The legal legitimacy of the China International Commercial Court: history, geopolitics, and law

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**ABSTRACT**
The academic contribution to the question of reforms to the China International Commercial Court (CICC) has essentially been based on classic comparative legal approaches. More precisely, two main schools of thought have emerged which compare the CICC with the international commercial courts established by Singapore (the Singapore International Commercial Court [SICC]) and Dubai (the Dubai International Financial Centre [DIFC]) because Chinese officials have presented these institutions as models for the CICC. This article breaks new ground by adopting a legal and geopolitical analysis. The article makes an interdisciplinary enquiry, which combines political-economy and sociological analysis. The political-economy approach emphasizes an institutional reform in line with China’s self-interested response to the commercial needs of Chinese investors along the Belt and Road Initiative. The sociological approach refers to China’s history and culture, appreciates China’s contemporary policies, and suggests that reform on mediation and arbitration under the CICC are likely to play the most prominent role at the new court. This article highlights the fundamental contradiction between geopolitics and judicial independence within the realm of the CICC, and argues that if the designers of the CICC treat SICC and DIFC courts’ procedural rules as templates for replication, any reform attempts are likely to fail, given that the CICC forms part of China’s geopolitical tactics rather than being a product of market orientation. Instead, this article argues that the CICC should be understood as a mechanism for domestic reform purpose and function.

**KEYWORDS**
CICC; geopolitics; judicial independence; political economy; BRI

**I. Introduction**
In 2013, Chinese President Xi Jinping announced the ‘Belt and Road Initiative’ (BRI) — broadly viewed as a commercial and geopolitical project to link China with Southeast Asia, Southern Asia, Central Asia, Russia and Europe by land, and a 21st-century Maritime Silk Road. The BRI involves over USD1 trillion in investments, largely in infrastructure development for roads, ports, railways and airports as well as telecommunication networks and power plants. This project marks China as a major source of outward international investment, while at the same time exposing Chinese investors to various...
legal systems. Due to the complex nature of construction deals and project finance, it is envisaged that the BRI will generate an abundance of disputes, which may be covered by the traditional investor–state dispute settlement clauses, whereas some of them may fall within the ambit of domestic and transnational jurisprudence and rules. In these circumstances, it has become necessary to develop China-based institutions to streamline and control the flow of these disputes.2

The China International Commercial Court (CICC) was established by the country’s Supreme People’s Court (SPC) in December 2018 to adjudicate international commercial cases.3 China’s first international commercial court is in Shenzhen and the second international commercial court is situated in Xi’an. The two courts are supervised and guided by the Fourth Civil Division of the SPC. The CICC’s objective is:

> to try international commercial cases fairly and timely in accordance with the law, protect the lawful rights and interests of the Chinese and foreign parties equally, and create a stable, fair, transparent, and convenient rule of law international business environment.4

Although the CICC was created in the context of worldwide competition among international commercial courts, it is specifically designed to provide a dispute resolution platform for disputes arising from the BRI.5

In the broad system of international dispute settlement, international commercial courts have their discrete role as domestic international courts, which is beyond their recognized role as commercial courts. International commercial courts are rooted in the legal system of their home jurisdictions, but are specially created and tailored to meet the needs of transnational commercial disputes in terms of structure and personnel.6 In this respect, various institutions offer diverse innovations on the procedures of dispute resolution, and it is likely that some international commercial courts may depart from the general practice within the country. Hence, the emergence of international commercial courts driven by different initiatives has the potential to alter the landscape of commercial dispute resolution.7 China has been influenced by the sophisticated international models of difference between common law and civil law through its participation in the international economy and fulfilling its international commitments. The principle of the rule of law is increasingly taking a more prominent position in the country; in this connection, the BRI will undoubtedly change China’s role in international relations in a comprehensive manner.8

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2 Freshfields Bruckhaus Deringer, ‘China Establishes International Commercial Courts to Handle Belt and Road Initiative Disputes’ (Oxford Business Law Blog, 17 August 2018) <https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/china-establishes-international-commercial-courts-handle-belt-and-road-initiative-disputes> accessed 22 May 2020.
3 Zhang Yongjian, ‘Towards a Fair, Efficient and Convenient Dispute Resolution Mechanism for B&R-related International Commercial Disputes: China’s Practice and Innovation’ (China International Commercial Court, 2 July 2018) <http://cicc.court.gov.cn/html/1/219/199/203/831.html> accessed 17 November 2020.
4 See <http://cicc.court.gov.cn/html/1/219/193/195/index.html> accessed 22 May 2020.
5 See <http://cicc.court.gov.cn/html/1/219/208/210/819.html> accessed 22 May 2020.
6 Vijaya K Rajah, ‘(W)ith new Adversarial Commercial Dispute Resolution?’ (2017) 33 Arbitration International 17, 26.
7 Pamela K Bookman, ‘The Adjudication Business’ (2020) Yale Journal of International Law (forthcoming).
8 Julien Chaisse and Xu Qian, ‘The China International Commercial Court — Architecture, Pitfalls, and Promises’ in Stavros Brekoulakis and Georgios Dimitropoulos (eds), Hybrid Dispute Resolution Fora and Global Governance (Cambridge University Press, forthcoming 2021).
There is tremendous literature written on the merits and needs for the establishment of the CICC, with most authors demonstrating the challenges and difficulties faced by the court. Lessons essentially draw from comparative studies focusing on the experience of the Singapore International Commercial Court (SICC) and Dubai International Financial Centre (DIFC); these two courts have been presented as the models for the CICC, according to Chinese officials, and geographically relate to the BRI. The present article’s central argument is that if the designers of the CICC treat SICC and DIFC courts’ procedural rules as templates for replication, any reform attempts are likely to fail, given that the CICC forms part of China’s geopolitical tactics rather than being a product of market orientation. The central argument breaks new ground because it highlights the fundamental contradiction between geopolitics and judicial independence within the realm of the CICC. In order to discuss the main argument and its implications, this article discusses the different objectives of the SICC, CICC, and DIFC and their main features to demonstrate that the CICC is incapable of serving the needs of the BRI. The broader conceptual framework of this article is drawn from political-economy and sociological analysis, because it helps to understand the philosophy behind the establishment of the CICC and its limitations. The article demonstrates that the CICC should be positioned as a mechanism for domestic reform in purpose (i.e. object to be reached) and function (i.e. what the CICC does or is used for).

This article is structured as follows: Part I introduces the establishment of the CICC. Part II examines the legal and political contexts in which the DIFC, SICC and CICC were created and outlines their respective objectives. By studying the forces which drove the creation of these three courts, Part II generates important insights about how different goals might shape their developments. Part III provides reflections on the CICC’s jurisdiction and procedural matters to see whether the CICC will serve the demands of the BRI. Part IV critically discusses the likely reforms from sociological and political-economy perspectives to demonstrate constraints behind the creation of the CICC in serving the needs of the BRI. Part V concludes.

