The New Silk Road: The Chinese Supreme People's Court's "International Commercial Court" and Opportunities for Alternative Dispute Resolution

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I. INTRODUCTION

It is important for the Chinese International Commercial Courts to function in a way that ensures their reliability outside of the contentious politics of the Belt and Road Initiative. Unless the arbitration procedures are fair and consistent, corporations will be wary of engaging with them. Uncertainty does not factor well into business decisions, and the courts must offer the parties consistent outcomes in order to encourage their use. Although the creation of the China International Commercial Courts is a positive step towards better handling of international disputes, private parties will continue to be wary due to surrounding political and economic uncertainties.

This article will discuss this topic as follows. Section II will examine the background of the Belt and Road Initiative. Next, Section III will examine the Chinese arbitration system. Further, Section IV will discuss the model of the Chinese International Commercial Courts. Finally, Section V will examine the political impact, effect of increased inter-Asian reliance, and creation of trust among Belt and Road parties.

II. BACKGROUND

On June 29, 2018, the Supreme People's Court of the People's Republic of China opened two new "International Commercial Court[s]."[1] The Supreme People's Court chose Xi'an, the beginning of the ancient Silk Road, and Shenzen, a tech center that connects Hong Kong with China's mainland, for the location of the first two.[2] The establishment of the courts aims to assist the implementation of President Xi Jinping's "Belt and Road Initiative," a wide reaching plan to fund infrastructure and promote trade in Eurasia.[3] The courts contain many alternative dispute resolution features and are designed to be a one-stop shop for resolving disputes that arise during the implementation of the Belt and Road initiative.[4]

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[1] Sun Hang, *The First International Commercial Court and the Second International Commercial Court of the Supreme People's Court Started to Operate Officially*, PEOPLE'S CT. DAILY (June 29, 2018), http://cicc.court.gov.cn/html/1/219/208/209/814.html.

[2] *Id.*

[3] Nicolas Groffman, *Meet the 8 Chinese Judges Who'll Sit on Belt and Road Cases*, S. CHINA MORNING POST (Sept. 25, 2018), https://www.scmp.com/week-asia/economics/article/2165567/meet-8-chinese-judges-wholl-sit-belt-and-road-cases.

[4] Matthew S. Erie, *The China International Commercial Court: Prospects for Dispute Resolution for the "Belt and Road Initiative,"* 22 AM. SOC'Y INT'L L. INSIGHTS 11 (2018), https://www.asil.org/insights/volume/22/issue/11/china-international-commercial-court-prospects-dispute-resolution-belt.

On a theoretical level, the courts are designed to follow Xi Jinping's "Thought on Socialism with Chinese Characteristics for a New Era."[5] The Belt and Road Initiative seeks to continue the mission of Xi Jinping and was enshrined in the Chinese Constitution along with the elimination of term limits for Xi Jinping.[6] Chinese officials have gone so far as to label the project as "building a community with a shared future for mankind."[7] The project is massive and involves upwards of sixty countries that account for two-thirds of the entire population on Earth.[8] Estimates of total costs are an astounding USD$1.2-$1.3 trillion.[9] However, questions remain as to how exactly the new court will function in order to achieve these goals.[10] With the incomplete nature of the court in mind, it is imperative to understand its impact on global economic relationships. United States Secretary of State Mike Pompeo has engaged in exercises of soft power, recently warning Panama and other nations to not engage with China on Belt and Road Initiative projects and the loans that accompany them.[11] Recently, the U.S.- China Economic and Security Review Commission reported findings regarding national security implications of U.S.-China trade relations and recommended to Congress the creation of a fund to assist countries that China is seeking to engage with.[12] As the United States mulls potential action in the region, the innerworkings of the

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[5] Hang, *supra* note 1.

[6] Lily Kuo & Niko Kommenda, *What is China's Belt and Road Initiative?*, THE GUARDIAN (July 30, 2018), https://www.theguardian.com/cities/ng-interactive/2018/jul/30/what-china-belt-road-initiative-silk-road-explainer.

[7] *Facts Show B&R Initiative Serves Common Interests of Humanity: Senior Chinese Official*, XINHUA (Feb. 17, 2019), http://www.xinhuanet.com/english/2019-02/17/c_137827441.htm, *available at* LEXIS, News Library, <Facts show B&R Initiative serves common interests of humanity_ senior Chinese official> File.

[8] Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN REL. (Feb. 21, 2019), https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative.

[9] *Id.*

[10] *See* Kuo & Kommenda, *supra* note 6.

[11] Owen Churchill, *Mike Pompeo Warns Panama and Other Nations About Accepting China's 'Belt and Road' Loans*, S. CHINA MORNING POST (Oct. 20, 2018), https://www.scmp.com/news/china/diplomacy/article/2169449/mike-pompeo-warns-panama-and-other-nations-about-accepting. *See also* Joseph S. Nye, Jr., *Soft Power: The Means to Success in World Politics*, FOREIGN AFF. (May/June 2004), https://www.foreignaffairs.com/reviews/capsule-review/2004-05-01/soft-power-means-success-world-politics (defining "soft power" as "the ability of a country to persuade others to do what it wants without force or coercion").

[12] Jane Lanhee Lee, *U.S. Should Create Fund to Counter China's Belt and Road Push: Commission*, REUTERS (Nov. 14, 2018), https://www.reuters.com/article/us-usa-china-roads/u-s-should-create-fund-to-counter-chinas-belt-and-road-push-commission-idUSKCN1NJ0E1.

Belt and Road Initiative, like the Chinese International Commercial Courts, will become more relevant and their effects more studied.

III. CHINESE ARBITRATION

Before beginning a discussion of the Chinese International Commercial Courts, it is important to understand the basics of arbitration in China. China is a signatory party of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[13] China has its own internal arbitration system, referred to as "The Arbitration Law of the People's Republic of China," (hereinafter ALPRC) which has been developing since 1994.[14] While China does have a domestic arbitration system designed to handle internal matters, the focus of this article is on cross-border arbitration, or international commercial arbitration, which operates in a different regime.[15] There is no ad hoc arbitration in China, and the ALPRC only accounts for institutional arbitration.[16] This means that the only bodies that may conduct arbitration in China are permanent arbitration institutions and not temporary arbitration tribunals often set up through private contracts.[17] Further, the ALPRC does not recognize amiable arbitration awards (ones agreed upon by the parties outside of the law), and thus all awards are made by law.[18] China does enforce arbitration awards given by ad hoc arbitration in foreign jurisdictions by virtue of being a party to the New York Convention.[19]

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[13] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, 68.

