

CHINA'S BELT AND ROAD INITIATIVE: CHALLENGES FOR ARBITRATION IN ASIA

Patrick M. Norton*¹

Abstract. The focus of international arbitration has begun to shift to Asia in the wake of that continent's increasingly prominent role in cross-border trade and investment. China's ambitious Belt and Road Initiative ("BRI")² promises to exacerbate this trend. The BRI will require a broad range of complex, inter-related commercial transactions with significant political and economic ramifications. These transactions can be expected to generate both commercial and investor-state disputes, principally in Asia, and many of these disputes will be submitted to arbitration. This article considers the significant challenges that these developments will present for international arbitration.

I. Arbitration's Shift Toward Asia

The number of international commercial arbitrations involving Asia has grown rapidly in recent decades, in pace with Asia's greatly expanded role in international manufacturing, trade, and investment.³ Arbitration has become a favored option for dispute

*¹ The author is an independent arbitrator in the New York City area and a Member of Arbitration Chambers of Hong Kong and London. He was formerly the managing partner of a major law firm's Beijing office. Prior to that, Mr. Norton served as the Assistant Legal Adviser for East Asian and Pacific Affairs at the U.S. Department of State and Counsel to the Senate Select Intelligence Committee.

² The BRI initiative is also sometimes referred to as the "One Belt One Road Initiative" ("OBOR") based on a direct translation of its Chinese name, *Yi Dai Yi Lu* (一带一路).

³ See, Dr. Nicolas Wiegand & Dr. Tom C. Pröstler, *Arbitration Is Becoming Increasingly Asian*, BUS. L. MAG. (Sept. 3, 2015), <http://www.businesslaw-magazine.com/2015/09/03/arbitration-is-becoming-increasingly-asian-there-are-four-main-drivers-of-the-process/> [https://perma.cc/8UST-CNE3], (discussing the growth in the number of arbitrations in Asia and the reason behind the phenomenon).

resolution in Asia for the same reasons it has long been favored in its European and North American homelands: arbitration proceedings offer a more neutral forum than national courts; arbitral proceedings are generally more confidential than judicial proceedings; most importantly, arbitral awards are more readily enforceable than court judgments.

Recent cultural developments in Asian business have facilitated the expansion of arbitration in Asia. Three or four decades ago, Asian commerce was dominated by traditional business forms: Japan's *zaibatsu*, Korea's *chaebol*, and the family-run business empires of the Chinese diaspora. China's state-owned enterprises ("SOEs") were only beginning to explore trans-border commercial ventures. Most of these traditional and state-owned businesses were averse to compulsory third-party dispute resolution, preferring more confidential, face-saving negotiated solutions. Today, most large Asian businesses, private and state-owned alike, have evolved into multinational corporations run by professional managers and advised by international counsel. The companies' managers and lawyers have often been educated abroad and have experience working in the international economy. They deal regularly with business partners and competitors from other legal cultures and are familiar with international business practices, including the use of arbitration to resolve trans-border disputes.

The recent increase in intra-Asian and Asia-related arbitrations is reflected in the experience of the major international arbitral institutions. Most notably, the Hong Kong International Arbitration Centre ("HKIAC") and the Singapore International Arbitration Centre ("SIAC") have grown from local institutions in the 1980's and 1990's to among the world's leading arbitral institutions today. Each administers hundreds of cases annually.⁴ The China

⁴ Comparative statistics on the caseloads of arbitral institutions may be found on the Global Arbitration News ("GAR") website. *International Arbitration Statistics 2016—Busy Times for Arbitral Institutions*, GLOBAL ARB. NEWS (Jun. 26, 2017), www.globalarbitrationnews.com [<https://perma.cc/9HVV-RJRC>]. Statistics for the individual arbitral institutions may be found on their websites: HONG KONG INTERNATIONAL ARBITRATION CENTRE, www.hkiac.org [<https://perma.cc/PE9T-7JKU>]; SINGAPORE INTERNATIONAL ARBITRATION CENTRE, www.siac.org.sg [<https://perma.cc/AKP5-W45C>].

International Economic and Trade Arbitration Commission (“CIETAC”) regularly reports the largest number of international arbitrations of any arbitral institution in the world.⁵ The leading global arbitral institutions—the International Chamber of Commerce (“ICC”), London Court of International Arbitration (“LCIA”), and International Center for Dispute Resolution (“ICDR”)—all report a growing number of Asia-related cases, and in recent years each has established its own Asian offices to service the increased demand.⁶

II. China’s Belt and Road Initiative

A. An Economic Development Program of Unprecedented Ambition

In 2013, China’s President Xi Jinping announced a program of Chinese investment abroad of remarkable scope and ambition.⁷ In

⁵ *International Arbitration Statistics*, *supra* note 4; CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, www.cietac.org [https://perma.cc/RHL3-6NA4]. CIETAC has historically been the preferred Chinese institution for international disputes, but in recent years, other Chinese arbitral commissions, most notably the Beijing Arbitration Commission, have been competing for that business. BEIJING ARBITRATION COMMISSION, www.bjac.org [https://perma.cc/SQ6X-D6NX].

⁶ The ICC opened a case-management office in Hong Kong in 2008 and plans to open a similar office in Singapore in mid-2018. It has also established representative offices in Shanghai and Abu Dhabi. The LCIA has affiliated offices in Singapore and New Delhi. The ICDR now has an office in Singapore. A number of other arbitral institutions maintain a presence in Asia through various affiliations with Maxwell Chambers in Singapore. Details may be found on the institutions’ respective websites.

⁷ Xi first announced a “Silk Road Economic Belt” in a speech in Kazakhstan in September 2013. The following month he announced a “21st Century Maritime Silk Road” in a speech to the Indonesian parliament. In March 2015, the National Development and Reform Commission (“NRDC”), the Ministry of Commerce (“MOFCOM”), and the Ministry of Foreign Affairs (“MFA”), with the approval of the State Council, issued an overall mission statement for the BRI entitled “Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road.” The website of China’s State Council provides a chronology of official developments in the evolution of the BRI up through April 2015. *China to Play Bigger Intl Role: Blue Book*, XINHUA (Apr. 2, 2015) http://english.gov.cn/news/top_news/2015/04/02/content_281475082023687.htm [https://perma.cc/9PQJ-BV9X]. Various other Chinese institutions associated

essence, China proposes to use the enormous foreign currency reserves generated in recent decades by China's trade surpluses to finance infrastructure developments across the Eurasian continent and Southeast Asia. China characterizes these developments as a resurrection of two historic trade routes linking China with the Middle East and Europe:⁸ the old "Silk Road" land routes, and the ancient maritime routes linking China with the Middle East and Europe via the sea lanes around Southeast and South Asia.⁹ China envisions the development of unified rail and road links across Central Asia and Russia into Europe; a network of commercial seaports across South Asia connecting to the Middle East, Africa, and Europe¹⁰; power projects to fuel development throughout the

with the BRI also maintain specific web portals at which documentation concerning the BRI may be found, such as the portals of the NRDC, <http://en.ndrc.gov.cn/> [<https://perma.cc/CF3M-JCCQ>], and the Silk Road Fund, <http://www.silkroadfund.com.cn> [<https://perma.cc/J79J-Y5FQ>].

⁸ Overviews of the BRI and its development may be found in TOM MILLER, CHINA'S ASIAN DREAM: EMPIRE BUILDING ALONG THE NEW SILK ROAD (2017); Wang Xinsong, *One Belt, One Road's Governance Deficit Problem*, FOREIGN AFF. (Nov. 17, 2017), <https://www.foreignaffairs.com/articles/east-asia/2017-11-17/one-belt-one-roads-governance-deficit-problem> [<https://perma.cc/G93B-NXJY>]; Olga Boltenko, *Resolving Disputes Along the Belt and Road: Are the Battle Lines Drawn?* ASIAN DISPUTE REV. 190 (2017).