II. Genesis of international commercial courts: an expository commentary

This section discusses the salient procedural features of the SICC and DIFC to facilitate an understanding of the objectives of the CICC. The section also serves as the transnational part, as the same procedural matters will also be analysed in detail within the CICC framework in the next section. In subsection A, this article discusses the features and workings of the DIFC. In subsection B, we will talk about the functioning of the SICC, and

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9 Zhengxin Huo and Man Yip, ‘Comparing the International Commercial Courts of China with the Singapore International Commercial Court’ (2019) 68 International and Comparative Law Quarterly 903; Wei Cai and Andrew Godwin, ‘Challenges and Opportunities for the China International Commercial Court’ (2019) 68 International and Comparative Law Quarterly 869; Susan Finder, ‘Comments on China’s International Commercial Courts’ (9 July 2018) <https://supremepeoplescourtmonitor.com/page/1> accessed 22 May 2020; Matthew S Erie, The China International Commercial Court: Prospects for Dispute Resolution for the “Belt and Road Initiative” (2018) 22 American Society of International Law; Mark Feldman, “‘One-Stop’ Commercial Dispute Resolution Services: Implications for International Investment Law” in Julien Chaisse, Leila Choukroune and Sufian Jusoh (eds), Handbook of International Investment Law and Policy (Springer, forthcoming 2020); Ming Du and Wei Shen, ‘The Future of Investor–State Dispute Settlement: Exploring China’s Changing Attitude’ in Chaisse, Choukroune and Jusoh (eds), ibid.

10 See ‘Building the Judicial Guarantee of International Commercial Court “Belt and Road” Construction: An Exclusive Interview with Gao Xiaoli, Vice President of the Fourth Civil Division, the Supreme People’s Court, PRC’ (最高人民法院第四庭副庭長高曉力: 打造國際商事法庭 司法保障“一帶一路”建設法官視角) <http://www.chinaiprlaw.cn/index.php?id=5183> accessed 22 May 2020.
II.A. DIFC: the ‘investment-minded court’

The DIFC is designed to be a financial free zone. By way of background, it was to attract foreign investment and make the Emirate an international hub for commercial transactions. The objective of DIFC is to ‘promote Dubai’s geographic position in the Gulf as a significant strategic advantage for international investors — a gateway bridging those working in South and East Asia, the Middle East, Europe, Africa, and the Western Hemisphere’. There were to be three components of the DIFC: (a) an authorizing agency that would be the regulatory body overseeing employment law, corporate law, commercial law, and real estate; (b) a regulatory agency that would oversee all financial matters involving the DIFC; and (c) a set of common law courts. The unique independent regulatory framework creating the DIFC and the DIFC Courts was made possible through a synthesis of Federal and Dubai Law.

Following the passage of Law No. 16 in 2011, the DIFC Courts extended jurisdiction over ‘any civil or commercial claims or actions where the parties agree in writing to file such claim or action with it’. Parties could be based in any jurisdiction and would not need to have a connection with the DIFC Courts. Furthermore, the issue at dispute would not need to arise out of commercial activities located in the DIFC. As a result of these changes to elective jurisdiction, the DIFC saw a noticeable rise in the number of matters on their dockets. During 2015 and 2016, the Court of First Instance and the Court of Appeal heard a total of 108 cases. This development enabled the DIFC court judges to broaden their interpretation of the courts’ jurisdiction, for instance, to hear cases involving Islamic banking, and to reject motions to dismiss on the basis of forum non conveniens.

In order to make the DIFC Courts accessible to foreign professionals, Western common law and Western principles are used in English. The DIFC Courts are part of a dispute resolution complex that includes international commercial arbitration institutions, some of which are ‘joint ventures’ with London-based houses. According to the DIFC website:

Businesses in Dubai are free to choose between litigation and arbitration; common versus civil law; or English versus Arabic language — whichever system best suits their specific needs. The driving force has not been competition between courts for cases, but rather competition between countries for investment.

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11 Jayanth K Krishnan and Priya Purohit, ‘A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution’ (2014) 25 American Review of International Arbitration 497, 497.
12 See <https://www.difcourts.ae/about-courts-2/legal-framework> accessed 22 May 2020.
13 Ibid.
14 Dubai Law No. 16, Art 5(A)(2).
15 Jayanth K Krishnan, ‘The Story of the Dubai International Financial Centre Courts: A Retrospective’ (2018) Indiana Legal Studies Research Paper 40.
16 Ibid, 40.
17 Bookman (n 7).
18 Matthew S Erie, ‘The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution’ (2020) 59(3) Virginia Journal of International Law (forthcoming).
19 See <http://www.difc.ae/discover-difc> accessed 22 May 2020.
The DIFC regulations and rules were modelled on the London Commercial Court with some revisions:364彰, replacing British evidence rules with the International Bar Association (IBA) rules of evidence for arbitration. Parties can choose the substantive law applicable to their claims, and the background law is local ‘DIFC law’, ‘the result of legislation and common law decisions’. The DIFC Courts have six foreign judges and three Emirati judges, all of them internationally respected. Judges are to serve as part of an accessible Western-style judicial system within this Arab-Gulf monarchy, and the goal is to have the DIFC Courts be efficient, just and legitimate.

The DIFC Courts are set up to promote settlement. It is noted that in the Court of First Instance, where the most cases are heard, on average 92 per cent are settled before trial. The DIFC judiciary also has a liberal approach towards allowing proceedings to be held confidentially. The DIFC Courts also offer an appeal system that can hear matters against judgments and awards made by the Court of First Instance. This appellate body can also provide an ‘interpretation of any article of the DIFC’s laws based upon the request of any of the DIFC’s bodies or the request of any of the DIFC’s establishments’. The Court of Appeal is the court of last resort within the DIFC, and has discretionary jurisdiction. It seats a panel of at least three judges, whereas the Court of First Instance has single-judge benches. The DIFC Courts also offer appealing characteristics in terms of joinder and connected contracts, and parties can be joined and the proceedings consolidated. The right to appeal cannot be waived.

The steps for enforcement between the DIFC Courts and the local Dubai courts are straightforward. The prevailing party must apply for an ‘execution letter’ from the DIFC Courts, which then is sent to the local Dubai court. To enforce DIFC judgments within the United Arab Emirates (UAE), a claimant may rely on Dubai Law No. 16211, which provides for automatic mutual enforcement of decisions issued by courts within the UAE. Beyond the UAE, a claimant must rely on a relevant treaty for mutual recognition and enforcement. The UAE is a party to a number of multilateral and bilateral recognition and enforcement treaties. In addition, the DIFC Courts have established several non-binding agreements with partner institutions such as the London Commercial Court, the Supreme Court of Singapore, and the Supreme Court of the Republic of Kazakhstan. DIFC Courts have created a mechanism allowing a prevailing party to convert its court money judgment to an arbitral award, which can be easier to enforce in a broader number of jurisdictions under the New York Convention.

