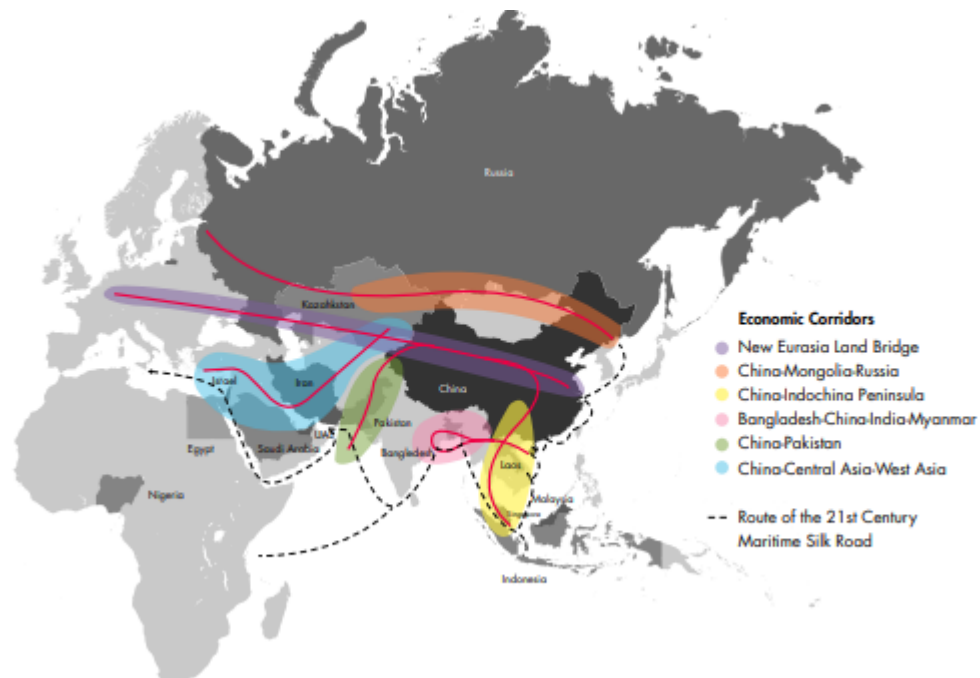


Figure 1: The six economic corridors of the BRI  
Source: DOI: 10.24294/jipd.v4i1.1180

The Belt and Road (BRI) relies on 5 inseparable and integrated elements contained in the Belt and Road Action Plan, a document issued on 28<sup>th</sup> March 2015 by the

National Development and Reform Commission (NDRC) jointly with the Ministry of Foreign Affairs and the Ministry of Commerce and which has since then shaped China's foreign policy and its international economic strategy<sup>13</sup>.

The mentioned principles are policy coordination, facilities connectivity, unimpeded trade, financial integration, and people-to-people ties. Policy coordination is essential to overcome the differences in technology and quality standards among the members. Truly, multilateral cooperation based on intergovernmental macro policy exchange and communication mechanisms creates common grounds between the partners and aids in the achievement of common standards and policies for the implementation of large-scale projects. As concerns, facility connectivity, this area is among the priorities in the development of the BRI<sup>14</sup>. It regards the construction of infrastructures, not only in the transport field but also in the energy sector as oil and gas pipelines, electricity networks, and telecommunication field as cross-border optical cable networks. Some countries along the Route lack infrastructure facilities and have natural barriers such as mountains, deserts, and rivers which cut them off from trade and travel. Therefore, building routes and other strategic infrastructure may improve the countries' economic situation meanwhile creating common infrastructure plans for BRI members, with the final aim to develop over time a solid infrastructure network integrating all Asian sub-regions and the continent to Europe and Africa. Unrestricted trade, based on the removal of obstacles to free trade between the BRI countries, is strictly required to enhance economic cooperation and promote investments along the Route. Measures such as removing trade barriers, lowering trade and investment costs, enhancing custom cooperation, improving bilateral and multilateral cooperation as regards accreditation, certification, and standard measurement, and promoting mutual recognition of regulation and assistance in law enforcement, may facilitate the creation of a free trade area along the Belt and Road and enhance the regional economy<sup>15</sup>. Financial integration represents the fuel of

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<sup>13</sup> Chi He, "The Belt and Road Initiative as Global Public Good: Implications for International Law", in *Normative Readings of the Belt and Road Initiative*, ed. Shan Wenhua, Kimmo Nuotio, and Kangle Zhang, (Cham: Springer International Publishing, 2018), pp. 85–104  
<https://doi.org/10.1007/978-3-319-78018-4>.

<sup>14</sup> Huping Shang, *The Belt and Road Initiative: Key concepts*, (Tianjin: Springer 2019), pp. 1-4.

<sup>15</sup> *Ibid*

the project. Considering the high costs of the Imitative, no country alone can afford it. Indeed, setting up financial institutions able to operate on the financial markets may attract private funds and encourage commercial equity investment funds needed for the implementation of the various projects<sup>16</sup>. By contrast, people-to-people ties are based on the friendly cooperation of the people living in BRI countries. The idea is to promote, among other, cultural, and academic exchanges, media collaboration, and volunteer services to facilitate the communication and cultural understanding of the different countries involved. Better awareness of the people living in other members of the BRI may improve the linkage between them and thus, facilitate the building of the Route.

Handed up to restructure the country's economy, the BRU aims to cope with the overcapacity of the Chinese economy. The system enables the production of a large list of goods such as railways equipment, building material, construction, and capital that cannot be absorbed by the domestic demand. The BRI presents itself as a solution, as the infrastructure projects along the route can fulfill the demand for these goods and shore up the domestic economy. In fact, in a healthy industry, more than 85 % of the production is absorbed by the domestic demand<sup>17</sup>. However, in the Chinese case, the percentage is below the standard. On export, the major Chinese trading partners are the United States, Japan, and European countries. Still, the export market of these countries has little room for growth<sup>18</sup>. By contrast, the developing countries along the Silk Route are lacking infrastructure, which makes them in need of Chinese exports of steel and coal<sup>19</sup> to build railways and highways. Relocation of the Chinese industrial activities may be a consequence of this project as the government aspires to shift the economic epicenter from the coastal regions to the western ones where labor and land are cheaper, environmental regulation lenient and the proximity to the Silk's partners can play a decisive role in reducing the shipping time. At the same time, moving the industrial and infrastructural complex into the inland provinces, where due to their small population and weak industrial bases the economic potential is huge, will cope with the recent immigration of low-value manufacturing from the coastal regions to foreign

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<sup>16</sup> *Ibid*

<sup>17</sup> Shang, *ref.20*, pp. 9-10.

<sup>18</sup> *Ibid*

<sup>19</sup> Steel and coal are among the most affected Chinese sectors of overcapacity.

countries. In the conditions of good connectivity and synergies reached China may relocate some low-end manufacturing capacities to BRI countries and focus on the fabrication of value-added goods.

The infrastructure projects along the route will enforce the logistical structure, allowing safe and quick arrivals to Europe, which is currently an important export destination for the Chinese market. This will ensure the country's energy supply, a buzzword in its national security. The economy is highly reliant on the imports of natural resources such as gas, oil, and mineral resources which are shipped by sea from Brazil, Australia, and the Middle East.<sup>20</sup> Therefore, the implementation of the Belt and Road Initiative sets up new land routes which leads to a diversification of the Chinese energy suppliers, meaning a decrease of the Chinese dependence on a single country and a reduction of the risks in case of a shortage. The Pakistan Economic Corridor is an essential hub for oil imports from the Middle East and its creation is part of national security as it will allow importing the oil without passing into the Malacca Strait which is dominated by the US.

The American influence in the China Sea and its dominance in international relations is another topic that China must deal with. Strengthening the partnership with the neighbors in the China South Sea might be a blueprint to reduce the US influence and elevate the country's status in the area, even if the existing territorial disputes are still a challenge to overcome<sup>21</sup>. Apart from maritime positions, the US dominates the major financial institutions, such as the WB, IMF, and the ADB<sup>22</sup> concurrently, China's voting rights in these institutions are not proportionate to its economic power. By funding the Silk Road Fund and Asian Investment Infrastructure Bank, the Asian government aspires to ensure alternative funds that are going to reflect its economic strength in the financial market, overcoming the imbalance mentioned above.

In the middle of the process, an internalization of the Renminbi will occur which once again will confirm the economic strength of the Chinese economy. In the official discourse, the government is underlining how the economic wellness of the countries involved is the main objective of the BRI. Speaking about the Route,

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<sup>20</sup> Shang, *ref 20*, pp. 9-11

<sup>21</sup> China has maritime disputes in the South China Sea with Japan, Vietnam, and the Philippines.

<sup>22</sup> In the Asian Development Bank, the US jointly with Japan are the major stakeholders.

Chinese President Xi Jinping refers to it as “a Chinese dream, a dream of peace, development, cooperation and mutual benefit, closely connected to beautiful dreams of people in other countries”<sup>23</sup>. Despite its declared intentions, the fear of a Chinese hegemony of the international economy and politics is still a lurking issue.

The government has been accused of neo-colonialism of developing countries, exploitation of natural resources, and support of regimes that violate human rights. The fact that requests for democratic elections, respect for human rights, minorities’ involvement in the political system, or environmental standards are not made by the Silk Route’s financial institution when issuing credit, increases the critics against the Project. The AIIB’s credits are extended without string conditions attached, as in the case of the Western institutions, being the utility of a future project in the BRI’s connectivity among the fewer elements considered. Some beneficiary countries, especially the African and Central Asia ones, are characterized by weak political systems, corrupt governments, and fragile economies, which make the restitution of the debt a difficult operation to be made. Moreover, a change in the government coalition may result in a disregard of the contracted obligations, which put Chinese investments at risk.

Thereby, it seems that the capacity of the developing countries to face the contracted economic obligations is underestimated by the Silk Route’s financial institutions in their function of enlarging funds. In the end, some countries receive more funds than they can repay, due to the economic fragility of their domestic markets in need of structural investments. The circle provokes the accumulation of unsustainable debt and economic dependence on the AIIB for emerging countries and a risky environment for the Chinese investor, which may put at risk the whole functioning of the system.

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<sup>23</sup> Ministry of foreign affairs of the People’s Republic of China, *The Chinese Dream Is a Dream of the People— President Xi Jinping Shares Stories of Liangjiahe in Seattle*, August 26, 2022 [https://www.fmprc.gov.cn/mfa\\_eng/topics\\_665678/zggcddwjw100ggs/xsd/202208/t20220826\\_10754300.html](https://www.fmprc.gov.cn/mfa_eng/topics_665678/zggcddwjw100ggs/xsd/202208/t20220826_10754300.html)

## 1.2 Legal basis

The Belt and Road Initiative is not based on a single agreement that clearly defines and regulates the project. Different from other forms of multilateral cooperation such as the EU or NAFTA which rely on a multilateral agreement, the BRI is more a strategy based on infrastructure development projects and carried out through bilateral agreements between China and the member countries. Indeed, the Chinese Project lacks a comprehensive institutionalization applying to all the participating countries, a formal adherence procedure, a founding charter with clearly defined principles and aims, publicly available key performance indicators to assess the progress of the different projects, and a timeline of development measured in decades for the long-term objectives<sup>24</sup>. All these elements contribute to the vagueness and ambiguity of the project and paradoxically represent one of its strengths. More in detail, the lack of institutionalization and stringent conditions encourage the great flexibility of the BRI, meaning that it can evolve with time, change its objectives under the wishes of the adherents, and follow the economic cycle<sup>25</sup>.

Undoubtedly, the bilateral dimension of cooperation is functional to build a partnership and avoids the imposition of a uniform model applied to all the countries. From another point of view, the lack of a multilateral agreement underpinning the countries' participation, creates no little confusion in the analysis of the legal context. The legal basis of the agreements varies depending on the specific project and the laws of regulations of the country involved. Sometimes the legal relationships are based on treaties or memorandum of understanding stipulated by the Chinese government and the partners while in other cases, there is an underlying contract or commercial agreement between companies. This may lead to a different treatment of a similar issue in different BRI countries, because of their legal agreement with China, creating then differentiated measures and provisions for the BRI's members.

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<sup>24</sup> Wade Shepard, "Why the Ambiguity of China's Belt and Road Initiative is Perhaps Its Biggest Strengths" *Forbes*, October 19, 2017  
<https://www.forbes.com/sites/wadeshepard/2017/10/19/what-chinas-belt-and-road-initiative-is-really-all-about/?sh=55ea84fbe4de>

<sup>25</sup> *Ibid*



Chinese investments abroad are protected by legal instruments such as foreign investment law, overseas investment insurance law, bilateral agreements, and multilateral treaties. Considering that the Belt and Road Initiative has not an underlying multilateral treaty, the implementation of the large-scale projects is done through soft law instruments and agreements concluded, recently or over the past decades, between PRC and other states. According to the UNCTAD reports, the government has stipulated 145 Bilateral Investment Treaties (BITs) – 106 of which are still in force – 25 Treaties with Investment Provisions (TIPs), and 21 Investment Related Instruments (IRIs) over the past years<sup>26</sup>. The benefits of these documents for the investors are the substantive and procedural standards they include. Since the first BIT concluded with Sweden in 1982 many changes have been made in terms of protecting investors. The arbitration clause in the first treaties, for example, was rare or limited to expropriation, a gap that was filled by the second-generation agreements.

The BITs stipulated from the late 1990s onwards regulated different possible types of conflicts between investor countries and included better aligned substantive standards with the international ones. Undeniably, the second-generation BITs, signed from 1997 to 2011, abandoned the previous restrictions amplifying the category of admissible investment disputes to arbitration<sup>27</sup>. The most recent BITs tend to strike a balance between the interests of investors and host countries. The China-Canada treaty is an example of a third-generation agreement that guarantees lower protection for the investor, but its arbitration clause covers different types of investor-state disputes.<sup>28</sup> As a matter of fact, the treaty not only provides a detailed regulation of the arbitration process, going from the submission of a claim to the enforcement of the final award, but it incorporates ISDS provisions that allow disputes in case of alleged breaches of specific treaty obligations that are listed in the BIT.<sup>29</sup> However, concerning BRI, the majority of members have no BITs with China or have a first-generation one, meaning that the Chinese investor and their outbound investments may not be protected by the ISDS mechanism

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<sup>26</sup> A complete list is available on: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china>

<sup>27</sup> See China-Switzerland BIT (2009)

<sup>28</sup> Shang, *ref.20*, pp. 207-211.

<sup>29</sup> See: China - Canada BIT (2012)

recently introduced. For instance, only the most recent Chinese BITs, such as the ones with Canada, Mexico, Tanzania, and the Cuba Modification Agreement include all the ISDS provisions typical of the Chinese third-generation agreements<sup>30</sup>.

Most of China's BITs provide several guarantees for investments made by a contracting state's investor in the territory of another state, such as “fair and equitable treatment”, “full protection and security”, “protection from expropriation”, and “transfer of funds”<sup>31</sup>. As concerns expropriation and other measures with similar effects, Chinese BITs align themselves with international standards, which means that these actions can be taken only (1) for a public purpose, (2) in a non-discriminatory manner (3) upon payment of prompt and effective compensation (4) and per domestic law, due process of law and with the general principles of the agreement<sup>32</sup>.

As regards multilateral investment treaties, China is a founder member of the Multilateral Investment Guarantee Agency (MIGA) and signatory of the Convention on the Settlement of Investment Disputes between States and National of the Other States (Convention). The former ensures guarantees for the non-commercial risks arising from overseas investment meanwhile the latter, provides a mechanism for the settlement of disputes between investors and host states. The Convention was formulated by the Executive Directors of the World Bank in 1965 and entered into force on October 14, 1966<sup>33</sup>. It established the International Centre for Settlement of Investment Disputes (ICSID)<sup>34</sup> which provides services for the conciliation and arbitration process between contracting states and nationals of other states, and due to its comprehensive regulation become very common among foreign investors. However, at present, the application rate of the Convention by the Chinese investors is not too high; there are only 17 cases of Chinese investors applying to ICSID as claimants against a host state<sup>35</sup>.

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<sup>30</sup> Yuwen Li, Cheng Bian, “China’s Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options”, *Netherlands International Law Review* 67 (2020):503–551, <https://doi.org/10.1007/s40802-020-00182-3>

<sup>31</sup> See: China- Uzbekistan BIT (2011)

<sup>32</sup> See: China - United Republic of Tanzania BIT (2013)

<sup>33</sup> <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf>

<sup>34</sup> <https://icsid.worldbank.org/>

<sup>35</sup> See the report at: <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china/investor>.

Even though previous accords continue to be significant, most of them were concluded before the announcement of the Chinese Initiative. At present, the BRI lacks explicit international law tools. As seen before, the BRI is not established through a treaty or other international law instrument, it lacks both a constituting and formal membership protocols. At this stage seems that China is not opting for hard law obligations in the BRI's implementation<sup>36</sup>. By contrast, an important role is played by the soft law instruments<sup>37</sup>. For instance, cooperation agreements such as joint communiques, joint statements, letter of intents, Memorandum of Agreement (MOA), Memorandum of Understanding (MOU), consensuses, and initiatives are widely promoted by the Chinese government in the BRI context. According to the Belt and Road Portal<sup>38</sup>, as of January 2023, the country has concluded more than six cooperation documents with 151 nations and 32 international organizations to jointly implement the Project all of them representing soft law instruments.<sup>39</sup> Their use once again underlines the great flexibility of the project. According to some scholars, not asking the parties to make hard commitments under binding legal obligations, may as well relieve the countries' fears of Chinese domination in the future<sup>40</sup>. As expected, considering the nature of the agreements, the parties may escape binding commitments that risk making them vulnerable in the future<sup>41</sup>.

The Chinese government often expressed the necessity to protect overseas investment. For instance, during the 20th National Congress, Chinese President Xi Jinping stated: "We will strengthen our capacity to ensure overseas security and protect the lawful rights and interests of Chinese citizens and legal entities

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<sup>36</sup> Wenge Zeng, "An analysis of the legal issues of China's overseas investment in the context of the "Belt and Road" Initiative", in *A legal analysis of the Belt and Road Initiative. Towards a New Silk Road?* ed. Giuseppe Martinico, Xueyan Wu (Switzerland: Palgrave Macmillan, 2020), pp. 199-219.

<sup>37</sup> Soft law refers to quasi-legal instruments such as agreements, principles and declarations that are not legally binding but still have practical and sometimes even legal effect.

<sup>38</sup> The website provides all the information about ongoing project and documents signed in the BRI context and it is directly guided by the Chinese National Development and Reform Commission (NDRC).

See: <https://eng.yidaiyilu.gov.cn/>

<sup>39</sup> pXinhua News Agency, "List of deliverables of Belt and Road forum", *Belt and Road Portal*, May 16, 2017

<https://eng.yidaiyilu.gov.cn/qwyw/rdxw/13698.htm>

<sup>40</sup> Giuseppe Martinico, "Comparative law reflections on the use of the soft law in the Belt and Road Initiative", in *A legal analysis of the Belt and Road Initiative. Towards a New Silk Road?* ed. Giuseppe Martinico, Xueyan Wu (Switzerland: Palgrave Macmillan, 2020), pp. 131-144.

<sup>41</sup> *Ibid*

overseas”<sup>42</sup>. Therefore, treaties include a provision like “constant protection and security in the territories of the other Contracting Party”<sup>43</sup>.

Precisely, Chinese domestic law disciplines the regulation, protection, and encouragement of foreign investments. The predominant scope of domestic regulation is to enforce the supervision of foreign exchange and to control the approval of investment projects. Until 2014 it was based on four levels: first, the approval of the State Council, then of the MOCFOM and the SAFE, the two institutions responsible for overseas investment management, next the approval of the functional departments - Ministry of Finance and Taxation, lastly the approval of the ministry of forestry, mining, and agriculture. Starting from May 2014 the management “filling first approval second” was embraced, which let the companies make their investment first and ask for the government approval secondary.