⁹ Consistent with President Xi's 2013 announcements, Chinese officials and documents often speak of a "Silk Road Economic Belt" and a "21st-Century Maritime Silk Road." *China to Play Bigger Intl Role: Blue Book*, *supra* note 7. In fact, China envisions six-distinct "international economic cooperation corridors." Three are entirely overland. The other three use various combinations of land and sea routes. MILLER, *supra* note 8, at 22, 30-31; Boltenko, *supra* note 8, at 192. The original "Silk Road" also followed various routes across Asia, not a single trail. MILLER, *supra* note 8, at 2.

¹⁰ In July 2016, state-owned COSCO (the China Ocean Shipping Company) purchased a 51% controlling interest in the Port of Piraeus, Greece for \$314 million to serve as the European terminus of a BRI sea route from China to Europe via the Suez Canal and pledged to invest an additional \$552 million to develop the port. *China Cosco to Invest Over \$552 Million in Port of Piraeus*, WALL STREET J., (July 6, 2016), <https://www.wsj.com/articles/china-cosco-to-invest-over-552-million-in-port-of-piraeus-1467789308> [<https://perma.cc/3KZD-T6P8>]. In November 2017, the Chinese-controlled Port of Piraeus entered into an agreement with the Shanghai International Port Group to cooperate in scheduling shipping between Shanghai and Piraeus. *Shanghai Port Teams Up with Greece's Piraeus to Boost Container Traffic*, REUTERS, (June 12, 2017), <https://www.reuters.com/article/greece-cosco-sipg/shanghai-port-teams-up-with->

region; and joint energy, mining, industrial, and agricultural projects. Some development plans include East Africa as well, brought within the rubric of historic Chinese trading interests by invocations of the legendary sea voyages of Ming dynasty admiral Zheng Ho.

The number and scale of potential BRI projects are unprecedented.¹¹ By 2016, only three years into the initiative, Chinese authorities estimated total BRI investments to date of \$890 billion.¹² In the spring of 2017, President Xi convened an international conference in Beijing to promote the BRI, at which he committed China to an additional \$124 billion in funding for BRI projects.¹³ At that time, MOFCOM reported that more than 600 BRI-related contracts had already been signed,¹⁴ and Chinese news sources were reporting that 50 Chinese state-owned enterprises (“SOE’s”) were already engaged in 1,700 BRI projects.¹⁵ In addition to greenfield projects,

greces-piraeus-to-boost-container-traffic-idUSL8N1J531W
[<https://perma.cc/UY4T-KMJD>].

¹¹ Reliable, consistent statistics on the BRI are elusive. Various agencies and media sources publish data from time to time. It is not always clear, however, what criteria they are using to identify projects for inclusion, and the numbers are therefore difficult to reconcile.

¹² James Kyngge, *How the Silk Road Plans Will Be Financed*, FIN. TIMES, (May 9, 2016), <https://www.ft.com/content/e83ced94-0bd8-11e6-9456-444ab5211a2f> [<https://perma.cc/VU5R-DCA6>].

¹³ Another source suggests that, as of the May 2017 conference, China was “currently leading over US\$926 billion worth of infrastructure projects under the BRI. Sarah Grimmer & Christina Charemi, *Dispute Resolution along the Belt and Road*, GLOBAL ARB. REV. (May 22, 2017), <https://globalarbitrationreview.com/chapter/1141929/dispute-resolution-along-the-belt-and-road> [<https://perma.cc/JF7A-YJUH>].

¹⁴ *Investment and Cooperation Statistics along ‘One Belt and One Road’ Countries from January–February 2017*, MINISTRY OF COMMERCE PEOPLE’S REPUBLIC OF CHINA, (Mar. 24, 2017), <http://english.mofcom.gov.cn/article/statistic/foreigntradecooperation/201704/20170402551454.shtml> [<https://perma.cc/R2PB-REVB>].

¹⁵ *SOEs Lead Infrastructure Push in 1,700 “Belt and Road” Projects*, CAIXIN, (May 9, 2017), <https://www.caixinglobal.com/2017-05-10/101088332.html> [<https://perma.cc/6R2G-N3F5>]. Caixin quoted Xiao Yaoqing, the head of the State-Owned Assets Supervision and Administration Commission (“SASAC”), as reporting that SOEs were then engaged in building: major high-speed highways in Kenya and Ethiopia and between China and Laos and Thailand; more than 60

Chinese corporations reportedly made \$64 billion in BRI-related corporate acquisitions in 2016 and the first half of 2017.¹⁶

The corporate and financial structures adopted for these projects necessarily vary widely, but the basic premise for the BRI is that Chinese corporations, public and private, will have a central role in their planning and implementation. Chinese banks,¹⁷ in conjunction with financial institutions from other countries and international banks like the Asian Development Bank (“ADB”) and the Asia Infrastructure Investment Bank (“AIIB”), the latter of which is itself a Chinese-initiated project,¹⁸ will structure the financing. Chinese construction companies will perform much of the construction, and Chinese corporations will assist in managing the resulting transportation, energy, power, and manufacturing facilities.

This is not to say that participants in BRI projects will be exclusively Chinese. China has made clear that it welcomes the participation of third countries and their commercial interests.

energy projects along BRI routes; oil and gas pipelines from Russia, Kazakhstan, and Myanmar to China; and 56 industrial projects in various BRI countries.

¹⁶ *Chinese Investment along the Silk Road Is Soaring*, WORLD ECON. F., <https://www.weforum.org/agenda/2017/08/chinese-investment-along-the-silk-road-is-soaring> [<https://perma.cc/R4MZ-LCUY>].

¹⁷ China reportedly uses various financing institutions. The most important are the policy banks, the China Development Bank, the China Exim Bank, and the Silk Road Fund, a private equity fund backed by China’s foreign reserves. China’s commercial banks also play a role. MILLER, *supra* note 8, at 41-42.

¹⁸ The AIIB was established at China’s initiative in January 2016 and was intended to play a key role in BRI financing. In its initial year of operation, the AIIB approved BRI-related projects in Bangladesh, Indonesia, Uzbekistan, Pakistan, and Myanmar. Most of these projects were jointly financed with the ADB or the World Bank. Contrary to initial concerns, the AIIB’s projects have not been limited to BRI projects, and its operations have won kudos for transparency and conformity to operational standards at international banks. Sara Hsu, *How China’s Asian Infrastructure Investment Bank Fared Its First Year*, FORBES (Jan. 14, 2017); Wade Shepard, *The Real Role of the AIIB in China’s New Silk Road*, FORBES (July 15, 2017). The Hsu and Shepard articles may be found on the Forbes website, www.forbes.com, under the authors’ names and the titles of the articles. Note that Shepard has a book on the BRI initiative scheduled to come out in the summer of 2018. W. Shepard, *On the New Silk Road: Journeying Through China’s New Artery of Power* (forthcoming, July, 2018)

Hong Kong¹⁹ and Singapore,²⁰ natural gateways for international finance between China and other countries throughout the BRI region, have been particularly active in developing roles for themselves. Third country involvement adds international technical and commercial expertise and helps spread the financial risks. In December 2017, for example, Japanese Prime Minister Abe announced that the Japanese government would provide backing to private Japanese banks for the financing of BRI projects,²¹ and later in the same month GE Financial Services announced that it was partnering with China's Silk Road Fund to establish an energy infrastructure investment platform.²²

B. Geopolitical Uncertainties

BRI's sheer scale has, from the outset, raised questions as to the initiative's coherence. China has suggested that more than 60 countries will participate but has refused to put any geographic limits on BRI or require that participating countries enter into a common organization or treaty structure.²³ The only link among

¹⁹ *The Belt and Road Initiative*, HONG KONG TRADE & DEVELOPMENT COUNCIL ("HKTDC") (Sep. 13, 2017), <http://china-trade--research.hktdc.com/business-news/article/The-Belt-...itiative/The-Belt-and-Road-Initiative/obor/en/1/1X3CGF6L/1XOA36B7.htm> [https://perma.cc/KJ3B-6NDZ].