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20 Erie (n 18).
21 Bookman (n 7).
22 DIFC website (n 19).
23 Bookman (n 7).
24 Krishnan (n 15) 23.
25 Ibid.
26 Ibid, 22.
27 Ibid.
28 Janet Walker, ‘Specialized International Courts: Keeping Arbitration on Top of Its Game’ (2019) 85(1) Arbitration 11.
29 Ibid, 15.
30 Krishnan (n 15) 49.
31 Erie (n 18) 12.
32 Bookman (n 7).
The government was determined to create a new global judiciary that would be seen as legitimate and functional by the commercial-investor world. The philosophy behind it is that if the DIFC wants to reach that goal, it should be stable, credible and long-standing. It should respect and recognize a template of the rule of law. The DIFC Courts have found in favour of the government in cases involving the DIFC authority, whereas they have also ruled against quasi-government corporations. The DIFC could be seen as a court ‘doing its job’ in creating ‘certainty and trust’, given the high settlement rate for disputes.

II.B. SICC: the ‘aspiring litigation destination’

The idea to create the SICC, to grow the legal services sector and expand the scope of internationalizing and exporting Singapore law, was first mooted by the Honourable Chief Justice Sundaresh Menon in 2013. The SICC was officially launched in 2015 as a division of the High Court of Singapore, and as part of Singapore’s ongoing effort to become a leading centre for the resolution of international commercial disputes. With comprehensive legislative changes, one of the aims of the SICC is to provide parties with an incentive to choose litigation, in such a manner that coherent and transparent developments in commercial law may take place.

Parties can establish jurisdiction under the SICC by a written agreement, although the dispute need not have a connection with Singapore. The philosophy behind this departure from the traditional forum non conveniens principles under Singapore law is that the parties’ autonomy is paramount. This is in line with the SICC’s prime objective to compete with other international forums, especially for cases that would not otherwise be heard by the Singapore High Court. In this connection, the SICC’s jurisdictional rules are designed to promote forum shopping by potential users who are not generally connected with Singapore.

The SICC’s judicial panel comprises both local and foreign judges. To date, 16 international judges have been appointed from both common and civil law jurisdictions. Appointments are made under the Chief Justice’s recommendations, and the foreign judges do not enjoy tenure, instead being appointed for a term to hear cases as the Chief Justice specifies. There is great latitude for foreign representation in SICC proceedings, to complement the advantage of having international judges, if a dispute is an ‘offshore’ case. The underlying intention is crystal clear: that this aspect of liberalization can attract litigants who would not otherwise choose litigation in a domestic court.

33 Krishnan (n 15) 20.
34 Erie (n 18) 42.
35 Alex Taylor, ‘Dubai: The Gateway to the Middle East for International Firms’ (The Lawyer, 13 October 2017) <https://www.thelawyer.com/issues/the-lawyer-october-2017/lawfirms-in-middle-east-2017> accessed 22 May 2020.
36 See <https://www.sicc.gov.sg/about-the-sicc> accessed 22 May 2020.
37 See ‘Report of the Singapore International Commercial Court Committee’ (Singapore Ministry of Law, 29 November 2013) <https://www.mlaw.gov.sg/content/dam/mlaw/corp/News/Annex%20A%20%20SICC%20Committee%20Report.pdf> accessed 22 May 2020.
38 Man Yip, ‘The Resolution of Disputes Before the Singapore International Commercial Court’ (2016) 65 International and Comparative Law Quarterly 440.
39 Huo and Yip (n 9) 920.
40 SICC website (n 36).
41 Huo and Yip (n 9) 932.
SICC proceedings allow parties to opt out of the application of Singapore’s rules of evidence and apply other rules of evidence, such as the IBA Rules on the Taking of Evidence.42 Parties can vary, limit or waive their rights of appeal to the Singapore Court of Appeal by written agreement.43 The SICC may also issue a confidential order based on parties’ application.44 It is worth mentioning that there is no requirement for foreign law to be proved, and as a result, the parties do not need to call foreign experts; instead, the SICC may determine foreign law by submission.45 This represents an interesting departure from the traditional common law approach, and gives the parties the autonomy to manage costs.

Singapore signed and ratified the Hague Convention on Choice of Court Agreements (HCCCA) in 2016 to increase the international enforceability of its judgments.46 Thirty-one countries are now parties to the HCCCA, including all European Union jurisdictions. Also, under the Reciprocal Enforcement of Commonwealth Judgments Act, SICC judgments may be enforced in ten jurisdictions.47 There is also the Reciprocal Enforcement of Foreign Judgments Act,49 which covers the Hong Kong Special Administrative Region.50 On 19 January 2015, the Supreme Court of Singapore entered into a non-binding Memorandum of Guidance with the DIFC Courts concerning the reciprocal enforcement of monetary judgments.51 On 31 August 2018, the Supreme Court of Singapore entered into a Memorandum of Guidance with the SPC on the recognition and enforcement of money judgments in commercial cases.52

Indeed, all these attributes certainly position the SICC well to appeal to the growing body of potential commercial users who might prefer litigation for its greater transparency and accountability but are more comfortable with arbitration for its neutrality and flexibility.53 This confirms one of the SICC’s international foci, which is to address the weakness of arbitration in creating law,54 and thus the SICC has been described as ‘a careful marriage between litigation and arbitration’.55

42 Singapore International Commercial Court User Guides, Note 4 (Disapplication of Singapore Evidence Law) para 23 <https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/siccuser-guides-31jan19.pdf> accessed 22 May 2020.
43 Singapore International Commercial Court Practice Directions, para 139 <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions-amended-version-(final)77b73133f2f6cebeb9bf0000fccc945.pdf> accessed 22 May 2020.
44 Adeline Chong and Man Yip, ‘Singapore as a Centre for International Commercial Litigation: Party Autonomy to the Fore’ (2019) 15 Journal of Private International Law 97.
45 Huo and Yip (n 9) 936.
46 See <https://www.hhcc.net/en/instruments/conventions/full-text/?cid=98> accessed 22 May 2020.
47 See Reciprocal Enforcement of Commonwealth Judgments Act <https://sso.agc.gov.sg/Act/RECJA1921> accessed 22 May 2020.
48 Gary F Bell, ‘The New International Commercial Courts — Competing with Arbitration? The Example of the Singapore International Commercial Court’ (2018) 11(2) Contemporary Asia Arbitration Journal 93, 204.
49 SSO website (n 47).
50 Bell (n 48) 204.
51 See Memorandum of Guidance — Enforcement Between DIFC Courts and the Supreme Court of Singapore <https://www.diffcourts.ae/2015/01/21/memorandum-guidance-enforcement-diff-courts-supreme-court-singapore> accessed 22 May 2020.
52 Haria Baharudin, ‘Singapore and China Courts Agree on Guide for Money Judgment in Commercial Cases to Be Recognised in Each Other’s Country’ (The Straits Times, 3 September 2018) <https://www.straitstimes.com/singapore/singapore-and-china-courts-agree-on-guide-for-money-judgment-in-commercial-cases-to-be> accessed 22 May 2020.
53 Huo and Yip (n 9) 936.
54 Singapore Ministry of Law website (n 37).
55 Steven Chong, ‘The Singapore International Commercial Court: A New Opening in a Forked Path’ (21 October 2015) <http://www.supremecourt.gov.sg/Data/Editor/Documents/%20Steven%20Chong%20Speeches/The%20SICC%20-%20A%20New%20Opening%20in%20a%20Forked%20Path%20in%20London%20%20(21.10.15).pdf> accessed 22 May 2020.
II.C. CICC: innovation or novation?