[14] Monika Prusinowska, *China as a Global Arbitration Player? Recent Developments of Chinese Arbitration System and Directions for Further Changes*, 10 TSINGHUA CHINA L. REV. 33, 35 (2017).

[15] Weigong Xu, *Definition of Arbitration in China*, 30 J.L. & COM. 107, 108–09 (2012).

[16] *Id.* at 109. There is some debate as to this conclusion, as there is no explicit ban on ad hoc arbitration. However, Article 18 of the ALPRC requires the "designation of an arbitration commission," which in turn makes arbitration generally institutional. Jerry Zhang & Thomas Manson, *International Commercial Arbitration in China: CIETAC*, 74 ADVOCATE (VANCOUVER) 551, 552 (2016).

[17] Xu, *supra* note 15 at 109. For example, some of these bodies are the Beijing Arbitration Commission, Wuhan Arbitration Commission, Maritime Arbitration Commission, the International Arbitration Court of the International Chamber of Commerce, and those now attached to the CICC, which will be discussed in this article.

[18] *Id.* at 110.

[19] Liu Xiaohong & Yang Ling, *Redemption of Chinese Arbitration? – Comments on the Civil Procedure Law (2012) and Free Trade Zone Arbitration Rules (2014)*, 13 CHINESE J. INT'L L. 653, 659 (2014) ("As a signatory to the New York Convention, China

The ALPRC has rigid requirements for an arbitration agreement to be valid, requiring that an agreement include: (1) an expression of an intent to apply for arbitration, (2) matters for arbitration, and (3) a designated arbitration commission.[20] The third requirement, a designated arbitration commission, is problematic for corporations that do business in multiple foreign nations, are unaware of the specific rules in China, and simply put in place catch-alls in their contracts like "ICC rules shall apply."[21] Writing is the only valid form of arbitration agreement.[22] The applicable law shall be the one chosen by the parties to the dispute, and if there is no choice, the law of the place of arbitration.[23]

In general, the jurisdictional element requires a valid arbitration agreement to appear in front of a permanent arbitral institution, as determined by either the tribunal or commission itself.[24] The validity of an arbitration agreement is determined according to the ALPRC.[25] The process for examining an arbitration agreement depends on where a party submitted the case and at what stage of proceedings the body that has the case is.[26] According to Article 26 of the ALPRC, if one party submits the dispute to a court and the other to an arbitrator, the court shall dismiss the case and allow the arbitrator to handle unless the arbitration agreement is null and void.[27] Further, if the court accepts the case and the other party does not raise objection, the arbitration agreement is deemed forfeited, and the court retains jurisdiction.[28] If both parties are seeking a decision on the enforceability of the arbitration agreement, one at the court and one to an arbitration commission, the court shall dismiss the case if the arbitration commission has already accepted the case and made a decision.[29] If the arbitration commission has not already made

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has made only commercial affair and reciprocity reservations. By virtue of the provisions of the Civil Procedure Law of China, foreign arbitral awards that can be recognized and enforced in China include both *ad hoc* arbitral awards made overseas and arbitral awards made by foreign arbitration institutions.").

[20] Li Chen, *The New Progress in Chinese Arbitration Law*, 6 FRONTIERS L. CHINA 447, 452 (2011).

[21] *See id.* (discussing a case between a German company and a Chinese company where the arbitration agreement simply stated, "ICC rules Shanghai shall apply," and the court did not find it to be in accordance with the ALPRC).

[22] *Id.* at 455.

[23] *Id.*

[24] Taroh Inoue, *Introduction to International Commercial Arbitration in China*, 36 H.K. L.J. 171, 177-79 (2006).

[25] Chen, *supra* note 20, at 450–51.

[26] *Id.* at 451.

[27] *Id.*

[28] *Id.*

[29] *Id.*

a decision, the court shall accept the case and instruct the arbitration commission to suspend.[30]

A Chinese arbitral proceeding is made up of a panel, and the parties do not have free choice for arbitrators outside of this panel, so most arbitrators end up being Chinese nationals.[31] When local Chinese law is the subject of the dispute, foreign attorneys are not able to represent their clients in the arbitration and they must hire a local law firm.[32]

In 2012 and 2014, China made changes to its civil procedure and arbitration rules that symbolized an increased favoritism towards arbitration.[33] As symbolic evidence of this shift, Chinese criminal law now provides for up to three years of imprisonment if a person with arbitration authority "renders an award not in strict accordance with the applicable law."[34] Issues remain: there are still high formal requirements; "judicial review of domestic arbitral awards is still too rigorous"; and there is still discrimination between domestic and foreign-related arbitration.[35] In an effort to help bridge the gap between domestic and international arbitration, China went so far as to open an office of the Chinese International Economic and Trade Arbitration Commission (hereinafter CIETAC), the largest arbitral bodies in China, in Vancouver.[36] The hope in opening foreign offices is that more businesses will include arbitration agreements specifying the CIETAC as the arbitrator, creating incentives for Chinese companies to do business in Vancouver.[37]

Some of these reforms directly resulted from the Belt and Road Initiative.[38] In 2017, the Supreme People's Court clarified the scope of judicial review cases, and decided that all judicial review cases shall be handled by a special trial bench of each competent court, expanding the prior reporting mechanism and further clarifying the applicable law provisions.[39] Of

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[30] *Id.*

[31] Jingzhou Tao, *Salient Issues in Arbitration in China*, 27 AM. U. INT'L L. REV. 807, 814–16 (2012).

[32] *Id.* at 817.

[33] Xiaohong & Ling, *supra* note 19, at 661.

[34] *Id.* at 657. The sentence can range from three to seven years depending upon the severity of the infraction.

[35] *Id.* at 661.

[36] Chuck Chiang, *Chinese arbitration organization to open Vancouver branch*, RICHMOND NEWS (Aug. 15, 2018), https://www.richmond-news.com/business/chinese-arbitration-organization-to-open-vancouver-branch-1.23401131.

[37] *Id.*

[38] Jingzhou Tao & Mariana Zhong, *China's 2017 Reform of its Arbitration-Related Court Review Mechanism with Focus on Improving Chinese Courts' Prior-Reporting System*, 35 J. INT'L ARB. 371, 372 (2018).