²⁰ *See Singapore ready to partner China to build Belt and Road*, XINHUA, http://news.xinhuanet.com/english/2017-08/15/c_136528820.htm [https://perma.cc/UG7S-THCH] (reporting on statements by Singapore's Minister of National Development and Second Minister for Finance on readiness of Singapore Government to cooperate with China on BRI projects).

²¹ *Japan to Help Finance China's Belt and Road Projects*, CNBC (Dec. 5, 2017), <https://www.cnbc.com/2017/12/05/japan-to-help-finance-chinas-belt-and-road-projects.html> [https://perma.cc/8RYQ-PPY2].

²² *General Electric, China's Silk Road Fund to Launch Energy Investment Platform*, REUTERS (Nov. 9, 2017), <https://www.reuters.com/article/us-trump-asia-china-deals-ge/general...s-silk-road-fund-to-launch-energy-investment-platform-idUSKBN1DA057> [https://perma.cc/F87G-7MQW]. China's State Administration of Foreign Exchange ("SAFE") announced that it had approved the deal and it would involve joint investments in electric power grids and new energy and oil and gas projects along the Belt and Road. *Id.*

²³ Chinese sources typically refer to 67 or 68 countries. *SOEs Lead Infrastructure Push in 1,700 "Belt and Road" Projects*, *supra* note 15. At a press conference on April 18, 2017, however, Chinese Foreign Minister Wang Yi refused to place limits on the countries that may be considered as coming within

many of the countries and projects on China's lists is generally China's own strategic and economic interests in fostering closer political and economic ties with as many countries on the Eurasian continent and East Africa as possible. This diffuseness risks making the BRI incoherent—no more, perhaps, than a romantic sobriquet for all Chinese international economic expansion. The absence of common cultures, legal systems, and geopolitical interests among the BRI participants also forms significant political obstacles to the emergence of common legal practices or institutions across the BRI's extraordinary geographic scope.

Some of the countries that China proposes to include in the BRI are also reluctant to enmesh themselves in economic projects that may be expected to further Chinese geopolitical interests. India and Japan, China's principal geopolitical rivals in Asia, have been especially reluctant to welcome China's BRI advances and have put forward broad, Asia-wide investment programs of their own.²⁴ Others, smaller countries such as Myanmar and Vietnam, are often fearful of the embrace of their more powerful neighbor and have welcomed Chinese approaches with caution.²⁵

In some countries the BRI also raises unflattering analogies with earlier colonial or neo-colonial investment regimes. Foreign—whether European, American, or Chinese—investments and ongoing operational roles in the management of major transportation, resource, energy, or industrial projects inevitably generate mixed reactions from host governments and populations, which may welcome the projects initially but often come to resent

the BRI. He said that the BRI “should be open to all like-minded countries and regions,” and that China “has no intention of designating clear geographic boundaries for the Belt and Road.” *Id.*

²⁴ Wade Shepard, *India and Japan Join Forces to Counter China and Build Their Own New Silk Road*, FORBES (July 31, 2017). The article may be found at www.forbes.com under the author's name and the article's title. *See also*, Kai Schultz, *Sri Lanka, Struggling with Debt, Hands a Major Port to China*, N. Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/world/asia/sri-lanka-china-port.html> [<https://perma.cc/6CY2-K65A>]; MILLER, *supra* note 8, at 180-86; *But see Japan to Help Finance China's Belt and Road Projects*, *supra* note 21 (reporting Japan's recent announcement that it may cooperate in funding some BRI projects).

²⁵ MILLER, *supra* note 8, at 127-35, 222-35.

foreign control, even partial, of important natural resources and key sectors of their economies.

C. Tensions between Chinese Political and Commercial Interests

There is also a fundamental tension in many projects between the Chinese Government's geopolitical interests and the commercial criteria by which the Chinese parties to the transactions are ostensibly directed to conduct their business.

Chinese authorities invariably repeat the mantra that BRI projects will be guided by "market principles."²⁶ Nevertheless, China's broader political interests often, and unavoidably, intrude. This is evident in many BRI projects from the outset, when the Chinese parties must assess the commercial risks of the project and the commercial terms that should be adopted in light of those risks. Many of the BRI projects are sited in countries characterized by political instability, undeveloped and unreliable legal systems, and a reputation for weak corporate governance, including corruption.²⁷

²⁶ The Silk Road Fund's BRI portal states that the "Fund makes investment decisions based on market principles, international practice and professional standard [sic]." *Overview*, SILK ROAD FUND (last visited Apr. 8, 2018) <http://www.silkroadfund.com.cn/enweb/23775/23767/index.html> [<https://perma.cc/U34H-ET53>]. Similarly, the Chairman of the Export-Import Bank of China has said that "the bank always adheres to the market-oriented operating principle to fund the Belt and Road projects, stresses long-term investment and pays attention to risk control, in order to attain small but guaranteed profit as well as sustainable development." *Bank Governors Vow Financial Support to Belt and Road Projects*, PEOPLE'S DAILY ONLINE (May 18, 2017), http://www.cdb.com.cn/English/xwzx_715/khdt/201709/t20170921_4597.html [<https://perma.cc/98N8-D7G3>].

²⁷ Pinsent Masons has published a detailed analysis of the risk factors in each of 44 BRI countries. "One Belt, One Road": *Mapping China's Outbound Route*, PINSENT MASONs, (Aug. 2016), https://www.pinsentmasons.com/PDF/2016/obor/OBOR-Pinsent_Masons-2016.pdf [<https://perma.cc/8XT4-ZY2Z>]. Much of the data is drawn from: *One Belt, One Road*, THE ECONOMIST INTELLIGENT UNIT (2016), [http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=One-Belt-One-Road-an-economic-roadmap-\(Sep\).pdf&mode=wp&campaignid=OBORSept2016](http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=One-Belt-One-Road-an-economic-roadmap-(Sep).pdf&mode=wp&campaignid=OBORSept2016) [<https://perma.cc/PSE8-E8EP>].

These would all be red flags to commercial investors, discouraging an investment altogether or requiring a higher rate of return to justify acceptance of the risks. The Chinese Government, however, has geopolitical reasons for encouraging ambitious BRI projects despite such risks, and the Government retains *de facto* control over SOE decision-making, even in formally independent commercial entities. Indeed, some reports suggest that Chinese officials anticipate losing up to 80% of their investment on BRI projects in Pakistan and 50% in Myanmar but proceed nevertheless because of China's perceived geopolitical interests.²⁸

This tension between commercial and geopolitical interests encourages incautious investment decisions. Chinese enterprise managers may well launch projects in the expectation that they will enjoy the potential benefits of their investment if it succeeds and that the Chinese Government will cover their losses if it fails.²⁹ The sheer size of the BRI, moreover, makes it difficult for the central government to oversee and coordinate BRI projects. Governmental decision-making is reportedly dispersed among various ministries and agencies that have their own agendas.³⁰ Participation of provincial or local entities may also skew government decision-making. At those levels, the principal motivation for projects is often finding outlets for excess production at local manufacturing facilities (e.g., steel or cement) or justifying new facilities, all in the hope of preserving or expanding local employment.³¹

C. Problems with BRI Projects

²⁸ Kyngé cites a research analyst quoting Chinese officials privately admitting an expected 80% loss on projects in Pakistan. Kyngé, *supra* note 12.