The BRI is not only a trading channel, but also a new strategy to facilitate greater Chinese participation in the global economy, especially in Asia, and to shape a new structure for global economic governance. China faces an increasing number of civil and commercial disputes with foreign dimensions due to its outward economic expansion and significant overseas investment. Chinese courts decided approximately 75,000 foreign-related civil and commercial cases and provided international judicial assistance for approximately 15,000 cases in the five-year period of 2013–2017. With the establishment of the CICC, China is expected to be more involved in adjudicating commercial cases concerning China and have a greater say in rule making for international business and trade. Against the DIFC’s and SICC’s goals of independence, transparency and fairness, however, the CICC seems headed in a different direction. Following his ascent to power in 2012, President Xi Jinping promised to deliver on the ‘Chinese dream’ of national rejuvenation. Undoubtedly, the BRI can be viewed as ‘the signature of his tenure as leader and the practical embodiment of his “Chinese dream”’.

In March 2019, Zhou Qiang, president of the SPC, delivered his annual report to the legislature and pledged to ‘uphold the Communist Party’s “absolute leadership”’ over the work of Chinese courts — for China rejects judicial independence, calling it a false Western ideal. Zhou also called for strict implementation of rules requiring judges to seek Communist leaders’ instructions when ‘major matters’ arise.

The CICC seems to market itself as an internationally respected institution, although many responses to the launch of the CICC have been critical or, at a minimum, sceptical. It is unclear whether the CICC will establish itself as independent of or consistent with international standards. Will the system be in favour of Chinese partners? It remains to be seen whether the offered Alternative Dispute Resolution will ‘become mandatory or … the parties will feel forced into them, which is contrary to the consent-based foundations of arbitration and mediation’. In this connection, the next section will discuss what an international commercial court with Chinese characteristics might look like, to highlight these concerns.

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56 Cheng King and Jane Du, ‘Could “Belt and Road” Be the Last Step in China’s Asian Economic Integration?’ (2018) 27 Journal of Contemporary China 811.
57 Ming Du, ‘China’s “One Belt, One Road” Initiative: Context, Focus, Institutions, and Implications’ (2016) 2 The Chinese Journal of Global Governance 30.
58 Cai and Godwin (n 9) 871.
59 Qiang Zhou, ‘Supreme People’s Court Work Report’ (9 March 2018) <http://english.court.gov.cn/2018-03/09/content_35971310.htm> accessed 22 May 2020.
60 Cai and Godwin (n 9) 871.
61 Yinan Zhao, “Chinese Dream” is Xi’s Vision’ China Daily (18 March 2013) <http://www.chinadaily.com.cn/business/2013-03/18/content_16315350.htm> accessed 13 August 2020.
62 Huo and Yip (n 9) 906.
63 ‘A Belt-and-Road Court Dreams of Rivaling the West’s Tribunals’ The Economist (6 June 2019) <https://www.economist.com/china/2019/06/06/a-belt-and-road-court-dreams-of-rivaling-the-wests-tribunals> accessed 22 May 2020.
64 Mark Feldman, ‘Connectivity and Decoupling: Belt and Road Dispute Resolution in a Fractured Trade Environment’ (10 September 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3451034> accessed 22 May 2020.
65 Cai and Godwin (n 9) 871.
66 Zihao Zhou and Nathan Harpinter, ‘Survey Results: Rules on China’s International Commercial Courts’ (Stanford Law School: China Guiding Cases Project, December 2018) <https://cgc.law.stanford.edu/commentaries/clc-3-201812-26-zhou-harpinter-cao> accessed 22 May 2020.
67 Bookman (n 7).
III. Four issues for the CICC: a critical look at limits and potential

China’s main reason for establishing the CICC is to facilitate the development of the BRI. This is a significant step for China’s judicial system. However, there is ample space for improvement in the court’s jurisdiction, internalization, and proceedings. In subsection A, we will discuss the jurisdiction of the CICC, which is of two types: consensual and non-consensual. In subsection B, we will review the internalization of the CICC, and in subsection C, we will look at how proceedings take place.

III.A. Uncertain paths: the battle for jurisdiction

The CICC will only hear international commercial and civil matters. It will not hear investor–state disputes or inter-state trade disputes. The CICC has jurisdiction for the following disputes:68

1. First-instance international commercial cases in which the parties have chosen the jurisdiction of the Supreme People’s Court according to Article 34 of the Civil Procedure Law, with an amount in dispute of at least RMB 300 million;
2. First-instance international commercial cases subject to the jurisdiction of higher people’s courts which nonetheless consider that the cases should be tried by the Supreme People’s Court, and for which permission has been obtained;
3. First-instance international commercial cases with a significant nationwide impact;
4. Cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards according to Article 14 of the Provisions; and
5. Other international commercial cases which the Supreme People’s Court considers appropriate to be tried by the International Commercial Court.

As an initial observation, the CICC neither follows the approach of the DIFC Courts in creating a special jurisdiction, nor are there legal actions to legitimize its creation as with the SICC. The CICC was created pursuant to a judicial interpretation document issued by the SPC. It is clear that the CICC is not a product of constitutional amendment, and the jurisdiction of the CICC thus is constrained by existing Chinese law.69 In addition, since China operates on a ‘modified civil law system, the CICC will have less discretion to develop its jurisdiction through its own judicial decisions’.70

III.B. Consensual jurisdiction

The usual way the for the CICC to assume jurisdiction is based on the parties’ consent pursuant to Articles 2(1) and 2(4) of the Judicial Interpretation on the CICC. The parties’

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68 Provisions of the Supreme People’s Court on Several Issues Regarding the Establishment of the International Commercial Court (最高人民法院關於設立國際商事法庭若干問題的規定) (hereinafter ‘Judicial Interpretation on the CICC’), Art 2.

69 While most Chinese scholars acknowledge the merits of and need for the SPC to take the lead, see Zhengxin Huo, ‘Two Steps Forward, One Step Back: A Commentary on the Judicial Interpretation on the Private International Law Act of China’ (2013) 43 Hong Kong Law Journal 685, 710.

70 Erie (n 9).
The parties to a contractual dispute or any other property dispute may agree in writing to be subject to the jurisdiction of the people’s court at the place having connection with the dispute, such as where the defendant is domiciled, where the contract is performed, where the contract is signed, where the plaintiff is domiciled or where the subject matter is located, etc, provided that such agreement does not violate the provisions of the Law regarding court-level jurisdictions and exclusive jurisdictions.71

Unlike DIIFC Courts or the SICC, which abandoned the requirement for connections with the dispute, the CICC requires an actual connection to assume jurisdiction. Before the creation of the CICC, parties were not allowed to choose the SPC to hear their disputes. In this respect, the CICC could be attractive, especially for parties who are inclined to submit their disputes to a Chinese court, or cases that are already under Chinese jurisdiction. The CICC will perhaps gain prominence quickly if consent to CICC jurisdiction becomes a precondition of Chinese investment along the BRI.

