

Dispute Resolution Commercial Transactions Along the Belt and Road: Creating Fair and Consistent Judgments

SARA ZOKAEI[†]

For over forty years, China has promulgated national policies of opening-up and cooperation with other nations. Over the past eight years, China has been expanding its efforts to uphold these policy goals via the Belt and Road Initiative, China's global infrastructure project. With this increase in international economic activity and commercial transactions, China has recognized the need for judicial reform to better serve the legal needs of foreign parties. Given China's preference for peaceful cooperation, arbitration, and mediation, reform was necessary to cater to the needs of foreign parties who prefer litigation.

In parallel with the Belt and Road Initiative, China has expanded its domestic dispute resolution mechanisms to provide broad legal resources for Belt and Road transacting parties. China has outlined its commitment to provide a fair, predictable, and law-based business environment for international parties in a series of opinions issued by the Supreme People's Court of China. Further, China has forged key legal instruments to support its commitment to provide fair and consistent court judgments: (1) establishment of the International Commercial Courts; (2) issuance of BRI-specific guiding cases, and (3) commitment to expanded application of the principle of reciprocity in the enforcement of foreign judgments.

While China's extensive domestic judicial reform, to some extent, has been consistent with its promulgated policies and Belt and Road goals, the vagueness of the Supreme People's Court opinions outlining the reforms still present distinct logistical challenges to achieving fair, predictable, and consistent court judgments. As a result, Belt and Road parties choosing to litigate their international commercial disputes may face hurdles in their pursuit of fair and predictable legal protections in court.

[†] J.D. 2022, University of California, Hastings College of the Law.

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INTRODUCTION

Since 1978, the beginning of the Deng era, the Chinese Communist Party (“CCP”) has pursued extensive economic reform and committed to the policy of opening-up to promote global economic development in the People’s Republic of China (“China”).¹ Since 2013, the Belt and Road Initiative (“BRI”) has been at the core of this endeavor. In 2013, China announced its plans to implement the BRI, a global infrastructure development project and key manifestation of China’s commitment to the policies of opening-up and cooperation.² The BRI is the CCP’s modern attempt at revitalizing the spirit of the ancient Silk Road and accelerating global economic development through Chinese principles of “peace and cooperation, openness and tolerance, mutual learning and reference, and mutual benefit and win-win.”³ Comprised of the figurative “Belt”—i.e., land-based economic corridors—and “Road”—i.e., maritime trading routes—the project is essentially a conglomerate of trade corridors that geographically span from China through Europe, the Middle East, eastern Africa, and the rest of Asia.⁴

Central to efficient facilitation of cross-border economic activity is access to legal recourse in the event of a dispute. The sheer breadth of facilitating commercial transactions across countries of varying economies and legal systems creates fertile ground for international disputes.⁵ Foreign parties transacting along the Belt and Road need to know that they have access to fair and enforceable legal protections. Cognizant of these varying dispute resolution preferences and faced with a potential surge in complex disputes, China has developed a legal framework that gives international businesses broad access to

1. See Albert H. Y. Chen, Legal Thought and Legal Development in the People’s Republic of China 1949-2008 7 (Mar. 28, 2009) (unpublished manuscript), <https://papers.ssrn.com/abstract=1369782>.

2. See Visions and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road (issued by the Nat’l Dev. & Reform Comm’n, Mar. 2015) (China) [hereinafter *Visions*].

3. Zuigao Guanyu “Yidai Yilu” Jianshe Tigong Sifa Fuwu He Baozhang de Ruogan Yijian (最高人民法院关于人民法院为“一带一路”建设提供司法服务和保障的若干意见) [Several Opinions of the Supreme People’s Court on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road” by People’s Courts], Sup. People’s Ct. No. 9, June 16, 2015 (China) [hereinafter *Several Opinions*].

4. The belt, alone, consists of six corridors: the Bangladesh-China-India-Myanmar Economic Corridor, the China-Central Asia-West Asia Economic Corridor, the China-Indochina Peninsula Economic Corridor, the China-Mongolia-Russia Economic Corridor, the China-Pakistan Economic Corridor, and the New Eurasian Land Bridge Economic Corridor. The road is made of two large maritime routes: the 21st Century Maritime Silk Road and Polar Silk Road. See MICHELE RUTA, MATIAS HERRERA DAPPE, SOMIK LALL, CHUNLIN ZHANG, ERIC CHURCHILL, CRISTINA CONSTANTINESCU, MATHILDE LEBRAND & ALAN MULABDIC, WORLD BANK, BELT AND ROAD ECONOMICS: OPPORTUNITIES AND RISKS OF TRANSPORT CORRIDORS 3, 8 (2019), <https://www.worldbank.org/en/topic/regional-integration/publication/belt-and-road-economics-opportunities-and-risks-of-transport-corridors#authors>.