²⁹ Wang cites a law firm study estimating that 30% of Chinese outbound investments fail because of unreliable risk analysis, and says that some SOEs falsify data to avoid scrutiny by government regulators. Wang, *supra* note 8, at 7.

³⁰ Wang notes that in February 2015 the State Council established a Leading Small Group for Advancing the Work of Building the Belt and Road Initiative to oversee coordination of BRI projects among Chinese ministries. He reports that this group has not been effective, the day-to-day coordination is conducted by the NRDC, and that much of the workload is borne by the Department of Western Region Development under the NRDC. *Id.* at 6-7.

³¹ WANG, *supra* note 8, at 6-7.

A number of BRI projects have already encountered problems arising in large part out of conflicts between the governments' commercial and political interests.

A series of BRI-related projects in Sri Lanka have long been controversial, involving allegations of corruption,³² criticized by opposition politicians as “playing geopolitics with national assets,”³³ and generating anti-Chinese rioting.³⁴ The criticism of China's BRI investments in the country came to a head in December 2017 when Sri Lanka was unable to repay a multi-billion dollar loan that had financed a BRI project to develop the strategic port of Hambantota. As a result, Sri Lanka was forced to grant a 99-year lease on the port to Chinese interests.³⁵ From a commercial standpoint, the foreclosure on the Hambantota loans was no more than a standard remedy exercised by a creditor when the debtor is unable to pay. From a broader geopolitical standpoint, however, the transfer of a major national seaport to foreign control has generated further local opposition to Chinese projects in Sri Lanka generally.³⁶

China's BRI projects with Pakistan have also been plagued by political controversy.³⁷ The two countries have announced a broad range of BRI projects that are subsumed within the “China-Pakistan Economic Corridor” (“CPEC”).³⁸ A port project at Gwadar, however, has been forestalled by threats to the port from

³² MILLER, *supra* note 8, at 186-95.

³³ Schultz, *supra* note 24.

³⁴ Wang, *supra* note 8, at 4-5; James A. Dorsey, *Asian Ports: Pitfalls of China's One Belt, One Road Initiative*, THE WORLD POST (Feb. 28, 2017), https://www.huffingtonpost.com/entry/asian-ports-pitfalls-of-chinas-one-belt-and-one-road_us_58b0fc3fe4b0658fc20f955b [https://perma.cc/KRU5-ND3V].

³⁵ Schultz, *supra* note 24.

³⁶ For China itself, the Hambantota lease also bears an ironic resemblance to China's 19th century grant of a 99-year lease of Hong Kong to Britain when China was unable to pay its (admittedly questionable) Opium War debts.

³⁷ MILLER, *supra* note 8, at 174-80; Dorsey, *supra* note 34.

³⁸ The projects include the development of the port of Gwadar, the construction of a major roadway linking Gwadar and Western China along the Karakorum Road, the development of fresh water and waste water treatment plants, and the \$14 billion Diamer-Bhasha Dam. Information on the CPEC can be found on the “CPEC Portal” at www.cpecinfo.com [https://perma.cc/GVH6-2SNT]. The portal is maintained by the Pakistan China Institute and China Radio International.

domestic terrorists; road construction linking Gwadar to China's Karakorum Highway has been delayed, reportedly as a result of Indian objections to construction near Kashmir; and Pakistan has rejected Chinese financing for the \$14 billion Diamer-Bhasha Dam because Chinese parties reportedly wanted a security interest in the dam itself.³⁹

Problems have arisen elsewhere as well. Nepal scrapped a \$2.5 billion hydroelectricity project because of alleged financial irregularities by the Chinese parties, and Myanmar halted a \$3.6 billion Chinese-backed dam.⁴⁰ A \$5.5 billion railway project in Indonesia remains in the planning stages five years after its inception, reportedly because the host government has been unable or unwilling to procure necessary land use rights.⁴¹ In the face of security threats, a Chinese SOE has effectively abandoned a copper mine in Afghanistan that it had purchased for \$3.5 billion,⁴² and another Chinese SOE has abandoned a gold mine in Kyrgyzstan.⁴³ And in 2016 popular riots broke out in Kenya opposing Chinese construction of a railway project linking Mombasa and Nairobi.⁴⁴

³⁹ Saibal Dasgupta & Anjana Pasricha, *Pakistan, Nepal, Myanmar Back Away from Chinese Projects*, VOICE OF AM. NEWS (Dec. 4, 2017), <https://www.voanews.com/a/three-countries-withdraw-from-chinese-projects/4148094.html> [<https://perma.cc/F7D3-NPU4>].

⁴⁰ *Id.*

⁴¹ Wang, *supra* note 8, at 3.

⁴² In 2009 Chinese companies obtained an Afghan Government concession to mine Mes Aynak, believed to be the second largest copper deposit in the world. The concession required the Chinese parties to build a power plant and a railway. Because of ongoing disputes over the contractual terms, no work has taken place under the concession. Mohsin Amin, *The Story Behind China's Long-Stalled Mine in Afghanistan*, THE DIPLOMAT (Jan. 7, 2017), <https://thediplomat.com/2017/01/the-story-behind-chinas-long-stalled-mine-in-afghanistan/> [<https://perma.cc/MDV4-2974>]; Boltenko, *supra* note 8, at 193.

⁴³ Zijin Mining Group Co., an SOE, had purchased the Kyrgyz gold mine shortly before the BRI was announced. Zijin evacuated its employees and ceased operations after disputes over compliance with local environmental regulations and over Zijin's tax liabilities. Boltenko, *supra* note 8, at 193.

⁴⁴ Wang, *supra* note 8, at 4.

III. Commercial Disputes Under the BRI

This rather extensive discussion of the political context in which BRI projects are initiated and implemented is necessary for an understanding of how commercial disputes arising out of these projects are likely to be resolved. While some disputes will doubtless be handled on a purely commercial basis, the potential political and economic ramifications of the larger disputes will inevitably shape how the parties decide to handle them.

A. A Complex Landscape of Inter-related, High Value Contracts

There will be at least two basic sets of contracts for a typical BRI project: performance agreements to construct the railroad, port, industrial project, and underlying financing agreements. There will be one or more Chinese parties and one or more host country parties to each set of agreements. In some cases, third country corporations may also participate, and it is likely that many financing deals will involve international banks. Some projects may also anticipate that the Chinese parties or their affiliates will play a role in operating the road, port, power plant, and others for a period of time after its completion. All of these arrangements require multiple, inter-related contracts among the performance, financing, and operating entities.

On both the host country side and the Chinese side, the parties to the contractual agreements will often be joint ventures or special purpose vehicles incorporated in offshore jurisdictions. International banks and third country participants may also be party to some of these contracts, both on-shore and off-shore. The host government, too, may be party to some agreements, e.g., performance guarantees, economic stabilization agreements, or land usage agreements. These multi-level corporate structures and collateral government agreements add additional layers of potential contractual complexity.

Many of these complex contractual structures will be of long duration. Construction of many projects will undoubtedly take

years. The financing may take various forms of debt or equity that will often be secured by the project's later performance, for example, a share in revenues generated by a power plant or port duties received by the management of a seaport. Repayment may be over a period of decades. If the financing involves equity, Chinese parties may wind up holding equity positions in major infrastructure projects in the host country. If, as in the Hambantota port project in Sri Lanka, parts of the physical plant serve as security for financing or for the local parties' performance, those assets may be at risk of transfer to Chinese entities upon default.⁴⁵

The amounts in question will often be substantial. Many of the individual projects to date (e.g., Gwador, Hambantota, the Diemer-Bhasha Dam) are already measured in the billions. Upon completion—and even during construction—the BRI projects will be significant factors in the local economy of the host country, and their success or failure will have broad economic and political implications both locally and internationally.

