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Mollengarden, Zachary

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“ONE-STOP” DISPUTE RESOLUTION ON THE BELT AND ROAD: TOWARD AN INTERNATIONAL COMMERCIAL COURT WITH CHINESE CHARACTERISTICS

Zachary Mollengarden*

ABSTRACT

On July 1, 2018, China’s Supreme People’s Court published the “Provisions on Several Issues regarding the Establishment of International Commercial Courts.” The Provisions followed on the heels of a January announcement from the Central Leading Group for Comprehensively Deepening Reforms alluding to plans to establish a dispute settlement mechanism dedicated to China’s Belt and Road Initiative. The Provisions confirmed that what the press had swiftly branded the “Belt and Road Court” (BRC) will comprise three international commercial courts. Regardless of analysts’ discipline or affiliation, the response to the initial proposal, and now to the framework laid out in the Provisions, has been predictably binary, reflecting a longstanding division in interpretations of China’s commercial dispute resolution policies.

One branch, call it the sociological school, explains China’s policies with reference to the country’s history and culture. It contends that a direct line may be drawn from the Chinese people’s traditional aversion to litigation to their government’s preference for informal and private mechanisms for dispute resolution. With reference to the BRC, the causal narrative this school presents is one of continuity, contending that to understand the BRC, the basic explanatory trajectory must proceed *from China outward* to the international arena. An alternative branch, call it the political-economy school, argues that China’s policies toward international commercial dispute resolution respond to the same goals and imperatives as any other state. China’s policies are viewed as a self-interested response to factors such as commercial flows, security considerations, and development goals. Insofar as such matters are subject to constant flux, China’s dispute resolution policies are understood to be

* Zachary Mollengarden is a Law Clerk at the U.S. Court of Appeals for the Eleventh Circuit. He received his J.D. from Yale Law School in 2018, where he was Articles Editor of the *Yale Law Journal*. He also received his M.Phil. in International Relations from the University of Cambridge.

commensurately fluid. Here, the basic explanatory trajectory proceeds *from the international arena inward* into China.

As with all binaries, there is a middle way—an approach that interprets China’s commercial dispute resolution policies generally, and the newly established BRC in particular, as a product of continuity as well as change, influenced as much by internal dynamics as external imperatives. This Article adopts this middle way in order to identify and assess the principal tensions that have confronted, and will continue to challenge, the designers of what will amount to an international commercial court with Chinese characteristics.

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INTRODUCTION

Beginning in 1975, the Water and Development Authority of Pakistan performed a series of studies to identify and rank potential hydropower plants along the Jhelum River in Pakistan’s northeast.¹ Reporting its findings in 1983, the Authority recommended Karot, a site located 55 kilometers east of Islamabad in the heart of the contested Kashmir region.²

1. NAT’L ELEC. POWER REGULATORY AUTH., DETERMINATION OF THE AUTHORITY IN THE MATTER OF GENERATION LICENCE APPLICATION OF KAROT POWER COMPANY (PRIVATE) 1 (Nov. 22, 2013), <http://www.nepra.org.pk/Licences/Generation/IPP-2002/LAG-169%20GENERATION%20LIC%20KAROT%20PCPL%2026-11-2013%2013100-02.PDF> [<https://perma.cc/6M5H-WYAP>].

2. See KAROT POWER CO. (PRIVATE) LTD., TARIFF PETITION, KAROT HYDROPOWER PROJECT10 (Sept. 23, 2011), <http://www.nepra.org.pk/Tariff/Petitions/2011/PETITION-----KAROT%20POWER.PDF> [<https://perma.cc/7YK3-95ZC>].

Then nothing happened. Another group of studies was prepared in 1994, and Karot was once again recommended as a location for hydro-power development.³ Another decade later, Pakistan's Private Power and Infrastructure Board took over the initiative. After an international bidding process in May 2007, the Board awarded a consortium of Chinese investors the hydropower project.⁴ The global financial crisis and another eight years of bureaucratic wrangling passed before the consortium, including Yangtze Three Gorges Technology & Economic Development Company and China Machinery Engineering Corporation, were awarded a US \$1.277 billion engineering, procurement, and construction contract for the planned 720-megawatt hydropower plant.⁵

The now \$1.98 billion Karot project⁶ is owned by the Karot Power Company, a special purpose vehicle⁷ established by China Three Gorges South Asia Investment Ltd. (CTGSAIL).

CTGSAIL, in turn, is a holding company 70 percent owned by the world's largest hydropower operator, China's⁸ state-owned Three Gorges Corporation. The remaining 30 percent of CTGSAIL's equity is divided between a state-owned investment fund, the Silk Road Fund, and the

3. NAT'L ELEC. POWER REGULATORY AUTH., *supra* note 1, at 1.

4. NAT'L ELEC. POWER REGULATORY AUTH., DETERMINATION OF THE AUTHORITY IN THE MATTER OF TARIFF PETITION FILED BY KAROT POWER COMPANY LIMITED (KPCL) FOR APPROVAL OF FEASIBILITY STAGE TARIFF IN RESPECT OF 720-MW KAROT HYDROPOWER PROJECT (CASE No. NEPRA/TRF194/KPCL-2011) 4 (May 29, 2012), <http://www.nepa.org.pk/Tariff/IPPs/karot%20hydro%20power/TRF-194%20KPCL%20Determination%2029-05-2012%204825-27.pdf> [<https://perma.cc/9JLN-KU9R>].

5. Michael Harris, *Chinese Consortium Wins EPC Contract for Pakistan's 720-MW Karot Hydroelectric Project*, HYDROWORLD (May 21, 2015), <https://www.hydroworld.com/articles/2015/05/chinese-consortium-wins-epc-contract-for-pakistan-s-720-mw-karot-hydroelectric-project.html> [<https://perma.cc/SN4Z-GJWK>].

6. *Chinese Consortium Wins EPC Contract for \$1.984bln Hydropower Project*, BOARD OF INV., PRIME MINISTER'S OFFICE, GOV'T OF PAK. (May 20, 2015), <http://boi.gov.pk/ViewNews.aspx?NID=469> [<https://perma.cc/29JX-RXXA>].

7. Karot Power's English language website is a work in progress. "Project Financials," for example, is a blank page. However, one can learn of the company's vision ("Uphold Three Gorges Spirit, Create Overseas Classics") as well as its mission to "Build Overseas Quality Project, Foster Grand Image for Pak-China Energy Cooperation." See *Vision & Mission*, KAROT POWER CO. (PRIVATE) LTD., <http://karotpower.com/vision> [<https://perma.cc/LX6A-9XKV>] (last visited Nov. 19, 2018).

8. English-language scholars have variously referred to the state as the "People's Republic of China," used the short form "China," or, perhaps in a bid for authenticity, used a Romanized spelling of the country's name in Mandarin. Encyclopedia Britannica's entry for the country opens with this bewildering first sentence: "China, Chinese (Pinyin) Zhonghua or (Wade-Giles romanization) Chung-hua, also spelled (Pinyin) Zhongguo or (Wade-Giles romanization) Chung-kuo, officially People's Republic of China, Chinese (Pinyin) Zhonghua Renmin Gongheguo or (Wade-Giles romanization) Chung-hua Jen-min Kung-ho-kuo, country of East Asia." Erik Zürcher et al., *China*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/China> [<https://perma.cc/AR83-AA54>] (last updated Oct. 16, 2018). For the sake of neutrality and ease of reference, this Article will refer to the state as "China."

World Bank's private sector arm, the International Finance Corporation (IFC).⁹

CTGSAIL has provided 93 percent of the project's equity funding,¹⁰ with backing for the investment from the People's Bank of China, the Silk Road Fund, and the IFC. As for the remaining 80 percent of the project financed through debt, the institutional roster is unsurprising, with major lenders including China Development Bank, the Export-Import Bank of China, the Silk Road Fund, and the IFC. The Pakistani government has guaranteed Karot's lenders and equity investors a tariff of 7.57 cents per unit of power produced for thirty years at an exchange rate of 101.6 Pakistani rupees to the U.S. Dollar.¹¹ After the thirty years have elapsed, Karot Power will relinquish ownership to the governments of the Azad Kashmir territory and Punjab province.¹²

Thus far, the project has involved several decades of petitioning and permitting, an array of subsidiaries and holding companies, and not least, a substantial sum of (primarily Chinese) money—to what end? International reporting on the project suggests at least two answers. The first, logically enough, focuses on hydropower: the electricity generated by Karot is expected to satisfy the needs of seven million Pakistani households and begin to remedy the country's chronic energy shortages. As Qin Guobin, chief executive of CTGSAIL, noted in an interview: "Pakistan[']s total installed capacity is equal to one big city of China like Shanghai. That's not enough."¹³

The second answer involves an alternative form of power. The Karot project is a jewel within the China-Pakistan Economic Corridor

9. There may have been some additions to the shareholder list after China Three Gorges South Asia Investment Ltd. sought new equity investors in the summer of 2016. See Lyu Chang & Jing Shuiyu, *China Three Gorges Seeks Investors*, CHINA DAILY (May 24, 2016), http://www.chinadaily.com.cn/business/2016-05/24/content_25436318.htm [<https://perma.cc/5CAQ-VR9D>]. However, I have found no information on whether the share offer occurred or its results. The firm's website suggests that its major partners remain the same. *Our Partners*, CHINA THREE GORGES SOUTH ASIA INV. LTD., <http://ctgsail.com/partner> [<https://perma.cc/8R8N-C7VS>] (last visited Nov. 19, 2018).

10. The remaining 7percent of the equity funding comes from Pakistan-based Associated Technologies Ltd. See Gregory B. Poindexter, *Pakistan Awards US \$1.4 Billion Contract for 720-MW Karot Hydroelectric Project on Jhelum River*, HYDROWORLD (Mar. 4, 2015), <https://www.hydroworld.com/articles/2015/03/pakistan-awards-us-1-4-billion-contract-for-720-mw-karot-hydroelectric-project-on-jhelum-river.html> [<https://perma.cc/3B2S-A89S>].

11. Khaleeq Kiani, *Implementation Pact for \$1.9bn Karot Power Project Signed*, DAWN (Sept. 29, 2016), <https://www.dawn.com/news/1286749> [<https://perma.cc/LZP9-PD7Q>].

12. Khaleeq Kiani, *Govt Orders Transfer of Hydropower Projects to AJK, GB*, DAWN (July 2, 2016), <https://www.dawn.com/news/1268573> [<https://perma.cc/QJ9K-LFJ5>].

13. Kamran Haider, *China Quickens Work on Pakistan Utility in Area Claimed by India*, BLOOMBERG (Sept. 18, 2017), <https://www.bloomberg.com/news/articles/2017-09-18/china-quickens-work-on-pakistan-utility-in-area-claimed-by-india> [<https://perma.cc/54CC-LNV4>].

Initiative, an infrastructure program covering a 3,000 kilometer route from China’s Xinjiang Uygur Autonomous Region to Pakistan’s Gwadar Port on the Arabian Sea.¹⁴ The Economic Corridor—which as of 2018 comprises approximately \$62 billion in Chinese-financed aid and infrastructure projects¹⁵—is one component of China’s Belt and Road Initiative (BRI),¹⁶ an immense state-led development strategy that aims to (re)connect China with Asia, the Middle East, and North Africa via a “Silk Road Economic Belt” and “21st-century Maritime Silk Road.”¹⁷

Chinese state media has suggested that Karot may prove a step toward peace between India and Pakistan in the Kashmir region.¹⁸ The Chairwoman of the Silk Road Fund was less idealistic in a 2017 interview, first lauding the investment as reflecting the “principles and ideas” of the Fund and the BRI, but later noting that she also “expected to achieve a reasonable investment yield under controllable risks.”¹⁹

And there’s the rub.²⁰ The World Bank’s Ease of Doing Business index ranks Pakistan 147 of the 190 nations it assessed. Obtaining

14. *Id.*

15. Arif Rafiq, *China’s \$62 Billion Bet on Pakistan*, FOREIGN AFF. (Oct. 24, 2017), <https://www.foreignaffairs.com/articles/china/2017-10-24/chinas-62-billion-bet-pakistan> [<https://perma.cc/X5K8-LWCT>]. This figure is expected to exceed \$100 billion by 2030. See *Chinese Investment in CPEC Will Cross \$100 Billion*, CHINA-PAK. ECON. CORRIDOR (Feb. 10, 2018), [http://www.cpecinfo.com/news/chinese-investment-in-cpec-will-cross-\\$100-billion/NDg1Mw](http://www.cpecinfo.com/news/chinese-investment-in-cpec-will-cross-$100-billion/NDg1Mw) [<https://perma.cc/8MRL-Q42V>].

16. Some readers may be more familiar with the BRI’s former title, the “One Belt One Road Initiative,” which prevailed in English-language sources until 2016. The initiative was introduced in a September 2013 speech by President Xi Jinping at Kazakhstan’s Nazarbayev University. In this introductory speech, President Xi referred to it as the “Economic Belt along the Silk Road.” Speaking before the Indonesian Parliament in October 2013, President Xi added the second element of a “21st-century Maritime Silk Road.” Combined, we had “One Belt, One Road.” See Weidong Zhu, *Some Considerations on the Civil, Commercial and Investment Dispute Settlement Mechanisms Between China and the Other Belt and Road Countries*, 3 TRANSNAT’L DISP. MGMT 2 (2017). The government issued guidelines for the official translation of the project in 2015, striking the numerals and forbidding the use of terms such as “strategy,” “program,” “project,” or “agenda.” The more innocuous “initiative” prevails today, with no need to limit its scope to the singular. For a mildly caustic review of this evolution, see Wade Shepard, *Beijing to the World: Don’t Call the Belt and Road Initiative OBOR*, FORBES (Aug. 1, 2017), <https://www.forbes.com/sites/wadeshepard/2017/08/01/beijing-to-the-world-please-stop-saying-obor/#4dc0b-c4d17d4> [<https://perma.cc/5SF4-E82E>].

17. See generally *Vision and Actions on Jointly Building Silk Road Economic Belt*, NAT’L DEV. & REFORM COMMISSION, CHINA, (Mar. 28, 2015), http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html [<https://perma.cc/Y55K-XXPT>].

18. See Hu Weijia, *Karot Hydropower Project Could Generate Wide Range of Benefits for China, India and Pakistan*, GLOBAL TIMES (Sept. 20, 2017), <http://www.globaltimes.cn/content/1067397.shtml> [<https://perma.cc/A9PC-APME>].

19. Chris Wright, *Making Sense of Belt and Road—The Belt and Road Project Borrower: Karot Hydropower, Pakistan*, EUROMONEY (Sept. 26, 2017), <https://www.euromoney.com/article/b14t13rsrlb4r9/making-sense-of-belt-and-road-the-belt-and-road-project-borrower-karot-hydropower-pakistan> [<https://perma.cc/XKN2-MNN9>].

20. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

electricity (#167) will hopefully be less of a problem after Karot. Paying taxes (#172), trading across borders (#171), and perhaps most concerning, enforcing contracts (#156), are likely to be risks less susceptible to Chinese investors' control.²¹ The January 2018 kidnapping of a Chinese engineer employed on the project also indicates that commercial risks may prove less consequential than Pakistan's political and social instability. Indeed, after spending an estimated \$29 billion in Corridor-related investments, Chinese officials announced that they may freeze their remaining commitments until Pakistan stabilizes.²² Not to be outdone, Pakistan's Water and Development Authority withdrew its support for the Chinese-funded Diamer-Bhasha dam, with its Chairman contending that the "Chinese conditions . . . were not doable and against our interests."²³

A principal function of international investment agreements generally, and a state's international commercial dispute resolution policies²⁴ in particular, is to establish legal structures under which such risks become, if not "controllable," then at least remediable when realized. The Chinese Communist Party (CCP) has developed such structures since its first years in power. On May 6, 1954, the Administration Council of the Central Government (today's State Council) published its Decision on the Establishment of the China Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade. Two state-led institutions to provide international commercial arbitration (ICA) services—the predecessors of today's China International Economic and Trade Arbitration Commission (CIETAC) and Chinese Maritime Arbitration Commission—were established in 1956 and 1959, respectively.²⁵

21. *Ease of Doing Business in Pakistan*, WORLD BANK: DOING BUS., <http://www.doingbusiness.org/data/exploreeconomies/pakistan> (last visited Nov. 19, 2018).

22. James M. Dorsey, *Disappeared Chinese Engineer Holds Ties with Pakistan Hostage*, SOUTH CHINA MORNING POST (Jan. 27, 2018), <https://www.scmp.com/week-asia/geopolitics/article/2130795/disappeared-chinese-engineer-holds-ties-pakistan-hostage> [<https://perma.cc/5MLL-3AGR>].