[39] *Id.* at 374–78.

particular importance is the new prior reporting system, which requires lower courts to automatically report their findings and reasoning to a higher court if they do not enforce an arbitration award.[40] The aim of expanding prior reporting was to avoid inconsistent enforcement and reward, and to give an additional remedy to foreign owned or invested companies in the Chinese court system.[41] The reform gives foreign owned or invested companies the opportunity to have their case heard all the way up to the Supreme People's Court, whereas domestic arbitration cases are only guaranteed review up to The Higher People's Court.[42] This disparity represents a newfound focus on foreign investment in the Belt and Road era and a recognition by the Chinese government that if foreign investment is going to increase, there will need to be an effective and impartial alternative dispute resolution system. This interest mirrors the mission of the Chinese International Commercial Court and its efforts to be friendlier to foreign companies.

IV. THE MODEL OF THE CHINESE INTERNATIONAL COMMERCIAL COURT

The Chinese International Commercial Court is different from other international courts and tribunals in that it functions within the originating country's domestic legal system.[43] The court has very broad jurisdiction. The court can claim jurisdiction in five situations: (1) "first instance international commercial cases that have a significant nationwide impact"; (2) "first instance international commercial cases which are subject to the higher people's courts who nonetheless consider that the cases should be tried by the Supreme People's court for which permission has been obtained"; (3) first instance international commercial cases in which the parties have chosen the jurisdiction of the Supreme People's court in accordance with Article 34 of the Civil Procedure Law with a controversy amount of at least 300,000,000 RMB (Chinese yuan); (4) cases involving applications for preservation measures in arbitration, or for setting aside or enforcing international commercial arbitration awards according to Article 14 of the Civil Code; and (5) other international commercial cases that the Supreme People's Court considers

[40] *Id.* at 376.

[41] *Id.*

[42] *Id.*

[43] Erie, *supra* note 4 ("[T]he CICC is less an 'international commercial court' . . . and more a court of limited jurisdiction built within the existing hierarchy of PRC courts.").

appropriate for the International Commercial Court.[44] The Supreme People's Court, therefore, appears to have unlimited authority to refer cases it feels appropriate to the court as long as the case meets the definition of "international commercial case," discussed below.

The Supreme People's Court defines an "international commercial case" as:

> (1) a case in which "one or both parties are foreigners, stateless persons, foreign enterprises or other organizations;" (2) "one or both parties have their habitual residency outside the territory of the People's Republic of China;" (3) "a case with legal facts that create, change, or terminate the commercial relationship which have taken place outside of the territory of the People's Republic of China;" and (4) if "the subject matter in dispute is outside the territory of the People's Republic of China."[45]

It is unclear whether entities are able to opt-out of jurisdiction in forum selection clauses, or even whether entities must state in their contracts their desire for Chinese International Commercial Court jurisdiction.[46]

The court utilizes a diverse array of dispute resolution mechanisms to resolve international commercial disputes, which include mediation, arbitration, and litigation.[47] The judges on the court are all Chinese judges selected by the Supreme People's Court.[48] According to Supreme Court Regulations, the judges are to be familiar with international matters and

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[44] *A Brief Introduction of China International Commercial Court,* China International Commercial Court (June 28, 2018), http://cicc.court.gov.cn/html/1/219/193/195/index.html. For original Chinese legislation, see *Zui gao ren min fa yuan guan yu she li guo ji shang shi fa ting ruo gan we ti de gui ding* [Supreme People's Court Regulations on Certain Issues in Establishing an International Commercial Court] (promulgated by Sup. People's Ct. Trial Comm., June 25, 2018, effective July 1, 2018), http://www.court.gov.cn/zixun-xiangqing-104602.html [hereinafter *Court Regulations*].

[45] *A Brief Introduction of China International Commercial Court, supra* note 44.

[46] Erie, *supra* note 4.

[47] *Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions,* China International Commercial Court (June 27, 2018), http://cicc.court.gov.cn/html/1/219/208/210/819.html.

[48] Court Regulations, *supra* note 44.

proficient in English and Mandarin.[49] The judges sit on a panel of three or more judges, in a discussion style, with the majority ruling and the opportunity for a minority opinion.[50] The decision is binding, and the Chinese International Commercial Court can instruct a lower court to follow its judgement.[51]

On December 29, 2018, the First Chinese International Commercial Court announced it accepted multiple cases.[52] The first case is an action for unjust enrichment between Asia Optical Company (亚洲光学股份有限公司), Sintai Optical (东莞信泰光学有限公司), and Fuji Film Company (富士胶片株式会社).[53] Next, the court accepted a products liability case between Guangdong Ben Cao Herb Industry Company (广东本草药业集团有限公司) and an Italian pharmaceuticals company.[54] The Second Chinese International Commercial Court accepted a case regarding shareholder profit distribution of Red Bull Vitamin Energy Company and Inter-Bio Pharmaceuticals Holdings Company (英特生物制药控股有限公司). In addition, the court accepted shareholder actions related to damaging of various companies' interests.[55] The court also accepted numerous applications for the consideration of the validity of arbitration agreements.[56]

As the first string of cases illustrates, a surprising number of internal corporate disputes are being put in front of the court. The court has not put forth its reasoning for accepting these cases, merely stating that they were accepted under Article 20 and Article 38 of the Civil Procedure Law of the People's Republic of China, as well as Article 2 of Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court.[57] Article 20 states that "A higher people's

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[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *The International Commercial Court of the Supreme Court has accepted a number of cases concerning international commercial disputes*, China Int'l Commercial Court, 最高法院国际商事法庭已受理一批国际商事纠纷案件 (Dec. 29, 2018), http://cicc.court.gov.cn/html/1/218/149/192/1150.html.

[53] *Id.*

[54] *Id.*

[55] *Id.* For an interesting discussion on shareholder derivative suits in China *see* Hui Huang, *The Statutory Derivative Action in China: Critical Analysis and Recommendations for Reform*, 4 BERKELEY BUS. L.J. 227 (2007).

[56] China Int'l Commercial Court, *supra* note 52.