In sum, the BRI can be expected to generate a very large number of complex international contracts among multiple parties from two or more jurisdictions involving billions of dollars in investments and performance over a period of years, if not decades. Even if many of today's proposed projects ultimately prove to be politically or commercially impracticable, the sheer scale of the BRI guarantees that a number of high-profile, large-value projects will go forward. These projects and the complex contractual structures they require will inevitably generate a significant number of contractual disputes.

B. Dispute Resolution Options

Commercial disputes arising out of the BRI may potentially be submitted to resolution in a broad range of judicial or arbitral fora. The complex circumstances of each contractual relationship and the host country's laws will dictate some choices, but the parties themselves will typically enjoy considerable discretion in selecting and structuring dispute resolution procedures in their contracts.

⁴⁵ See *supra* text accompanying note 36.

1. Mediation

Mediation remains a favored option for Asian parties that prefer non-adversarial, face-saving resolution of disputes. It also provides a relatively inexpensive procedure that can be conducted confidentially and, if successful, may avoid expensive, drawn-out adversarial procedures later. Because of the highly political context of many BRI projects, it is almost inevitable that many disputes will first be submitted to informal government-to-government discussions. When the governments are not directly involved in the commercial disputes, those discussions are, as a practical matter, a form of informal “mediation,” and this kind of government-to-government mediation may well be the most common form of dispute resolution for BRI projects generally.

Whether BRI-related contracts will incorporate institutional mediation is less certain. The International Academy of the Belt and Road, a research institution headquartered in Hong Kong,⁴⁶ issued a Blue Book Dispute Resolution Mechanism for the Belt and Road (the “Blue Book”) in October 2016.⁴⁷ The Blue Book advocates a med/arb approach: contractual stipulation that institutional mediation be held first, compulsory arbitration if the mediation fails.⁴⁸ In September 2017, the Singapore International Mediation Centre (“SIMC”) and the China Council for the Promotion of International Trade (“CCPIT”) agreed to this approach and agreed to cooperate in facilitating institutional mediation of BRI-related disputes.⁴⁹ The Hong Kong Government has also endorsed institutional mediation for BRI disputes.⁵⁰

⁴⁶ International Academy of the Belt and Road, <http://interbeltandroad.org> [https://perma.cc/7JA9-ZM3J].

⁴⁷ Wang Guiguo, *the Belt and Road Initiative in Quest for a Dispute Resolution Mechanism*, 25 *Asia Pacific L. Rev.* 1, 1-16 (2017), <https://www.tandfonline.com/doi/abs/10.1080/10192557.2017.1321731?needAccess=true#aHR0cHM6Ly93d3cudGFuZGZvbmxpbmUuY29tL2RvaS9wZGYvMTAuMTA4MC8xMDE5MjU1Ny4yMDE3LjEzMjE3MzE/bmVIZEFjY2Vzcz10cnVlQEBAMA> [https://doi.org/10.1080/10192557.2017.1321731].

⁴⁸ *Id.*; Boltenko, *supra* note 8, at 194.

⁴⁹ SIMC and CCPIT memorialized this agreement in a Memorandum of Understanding. *The Role of Mediation in the Resolution of Belt and Road*

This med/arb approach seems most likely to be used in commercial contracts and disputes that do not engage significant government-to-government political interests. Where political interests are engaged, it is more likely that the parties will first raise the disputes to a political level and, if that proves unsuccessful, go directly to compulsory third-party resolution.

2. National Courts

Some disputes arising out of BRI contracts will doubtless be submitted to judicial resolution. Certain disputes, e.g., real estate or tax disputes, may be subject to mandatory local laws and the mandatory jurisdiction of host country courts. Offshore disputes among parties involved in BRI projects may also be subject to the jurisdiction of the parties' home country courts. For example, disputes among the Chinese parties to BRI financing agreements or between Chinese construction companies jointly constructing a road or a port may well be heard in Chinese courts.⁵¹ Chinese and third country parties to financing agreements for BRI projects may agree to submit their disputes to the courts and laws of the favored neutral jurisdictions in Asia—Hong Kong or Singapore—or even to the

Disputes, HERBERT SMITH FREEHILLS (Oct. 11, 2017), <http://hsfnotes.com/asiadisputes/2017/10/11/the-role-of-mediation-in-the-resolution-of-belt-and-road-disputes/> [https://perma.cc/2EFM-2Z37].

⁵⁰ Hong Kong's Secretary of Justice endorsed the Blue Book approach at a conference in Hong Kong also held in September 2017. *Id.*

⁵¹ The Supreme People's Court has issued formal opinions directing Chinese courts to accommodate BRI-related disputes. Zuigao Renmin Fayuan Guanyu Renmin Fayuan Wei "Yidai Yilu" Jianshe Tigong Sifa Fuwu He Baozhang De Nuogan Yijian (最高人民法院关于人民法院为“一带一路”建设提供司法服务和保障的若干意见) [Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the 'Belt and Road' by People's Courts] (promulgated by the Sup. People's Ct., Jun. 16 2015, effective Jun. 16, 2015) Sup. People's Ct. Doc. No. 9 [2015], Jun. 6, 2015, <http://en.pkulaw.cn/display.aspx?cgid=251003&lib=law> [https://perma.cc/2J7M-CSDM]. The 2015 Opinions are general admonitions to the lower courts to facilitate the handling of cases involving the BRI and to recognize its importance as a matter of national policy. It is unclear what practical effects they will have in Chinese judicial proceedings. Nor is it clear whether they are intended to enhance the role of Chinese courts in handling BRI disputes, although the courts are directed, according to section I(2), to “actively carry out international judicial cooperation with countries along the ‘Belt and Road’”

more prominent international jurisdictions such as London or New York. The courts in all of these jurisdictions have longstanding experience in dealing with international transactions, and their laws are often tailored to accommodate adjudication of such disputes in their courts.

The Chinese and host country entities party to the core BRI financing and performance agreements will be disinclined, however, to submit willingly to the jurisdiction of each other's courts. Many of the host countries for BRI investments have relatively new judicial systems with limited experience in adjudicating complex international commercial disputes and, of equal significance, a limited record of political independence. It is difficult to imagine Chinese companies willingly submitting to their jurisdiction. Conversely, China's courts have a long history of political interference in judicial decision-making when, as will often be the case with BRI projects, the disputes have significant political or economic ramifications. It is, therefore, equally difficult to foresee host country parties to BRI contracts accepting Chinese choice-of-forum clauses.⁵²

The solution to this impasse, as with most international contracts, will be arbitration. China itself has already endorsed arbitration as the appropriate method of dispute resolution for BRI projects,⁵³ and host country parties can generally be expected to acquiesce in the inclusion of arbitration clauses in their contracts as the most practicable means of finding a neutral forum.

⁵² China has also recently suggested that it is considering the establishment of a Chinese international court for BRI disputes along the lines of the Singapore International Commercial Court or the Dubai International Financial Centre. Both of those courts employ international judges. *The Role of Mediation in the Resolution of Belt and Road Disputes*, *supra* note 49, at 3-4. I am inclined to doubt that the Chinese Government would accept such an arrangement.

⁵³ China's endorsement of arbitration for BRI disputes has generally taken the form of statements by officials at various international conferences. The Vice President of the Supreme People's Court, He Rong, for example, stated at a conference in Hong Kong that "[t]he Supreme People's Court is committed to supporting Hong Kong as the international dispute resolution centre for the One Belt One Road initiative" Grimmer & Charemi, *supra* note 13, at 5.