23. *Id.*

24. This Article focuses primarily on China's policies toward international commercial arbitration (private party v. private party, adjudicated in a private forum), international commercial litigation (private party v. private party, adjudicated in a public forum), and investor-state disputes (private party v. public party, adjudicated in a private or public forum). I grant that "international commercial dispute resolution policies" is broad enough to encompass a larger scope of disputes—most notably, those involving two states—but consider the phrase the most precise (while still being comprehensible) to refer to the various policies that will be the focus here.

25. CIETAC's designation at the time was the Foreign Trade Arbitration Commission. Tracing the evolution of its name offers a decent proxy for the evolution of China's policy stance toward international arbitration generally. From the Foreign Trade Arbitration Commission, in 1980 today's CIETAC became the Foreign Economic and Trade Arbitration Commission, aligning with China's "reform and opening-up" under Deng Xiaoping in 1978, and more specifically pursuant to the State Council's Notice Concerning the Conversion of the Foreign Trade Arbitration

Chinese authorities were slower in developing the infrastructure for participating in the formation and enforcement of international investment law (IIL).²⁶ China signed its first bilateral investment treaty (BIT) with the Kingdom of Sweden on March 29, 1982.²⁷ China soon made up for lost time, however, and today has 145 such agreements,²⁸ second only to Germany.

Analysis of China's international commercial dispute resolution policies is equally longstanding. Here, however, the story is not just of maturation, but also of marked and enduring bifurcation. One branch of analysts, call it the sociological school,²⁹ explains China's policies with

Commission Into the Foreign Economic and Trade Arbitration Commission. In 1988, shortly after Chen Yun took office, the State Council's Official Reply Concerning the Renaming of the Arbitration Commission as the China International Economic and Trade Arbitration Commission and Amendment of Its Arbitration Rules rebranded the institution as CIETAC. See *Introduction*, CHINA INT'L ECON. & TRADE ARB. COMMISSION (2015), <http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en> [<https://perma.cc/B7Y9-4FEQ>]; *China Maritime Arbitration Commission*, INT'L TRADE CENTRE, <http://www.intracen.org/China-Maritime-Arbitration-Commission> [<https://perma.cc/FH39-ZV2Z>] (last visited Nov. 19, 2018).

26. "International investment law" is used in this Article to refer to the rules addressing foreign direct investment generally and dispute resolution between foreign investors and sovereign states particularly. For readers seeking a general introduction, see ORG. FOR ECON. CO-OPERATION & DEV., *INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS* (2018).

27. Agreement on the Mutual Protection of Investments, China-Swed., Mar. 29, 1982, 1350 U.N.T.S. 247.

28. According to the United Nations Council on Trade and Development (UNCTAD), 123 of these BITs are in force. UNCTAD identifies a further 32 "treaties with investment provisions," which includes free trade agreements with investment chapters and treaties with clauses that reference cooperation on investment or a mandate for later negotiations on investment matters. See, e.g., Free Trade Agreement, Austl.-China, ch. 9, Dec. 20, 2015, [2015] A.T.S. 15. China is also a party to 21 of what UNCTAD describes as "investment related instruments," such as the General Agreement on Trade and Services, the New York Convention on the Recognition and Enforcement of Arbitral Awards, and the World Bank Investment Guidelines. In total, UNCTAD identifies 189 international investment agreements to which China is a party, which falls short of Germany's 262, but, for the sake of making the usual comparison, exceeds that of the U.S. by 41. Statistics are accurate as of May 2018. See *Investment Policy Hub: China*, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA/Country-Bits/42#iiaInnerMenu> [<https://perma.cc/7Q8P-KE7D>].

29. Note that characterizing such analyses as "sociological" does not always imply (though it certainly does not preclude) that they assign causal force to enigmatic concepts such as culture. A sociological claim, at least as understood here, can also encompass a causal account premised on rational self-interest. Thus sociological scholars tracing the Chinese people's aversion to litigation have highlighted policies such as the following from the Qing dynasty emperor Xuanye (the Kangxi Emperor): "The Emperor . . . is of the opinion that lawsuits would tend to increase, to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice . . . I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate. In this manner the evil will be cut up by the roots; the good citizens, who may have difficulty between themselves, will settle them like brothers, by referring to the arbitration of

reference to history and culture.³⁰ It contends that a direct line may be drawn from the Chinese people's traditional aversion to litigation to their government's preference for informal and private mechanisms for dispute resolution in international commercial affairs.³¹ The causal narrative is one of continuity, and thus contends that to appreciate China's contemporary policies, the basic explanatory trajectory must proceed *from China outward* to the international arena.

An alternative branch, call it the political-economy school, argues that China's policies toward international commercial dispute resolution respond to the same ambitions and imperatives as any other state.³² The independent variables of interest to these analysts will be familiar to those acquainted with the realist tradition in international relations.³³

some old man, or the mayor of the commune. As for those who are troublesome, obstinate, and quarrelsome, let them be ruined in the law-courts that is the justice that is due to them." FAN KUN, *ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS* 6.3.1 (2013). One need not cite "Asian values" or "Chinese culture" to understand why a citizen at the time may have avoided the courts, but the basic premises remain sociological.

30. See Joshua Karton, *Beyond the "Harmonious Confucian": International Commercial Arbitration and the Impact of Chinese Cultural Values*, in *LEGAL THOUGHTS BETWEEN THE EAST AND THE WEST IN THE MULTILEVEL LEGAL ORDER* 520 (Chang-fa Lo et al. eds., 2016) (noting the "vast body of sociocultural scholarship on dispute resolution," and concluding that "the literature on 'Asian' or 'Chinese' practices is perhaps the vastest.").

31. Any attempt to capture the basic tenets of this approach would swallow the Article. The Confucian analects and ancient Chinese proverbs central to its arguments have all been rehearsed and scrutinized elsewhere. Those seeking rigorous examples of this literature may consult Carlos de Vera, *Arbitrating Harmony: Med-Arb and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 *COLUM. J. ASIAN L.* 149 (2004); Gabriel Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China*, 25 *J. INT'L ARB.* 479 (2008); Fan Kun, *Glocalization of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China*, 18 *HARV. NEGOT. L. REV.* 175 (2013). For a thoughtful critique, see Karton, *supra* note 30, at 521–22.

32. Or better yet, any other city-state. Consider the Melian Dialogue, arguably the foundational text for realist international relations theory's skepticism toward international law. There, the Athenians famously dispense with "specious pretenses—either of how we have a right to our empire because we overthrew the Medes, or are now attacking you because of wrong that you have done us . . ." In lieu of pretense, the Athenians ask for the Melians to "aim at what is feasible . . . since you know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must." THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* ch. V, ¶¶ 84–116. Over two millennia later, in 1891, a Chinese diplomat expressed a familiar sentiment: "International law is just like Chinese statutory law—reasonable but unreliable. If there is right without might, the right will not prevail." TSUI KUO-YING, CH'U-SHIH MEI-HIJ-PI-KUO JIJ-CHI [DIARY OF A MISSION TO THE UNITED STATES, JAPAN, AND PERU, 1895] *quoted in* JEROME ALAN COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 10 (1974).

33. The Stanford Encyclopedia of Philosophy provides a thorough and accessible introduction. See W. Julian Korab-Karpowicz, *Political Realism in International*

China's policies toward ICA and IIL are thus a self-interested response to commercial flows, security considerations, and "high" politics generally. Insofar as such matters are subject to constant flux, China's policies are understood to be commensurately fluid. Here, the explanatory trajectory proceeds *from the international arena inward* into China.

The familiar descriptive, "with Chinese characteristics," maps neatly onto this divide. Sociological analyses point to the expression as evidence that domestic factors predominate in China's implementation of "socialism,"³⁴ "the rule of law,"³⁵ and a host of other socioeconomic and political concepts.³⁶ The political-economy approach finds equal support for its approach by emphasizing the nouns that are described by this prepositional phrase. The divide may be summarized as follows, taking "Rule of Law with Chinese Characteristics"³⁷ as our example. For the sociological school, read "Rule of Law *with Chinese characteristics*. For the political-economy approach, it is the "*Rule of Law with Chinese Characteristics*."

Now try an international commercial court (ICC).³⁸ On January 23, 2018, China's Central Leading Group for Comprehensively Deepening Reforms released plans for the establishment of a Belt and Road dispute settlement mechanism.³⁹ On July 1, 2018, China's Supreme Peo-

Relations, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 7, 2010), <https://plato.stanford.edu/entries/realism-intl-relations> [<https://perma.cc/FAF8-VYBA>].

34. See, e.g., Ian Wilson, *Socialism with Chinese Characteristics: China and the Theory of the Initial Stage of Socialism*, 24 POL. 77 (1989).

35. See, e.g., Jeffrey E. Thomas, *Rule of Law with Chinese Characteristics: An Empirical Cultural Perspective on China, Hong Kong and Singapore*, 22 ASIA PAC. L. REV. 115 (2014).

36. For a sample, see YASHENG HUANG, CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE (2008); LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS (David Kennedy & Joseph E. Stiglitz eds., 2013); or, most pertinent here, Aweis Osman, *China's Maritime Silk Road and the Future of African Arbitration*, 3 TRANS. DISP. MGMT. 9 (2017) ("[I]n 2014 the 5th FOCAC-Legal Forum was jointly hosted by the China Law Society and the Attorney-General's Office of the Republic of Angola, where delegates discussed the development of a dispute resolution mechanism 'with Chinese and African characteristics.'").

37. See generally Deanne Wilson, *China: "Socialist Rule of Law with Chinese Characteristics"?*, 45 INT'L L. NEWS 1 (2016).

38. The "ICC" acronym may be particularly offensive to readers better acquainted with the International Criminal Court in The Hague or the International Chamber of Commerce. The latter is particularly problematic because of its prominent role in commercial arbitration. I will use "ICC" to refer to these commercial courts and will refer to the International Chamber of Commerce by its full title. The International Criminal Court will, gratefully, have no place in the remainder of the Article.

39. Guo Liqin, *China Will Set Up a New International Commercial Court in Beijing, Xi'an and Shenzhen*, YICAI (Jan. 24, 2018), <http://www.yicai.com/news/5395142.html> [<https://perma.cc/7C2U-43UG>]. Plans for such a mechanism had been public since September 2017. The Supreme People's Court (SPC) held a Belt and Road judicial conference in Dunhuang at which Judge Liu Guixiang, a member of the court's judicial committee, referenced plans to develop a court dedicated to disputes arising from Belt and Road projects. Susan Finder, *SPC Reveals New Belt & Road-Related*

ple's Court followed up with the "Provisions on Several Issues regarding the Establishment of International Commercial Courts." What the press swiftly branded the "Belt and Road Court" (BRC) will comprise three ICCs: one in Xi'an addressing commercial disputes from projects on the Silk Road Economic Belt, one in Shenzhen addressing disputes from the 21st Century Maritime Silk Road, and a headquarters in Beijing.

Analysts' response to the BRC has been predictably binary. Sociological accounts emphasize how a BRC will allow China to bring its preference for consensual dispute resolution to bear on BRI-related disagreements, and hence predict that mediation and consultation are likely to play the most prominent role at the new court.⁴⁰ Political-economy perspectives contend that the BRC is better understood as an institutional response to the fact that Chinese investors are increasingly exposed to dispute resolution mechanisms—such as the World Bank's International Centre for Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce for international commercial arbitrations—over whose development China has had little say.⁴¹ The principal distinction between these responses is again directional: sociological mainly proceeds from China outward; political-economy from the international arena inward.⁴² For both, however, the result is an ICC with Chinese characteristics.

As with all binaries, there is a middle way—an approach that interprets China's international commercial dispute resolution policies as a product of continuity as well as change, influenced as much by internal dynamics as external imperatives. An approach, moreover, that recognizes that accepting the lessons of both sociological and political-economy accounts need not amount to saying that all variables matter, or that all variables matter equally. This Article's central claim, in brief, is that

Initiatives, SUPREME PEOPLE'S COURT MONITOR (Oct. 7, 2017), <https://supremepeoplecourtmonitor.com/2017/10/07/spc-reveals-new-belt-road-related-initiatives> [https://perma.cc/CE5Q-8U4S].

40. See, e.g., Ravi Prasad et al., *The Belt and Road Initiative Will Remain More Chinese Than International*, BELT & ROAD BLOG (Mar. 19, 2018), <https://beltandroadventures/beltandroadblog/2018/03/18/the-belt-and-road-initiative-will-remain-more-chinese-than-international> [https://perma.cc/D77N-Z62W].

41. See, e.g., Jacob Mardell, *Dispute Settlement on China's Terms: Beijing's New Belt and Road Courts*, MERCATOR INST. FOR CHINA STUDIES (Feb. 14, 2018), <https://www.merics.org/en/blog/dispute-settlement-chinas-terms-beijings-new-belt-and-road-courts> [https://perma.cc/DCE2-XDES].

42. The careful reader may have observed that a sociological account could just as readily proceed from the international arena inward—assessing, for example, the extent to which Chinese policy is influenced by the norms and behaviors among cosmopolitan global elites—while a political-economy account could likewise focus on domestic political and economic factors, assigning causal primacy to intra-CCP dynamics or the extent to which China's economic development has reached particular portions of civil society. The careful reader is, of course, correct. My response is to draw her attention to the adverb, "mainly." My intention is to capture general trends in the literature, not to suggest rules defining the universe of potential approaches to the topic.

understanding China's ambitions for, and the likely functioning of, an ICC with Chinese characteristics requires proceeding from China outward *and* from the international arena inward. It proceeds in three Parts.

Parts I and II discuss China's policies toward ICA and IIL. China applies distinct rules to commercial arbitrations that are strictly domestic versus those with foreign or foreign-related elements.⁴³ The tensions that have followed from this approach were as predictable as they are difficult to remedy. Adding to the difficulty, Chinese authorities have reformed the 1994 Arbitration Law in a piecemeal fashion, occasionally through formal amendment, but more often by delegating required updating to private actors and the courts. Part I considers the development and current state of these tensions in light of the dispute resolution services to be offered by the BRC.

China's policies toward IIL—and the investment agreements that are the most observable expression of these policies—increasingly mirror what is considered international best practices. The standard account (offered primarily by analysts writing from a political-economy perspective) describes China's approach to IIL over the past three decades as a response to the country's shifting investment position. Simplifying only somewhat: there is more Chinese investment abroad; ergo, there are more liberal investment protections in China's investment agreements. Part II focuses on the dispute settlement provisions in these agreements. It adds some nuance to the standard account by incorporating insights from the sociological school, and perhaps more importantly for purposes of analyzing the BRC, by considering the implications for China of the recent shift in international sentiment against investor-state dispute settlement.

While Parts I and II consider the inputs, Part III looks to the outcome. It begins in Subpart III.A by discussing the ICCs recently established by Singapore and Dubai, which Chinese officials have presented as models for the BRC.⁴⁴ The remainder of Part III turns to the BRC. It draws on the preceding analysis, and the recent announcements sketching the outlines of the Court, in order to draw attention to the principal tensions that its designers confront, and concludes by drawing some broader lessons about what it may mean to establish an ICC with Chinese characteristics.

This Article contributes toward understanding policies and institutions whose relevance will continue long after the BRC is up and running. It argues that this understanding must be as cognizant of internal Chinese norms as of external political and economic factors. In brief, it assesses an ICC with Chinese characteristics.

43. "Foreign" and "foreign-related" are consequential terms in this context. For definitions and their legal implications, see *infra* Part I.B.

44. See *Zhuanfang Zuigao Renmin Fayuan Minshi Shenpan Di Si Ting Fu Ting Zhang Gao Xiaoli* (专访最高人民法院民事审判第四庭副庭长高晓力) [Interview with Gao Xiaoli, Vice President of the Fourth Court of Civil Trials of the Supreme People's Court] (Mar. 10, 2018), <https://mp.weixin.qq.com/s/wwM5Obhz069STbeJ73oMda> [<https://perma.cc/9X42-BE39>].

I. INTERNATIONAL COMMERCIAL ARBITRATION

This Part traces the development of China's policy toward ICA in three Sections. Subpart I.A reviews the creation and maturation of China's first and most prominent arbitral institution, CIETAC, and the 1994 Arbitration Law. Subpart I.B discusses China's bifurcated treatment of domestic arbitrations versus those that involve foreign elements. Subpart I.C then draws on the preceding in order to identify some core tensions in China's ICA policies that have and will continue to confront the designers of the BRC.

A. *Creation and Maturation*

The Chinese government first recognized arbitral awards as binding within China in the 1923 Arbitration Act.⁴⁵ Per the standard account, another six decades passed—up to the “reform and opening up” program of the late 1970s—before the government turned to international arbitration in earnest. Looking primarily to foreign trends (in this Article's vocabulary, taking a political-economy perspective), the standard account implicitly dismisses the intervening decades during which China established much of the institutional architecture for ICA that remains in place today.