[57] China Int'l Commercial Court, *The China International Commercial Court of the Supreme People's Court of China has accepted a Number of Cases concerning International Commercial Disputes* (Dec. 29, 2018), http://cicc.court.gov.cn/html/1/219/208/210/1152.html.

courts shall have jurisdiction as the court of first instance over civil cases that have major impacts on the areas of its jurisdiction."[58] Article 38 states that:

> If a party rejects to the jurisdiction of his case after the case was accepted by a people's court, the party shall raise the rejection during the period for submitting briefs. The people's court shall examine such objection. If the objection is tenable, the people's court shall rule, that the case be transferred to the people's court that does have jurisdiction over the case; if the rejection is untenable, the people's court shall overrule the objection.[59]

Article 2 of Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court lays out the jurisdiction requirements previously examined in this article. Accepting cases that deal with internal corporate matters mirrors the broad jurisdiction the court claims and the uncertainty that accompanies broad jurisdiction. As Susan Finder, a member of the international expert committee of the China International Commercial Court, notes, none of the first cases were specifically related to the Belt and Road Initiative.[60]

Additionally, the court has now clarified its use of international experts during mediation. Members of the expert committee can: (1) preside over mediations; (2) provide an advisory opinion on specialized legal issues such as international treaties, international commercial rules, finding and applying foreign laws involved in cases heard by the International Commercial Court and the People's Courts at all levels; (3) provide advice and suggestions on the development of the International Commercial Court; (4) provide advice and suggestions on the formulation of judicial interpretations and judicial policies of the Supreme People's Court; and (5) other matters entrusted by the

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[58] WEI LUO, THE CIVIL PROCEDURE LAW AND COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA 41 (2006).

[59] *Id.* at 47.

[60] Susan Finder, *China International Commercial Court starts operating*, SUPREME PEOPLE'S COURT MONITOR (Jan. 14, 2019), https://supremepeoplescourtmonitor.com/2019/01/14/china-international-commercial-court-starts-operating/.

International Commercial Court.[61] Allowing foreign experts to preside over mediations is likely an effort by the CICC to calm international parties' nerves over arbitration in a foreign environment. It is, however, unclear whether members of the committee feel comfortable in this task, as many come from nations where being a mediator and presiding over mediations are separate professions.[62] The second use, providing advisory opinions, vastly expands the role of the foreign expert by allowing them to issue opinions to courts of *all levels*.[63] There is no indication as to the weight these advisory opinions will be given, how the expert will get to China (the rules allow a party to request an expert to appear and explain their opinion if they choose to do so), whether there is any recourse for incorrect or negligently made opinions, or how the opinion will be translated.[64] Some experts posit that the allowance of foreign experts is a symbolic acceptance by the Supreme People's Court that domestic judges and arbitrators have significant problems ascertaining foreign law.[65]

Overall, the structure of the court mirrors the Chinese government's interest in making sure Belt and Road Initiative related disputes are settled efficiently and fairly. Although there are still a significant number of unknowns surrounding the court's procedural framework, the allowance of foreign experts represents a serious effort by the Supreme People's Court to eliminate bias, favoritism, and distrust. In addition, the way in which the Supreme People's Court issued the procedural rules (as rules rather than judicial interpretation) allows the court to re-examine the procedure once the court gains more experience and hears criticism.[66] This important distinction again shows the determination of the court to function in a way that encourages parties to both use and assist in the development of the new court system.

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[61] China Int'l Commercial Court, *Notice of the General Office of the Supreme People's Court on Releasing "Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For trial implementation)"* (Dec. 5, 2018), http://cicc.court.gov.cn/html/1/219/208/210/1146.html.

[62] Finder, *supra* note 60.

[63] *Id.*

[64] *Id.*

[65] *Id.* For an additional discussion on the trouble Chinese judges have with foreign law, see Susan Finder, *Supreme People's Court & foreign-related disputes*, SUPREME PEOPLE'S COURT MONITOR (March 11, 2018), https://supremepeoplescourtmonitor.com/2017/03/11/supreme-peoples-court-foreign-related-disputes/.

[66] Susan Finder, *Some comments on the China International Commercial Court rules*, SUPREME PEOPLE'S COURT MONITOR (Feb. 11, 2019), https://supremepeoplescourtmonitor.com/2019/02/11/some-comments-on-the-china-international-commercial-court-rules/.

V. POLITICAL IMPACT

The establishment of the China International Commercial Court has many political implications for the world. As an extension of the "Belt and Road" initiative, it fits into the ruling Communist Party of China's overall plan for the economy. Retired Chinese general, Qiao Liang, told a crowd at a Chinese military school that the Belt and Road Initiative was a direct response to U.S. policy, and a "hedge strategy against the eastward move of the U.S."[67] For some, this initiative operates like a "trojan horse," concealing military expansion and Chinese influence under the guise of infrastructure investment.[68] The United States Secretary of State, Mike Pompeo, warned Asian nations that accepting infrastructure loans from China (a part of the Belt and Road Initiative) carries with it the risk of becoming reliant on China.[69] In fact, the United States is countering Chinese state run ventures' investment in the region with their own, through a State Department program entitled "Indo-Pacific Economic Vision." [70] Through increasing cooperative investment programs in the Indo-Pacific, the U.S. seeks to destabilize China's efforts to exercise control through the holding of debt in the region.[71] Japan has matched the U.S. State Department's commitment for investment in the region with its own $200 billion initiative entitled the Partnership for Quality Infrastructure Initiative.[72] These plans embody the U.S. and its allies' determination to combat Chinese influence in Southeast Asia.

There is not universal acceptance of the current U.S. strategy. Colin Grabow, policy analyst at the CATO Institute, argues that growing Chinese globalization is a positive result for the United States.[73] Grabow reasons that the alternative is an isolated, "economically flailing" China, as it was pre-reform of the 1970s.[74] His solution is to rejoin the Trans-Pacific Partnership, which President Trump pulled the U.S. out of, or enter into an even more ambitious free-trade agreement with China.[75] The issue is further complicated by growing tensions between the United States and the European Union. Germany has remained receptive to the idea of global Chinese investment, and

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[67] Chatzky & McBride, *supra* note 8.

[68] *Id.*

[69] Churchill, *supra* note 11.

[70] *Id.*

[71] *Id.*

[72] Chatzky & McBride, *supra* note 8.

[73] Colin Grabow, *Responsible Stakeholders: Why the United States Should Welcome China's Economic Leadership*, 821 CATO INST. 1 (2017), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-821-updated-3.pdf.