3. Arbitration Options for BRI Projects

Arbitration clauses in international contracts require two basic choices: venue and an administering arbitral institution. Each is important for different, albeit related, reasons.

a. Venues

Choosing an appropriate venue for an international arbitration involves three basic issues: (1) being sure that local laws reasonably support arbitration and that local courts will therefore support, and not unreasonably interfere with, the conduct of the arbitration; (2) confirming that the host country is party to the New York Convention⁵⁴ in order to ensure that the resulting award will be enforceable; and (3) being sure that appropriate logistical support for the arbitration proceeding—international airline access, hearing facilities, translation facilities—will be available.

The favored jurisdictions for disputes arising out of BRI projects in South and Southeast Asia will almost certainly be Hong Kong and Singapore, each of which is already a highly successful venue for international commercial arbitration and meets these criteria. Each has a well-established legal system with a record of independent courts and legislative and judicial support for arbitration⁵⁵; each is party to the New York Convention⁵⁶; and each has excellent

⁵⁴ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, Jun. 10, 1958, 330 U.N.T.S. 3 (1959).

⁵⁵ Non-Chinese parties sometimes avoid Hong Kong as a venue for arbitration out of concern that, as a part of China, Hong Kong's judicial or arbitral proceedings are potentially subject to interference by Mainland Chinese authorities. This risk cannot be dismissed entirely, but under the "one country, two systems" arrangements that implemented Hong Kong's reversion to Chinese sovereignty in 1997, such intervention is highly improbable because of the broader political repercussions for China of ignoring Hong Kong's independence in such matters. In the present context, China itself has a significant additional interest in continuing the independence of Hong Kong's judicial and arbitral institutions as leading fora for resolving BRI-related disputes.

⁵⁶ Because Hong Kong is now a part of China, it is no longer eligible to be a party to the New York Convention. Hong Kong and China therefore implemented in 1999 an "Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special

logistical facilities, including Chinese language translation capacity, a potentially critical consideration for projects that involve Chinese parties. Hong Kong and Singapore are also venues generally acceptable to the Chinese Government⁵⁷ and Chinese commercial entities.

Outside of South and Southeast Asia, the choices for BRI projects are less certain. A variety of potential venues have adequate logistical facilities, though only a few have dedicated arbitration centers and very few have adequate Chinese language support. Many of the BRI countries have enacted versions of the UNCITRAL Model Arbitration Law,⁵⁸ and most are, like China, also party to the New York Convention. Few, however, have experience in actually hosting international arbitrations and a limited record, at best, of having awards rendered in their territory enforced elsewhere under the Convention. Undoubtedly, various regional arbitration institutions will try to attract arbitrations concerning BRI projects within their geographic ambit. It remains to be seen what success they will have.

Projects in countries outside the geographical orbits of Hong Kong or Singapore may prefer to site their arbitrations in traditional venues such as London, Paris, Zurich, Geneva, Stockholm, or New York. Each offers a neutral site with generally supportive local laws, excellent logistical facilities, and a track record of enforceable awards. On the other hand, the traditional venues are geographically distant from the BRI region and typically expensive. These may prove disincentives in some cases.

Administrative Region.” *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region*, DEPARTMENT OF JUSTICE, <https://www.doj.gov.hk/eng/mainland/pdf/mainlandmutual2e.pdf> [<https://perma.cc/ZDC7-BZQE>]. This “arrangement” provides terms for mutual enforcement of awards similar to those available under the New York Convention and appears to be working quite well.

⁵⁷ See *supra*, text accompanying note 55.

⁵⁸ UNCITRAL Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law (“UNCITRAL”), UN Doc A/40/17, Annex I (June 21, 1985). Revisions to the UNCITRAL Model Law were adopted by the United Nations in December 2006. Texts of the Model Law and the Revised Model Law are available at www.uncitral.org.

b. Arbitral Institutions

Several independent arbitral institutions now administer the large majority of international arbitrations. Each has its own rules and procedures. Although the differences among the institutional rules may be consequential in some cases, the rules of the leading institutions are increasingly congruent and are likely to influence only marginally the selection of the arbitral institution in a contractual arbitration clause. For present purposes the more significant factors in designating the administering institution are likely to be geographic proximity and institutional credibility.

The HKIAC and SIAC are already among the leading arbitral institutions worldwide, and, as discussed above, each is headquartered in a favorable venue. Both the HKIAC and the SIAC seem almost certain, therefore, to attract a large share of arbitrations arising out of BRI projects in South and Southeast Asia and, to a lesser extent, beyond. Well-established international institutions such as the ICC, LCIA, and ICDR have also taken steps to enhance their ability to service Asia-based or Asia-related arbitrations, including the establishment of offices in Hong Kong or Singapore that makes it easier to service arbitrations sited in those venues. All of these institutions are viable options for administering arbitrations arising out of disputes in BRI projects in South or Southeast Asia.

Outside of that region, it seems most likely that the leading global institutions—again, the ICC, LCIA, ICDR, perhaps the Stockholm Chamber of Commerce (“SCC”) or the Permanent Court of Arbitration (“PCA”)—will dominate the field. As a result of their experience in administering complex international arbitrations, the established arbitral institutions enjoy significant commercial credibility that enhances the likelihood of their incorporation in arbitration clauses. When the parties to an international contract, including a BRI-related contract, are negotiating a choice-of-forum clause, it will be difficult to refuse to agree to a well-known arbitral institution such as the ICC, the HKIAC, or the SIAC.

Local or regional organizations are also emerging in particular regions,⁵⁹ anticipating at least regionally-focused business. *Ad hoc* arbitration⁶⁰ of BRI-related disputes is also a possibility, but the award of an *ad hoc* tribunal lacks the imprimatur of an award rendered by one of the more established institutions. *Ad hoc* arbitration, moreover, is barred in China, and because they have little experience using it, Chinese parties and counsel may resist its inclusion in contractual arbitration clauses.

4. China as the Venue for BRI Arbitrations

The Chinese Government and Chinese arbitral institutions are taking measures to facilitate the holding of BRI-related arbitrations in China.⁶¹ This is hardly surprising. Logistical facilities in the major Chinese cities now meet international standards, and China has long been party to the New York Convention. The Chinese parties to BRI contracts will also undoubtedly feel more

⁵⁹ The most successful regional arbitration centers to date include the Asia International Arbitration Centre, www.aiac.world (formerly the Kuala Lumpur Regional Centre for Arbitration); the Dubai International Arbitration Centre, www.diac.ae [<https://perma.cc/8NG7-97XD>]; and the Cairo Regional Centre for International Commercial Arbitration, www.crcica.org [<https://perma.cc/X7TW-4LYJ>]. Each will be a credible candidate for BRI-related disputes within their particular geographic areas.

⁶⁰ Most likely under UNCITRAL Rules, which have an appealing neutrality and an established record of application in cases potentially involving political issues, e.g., investor-state disputes. For the sake of convenience and to ensure that the procedures for appointment of arbitrators will function appropriately, the parties to an agreement specifying the application of UNCITRAL Rules typically also specify that the arbitration be administered by an established arbitral institution. Most of the established arbitral institutions have procedures anticipating this kind of administrative arrangement.

⁶¹ In October 2016, for example, the Wuhan Arbitration Commission, one of more than 200 local arbitration commissions in China, announced the establishment of a “‘One Belt, One Road’ Arbitration Court” to “govern disputes involving Chinese enterprises.” The new President of the OBOR Arbitration Court said that they anticipated that most projects would involve infrastructure construction. *China establishes “One Belt, One Road” Arbitration Court, WHERE CHINA MEETS THE WORLD*, <http://www.chinagoabroad.com/en/article/21685> [<https://perma.cc/2QGG-58DF>]. This sounds as though the contemplated disputes are intra-Chinese, and Wuhan is an improbable venue for international cases, but it is not out of the question that the new “Arbitration Court” would also seek cases between Chinese and host country parties.

comfortable in their home territory with institutions that are familiar with Chinese business practices and are accustomed to conducting proceedings in Chinese. Some may also feel that because Chinese institutions are generally funding the projects, the use of Chinese venues and arbitral institutions is appropriate.