First, it is difficult for parties to establish jurisdiction in terms of how to draft an effective dispute resolution clause under the meaning of ‘amount in dispute at least RMB300 million’.72 There is not always a positive correlation between the total value of the contract and the amount in dispute. That is to say, one cannot predict the ‘size of the dispute’ when drafting an effective dispute resolution clause. In addition, cases exceeding RMB300 million may still have difficulty in reaching the CICC, as the plaintiff may change the claims. If we take a closer look at the quantum requirement under Article 2(1), the cases most likely to come to the CICC are disputes involving state-owned or state-linked enterprises. Such projects involve substantial interests, which are probably what the Chinese government is aiming to protect.

Second, it is also noted that the CICC’s jurisdiction is limited to international commercial disputes. In defining ‘foreign’, the CICC follows the traditional ‘three-element test’ pursuant to Article 3 of the Judicial Interpretation on the CICC,73 i.e.:

(i) One or both parties are foreigners, stateless persons, foreign enterprises or other organizations;
(ii) One or both parties have their habitual residence outside the territory of the People’s Republic of China;

71 Civil Procedure Law of the People’s Republic of China (《中華人民共和國民事訴訟法》) (CPL), Art 34 <http://cicc.court.gov.cn/html/1/219/199/200/644.html> accessed 22 May 2020.
72 In practice, Chinese courts are unclear in deciding the ‘amount in dispute’. Some guidance may be drawn from Arts 197 and 198 of the Interpretation of the Supreme People’s Court on the Application of the CPL (最高人民法院關於適用《中華人民共和國民事訴訟法》的解釋).
Article 197: ‘Where the subject matter of litigation is securities, the amount of the said subject matter is calculated according to securities transaction rules and as per the closing price on the last trading day before the day of litigation of a party concerned, the market price that day or the face value.’
Article 198: ‘Where the subject matter of litigation is a house, land, forest, vehicle, ship, cultural relic or any other special thing or intellectual property right, and the value thereof is difficult to determine at the time of litigation, a people’s court shall explain to the plaintiff the litigation risks of an excessively high or lower claim, and determine the amount of the subject matter of litigation as per the value claimed by the plaintiff.’
73 Judicial Interpretation on the CICC (n 68), Art 3; for comment, see Huo (n 69) 692.
(iii) The object in dispute is outside the territory of the People’s Republic of China; or
(iv) Legal facts that create, change, or terminate the commercial relationship have taken place outside the territory of the People’s Republic of China.

It is unclear why the CICC adopted such a rigid test, especially by contrast with the general practice of other Chinese courts. Though two judicial interpretation documents were issued by the SPC, in 2010 and 2015 respectively, other Chinese courts apply a more flexible test. The meaning of ‘foreign’ has been expanded to include civil or commercial relationships that don’t technically satisfy the ‘three-element test’ but do have a substantial connection with a foreign jurisdiction. Consider two companies which are wholly owned by a foreign corporation. These two companies are registered in China and have their principle business there. If these two companies want to conclude a contract and operate a business which directly relates to the BRI in China, they cannot submit their case to the CICC because they don’t meet the requirements under the ‘international’ test. Under Chinese Company Law, they are still considered to be domestic entities, as they are registered in China and the contract was concluded and performed in China, even though they are wholly owned by a foreign corporation.

III.C. Non-consensual jurisdiction

Articles 2(2), 2(3) and 2(5) show less common ways for the CICC to establish its first jurisdiction: for instance, by referral from higher courts, or at the instruction of the SPC, if a case has significant national impact. Even at this stage, it is still unclear how the SPC will exercise this judicial discretion. At the time of writing, there are no party-consent cases heard by the CICC, and the cases published under its official website are not BRI-related disputes.

III.D. How to go global: challenges and considerations for internationalization

Many international commercial courts have specific standards for the appointment of judges, and they prefer to employ not only judges from their own countries, but also judges with international standing. But in the case of the CICC, only Chinese citizens can serve as judges. However, an Expert Committee has been established by the CICC, which offers an alternative to the practice of not appointing foreign experts as judges. In subsection 1, we will further discuss the judges and Expert Committee of the CICC, while in subsection 2, we will review China’s definition of lawyers and representation of foreign lawyers in the CICC.

III.E. Judges and Expert Committee

The SPC will appoint judges who are familiar with international commerce and investment and able to work in English to sit in the CICC. Cases in the CICC will be heard by a panel

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74 Huo and Yip (n 9) 916.
75 Company Law of the People’s Republic of China (2013 Amendment) (《中華人民共和國公司法》) Arts 2 and 191 <http://en.pkulaw.cn/Display.aspx?lib=law&Gid=183386> accessed 22 May 2020.
76 Judicial Interpretation on the CICC (n 68), Art 4. CICC judges are professional Chinese judges who are ‘experienced in trial work, familiar with international treaties, international usages, and international trade and investment practices, and capable of using Chinese and English proficiently as working languages’. 
of three or more judges.\textsuperscript{77} The first group of eight judges was appointed by the SPC on 3 July 2019.\textsuperscript{78} In accordance with the work demands of the SPC, the second group of seven judges was appointed by the CICC on 7 December 2019 and the third group of three judges was appointed on 21 July 2020.\textsuperscript{79} On one hand, the CICC possesses a select team of highly qualified senior judges with extensive experience in adjudicating international commercial disputes. On the other hand, unlike the SICC’s and DIFC’s judicial panels, which comprise both local and foreign judges, only Chinese citizens can serve as judges in the CICC. As a remedy, to ‘internationalize’ the CICC, the court has established an Expert Committee as an institutional innovation within a rigid and traditional legal system. Members of the Expert Committee may act as mediators in the CICC’s international cases, provide advisory opinions in international commercial disputes at the instruction of the CICC or various levels of people’s courts, and give advice and suggestions to the CICC and SPC.\textsuperscript{80} The practical value of the committee remains to be seen, however, as there are currently no published cases reflecting the input of the experts.

\section*{III.F. Foreign lawyer representations}

A related source of tension concerning internationalization arises under the current Chinese legislation, as foreign lawyers do not have a right of audience before Chinese courts. Article 2 of the Law of the People’s Republic of China on Lawyers 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.’\textsuperscript{81} Being a lawyer under Article 5 requires ‘obtaining a practice certificate pursuant to law’, but the practice certificate is only available to individuals who have passed the National Judicial Exam, which is only for Chinese citizens.\textsuperscript{82} Foreign lawyers can only indirectly participate in CICC cases by assisting Chinese counsels, even if the applicable law is foreign law. In this case, it is obvious that the CICC may not possess an equal level of attractiveness in terms of referring to leading international experts and flexible rules of representation for foreign lawyers.

