

Dispute Settlement in China's Belt and Road Initiative

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Introduction

China's rapid economic rise has had major impacts on world politics in the 21st century. The subject of this paper, the recent Belt and Road Initiative (BRI), is one of many examples of China's continuing political and economic evolution. This paper will first place the BRI in its geopolitical context. Then, it will discuss the legal implications of the BRI in matters of dispute settlement, exposing the delicate decisions that Beijing will have to take.

1. Contextualization

1.1. Political and economic analysis of the realities surrounding BRI

1.1.1. Chinese economic growth

Since 1953, under Chairman Mao Zedong's leadership, the Chinese economy has been centrally planned. Under this model, the State sets production goals, effectively giving no incentive or motive for firms, workers, and farmers to seek increased productivity and efficiency¹. After Mao's death in 1979, China launched several economic reforms following free market principles². This allowed an unprecedented period of growth in which China's annual real GDP averaged 9,5%³. China's rate of GDP growth has however declined slowly in the past 2 decades and recent IMF forecasts predict that by 2024, it will fall to 5,5%⁴. This is due to China's technological development which is starting to level itself to be on par with major developed countries. As a result, real GDP growth will diminish significantly from its historic levels unless China

¹ US Congress, Congressional Research Service, *China's Economic Rise: History, Trends, Challenges, Implications for the United States*, (Washington: Congressional Research Service, June 25 2019) at 2.

² *Ibid* at 4.

³ *Ibid* at 6.

⁴ Yuan Ying, "China's growth to weaken to 5.5% by 2023, IMF says", *Financial Times*, (May 30 2018) online: <<https://www.ft.com/content/473ff7ca-63d2-11e8-90c2-9563a0613e56>>.

restructures its economic policies⁵. In economic jargon, this is known as the “middle-income trap”, where failure to sustain high levels of productivity in an economy leads to economic stagnation and inability to transition to a high-income economy⁶. Despite these ongoing problems, China has become a serious contender to America’s title as the first world power.

1.1.2. Tense political rivalry in China-USA relationships

Although China has incessantly repeated that it does not seek conflict with the United States, recent events such as the ongoing bilateral trade war or China’s dismissal of American concerns pertaining to its positioning in the South China Sea seem to indicate that Beijing’s quest for political, economic and military legitimacy is leading to exactly the contrary of what it says it is doing⁷. If China surpassed the US as the biggest global superpower, it would mean a massive shift in global power dynamics, which explains the tense atmosphere surrounding the China-USA relationship.

1.2. China’s quest for global recognition and the BRI

1.2.1. Origins

In September 2013, during his visit to Central Asia and Southeast Asia, Chinese President Xi Jinping announced his intentions of developing the BRI. It was touted as the modern reinvention of the old Silk Road, the famed network of trade routes leading to and from China and used between the 2nd century BCE to the 18th century for the commerce of spice and other goods. He

⁵ Glawe Linda and Wagner Helmut, “The People’s Republic of China in the Middle Income Trap?” (June 2015) at 20, online (pdf): *Asian Development Bank Institute* <<https://www.adb.org/sites/default/files/publication/322961/adbi-wp749.pdf>>.

⁶ *Ibid* at 6.

⁷ Graham Richardson “The China Threat: Myths, Realities and Implications for U.S. Foreign Policy” (2010) at 56, online (pdf): *Centre for International Policy Studies* <<https://www.cips-cepi.ca/wp-content/uploads/2011/10/Richardson.pdf>>.

also emphasized that this project would allow new bilateral and multilateral trades deals to be signed, effectively creating stronger economic as well as political bonds between China, Central Asia, Russia and Baltic Europe⁸. The premise of the BRI is relatively simple: establish wide-range economic corridors between China and participating countries in order to facilitate and enhance political and economic cooperation⁹. This will be done primarily through the injection of Chinese capital investment into the infrastructural economy of participating countries in the areas of transport, energy, and industrial activity¹⁰.

Behind this massive project are three key policy considerations. First, export China's oversupply of domestic products such as steel. Second, increase China's influence in other parts of the world and especially emerging countries. Third, provide alternative financing sources to participating countries¹¹.

1.2.2. The situation until now

The massiveness of this project is quantifiable: according to China's official media in December 2017, 86 countries and international organizations had already signed cooperation agreements under the helm of BRI¹². Additionally, the World Economic Forum predicts that China could spend up to \$8 trillion on BRI, effectively providing a huge boost to China's economy by

⁸ Poominty Sooksripaisarnkit & Sai Ramani Garimella, *China's One Belt One Road Initiative and Private International Law*, ((New York: Routledge, 2018) at 1-3.