Sociological accounts call for greater attention to domestic variables, and thus counsel for beginning the story two decades prior to “opening up” with the establishment of CIETAC's predecessor, the Foreign Trade Arbitration Commission (FTAC), in 1956.⁴⁶ The judicial institutions established by the newly empowered Communist Party during China's state-building period were closely modeled on those of the Soviet Union. The FTAC was no exception, taking its name and structure directly from the Foreign Trade Arbitration Commission of the Soviet Union under the Soviet All-Union Chamber of Commerce. As Luming Chen has noted, given that China's foreign trade at the time primarily involved bartering with members of the Soviet bloc, the country had little need for an institution with authority to administer contractual disputes between Chinese and foreign parties.⁴⁷

The FTAC administered only a few dozen cases during its first decades. However, the dearth of disputes was only partly a function of China's trade policy. The remainder of the explanation looks to FTAC's many departures from the principals of party autonomy then taking hold in western arbitral institutions. Relative to its western peers, the FTAC's

45. Kun, *Glocalization of Arbitration*, *supra* note 31, at 211.

46. The China Maritime Arbitration Commission was established in 1959 and has undergone a similar set of reforms as CIETAC. Because of CIETAC's relative prominence, and the related availability of information, I focus on CIETAC's history here. However, this is not to suggest that the Maritime Arbitration Commission's experience will be immaterial to the formation of the BRC. Recall that the Shenzhen component of the BRC will focus on disputes arising from maritime silk road projects.

47. Luming Chen, *Some Reflections on International Commercial Arbitration in China*, 13 J. INT'L ARB. 121, 126 (1996).

rules were inflexible and its oversight interventionist.⁴⁸ For critics, the same attributes characterize China’s policies toward ICA today.

As seen in the titular transformation from “Economic Belt along the Silk Road,” to “One Belt One Road,” to the “Belt and Road Initiative,” Chinese authorities appreciate the importance of a name. Thus, the first indications of China’s trade liberalization in the late 1970s were swiftly accompanied by titular reform, along with amendments to FTAC’s arbitral rules.⁴⁹ In 1980, The State Council announced that FTAC would henceforth be known as the Foreign Economic and Trade Arbitration Commission⁵⁰—adding “economic” to reflect an expanded remit that now included disputes “arising from various kinds of China’s economic cooperation with foreign countries.” Eight years later, and one year after China acceded to the Convention on the Recognition and Enforcement of Arbitral Awards (the New York Convention), the State Council rebranded the institution and modified its rules once more. “Foreign” was dropped in favor of “international,” and the institution was now decidedly Chinese—the “China International Economic and Trade Arbitration Commission” (CIETAC).⁵¹

The National People’s Congress enacted its first—and the still prevailing⁵²—comprehensive arbitration law in August 1994.⁵³ Along with

48. Graeme Johnston, *Party Autonomy in Mainland Chinese Commercial Arbitration*, 25 J. INT’L ARB. 537, 539 (2008).

49. *See, e.g.*, Law of the People’s Republic of China on Joint Venture Using Chinese and Foreign Investment (promulgated by the Standing Comm. Nat’l People’s Cong., July 8, 1979, effective July 8, 1979), translated in *China: Law on Joint Ventures*, 18 INT’L LEGAL MATERIALS 1163 (1979).

50. *See Arbitration*, CHINA COUNCIL FOR THE PROMOTION OF INT’L TRADE (Sept. 16, 2015), http://en.ccpit.org/info/info_8a8080a94fd37680014fd3d050340009.html [<https://perma.cc/E8KV-9N4K>].

51. OFFICIAL REPLY CONCERNING THE RENAMING OF THE FOREIGN ECONOMIC AND TRADE ARBITRATION COMMISSION AS THE CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION AND AMENDMENT OF ITS ARBITRATION RULES, GENERAL OFFICE OF THE STATE COUNCIL (1988), <http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200211/20021100053389.shtml> [<https://perma.cc/EQC3-QXEL>]. Since 2000, CIETAC may also be referred to as the Arbitration Court of the China Chamber of International Commerce.

52. Prevailing, but not solitary. In addition to the 1994 arbitration law, see, for example, Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong. Sept. 7, 1990, effective June 1, 1991), art. 54, translated in NAT’L PEOPLE’S CONG. DATABASE OF LAWS & REGS., http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383888.htm (“A dispute over copyright may be settled through mediation. It may also be submitted for arbitration to a copyright arbitration . . .”); Product Quality Law of the People’s Republic of China (promulgated by Standing Comm. Nat’l People’s Cong., Feb. 22, 1993, enacted Sept. 1, 1993), art. 47, translated in NAT’L PEOPLE’S CONG. DATABASE OF LAWS & REGS., http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383813.htm (“Where a civil dispute over product quality arises, the parties concerned may seek a settlement through negotiation or mediation. Where the parties are unwilling to resort to negotiation or mediation, or the negotiation/mediation fails, they may apply to an arbitration organization for arbitration . . .”).

53. *Zhonghua Renmin Gongheguo Zhongcai Fa* (中华人民共和国仲裁法)

setting out the core rules of arbitration procedure, the Arbitration Law ended CIETAC's monopoly over foreign and foreign-related disputes.⁵⁴ A proliferation of arbitration commissions followed: as of 2015, CIETAC had been joined by 243 institutions, including more than 200 city-based arbitration commissions.

Notwithstanding consistent calls for the Arbitration Law's wholesale replacement,⁵⁵ it remains in force with few amendments to the text. In lieu of formal amendment, the Law has been modified through a combination of top-down and bottom-up influences, each capable of instantiating the causal claims of the sociological and political-economy approaches.

"Bottom-up" refers to modifications and adjustments of the procedures set out in the Arbitration Law that are a product of the competition for disputes among China's arbitral commissions. Institutions such as the Beijing Arbitration Commission, for example, have sought to attract efficiency-minded disputants by requiring tribunals to render awards within six months of the date of their constitution.⁵⁶ Both political-economy and sociological perspectives aid in understanding such rules: the former pointing to the demands of an increasingly foreign clientele; the latter to the emphasis in Asian cultures on resolving disputes in an expeditious fashion.⁵⁷ "Top-down" reform of the Arbitration Law has come primarily from the Supreme People's Court (SPC) via judicial interpretations.⁵⁸ To take the most recent example, a pair of interpretations effective January

[Arbitration Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995) translated in *Arbitration Law of China*, MINISTRY OF COMMERCE, CHINA, <http://english.mofcom.gov.cn/article/policyrelease/internationalpolicy/200705/20070504715852.html> [<https://perma.cc/T66G-RA6E>].

54. To be precise, it was a 1996 Notice from the State Council interpreting the Arbitration Law that permitted local arbitration commissions to address foreign and foreign-related disputes. See NOTICE CONCERNING SEVERAL ISSUES TO BE CLARIFIED FOR THE PURPOSE OF IMPLEMENTING THE PRC ARBITRATION LAW, GENERAL OFFICE OF THE STATE COUNCIL (1996).

55. See João Ribeiro & Stephanie Teh, *The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law*, 34 J. INT'L ARB. 459, 460 (2017).

56. *Beijing Arbitration Commission Arbitration Rules* art. 68, BEIJING ARBITRATION COMM'N, <http://www.bjac.org.cn/english/page/ckzl/gz2008.html> [<https://perma.cc/77E7-TEJH>] (last visited Nov. 21, 2018). Liyu Denning Jin expresses some skepticism over the extent to which this deadline is met in practice. Liyu Denning Jin, *Commercial Arbitration: China*, GLOBAL ARB. REV. (June 6, 2017), <https://globalarbitrationreview.com/jurisdiction/1000181/china> [<https://perma.cc/82ZR-44FM>].

57. See also *Beijing Arbitration Commission Arbitration Rules*, *supra* note 56, art. 53 (establishing default expedited procedures unless the amount in dispute exceeds RMB 1,000,000).

58. For an introduction to judicial interpretations and "judicial lawmaking" in China, see Vai Lo Lo, *Towards the Rule of Law: Judicial Lawmaking in China*, 28 BOND L. REV. 149 (2016).

1, 2018 focus on the procedures and extent of judicial review of arbitral decisions in domestic and foreign-related disputes.⁵⁹

Chinese authorities thus appear to be content with reform of the Arbitration Law proceeding through a combination of market dynamics (bottom-up) and authoritative mandates (top-down) without formally meddling with the Law's text. This approach is consistent with the development of ICA policy in CIETAC, an institution at once consistently interventionist (top-down) but also responsive to Chinese citizens' shifting stance toward global trade (bottom-up).

B. *Bifurcation*

The Chinese authorities have also been content to retain a bifurcated or "dual-track" approach to domestic versus foreign and foreign-related disputes. Under the 1994 Law, arbitrations in China fall within one of three categories: foreign-related, foreign, and domestic. Before considering the implications of this approach, some definitions are in order. "Foreign-related" is not explicitly defined in the legislation. Analysts have instead looked primarily to two SPC Opinions for guidance. Article 178 of the Several Opinions on the Implementation of the General Principles of Civil Law (1988) provides that a relationship "shall be called foreign-related" where (a) "either party or both parties in a civil legal relationship is an alien, a stateless person or a foreign legal person"; (b) "the object of the civil legal relationship is within the territory of a foreign country"; or (c) "the legal facts that produce, alter or annihilate the civil relations of rights and obligations occur in a foreign country."⁶⁰ Article 304 of the Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law was explicitly cited by the SPC in a 2003 circular addressing foreign-related arbitrations. It similarly stipulates that "civil cases involving foreign elements" include those where (a) "one party or both parties are foreigners, stateless persons, foreign enterprises or organizations"; (b) "the legal facts for establishment, alteration or termination of a civil legal relationship between the parties concerned take place at abroad"; or (c) "the subject

59. *Zuigao Renmin Fayuan Guanyu Shenli Zhongcai Sifa Shencha Anjian Ruogan Wenti de Guiding* (最高人民法院关于审理仲裁司法审查案件若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Arbitration Judicial Review Cases], THE SUPREME PEOPLE'S COURT OF CHINA (Dec. 29, 2017), <http://www.court.gov.cn/fabu-xiangqing-75872.html> [<https://perma.cc/H2B7-EH4T>]. Several law firms have published English language summaries for their clients. See, e.g., Roy Chan, et al., *SPC Issued Two Interpretations Regarding the Judicial Review of Arbitration Cases*, DLA PIPER (Jan. 18, 2018), <https://www.dlapiper.com/en/china/insights/publications/2018/01/spc-issued-two-interpretations-regarding-the-judicial-review-of-arbitration-cases> [<https://perma.cc/EKP9-PVA8>].

60. Whitmore Grey & Henry Ruiheng Zheng, *Opinion (For Trial Use) of the Supreme People's Court on Questions Concerning the Implementation of the General Principles of Civil Law of the People's Republic of China*, 52 L. & CONTEMP. PROBS. 59 (1989).

matter of an action is located at abroad.”⁶¹ To summarize, whether an action is foreign-related turns on the location of the parties, the aim or “legal facts” of their relationship, and the subject of the dispute.

Defining what constitutes a “foreign” arbitration is more straightforward. A foreign arbitration is any arbitral dispute that meets the requirements to be “foreign-related” and is seated⁶² outside of China.⁶³ Finally, “domestic” arbitrations are all those proceedings that are not foreign or foreign-related.

Turning to the implications of China’s bifurcated approach, note first⁶⁴ that domestic disputes may not be submitted to a foreign arbitral institution. If a party seeks to enforce a foreign institution’s award for what the Chinese court considers a domestic dispute, the court will refuse enforcement under Article V(1)(a) of the New York Convention.⁶⁵ Whether or not the legal entities in the dispute are Chinese persons is often crucial.⁶⁶ Second, Chapter VII of the Arbitration Law details

61. Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China (promulgated by the Supreme People’s Ct., July 14, 1992), WESTLAW CHINA, <http://www.cspil.org/Uploadfiles/attachment/Laws%20and%20Regulations/%5Ben%5Dguojifalvwenjian/OpinionsoftheSupremePeoplesCourtonCertainIssuesConcerningtheApplication.pdf>.

62. In the arbitral context, “seat” refers to the legal jurisdiction to which the arbitration is connected. It is a crucial consideration because the seat determines the *lex arbitri* and the courts that have supervisory jurisdiction over the arbitration. Note that whether “seat” is synonymous with “venue” is, in some jurisdictions at least, a debated question. See, e.g., Phillip Capper, *When is the ‘Venue’ of an Arbitration its ‘Seat’?*, KLUWER ARB. BLOG (Nov. 25, 2009), <http://arbitrationblog.kluwerarbitration.com/2009/11/25/when-is-the-venue-of-an-arbitration-its-seat> [<https://perma.cc/N2JZ-9ZCK>]; see also KUN, *supra* note 29, at 1.4.1.

63. The courts enjoy some discretion in these determinations. *Xi Men Zi Guoji Maoyi (Shanghai) Youxian Gongsi, Shanghai Huangjin Zhidi Youxian Gongsi (西门子国际贸易(上海)有限公司, 上海金地有限公司)* [Siemens International Trading (Shanghai) Co., Ltd. v. Shanghai Golden Landmark Co., Ltd.], STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT, B&R Cases, Typical Case 12 (Shanghai Interm. People’s Ct. Nov. 27, 2015) is demonstrative. Despite the facts that both parties were registered in China, the equipment under the contract was situated in China, and the place of delivery under the contract was in China, the Intermediate People’s Court of Shanghai found that the contract dispute involved foreign elements. The court’s decision turned in large part on the fact that both parties were wholly owned by foreign enterprises registered in the Shanghai Free Trade Zone.

64. The discussion here does not pretend to exhaust the implications of China’s bifurcated arbitration system. I focus on those elements and tensions most likely to be relevant for the BRC.

65. U.N. Conference on International Commercial Arbitration, *New York Convention*, U.N. Doc. E/CONF.26/8/Rev.1 Art. V(1)(a) (June 10, 1958) (“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made . . .”).

66. See, e.g., *Beijing Chaolai New Life Sports and Leisure Co., Ltd. and Beijing*

“Special Provision[s] on Arbitration Involving Foreign Interests.” The relative autonomy afforded parties in the appointment of arbitrators is particularly noteworthy. In domestic arbitrations, the parties may only select among “righteous and upright persons” that meet one of five further criteria (for example, that the prospective arbitrator has eight years of judicial or legal experience).⁶⁷ Parties in foreign-related and foreign disputes, by contrast, “may appoint arbitrators from among foreign nationals with specialized knowledge in law, economy and trade, science and technology.”⁶⁸ There are no further requirements. Third, the parties in domestic arbitrations must submit all requests for evidence to the “people’s court at the place where the evidences are obtained,” i.e., the local People’s Court. For foreign-related disputes, parties instead submit such requests to the Intermediate People’s Court, thereby bypassing less reliable lower courts.⁶⁹

Fourth, and perhaps most importantly, this distinction in which court reviews requests for evidence is mirrored in the review of arbitral awards. The distinction has both legal and institutional components. On the legal side, domestic arbitral awards may be set aside, or their enforcement denied, based on substantive matters such as the validity of the evidence on which the award was based. The enforcement of foreign-related awards may only be refused on procedural grounds. On the institutional side, the SPC has established what is referred to as a “prior-reporting system,” under which local (presumptively protectionist) influences are curtailed by mandating that an intermediate court intending to refuse an award from a foreign-related arbitration must request approval of this decision from the High People’s Court. If the High People’s Court agrees with the intermediate court, it must then submit its conclusion to the SPC for review. A recent SPC interpretation extends this system to domestic arbitrations involving parties from different provinces, or if the lower court’s ground for refusal is “infringement of public interest.”⁷⁰

Zhixin Investment Consulting Co., Ltd., BJ COURT.GOV.CN (Oct. 17, 2014), <http://www.bjcourt.gov.cn/cpws/paperView.htm?id=100039499405> [<https://perma.cc/BE28-NZAK>] (in a case between a Chinese company and a wholly foreign-owned company registered in Beijing, the Supreme People’s Court refused to enforce the award from the Korean Commercial Arbitration Board and found, inter alia, that both parties were domestic entities because of their registration). *Cf. Siemens v. Shanghai Golden Landmark*, *supra* note 63.

67. *Zhonghua Renmin Gongheguo Zhongcai Fa* (中华人民共和国仲裁法) [Arbitration Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 13, *translated in Arbitration Law of China*, MINISTRY OF COMMERCE, CHINA, <http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200705/20070504715852.html> [<https://perma.cc/T66G-RA6E>].

68. *Id.* art. 67.

69. See Yuhua Wang, *Court Funding and Judicial Corruption in China*, 69 CHINA J. 43, 44–47 (2013); Ling Li, *Corruption in China’s Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., 2010).