\section*{III.G. Proceedings uncertainties: critical stages in the CICC justice process}

In subsection 1, we will look at how to decide which law is to be applied in a case and whether foreign law can be made applicable in a case. In subsection 2, we will

\begin{itemize}
\item \textsuperscript{77} Judicial Interpretation on the CICC, ibid, Art 5.
\item \textsuperscript{78} The eight judges are Wang Chuang, Zhu Li, Sun Xiangzhuan, Du Jun, Shen Hongyu, Zhang Yongjian, Xi Xiangyang, and Gao Xiaoli. See ‘Eight Judges of the China International Commercial Court Were Appointed’ \textit{(China International Commercial Court, 3 March 2018)} \texttt{<http://cicc.court.gov.cn/html/1/219/208/210/821.html>} accessed 22 May 2020.
\item \textsuperscript{79} The seven judges are Wang Shumei, Wei Wenchao, Song Jianli, Zhang Xumei, Yu Xiaohan, Ding Guangyu, and Guo Zaiyu. See ‘The Second Group of Judges of the China International Commercial Court Were Appointed by the Supreme People’s Court’ \textit{(China International Commercial Court, 7 December 2018)} \texttt{<http://cicc.court.gov.cn/html/1/219/208/210/1134.html>} accessed 22 May 2020. The third group of three judges comprises Ren Xuefeng, Hu Fang, and Huang Xiwu. See ‘The Appointment of the Third Group of Judges of the China International Commercial Court’ \textit{(China International Commercial Court, 21 July 2020)} \texttt{<http://cicc.court.gov.cn/html/1/219/208/210/1622.html>} accessed 14 November 2020.
\item \textsuperscript{80} Decision of the Supreme People’s Court on the Appointment of the First Group of Members of the International Commercial Expert Committee \textit{(最高人民法院關於聘任國際商事專家委員會首批專家委員的決定)} \texttt{<http://cicc.court.gov.cn/html/1/218/149/192/949.html>} accessed 22 May 2020.
\item \textsuperscript{81} Law of the People’s Republic of China on Lawyers \textit{(《中華人民共和國律師法》)}, Art 2.
\item \textsuperscript{82} Ibid, Art 5.
\end{itemize}
discuss the issue of language used during the proceedings and submission of evidence. In subsection 3, we will talk about the CICC as a dispute resolution platform. Lastly, in subsection 4, we will discuss the enforceability of the CICC’s judgments.

**III.H. Foreign law ascertainment**

Pursuant to Article 8 of the Judicial Interpretation on the CICC, there are the following ways to decide the foreign law: (1) provided by the parties; (2) provided by legal experts from China or abroad; (3) provided by an institution rendering law-finding services; (4) provided by a member of the International Commercial Expert Committee; (5) provided by the central authority of another contracting party that has entered into a judicial assistance treaty with China; (6) provided by the Chinese Embassy or Consulate in the relevant country; (7) provided by the Embassy of the relevant country in China; and (8) other reasonable ways.\(^83\) Article 8 should be read together with Article 10 of the Private International Law Act, where if foreign law cannot be ascertained or where there is no relevant rule of law after conducting the ascertainment process, Chinese law will be applied by default.\(^84\) To reiterate, the SICC and DIFC follow the general practice in arbitration, i.e. that the question of foreign law may be determined by submission instead of proof, which can be more efficient and reduce costs for the parties.

**III.I. Evidence**

Article 9 of the Judicial Interpretation on the CICC states the rules of evidence. Evidence can be submitted in English without translation based on parties’ consent. The aim is to reduce the costs of the parties. However, this might be practically difficult, as the proceedings will be conducted in Chinese pursuant to Article 262 of the CPL, which stipulates that proceedings of cases involving foreign elements should be conducted in ‘languages commonly used in China’.\(^85\) The CICC accordingly needs to establish strong procedures for reviewing and interpreting laws and regulations, as there are numerous non-English-speaking countries along the BRI.

**III.J. ‘One-stop’ dispute resolution platform**

According to Article 11 of the Judicial Interpretation on the CICC, the SPC aims to set up a dispute resolution platform on which ‘mediation, arbitration and litigation are efficiently linked’.\(^86\) It is noted that the first group of CICC international mediation and arbitration

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\(^{83}\) Judicial Interpretation on the CICC (n 68), Art 8.

\(^{84}\) Act on the Application of Laws on Foreign-Related Civil Relationships (《中華人民共和國涉外民事關係法律適用法》), Art 10 (hereinafter ‘Private International Law Act’).

\(^{85}\) CPL (n 71), Art 262.

\(^{86}\) Judicial Interpretation on the CICC (n 68), Art 11; see generally Feldman (n 9).
III.K. Strengthening the CICC: reflections on enforceability

Finally, there are concerns about the finality of the CICC’s judgments. If the parties resolve the dispute by arbitration under the CICC, the arbitral award can be enforced under the New York Convention. However, there is no international treaty for the recognition and enforcement of foreign court judgments comparable to the New York Convention for the recognition of foreign arbitral awards. If a foreign party prevailed against a Chinese party in the CICC, the foreign party would likely have trouble getting the Chinese court judgment recognized and enforced by a court outside China.

At the local level, the enforceability of the CICC’s judgments is guaranteed by Article 15 of the Judicial Interpretation on the CICC, and all judgments and orders made by the CICC are legally binding. There is no appeal system under the CICC, as it is a part of the SPC, the highest court in China, so judgments are final. In this case, the CICC is not without attractiveness, especially when the defendant is a Chinese SOE with assets primarily located in China. If the dispute is resolved by mediation, at the parties’ request, the CICC can convert the mediation agreement to a court order to facilitate its enforcement. Bearing the CICC’s fundamental objective in mind, the enforcement issue related to SOEs in China could be a pragmatic or even instrumental means of facilitating the wider acceptance of the BRI.

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87 Notice of the Supreme People’s Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the ‘One-Stop’ Diversified International Commercial Dispute Resolution Mechanism (最高人民法院公告關於確定首批納入一站式國際商事糾紛多元化解決機制的國際商事仲裁及調解機構的公告). These institutions are the China International Economic and Trade Arbitration Commission, the Shanghai International Economic and Trade Arbitration Commission, the Shenzhen Court of International Arbitration, the Beijing Arbitration Commission, the China Maritime Arbitration Commission, the Mediation Centre of China Council for the Promotion of International Trade, and the Shanghai Commercial Mediation Centre. See <http://cicc.court.gov.cn/html/1/218/321/323/index.html> accessed 22 May 2020.
88 Judicial Interpretation on the CICC (n 68), Art 15.
89 Ibid, Arts 11–13.
At the international level, China has signed but not ratified the HCCCA. The enforcement of court judgments is based on a bilateral judicial assistance treaties in civil and commercial matters or on a reciprocal basis. As of August 2018, China has signed 39 bilateral treaties on judicial assistance in civil and commercial cases with other jurisdictions, 37 of which are already effective. In judicial practice, this covers only a small proportion of BRI countries and regions. As for reciprocity, though, it is unlikely to provide a reliable basis for seeking enforcement of CICC judgments abroad, because the issue of reciprocity would be determined solely by the court in the foreign jurisdiction. This uncertainty may hinder the development of the CICC, as the parties will not be able to reliably predict whether a foreign jurisdiction would recognize a CICC judgment.