5. 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*, CHINA INT’L COM. CT.: INT’L COM. LITIG. & DIVERSIFIED DISP. RESOL. (Mar. 19, 2018), <http://cicc.court.gov.cn/html/1/219/208/209/774.html> [hereinafter *Building the Judicial Guarantee*].

a variety of legal instruments to resolve disputes arising on the Belt and Road.⁶ More importantly, China has implemented a robust judicial reform scheme to expand access to courts, depoliticize the courts, and produce more consistent judgments to better facilitate these commercial transactions.⁷

Law and legal infrastructure are critical to protect and support foreign investors who have to navigate foreign regulations and bear the risk of potential regulatory changes.⁸ President Xi Jinping has emphasized that governmental institutions in China should “safeguard national security and social stability, improve the credibility of the judiciary, enhance people’s sense of security and satisfaction [and] build a . . . just and standardized legal environment.”⁹ The CCP’s expansive control over governmental operations is indispensable to this pursuit. Through exerting power on courts, the CCP has great ability to reform China’s legal system in a way that is conducive to economic development and national goals. Accordingly, the Supreme People’s Court (“SPC”) has issued a series of opinions that lay out China’s policy goals and strategy to provide adequate judicial services to international parties transacting on the Belt and Road. In the initial blueprint for these judicial services, *Several Opinions of the Supreme People’s Court on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road” by People’s Courts* (“*Several Opinions*”), the SPC acknowledges that the rule of law and judicial functions are critical safeguards for parties transacting on the Belt and Road.¹⁰ The follow-up opinion clarifies that the expansion of judicial services is aimed at “creat[ing] an international, law-based and convenient business environment with more stability, fairness, transparency and predictability for jointly building the Belt and Road with high quality,” in light of the new era of economic reform.¹¹ With this goal in mind, China has adopted a number of changes in the judiciary to further the goals of the BRI.

The three main legal instruments that have been key to providing BRI transacting parties with greater assurance of fair and predictable court judgments are China’s international commercial courts, the guiding cases system, and the principle of reciprocity. While such institutions and reforms are steps toward providing credible judgments to BRI participants choosing to litigate, the legal framework still lacks cohesiveness and unity in application of law and enforcement. Furthermore, although China has made tremendous progress in adopting more fair and accessible judicial processes for parties transacting on

6. See Opinions on Further Providing Judicial Services and Guarantees by the People’s Courts for the Belt and Road Initiative, 2019 SUP. PEOPLE’S CT. (Dec. 9, 2019), https://www.shanghai.gov.cn/nw48709/20200826/0001-48709_127899.html [hereinafter Opinions].

7. Rebecca Liao, *Judicial Reform in China: How Progress Serves the Party*, FOREIGN AFFS. (Feb. 2, 2017), <https://www.foreignaffairs.com/articles/china/2017-02-02/judicial-reform-china>.

8. RUTA ET AL., *supra* note 4, at 82.

9. Liao, *supra* note 7.

10. *Several Opinions*, *supra* note 3.

11. *Opinions*, *supra* note 6.

the Belt and Road, the legal system still presents significant challenges to obtaining fair, consistent, and predictable outcomes for international businesses who choose to litigate.

This Note first considers the context and policies that led to the development of the BRI and judicial reform in China. This background is followed by a discussion of reformed and newly developed dispute resolution mechanisms available to foreign parties engaging in Belt and Road commercial transactions. These dispute resolution mechanisms are then analyzed with respect to the challenges they present to achieving China's promulgated goals of providing consistent and fair judgments. This Note ends with a summary of how the reforms in the judiciary reflect an effort to achieve national policy goals of fair and consistent judgments but still fall short of these goals with respect to foreign litigants.

I. ESTABLISHING THE BELT AND ROAD AND THE NEED FOR JUDICIAL REFORM

For over two thousand years, China's historic Sino-centric worldview was center stage in its approach to global governance.¹² The CCP's focus on its core interests of national security, sovereignty, and development have shaped the path for how China chooses to engage with the international order.¹³ However, the rise of China's socialist market economy under Deng Xiaoping served as a sharp turning point in China's engagement with foreign countries. Beginning in 1979, China implemented vast economic reform measures to move in the direction of an economy based on free market principles.¹⁴ This transformation ultimately led to increased participation in international engagements—e.g. signing the International Covenant on Economic, Social and Cultural Rights, entrance into the WTO, and liberalization of trade barriers—and fundamentally changed China's role in the global economy.¹⁵ In recent years, China has taken a strong role in the global economy and accounts for over 14% of the global GDP.¹⁶ This role has enabled China to pursue attractive opportunities to expand its economy and exert greater influence over the international order. To effectively carry out these operations, China has promulgated national policies of opening-up and cooperation with other nations.

In furtherance of these policies, China has used its growing leadership to bring together nations and facilitate global economic development through the

12. See *China's Approach to Global Governance*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/china-global-governance> (last visited Jan. 24, 2022).

13. See MICHAEL J. MAZARR, TIMOTHY R. HEATH & ASTRID STUTH CEVALLOS, *CHINA AND THE INTERNATIONAL ORDER* 13–14 (2020).

14. WAYNE MORRISON, *CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES* 4 (2019).

15. *Id.*; see also Peter K. Yu, *Building Intellectual Property Infrastructure*, 14 U. PA. ASIAN L. REV. 275, 279 (2019).

16. *China: Percent of World GDP*, GLOB. ECON., https://www.theglobaleconomy.com/China/gdp_share (last visited Jan. 24, 2022).