Investments concerning national sovereignty, security, social and public interests, and Chinese law and regulations, ones that could damage China’s relation with a country or could violate international agreements ratified by China about prohibited export products are excluded from this system. For their part, the protection norms guarantee safeguards for the investors through the establishment of measures such as the overseas investment insurance law. As a matter of fact, the main receivers of these measures are state-owned enterprises, which represent the main driving force of Chinese overseas investments. In terms of encouragement policies, provisions such as financial and fiscal measures, foreign aid, international agreements, providing information, and risk management are guaranteed.<sup>44</sup> Among these measures, there are the funds enlarged by the banks and strongly guaranteed by the Central State to enterprises that conduct foreign direct investments. Indeed, state-owned commercial banks like the Export-Import Bank of China offer low lending rates, quick approval mechanisms, and adjustable terms for OFDI projects.

As regards the tax system, the State Administration of Taxation (SAOFT) has implemented some tax relief policies to back up China's “Going Out Strategy”. One

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<sup>42</sup> ANI, “Protection of overseas Chinese nationals, BRI projects become top priority of China: Report”, *ANINEWS*, November 11, 2022

<https://www.aninews.in/news/world/asia/protection-of-overseas-chinese-nationals-bri-projects-become-top-priority-of-china-report20221111151457/>

<sup>43</sup> See: China - Netherlands Treaty (2001).

<sup>44</sup> Zeng, ed. Martinico, Xu, *ref.* 36 pp. 199-219.

of them is tax treaties: agreements stipulated between China and its partners in which it is established that in case of a conflict between domestic tax legislation and tax treaty, the company may choose the most favorable tax rate. The provision of information is another hallmark of this process, and an important role is played by MOFCOM which uses its global commercial consulate to come up with a list of overseas investment opportunities. Another measure to foster direct overseas investment is the new foreign exchange policy promulgated by the People's Bank of China. It envisaged the direct use of RMB for overseas investment under certain conditions<sup>45</sup> to reduce the exchange risk. Another important feature of the BRI process is the reduction of risk management thanks to the role played by the China Export and Credit Insurance Corporation (SINOSURE). Their main functions are risk prevention and financing expansion. As mentioned on its official web page, SINOSURE fosters Chinese exports "by means of export credit insurance against non-payment risks for China's foreign trade and investment cooperation"<sup>46</sup>. Moreover, SINOSURE is state-funded insurance, and it differs from other insurance companies because of its government recovery status similar to sovereign pursuit. In fact, Chinese enterprises abroad can also apply for insurance protection. The company backs up, especially small and micro - businesses in exploring the international market and offers support as regards credit limit approval and credit investigation in emerging markets. In addition, some measures to settle claims regarding compensation verification and aspects of loss determination were introduced to improve the overall claim settlement efficiency.

All the elements illustrated above underline and deepen the grand strategy of the BRI meanwhile shedding light on its weaknesses: the lack of a coherent program of overseas investments and permanent institutions. At present, BRI projects are carried out under bilateral cooperation different from the usual economic cooperation based on multilateral treaties and shared law principles. Most of all, BRI requires (1) a multilateral treaty between the parties, (2) a central body to regulate projects and create an assembly for deliberations and development (3) a

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<sup>45</sup> The policy can be used only by a non- financial company registered in a province that allows cross- border settlement accounts and which invest in a country which allows RMB outward direct investment account settlement.

<sup>46</sup> See more at <https://www.sinosure.com.cn/en/Sinosure/Profile/index.shtml>

dispute resolution mechanism that ensures a minimum legal certainty<sup>47</sup>. To the best of our knowledge, the authorities have not specified yet if the project will continue to rely on existing legal instruments or if new institutions and legal arrangements would be created. Meanwhile, the absence of a common framework of rules and permanent institutions is hardening dispute arbitration, a matter that will be better analyzed in the next paragraphs.

### 1.3 Current resolution mechanism

As seen before, BRI is an economic partnership whose implementation is based on cultural integration and the legal protection of the parties. The execution of the projects along the Route implies a wide range of matters comprising investment, intellectual and property rights, product safety standards, trade, tax law, and competition laws. A successful collaboration between the partners requires deep coordination of the different states' departments and regulation of the enterprises and individuals involved. In a cooperation like this, disputes are inevitable, and the arbitration of the national court can be inadequate to solve them, due to the differences in the juridical, economic, social, and cultural environment of the countries involved.

As it stands, the absence of a BRI-specific dispute resolution mechanism able to give impartial and transparent awards represents a chink in China's armor. Considering the multicultural nature of the involved countries, creating a conflict resolution structure that works for not just one country but many of them are unavoidably difficult. At present, disputes along the Route are settled using traditional instruments, such as the appeal to host countries' courts, investor-states arbitration, and mediation. Currently, establishing a regulatory mechanism is hindered by various challenges, going from a lack of transparency in the decision-making, the elevated cost of international arbitration, and risk exposures to the state sovereignty, as well as the inadequacy of current resolution mechanisms<sup>48</sup>.

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<sup>47</sup> Malik Dahlan, "Envisioning foundations for the law of the Belt and Road Initiative: rule of law and dispute resolution challenges", *Harvard International Law Journal Essay* 62 (2020).

<sup>48</sup> Malik Dahlan, "Dispute regulation in the institutional development of the Asian infrastructure investment bank: establishing the normative legal implications of the Belt and Road Initiative" in *International organizations and the promotion of effective dispute resolution*, ed. Peter Quayle and Xuan Gao (Leiden: Brill, 2019), 121-144.

Therefore, to overcome these weaknesses is imperative to develop an independent and transparent resolution system, based on investor-state dispute settlement provisions and mediation.

The International Academy of the Belt and Road Initiative, a research institution of the Belt and Road Initiative founded in 2016, set up a platform, created by experts from different countries which aims to provide expert consultation to the countries and institutions involved in the BRI process. In its first declarations, all the participants agreed that a sound dispute mechanism is indispensable to enhance profitable cooperation between the countries, companies, and individuals involved in the BRI. To achieve that, a working group (WG) was created with the task of proposing a resolution mechanism that could embrace the differences between the partners. The WG underlined how the absence of a resolution mechanism may provoke obstacles in matters such as trade, investment, intellectual property, and contractual structures. Then, the WG stressed the necessity of taking into account: traditions, cultural background, and characteristics of the legal system and legal environment of the countries involved, in creating a new mechanism. The project must include (1) a mechanism for dispute settlement in every country's jurisdiction, (2) mediation, (3) arbitration, and (4) an appellate court<sup>49</sup>. According to the experts, the illustrated system must deal with all kinds of disputes, regardless of their classification or the parties involved. However, this system is far from being smoothly implemented, as various controversies increase the risk of the project's success.

Speaking about that, disputes along the BRI implementation may occur between governments, enterprises, host states, and investors. These can be classified into commercial, international trade, and investment disputes, depending on the nature of the disagreement. The first type of dispute reflects the conflict between enterprises, the second refers to disputes between the contracting states, and the last type comprises disagreements between the host state and foreign investors. The last type of dispute is more complex and may regard a claim of the investor against the host state in matters such as tax policies, administrative rules, or judicial decisions, actions, or omission of them which may have deteriorated the economic profit of

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<sup>49</sup> Guiguo Wang, Yuk-Lun Lee, Mei-Fun Leung, *Dispute Resolution Mechanism for the Belt and Road Initiative*, (Singapore: Springer, 2020), 1-2

the investor. In this sense, the absence of specific obligations under a treaty gives authority to the local court which takes decisions based on its local rules, being the only option for the investor to appeal. By contrast, in case of an investment dispute and an existing agreement between the host and the home state, the mechanism of the resolution may be arbitration with the host states. Thus, based on the nature of the controversy, a different resolution mechanism would be required. Therefore, a Belt and Road resolution mechanism should consider elements such as the interests of the parties involved, the nature of the controversy, and the legal instrument involved in solving a dispute.

### 1.3.1 Litigation in national courts

The ongoing trend of the last international investment treaties is the inclusion of an arbitration forum for dispute settlement between the investor and the host state. As seen before, the BRI is characterized by soft law instruments and only few modern bilateral agreements, meaning that just few of them refer to an arbitration forum. In these cases, an investor can always appeal to the national courts of the host state for a dispute settlement. Then, disputes arising in the Belt & Road project, unless it involves specific obligations under a treaty, can be settle by the local courts of the host countries in accordance with their local law. Moreover, according to some scholars, domestic courts have jurisdiction on some issues concerning cross-border investment<sup>50</sup>. Besides, critics of the arbitration stress that given the domestic courts' ability to solve investments disputes, there is no need to appeal to international tribunals<sup>51</sup>. It is worth noting that most of the older BITs follow the exhausting of local remedies rule, which states that investors must exhaust all domestic legal remedies before submitting to international arbitration, a typical clause of the first-generation BITs signed in 1970<sup>52</sup>. Most of the Chinese BITs are

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<sup>50</sup> Gabrielle Kaufmann-Kohler, Michele Potestà, "Investor-State Dispute Settlement and National Court" *European Yearbook of International Economic Law*. (Cham: Springer: 2020), pp. V-VI  
[https://doi.org/10.1007/978-3-030-44164-7\\_1](https://doi.org/10.1007/978-3-030-44164-7_1)

<sup>51</sup> *Ibid*

<sup>52</sup>A. Saravanan, S.R. Subramanian. "International legal framework relating to the protection of foreign investment" in *Role of domestic courts in the settlement of investor-state dispute: The Indian scenario*, ed. A Saravanan, S.R. Subramanian (Singapore: Springer, 2020), pp 9-32  
<https://doi.org/10.1007/978-981-15-7010-0>



silent about judicial remedies<sup>53</sup> and some of them require the exhaustion of the “domestic administrative review procedure specified by the laws and regulations” of the host state<sup>54</sup>. Moreover, some of the Chinese requires to exhaust the domestic remedies within three months<sup>55</sup>.

The appeal to the national courts may present some concerns as their effectiveness in solving an investment dispute depends on some factors as the independence and impartiality of the judicial system, and the investment’s protection included in the country’s law and regulations. Furthermore, even if the investor prevails in court, the national executive may disregard the court’s decision. To avoid bias awards or inefficiency in the domestic courts, foreign investors prefer to relay on alternative dispute resolution mechanisms such as international arbitration.

In the BRI context, the appeal to the host state courts appears to be inadequate as the projects take place in nations with different legal systems, like:

- common law countries such as Pakistan, Malaysia, and Myanmar,
- continental countries represented among others by Kazakhstan, Uzbekistan, Kyrgyzstan, Turkmenistan, Tajikistan,
- Islamic law countries like Iran and Afghanistan,
- mixed and hybrid jurisdiction as Oman and Brunei.

Given the differences in their jurisdiction, similar cases brought to different host states’ courts may produce different results, thus compromising the efficiency of the method and consequently the investors’ trust<sup>56</sup>. In addition, among the member states some of them are developing countries suffering from a lack of resources, and qualified personnel as well as other system deficiencies, factors that might produce unsatisfactory decisions resulting sometimes in injustice, and a higher risk to investors’ interests. In particular, the high-value, multi-party, multi-jurisdictional character of the projects of the route contrasts the multi-cultural, political,

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<sup>53</sup> IISD, “Exhaustion of Local Remedies in International Investment Law IISD Best Practices Series - January 2017”, *International Institute for Sustainable Development*, 2017 <https://www.iisd.org/system/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf>

<sup>54</sup> See China - Côte d’Ivoire BIT (2002)

<sup>55</sup> See Protocol to the Agreement between the Belgium–Luxembourg Economic Union and the Government of the People’s Republic of China on the Reciprocal Promotion and Protection of Investments (2006).

<sup>56</sup> Wang, *ref. 49*

investment, and legal systems of the parties. Moreover, the international nature of the BRI itself increases the possible complications due to the vast number of routes and the many stakeholders involved. Particularly, in large-scale infrastructure projects disputes may arise at different stages: from the market entry, the construction and financing phase, and the implementation and coordination of the policies. The uncertainty of the award and the vast differences in legal systems' strengths and reliability, make litigation in a BRI-host country extremely risky for the investors especially when it comes to the recognition of a foreign judgment.

Nevertheless, the domestic courts still play a fundamental role during the arbitral proceedings. Certainly, unless and until courts are willing to enforce arbitration agreements, there may be no arbitral processes in which national courts can help, and no arbitral awards that can be overturned, recognized, or enforced<sup>57</sup>. Moreover, during an arbitral process, a party may advance a request to national courts for provisional measures or other reliefs before issuing an arbitral award. The intervention of the domestic court is useful at this stage to ensure the appropriate conduct of the arbitration. For example, the court may assist in taking evidence or ordering interim steps and such reliefs are occasionally utilized to suspend or halt concurrent court procedures<sup>58</sup> primarily via anti-suit injunctions<sup>59</sup>. Though the parties are free to address the national courts in any circumstance, in practice they would do it in two circumstances: in case of urgency prior to the formation of arbitral tribunals and secondly, when the tribunal lacks authority or power to grant requested remedies<sup>60</sup>. Most of all, the local courts play an essential role in the enforcement of the awards, involving the recognition and the execution process<sup>61</sup>.

Through the recognition the award is acknowledged as final, binding, and enforceable within the confines of the legal system of the enforcement state

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<sup>57</sup> George A. Bermann, "The role of national courts at the threshold of arbitration", *The American Review of International Arbitration* 28, no.3, (2017)

<https://arbitrationlaw.com/library/role-national-courts-threshold-arbitration-aria-vol-28-no-3>

<sup>58</sup> A. Saravanan, S.R. Subramanian. "Interaction between domestic courts and investment arbitration tribunals" in *Role of domestic courts in the settlement of investor-state dispute: The Indian scenario*, ed. A Saravanan, S.R. Subramanian (Singapore: Springer, 2020), pp 33-77 <https://doi.org/10.1007/978-981-15-7010-0>

<sup>59</sup> It refers to a provisional measure issued by arbitral tribunals to prevent the parties from initiating or pursuing recourse before State courts or other international tribunals pending resolution of a dispute before a particular arbitration forum.

<sup>60</sup> Saravanan, *ref.* 58, pp 33-77

<sup>61</sup> *Ibid*

meanwhile the execution involves the identification of assets or the equivalent amount of award that is directed to be released to the award debtor<sup>62</sup>. Though the states are part of different international agreement including matters as the enforcement of a foreign award on their national jurisdiction, as the ICISID Convention or the New York Convention (which will be discussed in the next paragraphs) the awards' implementation can be a difficult and long process<sup>63</sup>. In fact, a coordination of the national courts and the investment arbitration tribunals will improve the dispute settlement mechanism.

Then, considering the number of the countries involved in the BRI and their different jurisdictional system, a litigation before their national courts may create uncertainties for the foreign investor which prefer to apply for international arbitration, while a coordination between the members' national courts is not only desirable but increases the investors' trust in the host states juridical systems.

### 1.3.2 International arbitration

The intensification of the commercial and investment relationship between the countries over the decades led to the creation of a multitude of multilateral organizations, institutions, commissions, and working groups committed to finding effective schemes for resolving increasingly complex disputes of significant economic value as an alternative to national courts' litigation. Among the various options available, arbitration in its various forms has without a doubt enjoyed the most success. Thanks to its peculiarities of velocity and flexibility and a worldwide and specialized community of jurists, international commercial arbitration has emerged as the most popular mechanism in the global economic market. A commercial dispute regards inter-enterprises disputes related to commercial transactions such as trade, intellectual property protection, divisions of enterprises, sale, and purchase of equipment and so on. The arising disputes are usually regulated in a contract between the parties, in which it is specified the resolution mechanism, and the governing law. Alongside classical international commercial

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<sup>62</sup> *Ibid*

<sup>63</sup> *Ibid*

arbitration, investment arbitration focused on resolving disputes between states and foreign investors has also gradually emerged and more and more BITs and FTA agreements introduced investor-states arbitration clauses. Such agreements usually define the rule of the process: the institution to be chosen, the conditions, and applicable rules and laws. In most cases, if not envisaged differently in the treaties, the customary rule is part of the applicable law. The great advantage of an arbitration process is its flexibility, the parties can decide the creation of an ad hoc tribunal and the rules to follow. Over the last years, the most common regimes used were: (1) the International Centre for Settlement of Investment Disputes (ICSID), (2) other institutions organized according to UNCITRAL arbitration rules, (3) other institutions set up under the arbitration rules, such as the Arbitration Rules of the Stockholm Chamber of Commerce (SCC). The ICSID Centre also called the Washington Convention, which was signed in 1965 and entered into force the next year, is considered to be the most comprehensive instrument in this sense. The Convention was conceived by the World Bank directorate as a supranational method of dispute resolution, which would ensure fair and equal treatment between the public party (host state) and private party (investors). Assuredly, the purpose of the Convention is to foster international cooperation for economic development and provide a better arbitral venue to settle disputes arising from foreign investment. According to the Convention, the parties are obliged to introduce and recognize an ICSID award in their domestic legal systems, which unlike non-ICSID awards must be made public. In addition, different from a national tribunal, the Washington Convention does not envisage an appellate body, the only means of appealing an arbitration award are the review and the annulment, Articles 51 and 52 respectively disciplines the specific cases.

Other developments such as the adoption of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and additional international law instruments negotiated within organizations such as the United Nations Commission on International Trade Law (UNCITRAL), fostered the wide use of arbitration. Around 60 of BRI's countries are signatories of the "Convention

on Recognition of the New York Convention<sup>64</sup>. In signing the New York Convention, China opted for a commercial clause, declaring the document is to be applied only to a legal relationship that is considered commercial according to its domestic law. Specifically, Article 2 of the Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China, specified that investment disputes between investors and host states are excluded from commercial disputes.

For a long time, China has maintained a silent approach to this multilateral system, without making its specific weight felt in shaping the dispute settlement methods applied to international trade. Among the reasons, a skeptical view towards Western arbitration can be found. The proceedings are perceived as distant and incompatible with the traditional Confucian moral values that promote harmony and repudiate divisions. Moreover, another reason is that before the Chinese late integration into the global economic system, the country was a passive player in international trade dynamics and not directly affected by the same disputes.

The first Chinese arbitration processes were limited to commercial disputes between private parties and for years the Chinese system has distinguished itself from the rest of the countries by cultivating a dual-track approach. In particular, the 1994 Arbitration Law provided two separate systems to regulate domestic and international arbitrations, with differentiated rules and treatment based on the identification of "foreign" (foreign-related elements). This peculiar approach, characterized by a "selective adaptation", in the years to come would allow China to combine international openings and local restrictions, contributing along with other enforcement and procedural restrictions, to its reputation as a country not particularly conducive to arbitration. The first investment institution in exploring investment arbitration was the Shenzhen Court of International Arbitration (SCIA), located in Shenzhen, Guangdong Province, which in 2016 updated its arbitration rules and expanded its jurisdiction to include arbitration proceedings relating to foreign investment disputes, intended as disputes between states and investor of

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<sup>64</sup> The Convention was signed in New York in 1958 and aims to create a common legislative framework for the recognition of arbitration agreements and ensure that a foreign award would be recognized and enforced in a member state in the same way as a domestic award.

To see more: <https://uncitral.un.org/>

other states. Subsequently, the SCIA asserted that it could manage all types of disputes in compliance with the UNCITRAL Arbitration Rules.