IV. Solving the right problems: three directions for CICC reform

Clearly, the CICC was not established to compete for the best international practice for commercial arbitration. Due to its design and procedural limitations, much is still unclear about how the court will function. In this connection, there arises a broader conceptual question: how do the Chinese authorities want to frame the CICC to address its limitations and serve the adjudicative needs of the BRI? In a manner more akin to the DIFC, which departs from the legal framework governing the rest of the country? Or like the SICC, only deviating slightly from general practice within the country? Different reform suggestions follow from each conception. In this section, this article analyses general trends in terms of how the Chinese authorities may perceive the CICC: namely, the political-economy and sociological perspectives. In the end, this article adds another perspective by incorporating insights from geopolitical study, arguing that any reform attempts are likely to fail given that the CICC forms part of China’s geopolitical tactics rather than being a product of market dynamics. In subsection A, we will discuss likely reforms from a political-economy perspective; in subsection B, we will look at the reforms from a sociological perspective; and finally, in subsection C, we will demonstrate the geopolitical constraints of the CICC in serving the needs of the BRI.

IV.A. State control matters: the political-economy accounts

Political realism considers ‘the principal actors in the international arena to be states, which are concerned with their own security, act in pursuit of their own national interests, and struggle for power’. According to Waltz, the states in international systems are like

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90 Convention of 30 June 2005 on Choice of Court Agreements (1 October 2015) <https://www.hcch.net/en/instruments/conventions/status-table?cid=98> accessed 22 May 2020.
91 Dongchuan Luo, ‘Consultation, Cooperation and Common Development’, Keynote Speech at the First Seminar of the International Commercial Expert Committee (26 August 2018) <http://cicc.court.gov.cn/html/1/219/199/203/1063.html> accessed 22 May 2020.
92 Zachary Mollengarden, ‘“One-Stop” Dispute Resolution on the Belt and Road: Toward an International Commercial Court with Chinese Characteristics’ (2019) 36(1) UCLA Pacific Basin Law Journal 72. Mollengarden argues that ‘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’. A nuanced understanding of ‘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’.
93 Julian W Korab-Karpowicz, ‘Political Realism in International Relations’ The Stanford Encyclopedia of Philosophy (7 July 2010) <https://plato.stanford.edu/entries/realism-intl-relations> accessed 22 May 2020.
firms in a domestic economy and have the same fundamental interest, which is to survive.\footnote{Ibid.} Internationally, ‘the environment of states’ actions, or the structure of their system, is set by the fact that some states prefer survival over other ends obtainable in the short run and act with relative efficiency to achieve that end’.\footnote{Kenneth Waltz, Theory of International Politics (McGraw-Hill 1979) 93.} In a subsequent work, the political realist Keohane accepts Waltz’s general assumption that states’ self-interested actors rationally pursue their goals, but employing game theory, he shows that states can broaden their perceived self-interest through economic cooperation and involvement in international institutions.\footnote{See generally, Robert O Keohane, International Institutions and State Power: Essays in International Relations Theory (1st edn, Westview 1989).} This political-economy account explains why states behave in a similar way despite their different forms of government and diverse political ideologies — the similarities are due to their growing interdependence. This may also help to explain the phenomenon of emerging international commercial courts, the diverse patterns of governance among states notwithstanding.

In this respect, China’s policies towards international commercial dispute resolution are responding to the same ambitions and imperatives as are any other state.\footnote{In line with its rapid economic growth, China in 1998 endorsed the ‘Going Out’ policy, which aims at positively exploring international markets, taking advantage of resources abroad, and strengthening the development impetus and potential of the Chinese economy. The BRI marks such reform, and in this case, the political-economy school contributes to an understanding of China’s investment policies. Indeed, some scholars describe China as embracing international standards in its treaty-making practices for investment protection. Nonetheless, China needs to retain some control in order to manage the risks associated with the ‘Going Out’ strategy for Chinese transnational corporations.} When it comes to the CICC, China needs to strike a balance between parties’ autonomy, as appreciated in international commercial arbitration, and state control in the dispute resolution process. The CICC’s jurisdictional and internationalization limitations are the result of such considerations. Another pertinent example can be found in the Fifth Forum on China–Africa Cooperation (FOCAC) — a legal forum which 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’.\footnote{Congyan Cai, ‘Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice’ (2006) 7 Journal of World Investment and Trade 621, 627.}

**IV.B. The role of history and culture in developing the CICC: a sociological perspective**

The alternative, sociological account argues that any analysis of the CICC should refer to China’s history and culture. In a modern legal landscape, international commercial arbitration is perhaps the best subject for a case study of interactions between culture and
IV.C. Comparative law and legal culture: a geopolitical investigation

Both the political-economy and sociological accounts can find equal support in relation to international commercial courts with Chinese characteristics. Yet neither account is helpful for answering fundamental questions, such as how the Chinese authorities should perceive CICC in the long run in order to address the court’s limitations, and whether the reform of the CICC will be successful.

As a rising state, China must make choices about:

how to involve itself in the wide variety of international institutions and regimes. Many of the existing global rules and institutions were established prior to China’s ascent and entry into the global system. While the United States and the other Western states were ‘present at the creation’, China was largely absent.

China finds itself confronted with choices about its role in global and regional governance, as the nation grows in power.

101. Joshua Karton, ‘Beyond the “Harmonious Confucian”: International Commercial Arbitration and the Impact of Chinese Cultural Values’ in Chang-fa Lo, Nigel N T Li and Tsai-yu Lin (eds), Legal Thoughts Between the East and the West in the Multilevel Legal Order (Springer 2016) 520.
102. Ibid, 521.
103. 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’ (2004) 18 Columbia Journal of International Law 149; Gabriel Kaufmann-Kohler and Kun Fan, ‘Integrating Mediation into Arbitration: Why It Works in China’ (2008) 25 Journal of International Arbitration 479; Fan Kun, ‘Glocalization of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China’ (2013) 18 Harvard Negotiation Law Review 175.
104. karton (n 101) 521.
105. Møllengarden (n 92) 65.
106. John G Ikemenberry and Darren J Lim, ‘China’s Emerging Institutional Statecraft: The Asian Infrastructure Investment Bank and the Prospects for Counter-Hegemony’ (April 2017) 7 <https://www.brookings.edu/wp-content/uploads/2017/04/chinas-emerging-institutional-statecraft.pdf> accessed 22 May 2020.
107. See generally, Nadège Rolland, China’s Vision for a New World Order (National Bureau of Asian Research Special Report No. 83, 2020) 12.
After decades of perception and increased understanding of global rules and institutions, China’s engagement in extra-regional governance includes infrastructure finance and dispute settlement. China has enhanced its leadership by developing multilateral organizations, such as the Asian Infrastructure Investment Bank, and domestic institutions that deal with China’s external engagement — in our case, the CICC.108

China has defined the BRI goals within its growing thematic and geographic scope. The documents that define these aspects of the BRI were prepared by a number of Chinese ministries before receiving approval from the State Council. These ministries include the National Development and Reform Commission, the Ministry of Foreign Affairs, and the Ministry of Commerce. In addition, the BRI is enshrined in the Constitution of the Communist Party of China.109 This means that the BRI is not only a key foreign policy of China, but also ‘an unquestionable tenet of China’s leading political institution’.110