BRI. With over 142 participating countries and over 65 domestic economies involved, the BRI has gained major traction with foreign parties looking to access new markets.¹⁷ Built based on traditional Chinese principles of cooperation, openness, inclusiveness, and mutual benefit,¹⁸ the Belt and Road platform is clearly aimed at achieving distinct policy goals, but it also seems to serve as a vehicle to strengthen China's geopolitical position.¹⁹ By implementing such a platform, China is signaling its willingness to cooperate and work with other countries.

A. THE FORMATION AND LEGAL FRAMEWORK OF THE BRI

Consistent with Chinese principles, the BRI is essentially a series of non-binding contracts formed by a collection of memoranda of understanding ("MOU") and cooperation documents between China and participating nations.²⁰ Each MOU lays out the common goals, including promoting connectivity of policy, infrastructure, trade, finance, cooperation for common development, and developing an open global economy.²¹ The MOUs subsequently describe the specific areas of cooperation that are targeted by the parties, such as sustainability development and people-to-people connectivity.²² In contrast to a one-size fits all approach, the flexibility in project governance enables participating nations to advocate for favorable initiatives, but it also suggests a commitment to engage in partnerships tailored to the needs of each participating country.²³ Given the highly individualized nature of Belt and Road relationships, the legal framework reflects this flexible approach. International parties transacting along the Belt and Road are free to arbitrate, mediate, or litigate as desired, so long as they comply with their MOUs.²⁴ While this freedom of choice is consistent with China's policies of opening-up and cooperation, until recently, the Chinese legal system made it difficult for foreign parties favoring litigation to obtain predictable judgments.

Prior to an era of reform commencing in the late 1970s, the CCP retained exclusive control over all political organs, restricting all means of implementing

17. *Countries of the Belt and Road*, GREEN FIN. & DEV. CTR, <https://green-bri.org/countries-of-the-belt-and-road-initiative-bri> (last visited Jan. 24, 2022); *Overview of the Belt and Road Initiative*, HKIAC: BELT & ROAD, <https://www.hkiac.org/Belt-and-Road/overview-belt-and-road-initiative> (last visited Jan. 24, 2022).

18. See Visions, *supra* note 2.

19. Lutz-Christian Wolff, *Legal Responses to China's "Belt and Road" Initiative: Necessary, Possible or Pointless Exercise?*, 29 *TRANSNAT'L L. & CONTEMP. PROBS.* 249, 254–55 (2020).

20. See Visions, *supra* note 2.

21. See Memoranda of Understanding Between the Government of the Italian Republic and the Government of the People's Republic of China on Cooperation within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative; see Memoranda of Understanding Between the Government of the State of Victoria Australia and the Government of the National Development and Reform Commission of People's Republic of China on Cooperation within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative.

22. See Visions, *supra* note 2.

23. *Id.*

24. *Id.*

any semblance of Western democracy.²⁵ Traditional socialist thought generally rejects litigation as a solution to resolving disputes because it disfavors the risk of creating enemy-like relationships.²⁶ As a result, China gave preference to arbitration and mediation in settling in legal disputes. Although China had a court system at the time, the complete lack of independence of the courts from the political regime was not favorable to parties choosing to litigate. After the adoption of the Constitution of the People's Republic of China in 1982, the power of the CCP began to operate within the framework of the Constitution—replacing the rule of man with rule of law—yet the court system had failed to reflect the constitutional independence of the judiciary.²⁷ More recently, China has implemented a series of judicial reforms to create greater fairness, stability, consistency, and predictability.

B. THE NEED FOR JUDICIAL REFORM

China has acknowledged the need for judicial reform to create a system more friendly to international parties. China's court system was simply incompatible with the changes in society resulting from opening up and economic reform over the past twenty years.²⁸ Unsurprisingly, international parties have broad access to arbitration resources across the world and are typically guaranteed enforcement of arbitral awards in China under the New York Convention.²⁹ However, in order to effectively cooperate and promote global economic development, China's legal system would need to expand its recognition of dispute resolution mechanisms used internationally. This includes increased recognition and resources for litigants. Because the BRI framework allows for transacting parties to litigate, Chinese courts must be able to provide fair, predictable, and consistent court judgments. Without predictable, enforceable legal protections in court, the ability to litigate over a BRI dispute is an empty promise, which may ultimately deter international commercial transactions.³⁰ In contrast, by providing international businesses with a variety of fair and predictable legal services, China would reinforce its commitment to cooperate with parties who prefer different dispute resolution systems.

Another pertinent consideration is that prolonged cooperation for global economic development requires a legal system flexible enough to endure over

25. Chen, *supra* note 1, at 1–4.

26. Margaret Y. Woo, *Court Reform with Chinese Characteristics*, 27 WASH. L. REV. 241, 254 (2017).

27. See Chen, *supra* note 1, at 9–10.

28. Zou Keyuan, *Judicial Reform in China: Recent Developments and Future Prospects*, 36 INT'L L. 1039, 1040 (2002).

29. China signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards known as the New York Convention in 1986. *Notice of the Supreme People's Court on the Implementation of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" Acceded to by China*, SUP. PEOPLE'S CT. (Apr. 10, 1987), <http://cicc.court.gov.cn/html/1/219/199/411/698.html> [hereinafter *Notice on New York Convention*]; see New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

30. WORLD BANK, *supra* note 4, at 83.

time. Given the projected volume of parties transacting on the Belt and Road, there is likely to be an influx in cross-border commercial disputes. Therefore, the judiciary must have the capacity and expertise to handle a large volume and variety of cases. Without adequate resources to ascertain the appropriate law, produce consistent outcomes, and adjudicate fairly, China risks suffering reputational harm among parties preferring litigation.³¹ In turn, providing fairer and consistent judicial services across all dispute resolution mechanisms not only supports China's policies of cooperation, but it may even attract parties who resist Belt and Road engagement for fear of facing uncertainty or biased court judgments in the event of dispute.