A leading arbitration institution in the current Chinese system is the China International Economic and Trade Commission (CIETAC) which released the International Investment Arbitration Rules of the China International Economic and Trade Arbitration Commission, entering into force in 2017. The CIETAC's reason for publishing its own investment arbitration rule is to take advantage of the market's significant potential in China and to support the rise in Chinese parties' involvement in investment disputes<sup>65</sup>. By formally publishing its investment arbitration rules in September 2019, the Beijing Arbitration Commission followed the CIETAC's example with the intent of creating a non-ICSID investment arbitration in China. However, the institution's attempts did not receive a favorable response from the community as no arbitral practice has been developed. The reasons are strongly ingrained in Chinese law and court practice concerning non-ICSID arbitration. For instance, article 2 of CLA states as follows:

Contractual disputes and other disputes over rights and interests in property between citizens, legal persons, and other organizations that are equal subjects may be arbitrated.<sup>66</sup>

This provision explains the impossibility of investment disputes' arbitration between private investors and host countries under Chinese law. According to it, even in the presence of arbitration agreements between investors and host countries, if it is regulated by Chinese law, non-ICSID investment arbitration is not arbitrable.

Moreover, despite the existence of an extensive range of procedural rules available for investment arbitration, the obstacle put by the national courts in enforcing interim measures debilitates the overall functioning of the system. In particular, most of the arbitration rules envisage a delegation of power to the arbitral

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<sup>65</sup> Meng Chen, "The reforming Chinese chapter of international dispute resolution under the Belt and Road Initiative", *The Pacific Review*, 34, no. 3 (2021): 469–489  
<https://doi.org/10.1080/09512748.2019.1677749>

<sup>66</sup> See the article at: [http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383756.htm)

tribunals which are asked by the parties to grant interim measures, ensuring property and evidence security, for example, through arbitral decisions or other decision-making mechanisms, prior to the emission of the final award that settles the dispute<sup>67</sup>. If arbitral tribunals issue interim orders like arbitral awards, parties may wish to file applications with Chinese courts to enforce arbitral awards under the New York Convention and relevant Chinese laws<sup>68</sup>. Still, the Chinese Arbitral Law does not envisage an attribution of power to Chinese courts to grant interim measures, meaning Chinese courts are not authorized to enforce interim decisions in different forms except for arbitral awards. So, in case of receiving a request for interim measures, the arbitral tribunal will address them to the competent domestic court. In addition, Chinese legislation is silent about whether Chinese courts will approve interim measures for ad hoc arbitration or arbitration conducted by a foreign institution.

These features make the Chinese arbitration framework different from the common arbitration rules, its weaknesses being: the absence of interim measures, delegations inside the various divisions of the Chinese court, the impossibility of an appeal to the courts' awards, and inconsistent arbitral judicial review standards<sup>69</sup>. Nevertheless, over the past decades, the Chinese arbitration market has experienced an unprecedented explosion of arbitration institutions. Indeed, their number increased to 250 in 2019, which represents about the maximum envisaged by the Chinese Arbitration Law (CAL)<sup>70</sup>. Besides, in 2017 of the 239,360 arbitration cases brought before the Chinese court about 3,188 of them were related to foreign trade<sup>71</sup>. Moreover, of the 2,962 cases administered by the CIETAC, 522 of them were associated with foreign trade. Considering the increase of the arbitral market, the Supreme People's Court (SPC) decided to overcome the dual approach and adopted the following reforms aimed at the improvement of the arbitration system:

*The Notice of the Supreme People's Court on Issues Concerning the Centralized Arbitration Judicial Review Cases* was published in May 2017. The document

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<sup>67</sup> Chen, *ref.* 65

<sup>68</sup> *Ibid*

<sup>69</sup> *Ibid*

<sup>70</sup> *Ibid*

<sup>71</sup> *Ibid*

centralizes all legal review cases, comprising set-aside and enforcement reviews — in particular adjudicatory divisions. The mentioned divisions are usually the fourth-civil tribunals of the Chinese courts, which oversee foreign trade commercial cases. Therefore, the enforcement departments of the Chinese courts become responsible for all the enforcement cases. Then, if after that the enforcement departments acquired the enforcement applications, a party refuses to comply with the award and makes an appeal, the case will be returned to the competent judicial authority for judicial review under Chinese law. This process allows for overcoming the ambiguous division of the different departments inside the Chinese courts, giving each department specific competencies.

*The Relevant Provisions of the Supreme People’s Court on the Handling of Arbitration Judicial Review Cases* was published in December 2017. The document's purpose is to give a unified version of the arbitral judicial review standards. It contains the exceptional cases specified in the Chinese Arbitral Law (CAL) and the Civil Procedure Law of the People’s Republic of China (CCPL) for the invalidation and the subsequent denial of the enforcement of an arbitral award. Indeed, it gives guidelines containing the elements that are easily misused during an arbitration process, such as the falsification of the evidence.

*The Relevant Provisions of the Supreme People’s Court on the Report of Arbitration Judicial Review Cases* was published in December 2017. The SPC, through this document, wishes to apply the same arbitral reporting system for international trade issues to the domestic arbitral awards. In particular, the current reporting system imposes on the court to report the negative verdicts concerning foreign trade issues to the SPC, which must review them. Then, the document includes remedies for courts’ negative verdicts on domestic issues and requires that only negative decisions on strictly domestic issues and arbitration agreements must be presented to the SPC. The system of reporting remedies for foreign-related issues is underlining the ongoing trends in China’s Court system to support arbitration concerning foreign arbitration.

*Relevant Provisions of the Supreme People’s Court on the Enforcement of Arbitral Awards* was published in February 2018. The document aims to rationalize the arbitration enforcement proceedings. It prohibits presenting the same challenging



reasons in an annulment and enforcement process as well as proposing repeating applications for the refusal of the same award.

After the reforms were implemented, according to the commercial arbitration statistics published by CIETAC related to the judicial review cases and foreign trade awards after 2014, only in a few cases the Chinese courts denied the enforcement of foreign trade awards<sup>72</sup>. According to data provided by the SPC concerning the years from 2013 to 2016, only 5.33 % of the foreign-related arbitral applications were settled aside by the Chinese courts which refused as well to enforce 0.14 % of them. The presented data underlines the changes in the Chinese arbitral judicial system after the revolution started by the SPC. Without a doubt, the Chinese arbitration authorities assumed more responsibility in resolving international disputes which is essential considering the transnational nature of Chinese economic business activities. Still, the Chinese enforcement of the arbitration award system is far away from being perfect.

As a rule, according to Article 283 of the Chinese Civil Procedure Law, the People's Courts recognize the enforcement of foreign awards only in case of a bilateral judicial assistance treaty or by applying the reciprocity principle. Considering the commercial reservation declared by the People's Republic of China on the New York Convention, in the absence of a bilateral treaty, the enforcement of non-ICSID investment arbitration awards is entirely subject to the principle of reciprocity's interpretation given by the domestic courts. The BITs including arbitration clauses are an exception, for instance, the government has signed commercial bilateral judicial assistance treaties with only 12 countries<sup>73</sup>.

A reluctance to include provisions different from expropriation in its BITs creates a gap in the arbitration system as a violation of other provisions different from expropriation is not subject to the investor-state arbitration mechanism, limiting therefore the coverage area of the resolution mechanism. As concerns the application of the reciprocity principle, in enforcing the foreign awards the government is opting for "factual reciprocity". More specifically, the Chinese People's Court is considering and enforcing only the foreign judgments of those

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<sup>72</sup> *Ibid*

<sup>73</sup> The 12 countries include East Timor, Bangladesh, Afghanistan, Nepal, Maldives, the Kingdom of Bhutan, Iraq, Jordan, Pakistan, Latvia, Bosnia and Herzegovina and the Republic of Montenegro

countries whose courts have previously recognized and enforced a Chinese award<sup>74</sup>, limiting in this way the enforcement of the awards of BRI countries' courts which did not enforce a Chinese award. Another obstacle to the enforcement of foreign awards is represented by the Chinese choice to embrace the absolute immunity doctrine, which excludes states from adjudication by foreign authorities. The same theory establishes that in any enforcement procedures, state assets are protected from execution in enforcement proceedings unless they agree to waive this immunity. Therefore, Chinese courts refuse to apply their jurisdiction in cases involving foreign states which resisted foreign jurisdiction or resisted relinquishing immunity. This implies a denial of the Chinese judges to accept assets for investment arbitration belonging to states which have not declined their enforcement immunity — enforcement may occur only if those assets are qualified for commercial uses.<sup>75</sup>

Considering the gaps in the arbitration legislation and the differences between the Chinese and the common international practice issues such as the enforcement of interim measures decisions, arbitrability of investment disputes, theory of limited sovereign immunity, and enforcement of non-ICSID arbitral awards under the New York Convention, must be addressed to improve the entire Chinese arbitration system<sup>76</sup>.

BRI countries understand and institutionalize differently the international rules. Regulations, and practical approaches to the legal framework of one country can clash with the interpretation given by other BRI members. Once again, the current dispute resolution mechanism proves itself deficient in taking into consideration the distinct development and nature of all the countries involved. The participation of BRI countries in different regional organizations, such as the European Union, the African Union, the Arab League, and the Association of Southeast Asian Nations may represent other obstacles in creating unifying regulations. In particular, the affiliation with these organizations might influence the state's ability to pledge to a new resolution mechanism<sup>77</sup>.

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<sup>74</sup> Dahlan, *ref* 47

<sup>75</sup> See the FG Hemisphere Associates LLC vs. Democratic Republic of the Congo of 2001 case.

<sup>76</sup> Chen, *ref.* 65

<sup>77</sup> James Crawford AC, "China and the development of an international dispute resolution mechanism for the Belt and Road construction", in *China and international dispute resolution in*

To conclude, the absence of a neutral dispute settlement mechanism and a coherent legal framework based on principles accepted by all the parties and the failures in the current resolution mechanism landscape put at risk the harmony of the strategy. Moreover, in establishing a new mechanism or disputing within the existing legal framework it is essential to keep in mind that, given the cultural characteristic of the Chinese system, any approach different from its socio-cultural and legal tradition, based on the soft low dispute mechanism, will probably be refused.

#### 1.4 China's preference for mediation

Mediation between the parties seems to be the preferred option by the Chinese management due to its flexibility and its cultural nature. Indeed, as opposed to arbitral awards which are winner-take-all, mediation enforces a collaboration between the partners and avoids bureaucratic and legal burdens, perfectly fitting the Chinese culture of restoring harmony. The use of mediation in the BRI dispute matches Chinese cultural and Asian norms. Confucian values, deeply eradicated in Asian Culture, promote the research of harmony and compromise, and criticize confrontation, showing fury and the pursuit of personal gain. In fact, according to them, an optimal result is achieved through moral persuasion, not public authority.

Asian culture advocates for harmony in human relationships which lay a foundation for the use of mediation in the economic field. This can be a reason why China prefers to rely on a network of relationships (*guanxi*) in reaching an agreement rather than imposing the rule of law<sup>78</sup>. Apart from being a Confucian value, mediation is considered typical of Eastern Countries. There, in fact, it plays an important role in their judicial system<sup>79</sup>.

Considering that some countries influenced by Eastern values take part in BRI, employing mediation as a dispute mechanism can be appropriate to reflect this

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*the context of the 'Belt and Road Initiative'*, ed. Wenhua Shan, Sheng Zhang, Jinyuan Su (Cambridge: Cambridge University Press, 2021), pp. 11-22

<sup>78</sup> Henneke Brink, "Dispute resolution in the Chinese Belt and Road Initiative: The Role of Mediation", *Corporate Mediation Journal*, (2021): 45-51

<sup>79</sup> *Ibid*

trend. As regards methodology, mediation makes recommendations and aims to create solutions beyond legal remedies<sup>80</sup>. In a mediation process, both parties play an active role in finding a solution through a confidential, unbiased, and neutral process. Surely, this method is optimal when both parties wish to maintain control over the result or are uncertain of the outcome in an arbitration process. The parties can conserve self-determination as no decision is imposed on them by a judge or a tribunal, thus excluding risks of political interference. In addition, mediation avoids the high costs of arbitration, gives a fast resolution, and most important consent to the maintaining of good relationships between the partners.

To be accepted and supported by the international community, the mediation rules must be separated from the arbitration ones, and the government must widely spread them to obtain public trust. For instance, a mediator should not participate in the subsequent arbitration, and if a mediation starts in the middle of the arbitration process, the arbitrator should not take part in it. In addition, during the mediation process, the parties must be bound by a confidential path: the position of the parties, the evidence brought, and the concessions made should not be used during the arbitration proceeding<sup>81</sup>.

The mediation process usually starts with the consent of the parties assisted by a neutral entity with no determinative power on the result. A typical mediation procedure includes initiating the mediation process, organizing the mediation, choosing a mediator, and reaching an agreement with the parties' consent. The parties maintain their autonomy and can freely withdraw at each moment if unsatisfied. Moreover, the outcome of a mediation process is a compromise between the parties which allows for the preservation of the ongoing relationship.

In some jurisdictions, it is the first mandatory step before bringing the case to the courts. In Hong Kong, for instance, in all civil lawsuits, the parties must conduct a mediation first, and only if it fails the case can be brought before a court<sup>82</sup>. The Chinese system recognizes four types of mediation: (1) people's mediation, (2) administrative mediation, (3) judicial mediation, and (4) institutional mediation<sup>83</sup>.

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<sup>80</sup> Dahlan, *ref. 48*

<sup>81</sup> Wang, *ref. 49*, pp. 4-6

<sup>82</sup> *Ibid*

<sup>83</sup> Chen, *ref. 65*

People’s mediation and administrative mediation regulate issues implying land use or labor disputes. By contrast, issues regarding international trade and investment require the mediation of Chinese courts and arbitration institutions.

The “Civil Procedure Law of the People’s Republic of China (CCPL)”, “Law of the People’s Republic of China on Labour-dispute Mediation and Arbitration” and “People’s Mediation Law of the People’s Republic of China”, are among the laws that regulate mediation in civil procedures, labor-dispute mediation, and people’s mediation respectively<sup>84</sup>. Mediation is widely and frequently adopted in the domestic judicial system to solve disputes. For instance, in 2017, about 11,373,753 civil cases of first instance were brought before the Chinese People’s Court, and 25.3 % of them were settled through mediation<sup>85</sup>. Since a mediation process does not necessarily lead to a final agreement, the application rate in the Chinese is very high. Quoting, about 60% of civil cases in some courts go first through mediation. However, this system may provoke injustice and unfairness. Every judge has a great discretionary power in this process and some low courts pressure their judge to apply mediation to obtain a high rate of application in civil cases and to impress the high courts. Then, this pressure may induce some judges to solve every case through mediation, and by this risking disregarding the facts and surpassing the law. Most important, sometimes even if the rate of mediation is high the settlement agreements may not be honored by the parties. In this last case, a subsequent intervention of the Chinese courts is required.

A mediation process is applied by the Chinese judicial body also in international foreign-related issues. As an example, articles 49 to 52 of the Chinese Arbitration Law (CAL) recognize the outcomes of an arbitration award and require the intervention of arbitral tribunals in favor of a mediation process, if requested by the parties. Article 51 states:

The arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if

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<sup>84</sup> *Ibid*

<sup>85</sup> *Ibid*

both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly.<sup>86</sup>

In addition, in the same article is specified that:

If conciliation leads to a settlement agreement, the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result of the settlement agreement. A written conciliation statement and an arbitration award shall have equal legal effect<sup>87</sup>

In this way, the Chinese Arbitration Law creates a legal framework characterized by an arbitral tribunal that may conduct a mediation process which results in a conciliation statement that is enforced by the tribunals, thus having the same effect as an arbitral award. However, this process implies the participation of the same arbitral tribunal in the mediation and arbitration process, an uncommon rule in international practice. Using the same judicial body in both processes may put at risk the enforcement of the awards at the international level as foreign investors may refuse to comply with it. As a consequence, this may increase the possibility of a breach of due process stressing meanwhile the contradictions between the mediation process adopted by the international community and the Chinese practices.

The “Plan on Building Rule of Law in China (2020-2025)” stressed the role played by the people’s mediation in the administrative and judicial system<sup>88</sup>. To date, independent mediators do not have a role in the legal system, even if the situation might in the future. Given the increased demand for mediation in commercial disputes, the Hong Kong Mediation Centre offers training courses meanwhile the China Council for the Promotion of International Trade elaborates on joint commercial mediation projects with the UK Centre for Effective Dispute Resolution.<sup>89</sup> Similar organizations were funded also in the BRI countries. For example, the International Commercial Mediation Centre for Belt and Road is a

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<sup>86</sup> See the article at: [http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383756.htm)

<sup>87</sup> *Ibid*

<sup>88</sup> Brink, *ref.* 78

<sup>89</sup> *Ibid*

Beijing-sponsored company that offers training and mediation services and whose offices are located also in Kazakhstan. From its launch in 2016 to August 2019 it heard 585 cases and settled 65 % of them<sup>90</sup>. The International Commercial Dispute Prevention and Settlement Organization (ICDPASO) established by the Chinese Chamber on International Commerce, represents another initiative to promote mediation as a dispute resolution instrument. Along with mediation, the organization offers services such as arbitration, investment arbitration, and dispute prevention. It is made up of 50 members from different countries and collaborates with international organizations such as the International Chamber of Commerce, the United Nations Commission on International Trade Law (UNCITRAL), and the World Intellectual Property Organization<sup>91</sup>. It seems that ICDPASO aims to be a forum for the settlement of commercial disputes by employing instruments that fit with the Asian culture. Its group of experts presented mediation as the first level of settling disputes before ICDPASO and formulated arbitration rules; the status of these rules was quite ambiguous.

The preference for mediation is reflected in the Chinese judicial system through the “Opinions of the Supreme People’s Court on Further Deepening the Reform of the Diversified Dispute Resolution Mechanism of the People’s Courts”, the “Provisions of the SPC on Invited Mediation by the People’s Courts” and the Chinese authorities’ decision to sign the “United Nation Convention on International Settlement Agreements resulting from Mediation”<sup>92</sup> (the Singapore Convention)<sup>93</sup>. The latter is the result of UNCITRAL's effort to enforce international settlement agreements. It was adopted in New York in 2018 and, up to date, is signed by 55 countries – including China – and ratified by 11. The document provides a legal framework able to enforce settlement agreements arising

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<sup>90</sup> Ben Rigby, “IBASeoul: Beyond the Belt and Road” *African Law Business*, September 27, 2019 <https://www.africanlawbusiness.com/news/10172-ibaseoul-beyond-the-belt-and-road>

<sup>91</sup> Brink, *ref.* 78

<sup>92</sup> Chen, *ref.* 65

<sup>93</sup> The Singapore Convention on Mediation is a uniform and efficient framework for international settlement agreements resulting from mediation that applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute. The document was approved in July 2018 and entered into force in September 2020. More information at: <https://www.singaporeconvention.org/>

from mediation, such as definitions, general principles, and exceptional cases for refusing enforcement<sup>94</sup>.

The main purpose of the Convention is to foster international trade and to promote mediation as an alternative way of dispute settlement. It intends to facilitate the settlement agreements established during international commercial mediation to be put into effect. To ensure easy implementation of internationally mediated settlement agreements across borders, the instrument's proponents expect that it will be widely signed and accepted. The concept states that if there is no longer a concern about cross-border recognition and enforcement of mediated settlement agreements, it will be quicker for multinational firms to regard mediation as a serious and, in some situations, more desirable, alternative to arbitration. Undoubtedly, considering its binding nature, the convention should give certainty and stability to the mediation process in the international framework. In addition, UNCITRAL presented the “UNCITRAL Model Law on International Commercial Mediation” and “International Settlement Agreements resulting from Mediation (2018)” to offer a legislative guide to its members<sup>95</sup>. Out of the 55 signatory countries, most of them take part in the BRI or have just recently signed a bilateral trade agreement with China — which signed the Convention but has not ratified it yet.

Practically speaking, China's lack of comprehensive domestic rules and procedures for the implementation of settlement agreements is a barrier, but it also worries about the protection of the rights of other parties, or the general public and that the Convention might be abused. Nonetheless, given its pro-mediation attitude to BRI dispute settlement, China may firmly anticipate taking advantage of the Singapore Convention taking effect in BRI countries. It is safe to presume that China believes it can successfully defend its interests at the negotiating table based on this strategy. In these situations, it benefits China if settlement agreements can be quickly enforced in BRI nations. However, the binding feature of the agreement is compromised by the fact that only a few members ratified the Convention, and

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<sup>94</sup> Chen, *ref. 65*

<sup>95</sup> *Ibid*



subsequently only in these 11 countries<sup>96</sup> it entered into force, meaning the effect on international trade is still mild and the Chinese strategy weak.