70. For an overview, see Douglas Thomas & Alison Ross, *China Reforms*

The clear implication is that awards from foreign-related disputes—and now inter-province disputes—enjoy legal and institutional presumptions favoring enforcement unavailable to their domestic counterparts.

China's bifurcated approach offers equal fodder for sociological and political-economy accounts. Sociological analysts point toward a Chinese preference for mediation⁷¹ to explain features such as the enhanced scrutiny applied to awards between Chinese parties. Political-economy analysts look instead to foreign variables, arguing that Chinese authorities have succumbed to the presumptions of party autonomy and award enforceability afforded in leading jurisdictions for commercial arbitration such as France, the United States, or closer to home in Dubai and Singapore.

Yet neither account is adequate in isolation. Despite sociological accounts' devotion to history, such analysis struggles to explicate the origins of the Arbitration Law's bifurcation and its evolution. Looking to Chinese culture and other internal factors predisposes such accounts to a static conception of Chinese interests, such that if they can explain the origin of bifurcation (by pointing, for example, to a "middle-kingdom" mentality, the scars of China's colonial heritage, or perhaps Confucian analects) they struggle to explain what changed such that foreign parties are now afforded significant procedural privileges.

Political-economy perspectives appear more compelling at first blush. They are externally oriented, and so not surprisingly, more persuasive with regard to questions of foreign influence. Yet they are symmetrically unhelpful with regard to internal questions, such as why authorities chose to deny certain privileges to domestic arbitrations. At best, a political-economy lens offers a political account that focuses on the authoritarian tendencies of China's leadership. To explain *that*, however, we swiftly return to sociological considerations. In sum, it is only by combining these two perspectives that one begins to develop a rounded conception of both the motivations for and contents of China's bifurcated regime. This conception also aids in identifying the tensions in China's ICA policy likely to be of greatest import to the designers of the mooted BRC.

C. *Outstanding Tensions*

In lieu of discussing the outstanding tensions in China's policy toward ICA in the abstract, consider again the Karot hydropower project. Suppose that the "controllable risks" alluded to by the Silk Fund's chairwoman prove less susceptible to control than expected. A dispute between a Chinese and Pakistani party ensues. Part II takes up the

Reporting System, GLOBAL ARB. REV. (Feb. 9, 2018), <https://globalarbitrationreview.com/article/1153364/china-reforms-reporting-system> [<https://perma.cc/WX9J-825J>].

71. Meaning a preference for resolving disputes via awards whose legitimacy is established *ex post* through a mutual agreement, rather than *ex ante* through contract, as found in the arbitral context.

question of an investor's recourse against Pakistan's public organs under investment law. Here, we are concerned with a dispute between two private commercial entities in a contract designating China as the forum for arbitration.

First, when appointing their panel, Article 67 of the Arbitration Law provides for the appointment of foreign arbitrators, and as noted above, only requires that the arbitrator have "specialized knowledge" in one of various fields. Article 13 further stipulates that the arbitration commission that the parties select must maintain a list of arbitrators. For a decade, this provision was understood to restrict the parties to the roster of arbitrators maintained by that commission.

Demonstrating the "bottom-up" amendment process, the 2005 version of the CIETAC rules afforded parties the choice to select arbitrators from outside its roster by mutual agreement.⁷² The current CIETAC rules begin by providing that "[t]he parties shall nominate arbitrators from the Panel of Arbitrators provided by CIETAC," but then allows an exception "[w]here the parties have agreed to nominate arbitrators from outside CIETAC's Panel of Arbitrators."⁷³ In a three-arbitrator tribunal, if the parties cannot reach mutual agreement on the presiding arbitrator, the matter is reserved to the discretion of the Chairperson of CIETAC. He or she will first look to lists of candidates submitted by the two parties. Where there is more than one overlap between the two, the Chairperson will make a choice "having regard to the circumstances of the case." Where there are no common candidates, the "circumstances" language is replaced with: "the presiding arbitrator shall be appointed by the Chairman of CIETAC." The Beijing Arbitration Commission's rules analogously provide for the Chairperson of the Commission to appoint the presiding arbitrator without restrictions.⁷⁴

Compare CIETAC and the Beijing Commission's approach with the Arbitration Rules for the International Chamber of Commerce. Article 13(1) begins, "In confirming or appointing arbitrators, the [Chamber's] Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals"⁷⁵ CIETAC and the Beijing Commission's rules do not so much constrain party autonomy as preserve

72. See China International Economic and Trade Arbitration Commission Arbitration Rules (promulgated by the China Council for the Promotion of Int'l Trade, Nov. 4, 2014, effective Jan. 1, 2015), art. 26(2), *translated in* CHINA INT'L ECON. & TRADE ARBITRATION COMM'N, <http://www.cietac.org/Uploads/201703/58c0fe0c7337a.pdf>.

73. *Id.* art. 26 (1–2).

74. *Beijing Arbitration Commission Arbitration Rules*, *supra* note 56, art. 18 ("If the parties fail to nominate or request the Chairman to appoint their arbitrators or the presiding arbitrator in accordance with those provisions, the arbitrators or the presiding arbitrator shall be appointed by the Chairman.").

75. *Arbitration Rules* art. 13(1), INT'L CHAMBER OF COMMERCE (last updated Mar. 1, 2017), <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration> [<https://perma.cc/G8UC-AKXQ>].

the discretion of the Commission's Chairperson when the parties cannot settle on a mutually acceptable chair. The extent to which this is discomforting will vary with one's suspicions regarding the independence and ambitions of the commission's chairperson. Hence it bears noting here that pursuant to a 1995 State Council notice,⁷⁶ the legislative affairs offices of local governments are instructed to supervise the establishment and operation of arbitration commissions within their jurisdiction. Indeed, a 2007 study by the Beijing Arbitration Commission found that 69.3 percent of personnel in local arbitration commissions had some affiliation with the local government.⁷⁷ Self-funding commissions—meaning those sustained solely by their own fees—are also more the exception than the norm among China's local arbitration commissions. And even those commissions that are not reliant on public appropriations may still be constrained by regulations under which commission finances are subject to municipal supervision.⁷⁸ The implication—and no doubt concern for some parties—is that local governments may apply fiscal or alternative pressures on their local commissions, which may in turn ensure that the appointees to a tribunal get the message.

A second tension relates to the prohibition of ad hoc arbitration.⁷⁹ Under Article 16 of the Arbitration Law, arbitration agreements must contain, *inter alia*, “[t]he arbitration commission” chosen by the parties. The SPC has repeatedly invalidated agreements that failed to respect this requirement.⁸⁰ At stake here is the extent to which parties are free to design their dispute resolution mechanism according to their own lights, and, for those parties suspicious of Chinese commissions, to evade their control.

The SPC has softened the harsher implications of this provision in some circumstances. For example, a 2014 dispute between a U.S. technology company and a Chinese petrochemical firm involved a “hybrid” arbitration clause that designated CIETAC as the commission but further

76. See NOTICE ON FURTHER THE WORK OF RESTRUCTURING THE ARBITRATION INSTITUTIONS, GENERAL OFFICE OF THE STATE COUNCIL (May 22, 1995).

77. THE DEVELOPING WORLD OF ARBITRATION: A COMPARATIVE STUDY OF ARBITRATION REFORM IN THE ASIA PACIFIC 22 (Anselmo Reyes & Weixia Gu eds., 2018).

78. See Fuyong Chen, *Striving for Independence, Competence, and Fairness: A Case Study of the Beijing Arbitration Commission*, 18 AM. REV. INT'L ARB. 313, 326 (2009) (describing the “income and expenses separate” system and the requirement for the Beijing Arbitration Commission to submit its spending plans to the municipal finance department for approval).

79. In an ad hoc arbitration, the parties determine all aspects of the proceedings—the number of arbitrators, applicable law, applicable procedure, etc.—on their own. This, at least, is ad hoc arbitration in its purest form. There are varying possible degrees of potential affiliation with the services of arbitral institutions, and therein lies the source of some of the concern with China's blanket prohibition: it is not always clear what falls under the blanket.

80. See, e.g., *People's Insurance Company of China, Guangzhou v. Guanghobe Power et al.* (Sup. People's Ct. 2003).

stipulated that UNCITRAL arbitration rules would apply.⁸¹ Resisting arbitration, the Chinese party argued that the clause was invalid because UNCITRAL rules only apply to ad hoc proceedings, and ad hoc proceedings are impermissible under the Arbitration Law. The Zhejiang Province Ningbo City Intermediate People’s Court was inclined to agree, but pursuant to the reporting system described above, was obliged to submit this interpretation to the Zhejiang Higher People’s Court. Without making a broader pronouncement on the validity of arbitrating disputes in China under external arbitral rules, the Higher People’s Court held that the arbitration agreement was valid.⁸² The SPC’s December 2016 Opinion on the Provision of Judicial Protection of the Development of the Free Trade Zone likewise afforded parties registered in free trade zones the choice to resolve disputes through ad hoc arbitration, so long as the agreement specifies the place (within mainland China), the rules, and the arbitrators for the proceeding.⁸³ Such autonomy is, of course, of little use to parties in a dispute arising along the Belt and Road.⁸⁴

Third, the reference to the “the arbitration commission” in Article 16 has been interpreted to preclude enforcing awards rendered by foreign arbitral institutions seated in China. Consider, for instance, an arbitration clause stipulating “ICC Rules, Shanghai shall apply.”⁸⁵ In this case, the SPC instructed the lower court to strike the arbitration agreement as invalid. Its reasoning was as follows: because the parties did not specify the law to govern the validity of the arbitration agreement, but did specify a Chinese seat, China’s choice of law rules would apply. Those rules called for enforcing the law of the seat, meaning Chinese law. The

81. Specifically, it provided that “The arbitration shall take place at China International Economic Trade Arbitration Centre (CIETAC), Beijing, P.R. China and shall be settled according to the UNCITRAL Arbitration Rules as at present in force.” *Zhe Jiang Yisheng Petrochemical Co., Ltd. v. INVISTA Technologies S.à.r.l., Luxembourg, A Case of an Application to Affirm the Invalidity of an Arbitration Clause (2014)*, STANFORD LAW SCHOOL: CHINA GUIDING CASES PROJECT (July 7, 2015), <http://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/typical-case-6> [<https://perma.cc/U8JQ-3BW7>].

82. *Id.*

83. Wei Ziyou Maoyi Shiyan Qu Jianshe Tigong Sifa Baozhang De Yijian (关于为建立自由贸易试验区提供司法保障的建议) [Opinion on the Provision of Judicial Protection of the Development of the Free Trade Zone] (promulgated by the Sup. People’s Ct, Dec. 30, 2016) (China).

84. Autonomy is of little use barring a lawyer persuasive enough to convince the court that Belt and Road-related disputes should be considered as analogues to those between parties in China’s free trade zones. The implication would be that the Belt and Road Initiative effectively created a special economic zone of continental proportions. There is precedent for China establishing special economic zones outside its borders, but a transcontinental special economic zone would be a novelty. *See generally* Deborah Bräutigam & Tang Xiaoyang, *African Shenzhen: China’s Special Economic Zones in Africa*, 49 J. MOD. AFR. STUD. 27 (2011).

85. Deguo Xupulin Guoji Youxian Zeren Gongsi yu Wuxi Woke Tongyong Gongcheng Xiangjiao Youxian Gongsi Shenqing Queren Zhongcai Xieyi Xiaoli An (德国旭普林国际有限责任公司与无锡沃可通用工程橡胶有限公司申请确认仲裁协议效力案) [Züblin Int’l GmbH v. Wuxi Woco Gen. Rubber Eng’g Co. Ltd.] (People’s Ct. of Wuxi High-tech Indus. Dev. Dist., Sept. 2, 2004) ¶ 2.

SPC then found nothing in the arbitration clause designating a specific institution. Pursuant to Article 16, the absence of a designated arbitration commission invalidated the agreement.

The merits of this decision are not of interest here—along with the fact that it has no force as precedent, subsequent cases have called its conclusion into question.⁸⁶ Instead, these seeming niceties of statutory interpretation speak to more fundamental jurisdictional questions facing the designers of the BRC. What must parties say, do, or withhold in order to confer or deny jurisdiction to the new court? Neither the spare text in China's 1994 Arbitration Law, nor the superstructure of amendments and interpretations built atop it, provide a clear norm to inform the answer to this question. As discussed below, the recently issued "Provisions on Several Issues" document does set out a jurisdictional framework, but it will require a great deal of fleshing out.

Finally, one of the distinguishing features of private dispute resolution in China is the prominence of so-called "med-arb" techniques.⁸⁷ The expression refers to dispute resolution that utilizes mediation and arbitration in the same, consolidated proceeding. Med-arb is an alternative available to parties pursuing ICA in many of China's leading commissions.⁸⁸ The practice has received praise and skepticism from abroad, often along lines that echo the sociological and political-economy divide.

Supporters, typically of a sociological bent, contend that the hybrid practice upholds local traditions that prioritize restoring harmony between the parties over protecting their autonomy.⁸⁹ Under this model, the arbitrator's role is conceived with reference to the end of dispute resolution, and those tools requisite or useful to reach that end are deemed appropriate. Critics contend that combining mediation and arbitration undermines the arbitrator's impartiality, raises evidentiary and procedural concerns, and generally dilutes distinctions between the two procedures, undermining the utility of each in the process. These predominantly political-economy accounts conceive of the arbitrator's role more with reference to the means or process than the end or resolution. Under this view, Karot Power and the Pakistani subcontractor did not bargain for harmony but rather dispute resolution, and allowing, for example, an individual to listen to *ex parte* communications in a

86. See, e.g., *DUFERCO S.A. v. Ningbo Art & Crafts Import & Export Co., Ltd.* (Ningbo Intern. People's Ct., Apr. 22, 2009) (upholding agreement to submit dispute to International Chamber of Commerce's Court of Arbitration with Shanghai as the seat). Note that the court held that the International Chamber of Commerce satisfied the "designated arbitration institution" requirement, but did not squarely address whether an arbitration by a foreign institution seated in Shanghai would be valid.

87. For a good introduction on the subject, see Gu Weixia, *The Delicate Art of Med-Arb and its Future Institutionalisation in China*, 31 PAC. BASIN L.J. 97 (2014).

88. See, e.g., *Beijing Arbitration Commission Arbitration Rules*, *supra* note 56, arts. 42–43.

89. Carlos de Vera, *Arbitrating Harmony: Med-Arb and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 166–168 (2004).

mediatory role and subsequently don the hat of arbitrator days later can only undermine that bargain.

II. INTERNATIONAL INVESTMENT LAW

The prevailing framework for discussing China's policies toward IIL considers the evolution of its approach in terms of "generations" of investment agreements. Much like generations X, Y, and Z, the boundaries between these generations,⁹⁰ as well as the substantive content one is supposed to infer from a given category, is subject to debate. What the metaphor suggests, in a simplified but still analytically useful fashion, is that there are identifiable inflection points in Chinese policy. This Part focuses on the inflection points most relevant to investor-state dispute settlement,⁹¹ and in particular, vis-a-vis countries hosting Chinese investment under the auspices of the BRI. The Provisions on Several Issues regarding the Establishment of International Commercial Courts does not envision the BRC hosting investor-state disputes. Insofar as BRI continues to be designed by state officials and implemented by state-owned entities, however, a clear understanding of the past and potential future of Chinese policy toward IIL is central to a clear understanding of an ICC with Chinese characteristics.⁹²

90. Analysts ascribing to the "generational" approach have divided China's investment agreements into two, three, four, and an "emerging" fifth generation. For two generations approaches, see Anna Chuwen Dai, *The International Investment Agreement Network Under the "One Belt One Road" Initiative*, 3 *TRANSNAT'L. DISP. MGMT.* 17 (2017); for three generations, see Matthew Hodgson & Adam Bryan, *Bumps in The Road: Identifying Gaps in China's Belt and Road Treaty Network*, 3 *TRANSNAT'L. DISP. MGMT.* 2 (2017); Huaxia Lai & Gabriel M. Lentner, *Paving the Silk Road BIT by BIT: An Analysis of Investment Protection for Chinese Infrastructure Projects Under the Belt & Road Initiative*, 3 *TRANSNAT'L. DISP. MGMT.* 8 (2017); and for four or more, see Axel Berger, *Hesitant Embrace: China's Recent Approach to International Investment Rule-Making*, 16 *J. WORLD INV. & TRADE* 845 (2015); Tyler Cohen & David Schneiderman, *The Political Economy of Chinese Bilateral Investment Treaty Policy*, 5 *CHINESE J. COMP. L.* 114 (2017).

91. Nearly every investment agreement provides for state-state dispute resolution as well. However, these provisions are rarely invoked, and have been interpreted restrictively by investment tribunals. See Anthea Roberts, *State-To-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 *HARV. INT'L L.J.* 1, 3 (2015). These clauses' seeming quiescence is a puzzle, but one beyond the scope of this Article.