While there are examples of foreign jurisdictions achieving significant economic growth absent a strong legal framework, one school of thought in economics—that is, the Rights Hypothesis—suggests that a lack of stable and predictable legal rights generally discourages investment and reduces the effectiveness of the economy.³² For this reason, a strong, reliable court system seems like an essential backbone to support BRI transactions. Furthermore, because the BRI serves to further Chinese national commitments to opening-up and cooperation with foreign nations, creating a strong legal framework that supports varying dispute resolution preferences is a core investment necessary to achieve these commitments.³³ By reforming the court system in a way that is supportive of international litigants, China can instill greater confidence in international businesses transacting along the Belt and Road and reinforce China's commitment to the greater international order.

II. AVAILABILITY OF DISPUTE RESOLUTION MECHANISMS AND CHINA'S EFFORTS TO EXPAND AND REFORM DOMESTIC DISPUTE RESOLUTION MECHANISMS

China has taken a “demand-oriented approach” toward providing legal services to international parties transacting on the Belt and Road.³⁴ Not only has China promulgated a commitment to support the development of international arbitration, mediation, and domestic international commercial courts, but it has also committed to continuously assess the legal needs of BRI participants and reform accordingly.³⁵ With the potential to sweep in a wide range of legal issues from across borders, legal services for BRI transacting parties need to be supported by institutions with the tools and expertise to apply appropriate laws.

31. Donald C. Clarke uses the Soviet Union, Vietnam, and China prior to reform as examples of states that have achieved significant economic growth in the absence of a “well-functioning legal system.” See Donald C. Clarke, *China: Creating a Legal System for a Market Economy* 2–3 (GWU Legal Stud., Research Paper, No. 396, 2007) (describing the dependency of well-functioning economies and willingness of parties to utilize court on the capability judicial systems).

32. See *id.* at 2.

33. See Several Opinions, *supra* note 3.

34. Opinions, *supra* note 7.

35. *Id.*

Given the variety of dispute resolution preferences among participating parties, China has been active in expanding the scope of reliable legal instruments available to BRI participants. More specifically, China has been catering to the needs of parties who prefer litigation by implementing a variety of court reforms to provide fair and consistent adjudication in Chinese courts. This is evidenced by the establishment of international commercial courts, the issuing of BRI-related guiding cases, and expanded application of the principle of reciprocity in the enforcement of foreign judgments.

A. ACCESS TO BRI ARBITRATION AND MEDIATION SERVICES

To align with the Chinese principles of harmony and policies of cooperation, China endorses using arbitration and mediation to minimize adversarial relations and resolve disputes quickly and efficiently.³⁶ As a signatory of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) since 1987, China enforces judgments awarded via arbitration under the principle of reciprocity.³⁷ Therefore, all international businesses whose countries are signatories of the agreement are entitled to enforcement of arbitral awards in China regardless of the jurisdiction in which the award was rendered. The certainty of enforceability of arbitral awards is further addressed in the *Notice of the Supreme People’s Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China*, in which the SPC explicitly states that in the event of conflict between the New York Convention and China’s Civil Procedure Law, the New York Convention will prevail.³⁸ In other words, foreign parties whose home countries are signatories to the New York Convention are guaranteed enforcement of their arbitral awards. Because 92% of BRI participating countries have ratified the New York Convention,³⁹ the predictability and consistency associated with arbitration creates an attractive dispute resolution choice for BRI transactions.

One popular forum outside mainland China that provides high quality arbitration services for BRI transactions is the Hong Kong International Arbitration Centre (“HKIAC”). Known for the independence of its judiciary, common law system, and expertise in handling commercial disputes, the HKIAC holds a strong reputation for providing quality arbitration services.⁴⁰ In anticipation of the rise of international commercial disputes arising from Belt and Road transactions, the HKIAC has established the Belt and Road Advisory

36. INT’L CHAMBER OF COMMERCE, ICC GUIDANCE NOTES ON RESOLVING BELT AND ROAD DISPUTES USING MEDIATION AND ARBITRATION 2 (2019).

37. *Notice on New York Convention*, *supra* note 29.

38. *Id.*

39. *Why HKIAC for Belt and Road Disputes*, HKIAC, <https://www.hkiac.org/Belt-and-Road/why-hkiac-belt-and-road-disputes> (last visited Jan. 24, 2022).

40. Vincent Connor, *HKIAC Announces Dedicated ‘Belt and Road’ Resources*, PINSENT MASONS (Apr. 27, 2018), <https://www.pinsentmasons.com/out-law/news/hkiac-announces-belt-and-road-resources>.