[74] *Id.*

[75] *Id.* at 8.

there are reports that Chancellor Angela Merkel plans to advocate for further economic cooperation with China when Germany holds the EU presidency in 2020.[76] In addition, according to a Pew Research poll, respondents in France and Germany were two to three times more likely to trust the leaders of Russia or China in comparison to President Donald Trump.[77] United States Vice President Mike Pence responded "[w]e cannot ensure the defense of the West if our allies grow dependent on the East."[78] Southeast Asian countries are keenly aware of a lack of U.S. influence in the region, and according to a survey by ISEAS-Yusof Ishak Institute in Singapore, 60% of Southeast Asian respondents believe U.S. influence in the region has shrunk in the past year.[79]

Debt and loan complications create an additional obstacle in the way of the Belt and Road Initiative's success. Debt is not only a problem for Belt and Road projects directly funded by the government, as state owned enterprises, like construction and engineering contractors, face their own increasing indebtedness.[80] According to a study by the *Financial Times*:

> The data show that in terms of total debt to ebitda (earnings before interest, tax, depreciation and amortisation), a common measure of a company's ability to repay its debts, the top 10 Chinese contractors had an average multiple of 9.2 times, signifying extreme indebtedness. Their non-Chinese counterparts had an average multiple of 2.4 times.[81]

This evidence shows that together with debt trapped countries, Chinese companies are themselves at risk of default. However, because the companies are state owned, they operate without risk of bankruptcy, running up massive

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[76] Simon Shuster, *Russia and China Are Driving a Wedge Between Estranged U.S. and Europe*, TIME (Feb. 18, 2019), http://time.com/5531770/munich-security-conference-mike-pence-angela-merkel-china-russia/.

[77] *Id.*

[78] *Id.*

[79] Jack Kim & Simon Lewis, *Southeast Asia Wary of China's Belt and Road Project, Skeptical of U.S.: Survey*, REUTERS (Jan. 6, 2019, 11:09 AM), https://www.reuters.com/article/us-asean-singapore/southeast-asia-wary-of-chinas-belt-and-road-project-skeptical-of-u-s-survey-idUSKCN1P00GP.

[80] James Kynge, *China's Belt and Road Projects Drive Overseas Debt Fears*, FIN. TIMES (Aug. 7, 2018), https://www.ft.com/content/e7a08b54-9554-11e8-b747-fb1e803ee64e.

[81] *Id.*

debt.[82] In fact, the state-run companies that bail out other indebted companies are often more indebted than the companies they purchase.[83] The system operates without checks and balances, which leads to a "borrowing binge" as companies race to finance various government projects, layering debt on more debt.[84] As evidence of the increase in borrowing, China opened both a state-funded investment fund, known as the Silk Road Fund, and a state-owned investment bank, known as the Asian Infrastructure and Investment Bank (AIIB).[85] Neither the United States nor Japan participate in the AIIB, which parties see as an alternative to the World Bank and International Monetary Fund.[86] In addition, due to the difficulty in examining the underpinnings of Belt and Road Initiative projects, Chinese companies have a competitive advantage that encourages them to make riskier investments.[87] McKinsey, a world-renowned consulting firm, found that "[g]lobal debt in these years has grown by $57 trillion, raising the ratio of debt to GDP by 17 percentage points . . . . That poses new risks to financial stability and may undermine global economic growth."[88] Risky Belt and Road Initiative lending has already caused some global financial strife, as Pakistan sought billions of dollars in loans from Saudi Arabia, the International Monetary Fund, and China, as it fought a growing balance of payments crisis.[89] Even more worrisome is a report by Fitch Ratings, one of the "big three" credit rating agencies, stating that:

> Fitch has doubts that China's banks can identify profitable projects and manage risks better than international commercial banks and multilateral lenders with decades of

[82] *Id.*

[83] *Id.*

[84] Enda Curran, *China's Debt Bomb*, BLOOMBERG (Sept. 17, 2018, 2:09 AM), https://www.bloomberg.com/quicktake/chinas-debt-bomb ("It's been called a mountain, a horror movie, a bomb and a treadmill to hell.").

[85] SCMP Reporter, *Explained: Belt and Road Initiative*, S. CHINA MORNING POST (Feb. 21, 2019), https://www.scmp.com/week-asia/explained/article/2187162/explained-belt-and-road-initiative, *available at* LEXIS, News Library, Explained_ Belt and Road Initiative File.

[86] *Id.*

[87] Jonathan E. Hillman, Commentary, *Corruption Flows Along China's Belt and Road*, CSIS (Jan. 18, 2019), https://www.csis.org/analysis/corruption-flows-along-chinas-belt-and-road.

[88] Richard Dobbs et al., *Debt and (Not Much) Deleveraging*, MCKINSEY GLOBAL INST. (Feb. 2015), https://www.mckinsey.com/featured-insights/employment-and-growth/debt-and-not-much-deleveraging..

[89] Chatzky & McBride, *supra* note 8.

> experience in financing emerging-market infrastructure . . . . After all, Chinese banks do not have a track record of allocating resources efficiently at home, especially in relation to infrastructure projects – they are unlikely to have more success overseas.[90]

Additionally, as the banks offer funds for investment in risky markets, the quality of the assets they hold could be called into question.[91] As asset quality decreases, so does a bank's performance because, simply put, if a bank's holdings are in loans that may never be paid off, the assets the bank holds carry value less than what was paid out.[92]

As risky economic behavior continues, dispute tends to arise. As countries fail to make payments, causing more debt to be leveraged, China will inevitably need mechanisms to recuperate its losses. As this article posits, this mechanism will be embodied in alternative dispute resolution systems like The Chinese International Commercial Court. Until the Chinese International Commercial Court issues decisions and explains its reasoning for accepting cases, companies will continue to be in the dark as to how the court's procedure works.

A. *Increased Inter-Asian Reliance*

The International Commercial Court was founded on the principal of ensuring construction of the Belt and Road Initiative.[93] Although the court has wide reaching jurisdiction, it appears the primary goal is to further dispute resolution among Belt and Road countries, which is exemplified by the Belt and Road Initiative being mentioned in the very first paragraph of the promulgated regulation.[94]

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[90] Peter Wells & Don Weinland, *Fitch Warns on Expected Returns from One Belt, One Road*, FIN. TIMES (Jan. 26, 2017), https://www.ft.com/content/c67b0c05-8f3f-3ba5-8219-e957a90646d1.

[91] *Id.*

[92] *See* FDIC, *Asset Quality*, *in* DSC RISK MANAGEMENT MANUAL OF EXAMINATION POLICIES, https://www.fdic.gov/regulations/safety/manual/section3-1.pdf. For a discussion on Chinese banks and asset quality, see also Engen Tham & Shu Zhang, *Big Chinese Banks' Profits Mask Building Risks to Asset Quality*, REUTERS (Oct. 30, 2018, 6:27 AM), https://www.reuters.com/article/us-china-banks-results/big-chinese-banks-profits-mask-building-risks-to-asset-quality-idUSKCN1N419E.

[93] Court Regulations, *supra* note 44.