All the factors combined, the Chinese approach to the Belt and Road Initiative, based mainly on soft law instruments, and the current dispute resolution mechanism landscape may create obstacles in the implementation of the projects.

To overcome it, different proposals were made by experts for the creation of a new BRI-specific mechanism, some of which will be discussed in the following chapters.

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<sup>96</sup> Belarus, Ecuador, Fiji, Georgia, Honduras, Kazakhstan, Qatar, Saudi Arabia, Singapore, Turkey, Uruguay.

# Chapter II: China International Commercial Court

## 2.1 International Commercial Courts

In recent decades, the growth of economic relations in the global market and subsequent increase in cross-border transactions have made settling disputes more complicated. The traditional judicial instruments have shown their limitations in addressing these challenges. When it comes to transactions involving only private parties, international courts do not have jurisdiction. Instead, the default jurisdiction is international commercial arbitration. International law aimed to enhance the legal system by introducing new international standards for national courts and establishing international organizations to reform domestic judicature.<sup>97</sup> However, these measures failed to address the complex disputes arising from cross-border commerce operations. Arbitration, on the other hand, has been scrutinized for its high costs, long delays, and limited arbitrability in certain areas such as intellectual property, patents, plant breeder's rights, and trust disputes<sup>98</sup>. Additionally, its consent-based model poses challenges in multi-party or multi-contract relationships, where tribunals may not admit third parties to the dispute due to the lack of a single cohesive arbitration agreement<sup>99</sup>. To bridge the gap in international adjudication and overcome some of the arbitration shortcomings, domestic courts

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<sup>97</sup> Dimitropoulos and Brekoulakis, *ref. 9*

<sup>98</sup> Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, "The role on national courts during the proceedings" in *Redfern and Hunter on International Arbitration*, ed. Blackaby, Nigel, Constantine Partasides, Alan Redfern, and Martin Hunter (Oxford: Oxford University Press EBooks, 2009), pp.439-464  
<https://doi.org/10.1093/law:iic/9780199557189.001.1>

<sup>99</sup> Dalma Demeter and Kayleigh Smith, "The Implications of International Commercial Courts on Arbitration", *Journal of International Arbitration* 33, no.5 (2016): 441–469  
<https://doi.org/10.54648/joia2016035>

have established International Commercial Courts (ICommCs). As a result, they acquired a hybrid nature due to the mix of domestic and international features.

The ICommCs are domestic instruments as they are established by national legislators. Still, their composition and the cross-border dimension of the cases they deal with make them acquire an international nature. In a global rivalry setting to draw cases to their jurisdictions, the ICommCs portray themselves as a new forum for the resolution of cross-border disputes. In this sense, they coexist with the traditional domestic court system, as well as various hybrid domestic and international dispute resolution methods such as international and domestic arbitration, mediation, and conciliation<sup>100</sup>.

According to Mark Feldman<sup>101</sup>, the reasons driving the establishment of such courts are assisting local industries, stimulating foreign investment, promoting domestic law, encouraging legal harmonization, and supporting the rule of law<sup>102</sup>. Besides, a well-functioning center for the settlement of international commercial disputes increases the country's reputation as a fair and efficient jurisdiction. Some identified advantages of commercial courts are simplified techniques, efficiency, minimal rates, versatility, equitable and predictable applicable law, coordinated legal and economic advancement, top-quality decision-making process, and the preservation of a dynamic regulatory framework<sup>103</sup>. The new commercial courts represent a bridge between formal and private justice. Indeed, dealing with transnational disputes does not deprive the courts of the advantages linked to state justice. In particular, the awards are immediately and directly enforced within the jurisdiction where they have been adopted (as opposed to arbitration awards that must be recognized by foreign courts).

Unlike arbitration courts, ICommCs proceedings take place in open courts where the awards are always publicly available, and the proceedings are considered more cost-effective than arbitration. Moreover, the courts envisaged an appeal procedure that is missing in the arbitration proceeding where, furthermore, the

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<sup>100</sup> Dimitropoulos and Brekoulakis, *ref. 9*

<sup>101</sup> Mark Feldman is a professor of law whose research area covers multinational enterprises, international investment and dispute resolution, and China as a rule-maker and institution builder

<sup>102</sup> Mark Feldman, Speech "Situating the China International Commercial Court" at Hong Kong University, 2019

<sup>103</sup> *Ibid*

tribunal may review the arbitration award only on a restrictive number of cases<sup>104</sup>. Besides, State justice creates a case law or a precedent, upholding thus, legal order's stability and predictability. At the same time, the Courts can preserve some privileges typical of arbitration as party autonomy. Namely, the Dubai International Financial Centre's (DIFC) Courts and the Singapore International Commercial Court (SICC) employ the substantive rules decided by the parties (the procedural rules are established by the Courts)<sup>105</sup>. Still, the ICommCs lack some advantages typical to arbitration. In detail, unlike arbitration, the parties are not able to choose the judges, which are appointed based on the domestic law of the country where the International Commercial Court is located. Additionally, while the recognition and enforcement of awards within the jurisdiction of the ICommCs may proceed smoothly, challenges arise when enforcing awards in foreign jurisdictions. Currently, there is no equivalent instrument to the New York Convention for arbitration awards that applies to ICommCs' awards. The Dubai International Financial Centre (DIFC) was the first court established, and since then, others have been established, such as the China International Commercial Court (CICC).

## 2.2 Creation of the CICC

As underlined in the first chapter, the BRI projects take place in countries with different legal systems and cultures, and the resolution of disputes in the local courts may lead to different and inconsistent outcomes. To overcome it, the Supreme People's Court of China has proposed the creation of a Belt and Road resolution mechanism that comprises both arbitration and mediation methods<sup>106</sup>. Proceeding from such concerns, in July 2015 the SPC issued "Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the Belt and Road" where the Court underlined the importance of solving the arising disputes in a timely manner and of considering some elements as politics, religious, legislations, and traditions<sup>107</sup>. Then, on January 23, 2018, the Central Leading Group for Deepening Overall Reform reviewed and approved the guiding

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<sup>104</sup> *Ibid*

<sup>105</sup> Demeter and Smith, *ref.* 99

<sup>106</sup> See the full text at: [https://english.court.gov.cn/2021-10/23/c\\_761781.htm](https://english.court.gov.cn/2021-10/23/c_761781.htm)

<sup>107</sup> See the full text at: [https://english.court.gov.cn/2021-10/23/c\\_761781.htm](https://english.court.gov.cn/2021-10/23/c_761781.htm)

Opinions. Precisely, the government underlined the importance of fully considering the diversity of participants in the Belt and Road Initiative, the complexity of the types of disputes, and differences in legislation, judiciary, and rule-of-law culture across countries<sup>108</sup>.

The CICC has the responsibility to cater to the varying needs of both Chinese and foreign parties. Subsequently, the "Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court" were implemented as the next step<sup>109</sup> (hereinafter referred to as the "Provisions") on June 25, 2018 (they become effective from July 1, 2018). The Provisions, thus created two commercial courts, affiliated with the Supreme People's Court, and jointly known as China International Commercial Court (CICC). One is located in Xi'an and faces commercial disputes arising along the Silk Road Economic Belt, and another is in Shenzhen where it deals with disputes arising along the 21st Century Maritime Silk Road, both cities are strategic in the Great Bay Area. The two courts are considered "a permanent adjudication organ of the Supreme People's Court"<sup>110</sup> and as enunciated in article 11 of the Provisions, they represent a "one-stop international commercial" mechanism, acting as a "dispute resolution platform" which combines "mediation, arbitration and litigation"<sup>111</sup>.

The Fourth Civil Division of SPC in Beijing is responsible for coordinating and guiding the two international commercial courts<sup>112</sup>. The Provisions' nineteen articles regulate a possible dispute mechanism aimed to settle commercial disputes "fairly" and "timely" and to "create a stable, fair, transparent, and convenient rule of law international business environment, and provide services and protection for the "Belt & Road" construction"<sup>113</sup>, under the Supreme People's Court, the People's Republic of China law, and the Civil Procedure.

The SPC judicial interpretation is made up of a one-sentence preamble and 19 articles that outline the CICC's structure, jurisdiction, judicial panel, and several

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<sup>108</sup> See more at: <https://cicc.court.gov.cn/html/1/219/208/209/1316.html>

<sup>109</sup> See more at: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>110</sup> See the Article 1 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>111</sup> *Ibid Art.11*

<sup>112</sup> A brief introduction of China International Commercial Court at: <http://cicc.court.gov.cn/html/1/219/193/195/index.html>

<sup>113</sup> <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

operational rules. Through a judicial interpretation, a judge explains the meaning of the law. Legally speaking, the “Provisions” are a judicial interpretation document issued by the SPC; here is the main difference with other ICommCs which were established through a constitutional amendment or a legislative act. The SPC is used to give a general interpretation of the implementation of legislation in judicial proceedings and it results in the formation of new rules deliberately and comprehensively<sup>114</sup>. In particular, the SPC took an active role in filling the gaps in legislation due to the impossibility of the National People’s Congress to do so as it is reunited for only two weeks per year. Although the Supreme People’s Court is uncommon in other jurisdictions, Chinese scholars recognize its benefits in filling the gaps left by Chinese legislation<sup>115</sup>. Compared to the time required by the legislative process for the approval of a dispute resolution mechanism, the SPC results are more time efficient. In addition, considering its composition of legal experts, it seems to have a perfect capacity to complete the assignment<sup>116</sup>.

In the context of the CICC, however, the Courts’ establishment through an SPC judicial interpretation, imposes some limits on the reforms that might be needed to introduce to improve the overall Court’s functioning. The latter could not be put in force through an amendment to a legislative act as the CICC’s formation is based on a judicial interpretation and the courts’ status does not regulate a similar situation. The hierarchy of the legal acts may forge an interpretation of how reforms may be implemented within the CICC’s institutional framework. According to Chinese domestic law, a judicial interpretation can only interpret a national act, nor contradict or expand it, subsequently, any innovation of the CICC must follow the Chinese law and cannot be made based on the current SPC judicial interpretation<sup>117</sup>.

Thus, even if the Court strikes to deal with international disputes involving mainly BRI countries, its framework is constrained by Chinese law and the Court

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<sup>114</sup> Art. 32 of Law of the People's Republic of China on the Organization of the People's Courts (2006 Amendment), [http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content\\_1384078.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384078.htm)

<sup>115</sup> Zhengxin Huo and Man Yip, “Comparing the international commercial courts of China with the Singapore international commercial court”, *International & Comparative Law Quarterly* 68, no. 4 (2019): 903–42. doi:10.1017/S0020589319000319

<sup>116</sup> *Ibid*

<sup>117</sup> Li Wei, “Judicial interpretation in China”, *Willamette journal of international law and dispute resolution* 5, no. 1 (1997), pp. 87-112  
<https://www.jstor.org/stable/26211007>

must follow it for all the procedural rules not expressly indicated in the Provisions and the additional related interpretation issued by the SPC. Some problems may arise in the process as Chinese law is considered to be insular and conservative and for some aspects, incompatible with international standards; a risk considering the internationalism of the CICC<sup>118</sup>. The Court institution's validity is unquestionable; even if placed lower in terms of legal power than national legislative acts, the SPC judicial interpretations are considered valid legal sources. The real issue is whether creating a new dispute resolution mechanism outside of a major legislative act was appropriate, and how the CICC legal framework will handle any future developments.

In establishing an International Commercial Court, the government was following a trend started in the past years which led to the creation of international commercial courts in Europe, Asia, and the Middle East. However, the Chinese International Commercial Court is directly linked with the BRI — the only ICommCs connected with a specific project — and is mainly intended to serve as a legal safeguard in BRI disputes involving Chinese elements. Indeed, in the preamble of the Provisions, it is explicitly described that among others, the CICC aim is to “provide services and protection for the "Belt & Road" construction”<sup>119</sup>. In addition, in the “Opinions of the Supreme People's Court on Further Providing Judicial Services and Guarantees by the People's Courts for the Belt and Road Initiative”, the SPC underlines the importance of the ideas of the BRI members when promoting the fairness and efficiency of the Chinese Commercial Courts<sup>120</sup>. By doing so the country might obtain a greater influence in economic globalization and become an active actor in creating international law and practice while maintaining control of BRI disputes. The authority’s aim is that the emergence of the CICC can enhance cross-border trade by settling commercial disputes properly. For the Chinese authorities, the establishment of the Courts may represent an increase of the country’s authority among foreign investors, thereby an alternative

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<sup>118</sup> Julien Chaisse and Xu Qian, “Conservative innovation: The ambiguities of the China International Commercial Court”, *AJIL Unbound* 115 (2021) pp. 17–21  
doi:10.1017/aju.2020.81

<sup>119</sup> See the preamble: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>120</sup> See the full text at: [https://english.court.gov.cn/2021-10/23/c\\_761783.htm](https://english.court.gov.cn/2021-10/23/c_761783.htm)

to the Western arbitral tribunals<sup>121</sup>. It can also help to professionalize China's international commercial trials and strengthen China's international civil litigation system.

Some benefits such as flexibility, finality, and cost-effectiveness, decrease in processing time, increase in transparency, addressing international concerns about international arbitration issues, and increasing the CICC's worldwide impact and credibility can be underlined<sup>122</sup>. According to James Crawford, the CCIC presents a series of advantages<sup>123</sup>. For instance, even if the CICC has general jurisdiction, it can settle strategic disputes with the BRI, such as territorial disputes, comprising maritime delimitation<sup>124</sup>. A well-functioning Court requires the creation of a system that could appear trustworthy in the investor's eyes. Only if the investors will decide to appeal to the court despite its integration into the Chinese legal system, the CICC must be seen as a neutral, and transparent International Court. So, the CICC's success will depend on its ability to present itself as an adequate forum for the settlement of international disputes.

### 2.3 One-stop platform

The Provisions envisaged the creation of a one-stop platform able to guarantee a smooth transition between litigation, arbitration, and mediation, thus offering the investors a comprehensive mechanism for dispute settlement<sup>125</sup>. In detail, the Chinese International Commercial Court offers a comprehensive mechanism for dispute resolution through mediation, arbitration, and litigation, which is commonly known as the "one-stop" system. The People's Court encourages especially disputes settlement through "mediation, arbitration, and other non-litigations forms"<sup>126</sup>. According to it, a BRI dispute mechanism "shall further promote the improvement of the joint working mechanism for commercial mediation, arbitration mediation,

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<sup>121</sup> Dahlan, *ref.* 47

<sup>122</sup> Zhang Yuejiao speech at: <https://cicc.court.gov.cn/html/1/219/208/209/1316.html>

<sup>123</sup> Crawford AC, *ref.* 77

<sup>124</sup> *Ibid*

<sup>125</sup> See Art. 11 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>126</sup> See the paragraph 11 of the SPC Opinions: [https://english.court.gov.cn/2021-10/23/c\\_761781.htm](https://english.court.gov.cn/2021-10/23/c_761781.htm)



people's mediation, administrative mediation, industrial mediation, and judicial mediation”<sup>127</sup>.

The “one-stop shop” is part of the authorities plan to provide a broad variety of dispute resolution services so that all the BRI disputes can settle their disputes in the way they find a possible solution to their disputes by applying to CICC jurisdiction. This feature is unique and may attract foreign investors as they have the privilege of choosing their preferred method of dispute resolution. In this way, China maintains control over the procedures and a certain degree of assurance about the proceedings’ outcome<sup>128</sup>. Further, as seen in the previous paragraphs, the Supreme Court approved a package of arbitration rules that could serve as a scheme for the creation of a dispute settlement instrument.

Using the words of the ex-Vice President of the SPC Luo Dongchuan: “The CICC shall provide high-quality and practical legal services and safeguards for the Belt and Road Initiative”<sup>129</sup>. The Chinese traditional culture encourages parties to attempt mediation before resorting to litigation or arbitration in resolving issues, making the “one-stop” conflict resolution process a strategic move. The platform works through collaboration with international commercial mediation and arbitration institutions such as the World Trade Organization and the Asia International Arbitration Centre, among others<sup>130</sup>. The overarching goal of the act is to install a new internationalism and flexibility in the Chinese domestic legal system; the precise aim is to establish a Chinese method for the recognition and execution of judgments, thereby contributing to the overarching goal of establishing a legal system throughout the BRI area<sup>131</sup>. China desires that significant BRI commercial cases involving Chinese nationals would be brought before the CCIC. By doing so, the country will acquire control of the BRI commercial cases and gain significant influence in the dispute settlement along the Route.

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<sup>127</sup> *Ibid*

<sup>128</sup> Huo and Yip, *ref. 115*

<sup>129</sup> See the speech at: <https://cicc.court.gov.cn/html/1/219/208/209/1316.html>

<sup>130</sup> Dahlan, *ref. 47*

<sup>131</sup> *Ibid*

## 2.4 Practical aspect: language, judges, and Expert Committee

As concerns the use of the language, in conformity with Article 262 of the CPL, the proceedings in cases concerning foreign litigants must be held in "languages commonly used in China," as Chinese and the other languages spoken by the country's officially recognized ethnic minorities<sup>132</sup>. However, in conformity with Article 9 of the Provisions, upon the consent of the parties, evidence in English and not accompanied by a Chinese translation may be brought to the court's hearings<sup>133</sup>. The same states that all the foreign evidence brought before the Court's instance, whether it has been notarized, must be cross-examined during the court proceedings. Consequently, the CICC regulatory framework does not request notarization and legalization of evidence, which is expensive and time-consuming, as in any case, the court itself will examine the proofs. Considering that the authorities aim is to create a dispute resolution mechanism for the disputes arising in the BRI context, which involves different countries speaking numerous languages, the possibility of receiving English evidence is high. This makes indispensable the appointment of Chinese judges able to proficiently speak English while underlining the need for a future reform that adds English to the Court's languages.

Regarding its formation, the CICC shall be made up entirely of Chinese nationals, its judges, and even the attorneys who represent the parties must be Chinese citizens. Indeed, Article 9 of the Chinese Judges Law states that a judge in China must have Chinese nationality and as the CICC is a branch of the SPC, it must observe the same requirement<sup>134</sup>. Moreover, Article 263 of the CPL states that when a party during a judicial process needs legal representation that must be provided by the legal of the People's Republic of China<sup>135</sup>. Therefore, judges and lawyers participating in CICC proceedings must be Chinese, an element that harms

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<sup>132</sup> See Art. 11 of the CPL:[http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383880.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383880.htm)

<sup>133</sup> See Art. 9 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>134</sup> See Art.9 of the Chinese Judges Law:

<http://www.npc.gov.cn/englishnpc/c23934/202012/9c82d5dbefbc4ffa98f3dd815af62dfb.shtml>

<sup>135</sup> The Article states that except consulates and embassies accredited by the PRC no foreign organizations or individuals may serve documents or make investigations and collect evidence within the territory of the People's Republic of China.

[http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383880.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383880.htm)

the Court's competitiveness and its international nature. Still, under Article 4 of the Provisions, all the judges must have an international curriculum, rich experience in commercial disputes, be familiar with international law, and be able to use English as a working language<sup>136</sup>. The article lists all the characteristics the judges must have but does not mention the process through which they are appointed. At present, the CICC has 12 judges, most of them have a doctorate in law, improved experience in the Chinese judicial system and some of them have studied in the United Kingdom and the US<sup>137</sup>.