Under the BRI, Chinese policy banks fund Chinese contractors to undertake overseas investment projects, and indeed, 89 per cent of projects labelled as BRI are implemented by Chinese companies. One of the most prominent problematic features is the central role of the Chinese state in the economy, which may potentially pose political problems for host states. Western democracies may have little experience in ‘what it means to have a foreign state manage (or not) companies’ investment decisions, thereby fuelling several political concerns about the potential negative implications of the role of the Chinese state for host countries’.111

The recent decision to invite Latin America to join the BRI came directly from China’s Minister of Foreign Affairs, Wang Yi. This unilateral approach for dealing with BRI-related issues can also be seen in the way China structures some of its investments abroad.112 It is China’s sole prerogative to extend invitations to participate in the BRI; combined with its reluctance to welcome foreign investment as part of the BRI, some may question how international this initiative is at this stage.113

Furthermore, the relationship between Chinese investors and the Chinese government is often confusing. Even in the case of transactions conducted by individuals, doubts persist in terms of the actual influence of the Chinese government.114 Lack of transparency and the governance structure of Chinese firms have been issues which make investment transactions difficult to comprehend for a target company or host country.

Therefore, it is indeed of great concern how China can increase the confidence of foreign disputing parties in the Chinese judiciary within the CICC. The very involvement of

108 Heng Wang, ‘Selective Reshaping: China’s Paradigm Shift in International Economic Governance’ (2020) Journal of International Economic Law 12 (forthcoming).
109 ‘Belt and Road in CCP Constitution — Future Sealed?’ (Belt and Road Blog, 26 October 2017) <https://beltandroad.ventures/beltandroomblog/2017/10/26/belt-and-road-in-ccp-constitution-future-sealed> accessed 22 May 2020.
110 ‘The Belt and Road Initiative Will Remain More Chinese than International’ (Belt and Road Blog, 19 March 2018) <https://beltandroad.ventures/beltandroomblog/2018/03/18/the-belt-and-road-initiative-will-remain-more-chinese-than-international> accessed 22 May 2020.
111 Sophie Meunier, ‘Beware of Chinese Bearing Gifts — Why China’s Direct Investment Poses Political Challenges in Europe and the United States’ in Julien Chaisse (ed), China’s International Investment Strategy: Bilateral, Regional, Law and Policy (Oxford University Press 2019) 351.
112 Fabian Cambero and Dave Sherwood, ‘China Invites Latin America to Take Part in One Belt, One Road’ Reuters (23 January 2018) <https://www.reuters.com/article/us-chile-china-china-invites-latin-america-to-take-part-in-one-belt-one-road-idUSKBN1FB2CN> accessed 22 May 2020.
113 Belt and Road Blog (n 110).
114 Kai Schultz, ‘Sri Lanka, Struggling with Debt, Hands a Major Port to China’ New York Times (12 December 2017) <https://www.nytimes.com/2017/12/12/world/asia/sri-lanka-china-port.html> accessed 22 May 2020.
the Chinese government in the decisions of its companies, especially SOEs investing abroad, leaves doubts about the ultimate rationale for such investments in the first place. It is suspicious that in some cases, these SOEs are acting to fulfil ‘strategic goals, rather than market-developing and profit-maximizing goals’. Foreign disputing parties’ confidence in the CICC rests on the premise of its judicial independence. However, the unique role of government in SOEs or even private companies has caused considerable damage to judicial independence within the CICC.

In this connection, if the Chinese authorities continue to perceive the CICC as a specific mechanism for serving BRI-related disputes, the CICC will be prevented from reaching its goal. Based on its definitive objective, if the designers of the CICC treat SICC and DIFC Courts’ procedural rules as templates for replication, then reforms are likely to fail. The situation would be different if we perceived the CICC as a mechanism for domestic reform to facilitate commercial dispute resolution. One concrete example can be found regarding rules of evidence under the CICC, which frequently contain the requirement of certification or certification of evidence generated outside China. Such innovation has been followed by the Decision of the Supreme People’s Court on Revising the Several Provisions on Evidence in Civil Proceedings, which came into effect on 1 May 2020.

V. Conclusion

The literature discussing the limitations and reform of the CICC focuses on comparative analysis between the CICC, SICC and DIFC. This article breaks new ground in adopting a geopolitical analysis rather than conducting a sterile comparative analysis. Based on the definitive objective of the CICC, the court can be seen to form part of China’s geopolitical tactics rather than being a product of market orientation. The CICC was created to maintain Chinese governmental control over the entire dispute resolution process against unexpected legal risks. By contrast, the DIFC was created to attract foreign investment in the region and make the Emirate an international hub for commercial transactions, while the SICC was created to compete for international dispute resolution business and strengthen China’s influence in the region. This article’s central argument is that if the designers of the CICC treat SICC and DIFC Courts’ procedural rules as templates for replication, any reform attempts are likely to fail. The article also draws a broader conceptual framework from political-economy and sociological analyses in order to understand the philosophy behind the establishment of the CICC and its limitations.

International commercial courts and their very design features may allow them to facilitate cross-border commercial transactions. However, these also point to a larger contradiction between the ‘rule of law’ and non-democratic governments, as they can never fully eclipse state politics. An interdisciplinary enquiry based on geography, political-economy and sociology can help us understand the underlying logic of creating such international commercial courts. From a political-economy perspective, the creation of self-interested international commercial courts is not surprising; what truly matters is whether the mechanism fully corresponds to the legislation in serving unstated political

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115 Meunier (n 111) 351.
116 Judicial Interpretation on the CICC (n 68), Art 9.
117 Decision of the Supreme People’s Court on Revising the Several Provisions on Evidence in Civil Proceedings (最高人民法院關於修改《關於民事訴訟證據的若干規定》的決定).
objectives. Under the current Chinese legal framework, as discussed earlier, the extent to which the CICC will serve the needs of the BRI is highly questionable.

As has been noted, national companies have access to cheap credit because they are backed by subsidies and administrative help. In such cases, they are less concerned about short-term returns and are willing to take more risks. Therefore, they can plan for long-term investment instead of short-term ones, and hence the bids they offer can be higher than those of their competitors, the privately owned companies. Despite the fact that many governments have used judicial institutions to maintain control, to govern and to enhance political capital while not altering the character and sovereignty of their society, the key is to have a stable and predictable rule of law system firmly in place.

The limitations of the CICC are not mere technical defects. Rather, they are the direct result of how the Chinese authorities perceive the CICC. Different perceptions follow the various trajectory explanations of the CICC’s creation and legitimization. In the long run, this also affects how the CICC will function and determines whether reforms will be successful, rather than positioning CICC as a miniature engine for extra-governance strategy. This article argues that the CICC could have a positive impact on China’s efforts to create a predictable, fair and transparent dispute resolution mechanism as long as it is understood as an engine for domestic reform.

Acknowledgements

The author is grateful to both of the paper’s anonymous peer reviewers for their insightful comments, which led to improvements in her work. The opinions expressed herein are the author’s own.

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