[94] *See id.*

The Belt and Road Initiative has met significant domestic Chinese and international backlash. Domestically, Chinese citizens are wary of the spending that accompanies projects; internationally, countries are wary of China's growing influence.[95] The backlash has even extended to domestic politics among Belt and Road partner countries receiving investment. Malaysian Prime Minister Najib Razak was ousted in the country's May 2018 election by challenger Mahathir Mohamad, a vocal opponent to Malaysian-Chinese cooperation.[96] As the new Prime Minister, Mohamad has cancelled two major Belt and Road projects, a $20 billion railroad and a $2.3 billion pipeline, citing Malaysia's inability to pay for these expenses.[97] However, Mohamad has recently changed tone, reaffirming his commitment to cooperation with the Chinese and announcing he will attend the Belt and Road Summit in China, but noting once again that his nation cannot afford the pipeline project, which many view as a corrupt, "unsustainable or nonviable projects."[98] The fact that so much of the investment relies on friendly political climate undermines the reliability of the projects. Mohamad's opinions on the project were not unfounded, and the *Wall Street Journal* reported that Chinese officials agreed to help bail out the state development fund by inflating investment costs in Malaysia.[99] Encapsulating the allure of Chinese power were allegations that Chinese officials offered to "bug" the offices of Hong Kong journalists investigating the Malaysian fund.[100] In a move even more tailored to the political realm, the *New York Times* released an investigative report alleging that funds from the infrastructure project flowed directly into the failed reelection campaign of former president of Sri Lanka, and key Belt and Road ally, Mahinda Rajapaksa.[101] For this reason, changes in leadership and political concentrations of power may alter the course of the investments

[95] Christopher Balding, *Why Democracies Are Turning Against Belt and Road: Corruption, Debt, and Backlash*, FOREIGN AFF. (Oct. 24, 2018, 12:00 AM), https://www.foreignaffairs.com/articles/china/2018-10-24/why-democracies-are-turning-against-belt-and-road?cid=int-flb&pgtype=hpg.

[96] *Id.*

[97] *Id.*

[98] *Id. See also* Stefania Palma, *China and Malaysia in Talks to Cut Cost of Belt and Road Project*, FIN. TIMES (Feb. 20, 2019), https://www.ft.com/content/12ea931e-34f0-11e9-bb0c-42459962a812 (mentioning that as a result of this meeting, the parties are negotiating a "scal[ing] down" of the project in both size and cost).

[99] Tom Wright & Bradley Hope, *China Offered Bailout for Deals --- In Return for Helping Malaysia's Troubled Fund, It Would Get Railroad, Pipeline Stakes*, WALL ST. J. (Jan. 7, 2019), https://www.wsj.com/articles/how-china-flexes-its-political-muscle-to-expand-power-overseas-11546890449.

[100] *Id.*

[101] Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. TIMES (June 25, 2018), https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html.

Further, despite Chinese insistence that the plan is purely economic, the *New York Times* reported the existence of a secret plan to build Chinese military equipment, such as weaponry and jets, in Pakistan.[102] In addition, military analysts warn of a different type of interconnectedness, that of sea passage for China's navy.[103] For example, a new Chinese sea port in Pakistan gives China a quicker route to the Arabian Sea, "avoid[ing] (the) territorial waters of (several) American allies in the region."[104] Another area of concern for the United States and other Western nations is the potential involvement of Iran, which the United States currently targets with economic sanctions.[105] At a meeting in Beijing on February 19, 2019, Iranian Foreign Minister Javad Zarif expressed interest in Belt and Road Initiative cooperation between Iran and China, noting that, "[t]he initiative is of special significance to both Iran and China."[106] This has important potential implications for the United States, as China assisting Iran could counteract U.S. sanctions. The same situation is occurring in Syria, as China races to invest in the war-torn region and faces little competition in the Syrian market because of U.S. led sanctions on the Assad regime.[107] Chinese tech giant, Huawei, has even offered to rebuild Syria's telephone network.[108]

The Chinese holding of U.S. treasuries inspires wariness, and with increasing tariffs and economic warfare, creates a potential avenue for Chinese retaliation against the Trump Administration.[109] The threat is not unfounded. In 2017, Sri Lanka handed over control of the Hambantota Port to China on a 99-year lease as a result of its failure to make payments on Chinese loans,

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[102] Maria Abi-Habib, *China's 'Belt and Road' Plan in Pakistan Takes a Military Turn*, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/world/asia/pakistan-china-belt-road-military.html.

[103] *See id.*

[104] *Id.*

[105] Colin Dwyer, *U.S. Is About To Reinstate Iran Sanctions. Here's What That Means*, NPR (Nov. 2, 2018), https://www.npr.org/2018/11/02/663377999/u-s-is-days-away-from-reinstating-iran-sanctions-heres-what-that-means.

[106] Riyaz ul Khaliq, *Tehran Eyes Role in China's Belt and Road Initiative*, ANADOLU AGENCY (Feb. 19, 2019), https://www.aa.com.tr/en/middle-east/tehran-eyes-role-in-china-s-belt-and-road-initiative/1397189#.

[107] Mollie Saltskog & Colin P. Clarke, *The U.S. Withdrawal from Syria Is an Opportunity for China*, LAWFARE (Feb. 15, 2019), https://www.lawfareblog.com/us-withdrawal-syria-opportunity-china.

[108] *Id.*

[109] Trevor Hunnicutt & Kate Duguid, *China, Holding Treasuries, Keeps 'Nuclear Option' in U.S. Trade War*, REUTERS (Apr. 4, 2018), https://www.reuters.com/article/us-usa-trade-china-treasuries/china-holding-treasuries-keeps-nuclear-option-in-u-s-trade-war-idUSKCN1HB34M.

which at that time totaled $8 billion.[110] $8 billion represents almost 9.2% of Sri Lanka's gross domestic product, which stands at $87,174,682,200.[111] The immense pressure of such serious investment may lead to an increase in the Chinese requesting territory in exchange for debt, which creates a serious threat to China's economic and political foes.[112]

An additional, albeit not often discussed, danger in the Belt and Road Initiative countries is terrorism and crime. Mollie Saltskog, an intelligence analyst for The Soufan Group, and Colin Clarke, a senior fellow at The Soufan Center, posit that:

> An array of terrorists, insurgents and criminal networks remain active throughout regions and countries that are important hubs for the Belt and Road Initiative. For example, in Central Asia several highly capable terrorist groups have a presence, including the Islamic Movement of Uzbekistan, Jamaat Ansarullah, and Islamic Jihad Union. In 2016, the Chinese Embassy in Bishkek, Kyrgyzstan, was attacked by what was later confirmed to be members of the Turkistan Islamic Party—a transnational terrorist organization that views China as one of its primary targets due to China's treatment of its Muslim minority population. Chinese nationals have been killed in terrorist attacks in Thailand, Pakistan, Mali and elsewhere.[113]

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[110] Kai Schultz, *Sri Lanka, Struggling with Debt, Hands a Major Port to China*, N.Y. TIMES (Dec. 12, 2017), https://www.nytimes.com/2017/12/12/world/asia/sri-lanka-china-port.html.