92. Those countries participating in the BRI but not covered by an investment agreement include Timor-Leste, Bhutan, Maldives, Nepal, Afghanistan, Montenegro, Iraq and (to be clear, this Article is agnostic as to the nationhood of) Palestine. See *Palestine*, *BELT AND ROAD PORTAL* (Apr. 7, 2017, 3:55 PM), <https://eng.yidaiyilu.gov.cn/gbjg/gbgk/10033.htm> [<https://perma.cc/5335-4DGG>] (noting that "The People's Republic of China is one of the first countries to support the Palestine Liberation Organization and recognize the State of Palestine."). China has also reached memoranda of understanding (MoUs) with more than 70 nations concerning BRI projects. In addition to their nonbinding character, the dispute resolution provisions in the MoUs refer generically to "friendly consultations" and do not appear to supplement, much less supplant, the dispute resolution provisions in other instruments. *But see* Chris

A. *Opening Up*

During the first generation of China's investment agreements—covering the period between China's first BIT with Sweden in 1982 to the early 1990s—the dispute settlement clauses most often provided⁹³ investors with limited recourse to international arbitration against the host state. Capital exporting countries in Western Europe and Southeast Asia were typically China's counterparties.⁹⁴

In those agreements that provided for investor-state dispute settlement,⁹⁵ the jurisdiction of the tribunal was generally limited to disputes over the amount of compensation due for expropriation.⁹⁶ Institu-

Devonshire-Ellis, *Vassal States? Understanding China's Belt and Road MoU*, SILK ROAD BRIEFING (Feb. 8, 2018), <https://www.silkroadbriefing.com/news/2018/02/08/vassal-states-understanding-chinas-belt-road-mou> [https://perma.cc/L2YX-M4KX] (contending that the MOUs may become a “subtle[]” means by which China can influence future negotiations with BRI counterparts).

93. Note that while the text uses the past tense to describe many of these agreements, unless otherwise indicated, they remain in force between the parties.

94. *See, e.g.*, Agreement on the Mutual Protection of Investments, China-Swed., Mar. 29, 1982, 1350 U.N.T.S. 247; Agreement Between the Federal Republic of Germany and the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, China-Ger., Oct. 7, 1983, 145 U.N.T.S. 263 [hereinafter China-Ger. BIT] (superseded); Agreement on the Promotion and Exchange of Investments (with Exchange of Notes), China-N.Z., Nov. 22, 1988, 1787 U.N.T.S. 186. Developing state exceptions include investment treaties with Sri Lanka, Malaysia and Thailand. Confirming the general trend, however, China concluded no treaties with South American, North American, or African states.

95. The proviso, “[i]n those agreements,” is necessary here because the “limited recourse” mentioned above is sometimes better described as “no recourse.” *See, e.g.*, Agreement for the Promotion and Protection of Investments, China-Thai., art. 9(1-2), Mar. 12, 1985, 1443 U.N.T.S. 55 [hereinafter China-Thai BIT] (providing for consultation, negotiation, and ultimately submission to an arbitral tribunal for disputes “between the Contracting Parties.”); PRC, Norway Agreement on Mutual Protection of Investments, China-Nor., art. 8, Nov. 21, 1984, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/765> [https://perma.cc/8AA3-ZAT8].

96. *See, e.g.*, Agreement Between the People's Republic of China and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, China-Turk., art. VII(b), Nov. 13, 1990, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/789> [https://perma.cc/8WRQ-GUBR] [hereinafter China-Turk. BIT] (“If a dispute involving the amount of compensation resulting from an expropriation or nationalization referred to in Article III cannot be settled within one year from the date upon which the dispute arose, it may be submitted to an ad-hoc arbitral tribunal for settlement in accordance with the Arbitration Rules of UNCITRAL by each party subject to the dispute.”); Agreement on the Promotion and Protection of Investments, China-Sing., art. 13(3), Nov. 21, 1985, 1443 U.N.T.S. 293 [hereinafter China-Sing. BIT]. Note that ICSID tribunals have adopted varying interpretations of these restrictions on their jurisdiction. For example, in *Beijing Urban Constr. Grp. Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction (May 31, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw8968.pdf>, Yemen resisted the Chinese investor's construal of the clause to encompass not just questions of quantum but also liability. The tribunal found “the text itself in the China-Yemen BIT is not conclusive in supporting either a narrow construction or a broad construction,” but concluded that Yemen's reading “would undermine the

tional affiliation (such as with ICSID) was typically precluded. The clauses instead provided for ad hoc arbitration,⁹⁷ or referred generically to an "international arbitration tribunal established by both parties."⁹⁸ That institutions such as ICSID were barred from hosting the dispute, however, did not always imply that they were entirely absent from the agreement. It is easy to overstate China's aversion to Western institutions during this period. But doing so ignores provisions such as that in China's BIT with Sri Lanka which calls for the arbitral tribunal to determine its procedures "with reference to" the ICSID Convention,⁹⁹ or that with Mongolia, providing that the tribunal "may, in the course of determination of procedure, take as guidance" the ICSID arbitration rules.¹⁰⁰

Chinese investors in the Karot hydropower project considering a claim against a public entity would confront a BIT from this generation. Signed in 1989, Article 10 of the China–Pakistan BIT affords investors the right to "challenge[] the amount of compensation for the expropriated

BIT's objective and purpose." *Id.* ¶ 77. The tribunal in *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment (Feb. 12, 2015), <https://www.italaw.com/sites/default/files/case-documents/italaw4371.pdf>, similarly found the wording in the dispute resolution clause to permit it to determine whether an expropriation had or had not occurred. Here, China actively but unsuccessfully participated in the proceedings in support of Peru's position, sending the negotiators of the BIT and a cohort of legal scholars to contest its investor's claims. Finally, in the recent case of *China Heilongjiang Int'l Econ. & Tech. Coop. Corp. v. Mongolia*, (Perm. Ct. Arb. 2010), the tribunal looked to China's BIT practice throughout this "generation" and concluded that the China-Mongolia BIT did restrict its jurisdiction to quantum. The award is included as Exhibit A in the Chinese investor's petition to vacate the award submitted to the United States District Court for the Southern District of New York. The petition has been published online here, http://res.cloudinary.com/lbresearch/image/upload/v1506936892/s_29117_1035.pdf [<https://perma.cc/L8KG-M9W6>]. As discussed in greater depth elsewhere, such inconsistency has long been a source of consternation for critics of the global investment law regime generally. Applied to China, it may be a rationale for the establishment of the BRC in particular.

97. *See, e.g.*, Agreement Between the Government of the People's Republic of China and the Government of Italy Concerning the Encouragement and Reciprocal Protection of Investments, China-It., art. 11, Jan. 28, 1985, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3370> [<https://perma.cc/5XX5-JK38>] [hereinafter China-It. BIT]; Agreement Between the Government of the People's Republic of China and the Government of the Polish People's Republic on the Reciprocal Encouragement and Protection of Investments, China-Pol., art. 9, June 07, 1988, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/770> [<https://perma.cc/4UET-LH8V>] [hereinafter China-Pol. BIT].

98. China-Sing. BIT, *supra* note 96, art. 13(3).

99. Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments, China-Sri Lanka, art. 13(6), Mar. 13, 1986, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/781> [<https://perma.cc/QU2Q-Z2R6>] [hereinafter China-Sri Lanka BIT].

100. Agreement Between the Government of the Mongolian People's Republic and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, China-Mong., art. 8(5), Aug. 25, 1991, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/760> [<https://perma.cc/Q3TK-WYHL>] [hereinafter China-Mong. BIT].

investment asset . . . with the competent authority of the Contracting Party taking the expropriatory measures.”¹⁰¹ The first recourse for frustrated investors is thus not (or at least is not perceived to be) a neutral forum. Should the amount of compensation due remain in dispute after one year, investors may then petition “the competent court of the Contracting Party,” or “an international arbitral tribunal may, upon the request of the investor, review the amount of compensation.”¹⁰²

Political-economy accounts describe the restricted access to international arbitration and other neutral fora in China’s first generation agreements as a product of China’s position as a net recipient of foreign direct investment.¹⁰³ With few of its citizens investing abroad, China preferred maintaining its own authority over aiding their foreign initiatives. Those accounts emphasizing the political component draw attention to the tension between the reform agenda advanced by Premier Zhao Ziyang and Party Secretary Hu Yaobang, as well as calls for a more gradual liberalization from officials such as Chen Yun.¹⁰⁴ The result of this tension, the argument goes, was a truce that coupled an energetic treaty practice with a conservative approach toward the substance of the agreements.

Yet political-economy perspectives offer little aid in understanding the specific limitations that distinguished China’s policies toward IIL during this period. What is missing is a theory attuned to what is particularly *Chinese* about these instruments and the internal norms that influenced their negotiation. Put differently, because the political-economy school typically starts with a mass of states pursuing more or less the same basic interests, it struggles to distinguish why a particular actor pursued a particular position at a particular time or place. “Self-interest” and “domestic politics” are as accurate as they are imprecise. A sociological perspective complements these accounts by turning the analyst’s attention to the ideational foundation of “interest” and to the communal norms and principles that give the “self” in “self-interest” substantive content.

B. *Going Abroad*

During the second generation, covering the early 1990s up to the beginning of the twenty-first century, China’s “Opening Up and Reform”

101. Agreement Between the Government of the People’s Republic of China and the Government of the Islamic Republic of Pakistan on the Reciprocal Encouragement and Protection of Investments, China-Pak., art. 10, Feb. 12, 1989, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5660> [<https://perma.cc/S5HB-G3FB>] [hereinafter China-Pak. BIT].

102. *Id.*

103. See, e.g., Axel Berger, *China’s New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making*, 8, American Society of International Law Economic Law Interest Group 2008 Biennial Conference, Washington, D.C. (Nov. 14–15, 2008).

104. Cohen & Schneiderman, *supra* note 90, at 115.

policy transformed into "Going Abroad."¹⁰⁵ Both China's counterparties and the dispute resolution mechanisms available to investors under these agreements expanded commensurately.

Whereas during the first-generation China concentrated on capital exporting states and neighbors, second generation investment agreements included African,¹⁰⁶ South American,¹⁰⁷ and Caribbean counterparties.¹⁰⁸ Dispute resolution provisions increasingly provided access to international arbitration under the auspices of ICSID,¹⁰⁹ albeit with conditions. The China–Romania BIT, for example, begins by affording investors recourse to the competent court of the Contracting Party or to

105. A 1998 Central Committee publication summarizes the new ambition: "[I]t is necessary to consider seriously and implement the 'Going Abroad' strategy, positively explore international market[s] and take advantage of resource[s] abroad, thus strengthen[ing] the development impetus and potential of [the] Chinese economy." Quoted in Cai Congyan, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice*, 7 J. WORLD INV. & TRADE 621, 626–27 (2006). This strategy was included in the Outline of the Tenth Five-Year Plan for National Economy and Social Development in 2001.

106. See, e.g., Agreement Between the Government of the Kingdom of Morocco and the Government of the People's Republic of China, Regarding Reciprocal Encouragement and Protection Investments, China-Morocco, Mar. 27, 1995, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/761> [<https://perma.cc/7S8S-GVNB>] [hereinafter China-Morocco BIT]; Agreement Between the Government of the People's Republic of China and the Government of the Republic of Zimbabwe on the Encouragement and Reciprocal Protection of Investments, China-Zim., May 21, 1996, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3356> [<https://perma.cc/4CG9-UX3W>] [hereinafter China-Zim. BIT]; *Gabon—Bilateral Investment Agreements*, EXPORT.GOV, <https://www.export.gov/article?id=Gabon-Bilateral-Investment-Agreements> [<https://perma.cc/B79C-D5FP>] (last updated Jan. 13, 2017) (noting Gabon's BIT with China).

107. See, e.g., Agreement Between the Government of the People's Republic of China and the Government of the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investments, China-Uru., Dec. 2, 1993, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/794> [<https://perma.cc/4LG3-QC5V>] [hereinafter China-Uru. BIT]; Agreement Between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, China-Peru, June 9, 1994, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/767> [<https://perma.cc/GTV8-CL32>] [hereinafter China-Peru BIT]; Agreement Between the Government of the Republic of Chile and the Government of the People's Republic of China Concerning the Encouragement and the Reciprocal Protection of Investment, Chile-China, Mar. 23, 1994, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/664> [<https://perma.cc/HP62-LJQK>] [hereinafter Chile-China BIT].

108. See, e.g., Agreement Between the Government of the People's Republic of China and the Government of Jamaica Concerning the Encouragement and Reciprocal Protection of Investments, China-Jam., Oct. 26, 1994, <http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/917> [<https://perma.cc/HF4A-QMFH>] [hereinafter China-Jam. BIT]; Agreement Between the Government of Barbados and the Government of the People's Republic of China for the Promotion and Protection of Investments, Barb.-China, July 20, 1998, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4904> [<https://perma.cc/DS6C-XVYT>] [hereinafter Barb.-China BIT].

109. China signed the ICSID Convention on February 9, 1990. The treaty entered into force in February 1993.

ICSID for “any dispute”—meaning claimants were no longer restricted to disputes relating to the quantum due for expropriation. However, the Article concludes with the proviso that recourse to ICSID is available “if the parties to the dispute so agree”¹¹⁰—the host state thereby appearing to retain a veto over international dispute settlement.

Compare the Romanian agreement’s approach with that of the China–Israel BIT. Article 8 of the Israel BIT begins by affording access to ICSID for the conciliation or arbitration of “any legal dispute . . . concerning the amount of compensation in the case of expropriation.”¹¹¹ Perhaps because of the restricted scope of the subject matter, the treaty foregoes conditioning access to ICSID on the parties’ agreement, providing instead that “the investor affected may institute conciliation or arbitration proceedings” at ICSID.¹¹²

“Going abroad” entailed Chinese investors’ assuming greater risk, often in countries whose judiciary was more suspect than those in Western Europe. Given these new inputs, the political-economy account finds the output—more investor-friendly dispute resolution clauses—perfectly predictable.¹¹³ That conclusion is compelling, but also incomplete. Most notably, it offers little to explain China’s decision to reach investment agreements with several states with which it had virtually no commercial ties. Here, the “political” aspect of political-economy fails to recognize that BITs may also serve an ideological purpose. Newly liberal Soviet states¹¹⁴ and African leaders¹¹⁵ that had stood by China in the aftermath

110. Agreement Between the Government of the People’s Republic of China and the Government of Romania Concerning the Encouragement and Reciprocal Protection of Investments, China-Rom., art. 9(2), July 12, 1994, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/773> [<https://perma.cc/PV4U-43UR>] [hereinafter China-Rom. BIT].

111. Agreement Between the Government of the People’s Republic of China and the Government of the State of Israel for the Promotion and Reciprocal Protection of Investments, China-Isr., art. 8.1(a), Apr. 10, 1995, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3371> [<https://perma.cc/KW7P-9TVL>] [hereinafter China-Isr. BIT].

112. *Id.* art. 8.1(b).

113. See, e.g., Manjiao Chi, *From Europeanization Toward Americanization: the Shift of China’s Dichotomic Investment Treaty-Making Strategy*, 23 CAN. FOREIGN POL. J. 158, 165 (2017) (arguing that “the main reason for China’s IIT-making [international investment treaty] strategy shift . . . lies in its reversed economic status vis-à-vis its IIT partner countries . . .”).

114. E.g., China-Mong. BIT, *supra* note 100, art. 8(5); Agreement Between the Government of the Czech and Slovak Federal Republic and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, China-Slovk., Dec. 4, 1991, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/777> [<https://perma.cc/8PUU-2MST>] [hereinafter China-Slovk. BIT]; Agreement Between the Republic of Hungary and the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, China-Hung., May 29, 1991, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/740> [<https://perma.cc/7N6C-V93J>] [hereinafter China-Hung. BIT].

115. E.g., China-Zim. BIT, *supra* note 106; Agreement Between the Government of the People’s Republic of China and the Government of the

of Tiananmen feature prominently during this period. A more rounded conception of China's self-interest, informed by domestic and foreign variables, helps to explain why.

C. *Catching Up, Getting Ahead*

The third generation of investment agreements brings us to the present and China's IIL policies "into line with international standards."¹¹⁶ Indeed, analysts have described China's embrace of "standard treaty practice"¹¹⁷ in its investment agreements as a "fundamental change in the country's foreign economic policy," and more broadly, as evidence of China's entry into the family of nations.¹¹⁸

Republic of Sudan, China-Sudan, May 30, 1997, <http://tfs.mofcom.gov.cn/aarticle/h/aw/201002/20100206778963.html> [<https://perma.cc/472R-YVWF>] [hereinafter China-Sudan BIT].