⁹ *Ibid* at 3.

¹⁰ *Ibid*.

¹¹ *Ibid*.

¹² Xinhua, "China signs cooperation agreements with 86 entities under Belt and Road" (December 23 2017), online: *Chinadaily* < <https://www.chinadaily.com.cn/a/201712/23/WS5a3dbf9da31008cf16da306e.html>>.

way of increasing capital investments¹³. OBOR epitomizes all of the previously described tension on the global political arena. As an initiative led by China for large-scale economic cooperation in vast areas of policy, trade, investment, finance and socio-cultural exchanges, Western powers fear that the implementation of this massive initiative would allow Beijing to impose subjective standards of investment and trade on smaller states, effectively giving the Chinese a distinct opportunity to impose a subjective model of governance¹⁴. Legally speaking, the primacy of a characteristically Chinese interventionist policy would have unprecedented repercussions on international norms concerning restriction of sovereignty. This would set international business and trade law into uncharted territory concerning dispute resolution.

2. The legal ramifications of OBOR

2.1. Disputes

2.1.1. Legal issues that may arise from OBOR

A project of such massive proportions necessarily entails complex legal problems which will need to be addressed before being put in place. One of the specific and unique legal issues which arises out of the implementation of the BRI concerns the appropriate dispute settlement mechanism that should be designated in the BITs and/or FTAs signed between China and participating countries to the initiative. Effectively, as the cooperative framework of substantive and procedural rules within OBOR must be open to all participating parties and not just a select group of countries or regions, no single existing mechanism would be appropriate to settle disputes arising out of the initiative¹⁵. The proposed legal framework must also address the tense political climates reigning

¹³ Anna Bruce-Lockhart, “China’s \$900 billion New Silk Road. What you need to know” (June 26 2017), online: *World Economic Forum* <<https://www.weforum.org/agenda/2017/06/china-new-silk-road-explainer/>>.

¹⁴ Sooksripainsarnkit & Garimella, *supra* note 8 at 32.

¹⁵ Jiaxiang Hu & Jie Huang, “Dispute Resolution Mechanisms and Organizations in the Implementation of One Belt, One Road Initiative: Whence and Whither” (2018) 52:5 *Journal of World Trade* at 817.

in a lot of the countries that will participate in the initiative so that domestic government changes and political coups do not or minimally impede on the financial security of Chinese investments¹⁶. Furthermore, circumnavigating the different financial systems and currencies will, undoubtedly, prove to be a tough horse to saddle¹⁷.

2.2. Dispute settlement

2.2.1. Existing models of Dispute Settlement Courts explain why OBOR must have its own court for dispute settlement

Currently, the two main bodies used to resolve trade and investment disputes are the WTO's Dispute Settlement Body (DSB) and the International Centre for Settlement of Investment Disputes (ICSID). For both of these, there are incongruencies which make it so that the OBOR initiative cannot fully implement the existing mechanisms in the WTO's DSB and the ICSID.

The WTO'S DSB does not cover 13 partner countries of the BRI and only a select few partner countries who are members of the WTO actually resort to the DSB to solve their commercial litigation cases¹⁸. Additionally, many of the BRI partner countries are developing or emerging countries with unique legal systems, outside of the common and civil law traditions¹⁹. As such, there may be discomfort towards the heavy burdens which come with the DSB's litigious tradition, the cross-retaliation system it employs and its complicated rules²⁰. Furthermore, the appellate body of the WTO is an essentially disappearing body given that the United States has

¹⁶ *Ibid* at 818.

¹⁷ *Ibid*.

¹⁸ *Ibid* at 819.

¹⁹ *Ibid*.

²⁰ *Ibid*.

blocked the naming of new judges to replace those whose term expired²¹. In December of 2019, there was only one judge left, effectively meaning that the WTO's DSB may be falling to shambles. With uncertainty like this surrounding the DSB, China is better off designing its own DSB.

Integrating the ICSID framework is not an ideal solution for a few reasons. First, ICSID's arbitration decisions are final and rule out the possibility of diplomatic negotiation between two countries, which would run contrary to the OBOR initiative's prerogative that it seeks to create partnerships and not merely just transactional commercial relationships²². Secondly, the excessively expensive dispute settlement costs generated by litigation within the framework of the ICSID is inherently unattractive for a lot of the smaller developing countries looking to integrate within the BRI²³. Finally, the ICSID'S tendency to protect the interests of investors breeds distrust of the arbitrators on the part of the partner countries since most of them would be host countries of foreign direct investments (FDI)²⁴.