Committee, which consists of infrastructure, finance, construction, and maritime experts.⁴¹

Expanding on the use of non-adversarial dispute resolution methods, BRI parties can also enforce international settlement agreements under the U.N. Convention on International Settlement Agreements Resulting from Mediation (“Singapore Mediation Convention”). The Singapore Mediation Convention provides a framework for enforcement of international settlement agreements from resolved international commercial disputes.⁴² China, along with forty-six other countries, signed the agreement in 2019.⁴³ By signing on to this agreement, China continues to recognize the need for consistent application of cross-border commercial settlements without fundamentally abandoning its preferences of peaceful cooperation. As a result, if parties want to avoid resolving their disputes in China, they are free to do so without fear of their settlements being denied enforcement in China. While these arbitration and mediation services are nothing new and do not constitute any sort of domestic legal reform in China, they nevertheless provide an avenue for fair and reputable dispute resolution services to BRI participants choosing to wholly avoid resolving a dispute in China.

B. ESTABLISHMENT OF THE CHINA INTERNATIONAL COMMERCIAL COURT

A major signal of China’s commitment to reform the Chinese legal system to better serve the needs of international businesses transacting along the Belt and Road is the establishment of the China International Commercial Courts (“CICC”). As an organ of the SPC, this branch of the judiciary began operating on June 29, 2018 and consists of two courts: the Xi’an court—that is, the forum for disputes arising on the Belt—and the Shenzhen court—that is, the forum for disputes arising on the maritime silk road.⁴⁴ To accommodate all legal needs resulting from Belt and Road transactions, the CICC is intended to be a “one-stop” forum.⁴⁵ As a “one-stop” forum, the CICC provides arbitration, mediation, and litigation services specifically for international commercial disputes.⁴⁶ Given China’s preference for arbitration and the ease of enforcing arbitration

41. *Id.*

42. See G.A. Res 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 20, 2018).

43. Press Release, Ministry of Commerce, People’s Rep. of China, China Signs the United Nations Convention on International Settlement Agreements Resulting from Mediation (Aug. 8, 2019), <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201908/20190802891357.shtml> (China).

44. Malik R. Dahlan, *Dispute Regulation in the Institutional Development of the Asian Infrastructure Investment Bank: Establishing the Normative Legal Implications of the Belt and Road Initiative*, in INTERNATIONAL ORGANIZATIONS AND THE PROMOTION OF EFFECTIVE DISPUTE RESOLUTION 133 (2019); *Building the Judicial Guarantee*, *supra* note 5.

45. *Notice of the General Office of the Supreme People’s Court on Determining the First Group of International Commercial Arbitration and Mediation Institutions Included in the “One-Stop” Diversified Mechanisms for Resolving International Commercial Disputes*, SUP. PEOPLE’S CT. (Nov. 13, 2018).

46. *Id.*

awards in China, the arbitration services provided by the CICC are unsurprising. However, the new litigation services seem to serve as a true manifestation of China's commitment to provide more expansive, internationalized judicial services to foreign parties. In light of the historic concerns revolving around the consistency, fairness, and predictability of litigating in China, the CICC's framework appears to move toward addressing these concerns.

Although the SPC retains independent judicial power under the Chinese Constitution, the independence of the judiciary remains in the court, not the individual judges and committees which comprise the court.⁴⁷ Judges are appointed by the National People's Congress ("NPC"), and thus serve as an important instrument of policy in China.⁴⁸ Accordingly, the decisions and judgments of individual judges are subject to review. With this overarching control in mind, to truly reflect the policy of cooperation embodied by the BRI, it is necessary to have processes in place to ensure that judges who are adjudicating international commercial disputes use their unfettered discretion to apply the appropriate law in any given case. The *Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of International Commercial Courts* (the "*Provisions*") provides the blueprint for rules and regulations that guide judges on how to adjudicate international commercial cases and determine which laws apply.⁴⁹ The creation of the International Commercial Expert Committee and BRI-specific guiding cases are two key resources for CICC judges that help promote fair and consistent judgments.

1. Creation of the International Commercial Expert Committee for Ascertaining Laws

Given the complexity of making judgments involving foreign parties, the SPC created the International Commercial Expert Committee ("ICEC") to help guide judges to ascertain appropriate international laws and issue fairer rulings.⁵⁰ The committee, selected and appointed by the SPC,⁵¹ consists of Chinese and foreign experts who have extensive experience in international commercial law, trade and investment, have high international influence, and have a reputation for being ethical and fair.⁵² The committee serves to support

47. *China's Judicial System: People's Courts, Procuratorates, and Public Security*, OLE MISS, <https://olemiss.edu/courses/pol324/chnjudic.htm> (last visited Jan. 24, 2022).

48. *Id.*

49. *Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of International Commercial Courts*, SUP. PEOPLE'S CT. (June 27, 2018), <http://cicc.court.gov.cn/html/1/219/208/210/817.html> [hereinafter *Provisions*].

50. *See the Decision on the Establishment of the International Commercial Expert Committee of the Supreme People's Court*, SUP. PEOPLE'S CT. (Aug. 24, 2018), <http://cicc.court.gov.cn/html/1/219/235/243/index.html>.

51. *See Working Rules of the International Commercial Expert Committee of the Supreme People's Court (for Trial Implementation)*, SUP. PEOPLE'S CT., Article 5 (Nov. 21, 2018), <http://cicc.court.gov.cn/html/1/219/208/210/1146.html> [hereinafter *Working Rules*].