The nationality criterium for the Court's members is a unique feature among the other ICommCs and to overcome it and better balance the national and international components, the Provisions envisaged with Article 11 the creation of the International Commercial Expert Committee (ICEC). The latter is made up of world-recognized professionals in international and commercial law as retired judges, arbitrators, scholars, and practitioners. The ICEC must function as an advisory body, the key function of the experts is not to decide cases but to support the judges' work by handling the mediation process, providing advice and suggestions for the further development of the CCIC, giving a judicial interpretation of SPC's acts, forging an interpretation of foreign international law, and cooperating on other matters assigned by the CCIC<sup>138</sup>. The creation of the ICEC may create a formal channel for incorporating international aspects in the CICC's activities; the success of the initiative will depend on the role that the experts will assume.

#### 2.4.1 Further innovations

On 5 December 2018, three additional documents were released by the SPC to strengthen the Opinions' implementation, as follows: Notice of the Supreme

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<sup>136</sup> See Art. 4 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>137</sup> A complete list is available at: <https://cicc.court.gov.cn/html/1/219/193/196/index.html>

<sup>138</sup> See more at: <https://cicc.court.gov.cn/html/1/219/208/210/1146.html>

People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the "One-stop" Diversified International Commercial Dispute Resolution Mechanism (hereinafter referred to as "Notice")<sup>139</sup>, Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For Trial Implementation)<sup>140</sup>, and Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation) (hereinafter referred to as "Trial Procedure Rules")<sup>141</sup>. The Notice envisaged the participation of the following mediation and arbitration institutions in the "one-stop" dispute resolution platform:

- The China International Economic and Trade Arbitration Commission ("CIETAC")
- The Shanghai International Economic and Trade Arbitration Commission
- The Shenzhen Court of International Arbitration
- The Beijing Arbitration Commission
- The China Maritime Arbitration Commission
- The Mediation Centre of China Council for the Promotion of International Trade
- The Shanghai Commercial Mediation Center

The parties that bring a dispute before the CICC may be invited to solve first the disputes through especially mediation and sometimes arbitration. Then, the mentioned organizations give an important contribution in helping the parties reach an agreement before starting a litigation process. It is important to observe that all the arbitration and mediation institutions are Chinese, or at least located in the Chinese territory.

Through the Working Rules of the International Commercial Expert Committee (ICEC), the SPC envisaged a panel made up of 31 experts from China, the United States, South Korea, Russia, France, Germany, the United Kingdom, Australia, Macao, Hong Kong, and Taiwan<sup>142</sup>. As specified in Article 1 of the Working Rules, the SPC set up the International Commercial Expert Committee to support the CICC

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<sup>139</sup> See the full text at: <https://cicc.court.gov.cn/html/1/219/208/210/1144.html>

<sup>140</sup> See the full text at: <https://cicc.court.gov.cn/html/1/219/208/210/1146.html>

<sup>141</sup> See the full text at: <https://cicc.court.gov.cn/html/1/219/208/210/1183.html>

<sup>142</sup> See more at: <https://cicc.court.gov.cn/html/1/219/208/209/1316.html>

“to build a diversified dispute resolution mechanism that efficiently links mediation, arbitration, and litigation”<sup>143</sup>. The judicial regime of CICC differs from the procedure usually adopted by the Chinese system. Indeed, the model includes a variety of innovations — such as the use of digital methods to streamline the proceedings<sup>144</sup>— and seems to be specifically tailored to solve international commercial disputes. Subsequently, evidence gathering, oral testimony, and hearings can be done remotely through technological means. The Working Rules contain more specific rules concerning the commission's function and composition going from qualification conditions, responsibilities of the expert commissioner, tasks of the expert commission office, expert commissioner mediation, and consultation mechanism to function guarantee for the expert commissioner<sup>145</sup>.

The Trial Procedure Rules offer guidelines for the practical procedures of the CICC. Namely, it deals with aspects such as case approval, delivery, pre-trial mediation, court hearings, enforcement of the awards, the role of arbitration, and costs. Indeed, it comes to terms with more specific aspects that are left out in the Provisions, describing the steps that a claimant must follow to submit its dispute to the CICC jurisdiction. In addition, it regulates all three dispute resolution processes available: mediation, arbitration, and litigation, providing rules and specifying the connection between them.

## 2.5 Case Acceptance

As a branch of the SPC, the litigants can choose the SPC to hear their commercial disputes, which is a recent innovation in the Chinese legal system. Namely, before the establishment of the CICC, the litigant had numerous limitations in the choice of Chinese Courts. To mention, international cases could be submitted only to the Basic People's Court and only the cases considered important based on the effects that would arise in a jurisdiction were managed by the Higher People's Courts<sup>146</sup>. Legally speaking, the SPC may exercise its jurisdiction over international disputes

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<sup>143</sup> See art 1 of the Working Rules: <https://cicc.court.gov.cn/html/1/219/208/210/1146.html>

<sup>144</sup> See Art. 10 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>145</sup> Dahlan, *ref. 47*

<sup>146</sup> Huo and Yip, *ref. 115*

only in two cases: (1) the dispute has a nationwide impact in the country, and (2) the SPC considers that it falls under its jurisdiction<sup>147</sup>.

In practice, the SPC has rarely heard an international dispute and on various occasions, it underlined that the first instance commercial cases must be managed by the lower People's Courts<sup>148</sup>. Therefore, the SPC's judicial interpretation of the establishment of the Commercial Courts introduced the possibility for the parties to submit international commercial disputes to the SPC, specifically to CICC. This is an important innovation because considering the CICC's composition made up of trained and experienced judges, the Court may provide the parties with more efficient proceedings. The acceptance of the CICC's jurisdiction must be made through a written agreement, in conformity with Article 34 of the CPL and Article 2 of the Provisions. Indeed, the parties must choose the Supreme People's Court jurisdiction following Article 34 of the Chinese Civil Procedure Law which requests that the chosen court must have a bond with the case. In detail, it states:

The parties to a contractual dispute or any other property dispute may agree in writing to be subject to the jurisdiction of the people's court at the place having a connection with the dispute, such as where the defendant is domiciled, where the contract is performed, where the contract is signed, where the plaintiff is domiciled or where the subject matter is located, etc., provided that such agreement does not violate the provisions of the Law regarding court-level jurisdictions and exclusive jurisdictions.<sup>149</sup>

Then, the Provisions, following the CPL, require a case brought before the Court to have a connection with China. Moreover, in the Chinese judicial system, a bond between the parties and the courts is required even in recognition of a chosen foreign court; if the SPC decides the absence of connection between a case and the foreign

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<sup>147</sup> The Art. 20 of Civil Procedure Law states that the high people's court have jurisdiction only on civil cases that have major impact on the areas under their jurisdiction:

[http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383880.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383880.htm)

<sup>148</sup> Huo and Yip, *ref. 115*

<sup>149</sup> Art. 34 of the CPL

[http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383880.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383880.htm)

court chosen by the parties, it may refuse to enforce the foreign arbitral award in China's jurisdiction<sup>150</sup>.

A reform of the criteria for case acceptance may attract international cases and improve the competitiveness of the Chinese legal system and its position in the international business community. The CICC can be used as a trial initiative to hear cases without ties with the country, assessing the impact on the judicial system and possibly amplifying in the future the reform to the overall domestic judicial system. This once again will improve the investor's trust in the country's legal system<sup>151</sup>.

In addition, to be accepted by the Court, international commercial disputes have to satisfy the conditions indicated in Article 2 of the Provisions. The case must concern "an amount in dispute of at least 300,000,000 Chinese yuan" and it could have been originally assigned to the high People's Courts, and then transferred to the CICC<sup>152</sup>. Moreover, the case should "have a nationwide significant impact"<sup>153</sup>, or involve "preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards"<sup>154</sup>; if considered necessary, the SPC can include other cases. Therefore, in addition to the consensual submission to the CICC jurisdiction, the article illustrates some situations in which the Court's competence is automatically triggered. The economic requisite was possibly inserted to filter the cases and settle only the dispute with an important economic impact<sup>155</sup>. Concerning the transfer of the case from the High's People Courts to the CICC, it is made under the approval of the SPC, and it implies exercising the power of allocating jurisdiction between the national courts<sup>156</sup>. The SPC may refer a case to the CICC when it considers it as having a significant nationwide impact or in other cases it deems it appropriate.

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<sup>150</sup> See the Article 531 of the Supreme People's Court Judicial Interpretation of the Application of the Civil Procedure Law of the People's Republic of China  
<https://cicc.court.gov.cn/html/1/219/199/201/676.html>

<sup>151</sup> Wei Cai and Andrew Godwin, "Challenges and Opportunities for the China International Commercial Court", *International & Comparative Law Quarterly* 68, n. 4 (2019): 869-902  
<http://dx.doi.org/10.2139/ssrn.3479860>

<sup>152</sup> See Art. 2 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>153</sup> *Ibid*

<sup>154</sup> *Ibid*

<sup>155</sup> Cai and Godwin, *ref. 151*

<sup>156</sup> Huo and Yip, *ref. 115*

### 2.5.1 Jurisdiction of the Court

The CICC has jurisdiction only on civil and commercial international cases, meaning that it can regulate only commercial disputes between private parties, excluding investment or trade issues between states or an investor and a host state<sup>157</sup>. The Provisions defines in Article 3 when a case is to be considered an international commercial case, are as follows:

(a) one or both parties are foreigners, stateless persons, foreign enterprises or other organizations;

(b) one or both parties have their habitual residence outside the territory of the People's Republic of China;

(c) the object in dispute is outside the territory of the People's Republic of China;

(d) legal facts that create, change, or terminate the commercial relationship have taken place outside the territory of the People's Republic of China<sup>158</sup>.

The article reflects the Chinese general practice of determining a foreign case for the purpose of its jurisdiction. Indeed, the judicial authorities classify a case as foreign using the three-element approach: the litigants, the content, or the factual position<sup>159</sup>. Therefore, if a presented case does not fulfill this requirement the CICC will refuse the case. The Chinese International Commercial Court may also dismiss a case based on the *forum non convenient doctrine*. According to it, a Chinese Court (so the CICC as well) may refuse a foreign-related civil or commercial case based on the grounds specified in Article 532 of Judicial Interpretation of the CPL. The latter envisages the following conditions:

- i. The defendant raises that it will be more convenient to lodge the lawsuit to a foreign court or raises an objection to the jurisdiction of the people's court;

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<sup>157</sup> Chaisse and Qian, *ref. 118*

<sup>158</sup> See Art. 3 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>159</sup> Huo and Yip, *ref. 115*



- ii. There is no agreement governed by the People’s Courts of the People's Republic of China between the parties concerned;
- iii. The case does not belong to the exclusive jurisdiction of the People’s Courts of the People's Republic of China;
- iv. The case does not involve the interests of the People's Republic of China, its citizens, or other organizations;
- v. The major disputed fact of the case does not occur in the territory of the People's Republic of China and the laws of China are not applicable to the case so the People’s Court has great difficulties in determining the facts and applicable laws during the trial of the case;
- vi. The foreign court has the jurisdiction on the case and enjoys more convenience in trying the case.<sup>160</sup>

However, the *forum non conveniens doctrine* will not apply to the CICC when: the parties have chosen the CICC with a choice of court agreement (in conformity with the art. 2 of the Provisions) or the case was assigned by the SPC as it makes this control before transferring the case. In all the other cases the CICC may reject the case if it subsists the condition envisaged in the Art. 532 of Judicial Interpretation of the CPL<sup>161</sup>.

According to Mark Feldamn, the CCIC has a dual nature, it represents a newly established commercial court among the others, but at the same time the only one which is linked from its creation to the Belt and Road Initiative<sup>162</sup>. However, as seen before even if the SPC referred to is as an organism providing “services and protection for the ‘Belt & Road’ construction”<sup>163</sup>, its jurisdiction is not limited to BRI-related issues and can be extended to cases in which the parties are foreigners, stateless persons, foreign enterprises, or other organizations<sup>164</sup>. The classification of a commercial case is significant in China's legal system as the CICC manifests

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<sup>160</sup>See Art. 532 of Judicial Interpretation of the CPL:  
<https://www.hshfy.sh.cn/shfy/English/view.jsp?pa=aaWQ9MzY4ODU3JnhoPTEmbG1kbT1FTl8wNAPdcssPdcssz>

<sup>161</sup> Cai and Godwin, *ref. 151*

<sup>162</sup> Mark Feldman, Speech “Situating the China International Commercial Court” at Hong Kong University, 2019

<sup>163</sup> See the Preamble of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>164</sup> See Art. 3 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

its jurisdiction only on commercial foreign-related cases while the domestic cases are under the SPC's jurisdiction. In some cases, a party may intentionally introduce a foreign-related element to present the case as an international case and subsequently benefit from the CICC's legal framework<sup>165</sup>. Among the reasons are the expected lower cost of Court proceedings, its more efficient procedure, and the Chinese authority's caution in dealing with foreign cases<sup>166</sup>. Therefore, a clear indication of all the cases concerning the CICC jurisdiction is indispensable for the efficiency and transparency of the process.

## 2.6 Applicable law

According to Article 7 of the Provisions, the parties may choose the governing law through an agreement and by Chinese law.<sup>167</sup> If the parties do not reach an agreement on the applicable law, then the CICC will determine the substantive law under the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations. Then, Article 8 establishes the process of foreign law's determination:

- (1) provided by the parties;
- (2) provided by a legal expert from China or abroad;
- (3) provided by the institution rendering law-finding services;
- (4) provided by the member of the International Commercial Expert Committee;
- (5) provided by the central authority of the other contracting party that has entered into a judicial assistance treaty with China;
- (6) provided by the Chinese Embassy or Consulate in the relevant country;
- (7) provided by the Embassy of the relevant country in China;

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<sup>165</sup> Cai and Godwin, *ref. 151*

<sup>166</sup> *Ibid*

<sup>167</sup> See Art. 7 of the Provisions <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

(8) other reasonable ways to find foreign law.<sup>168</sup>

As a civil law country, in China, the content of foreign law is a matter of law and not a matter of fact<sup>169</sup>. Indeed, as opposed to the common law jurisdiction where the content of the law must be proven by the parties, a civil law jurisdiction is based on the principle that the Court knows the law<sup>170</sup>. In case the Court lacks sufficient knowledge, it must assess the foreign law itself.<sup>171</sup> Article 8 mentioned above, explains how the CICC may determine the foreign law, namely based on the party's and national organizations' submission. The "other reasonable means" leaves room for new innovations and according to some scholars, it may include a future BRI online database created by the SPC<sup>172</sup>. An important role here may be played by the International Commercial Expert Committee as it is made up of international experts who have among their tasks forging an interpretation of foreign international law. All the material and the expert's opinions will be brought during the Court's hearings. As raised before, the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations<sup>173</sup> is another instrument possibly used by the Court to determine the substantive law.

Article 10 of the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations indicates the SPC, the arbitral body, and the administrative organ as the institution in charge of assessing foreign law<sup>174</sup>. According to it, if a party asks for the application of another country's law, it should present that country's law. Then, the Court decides if the foreign law can be determined and makes provisions. Otherwise, the applicable law becomes the law of

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<sup>168</sup> See Art. 8 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>169</sup> Cai and Godwin, *ref. 151*

<sup>170</sup> *Ibid*

<sup>171</sup> *Ibid*

<sup>172</sup> Huo and Yip, *ref. 115*

<sup>173</sup> Full text available at: <https://www.lehmanlaw.com/resource-centre/laws-and-regulations/civil-proceedings/law-of-the-peoples-republic-of-china-on-choice-of-law-for-foreign-related-civil.html>

<sup>174</sup> The Art. 10 states: "Foreign laws applicable to foreign-related civil relations shall be ascertained by the people's court, arbitral authority or administrative organ. If any party chooses the applicable foreign laws, he shall provide the laws of this country. If foreign laws can not be ascertained or there are no provisions in the laws of this country, the laws of the People's Republic of China shall apply."

<https://www.lehmanlaw.com/resource-centre/laws-and-regulations/civil-proceedings/law-of-the-peoples-republic-of-china-on-choice-of-law-for-foreign-related-civil.html>

the People's Republic of China. Thus, Chinese law is applied by default when foreign law cannot be identified, or no appropriate rule emerges after the final proceedings.

The Provisions identified several techniques for foreign laws' ascertainment ensuring that it can be done efficiently and conveniently, which boosts trial efficiency and raises the Court's compatibility with international standards, gaining a reputation as a reliable and efficient destination for solving international commercial disputes<sup>175</sup>. Indeed, as determining applicable foreign may be challenging, at the end of 2019, the CICC launched a "foreign law ascertainment platform"<sup>176</sup> to assist People's Courts, the parties, and all organizations involved in a dispute resolution.

## 2.7 Proceedings

Once the parties present their dispute before the Court, a collegial panel of three judges is appointed, in conformity with Article 5 of the Provisions<sup>177</sup>. In other Chinese Courts, an active role is played by the people's assessors<sup>178</sup>; no mention is made of their possible participation in CICC, which seems to be excluded probably due to the complexity and international aspect of the commercial cases. The disputants can present their case directly on the official website of the CICC, or through "mail, post, on-site submission, or other means permitted by the China International Commercial Court"<sup>179</sup>. Indeed, differently from the rules available for the rest of the Chinese Courts, the CICC status is not requiring the parties to file written statements with the registrar or judge of the court in person<sup>180</sup>. Then, the case is entrusted to the Case Management Office which is established by the Court and is in charge of receiving the disputants, registering and handling cases,

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<sup>175</sup> The China International Commercial Court CICC (2018)

<https://cicc.court.gov.cn/html/1/219/208/209/1316.html>

<sup>176</sup> See its official website: <https://cicc.court.gov.cn/html/1/219/353/index.html>

<sup>177</sup> See Art. 5 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>178</sup> Guodong Du, "In China, what can People's Assessors do?", *China Justice Observer*, October 17, 2021 <https://www.chinajusticeobserver.com/a/in-china-what-can-people-s-assessors-do>

<sup>179</sup> See Art. 5 of the Trial Procedure Rules:

<https://cicc.court.gov.cn/html/1/219/208/210/1183.html>

<sup>180</sup> Jingzhou Tao and Mariana Zhong, "The China International Commercial Court (CICC): A New Chapter for Resolving International Commercial Disputes in China", *Dispute Resolution International* 13, no. 2 (2019): 153-172

coordinating the litigation, mediation and arbitration process, and extra-territorial law ascertainment services<sup>181</sup>. A translation service, under requests and paid by the parties, is also provided by the CICC, its organization is also a competence of the Case Management Office<sup>182</sup>.

A party who brings a case before the CICC must submit, following Article 2 of the Provisions, the following information: (a) statement of claimant, (b) a written agreement in which the parties accept the Court's jurisdiction, (c) an identity document for natural person or licence and the identity document of the legal representative for legal person, (d) evidence in support of the claim, (e) confirmation of the Address for service, (f) Pretrial Diversionary Procedures Questionnaire<sup>183</sup>. If in the pretrial questionnaire the party consent to mediation, then the CICC must register the case but without asking for the acceptance fees for the time being, in the absence of consent to mediation the case is officially accepted, and the Court asks for the fees<sup>184</sup>. During the proceedings, an important role is played by mediation. Following the Confucian values discussed in the previous chapters, the Chinese judicial system and the structure of Chinese International Commercial Courts including the creation of the International Commercial Expert Committee, mediation is the first step in the settlement of international commercial cases. The document places a strong emphasis on the role of mediation in international commercial dispute resolution and expressly encourages domestic-qualified mediation institutions with strong international reputations to settle BRI-related disputes.