As with Chinese courts, however, one must be skeptical as to the likely success of these efforts. Chinese parties undoubtedly will have leverage in many BRI negotiations, and some may try to use that leverage to dictate Chinese choice-of-forum clauses. By definition, however, Chinese venues and Chinese arbitral institutions will not be “neutral” for BRI-related disputes. Doubts also persist as to the willingness of Chinese courts to support arbitration under difficult political circumstances.⁶² The neutral venues and administering institutions discussed above seem more likely, therefore, to prove mutually acceptable in most BRI contract negotiations.

C. BRI’s Legal Challenges for Commercial Arbitration in Asia

1. Arbitrating Highly Political Disputes

The potential political ramifications of arbitrations arising out of BRI projects cast a shadow over the process generally.

Arbitration has previously handled, with reasonable success, a number of prominent arbitrations involving substantial foreign investments, although primarily in the context of investor-state arbitration (discussed below). The sheer number and scale of potential BRI disputes present institutional problems of a different order. Many BRI disputes may well involve hundreds of millions or even billions of US dollars. If a number of awards of this magnitude are rendered in prominent BRI-related cases over a short

⁶² Chinese courts are still subject to the guidance of legal/political committees of the Chinese Communist Party. In most circumstances these committees will have an incentive to encourage Chinese venues by directing local courts to provide the necessary support to arbitration. Nevertheless, some BRI projects will raise significant economic or political considerations that may override this incentive.

period, the adequacy and appropriateness of the institution itself may be questioned. This will be all the more so if the awards, for good reason or bad, generally favor one side or the other, i.e. if they generally run in favor of the Chinese investors or in favor of their counter-parties in the host country.

There is, moreover, a risk or indeed, a likelihood, that the parties to BRI-related disputes will follow the practice, already common elsewhere, whereby each party to a commercial arbitration appoints an arbitrator of its own nationality to the arbitral panel, leaving the outcome of a case—in appearance, if not always in practice—in the hands of an individual, “neutral” chairman.⁶³ The potential size and number of many BRI projects risk magnifying the political consequences of this approach. China and host countries alike may find unsatisfactory a system in which legal disputes arising out of high-profile BRI projects are being resolved by a relatively small number of independent neutral arbitrators operating under the auspices of independent, non-governmental arbitral institutions.

2. Institutional Capacity

A related issue is the capacity of independent arbitral institutions, individually and collectively, to manage a significantly expanded caseload. It is impossible to anticipate how rapidly the volume of BRI-related arbitrations will increase. If the increase is relatively gradual, it may be that the adjustments necessary to accommodate BRI-related arbitrations will not be too difficult. The leading arbitral institutions already have extensive experience administering large caseloads, and one assumes that they will be able to adjust to larger caseloads if the rate of increase is not too great. Nevertheless, international arbitration for non-BRI cases is itself increasing quite rapidly, particularly in Asia, and it is quite possible that an additional increase from the BRI may challenge the administrative capacity of the institutions.

⁶³ JAN PAULSSON, *THE IDEA OF ARBITRATION* 276 (2013). Paulsson himself has long been a critic of the standard practice by which each party to a commercial arbitration is typically allowed to nominate one member of a three-arbitrator panel.

The most significant practical problem may be the size of the available arbitrator pool. All of the institutional arbitrations tend to draw on a common pool of arbitrators. The current pool of arbitrators with the legal and cultural experience desirable for handling complex commercial disputes in Asia is quite limited. The pool of arbitrators with experience in handling disputes involving more than, say, \$100 million, is even smaller. A frequent criticism of international arbitration, moreover, in Asia as elsewhere, is that reliance on this limited pool is overloading individual arbitrators' caseloads and causing serious delays in the resolution of cases and rendering of awards. The potential volume of the BRI caseload and the magnitude of potential awards is, again, the issue. An increasing volume of arbitrations arising out of large, complex BRI projects can only be expected to exacerbate these problems.

This capacity problem may, of course, be ameliorated by expanding the pool of arbitrators. The number of talented young lawyers engaged in international arbitration has increased dramatically in recent years, especially in Asia. If the BRI-related caseload does not expand too rapidly, a sufficient number of new arbitrators may well emerge to handle it. The addition of a substantial number of arbitrators from China and BRI host countries would have the additional advantage of enhancing the diversity of the arbitrator pool.⁶⁴

At least in the short term, however, the potential institutional capacity problem, conjoined with the political implications of placing decision-making authority in the hands of a relatively small number of neutral arbitrators, may cause some to question the political wisdom of consigning commercial disputes arising out of BRI projects to independent arbitral institutions.

3. Complex, Inter-related Contractual Disputes Administered by Different Arbitral Institutions or Courts

⁶⁴ The ICC has already anticipated this issue by initiating ambitious training programs for new arbitrators in Asia, and it would be surprising if the governments and arbitral institutions involved in the BRI did not follow this example.

More technical legal problems may arise from the potential complexity of BRI disputes. As discussed above, many BRI projects are likely to involve several layers of inter-related contracts among a variety of parties. These contracts will often include inconsistent choice-of-forum clauses. This is not, of course, a new or unique problem. Many international commercial projects involve a multitude of inter-related contracts among diverse parties, and legal proceedings in different fora often proceed in parallel. These situations typically raise a range of difficult issues: when may related cases before the same institution be consolidated? When may proceedings in different fora be conjoined? What legal effect does a judgment or award in one proceeding have on the legal or factual issues in another? The size and complexity of BRI projects may be expected to magnify problems of this nature.

In recent years the leading arbitral institutions have developed procedures for consolidating related cases and permitting, or sometimes requiring, the joinder of third parties to contractual disputes. These procedures apply, however, only when the arbitration clauses of the contracts at issue specify the same administering institution. It is much more challenging to manage disputes arising out of inter-related contracts whose arbitration clauses stipulate different rules, different institutions, and different national venues: these are precisely the circumstances that may well be found in many BRI-related disputes.

The SIAC has recently put forward a proposal for establishing in advance a protocol among the various arbitral institutions to cooperate in the consolidation of inter-related disputes arising out of contracts with arbitration clauses that stipulate different arbitral institutions.⁶⁵ The SIAC proposal is not aimed at BRI disputes, but it encompasses the kinds of problems that may be presented in many of those disputes.⁶⁶ It remains to be seen if this proposal or some

⁶⁵ Singapore International Arbitration Centre, *Proposal on Cross-Institutional Consolidation Protocol*, (Dec. 19, 2017), <http://siac.org.sg/69-siac-news/551-proposal-on-cross-institution-consolidation-protocol> [https://perma.cc/5XVB-7ZPR].

⁶⁶ This kind of cooperation would raise a number of difficult jurisdictional problems.

variation of it can be agreed and, if so, to what extent it would mitigate these problems.

4. Identifying and Applying Applicable Law

For commercial arbitral tribunals hearing BRI-related disputes, the most difficult issues may involve identifying and applying unfamiliar or undeveloped laws. The laws of many BRI host countries are of relatively recent origin and may not fully, or clearly, address issues relevant to transnational infrastructure development projects. China's laws, too, have only been promulgated relatively recently and still include areas of uncertainty. More fundamentally, the laws of China and the various BRI states arise out of quite different, and often incongruent, legal systems. China's commercial laws are essentially civil in origin. The laws of the host countries for BRI projects rest on a broad range of common law, civil law, customary law, or *sharia* systems.