116. Kate Hadley, *Do China's BITs Matter? Assessing the Effect of China's Investment Agreements on Foreign Direct Investment Flows, Investors' Rights, and the Rule of Law*, 45 GEO J. INT'L L. 255, 304 (2013). What constitute "international standards" is of course subject to debate, but the general (and accurate) claim is that China's final generation of BITs are more thorough, better drafted, and more liberal with regard to investor's access to international fora for dispute resolution. *See, e.g.*, Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, China-Mex., ch. III, July 11, 2008, 2656 U.N.T.S. 3 [hereinafter China-Mex. BIT] (addressing the details of investor-state dispute settlement over the course of ten articles); Agreement Between the Swiss Federal Council and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, China-Switz., art. 11, Jan. 27, 2009, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4811> [<https://perma.cc/2UPB-YS8B>] [hereinafter China-Switz. BIT] (precluding the invocation of sovereign immunity, restricting dispute resolution through diplomatic channels, and making the arbitral award "final and binding"). *But see* Agreement Between the Government of the People's Republic of China and the Government of Malta on the Promotion and Protection of Investments, China-Malta, art. 9(3), Feb. 22, 2009, <http://investmentpolicyhub.unctad.org/Download/Treaty-File/3368> [<https://perma.cc/N5AF-DXAJ>] [hereinafter China-Malta BIT] (barring an investor from proceeding to ICSID or an ad hoc international arbitration under UNCITRAL rules unless it "has gone through the administrative review procedures according to the laws of People's Republic of China and the dispute remains; and the dispute has not been submitted to a court of the People's Republic of China.").

117. Cohen & Schneiderman, *supra* note 90, at 111.

118. *E.g.* Wenhua Shan, Norah Gallagher, & Sheng Zhang, *National Treatment for Foreign Investment in China: A Changing Landscape*, 27 ICSID REV. 120, 141 (2012). Particularly noteworthy here is the extension of China's investment agreements into multilateral instruments. The 2009 ASEAN-China Investment Agreement is indicative. It contains various provisions understood to be international best practice but largely absent from China's bilateral agreements in previous generations (and from many of the early "third generation" instruments), such as general exceptions for the protection of "human, animal or plant life or health," and "safety." Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-Operation Between the People's Republic of China and the Association of Southeast Asian Nations, ASEAN-China, art. 16, Aug. 15, 2009, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2596> [<https://perma.cc/Q6J5-UEEE>]. With regard to dispute resolution, "at the choice of the investor," disputes that have not been settled six months after notification to the host state may be submitted to local courts or

Prominent Chinese scholars, often invoking sociological considerations, have begged to differ. Their arguments are less empirical than normative. Without denying that China's most recent investment agreements mirror those of liberal Western states (often because they are based on the model BIT of their Western counterparty), these analysts call for Chinese authorities to be cautious about whether China is ready to accept the obligations that accompany membership in such a family.¹¹⁹ Argentina is the posterchild for their fears. An Chen, one of China's designated arbitrators at ICSID since 1993, offers a particularly ominous warning of the consequences when developing states' offer unduly liberal access to international dispute resolution: "When looking forward and finding somebody ahead is falling into the torrential whirlpool and is struggling hard to extricate himself ["himself" being Argentina], the follower [China] should be very cautious and make a detour . . ." ¹²⁰

That detour may have become available for China, albeit from an unpredicted (and external) source. Shortly after China reached the frontier of international best practices toward investor-state dispute settlement, a more state-centric orientation in closer keeping with China's earlier agreements—and the wishes of critics such as An Chen—took hold in many states. What has been described as the "return of the state" in international investment agreements¹²¹ captures widespread skepticism and sometimes outright hostility—in particular among citizens in Western Europe, Australia, and Canada—toward the perceived erosion of host states' sovereign prerogative to regulate health, environmental, and other matters in the general public interest without owing compensation to foreign investors.¹²²

Leading institutional remedies for the perceived illegitimacy of the current regime include the formation of a standing investment court¹²³

administrative tribunals, ICSID (provided that the home and host state are ICSID members), ICSID's Additional Facility (provided that either the home or host state is an ICSID member), arbitration under UNCITRAL rules, or, "if the disputing parties agree, to any other arbitration institution or under any other arbitration rules." *Id.* art. 14(4).

119. See, e.g., Wei Yanru, *On the Impropriety of China's Recent Complete Acceptance of ICSID Jurisdiction*, 1 J. INT'L ECON. L. 8 (2006).

120. An Chen, *Should the Four Great Safeguards in Sino-Foreign BITs Be Hastily Dismantled? Comments on Provisions Concerning Dispute Settlement in Model U.S. and Canadian BITs*, 7 J. WORLD INV. & TRADE 899, 929 (2006).

121. See, e.g., José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223 (2011); Wolfgang Alschner, *The Return of the Home State and the Rise of 'Embedded' Investor-State Arbitration*, in *THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION* 293 (2014).

122. See Uche E. Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT'L L. 131, 136–145 (2013) (noting the "growing rejection of hitherto accepted norms, practices and structures of the regime" and detailing the various states that have withdrawn from the ICSID Convention and otherwise restricted their accession to BITs).

123. See, e.g., GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, *THE COMPOSITION OF A MULTILATERAL INVESTMENT COURT AND OF AN APPEAL MECHANISM FOR*

and an appellate mechanism for investor-state disputes.¹²⁴ Indeed, Article 9.23 of the China–Australia Free Trade Agreement, signed in June 2015, calls for the parties in 2018 to “initiate negotiations with a view to establishing an appeal review mechanism” for arbitral awards arising from the agreement.¹²⁵

Without wading into the policy arguments on either side of this debate, we may note that the proposed BRC—even if it adjudicates only disputes between private parties, as the current Provisions indicate—is responsive to calls for more stable, institutionalized fora for international dispute settlement. After decades of “catching up,” the BRC aspires to put China at the vanguard of a movement to provide dispute resolution services by way of an international commercial court (ICC). And if the BRC does ultimately incorporate investor-state along with strictly private dispute resolution mechanisms under the auspices of a single institution, it would be unique among the growing cohort of ICCs.

III. AN ICC WITH CHINESE CHARACTERISTICS

Judges from China’s SPC have pointed toward the ICCs in Singapore and Dubai as models for the BRC.¹²⁶ This Part begins by reviewing the central features of each court. Subpart III.B then turns to the BRC to consider the design challenges in forming an ICC with Chinese characteristics.

A. *The Models*

The most recent generation of ICCs developed as a hybrid response to the perceived failings of international arbitration, litigation, and mediation. They are quintessentially “in between” these mechanisms for dispute resolution. In selecting litigation, parties typically gain the benefits of an opportunity for appeal, substantial procedural protections, and a professionalized judiciary. In exchange, they suffer substantial costs, minimal flexibility, and a sluggish pace. Parties that instead opt for

INVESTMENT AWARDS, CIDS SUPPLEMENTAL REP. (2017); N. Jansen Calamita, *The Challenge of Establishing a Multilateral Investment Tribunal at ICSID*, 32 ICSID REV. 611 (2017).

124. See Stephan W. Schill, *Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, 20 J. INT’L ECON. L. 649 (2017); Katia Yannaca-Small, *Improving the System of Investor-State Dispute Settlement*, (OECD Working Papers on Int’l Inv., 2006/01, 2006).

125. Free Trade Agreement between the Government of Australia and the Government of the People’s Republic of China, Austl.–China, art. 9.23, June 17, 2015, [2015] A.T.S. 15.

126. See *Interview with Gao Xiaoli*, *supra* note 44; boss_young, *Guojian “Yidai Yilu” Guoji Zhengduan Jiejue Jizhi: Di Er Jie Donghu Guoji Falü Luntan Neirong Fenxiang* (构建“一带一路”国际争端解决机制 | 第二届东湖国际法律论坛内容分享) [Building the “One Belt and One Road” International Dispute Resolution Mechanism: Content of the Second East Lake International Law Forum] (Nov. 27, 2017), WEIXIN, <https://mp.weixin.qq.com/s/yZ9N2RwSPeK2SoQ1q5vBJQ> [<https://perma.cc/U29B-6T93>].

international arbitration gain a substantial degree of autonomy, and in some circumstances, save time and costs as well. However critics contend that those circumstances are increasingly rare, denigrating ICA as “arbitration.” Finally, mediation offers an opportunity to save business relationships as well as costs. Those savings may be illusory if mediation ultimately leads to arbitration or litigation, however, or when the parties find that they require a final and enforceable award.

Enter the most recent crop of ICCs. The Singapore International Commercial Court (SICC) was first proposed by Singapore’s Chief Justice, Sundaresh Menon, in 2013. Singapore established an exploratory committee shortly thereafter, and a framework for the new institution was in place by the fourth quarter of 2014. The SICC opened its doors on January 5, 2015.¹²⁷ Taking the English Commercial Court in London as its model, Michael Hwang aptly summarizes Singapore’s goals as essentially four-fold:¹²⁸ To advance Singapore’s ambition to serve as an Asian hub for commercial disputes; to contribute to the development of a freestanding international commercial law that harmonizes the diverging legal traditions in the region; to offer tools such as joinder of third parties and an appellate mechanism for disputants that prefer ICA to litigation, but find these mechanisms necessary; and to “leverage on Singapore’s neutrality, legal expertise, integrity, and efficiency.”¹²⁹ In conjunction with the Singapore International Arbitration Centre and Singapore Mediation Centre, the SICC was to provide the final component required to make Singapore a one stop shop for international commercial dispute resolution.¹³⁰

Three years after its founding, the most important features of the SICC for reaching these goals include its personnel, the autonomy afforded disputants, joinder and consolidation power, jurisdictional arrangements with the Singapore High Court, and an appellate mechanism. I briefly consider each.

Beginning with personnel, the SICC’s bench comprises 36 judges. Along with the Chief Justice of the High Court, there are four judges of appeal,¹³¹ sixteen high court judges, and fifteen “international judges.” International judges are appointed by the President of Singapore with the proviso that the Chief Justice must be of the opinion that the candidate “is a person with the necessary qualifications, experience and

127. *Establishment of the SICC*, SING. INT’L COMMERCIAL COURT, <https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc> [<https://perma.cc/MSW3-FFB8>] (last updated Jun. 14, 2018).

128. Michael Hwang, *Commercial Courts and International Arbitration—Competitors or Partners?*, 2014 Clayton Utz–Sydney University Lecture (Nov. 11, 2014), in 31 *ARB. INT’L*, no. 2, 2015, at 193, 196. In the speech, Hwang identifies six ambitions. I have combined those with substantial overlap.

129. *Id.*

130. See Man Yip, *The Resolution of Disputes Before the Singapore International Commercial Court*, 65 *INT’L & COMP. LAW Q.* 439, 444 (2016).

131. The superior courts in Singapore include the Court of Appeal and the High Court. Collectively, they comprise the Supreme Court of the Republic of Singapore.

professional standing” to hold the position.¹³² After the appointment of four new international judges in January 2018, the bench includes six British nationals, four Australians, and one judge from each of the following countries: the U.S., France, Canada, Hong Kong, and Japan.¹³³ The prevailing theme among the SICC’s international judges is substantial experience in cross-border commercial matters and a background in common law (or more specifically, Commonwealth) jurisdictions.¹³⁴ Note that in addition to its international judiciary, the SICC also eases foreign attorney’s registration requirements and affords them greater authority to appear and plead before it once registered.¹³⁵

The autonomy afforded disputants before the SICC often mirrors that available in commercial arbitrations. Thus, parties in SICC proceedings may agree to set aside Singapore’s Evidentiary Act in favor of, for example, the IBA Rules on the Taking of Evidence.¹³⁶ They may also elect for the IBA Rules to displace Singapore’s general discovery provisions, substituting document production for more searching (and costly) domestic procedures.¹³⁷

Coupled with the autonomy afforded disputants is the SICC’s authority to join third parties and consolidate proceedings. Recall that arbitration is fundamentally consensual, and thus generally precludes joinder of resisting third parties. This power is particularly attractive for the commercial disputes that comprise much of ICA—disputes that often involve contractual arrangements among the host of contactors, subcontractors, and sub-subcontractors required for complex projects such as Karot.

The SICC may obtain jurisdiction over a dispute either via explicit reference by the parties or referral from Singapore’s High Court.

132. CONSTITUTION OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, art. 95(4)(c).

133. *Judges*, SING. INT’L COMMERCIAL COURT, <https://www.sicc.gov.sg/about-the-sicc/judges> [<https://perma.cc/3VTV-K8CX>] (last updated Jun. 14, 2018).

134. The Japanese judge, Yasuhei Taniguchi, is a former chairperson of the WTO Appellate Body. The French judge, Dominique T. Hascher, combines experience on the Supreme Judicial Court in France with a period as General Counsel and Deputy Secretary General of the International Chamber of Commerce’s International Court of Arbitration. The other exception to the commonwealth trend, Carolyn Berger, was a Justice on the Supreme Court of Delaware, the appellate court overseeing the U.S.’s leading jurisdiction for commercial disputes.

135. *See Registration of Foreign Lawyers before the SICC*, SING. INT’L COMMERCIAL COURT, <https://www.sicc.gov.sg/registration-of-foreign-lawyers> [<https://perma.cc/5YGU-QTU2>] (last updated Jun. 14, 2018). Foreign attorneys are restricted to appearing in cases with no substantial connection to Singapore (“offshore” cases), or, in those cases with a substantial connection to Singapore, only for the purpose of submissions pertaining to foreign law. *See* Legal Profession Act, § 36P (Ordinance 57 of 1966) (Sing.), read in conjunction with rule 3 of the Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules (2014) (G.N. No. S 851/2014).

136. *See* Supreme Court of Judicature Act, Order 110, Rule 23 (Act 24 of 1969) (Sing.).

137. *See id.* Order 110, Rules 14–21.

Specifically, it has jurisdiction to hear and try any action that is (i) international and commercial in nature; (ii) that the High Court may hear via its own original civil jurisdiction (*viz.*, at first instance); (iii) in which all parties in the originating process have submitted to its jurisdiction under a written agreement and (iv) where the parties do not seek relief that is only available through a prerogative order, such as an order for review of detention or quashing order.¹³⁸ Legislation in January 2018 clarified that the SICC also has jurisdiction “to hear any proceedings relating to international commercial arbitration that the High Court may hear and that satisfy such conditions as the Rules of Court may prescribe.”¹³⁹ The requirements for joinder mirror those in general Singaporean law.¹⁴⁰

Notwithstanding these features, parties to an SICC proceeding are likely to care most about outcome. A right of appeal to Singapore’s Court of Appeal¹⁴¹ is available by default; however, parties may also waive or modify this right by contract. Much like joinder, the SICC’s appeal mechanism offers an attractive safeguard for high value commercial disputes.

The Dubai International Financial Center Courts (DIFC Courts) offer an interesting point of comparison. The DIFC was established in 2004 to provide a legal infrastructure better suited to the needs of transnational commerce than that available in the rest of the Emirate, and what one analysis has summarized as an “express way for capital and investment.”¹⁴² The DIFC Courts are an adjunct to the Financial Center and comprise an ICC and arbitration/mediation center affiliated with the London Court of International Arbitration.¹⁴³ Mirroring the SICC, the DIFC Courts are modeled on the English Commercial Court and provide for an international judiciary,¹⁴⁴ appearance by foreign lawyers,

138. SING. INT’L COMMERCIAL COURT, SICC PROCEDURAL GUIDE (2017).

139. Supreme Court of Judicature (Amendment) Act 2018, Art. 2 (Act No. 1 of 2018) (Sing.).

140. SICC PROCEDURAL GUIDE, *supra* note 138, at 16–17.

141. Note that the bench of the Court of Appeal may, “if the Chief Justice so requires,” include an international judge, but the SICC Procedural Guide comments that “[g]enerally, the Court of appeal will consist of . . . Judges of Appeal.” *Id.* at 30.

142. Zain Al Abdin Sharar & Mohammed Al Khulaifi, *The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis*, 46 HONG KONG L.J. 529, 536 (2016).

143. English Chief Justice Sir Anthony Evans has described the affiliation as “essentially . . . a joint venture between the DIFC and the London Court of International Arbitration.” *The Future of Arbitration in Dubai*, DIFC COURTS (Dec. 31, 2008), <https://www.difccourts.ae/2008/12/31/the-future-for-arbitration-in-dubai> [<https://perma.cc/DSK7-F26D>]. This is a striking instance of the institutional vocabulary of business making its way into dispute resolution. Applying the metaphor elsewhere, one might describe a U.S. federal district court as a subsidiary of the Supreme Court, or the U.S. Court of Appeals for the Federal Circuit as a special purpose vehicle.