In the case the parties opted for mediation, Article 12 of the Provisions establishes that within seven days from accepting the dispute and upon the consent of the parties, the CICC may entrust a member of ICEC or a mediation institution part of the "one-stop" dispute platform<sup>185</sup>. The process is overseen by the Case Management Offices which shall keep a conference with the parties and debate and negotiate on the pretrial mediation process, as well as the time limit for the

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<sup>181</sup> See Art. 7 of the Trial Procedure Rules:  
<https://cicc.court.gov.cn/html/1/219/208/210/1183.html>

<sup>182</sup> *Ibid* Art. 6

<sup>183</sup> *Ibid* Art. 8

<sup>184</sup> *Ibid* Art. 12

<sup>185</sup> See Art. 12 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

mediation, which should not be more than twenty working days<sup>186</sup>. If the litigants agree to a pretrial mediation conducted by the ICEC, then they jointly choose from 1 up to 3 members to act as mediators. If, by contrast, the parties prefer an international commercial arbitration institution to carry on the process, then they must choose one from the list provided by the SPC. According to the Article 18 of the Trial Procedure Rules:

The case management conference shall be held via online video. If it is impracticable to hold the conference via online video, the parties and/or their representatives shall be notified to attend in person<sup>187</sup>.

The agreement reached at the conference is reported in a Case Management Memorandum prepared and sent to the parties by the Case Management Offices<sup>188</sup>. As regards mediation conducted by the ICEC, the proceedings are not open to the public<sup>189</sup> and the Experts Members shall terminate the mediation if (a) the parties decide to stop the mediation, (b) no agreement is reached within the time limit and the parties do not decide for an extension of time, (c) the Experts Members are unable to continue the process, (d) other circumstances<sup>190</sup>. In case of a final agreement reached by the disputants, the ICEC or the international commercial institution that dealt with the process must present it to the Case Management Offices within three days<sup>191</sup>. Subsequently, the CICC by the legislation may issue a mediation letter. Then, upon the request of the parties, the CICC can legitimize the agreement and adopt a judgment based on it, in conformity with Article 13 of the Provisions<sup>192</sup>. So, the CICC can adopt a conciliation statement and convert the agreement into an award to facilitate its recognition and enforcement. This is especially useful if the agreement must be executed in China, as in the case of

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<sup>186</sup> See Art. 17 of the Trial Procedure Rules:

<https://cicc.court.gov.cn/html/1/219/208/210/1183.html>

<sup>187</sup> *Ibid* Art. 18

<sup>188</sup> *Ibid* Art. 19

<sup>189</sup> *Ibid* Art. 21

<sup>190</sup> *Ibid* Art. 22

<sup>191</sup> *Ibid* Art. 24

<sup>192</sup> See Art.13 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

Chinese state-owned enterprises with investment in the country<sup>193</sup>. Still, the Provisions do not clarify if a judge may act as a mediator during the proceedings. Indeed, Chinese Law entrusts the judges in other people's court to act as mediators during judicial proceedings<sup>194</sup>.

In the CICC's case, the Provisions do not specify if the judges may act as mediators. In the second paragraph of Article 15, it is unclear if "a conciliation statement made by the CICC " refers to a statement made by judges in the role of mediators or only in the process of converting the mediation agreement into the mediation statement, described in Article 13. The reluctance of the SPC to attribute explicit mediation powers to the CICC's judges may be due to the ongoing debates in numerous jurisdictions about the role the judges should carry in a mediation process<sup>195</sup>.

Among the arguments to exclude them from the mediation process, one is that participation in the process may undermine their neutrality in establishing the final decision in a litigation process. In case a mediation fails and the judge who took part in the mediation process must settle the dispute he will not be perceived as impartial by the parties<sup>196</sup>. This could possibly happen because during the mediation the judges heard information that they might take into consideration when adjudicating the case, breaking to some extent with the neutrality principle. Still, in the case of the CICC jurisdiction, the question of whether the judges may take part in meditation is not settled by the SPC and will need further clarification.

On the opposite, in the parties fail to reach a mediation agreement, all the collected evidence must be transferred to the Case Management Offices within three working days<sup>197</sup>. Unless the parties agree otherwise, the mediation record and the facts accepted by the parties, for the purpose of achieving a compromise, shall not be acceptable proof in the litigation proceedings, as they can to some extent

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<sup>193</sup> Brink, *ref.* 78

<sup>194</sup> Article 94 of the 2017 CPL states that: "When a people's court conducts mediation, mediation may be conducted by one judge or by the collegial bench, and mediation shall be conducted in situ to the extent possible."

<sup>195</sup> Cai and Godwin, *ref.* 151

<sup>196</sup> *Ibid*

<sup>197</sup> See Art. 25 of the Trial Procedure Rules:

<https://cicc.court.gov.cn/html/1/219/208/210/1183.html>

prejudice the parties<sup>198</sup>. Then, the CICC starts a pretrial conference usually after the expiration of the defense period, sometimes even before it if the parties agree to do so. By Article 27 of the Trial Procedure Rules, the information included is:

- (1) clarifying the plaintiff's claim(s) and the defendant's defense opinion(s);
- (2) reviewing and determining on the parties' application for adding or amending the claim(s) and for making counterclaim(s), and the claim(s) relevant to the action raised by the third party;
- (3) hearing submissions on the consolidation of actions and the joinder of the parties etc.;
- (4) hearing on an application for disqualification;
- (5) determining whether the trial should be open to the public;
- (6) determining on the appearance of witnesses, investigation and collection of evidence, commissioned authentication, provision of evidence by the parties, inspection, and preservation of evidence upon application by the parties.
- (7) arranging for the exchange of evidence;
- (8) clarifying the method for foreign law ascertainment;
- (9) determining whether the Expert Member(s) should be permitted to appear in court to make supplementary explanations;
- (10) summarizing issues in dispute;
- (11) conducting mediation;
- (12) arranging for translation services;
- (13) determining the parties' application for trial via online video depending on the circumstances, if the parties so apply;
- (14) any other procedural matters.<sup>199</sup>

The conference is usually held via online video<sup>200</sup> and it is presided over by a collegial panel or only one judge of panel<sup>201</sup>. In case a party fails to attend the conference, without valid justification, it is interpreted as a refusal to attend the

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<sup>198</sup> See Art. 26 of the Trial Procedure Rules:  
<https://cicc.court.gov.cn/html/1/219/208/210/1183.html>

<sup>199</sup> See Art. 27 of the Trial Procedure Rules:  
<https://cicc.court.gov.cn/html/1/219/208/210/1183.html>

<sup>200</sup> *Ibid Art. 28*

<sup>201</sup> *Ibid Art. 29*



trial<sup>202</sup>. Alternatively, if the parties leave the online proceeding without permission it is considered a withdrawal from the process<sup>203</sup>.

These digital methods underline the digitalization introduced in the CICC's framework and this allows the parties greater flexibility to the disputants as they can attend all the proceedings via online. Considering the international composition and the envisaged task of the ICEC, the members play an important role even in the litigation process. As a matter of fact, if considered necessary by the collegial panel, the experts may be consulted for matters such as international treaties, general commercial rules, or foreign law<sup>204</sup>. At the end of the proceedings, a decision is adopted by the collegial panel, and as will see in the next paragraph, it becomes directly enforceable within the national jurisdiction.

Alternatively, if the parties prefer to settle their conflict through arbitration, the CICC will select an international arbitration institution, also part of the one-stop platform, to deal with the case. In terms of coordinating arbitration and litigation, parties that select arbitration to settle a dispute can apply to the CICC for judicial assistance, such as evidence, grant of a freezing order, or other injunctions prior to or after the procedures' beginning.<sup>205</sup> Then, the party that wishes to set aside and enforce the arbitration award shall submit it accompanied by an application letter to the CICC's jurisdiction which after reviewing it will enforce the award<sup>206</sup>.

For what concerns all the expenses for the proceedings, in conformity with Articles 35, 36, and 37 of the Trial Procedural Rules, the parties must cover them<sup>207</sup>. For all the aspects not described in the Trial Procedural Rules, the SPC reserves the right to give future interpretations<sup>208</sup>. In this way, the SPC may fill the gaps arising when applying the rules to a commercial case.

At present, according to the CICC website, only a few cases were settled by the CICC. All the cases were initially brought to Intermediate People's Court and not

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<sup>202</sup> *Ibid Art. 30*

<sup>203</sup> *Ibid*

<sup>204</sup> See Art. 31 of the Trial Procedure Rules:

<https://cicc.court.gov.cn/html/1/219/208/210/1183.html>

<sup>205</sup> See Art. 14 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>206</sup> See Art. 35 of the Trial Procedure Rules:

<https://cicc.court.gov.cn/html/1/219/208/210/1183.html>

<sup>207</sup> *Ibid Art. 36,37, 38*

<sup>208</sup> *Ibid Art. 40*

all of them had a direct link with the BRI. For instance, Luck Treat Limited vs. Zhong Yuan Cheng Commercial Investment Holdings Co Ltd. case was first presented to the Shenzhen Intermediate People's Court of Guangdong Province. Then, the Shenzhen Intermediate Court considered that this case, jointly with other two similar cases<sup>209</sup> had a great legal significance. Therefore, they should be transferred to the CICC.

The transfer mechanism, as specified in Art. 2 of the Provisions, involves the assistance of the SPC. Indeed, is the Supreme People's Court that must review and transfer the case to the CICC, a process that may result time-consuming. In all the cases registered by the CICC, the parties were invited to attend a mediation process first. In some cases, they held several rounds of discussions on the dispute resolution procedure and substantive issues but were unable to achieve an agreement. The Court took the decisions based on the Civil Procedure Rule, the Provisions, and the Chinese Law Applicable to Foreign-Related Civil Relationships. As regards, the applicable law, in the Luck Treat Limited vs. Zhong Yuan Cheng Commercial Investment Holdings Co Ltd. case, the parties agreed to accept the Chinese law as the governing law. Still, international law was cited and the CICC received material evidence in English (as envisaged in Art. 9 of the Provisions).

According to the data released by the CICC, the Guangdong Bencao Medicine Group Co., Ltd. (Bencao) vs Bruschetti S.R.L. (Bruschetti) case was the first one heard by the CICC and the only in which the Court approved a final judgment. The dispute concerns the distribution of a drug called "Latigent". After receiving all the necessary permits from the China Food and Drugs Administration (CFDA), Bruschetti started distributing the product in China. On November 2013 the company reached an agreement with the state-owned enterprise, the Guangdong Bencao Medicine Group Co., Ltd. According to it, the latter would have to be the only company able to promote, import, sell and distribute "Latigent" in China. Furthermore, Bruschetti issued the General Agency Authorization Letter, which authorized Bencao to operate as the exclusive seller of its product in China and

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<sup>209</sup> See the following cases: Newpower Enterprises Inc. vs Zhong Yuan Cheng Commercial Investment Holdings Co Ltd and Beijing HK CTS Grand Metropark Hotels Management Co Ltd. and Shenzhen Metropark Hotel Co Ltd. vs Zhong Yuan Cheng Commercial Investment Holdings Co Ltd.

<https://cicc.court.gov.cn/html/1/219/211/376/1542.html>

responsible for all bidding and distribution matters. At a certain point, the CFDA ordered to stop importing and selling “Latigent” as considered safety risky. The CFDA imposed then on Bencao to stop the sales and on Bruschetti to recall the product. Bencao notified the decision to Bruschetti but the latter did not respond to it. At that time, Bencao had a pendant contract with another company that was distributing the product in China, and after the CFDA’s decision returned the unsold products to Bencao asking for compensation. Bruschetti insisted that as a distributor, Bencao had to bear all the costs of the recall. Then, the parties decided to submit the dispute to the CICC. After reviewing the criteria for the acceptance of the case, the CICC started the proceedings. Initially, the parties agreed to a pretrial mediation, but no information about the mediation process are available.<sup>210</sup> The CICC heard the parties and cross-examined all the evidence provided, in conformity with the Provisions. Then, it decided that Bruschetti must compensate Bencao for all its inventory and related costs. According to research conducted by the U.S.-China Economic and Security Review Commission, the CICC stelled as well the dispute between the Manila branch of Australia and New Zealand Banking Group Ltd. and the Shanghai branch of Australia and New Zealand Bank vs the China National Electric Engineering Company and third-party Bank of Jiangsu <sup>211</sup>. According to the same, the applicants asked for a reconsideration of a suspension order against the respondents. The hearings were held on December 2020 and were attended by a member of the ICEC. However, no information about this case is available on the CICC website. Concerning the SPC website, in the “foreign-related trial” section, some additional information about the CICC performance obtained from the newspaper China Daily is provided<sup>212</sup>. For instance, it reported the first international commercial cases brought before the CICC, in May 2019. Named the “Red Bull case” the dispute concerned the shareholder qualifications of Thai companies Ruoychai International Group Co.,Ltd. vs Inter-Biopharm Holding Limited in the Chinese company Red Bull Vitamin Drink Co.,Ltd. Initially, the case

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<sup>210</sup> Leyton Nelson, “Dispute settlement with Chinese characteristics: assessing China’s International Commercial Court”, *U.S.-China Economic and Security Review Commission*, February 28, 2023

<sup>211</sup> *Ibid*

<sup>212</sup> See more at:

<https://subsites.chinadaily.com.cn/supremepeoplescourt/search.html?searchText=CICC+>

was accepted by the Beijing Court and then transferred to CICC. In the first stage, the parties agreed to the ICEC mediation but at a later moment a party opted out and the case moved on to litigation. A panel of 5 judges heard the case for about four hours and no final judgment was released immediately after the hearings. This dispute was not directly linked with the Belt and Road project nor were the other cases that were filed until January 2018. Based on the news release, the other cases dealt with the acknowledgment of shareholders and the distribution of earnings in Thailand, Japan, and Italy<sup>213</sup>.

## 2.8 Judgments

One of the benefits of the CICC is that as part of the SPC, which is the highest judicial power in China, its awards are immediately enforced within the national jurisdiction. This is reflected in Article 6 of the Provisions, which states that the CICC may appoint a lower-level people's court (as local people's courts and special people's courts under the jurisdiction of the SPC) to enforce an asset preservation ruling it has issued<sup>214</sup>. Besides, in contrast to the majority of ICommCs, the CICC's judgments are final and binding. Indeed, as specified in Article 15 of the Provisions:

A judgment or ruling made by the International Commercial Court is a legally effective judgment or ruling.

A conciliation statement made by the International Commercial Court shall have the same legal effect as a judgment after its receipt signed by the parties.<sup>215</sup>

Therefore, the Article stresses the legal status of CICC's awards and of the conciliation statement, de facto a judgment; all of them are final and binding. In ICommCs the appellate mechanism is one of the pieces of resistance of their institutional framework. The possibility of asking for a review of an award is what

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<sup>213</sup> See more at:

[https://subsites.chinadaily.com.cn/supremepeoplescourt/2019-05/31/c\\_761750.htm](https://subsites.chinadaily.com.cn/supremepeoplescourt/2019-05/31/c_761750.htm)

<sup>214</sup> See Art.6 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>215</sup> *Ibid* Art.15

might induce foreign investors to start litigation before an international commercial court rather than opting for arbitration.

Still, as seen above the CICC follows a one-trial system to conclude a case, meaning its awards are not subject to an appeal, but they can be brought before the Fourth Civil Division for a retrial based on specific grounds<sup>216</sup>. In this way, one of the major benefits of the ICommCs disappears in the institutional framework of the CICC. Indeed, the litigation before an International Commercial Court which combines national and international elements, is advantageous for investors due to some privilege typical of the domestic courts as the appeal mechanism. By missing it, the CICC equalate to international arbitration, where the awards are final and can be reviewed only on specific grounds, not very different from the Chinese ones. The national legislation envisaged that a CICC award can be reviewed only under Chapter 16 of the CPL<sup>217</sup> and Article 16 of the Provisions which states:

Parties may, in accordance with the provisions of the Civil Procedure Law, apply to the main body of the Supreme People's Court for a retrial of a legally effective judgment, ruling, or conciliation statement made by the International Commercial Court.

The main body of the Supreme People's Court shall constitute a new collegial panel respectively for the review of the application for a retrial and for conducting the retrial.<sup>218</sup>

The article includes the “conciliation statement” among the decisions possibly subject to a retrial. However, the Provisions do not envisage a situation in which the mediation agreement, reached under the ICEC or other mediation institution of the forum, was not converted into a conciliation statement by the CICC. Therefore, it is unclear if such an agreement will anyway have the same legal force as a CICC’s judgment or if it will be just a contractual obligation, thus not subject to the retrial process under Article 16<sup>219</sup>. Nor clarify the Provisions of the legal effect of the mediation statement if one or both parties refuse to sign it and violate the

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<sup>216</sup> Dahlan, *ref.* 47

<sup>217</sup> See Chapter XVI of the CPL: [http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383880.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383880.htm)

<sup>218</sup> See Art. 16 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>219</sup> Huo and Yip, *ref.* 115

agreement<sup>220</sup>. Therefore, further clarifications will be needed in the future by the SPC. The lack of an appeal itself is not the main problem, but it may aggravate the foreign litigants' concerns over the quality of justice available in CICC. In addition, it may open a question of constitutional legality<sup>221</sup>. In the Chinese legislation, the parties have guaranteed the right of an appeal, for instance, Article 49 at the CPL<sup>222</sup>. Still, the same safeguards are not provided in the CICC proceedings. If in the case of a consensual jurisdiction agreement, there is an indirect renounce of these options as the parties are cognisant that the Court's framework does not include an appeal, different is the situation when a case is transferred to the CICC<sup>223</sup>. In the last case, the parties are deprived of an appeal mechanism that differently they would have enjoyed in other Chinese courts; therefore, a doubt of constitutionality may arise. Besides, the one-trial system may cause no little concern for the international business community as Chinese law contemplates very few grounds for an award's retrial. They are indicated in the Article 157 of the 2017 CPL, and they regard especially procedural elements<sup>224</sup> (some additional circumstances were included in 2017 in Chapter 18 of the CPL)

Uncommon to the domestic practice and more compatible with the common law jurisdictions, the CICC's awards comprise the dissenting opinion<sup>225</sup>. The latter are included in the ultimate award to enhance judicial transparency, promote judges' independence, and bolster the trust of international actors in the Chinese legal system.<sup>226</sup> Still, as no appeal is provided, the practical use of the dissenting opinion is limited. Certainly, the innovations introduced by the Supreme People's Court represent an attempt to synchronize domestic proceedings with foreign judicial procedures, more familiar to foreign investors. Moreover, according to some authors, the CICC tries to explore "the adoption of rules related to flexible

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<sup>220</sup> *Ibid*

<sup>221</sup> Huo and Yip, *ref. 115*

<sup>222</sup> Art. 49 of the CPL states: "Parties shall have the right to appoint agents, to request for the withdrawal of judicial officers, to collect and present evidence, to engage in arguments in court, to request for mediation, to file appeals and to apply for execution."

<https://cicc.court.gov.cn/html/1/219/199/200/644.html>

<sup>223</sup> Huo and Yip, *ref. 115*

<sup>224</sup> There is possibility for a retrial when adjudicating the case, a judge commits embezzlement, accepts bribes, practices favoritism for personal gains, or adjudicates by distorting the law.

<sup>225</sup> See Art. 5 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>226</sup> Hansel Pham, "The China International Commercial Court", *White Case*, March 4, 2021

<https://www.white.case.com/insight-alert/china-international-commercial-court>

jurisdiction, Amicus Curiae, expert jury trials, confirmation of foreign lawyers' attorney status and improvement in the judgment enforcement regime"<sup>227</sup>. In CICC jurisdiction this final nature of the court's decisions is particularly complicated as its decisions might need recognition and enforcement in a foreign country.

To worsen the situation the Provisions do not regulate the enforcement of the CICC's judgments in foreign jurisdictions. This may reduce the recourse to the CICC due to the uncertainty of the enforcement of the CICC's awards in foreign jurisdiction. At present, their enforcement can be made based on a bilateral judicial assistance agreement (rarely used by the government) or other reciprocal agreements between China and its BRI partner based on the mutual execution of court judgments. Another way could be through the Hague Convention on the Choice of Court Agreements<sup>228</sup>. The Convention provides the parties with the required legal assurance that their choice of court agreement will be fulfilled and that a judgment rendered by the chosen court will be able to be recognized and executed in the jurisdiction of the countries part of the Convention. The system is similar to the New York Convention but with regard to litigation. However, the Convention was adopted only in 33 countries<sup>229</sup>, and China signed the Convention in 2017 but did not ratify it yet, which reduces its potential effects. Still, the enforceability of judgments is an essential criterion for foreign investors when deciding which dispute resolution clause to include in their contracts. Therefore, the wide use of the CICC proceeding will depend on China's ability to find a system of awards enforcement and executions in foreign countries.