52. *See id.* at art. 2.

judges by providing expert knowledge on international and domestic laws of their own jurisdictions.⁵³ When a court needs to apply foreign law, the judge should rely on the expertise provided by the committee.⁵⁴

China has vowed to strengthen the ICEC as a resource since its establishment in 2018. In the *Opinions of the Supreme People's Court Regarding Further Providing Judicial Services and Guarantees by the People's Courts for the Belt and Road Initiative*, the SPC states the goals of increasing the scope of the committee, increasing the number of foreign representatives, and leveraging the expertise of committee members in adjudicating cases.⁵⁵ In line with China's relationship with the HKIAC, the SPC has also stated the commitment to add expert members from the HKIAC to the ICEC.⁵⁶ Overall, the addition of this committee not only displays China's commitment to cooperation through increased use of foreign law experts in Chinese courts, but it also may be seen as a check on the CCP's overarching control of judges. In other words, the existence of the ICEC holds judges accountable for using foreign law experts when applicable because not doing so would appear inconsistent with China's policy of cooperation. In addition to the resources the ICEC provides in promoting fair outcomes, judges in the CICC have access to further guidance furnished by the guiding cases system.

2. BRI Guiding Cases for Creating Consistent Judgments

Similar to case law, "guiding cases" are gold standard cases that judges can turn to for guidance when adjudicating cases with similar fact patterns.⁵⁷ While the authority of guiding cases does not rise to the level of case law, the creation of guiding cases is particularly significant given the history of the Chinese judiciary. Traditionally, the SPC had no authority to create case law or engage in quasi-legislative conduct because such conduct interferes with the lawmaking authority of the NPC.⁵⁸ As a result, courts are bound to adjudicate in accordance with the Constitution.⁵⁹ However, the development of judicial precedent has been contemplated since 1987, and the SPC began to experiment with such a system starting in 2004.⁶⁰ In 2005, the SPC listed a case law-type system as a

53. *Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions*, GEN. OFF. CTR. COMM. COMMUNIST PARTY CHINA (June 2018), <http://cicc.court.gov.cn/html/1/219/208/210/819.html>.

54. *Id.*

55. *Opinions*, *supra* note 6.

56. *Id.*

57. Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2213 (2016).

58. Fengping Gao, *China's Guiding Cases System as the Instrument to Improve China's Case Guidance System, Which Includes Both Guiding Cases and Typical Cases*, 45 INT'L J. LEGAL INFO. 230, 237 (2017).

59. Shucheng Wang, *Guiding Cases and Bureaucratization of Judicial Precedents in China*, 14 U. PA. ASIAN L. REV. 96, 101 (2019).

60. Jia, *supra* note 57, at 2218–21.

policy objective for the court.⁶¹ With wide variation of economic and social development across China, the production of consistent judgments among similar cases across the nation proves to be difficult.⁶² Consistent with China's continuing scheme of judicial reform, in 2010 China finally took a step forward in trying to remedy these discrepancies and provide another instrument to help produce more consistent judgments.⁶³

The purpose of guiding cases is to support the lower courts in addressing statutory ambiguities and move toward more unified application of law across China.⁶⁴ The cases are to “summarize experience in adjudication work in a timely manner, guide the adjudication work of courts at various levels, unify the scales of justice and standards of adjudication, regulate judges’ discretionary power, and fully realize the guiding function of typical cases in adjudication work.”⁶⁵ The process of giving effect to guiding cases requires that a Guiding Case Recommendation Form be submitted, along with the case to be adjudicated, to the Office for the Work on Case Guidance of the Supreme People’s Court.⁶⁶ Following the review and acceptance of the case by the SPC’s Adjudication Committee, the case is distributed to each high people’s court and made public by announcement in the Gazette of the Supreme People’s Court, in the People’s Court Daily, and on the SPC’s website.⁶⁷ The limitation on these cases is that they cannot serve independently as a source of law—that is, there must be a statutory hook.⁶⁸ While these cases do not have binding authority in the way that case law does, in effect, guiding cases are said to have *de facto* binding authority.⁶⁹

Although this reform is not specific to advancing the BRI, the role of guiding cases with respect to the BRI has gained greater attention after the issuance of six Belt and Road cases. Guiding Case No. 107 through Guiding Case No. 112 all provide guidance for judges resolving disputes arising from Belt and Road commercial transactions. For example, in Guiding Case No. 107, which involves a dispute over a purchase contract between a Singaporean and German company, the case holds the applicable international law that governs

61. *Id.* at 2218–19.

62. See WANG LIFENG, CHINA GUIDING CASES PROJECT: THE NECESSITY AND FUNCTION OF CHINA’S GUIDING CASES SYSTEM 2 (2013), <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/08/CGCP-English-Commentary-9-Professor-Wang.pdf>.

63. See generally *Detailed Implementing Rules on the “Provisions of the Supreme People’s Court Concerning Work on Case Guidance,”* STANF. L. SCH. CHINA GUIDING CASES PROJECT (June 12, 2015), <https://cgc.law.stanford.edu/sgg-on-prc-detailed-implementing-rules-provisions-case-guidance> [hereinafter *Detailed Rules*].