[111] THE WORLD BANK, *Sri Lanka*, https://data.worldbank.org/country/sri-lanka (last visited Nov. 12, 2019) [https://web.archive.org/web/20181214205931/https://data.worldbank.org/country/sri-lanka].

[112] *See* Schultz, *supra* note 110.

[113] Mollie Saltskog & Colin P. Clarke, *The Little-Known Security Gaps in China's Belt and Road Initiative*, THE NATIONAL INTEREST (Feb. 17, 2019), https://nationalinterest.org/feature/little-known-security-gaps-chinas-belt-and-road-initiative-44587.

In addition to legitimate trade, the Belt and Road infrastructure projects may also serve as routes for illicit dealings like drug and weapons trade.[114] Currently, defense of Belt and Road infrastructure projects is handled by private Chinese security companies that often lack the experience and training necessary to protect the projects during conflict or combat.[115] These dangers, like goods hijacking and robbery, increase the risk for litigation and dispute.[116]

Although it may seem contradictory for a program designed to increase inter-Asian cooperation to cause such intense consequences and opposition from countries on the receiving end of Chinese investment, the Chinese position is that the program not only increases global involvement but also reins in excess capacity of China's domestic economy.[117] For poor countries that are tempted by promises of economic development, they may see Belt and Road projects as golden opportunities for the strengthening of weak economic sectors. However, like Sri Lanka, they are at a high risk for falling into debt-trap diplomacy, the process of forgiving debt for political and territorial concessions.[118] Tonga is facing similar problems. After riots destroyed the Tongan capital, Nuku'alofa, the government rebuilt the city with Chinese financing totaling USD $65 million ($115 million now from interest and borrowings).[119] Tonga entered into a loan repayment plan with China, deferring the loans for five years, following an agreement with China to continue Belt and Road projects, guaranteeing further cooperation.[120] China normally engages in a case-by-case determination of how to handle debt

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[114] *Id.*

[115] *Id.*

[116] *See, e.g.*, Anvil Knitwear, Inc. v. Crowley Am. Transp., Inc., Civ. 3242, 2001 WL 856607, (S.D.N.Y. July 27, 2001), *cited in* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS 111 (3d ed. 2015). In *Anvil Knitwear*, as goods were being trucked from Honduras to a port, the truck was hijacked. *Id.* The parties in the case included in the contract a clause which limited liability for hijackings. *Id.*

[117] Kuo & Kommenda, *supra* note 6.

[118] *Id.* Eight countries, all of them poor, are currently at risk of defaulting on Chinese Belt and Road loans. They are Djibouti, Kyrgyzstan, Laos, the Maldives, Mongolia, Montenegro, Pakistan and Tajikistan.

[119] Charlotte Greenfield, *China Defers Tonga's Loan Payments as Pacific Nation Signs Up to Belt and Road*, REUTERS (Nov. 17, 2018), https://www.reuters.com/article/us-apec-summit-tonga/china-defers-tongas-loan-payments-as-pacific-nation-signs-up-to-belt-and-road-idUSKCN1NN01J.

[120] *Id.* Both Tonga and China deny that the deferment was a result of a furtherance of Belt and Road projects. However, western commenters continue to be wary of this explanation. *Tonga Loan Deferment "Not Related" to Signing of Belt and Road Initiative*, MATANGI TONGA (Dec. 5, 2018), https://matangitonga.to/2018/12/05/tonga-loan-deferment-not-related-signing-belt-and-road-initiative.

relief.[121] Some examples of relief include; relief in exchange for disputed territory in Tajikistan; and restructuring of debt in Cuba in exchange for additional projects.[122]

The loan repayment issues present an ample opportunity for alternative dispute resolution. However, in disputes that arise, the Chinese side holds the advantage of holding the debt, and with it the power to coerce the other into compliance with its demands. For example, in international trade agreements, "mediation is generally not viewed as a sufficient dispute-resolution procedure . . . since it does not neutralize differences in bargaining power."[123] This brings into question the trustworthiness of judgements from the Chinese International Commercial Court because it functions within the domestic Chinese legal structure. To combat this issue, the Court provides users with example cases of how the court has fairly dealt with international disputes.[124] One such case, "Sino-Environment Technology Group Limited (Singapore) v. Thumb Environmental Technology Group (Fujian) Co., Ltd. (Disputes over Shareholder's Contribution)," is provided as an example of "Providing Impartial and Efficient Judicial Services and Safeguarding the Lawful Rights and Interests of both Domestic and Foreign Investors on an Equal Footing."[125]

More importantly for the context of international arbitration, is the case titled "Zhejiang Yisheng Petrochemical Co., Ltd. v. INVISTA Technology Co., Ltd. (Luxembourg)."[126] In this case, the court upheld an arbitration provision which was agreed to by both parties.[127] Specifically, the dispute was whether the agreement constituted *ad hoc* arbitration, a process not allowed by China.[128] As noted in the summary provided by the court, "[s]ince the clause did not define the arbitration agency's specific function, the

[121] John Hurley, Scott Morris, & Gailyn Portelance, *Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective*, 121 CGD POL'Y PAPER 1, 19 (2018), https://www.cgdev.org/sites/default/files/examining-debt-implications-belt-and-road-initiative-policy-perspective.pdf.

[122] *Id.* at 20.

[123] O. Thomas Johnson, Jr., *Alternative Dispute Resolution in the International Context: The North American Free Trade Agreement*, 46 SMU L. REV. 2175, 2179 (1993).

[124] Supreme People's Court Network (最高人民法院网), *Model Cases Regarding Providing Judicial Services and Safeguards by the People's Courts for the Construction of the "Belt and Road,"* CHINA INT'L COMMERCIAL CT. (), (May 15, 2017), http://cicc.court.gov.cn/html/1/219/199/204/812.html.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

court decided that the parties' agreement that an agency could apply another arbitration rule should be understood as follows: the agency can take charge of the whole arbitration process in accordance with relevant rules."[129]

By providing these example cases, the Supreme People's Court apparently attempts to inspire confidence in the Chinese International Commercial Court's ability to fairly handle arbitration, specifically in regard to foreign parties. The question remains as to whether foreign investors and partners in Belt and Road projects will find China's position persuasive. The previously mentioned reforms and potential future reform may quell the nerves of foreign parties, but the results of such reform are yet to be seen. As the court hears more cases, potential parties and their counsel will better know how to prepare for arbitration hearings.