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<sup>227</sup> Chen, *ref. 65*

<sup>228</sup> The Convention on Choice of Court Agreements is an international treaty concluded within the Hague Conference on Private International Law. It was concluded in 2005 and entered into force on 1 October 2015.

<https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>

<sup>229</sup> A complete list is available on: <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>







## Chapter III: Analysis of the results

### 3.1 Missed internationalization

As underlined in the previous chapter, the Chinese International Commercial Court assumes some specific characteristics that differentiate it from the rest of the ICommCs. First, even if the Court can exercise its jurisdiction over different kinds of foreign disputes, its construction is linked to the Belt and Road Initiative. Indeed, the Court was thought to be a forum for the commercial disputes arising along the Route<sup>230</sup>. Still, some critical points in its structure risk making the forum inadequate for dispute settlement.

The ICommCs are a hybrid instrument as they combine national and international elements. However, after analyzing the CICC's institutional framework it seems that the Court lacks and opposes greater levels of internationalization<sup>231</sup>. According to some scholars, the Chinese court is significantly hampered by an authoritarian system that severely restricts judicial independence and the rule of law in China<sup>232</sup>. The CICC, unlike other foreign business courts, are geared to demonstrate reliance on the Chinese system. Compared to other ICommCs, the CICC's structure lacks the presence of actors such as judges and lawyers coming from other jurisdictions.

As previously seen, by Article 9 of the Chinese Judges Law and Art 263 of the CPL, judges, and attorneys taking part in the CICC's proceeding must be Chinese nationals. Although the judges assigned to the CICC are well-regarded senior judges in Chinese courts, the diversity of the CICC's judges is insufficient to allay international parties' concerns about the lack of neutrality of Chinese domestic court judges. The absence of non-Chinese judges, typically employed in other International Commercial Courts, reduces the globalized aspect of the CICC and its

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<sup>230</sup> In the preamble of the Provisions is specified that the Court must provide services and protection for the "Belt & Road" construction.

<sup>231</sup> Huo and Yip, *ref. 115*

<sup>232</sup> Nora Sausmikat and Daniel Sprick, "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, 2019

efficiency. Indeed, judges from different jurisdictional systems may give essential support in interpreting and applying international law. The presence usually serves to combine the domestic and international elements, guaranteeing compatibility and interoperability between the systems<sup>233</sup>. They represent a sign of impartiality and competitiveness that might promote the CICC in the worldwide business community and incentivize foreign investors to resort to the CICC's jurisdiction. On the other hand, foreign lawyers' engagement in CICC lawsuits is currently confined to indirect participation, such as assisting Chinese counsel in the procedures. The appointment of only Chinese lawyers is in some way limiting the party's autonomy, as foreign litigants may prefer foreign lawyers especially when the case is governed by foreign law.

Another obstacle to the internalization of the CICC is that by Article 262 of the CPL, the Court's proceedings must be held in "languages commonly used in China". This includes Chinese and other languages spoken by the officially recognized ethnic minorities of China and excludes other international languages such as English. Considering the multicultural nature of the BRI, choosing only languages spoken in China for the CICC's proceedings may seem inadequate for a forum dealing with disputes arising from different BRI countries. As an international Court which intends to settle commercial disputes possibly taking place in 149 countries, the language requirement may call into question the efficiency and the neutrality of the CICC. By refusing to accept English for the proceedings, the CICC negates a common language to the BRI countries, diminishing the possibility of receiving related disputes. Therefore, the investors may prefer to apply to other dispute settlement instruments which incorporate English as a working language.

The restricted involvement of the ICEC's experts is another salient point of the Court's functioning. At present, the ICEC participation is limited to pretrial mediation and its members ask to take an active role and carry out independent arbitration and mediation proceedings<sup>234</sup>. Most of the articles of the Working Rules

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<sup>233</sup> Georgios Dimitropoulos, "The design of International Commercial Courts: from organizational hybridity to functional interoperability" in *Commercial Courts: The future of transnational adjudication*, ed Stavros Brekoulakis and Georgios Dimitropoulos (Cambridge: Cambridge University Press, 2022), pp. 251-277

<sup>234</sup> See more at <https://cicc.court.gov.cn/html/1/219/208/209/1316.html>

of the International Commercial Expert Committee of the Supreme People's<sup>235</sup> underline the experts' participation in the mediation process. The same is reduced in the litigation process and no member is authorized to offer arbitration services. One of the ICEC members, Shi Jingxia, suggested extending the parties' autonomy in the CICC proceedings<sup>236</sup>. According to him, it is to attribute the parties the power of choosing judges and expert members, similar to the autonomy they enjoy in arbitration. In addition, the member hopes for transparency and openness in the proceedings, excluding the mediation process, proceedings involving state secrets, personal privacy, or other situations envisaged by the law<sup>237</sup>.

The overall functioning of the one-stop platform is questionable as all the institutions taking part in the resolution platform are essentially Chinese or at least located in China. This represents, especially for foreign investors, a threat to the neutrality principle. Hence, some parties may prefer to seek recourse with alternative international organizations that provide arbitration services and have a more diverse composition to ensure fair proceedings. In addition, skeptics of this arrangement worry that smaller partners within BRI who enter into agreements with Chinese companies may feel obligated to submit to Court's jurisdiction<sup>238</sup>.

### 3.2 Procedural gaps

Another controversial issue is the case acceptance procedure. The CICC is keen to accept disputes of a high economic value that are connected to China and involves strategic interest for the country. To date, the CICC manifests its jurisdiction only over international commercial disputes involving one or more foreign parties, relevant foreign objects, or legal issues that have a substantive connection with China. Therefore, unlike other ICommCs as the Singapore International Commercial Court (SICC), an agreement in favor of the CICC jurisdiction is not sufficient to accept the case<sup>239</sup>. In conformity with Article 34 of

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<sup>235</sup> See the Articles at: <https://cicc.court.gov.cn/html/1/219/208/210/1144.html>

<sup>236</sup> *Ibid*

<sup>237</sup> *Ibid*

<sup>238</sup> Brink, *ref. 78*

<sup>239</sup> Man Yip, "The Battle for Jurisdiction through Jurisdictional Requirements: Comparing the Commercial Court of England and Wales, the Singapore International Commercial Court and the Chinese International Commercial Court" in *Commercial Courts: The future of transnational*

the CPL and Article 2 of the Provisions a case brought before the CICC must have an actual connection with China (the defendant's domicile, the place where the contract is performed, or the subject matter is located). Projects developed within the Belt and Road Initiative can easily satisfy this requirement as they usually have an international element as they are taking place in a foreign country and are carried out by a Chinese enterprise.

As specified in Article 2 of the Provisions, only high-value claims that exceed the quantum of RMB 300 million can be brought before the CICC. Still, the economic requisite appears to be complicated as it is difficult to evaluate in advance the exact amount of a dispute. Once again, this requirement underlines the conservative nature of the CICC and the authorities' intention to establish a Court dealing mainly with BRI disputes. A risk is that the Chinese authorities start to include the CICC as a dispute resolution method in the Memorandum of Understanding signed by China and its BRI partners<sup>240</sup>. However, as being based on consent, the CICC would not have automatic jurisdiction over BRI-related disputes. The parties will have to choose the CICC in their contract dispute resolution clauses or consent to its jurisdiction once a dispute occurs. As seen, they will have to prove that the presented case is involving a foreign element that has a connection with China and exceeds the amount of RMB 300 million. Therefore, even in the eventuality of a judicial agreement, the CICC may refuse to hear the case.

Traditionally, the jurisdiction of international litigation was based on the connection with the territory, sometimes even a physical one (intended as the domicile or the place of tort) but in the era of globalization this requirement was gradually abandoned<sup>241</sup>. Therefore, international commercial courts usually do not require a bond between the parties or transactions and the court's jurisdiction<sup>242</sup>.

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*adjudication*, ed Stavros Brekoulakis and Georgios Dimitropoulos (Cambridge: Cambridge University Press, 2022), pp. 176-200

<sup>240</sup> Julien Chaisse and Xu Qian, "China International Commercial Court: Architecture, Pitfalls and Promises", in *Commercial Courts: The future of transnational adjudication*, ed Stavros Brekoulakis and Georgios Dimitropoulos (Cambridge: Cambridge University Press, 2022), pp. 468-488

<sup>241</sup> Ralf Michaels, "Globalization and Law: Law Beyond the State", *Law and Social Theory* (2013) <https://ssrn.com/abstract=2240898>

<sup>242</sup> The Singapore Commercial Court (SICC) and the Dubai International Financial Centre (DIFC) do not require it, while the Qatar International Court requires an affiliation between the case and the court's jurisdiction.

This connection element required by the CICC is controversial and generates some disadvantages. Indeed, it deprives both sides of their freedom to select a neutral court, especially when there is a precedent of failed arbitration. In that case, the trust between the parties may be affected, and selecting a court in some way linked with one actor could deteriorate the situation<sup>243</sup>. Given these unique institutional conditions, the CICC has a competitive disadvantage compared to its equivalents.

The connection element may constrain the CICC's jurisdiction and its potential to become a forum for foreign investors; even if the parties select it as a dispute mechanism in an agreement, if no Chinese element is involved in the case, the CICC has no jurisdiction over it. Consequently, this choice alienates the international business community and underlines the differences between Chinese and international standards. Indeed, the two conditions also demonstrate that, in comparison to the SICC and the Commercial Court of England and Wales, party autonomy plays a significantly more limited role in the CICC<sup>244</sup>. However, in Article 34 of the CPL the reference to "etc." leaves room for other situations not directly specified that could possibly amplify the CICC jurisdiction. Nevertheless, currently, purely international commercial cases in search of a neutral third-party country to resolve the dispute cannot be brought before the CICC; a limit for its purpose of becoming an international dispute resolution. In other words, the CICC may solve only disputes that due to the national element would be anyway under the Chinese courts' jurisdiction<sup>245</sup>.

In addition, as seen in the dissertation, the CICC uses the three-element approach to determine a foreign case (the litigants, the content, or the factual position)<sup>246</sup>. This approach is found to be restrictive and the SPC issued two judicial interpretations in 2012 and 2015 to introduce some flexibility<sup>247</sup>. Civil and commercial cases which did not fulfill the three-element requirement but had a substantial link with a foreign jurisdiction, were added to the list. Still, considering the above-mentioned Article 3 of the Provisions, it seems that the CICC adopted

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<sup>243</sup> Huo and Yip, *ref. 115*

<sup>244</sup> Man Yip, *ref. 239*

<sup>245</sup> *Ibid*

<sup>246</sup> Huo and Yip, *ref. 115*

<sup>247</sup> Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the "Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships" (I) <https://cicc.court.gov.cn/html/1/219/199/201/679.html>

the former three-element approach, which precludes some cases from its jurisdiction. For instance, a dispute between two companies incorporated in China that are controlled by a foreign owner and carry out BRI-related business within China's territory may not satisfy the conditions to be considered as a foreign case. Specifically, the Chinese Company law considers the place of incorporation to determine the nationality of a country, thus as both companies have been incorporated in China they would be considered as nationals<sup>248</sup>. Moreover, the same indicates a company domicile in the place where the company has its principal business, thus in this case, as both companies develop their main activity in China, they are considered nationals according to the law<sup>249</sup>. As regards the content, even if the companies' economic activity is BRI related, their contract was performed in China and does not contain an international element under Article 3 of the Provisions, thus they cannot be considered foreign investors. Then, this three-element approach may compromise the Court's proper functioning and exclude cases such as the one illustrated above. Therefore, some cases that in practice present international elements cannot be recognized as so under the current system. This is limiting the Court's jurisdiction and its active role over the BRI disputes.

As raised before, in all the cases treated by the CICC the domestic law is the default choice. The parties can decide through an agreement the applicable law otherwise the CICC will assess the applicable law. Article 8 of the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations underlines how the CICC assess the applicable law. Namely, the ascertainment of foreign law is determined based on the submission of the parties, the ICEC, and national organizations. Given the preference for Chinese law, this approach may limit the application of foreign law. This element can compromise the fairness of the proceeding as international law seems to be more compatible with the nature of the disputes. Indeed, it involves litigants coming from different jurisdictions which are more familiar with international standards. In addition, no guidance on the submitting process regarding the way an institution may seek

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<sup>248</sup> See Art. 2 of the Company Law of the People's Republic of China  
[http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383787.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383787.htm)

<sup>249</sup> *Ibid* Art. 10

authorization to provide expert views on foreign law or the criteria for such authorization is provided. Neither is clear if there is a hierarchical order to the viewpoints of the various experts and institutions. Considering that the CICC's institutional framework does not provide for an appellate mechanism, the law ascertainment process becomes indispensable.

One crucial aspect that authorities must address is the enforcement process in foreign jurisdictions. Without proper safeguards in place, investors may be hesitant to bring their requests to the CICC and may opt for arbitration instead due to the enforceability of the arbitration awards under the New York Convention. The ratification of the Hague Convention on the Choice of Court Agreement by the CICC will ensure the enforcement of the Court's award in a foreign jurisdiction. Still, the government refused to ratify the Convention and to date, no multilateral agreement for the recognition and enforcement of the CICC's awards in foreign jurisdiction has been signed.

### 3.2 Predominant role of the SPC

Legally speaking, opposite to the other ICommCs, the CICC was established through a judicial interpretation of the SPC. The latter not only played an active role in the creation of the CICC but still exercise control over the Court's functioning. For instance, by the Provisions, a case may be transferred to the CICC by the SPC. Indeed, the Supreme People's Court may use its discretionary power to refer cases of "significant nationwide impact" to the CICC<sup>250</sup>. Yet, a clear definition of the meaning of significant nationwide impact is not provided. In addition, different from the CICC's status, no minimum claim quantum is indicated. Moreover, the SPC can transfer a case to the CICC every time it deems it appropriate, and so far, no rules for selecting the cases have been identified<sup>251</sup>. Usually, if the regulations make it easy to transfer proceedings without the approval of the parties, this may ease the referral of international business disputes to the international commercial court<sup>252</sup>. However, it would harm the international commercial court's reputation as well as

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<sup>250</sup> See Art. 2 of the Provisions: <https://cicc.court.gov.cn/html/1/219/199/201/1574.html>

<sup>251</sup> Art. 10 of the Company Law of the People's Republic of China  
[http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383787.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383787.htm)

<sup>252</sup> Man Yip, *ref.* 239



the image of the national judicial system, of which the international commercial court is a part<sup>253</sup>.

There is a sharp contrast in the transfer procedure between the SICC and the CICC. The first envisaged a series of rules for the case transfer, mainly based on the parties' consent. The CICC, on the other hand, does not envisage specific rules for the transfer mechanism which appears to depend on the SPC's discretionary power. Therefore, the judicial discretion in the CICC's structure is exercised without taking into consideration the parties' choices, precluding to some extent their autonomy. In addition, as the founding of the CICC, the SPC is responsible for providing further explanation of some ambiguous articles of the Provisions. Indeed, numerous articles in the Provisions such as the judges' selection and their participation in the mediation process, the transfer of cases from other domestic courts to the CICC, other cases for the determining of the foreign, etc., needs further clarification.

### 3.3 Lack of transparency

Assessing the efficiency and progress of the CICC is hindered by a lack of information. The limited availability of quality data poses a challenge to anyone attempting to evaluate the CICC's outcomes. This may be due in part to the political system and policies regarding data preservation, resulting in only a small amount of information in English being available online. The Chinese authorities have not disclosed important data about the CICC cases, making it difficult to assess its effectiveness in handling commercial disputes. Unfortunately, neither the official site of the CICC nor SPC holds archives of cases solved by the court, leaving the database section empty<sup>254</sup>. On the CICC website in the section "judgment" are illustrated only six cases brought before the court. In only one of them, the Court issued a judgment. In all the others it released rulings concerning the validity of an arbitration agreement and the set aside of an arbitral award. According to the website, no mediation statements were released by the CICC so far. The absence of a comprehensive database containing all the cases heard by the CICC creates a lack of transparency and complicates the task of evaluating the Court's efficiency in

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<sup>253</sup> *Ibid*

<sup>254</sup> See more at: <https://cicc.court.gov.cn/html/1/219/353/359/361/index.html>

dealing with international commercial disputes. Most of all, it precludes the opportunity to evaluate if the establishment of the CICC may be a suitable solution for the dispute settlement in the Belt and Road Initiative.

Considering that the two commercial courts were established in 2018, the number of cases received is insufficient to qualify this dispute resolution specific for the Belt and Road Initiative. As seen in the first chapter, the project involves numerous countries and infrastructure projects among the others, and the disputes that arise in these years are certainly much more than the ones brought before the CICC. The unwillingness of members to bring their disputes before the court may imply a lack of confidence in the CICC's structure. Indeed, the overall institutional framework of the Court implies a lack of transparency. Based on only 19 articles and some additional judicial interpretation of the SPC, many of the CICC's elements must be further clarified by the SPC. Still, this continuous but in some cases necessary intervention of the SPC could possibly be frowned upon by the foreign investors. Currently, the recourse to the Chinese legislation must be made for all the aspects not clearly defined in the Provisions. Considering that the BRI is made up of civil law, common law, and Islamic countries some disagreements may occur. Indeed, the involved nations have different legal systems, and not all of them may view the Chinese legal system favorably. Therefore, the uncertainty of the CICC and its chronic dependence on the Chinese judicial system seems to alleviate the foreign investors from the Chinese dispute resolution method<sup>255</sup>.

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<sup>255</sup> Sausmikat and Sprick, *ref.* 232



## Conclusions

The Belt and Road Initiative represent a partnership mainly based on soft law instruments. Therefore, it lacks a multilateral treaty and common rules applying to all the involved nations. This supposes the absence of a resolution mechanism able to settle all the disputes concerning the BRI activities. Currently, the arising disputes must be solved through traditional methods: arbitration, mediation, and resort before the national courts. Still, due to the multicultural, political, and economic dimensions of the BRI, these methods fail to efficiently solve the dispute arising along the Route. The high number of nations involved and the differences between their legal systems, based on civil law, hybrid traditions, and common law make complicated the task of finding a common resolution mechanism able to take into consideration the differences between the countries. The Chinese authorities tried to offer mediation, arbitration, and litigation services to foreign investors by creating the Chinese International Commercial Courts. Still, the strategy of offering a comprehensive mechanism capable of solving commercial disputes along the Route while maintaining control over the overall process failed. The institutional framework of the CICC, based on 19 Articles and characterized by the continuous intervention of the SPC discourages the investors from presenting their claims before the Court. Moreover, the lack of transparency, the deficiency of an instrument for the recognition and enforcement of the awards abroad, and the predominance of national elements on the international ones make the Court dependent on the domestic legal system. The CICC's failure to internationalize effectively sets it apart from other International Commercial Courts, raising questions about its neutrality and efficiency. Consequently, the two created Chinese International Commercial Courts were rarely intercepted by the BRI litigants in search of a neutral forum. Specifically, this absence of cases solved by the CICC complicates the task of assessing its success. The confidentiality and the restricted information available in English increase the investors' doubt about the CICC's transparency and complicate the scholars' task to evaluate its outcomes. The CICC database presents only a few cases solved by the Court, too few to say that this instrument can efficiently solve the dispute along the Route. Therefore, the limited cases solved by the CICC and the absence of quality data about its proceeding make

it difficult to consider the instrument as a specific BRI dispute mechanism. Currently, this massive strategy based on infrastructure and development projects failed to provide a trustful and efficient dispute resolution method. With various countries and strategic interests involved in the BRI, this can lead to conflicts between the participants.