144. Different portions of the DIFC’s website list a different number of judges (ten here: *Court Judges*, DIFC COURTS, <https://www.difccourts.ae/court-structure/judges/court-judges> [<https://perma.cc/R7RW-N5BX>] (last visited Oct. 4, 2018); twelve here: *Judges*, DIFC COURTS, <https://www.difccourts.ae/court-structure/judges> [<https://perma.cc/NV9G-K7V8>] (last visited Oct. 4, 2018). Using the twelve-person roster,

substantial party autonomy in the selection of rules of evidence, and the capacity to join third parties. The DIFC Courts’ departures from the SICC primarily follow from their role as principal overseer for the DIFC.

First, with regard to jurisdiction, the DIFC Courts exercise both default and opt-in jurisdiction. Parties within the DIFC may select any jurisdiction or law to govern their contracts. Any contract that is silent on these matters, however, defaults into the laws and jurisdiction of the DIFC Courts.¹⁴⁵ Along with the arbitration and mediation center, the Courts comprise a court of first instance and an appellate body. There is no further appeal from the DIFC Court of Appeal, meaning that parties may not, as in Singapore, seek review by a non-ICC tribunal.

Second, the DIFC is, as its Chief Justice once described it, “a common law island in a civil law ocean.”¹⁴⁶ More precisely, the DIFC Courts apply common law in English-language proceedings, notwithstanding the fact that their authority derives from a state that mingles civil and Sharia law in Arabic proceedings. Likewise, while the arbitration law governing the DIFC is closely modelled on the UNCITRAL Model law, the UAE does not have a dedicated arbitration law.¹⁴⁷

If the SICC was created in order to provide a hybrid model for the resolution of international commercial disputes, the DIFC Courts were first conceived to suit the needs and interests of firms situated or investing within Dubai’s special economic zone. It is therefore not altogether surprising to find that tensions have developed between the DIFC Courts and their counterparts outside the zone.

Dubai created a Joint Judicial Committee (JJC) in 2017 to review potential conflicts of jurisdiction between the DIFC and Dubai Courts. Supporters of the JJC—which enjoys the power to stay proceedings in the DIFC Courts—argue that it brings necessary clarity and predictability to interjurisdictional matters. Opponents contend that it threatens to undermine the central attractions of the DIFC, an incursion on the “island” from a hostile abroad.

Tensions first arose when firms began using the DIFC Courts to enforce arbitration awards rendered abroad against Dubai-based

the plurality of judges (five) are from the UAE. England and Wales is next with three judges (one of whom, Sir Jeremy Cooke, is also on SICC’s roster), followed by Singapore (two judges, one of whom, Judith Parkash, is also on SICC’s roster) and finally Australia and Malaysia with one judge each.

145. See Law No. 12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre, art. 5(A)(2) (Dubai).

146. Michael Hwang, *The Courts of the Dubai International Finance Centre—A Common Law Island in a Civil Law Ocean*, Address at the LAWASIA Conference (Nov. 1, 2008), in *DIFC COURTS* (Nov. 1, 2018), <https://www.difccourts.ae/2008/11/01/the-courts-of-the-dubai-international-finance-centre-a-common-law-island-in-a-civil-law-ocean> [<https://perma.cc/Y7DC-6H7E>]. The DIFC itself, meanwhile, is “an inviting oasis of opportunity” within “the desert sands of Dubai.” *Id.*

147. Arbitration is instead governed under the general Civil Procedure Law, which does not incorporate UNCITRAL Model Law norms. See Federal Law No. 11 of 1992 Concerning Issuance of the Civil Procedures Code (U.A.E.).

defendants (meaning defendants not located or registered in the DIFC). The JJC has only exacerbated the tension, with defendants in DIFC Court proceedings often appealing to the JJC in order to delay the enforcement action. Indeed, in a widely reported case in May 2017, the JJC refused to allow a foreign shipbuilder to enforce an arbitration award from London against a Dubai-based firm in the DIFC courts on the grounds that the award debtor had already opened a case in the Dubai courts.¹⁴⁸

Notwithstanding such jurisdictional mischief, and the broader tensions associated with creating an “island” (in the DIFC Court sense) or merely an alternative venue attuned to commercial parties’ needs (in the SICC sense), ICCs have been “shoot[ing] up like mushrooms.”¹⁴⁹ Those in Singapore and Dubai have already or will soon be joined by counterparts in Abu Dhabi,¹⁵⁰ the Netherlands,¹⁵¹ Germany,¹⁵² France,¹⁵³ and Belgium.¹⁵⁴ Each will present itself to commercial parties as an ideal forum for their international disputes and as a contributor to a 21st century *lex mercatoria*.¹⁵⁵ Each ICC will also reflect, to varying degrees, the particularities of their host jurisdiction. In January 2018, China announced its plan to join this cohort by creating an ICC with Chinese characteristics. On July 1, 2018, the SPC published the Provisions on Several Issues regarding the Establishment of International Commercial Courts.

B. *The BRC*

This Subpart draws on the preceding analysis—and the methods favored by sociological and political-economy approaches alike—to identify the principal questions before the BRC’s designers and consider what their responses thus far may portend. It bears emphasizing that my

148. See Simeon Kerr, *Legal Wrangles Dent Dubai’s Image as Region’s Financial Centre*, FIN.TIMES (Oct. 12, 2017), <https://www.ft.com/content/8d4f047e-87df-11e7-8bb1-5ba57d47eff7>.

149. Bob Wessels, *International Commercial Courts: the Netherlands Is Lagging Behind*, LEIDEN L. BLOG (Feb. 5, 2018), <https://leidenlawblog.nl/articles/international-commercial-courts-the-netherlands-is-lagging-behind> [<https://perma.cc/2US6-H2NE>].

150. *About Us*, ABU DHABI GLOBAL MARKET COURTS, <https://www.adgm.com/doing-business/adgm-courts/adgm-legal-framework/adgm-courts-legal-framework> [<https://perma.cc/NFA6-WBDM>].

151. *A First Guide to Commercial Litigation in the Netherlands*, DUTCH LITIG. ATTORNEYS, <https://netherlands-commercial-court.com> [<https://perma.cc/J9U9-7SQW>] (last visited Oct. 19, 2018).

152. See Matthias Weller, *The Justice Initiative Frankfurt am Main 2017*, CONFLICT OF LAWS.NET (Mar. 31, 2017), <http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt> [<https://perma.cc/RJ8Z-D6WB>].

153. *HCJP Presentation*, HAUT COMITÉ JURIDIQUE DE LA PLACE FINANCIÈRE DE PARIS, <http://hcjp.fr/presentation-2> [<https://perma.cc/VY8N-AVXW>] (last visited Oct. 19, 2018).

154. See Maxime Colle & Carlo Persyn, *An International Business Court in Brussels: a Modern Step Forward*, LEXOLOGY (Nov. 2, 2017), <https://www.lexology.com/library/detail.aspx?g=f101059a-3678-4797-8ee0-54c7a0487fc2> [<https://perma.cc/TN4P-AXKP>].

155. A law that Singapore’s Chief Justice Menon thought could be the product of “an international community of commercial courts.” Sundaresh Menon, *The Somewhat Uncommon Law of Commerce*, 26 SING. ACAD. L.J. 23, 48 (2014).

ambition is not so much predictive as diagnostic—asking “where are the tensions?” rather than suggesting how will they be definitively resolved. In this sense, the discussion should have relevance well after the BRC is up and running. After reviewing several of the key features of the BRC recently sketched by the SPC, I divide the analysis into “supply” and “demand” considerations. Because Say’s law is as shaky in economics as it is in institutional design,¹⁵⁶ I begin that discussion with factors relating to the demand for a BRC’s services.

1. The Framework

The Provisions published by the SPC in July 2018 include nineteen articles and less than 1300 words of substantive text. By way of comparison, Singapore’s Supreme Court of Judicature Act reviews the basic principles governing the SICC in 1200 words. What distinguishes the two texts, at least for the near future, is that Singapore’s Judicature Act sits atop reams of detail in the SICC’s Procedural Guide, Rules of Court, Practice Directions, and User Guides. The SPC’s Provisions stand alone. In brief, the SPC has provided analysts with a skeleton, and there is a great deal of flesh still to be added. The discussion that follows should be considered in this light.

As expected, the BRC will comprise tribunals sitting in Shenzhen, Xi’an, and Beijing. As for personnel, the SPC has appointed eight judges to the BRC thus far, all from within the corps of existing SPC judges, and all, as Article 4 of the Provisions requires, 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.”¹⁵⁷ Under Article 9 of China’s Laws on Judges, members of the judiciary must be Chinese nationals.¹⁵⁸ The Regulation does not purport to modify this provision, or any other aspect of extant Chinese law for that matter, and thus the BRC’s judiciary will be comprised exclusively of Chinese nationals. Moreover, although the BRC’s “three or more” judge tribunals will accept evidence submitted in English,¹⁵⁹ Article 240 of the Civil Procedure Law will continue to govern the proceedings. Trials at the BRC will therefore be conducted in

156. For those more familiar with 1980s American cinema than nineteenth century economic theory, Say’s Law in this context would contend that “If you build it, they will come.” *FIELD OF DREAMS* (Gordon Company 1989).

157. *See Judges*, CHINA INT’L COMMERCIAL COURT, <http://cicc.court.gov.cn/html/1/219/193/196/index.html> [https://perma.cc/RHX7-95PP] (last visited Oct. 19, 2018).

158. *Zhonghua Renmin Gongheguo Faguan Fa* (中华人民共和国法官法) [Judges Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 28, 1995, effective July 1, 1995), art. 9, 1995 vol. 1 *XIN FAGUI HUIBIAN* 58.

159. *Provisions of the Supreme People’s Court on Several Issues Regarding the Establishment of the International Commercial Court* arts. 5, 9, CHINA INT’L COMMERCIAL COURT, <http://cicc.court.gov.cn/html/1/219/199/201/817.html> [https://perma.cc/JF9Y-3JZV] (last visited Oct. 24, 2018).

a “language commonly used in the PRC,” which is to say, not English.¹⁶⁰ Parties may only be represented by Chinese law-qualified attorneys.

Yet the judges of the BRC will not be alone. In an innovative measure that suggests the BRC’s designers may be attempting to build a halfway house between a cosmopolitan DIFC or SICC-type ICC and the existing Chinese courts, the judges of the BRC will be supported by an International Commercial Expert Committee whose members are empowered to support the BRC’s construal of foreign law¹⁶¹ and serve as mediators in international commercial disputes.¹⁶² The first cohort of the Expert Committee has already been appointed to a four-year term, and its members are a striking cross-section of professors, practitioners, and justices from across the globe. By way of rough, summary statistics,¹⁶³ the committee is composed of 26 men and 6 women. Eleven experts hail from common law and 21 from civil law jurisdictions. The regional break down leans heavily toward Asia, with 18 experts (12 Chinese) on the Committee, joined by four experts from North America, eight from Europe, and one each from the Middle East and Africa. There are no experts from South America.¹⁶⁴ Westerners with a cursory acquaintance with the field are likely to recognize names such as Gabrielle Kaufmann-Kohler, Gary Born, and Emmanuel Gaillard.

Turning to jurisdiction, Article 2 empowers the BRC to hear disputes in five contexts: (a) international commercial cases where the parties have agreed to litigate in the SPC and the amount in dispute exceeds RMB 300M; (b) international commercial cases referred to the SPC by a high court, with SPC approval; (c) international commercial cases that “have a nationwide significant impact”; (d) “cases” involving applications for interim measures in assistance of arbitration, or to set aside or enforce an ICA award rendered by certain domestic ICA institutions¹⁶⁵; and (e) any other international commercial cases that the SPC

160. Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉
讼法) [Civil Procedure Law of the People’s Republic of China] (promulgated by the
Standing Comm. Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991), art. 240,
1991 vol. 2 XIN FAGUI HUIBIAN 3.

161. Provisions of the Supreme People’s Court on Several Issues Regarding the
Establishment of the International Commercial Court, *supra* note 159, art. 8.4.

162. *Id.* art. 12.

163. I emphasize “rough” and “summary” because many of the expert’s biog-
raphies preclude cleanly isolating them to a particular legal tradition or national
affiliation.

164. See *Expert Directory*, CHINA INT’L COMMERCIAL COURT, [http://cicc.court.gov.
cn/html/1//219/235/237/index.html](http://cicc.court.gov.cn/html/1//219/235/237/index.html) (last visited Oct. 19, 2018).

165. More specifically—or perhaps muddying things further—the BRC may pro-
vide such assistance or enforcement for mediation and ICA “institutions that meet
certain conditions to build up together with the International Commercial Court a dis-
pute resolution platform on which mediation, arbitration, and litigation are efficiently
linked” *Provisions of the Supreme People’s Court on Several Issues Regarding the
Establishment of the International Commercial Court*, *supra* note 159, art. 11.

“considers appropriate.”¹⁶⁶ An “international commercial case,” in turn, is defined as a case in which one of the following conditions is met:

- (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.¹⁶⁷

The BRC’s judgment will bind the parties, and appeals to the SPC will be restricted to those available for final judgments from other Chinese courts, such as if there was an error in the application of the law or new evidence has been found.¹⁶⁸

Perhaps most striking is Article 11’s announcement of the BRC’s ambition to be a “one-stop” international commercial dispute mechanism. In terms more familiar to Silicon Valley than the Hague, it envisions the BRC acting as a “dispute resolution platform” through which “mediation, arbitration, and litigation are efficiently linked.”¹⁶⁹ Several of the Articles outline the powers and tools available to the BRC to realize this ambition—for example, authorizing the BRC to issue a judgment based on a mediation agreement where the parties so request—but the precise contours of what it means (substantively, procedurally, even physically) to be a “one-stop” dispute resolution mechanism remains to be seen. What is clear, at least for the moment, is that the BRC will not be a “stop” for foreign investors seeking relief against their host states under IIL. The ensuing discussion of supply and demand side-considerations will nonetheless continue to draw on the analysis of China’s approaches to IIL above. This is in part because the line between public and private actors, especially in Asia, is often blurry at best, and in part because the BRC’s ambition to be “one-stop” compels consideration of the full ecosystem of dispute resolution mechanisms available to any given party.

2. Demand-side Considerations

China’s announcement of its intention to establish a BRC begets considerable skepticism. The typical response argued that the BRC was a power grab garbed in the rhetoric of dispute resolution—in plain terms, that the BRC would be utilized by Chinese investors to advance Chinese ends. Whether or not this would be as normatively appalling as many of these accounts suggest—or, indeed, whether the BRC would be unique among ICCs in pursuing such a goal—are questions best addressed elsewhere. Here, it is adequate to note that it is unlikely that Chinese authorities would invest such time and effort if the BRC were merely a thin veil for the otherwise naked exercise of China’s hard power over its

166. *Id.* art. 2.

167. *Id.* art. 3.

168. *Id.* arts. 15, 16.

169. *Id.* art. 11.

BRI partners. Demand-side considerations must thus consider why not just Chinese investors but also nonnationals may turn to the BRC for dispute resolution.

Consider the Karot project once more, and assume a dispute develops between the Three Gorges Technology & Economic Development Company and a Pakistani subcontractor. For the sake of exploring the BRC's interaction with IIL, suppose also that the Silk Road Fund raises a claim that Pakistan, ceding to domestic political pressures, has refused to allow the project company to change the stipulated minimum tariff rate.

The BRI is an economic and political initiative, and thus state-owned entities such as Three Gorges Technology and the Silk Road Fund will have to weigh political considerations alongside their commercial interests in dispute resolution. Put differently, both will have to ask whether the political costs of suing the Pakistani entity outweigh whatever benefits may be gained.¹⁷⁰ Setting aside any potential intervention by Chinese authorities, even a strictly commercial calculation may counsel against action before the BRC. The Silk Road Fund may rationally conclude that, as a repeat player in Pakistan, staying in the good graces of the host government will, over the long run, be more profitable than recouping the losses associated with this particular dispute. Three Gorges Technology is also a repeat player, but may not feel the same pressures to preserve relationships with the local Pakistani subcontractor. Either Silk Road or Three Gorges may favor mediation in order to mitigate these concerns. The takeaway here is simply that demand-side considerations for investors may vary depending on their investment horizon and anticipated method of dispute resolution. Providing a full menu of dispute resolution tools may enhance the demand for the BRC's services. However, that possibility is far from guaranteed insofar as "one-stop" may make the BRC particularly susceptible to concerns that dispute resolution techniques are best utilized in isolation—that "synergy," much like "platform," is a term better suited to tech entrepreneurs than commercial litigants.¹⁷¹

170. I refer generically to "benefits" because they should be considered in broad terms. Along with compensation, there is some (less readily quantified) value in protecting "the rule of law" by holding parties that have engaged in a strategic breach to account. However, this value may not be realized in the short run, or indeed by the investor itself. To the extent that such benefits are a nonexcludable public good, we should expect that there will be less incentive than optimal for an individual investor to pursue its claim against an opportunistic counterparty.