The parties to BRI contracts will, of course, try to obviate these problems in their contracts, specifying applicable laws and providing detailed terms intended to govern the most significant issues anticipated by the parties. For their part, arbitral tribunals can be expected to adhere as closely as possible to the terms of the applicable contracts and try, whenever possible, to avoid the more difficult conflict of law issues. Chinese and many host country parties, however, often prefer imprecise, more flexible contract terms, and they may also stipulate applicable laws that will be difficult to prove or interpret. Even the most sophisticated contracts, moreover, fail to anticipate all difficulties that may arise; indeed, they sometimes intentionally leave difficult issues open. In short, when the choice of law is uncertain and the applicable law is undeveloped, tribunals will face significant difficulties identifying, interpreting, and applying rules of law.

These problems, too, are not new or unique. Many international tribunals already deal with similar issues. Again, however, the number and magnitude of BRI-related cases may be expected to complicate these issues. It is more than likely that the terms of BRI contracts will be uncertain, it will be difficult to prove the content of

applicable law in many cases, and BRI tribunals may be required to render rulings on local law that is not clearly established or is subject to disputing views.⁶⁷

IV. State-to-State and Investor-State Disputes

Most BRI projects will be initiated by, and conducted under the auspices of, inter-governmental agreements between the Chinese and host country governments. This raises the likelihood of both state-to-state and investor-state legal disputes to which different laws apply and which may be resolved by different institutions and procedures.

A. State-to-State Disputes

Under customary international law, a state may “espouse” claims of its nationals⁶⁸ for treatment that amounts to a denial of justice⁶⁹ or violation of international minimum standards.⁷⁰ In the BRI context, China would be entitled to espouse the claims of Chinese investors for treatment by the host country violating these customary international law standards. Third countries whose nationals were

⁶⁷ Some have speculated whether, under these circumstances, particular laws or procedures common among BRI cases may evolve a sort of “BRI law.” It seems possible that some of the Chinese entities involved in BRI contracts will try to standardize their contracts across jurisdictions and that lawyers involved in preparing BRI contracts will borrow from other, publicly available contracts for the sake of convenience, if nothing else. It is possible, too, that arbitral tribunals may borrow general principles or standards of law from the rulings of other tribunals to legitimize their own rulings on otherwise novel issues of law. At this point, however, developments of this sort must remain highly speculative. The divergence of legal systems potentially involved is simply too great to expect ready consolidation of practice either at the contracting level or in adjudicatory proceedings.

⁶⁸ The right of espousal is a function of the more general right of diplomatic protection that a state may exercise on behalf of its nationals. BRIERLY’S LAW OF NATIONS 255 (Andrew Clapham ed., 7th ed. 2012).

⁶⁹ *See generally*, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005) (examining modern understanding of denial of justice).

⁷⁰ *See generally*, MARTINS PAPANISKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT (2013) (providing a holistic analysis of minimum standard and fair and equitable treatment in investment protection treaties).

involved in the projects would enjoy similar rights. If the governments agreed, such state-to-state claims could be referred to the International Court of Justice or *ad hoc* tribunals.

In the BRI context, however, claims of this nature are largely theoretical. China has never shown an inclination to submit its claims under customary international law to third-party dispute resolution. China is much more likely to seek to resolve disputes of this nature in diplomatic channels, where it can better exercise its political and economic leverage. State-to-state legal claims, if invoked at all, will be a secondary factor in China's diplomatic positions.

B. Investor-State Dispute Settlement

More likely for BRI projects are disputes of the kind that arise in an investor-state dispute settlement (“ISDS”) context: regulatory actions by the host government adverse to the interests of foreign investors that allegedly constitute compensable expropriations of property of the foreign investor or violations of economic stabilization clauses; claims that the host state has failed to provide the foreign investor “fair and equitable” treatment or “full protection and security”; failure of the host state to provide “national treatment”; and others. In recent decades a broad array of states have entered into more than 3,300 multilateral and bilateral international investment agreements (“IIAs”) authorizing the foreign investor to bring claims of this nature directly to investor-state arbitration tribunals, typically pursuant to the ICSID Convention⁷¹ and ICSID Rules.⁷²

Whether disputes of this nature arising out of BRI projects may be submitted to investor-state arbitration will depend on the terms of China's bilateral investment treaties (“BITs”) with host

⁷¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

⁷² *World Investment Report 2017: Investment and the Digital Economy*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), 111 (2017), http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf [https://perma.cc/UL3Q-Z3E7].

governments. China is already party to 128 such agreements,⁷³ including many with BRI countries.⁷⁴ Until recent years, however, China has primarily been a capital-importing country, and one of its principal policies in entering into BITs has been to limit its potential legal exposure to the claims of foreign investors in China. As a consequence, China's earlier BITS, while providing some guarantees to foreign investors, do not generally authorize investor-state arbitration, or they limit arbitration to valuation issues for expropriations and exclude questions of liability, effectively curtailing their utility.⁷⁵ Most of China's BITs with BRI countries are of this nature.⁷⁶

In recent years, however, China has emerged as one of the world's leading capital exporters, and it has a larger, and rapidly growing, interest in protecting China's own investors abroad. This may explain the inclusion in more recent Chinese BITs of clauses that do generally authorize investor-state arbitration, and Chinese parties have already begun to bring claims under those clauses.⁷⁷

The intriguing question is whether, in the light of the expected increase of claims by Chinese investors arising out of BRI projects, China will begin negotiating new BITs with BRI states, or amending existing BITs, to permit those investors to bring their

⁷³ *Database for Bilateral Investment Treaties*, WORLD BANK GROUP, (last visited Apr. 8, 2018) <https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a33> [https://perma.cc/VQJ2-6JJN].

⁷⁴ Vivienne Bath, "One Belt, One Road" and Chinese Investment, OXFORD BUS. L. BLOG (Jan. 5, 2017), <https://www.law.ox.ac.uk/business-law-blog/blog/2017/01/'one-belt-one-road'-and-chinese-investment> [https://perma.cc/3HG4-LCXL].

⁷⁵ Kate Hadley, *Do China's BITS Matter? Assessing the Effect of China's Investment Agreements over Foreign Direct Investment Flows, Investors' Rights, and the Rule of Law*, 45 GEORGETOWN J. INT'L L. 255, 303-04 (2013).

⁷⁶ Bath, *supra* note 74.

⁷⁷ Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium, ICSID Case No. ARB/12/29, in favor of State (Apr. 30, 2015); Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, in favor of Investor, (July 7, 2011); Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia, Perm. Ct. Arb. Case No. 2010-20 (June 30, 2017).

claims to investor-state arbitration. If it does not do so, China may find itself, like capital-exporting states in the past, facing a host of legal claims by its investors against BRI host governments that may otherwise be difficult or burdensome for China to resolve in diplomatic channels. Conversely, if China does amend more of its BITs to authorize Chinese investors to submit claims against host governments arising out of BRI projects to arbitration, China can expect pressure from other governments (involved in BRI or not) to demand reciprocal rights in their own BITs with China, thereby opening China itself to claims by foreign investors in China. In either case, it seems reasonable to anticipate a significant increase in investor-state arbitration involving China.

V. CONCLUSIONS

China's BRI will inevitably generate a large number of complex, inter-related disputes involving Chinese investments in dozens of countries. Arbitration, both commercial and investor-state, provides the most promising procedures for resolving these disputes on terms that may be regarded as satisfactory by all parties. The magnitude of China's proposed BRI investment program will, however, present serious challenges to existing arbitral institutions. It remains to be seen whether the current system of independent arbitral institutions can handle the potential increase in commercial arbitration and, at the same time, avoid becoming enmeshed in the potential political pitfalls. Uncertain, too, is China's willingness to participate in an expanded system of ISDS that can accommodate the inevitable investor-state claims that will arise. In both respects, China's BRI program can be expected to present significant challenges to international arbitration.