The effectiveness of the CICC in resolving BRI-related disputes will depend largely on the implementation of reforms that will create a more international and trustworthy institutional framework. The adoption of English as a procedural language, the acceptance of judges from foreign jurisdictions, and the adoption of an instrument able to recognize and enforce the CICC's awards outside the Chinese territory may increase the potential of the Court to receive BRI claimants. Alternatively, the Chinese authorities may consider adopting another instrument for future disputes. As it stands, the dispute resolution is a chink in the armor of the Belt and Road Initiative's armor, which if not solved can affect the success of the Project and especially the relations between the participants. Considering that the Chinese Strategy is an ongoing program, further developments concerning the dispute settlement may be achieved shortly.

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# Appendix 1

## Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court

Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court," adopted at the 1743rd meeting of the Adjudication Committee of the Supreme People's Court on June 25, 2018, is now released, and is effective from July 1, 2018.

The Supreme People's Court

June 27, 2018

### **Judicial Interpretation of the Supreme People's Court of the People's Republic of China**

**Fa Shi [2018] 11**

Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court

(Adopted at the 1743rd meeting of the Adjudication Committee of the Supreme People's Court on June 25, 2018, effective from July 1, 2018)

To try international commercial cases fairly and timely in accordance with the law, protect the lawful rights and interests of the Chinese and foreign parties equally, create a stable, fair, transparent, and convenient rule of law international business environment, and provide services and protection for the "Belt & Road" construction, according to the Law on Organization of the People's Courts of the People's Republic of China, the Civil Procedure Law of the People's Republic of China and other laws, in light of judicial practice, provisions concerning issues

related to the establishment of the International Commercial Court of the Supreme People's Court are set out below:

**Article 1.** The Supreme People's Court establishes the International Commercial Court. The International Commercial Court is a permanent adjudication organ of the Supreme People's Court.

**Article 2.** The International Commercial Court accepts the following cases:

(1) first instance international commercial cases in which the parties have chosen the jurisdiction of the Supreme People's Court according to Article 34 of the Civil Procedure Law, with an amount in dispute of at least 300,000,000 Chinese yuan;

(2) first instance international commercial cases which are subject to the jurisdiction of the higher people's courts who nonetheless consider that the cases should be tried by the Supreme People's Court for which permission has been obtained;

(3) first instance international commercial cases that have a nationwide significant impact;

(4) cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards according to Article 14 of these Provisions;

(5) other international commercial cases that the Supreme People's Court considers appropriate to be tried by the International Commercial Court.

**Article 3.** A commercial case with one of the following situations can be regarded as an international commercial case under these Provisions:

(a) one or both parties are foreigners, stateless persons, foreign enterprises or other organizations;

(b) one or both parties have their habitual residence outside the territory of the People's Republic of China;

(c) the object in dispute is outside the territory of the People's Republic of China;

(d) legal facts that create, change, or terminate the commercial relationship have taken place outside the territory of the People's Republic of China.

**Article 4.** Judges of the International Commercial Court shall be selected and appointed by the Supreme People's Court from the senior judges who are experienced in trial work, familiar with international treaties, international usages, and international trade and investment practices, and capable of using Chinese and English proficiently as working languages.

**Article 5.** Cases tried by the International Commercial Court shall be heard by a collegial panel consisting of three or more judges.

When deliberating cases, the collegial panel follows the rule of majority. Minority opinion can be specified in the judgment or ruling.

**Article 6.** The International Commercial Court may designate a lower people's court to enforce the preservation ruling it has made.

**Article 7.** In the trial of cases by the International Commercial Court, the applicable law of the substantive dispute shall be determined in accordance with the provisions of the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations.

In case the parties have chosen the applicable law by agreement in accordance with the law, the law chosen by the parties shall be applied.

**Article 8.** When the International Commercial Court applies foreign law in trying a case, it may find law in the following ways:

(1) provided by the parties;

- (2) provided by the legal expert from China or abroad;
- (3) provided by the institution rendering law finding services;
- (4) provided by the member of the International Commercial Expert Committee;
- (5) provided by the central authority of the other contracting party that has entered into a judicial assistance treaty with China;
- (6) provided by the Chinese Embassy or Consulate in the relevant country;
- (7) provided by the Embassy of the relevant country in China;
- (8) other reasonable ways to find foreign law.

The materials and expert opinions on foreign law provided in one or more of the above ways shall be presented during the hearing in accordance with the law and the parties shall be afforded a full opportunity to be heard.

**Article 9.** When parties submit the evidentiary materials to the International Commercial Court that came into being outside the territory of the People's Republic of China, regardless of whether they have been notarized, authenticated or otherwise formally certified, they shall be cross-examined during the court hearing.

In case the evidentiary materials submitted by a party is in English, a Chinese translation may not be accompanied upon the opposing party's consent.

**Article 10.** Audio-visual transmission technology and other information networking methods may be applied by the International Commercial Court in the investigation and taking of evidence as well as the organization of cross examination.

**Article 11.** The Supreme People's Court will set up an International Commercial Expert Committee and select international commercial mediation institutions and international commercial arbitration institutions that meet certain conditions to build up together with the International Commercial Court a dispute

resolution platform on which mediation, arbitration, and litigation are efficiently linked, thereby creating a "one-stop" international commercial dispute resolution mechanism.

The International Commercial Court supports parties to settle their international commercial disputes by choosing the approach they consider appropriate through the dispute resolution platform on which mediation, arbitration and litigation are efficiently linked.

**Article 12.** The International Commercial Court may, within seven days after accepting a case and with the consent of the parties, entrust the member of the International Commercial Expert Committee or the international commercial mediation institution to mediate the dispute.

**Article 13.** The International Commercial Court may issue a conciliation statement in accordance with the law after the parties have reached a mediation agreement following mediation conducted by the member of the International Commercial Expert Committee or the international commercial mediation institution. If the parties request a judgment, the International Commercial Court may make a judgment based on the mediation agreement and serve the parties with the judgment.

**Article 14.** Where the parties agree to submit their dispute to arbitration by an international commercial arbitration institution under Article 11 paragraph 1 of these Provisions, they may apply to the International Commercial Court for a ruling on the preservation of property, evidence or conduct before or after the arbitration proceeding commences.

Where a party makes an application to the International Commercial Court for setting aside or enforcement of an arbitral award rendered by an international commercial arbitration institution under Article 11 paragraph 1 of these Provisions, the International Commercial Court shall review the application in accordance with provisions of the Civil Procedure Law and other related legal provisions.



**Article 15.** A judgment or ruling made by the International Commercial Court is a legally effective judgment or ruling.

A conciliation statement made by the International Commercial Court shall have the same legal effect as of a judgment after its receipt signed by the parties.

**Article 16.** Parties may, in accordance with the provisions of the Civil Procedure Law, apply to the main body of the Supreme People's Court for a retrial of a legally effective judgment, ruling or conciliation statement made by the International Commercial Court.

The main body of the Supreme People's Court shall constitute a new collegial panel respectively for the review of the application for a retrial and for conducting the retrial.

**Article 17.** Parties may apply to the International Commercial Court for the enforcement of a legally effective judgment, ruling or conciliation statement made by the International Commercial Court.

**Article 18.** The International Commercial Court provides litigation convenience to the parties with its Electronic Litigation Service Platform, the Litigation Process Open Information Platform, and other litigation service platforms, and it supports online case registration, fee payment, review of files, exchange of evidence, service of process, court hearings, etc.

**Article 19.** These Provisions will be effective from July 1, 2018.

## Appendix 2

### Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation)

In order to facilitate the parties' resolution of disputes through the China International Commercial Court of the Supreme People's Court (hereinafter referred to as the China International Commercial Court), the Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation) (hereinafter referred to as the Rules) is hereby formulated in accordance with the Civil Procedure Law of the People's Republic of China (hereinafter referred to as the Civil Procedure Law), the Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court (hereinafter referred to as the Provisions), other laws and judicial interpretations.

#### Chapter 1 General Provisions

**Article 1** The China International Commercial Court provides an international commercial dispute resolution mechanism that integrates litigation, mediation and arbitration for the parties to resolve disputes fairly, efficiently, conveniently and economically.

**Article 2** The China International Commercial Court respects the parties' autonomy in accordance with law and fully respects the parties' choice of dispute resolution method.

**Article 3** The China International Commercial Court protects equally the legitimate rights and interests of Chinese and foreign parties and safeguards the full exercise of the procedural rights of Chinese and foreign parties.

**Article 4** The China International Commercial Court supports online process for case acceptance, payment, service of process, mediation, file inspection, evidence exchange, pretrial preparation and hearings etc., in order to provide convenience to the litigation participants.

**Article 5** The parties may file their documents with the China International Commercial Court through the litigation platform on the official website of the China International Commercial Court ([cicc.court.gov.cn](http://cicc.court.gov.cn)). Where it is impracticable, the parties may file their documents via the following means:

- (1) E-mail;
- (2) post;
- (3) on-site submission; or
- (4) other means permitted by the China International Commercial Court.

If a document is to be filed in accordance with Article 5(2) or (3), the submitting party shall file the document in paper form and provide duplicate copies as per the number of opposing parties, accompanied with electronic versions on a CD-ROM or any other portable storage device.

**Article 6** The China International Commercial Court provides translation services to the parties upon request. The requesting party shall bear the costs.

**Article 7** Each International Commercial Court establishes a Case Management Office, which is responsible for receiving the parties, accepting and managing cases, coordinating and integrating litigation, mediation, arbitration and other alternative dispute resolution methods, and organizing and managing translation services and extra-territorial law ascertainment services, etc.

## **Chapter 2 Acceptance of Cases**

**Article 8** When a plaintiff brings an action to the China International Commercial Court in accordance with Article 2(1) of the Provisions, the plaintiff shall submit:

(1) a statement of claim;

(2) an agreement in writing that chooses the jurisdiction of the Supreme People's Court, the First International Commercial Court or the Second International Commercial Court;

(3) if the plaintiff is a natural person, the plaintiff shall submit his identity document. If the plaintiff is a legal person or other organization, it shall submit the business license or other registration document, and the identity document of its legal representative or responsible person;

(4) if the plaintiff is represented by a lawyer or other agent in the action, the plaintiff shall submit a letter of authorization and the identity document of the representative;

(5) relevant evidential materials in support of the claim in the action;

(6) completed Confirmation of Address for Service;

(7) completed Pretrial Diversionary Procedures Questionnaire.

If a documentary proof stipulated in Article 8(3) or (4) is generated outside the territory of the People's Republic of China, the submitting party shall complete authentication procedures such as notarization or certification.

**Article 9** Upon receiving the documents submitted by the plaintiff in accordance with Article 8, the China International Commercial Court shall issue a receipt in electronic or paper form, which records the date of receipt.

**Article 10** When the High People's Courts request for adjudication by the Supreme People's Court in accordance with Article 2(2) of the Provisions, the High People's Courts shall state the reason(s) and submit relevant documents when making the request. The China International Commercial Court shall accept the case if the Supreme People's Court so approves.

**Article 11** The China International Commercial Court shall accept the case if the Supreme People's Court decides that it should be adjudicated by the China International Commercial Court in accordance with Article 2(3) and 2(5) of the Provisions.

**Article 12** With respect to an action the bringing of which fulfills the conditions in Article 119 of Civil Procedure Law, if the plaintiff consents to pretrial mediation in the completed Pretrial Diversionary Procedures Questionnaire, the China International Commercial Court shall register and enumerate the action without charging the case acceptance fees for the time being. If the plaintiff does not so consent, the China International Commercial Court shall officially accept the case.

### **Chapter 3 Service of Process**

**Article 13** The China International Commercial Court shall deliver copies of the statement of claim, the evidential materials, the Pretrial Diversionary Procedures Questionnaire and the Confirmation of Address for Service submitted by the plaintiff to the defendant(s) and other parties to the action.

**Article 14** If a party agrees to receive litigation documents from other parties in the Confirmation of Address for Service and the other parties serve the documents on the party by way of personal service, service by post, electronic service or other means, the China International Commercial Court shall recognize the service upon satisfaction of the receipt by the party being served.

**Article 15** If a party changes the address for service from the address given in the Confirmation of Address for Service, the party shall promptly notify the China International Commercial Court.

**Article 16** If the litigation documents are not in fact received because the party being served has refused to provide an address for service, the address for service provided is inaccurate, or the change of address has not been notified to the China International Commercial Court, these documents shall be deemed to have been served.

#### **Chapter 4 Pretrial Mediation**

**Article 17** The Case Management Offices shall convene a case management conference with the parties and/or their representatives within seven working days from the date of the service of the litigation documents on the defendant (if there are multiple defendants, from the date of the last service), discuss and decide on the pretrial mediation process, and set down the time limit for the mediation, which generally does not exceed twenty working days. If the parties do not consent to a pretrial mediation, the Case Management Offices shall determine the time schedule for the litigation procedures.

If the parties consent to the pretrial mediation to be conducted by the member(s) of the International Commercial Expert Committee (hereinafter referred to as Expert Member), the parties may jointly choose 1-3 Expert Members to act as mediators.

If the parties fail to reach an agreement on the choice of mediators, the China International Commercial Court shall designate 1-3 Expert Members to act as mediators.

If the parties consent to the pretrial mediation to be conducted by an international commercial mediation institution, the parties may jointly choose a mediation institution from the list of international commercial mediation institutions announced by the Supreme People's Court.

**Article 18** The case management conference shall be held via online video. If it is impracticable to hold the conference via online video, the parties and/or their representatives shall be notified to attend in person.

**Article 19** After the case management conference, the Case Management Offices shall prepare a Case Management Memorandum and deliver the same to the parties. The parties shall abide by the arrangement established in the Case Management Memorandum.

**Article 20** The Expert Members conducting the mediation shall be in accordance with the relevant laws and regulations and comply with the relevant requirements on mediation of the Rules and the Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For Trial Implementation), and facilitate settlement on a voluntary basis.

**Article 21** The mediation conducted by the Expert Members shall not be open to the public. The records of the mediation shall be made and signed by the parties and the mediator(s).

**Article 22** In the course of conducting the mediation, the Expert Members shall terminate the mediation if any of the following circumstances occurs:

(1) that all parties or any party makes a request in writing for the termination of the mediation proceeding;

(2) that the parties fail to reach a mediation settlement agreement within the agreed time limit, unless they reach an agreement on an extension of time;

(3) that the Expert Members are unable to perform or continue to perform, or unfit to perform their duties in mediation, and it is impracticable to choose or designate other Expert Members;

(4) any other circumstance.

**Article 23** The international commercial mediation institution conducting the mediation shall abide by the mediation rules of that institution or the rules agreed by the parties in accordance with relevant laws and regulations.

**Article 24** If the parties reach a mediation settlement agreement after the mediation conducted by the Expert Member(s) or by an international commercial mediation institution, the Office of the International Commercial Expert Committee or the international commercial mediation institution shall submit the mediation settlement agreement and the relevant case materials to the Case Management Office within three working days, for the China International Commercial Court to issue a mediation document after review of the aforesaid documents in accordance with the laws. The China International Commercial Court may issue a judgment upon the parties' request.



**Article 25** If the parties fail to reach a mediation settlement agreement or the mediation is terminated for any other reason, the Office of the International Commercial Expert Committee or the international commercial mediation institution shall submit the Mediation Form and the relevant case materials to the Case Management Office within three working days.

After receiving the aforesaid documents, the Case Management Office shall officially accept the case and determine the time schedule for the litigation procedures.

**Article 26** The record of the mediation and the facts admitted by the parties for the purpose of reaching a mediation settlement agreement in compromise shall not be admissible evidence in the litigation proceedings to the prejudice of the parties, unless the parties otherwise agree.

## **Chapter 5 Trial**

**Article 27** The China International Commercial Court shall hold a pretrial conference upon expiry of the defense period, and complete pretrial preparation. Under special circumstances, the pretrial conference may be held before the expiry of the defense period, provided that the parties so consent.

The pretrial conference shall include the following agenda:

- (1) clarifying the plaintiff's claim(s) and the defendant's defense opinion(s);
- (2) reviewing and determining on the parties' application for adding or amending the claim(s) and for making counterclaim(s), and the claim(s) relevant to the action raised by the third party;
- (3) hearing submissions on the consolidation of actions and the joinder of the parties etc.;
- (4) hearing on an application for disqualification;
- (5) determining whether the trial should be open to the public;

(6) determining on the appearance of witnesses, investigation and collection of evidence, commissioned authentication, provision of evidence by the parties, inspection, and preservation of evidence upon application by the parties.

(7) arranging for the exchange of evidence;

(8) clarifying the method for foreign law ascertainment;

(9) determining whether the Expert Member(s) should be permitted to appear in court to make supplementary explanations;

(10) summarizing issues in dispute;

(11) conducting mediation;

(12) arranging for translation services;

(13) determining the parties' application for trial via online video depending on the circumstances, if the parties so apply;

(14) any other procedural matters.

**Article 28** The pretrial conference may be held via online video, attendance in person or any other means that the China International Commercial Court deems appropriate.

**Article 29** The pretrial conference may be presided over by the collegial panel or one judge designated by the collegial panel.

**Article 30** Where a trial is conducted via online video, unless there is verified network failure, equipment damage, power outage or a force majeure event, a party who fails to participate in the online trial is deemed to have refused to attend the trial, and any party who quits during the online trial without permission is deemed to have withdrawn from the trial.

**Article 31** During the trial, if the collegial panel considers it necessary to consult the Expert Members on specialized legal issues relating to international treaties, international commercial rules and extra-territorial laws, it shall make a request to the Office of the International Commercial Expert Committee in accordance with the Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For Trial Implementation), stipulating a reasonable time limit for reply and enclosing the relevant materials.

### **Chapter 6 Enforcement**

**Article 32** The parties may apply to the China International Commercial Court for the enforcement of a legally effective judgment, ruling or mediation document rendered by the China International Commercial Court. The China International Commercial Court may delegate to the relevant enforcement authorities for execution.

**Article 33** If a party applies for the enforcement of a legally effective judgment, ruling or mediation document rendered by the China International Commercial Court against another party who is not or that has no assets in the territory of the People's Republic of China, Article 280(1) of the Civil Procedure Law shall apply.

### **Chapter 7 Support for Dispute Resolution by Arbitration**

**Article 34** Where a party applies for preservation in accordance with Article 14(1) of the Provisions in an international commercial case in which the amount in dispute exceeds 300,000,000 Chinese Yuan or significant influence otherwise exists, the international commercial arbitration institution shall submit the application to the China International Commercial Court in accordance with the Civil Procedure Law, Arbitration Law of the People's Republic of China and other laws. The China International Commercial Court shall accept the case after review, and adjudicate the case in accordance with the laws.

**Article 35** Where a party, in accordance with Article 14(2) of the Provisions, applies to the China International Commercial Court for setting aside or enforcement of an arbitration award made by an international commercial arbitration institution in an international commercial case in which the amount in dispute exceeds 300,000,000 Chinese Yuan or significant influence otherwise exists, the party shall submit an application letter, accompanied with the original arbitration award or mediation document. The China International Commercial Court shall accept the case after review, and adjudicate the case in accordance with the laws.

## **Chapter 8 Costs**

**Article 36** For the cases accepted by the China International Commercial Court, the parties shall pay the case acceptance fees and other litigation costs in accordance with the provisions of the Measures on the Payment of Litigation Costs.

**Article 37** For the cases mediated by the Expert Members, the parties shall negotiate and settle the necessary expenses incurred by the Expert Members for the mediation. If the negotiation fails, the parties shall be jointly liable for such expenses.

**Article 38** For the cases mediated by an international commercial mediation institution, the costs of mediation shall be subject to the applicable rules on costs of such international commercial mediation institution.

## **Chapter 9 Supplementary Provisions**

**Article 39** The Rules is effective as of 5th December 2018.

**Article 40** The Supreme People's Court shall interpret the Rules.