64. Jia, *supra* note 57, at 2214, 2221.

65. LIFENG, *supra* note 62, at 2.

66. *Detailed Rules*, *supra* note 63, at art. 6.

67. *Id.* at art. 8.

68. Jia, *supra* note 57, at 2232.

69. Gao, *supra* note 58, at 236.

the commercial conduct of the parties shall apply.⁷⁰ In the absence of an identifiable governing law, the law agreed to in the contract shall apply.⁷¹ In this specific case, because the contracting parties were organized under countries that are part of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), and the application of the CISG was not expressly excluded in the contract, the law of the CISG was applied.⁷² In another example, Guiding Case No. 108, which concerns a contract for the carriage of goods by sea between a Chinese and Danish company, the SPC held that the principles of fairness prescribed in China’s contract law apply even in cases when there is an applicable special law—in this case, maritime law.⁷³

Given the difficulty of ascertaining applicable laws in cases concerning international business entities, these cases are key resources for judges to look to when determining how to interpret and apply the appropriate law in adjudicating disputes over international commercial contracts. Furthermore, the addition of these BRI-specific Guiding Cases demonstrates China’s efforts to create more consistent judgments and provide some level of predictability as to how similar cases are likely to be adjudicated. Notwithstanding the contractual terms between foreign parties, the BRI-specific cases also provide examples of the SPC acknowledging and applying appropriate international laws, further promoting stability and consistency in the Chinese judiciary. China’s recognition of international law is in itself a significant step toward providing foreign parties with a sense of the legal system’s credibility. When placed in the context of the BRI, China more firmly exhibits its commitment to providing fair judgments for international businesses.

C. INCREASED ENFORCEMENT OF FOREIGN JUDGMENTS BASED ON RECIPROCITY

Built on the same principles used to enforce arbitral awards rendered in foreign jurisdictions, Chinese Civil Procedure Law (“CPL”) permits judgments made in foreign jurisdictions to be enforced in China under the principle of reciprocity.⁷⁴ Codified under Articles 281 and 282 of CPL, enforcement of a foreign judgment will be allowed pursuant to an international treaty or under the

70. See Helan di Sen Ke Qiufan Bo Yejin Chanpin Youxian Gongsi Yu Zhong Hua Xinjiapo Youxian Gongsi Guoji Huowu Maoyi Hetong Guoji Jiufen An (德国蒂森克虏伯冶金产品有限责任公司与中化国际(新加坡)有限公司国际货物买卖合同纠纷案) [ThyssenKrupp Metallurgical Products GmbH v. Sinochem Int’l (Overseas) Pte. Ltd., A Dispute Over a Contract for the International Sale and Purchase of Goods], Sup. People’s Ct. Guiding Case No. 107, Feb. 25, 2019 (China).

71. *Id.*

72. *Id.*

73. See Zhejiang Longda Stainless Steel Co., Ltd. v. A.P. Moller-Maersk A/S, A Dispute Over a Contract for the Carriage of Goods by Sea, SUP. PEOPLE’S CT. GUIDING CASE NO. 108 (Sup. People’s Ct. 2019) (China).

74. [The Civil Procedure Law of the People’s Republic of China] (promulgated by the Standing Comm. of the Nat’l People’s Cong., June 27, 2017, effective July 1, 2017), art. 281–82, 2017 FALÜ HUIBIAN [hereinafter CPL].

principle of reciprocity, so long as Chinese laws and policies are not violated.⁷⁵ The principle of reciprocity is the concept of acceding to recognition of awards or judgments made in foreign jurisdictions based on that jurisdiction's reciprocal recognition of awards and judgments made by China.⁷⁶

To enforce a foreign judgment based on reciprocity, the SPC must first review and issue an order for the judgment to be enforced.⁷⁷ This is important because unlike arbitration the judgment may not be enforced immediately, which prolongs and makes more difficult judgment enforcement for the prevailing party. The application of such a principle is consistent with Chinese principles of openness, inclusiveness, mutual learning, and mutual benefit.⁷⁸ However, given China's longstanding preference for non-adversarial dispute resolution, historically, the SPC has been resistant to enforcing such judgments.⁷⁹ Although the CPL has permitted the enforcement of foreign judgments via the principle of reciprocity, Chinese courts rarely find reciprocity absent a bilateral treaty.⁸⁰ For example, Chinese judgments have been enforced in a number of foreign nations, including Australia, Israel, South Korea, and the United Kingdom, yet China refused to do the same.⁸¹ However, the Belt and Road seems to have been an impetus for liberalizing the use of this principle.

Since the establishment of the BRI, China has announced that it would take a more active approach in enforcing foreign judgments on the basis of reciprocity.⁸² For example, one major development was the 2019 arrangement between Hong Kong and the SPC, which allows civil and commercial judgments made in Hong Kong courts to be enforced in China.⁸³ This is particularly significant because mainland China rarely enforces judgments of Hong Kong courts.⁸⁴ Reflective of China's goals of expanding access to legal remedies in

75. *Id.*

76. Alyssa V. M. Wall, *Designing a New Normal: Dispute Resolution Developments Along the Belt and Road*, 52 N.Y.U. J. INT'L L. & POL. 279, 295 (2019).