2.2.2. China's behavioral issues concerning litigation and arbitration

Besides designing an adequate dispute settlement body which responds to the multilateral concerns surrounding the BRI, China also has major behavioral corrections to address.

²¹ Keith Johnson, "How Trump May Finally Kill the WTO" (December 9 2019) , online: *Foreign Policy* <<https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/>>.

²² Surya Subedi, *International Investment Law: Reconciling Policy and Principle*, 3rd ed (Oxford: Hart Publishing, 2016), at 98.

²³ August Reinisch, "Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration" (2016) 761:19 *Journal of International Economic Law* at 768–771.

²⁴ Hu and Huang *supra* note 20 at 820.

In the context of litigation, China has a history of requiring *de facto* reciprocity for judgment recognition and enforcement (JRE) with partners that did not sign a bilateral JRE treaty. *De facto* reciprocity is an excessively restrictive practice for JREs, which limits reciprocity only to when a foreign court has recognized and enforced a judgment in practice²⁵. In other words, China does not recognize third party judgments unless the practice is normalized and substantively integrated within the Chinese legal system. Considering that 70% of BRI partner countries have not signed a bilateral JRE treaty with China, there is great uncertainty surrounding China's recognition and implementation of neutral party litigation decisions²⁶. The favoured alternative is *de jure* reciprocity, which establishes that a judgment rendered in one country may theoretically be recognized and enforced in the other contracting country²⁷. Chinese legal authorities have, however, grown increasingly aware of the distaste of other countries towards their tradition of *de facto* reciprocity. In the Nanning statement, issued by the second China-ASEAN Justice Forum, participants stated that in the event where two member states of the BRI do not have a JRE treaty and where neither have rejected the JRE due to a lack of reciprocity, "there should be a presumption of reciprocity within the limits of the countries' domestic laws"²⁸. This change of heart can be explained by the tense and fragile politico-economic environment surrounding the BRI described earlier. Indeed, significant hegemonic responsibility befalls China in the context of the BRI and it must show itself willing to be a fair player in order to get partner countries to actually sign on to the initiative²⁹. With so much riding on Xi's brainchild for the next few decades of Chinese economic expansion, China must also change its ways.

²⁵ *Ibid* at 832.

²⁶ *Ibid* at 831.

²⁷ *Ibid*.

²⁸ *Ibid* at 833.

²⁹ *Ibid* at 835.

Regarding arbitration, China's recognition and enforcement of *ad hoc* arbitration decisions remains a pressing issue for partner countries. Effectively, given that the composition of partner countries alongside the BRI would reflect the most diverse legal systems and traditions, *ad hoc* arbitration, meaning proceedings not administered by national courts and which requires parties to agree on procedure and arbitrators, would be the sensible solution since parties are free to choose applicable law, procedures and administrative support³⁰. Traditionally, *ad hoc* arbitration is not allowed in China³¹. However, in 2017, the Chinese Supreme People's Court advised that this type of arbitration would be permitted for enterprises registered in Free Trade Zones (FTZs), which are special areas contained in a country's sovereign boundaries where the rules of business differ from mainland rules³². Admittedly, China is moving towards recognizing *ad hoc* arbitration in its legal system. In fact, this is also seen in the Guangzhou Arbitration Commission's attempt to offer an Internet Arbitration Cloud Platform to conduct online *ad hoc* arbitration through the use of artificial intelligence and digital data service³³. While not officially designated as the procedure chosen for *ad hoc* arbitration, an online platform could prove itself procedurally efficient and economically interesting for the BRI³⁴.

Conclusion

In conclusion, only an integral revision of Chinese Arbitration Law and the Civil Procedure Law will allow a coherent approach towards the implementation of a new dispute settlement body

³⁰ *Ibid* at 834.

³¹ *Ibid*.

³² *Ibid*

³³ *Ibid*.

³⁴ *Ibid* at 836.

for the BRI. Furthermore, the legal framework surrounding the BRI must be engineered in a balanced manner. Effectively, the Chinese government must show its ability to create a far-reaching and comprehensive framework which will please partner countries and encourage continued commitment towards the development of the initiative. In fact, dispute resolution is but one of the many issues which the legal masterminds of the BRI must address. As such, it may be advisable for Beijing to enter into dialogue with legal experts from other participating countries in the process of drafting the set of rules, procedures and laws governing activities within the BRI.