171. Recall that the investors in the Karot Project are not all Chinese entities. The World Bank's IFC is also a participant and other multilateral development lenders have been active in BRI projects. Some of these entities, such as the AIIB, have their own internal dispute resolution mechanisms. The demand and supply side considerations for multilateral entities will differ in important ways from those of state-owned and private parties. The ambition of this Section, however, is not to review the calculations of any given party so much as to set out, in broad terms, some relevant considerations. The inner workings and incentives of, for example, the IFC, are beyond this Article's scope.

For foreign plaintiffs, the question will be a value proposition: the Pakistani subcontractor will consider whether the BRC offers a service that is in some manner superior to available alternatives. Holding institutional design considerations constant for the moment (these are better addressed in the “supply” analysis below), the subcontractor is likely to balance fears relating to home-court bias against the potential improvement in enforceability.

We must say “potential” improvements because matters of enforceability are likely to turn on the extent to which the Chinese respondent may invoke sovereign immunity¹⁷² and on where its assets are situated. If the respondent’s assets are located primarily at the site of the project (for example, if the subcontractor sues an SPV such as Karot Power and cannot “pierce” the relevant veils), and if the determination from the BRC court is a judgment rather than an arbitral award, then ICA outside of China would be superior because the entity could then take advantage of the New York Convention. However, if the respondent’s assets are located primarily in China, a judgment from the BRC would likely be more robust. In this regard, China’s 2017 signature of the Hague Choice of Court Convention—which guarantees the recognition and enforcement of judgments from other Contracting States subject to a limited number of exceptions—if and when it enters into force, will substantially improve the enforceability of BRC awards abroad.¹⁷³

3. Supply-side Considerations

Demand-side factors are ultimately beyond the control of the designers of the BRC. It is on the supply-side—which is to say on matters of institutional design—that the weight of China’s past and present policies toward ICA and IIL will be most keenly felt.

172. China’s approach to sovereign immunity in proceedings abroad would most likely become relevant if a foreign claimant sought to enforce an award against a state-owned entity abroad. For present purposes, it is adequate to note that China has yet to join the vast majority of states that have adopted the “restrictive” interpretation of sovereign immunity. In a letter to the Hong Kong Court of Appeal in a case concerning the issue of sovereign immunity, the Commissioner of the Ministry of Foreign Affairs of the PRC argued that “[t]he consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy . . . absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of ‘restrictive immunity.’” *FG Hemisphere Associates v. Democratic Republic of the Congo*, [2010] 2 H.K.C. 487 (C.A.). China’s recent signing of the United Nations Convention on Jurisdictional Immunities of States and Their Property perhaps indicates some movement toward the restrictive approach. However, that treaty has not entered into force and is unlikely to do so for the foreseeable future.

173. Note that article 1 stipulates that the Convention applies in “international cases to exclusive choice of court agreements concluded in civil or commercial matters.” Hague Convention on Choice of Court Agreements art. 1, June 30, 2005, 44 I.L.M. 1294. The BRC would thus not be able to take advantage of the Convention to enhance the enforceability of its judgments until counterparties begin identifying it in their choice-of-forum clauses.

Start with personnel. China's domestic arbitral institutions permit the appointment of foreign arbitrators for foreign and foreign-related proceedings, but this is a far cry from vesting a foreign citizen with the authority to invoke the authority of the state over disputing parties. One of the principal attractions of the SICC and the DIFC Courts is access to a bench whose uniformly sterling credentials are coupled with diverse national affiliations, and it is far from clear that an "Expert Committee" member will be an adequate substitute for a foreign judge. The designers of the BRC will have to determine whether China can countenance the appointment of foreign judges to the BRC—meaning, in practice, amend its laws. It is clear that, at present, China's judiciary lacks the English language skills and international experience of the judges that staff the BRC's model ICCs in Singapore and Dubai.¹⁷⁴

A related tension arises in relation to foreign lawyers. Under CIETAC's rules, for example, "[a] party may be represented by its authorized Chinese and/or foreign representative(s) in handling matters relating to the arbitration."¹⁷⁵ However, the provision appears to conflict with a strict reading of the Law of the People's Republic of China on Lawyers. Article 2 defines a lawyer as a "professional who has acquired a lawyer's practice certificate pursuant to law, and is authorized or designated to provide the parties with legal services."¹⁷⁶ Article 28 stipulates that a lawyer's services include "accepting authorization to participate in mediation or arbitration."¹⁷⁷ Combine the two and it would seem that to participate in mediation or arbitration, one should be a lawyer, and being a lawyer under Article 5 requires, *inter alia*, obtaining a "practice certificate pursuant to law."¹⁷⁸ That practice certificate is only available to individuals that have passed the National Judicial Examination, which is only available to Chinese citizens. In sum, eventually permitting foreign attorneys to represent their clients before the BRC may require either continued tolerance of marginal cases (as in the CIETAC rules) or legislative reforms.¹⁷⁹

174. 2011 marked the first time that a Chinese arbitrator, An Chen, was appointed from ICSID's designated list. Teresa Chang was appointed to another investor-state dispute later that year. Chinese news sources have indicated that developing such experience among domestic judges is a priority, and ICSID announced the election of nine Chinese nationals to its list in September 2017. See Guo, *supra* note 39.

175. China International Economic and Trade Arbitration Commission Arbitration Rules (promulgated by the China Council for the Promotion of Int'l Trade, Nov. 4, 2014, effective Jan. 1, 2015), art. 22, *translated in* CHINA INT'L ECON. & TRADE ARBITRATION COMM'N, <http://www.cietac.org/Uploads/201703/58c0fe0c7337a.pdf>.

176. Zhonghua Renmin Gongheguo Lüshi Fa (中华人民共和国律师法) [Law of the People's Republic of China on Lawyers] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective June 1, 2008), art. 2, 2007 vol. 11 XIN FAGUI HUIBIAN 48.

177. *Id.* art. 28.

178. *Id.* art. 5.

179. Getting into the court is only part of the battle. Once there, foreign attorneys are restricted as to the subject matters they may address. For example, foreign

China's Free Trade Zones adopt a more liberal attitude toward foreign attorneys and law firms,¹⁸⁰ raising a broader conceptual question: to what extent (in personnel matters and elsewhere) do Chinese authorities wish to frame the BRC to serve the adjudicative needs of a special economic zone¹⁸¹—an "island" apart, such as the DIFC Court—versus serving disputants in a manner more akin to the SICC, in which the BRC would deviate only slightly from the legal framework governing the rest of the country? The question may also be posed as whether Chinese officials understand the BRC as a mechanism for domestic reform (via the diffusion of expertise from the BRC's bench in a manner not so far afield of China's policy toward the import of foreign expertise via joint ventures and intellectual property); as a commitment device (in a manner that may remind some of China's accession to the WTO); or simply as a court with a remit limited to the peculiar needs of BRI disputes. Different design decisions follow from each conception, and the Provisions, while perhaps rhetorically gesturing toward the first, leave this an open question.

Turning to procedure, we have seen ICCs that are capable, on the one hand, of joining unwilling third parties and consolidating separate disputes, while on the other hand affording parties the autonomy to select rules of evidence and discovery. China's model ICCs strike a

law firms with representative offices in China may not serve clients on topics relating to "affairs on Chinese law," a phrase that Article 32 of the Provisions of the Ministry of Justice on the Execution of the Regulations on the Administration of Foreign Law Firms' Representative Offices in China defines to include

- (1) Participating in litigation activities within China as lawyers;
- (2) Providing opinions or certifications on the specific issues governed by Chinese laws in contracts, agreements, articles of association or other written documents;
- (3) Providing opinions and certifications on the acts or events governed by Chinese laws;
- (4) Presenting agent opinions or comments on the application of Chinese laws and the facts involving Chinese laws as agents in arbitration activities;
- (5) Handling, on the trustor's behalf, the procedures for registration, alteration, application or putting on record, and other procedures at the government organs of China or other organizations authorized by laws and regulations with administrative authorities.

Sifa Bu Guanyu Zhixing Waiguo Lushi Shiwu Suo Zhu Hua Daibiao Jigou Guanli Tiaoli de Guiding (司法部关于执行外国律师事务所驻华代表机构管理条例的规定) [Provisions of the Ministry of Justice on the Implementation of the Administrative Regulations on the China-based Representative Offices of Foreign Law Firms] (promulgated by the Ministry of Justice, July 4, 2002, effective Sept. 1, 2002), ch. V, 2002 China Law LEXIS 4318.

180. For a recent example in Shanghai, see Zhou Wenting, *Policy to Help Firms Hire Foreign Lawyers*, CHINA DAILY (Mar. 29, 2018, 7:24 AM), <http://www.chinadaily.com.cn/a/201803/29/WS5abc376aa3105cdcf6514f46.html> [<https://perma.cc/9RTY-VXRU>].

181. Implying that the BRI is likewise conceived as a special economic zone of continental proportions. Taken seriously, this would suggest that China understood its jurisdictional reach to extend to Eastern Europe and North Africa. Such a view would be quite inconsistent with China's traditionally statist orientation and fealty to nonintervention norms in international affairs.

different balance between party autonomy and state control than that taken in mediation, arbitration, or litigation—a balance that appears to be attractive to disputants in complex commercial cases akin to those that will arise in BRI projects. However, the DIFC Courts offer persuasive evidence of the ructions that may follow if the BRC’s procedural rules depart too substantially from other domestic fora. The balance is thus a fine one. Too great a departure from prevailing norms in other Chinese courts may lead to jurisdictional competition among judges, procedural gaming among disputants,¹⁸² and a general relationship of competition rather than complementarity. Too great a fealty to these prevailing norms and the BRC is redundant.

China’s approach to ICA and IIL thus far indicates a willingness to change, but not necessarily to experiment. Indeed, neither the sociological nor the political-economy perspectives offers a compelling account of, nor leads one to expect, substantial legal innovation by Chinese authorities. Yet to be effective, the BRC court and its designers will have to do just that. The BRC is likely to fail if its designers treat the SICC and DIFC Courts’ procedural rules as templates for replication rather than models to reshape.

If history is any guide, the choice of which “Chinese characteristics” to retain and which to dispense with will be a function of both internal and external factors. To be more precise, procedural rules facilitating “med-arb” techniques will have to be weighed against the finality requisite to afford parties access to appellate review; those allowing Chairpersons of arbitral institutions to select the presiding arbitrator without respect to the parties’ nationalities will have to be weighed against the need for the institution to rebut fears of pro-China bias.

Finally, and at the most general level, consider the design decision concerning the nature of the public good that China aims to provide. Commentary by state officials suggests two potential models premised on different understandings of the relevant public. Under the first model, the BRC will serve a public that corresponds with those actors engaged in projects on the BRI. The constituents of that public are therefore not strictly Chinese, but the institution remains fundamentally oriented toward Chinese investors’ rather than foreign parties’ claims.

The design decisions that follow from this first model include the default language of the proceedings, the extent to which the court is funded via fees from the parties or from the government, and whether any appellate review is available in the People’s Courts. The more the BRC’s designers privilege the interests of Chinese investors, the more we should expect to find Mandarin used in its proceedings (check), state officials to exercise control over its administration (check), and appellate review to occur outside the confines of the BRC (only in exceptional circumstances).

182. Which we might construe as private international law’s counterpart to *Erie* concerns.

Under this model, the BRC is an institutional response to an international dispute settlement system that has historically left Chinese parties at a disadvantage. Western laws, Western languages, and Western attorneys confront Chinese investors seeking to resolve disputes through international commercial mediation, arbitration, or litigation today. As the *Global Times* summarizes, "the existing dispute settlement regime cannot adequately protect the legitimate interests of Chinese enterprises overseas" ¹⁸³ This first model of the BRC would provide an alternative to the existing regime, and would not mark a substantial change from China's previous approaches to ICA and IIL. The ambition would not be to reform the status quo so much as to identify the features least and most accommodating to Chinese interests, and focus policy development on the former.

Those ascribing to the second model understand the relevant public to transcend the borders of the BRI. This is an altogether more ambitious conception of the BRC which posits the relevant public to be all those seeking to upend the prevailing structures of international commercial dispute resolution. The BRC would thus not seek to reform so much as reconstitute the existing system in a manner that better reflects the needs and power dynamics of the twenty-first century. The second model aligns with analyses that have interpreted the recent establishment of the AIIB not as a complement to the World Bank but rather a substitute; that argue China's ambition is not to reform the Bretton Woods institutions so much as establish "Beijing Woods" alternatives. The design decisions following from this model include multilingual proceedings (not yet), substantial independence for the BRC from state control (not yet), and an appellate mechanism within the BRC (not yet). It would constitute a substantial break from the measured approach that China has adopted toward ICA and IIL policies in the past.

Sociological and political-economy perspectives can explicate either model, and are thus indeterminate. For a sociological analyst, the first model may represent a tempered response to an international system in which China views itself as taker rather than maker of international norms. It must accommodate those norms to China's preferred methods of dispute resolution, but not displace them. Yet sociological accounts could just as readily explicate the second, more globalist model as a twenty-first century expression of a latent (but never extinguished) "middle kingdom" understanding of China's role in the world. ¹⁸⁴

183. He Quanlin & Chen Xiaochen, *Belt and Road Requires New Global Dispute Regime*, GLOBAL TIMES (Feb. 1, 2018, 10:43 PM), <http://www.globaltimes.cn/content/1087858.shtml> [<https://perma.cc/9WWH-S367>].

184. See Paul Krugman, *Belts, Roads, and Strategic Trade Policy*, N.Y. TIMES (May 20, 2017, 10:59 AM), <https://krugman.blogs.nytimes.com/2017/05/20/belts-roads-and-strategic-trade-policy> [<https://perma.cc/FRX2-F4NA>] ("Good highways across central Asia and down to South Asia could change that, giving China a new centrality in the world's economic geography; you might almost call it the Middle Kingdom").

Both these accounts are “inward-out” and consistent with the two models of the BRC.

Political-economy analyses can explain the first model as a rational response to the development of ICCs in nearby states such as Singapore and Dubai. To the extent that China’s investors seek ICC services, China would be wise to offer a local option. Alternatively, a political-economy account could approach the second model as reflecting China’s recognition that reforming the leading multilateral institutions from within is impossible, or at least impossible absent the development of a viable competitor. The causal moves here are outward-in, and as indeterminate with respect to the two models of the BRC as the sociological approach.

The BRC’s final shape will not offer conclusive evidence for or against either of these models. But it will offer signs. For instance, if the BRC ultimately allows English-language proceedings, it will suggest that the BRC’s designers have adopted a more ambitious (second model) understanding of the BRC’s purpose and place in the world. A Mandarin mandate would point toward a more restrained (first model) alternative. And the current approach, allowing only the submission of evidence in English, perhaps appropriately suggests that we now sit somewhere in-between. The indeterminacy of the sociological and political-economy accounts also offers a more important lesson: if we are to appreciate the rationales motivating and the implications of the BRC designers’ decisions, we will need analytical methods as inclined to proceed from China outward as from the international arena inward.

CONCLUSION

In March 2015, the Ministries of Commerce and Foreign Affairs published a document titled “Visions and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road.”¹⁸⁵ It began with a “vision[.]” of the past: “For thousands of years, the Silk Road Spirit—‘peace and cooperation, openness and inclusiveness, mutual learning and mutual benefit’—has been passed from generation to generation, promoted the progress of human civilization, and contributed greatly to the prosperity and development of the countries along the Silk Road”; as well as “actions” for the future: “Reflecting the common ideals and pursuit of human societies, [the BRI] is a positive endeavor to seek new models of international cooperation and global governance, and will inject new positive energy into world peace and development.”

The BRC aspires to reconcile such lofty rhetoric with the mundane fact that peace and cooperation do not always prevail in international commerce. The BRC will be an ICC with Chinese characteristics, and this Article has argued that understanding it requires bridging the divide between sociological accounts focusing on domestic norms and

185. See *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, *supra* note 17.

political-economy perspectives disposed to explain China's behavior in light of factors from abroad.

The historical development of China's international commercial dispute resolution policies, and the ICCs on which the BRC is modelled, suggest a number of tensions that the institution's designers will have to reconcile. This Article makes no claims regarding the right or best choices. Instead, it aims to show that using *all* of the analytical tools available will aid in appreciating both the motivations for and implications of whatever choices the BRC's designers make.

Looking ahead, and toward the broader debate over "China's rise," Li Zhaojie is surely right that just as there is no such thing as "Chinese mathematics," it makes little sense to refer to "Chinese international law" — "there can only be a Chinese theory and practice" of international law, of mathematics, or of international dispute resolution.¹⁸⁶ Another way of making the point: the BRC will be an ICC with Chinese characteristics. This Article offers a first attempt to understand what that means.

186. Li Zhaojie, *Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order*, 5 SING. J. INT'L & COMP. L. 314, 326 (2001).