B. *Creating Trust Among Belt and Road Parties*

The creation of the Chinese International Commercial Court relies on the parties' trust in the ability of the court to properly resolve disputes. International arbitration in China is a relatively new concept, as China first promulgated international business law in 1979, shortly after it opened its borders to foreign investment.[130] Although international arbitration is new, domestic mediation has occurred since at least 1954, when China promulgated the "Provisional General Rules for the Organization of People's Mediation Committees."[131] As the Chinese economy expanded, so too did its dispute resolution system, and by 1987 China's mediation system was the largest dispute resolution program in the world.[132]

Regardless of the size of the system, China's dispute resolution program has not carried with it the successful enforcement of judgements, although it is not as hopeless as some may believe.[133] Data shows that the enforcement rate for foreign awards was 52% by PRC courts and 47% for CIETAC awards, and of those awards "investors can expect to recover 75–50% of the award amount in 34% of the cases" and "half of the award at least 40% of the time."[134] In addition, ease of award enforcement correlated with a

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[129] *Id.*

[130] Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in The People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 122 (1996).

[131] *Id.* at 123.

[132] *Id.* at 123–24.

[133] Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 254 (2001).

[134] *Id.*

court's location, with Beijing, Shanghai, and Guangzhou leading.[135] This is a potential area of worry, as the new Chinese International Commercial Courts of the Supreme People's Court are located in Xi'an and Shenzen, not in large metropolitan hubs like Beijing and Shanghai.[136]

Local protectionism, where the courts gave preference to local parties over their foreign counterparts, was a problem.[137] In Peerenboom's empirical analysis, he provided this example of bias he received from the perspective of a foreign corporation:

> At first, the judge handling the case was very supportive of the applicant. He promptly recognized the foreign arbitral award, and then set up several conferences to explore the possibility of settlement. After the Chinese party refused to sign a settlement agreement, despite having agreed to do so, the court issued an ultimatum: either the Chinese party signs the agreement within 15 days or else the court would issue an order to freeze the company's bank accounts and seize assets. When the deadline had passed, counsel for the applicant contacted the judge. Suddenly, the judge's attitude appeared to have changed. He suggested that the Chinese party be given another extension. After several such extensions and fruitless attempts to get the Chinese party to sign a settlement agreement, the judge confided to the applicant's lawyer that he had been instructed by a senior judge to drag his feet. The general manager of the Chinese party had told his friend in government that the company intended to pay but that it would prefer to delay payment as long as possible. In the end, the respondent was able to postpone payment for more than two years.[138]

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[135] *Id.* at 255.
[136] Hang, *supra* note 1.
[137] Peerenboom, *supra* note 133, at 277.
[138] *Id.*

As exemplified in the preceding description, foreign investors face many obstacles in the way of receiving their arbitration awards, including corrupt banks freezing their assets, corrupt opposing counsel, and that the local governments responsible for enforcing awards often have a direct financial involvement in the enterprise at issue.[139] This problem is enlarged by the fact that the Chinese International Commercial Courts function within the Chinese domestic court system and are an arm of the Supreme People's Court.[140] Chinese domestic courts have forgone enforcement of awards on public interest grounds.[141] In the Chinese domestic system, the public policy exception is a controversial provision that is "dangerously susceptible to enlarged interpretations."[142] Potential biases and inconsistent award enforcement are even more of a problem in the high stakes world of trade agreements, where the opportunity for usage of a dispute settlement system increases, and can help to avoid, an all-out trade war.[143]

Trust, however, is easy to lose. Recent evidence shows that Belt and Road countries remain wary of the project and China's investment, and in a survey of Southeast Asian "government, academic and business communities, civil society, and the media," 70% said their governments "should be cautious in negotiating" Belt and Road projects.[144] The wariness was most evident in respondents from Malaysia, the Philippines, and Thailand.[145] An overall distrust in Chinese lending practices, a key component of the Belt and Road Initiative, could become legal issues as the payment plans come into effect. As exemplified by the court's acceptance of shareholder derivative matters to its jurisdiction,[146] challenges to lending practices may be on the horizon, as money becomes short and lending becomes riskier. In fact, some of the key political challenges to the Belt and Road Initiative, like Malaysia's,[147] have

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[139] *See id.* at 278–79.

[140] Erie, *supra* note 4.

[141] Peerenboom, *supra* note 133, at 290 ("The court decided to refuse enforcement on public interest grounds. The decision was approved by the SPC. The IPC then issued an order refusing to enforce the award. Although the Chinese party received a copy of the order, the foreign party never received the order, and to this day remains thwarted in its efforts to obtain the order.").

[142] Tao & Zhong, *supra* note 38, at 376.

[143] *See* Kennan J. Castel-Fodor, *Providing a Release Valve: The U.S.-China Experience with the WTO Dispute Settlement System*, 64 CASE W. RES. L. REV. 201 (2013) (a detailed discussion on how the WTO's dispute settlement system assists the U.S. with resolving trade related disputes with China).

[144] Kim & Lewis, *supra* note 79.

[145] *Id.*

[146] China Int'l Commercial Court, *supra* note 52.

[147] Balding, *supra* note 95.

come in the form of payment worries. Even the political challenges in Sri Lanka, and the confiscation of a port,[148] were a result of payment problems. If the pattern of accepting derivative actions continues, the scope of arbitration eligible matters will expand, increasing the size and effect of alternative dispute resolution in China and opening a door to new litigation.

VI. CONCLUSION

While the creation of the Chinese International Commercial Court is an important step in China's Belt and Road initiative, it remains to be seen whether the creation of the Chinese International Court will have the intended effect, or merely bolster China's control over arbitration cases with Belt and Road Initiative participants. While the creation of an expert panel will help ease tensions about the impartiality of the judiciary, countries may still have qualms about settling disputes from within the domestic Chinese legal system. The availability of further reform as the system begins operation is important to allow the court to adjust to unforeseen problems that may arise in the course of continued litigation. The political atmosphere of the Belt and Road Initiative also adds increased uncertainty to the Court's effectiveness. The new court will function amidst controversies over corruption, cost, political interference, and security concerns. As risky investment increases, disputes will arise. Because of these issues and China's known problems in dispute resolution, corporations will continue to be wary over arbitrating disputes through the Chinese International Commercial Court.

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[148] Schultz, *supra* note 110.