77. CPL, *supra* note 74, at art. 282.

78. Matthew Sava & Ning Zhang, *A New Era of Reciprocity: Trends in Foreign-Judgment Recognition in China*, REID & WISE LLC (Nov. 30, 2017, 6:09 PM), <http://www.reidwise.com/blog/2017/11/30/a-new-era-of-reciprocity>.

79. *Id.*

80. See Jie (Jeanne) Huang, *Enforcing Foreign Monetary Judgments in China: Breakthroughs, Challenges, and Solutions in the Context of "One Belt One Road,"* GEO. WASH. INT'L L. REV. 105, 106–7 (2020); CAMERON HASSALL, CLIFFORD CHANCE, BELT AND ROAD DISPUTE RESOLUTION FROM A CHINESE PERSPECTIVE 3 (2018), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2018/06/belt-and-road-dispute-resolution-from-a-chinese-perspective.pdf>.

81. Huang, *supra* note 80, at 106–07

82. Opinions, *supra* note 6, at 3; Nolen Dean Boyer, *Recognition and Enforcement of Foreign Judgments in China*, ANDERSON & ANDERSON LLP (Aug. 31, 2018), <http://www.anallp.com/index.php/index/article/aid/339.html>.

83. MARTIN DAVID, JO DELANEY, NANDAKUMAR PONNIYA, MINI VANDEPOL, BAKER MCKENZIE, BRI RISK MITIGATION AND DISPUTE RESOLUTION OPTIONS IN THE COMING DECADE 31 (Dec. 13, 2019), https://www.bakermckenzie.com/-/media/files/insight/publications/2020/03/bri-report_alb_baker-mckenzie.pdf.

84. Zhang Guanglei, *Recognizing, Enforcing HK Judgments in Mainland China*, CHINA BUS. L.J. (June 12, 2020), <https://law.asia/enforcing-hk-judgments-mainland/>.

the context of the BRI,⁸⁵ the commitment to a more expansive use of reciprocity is further evidenced by three main actions of China: signing the Hague Choice of Court Convention and the enforcement of two foreign judgments based on de facto reciprocity.

1. *Hague Choice of Court Convention*

China did not become a signatory of the Hague Choice of Court Convention (“HCCC”) until 2017, twelve years after it was created.⁸⁶ This action was another major signal of effort on China’s part to expand the range of credible legal instruments available to parties transacting on the Belt and Road. Similar to the role of the New York Convention in enforcing arbitral awards, the HCCC seeks to promote international trade and investment through judicial cooperation and enforcement of court judgments in foreign jurisdictions by enabling contracting parties to designate their choice of court.⁸⁷ The HCCC is an international legal framework for enforcing foreign judgments obtained under choice of court agreements.⁸⁸ By endorsing and expanding judicial cooperation, China’s participation in the HCCC allows BRI parties to litigate in different countries with greater assurance of enforceability in China.

2. *De Facto Reciprocity—Kolmar Case (Enforcement of a Singapore High Court judgment) and Liu Li Case (Enforcement of a California Judgment)*

Although there are no clear criteria for what constitutes “reciprocity” between China and a foreign nation, the SPC has issued two landmark opinions enforcing foreign judgments, which ultimately suggests that judges are capable and willing to enforce foreign judgments based on de facto reciprocity. The first landmark case, *Kolmar Group AG, A Case of an Application for the Recognition and Enforcement of a Civil Judgment of the High Court of Singapore*, is a case in which the Intermediate People’s Court of Nanjing enforced a judgment of the Singapore High Court on account of de facto reciprocity.⁸⁹ The facts are as follows: Kolmar Group (“Kolmar”), a Swiss petroleum product manufacturer and distributor,⁹⁰ had contracted with Jiangsu Textile Group Import & Export Co. Ltd. (“Jiangsu”), an international trading company for clothes, toys, electromechanical equipment and raw materials based in China.⁹¹ The parties

85. Boyer, *supra* note 82.

86. Sava & Zhang, *supra* note 78.

87. *See generally* Convention on Choice of Court Agreements, June 30, 2005, HCCH No. 37.

88. *Id.*

89. Kolmar Group AG, A Case of an Application for the Recognition and Enforcement of a Civil Judgment of the High Court of Singapore, Typical Case 13, STAN. L. SCH.: CHINA GUIDING CASES PROJECT (Dec. 9, 2016), <http://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/typical-case-13>.

90. *Kolmar Group AG*, BLOOMBERG, <https://www.bloomberg.com/profile/company/7321338Z:SW> (last visited Jan. 24, 2022).

91. *Jiangsu Textile Industry Group Import & Export Co Ltd*, BLOOMBERG, <https://www.bloomberg.com/profile/company/7902537Z:CH> (last visited Jan. 24, 2022).

had entered into a settlement agreement pursuant to a dispute arising from a purchase agreement between the parties.⁹² When Jiangsu failed to perform under the settlement agreement, Kolmar brought a suit in the Singapore High Court and the court made a judgment in favor of Kolmar.⁹³ However, because Jiangsu's operations were based in China, Kolmar applied to the Intermediate People's Court of Nanjing to enforce the foreign judgment in China.⁹⁴ Under CPL Article 282, the judgment may be enforced pursuant to a treaty between Singapore and China, or reciprocity, neither of which had been acceded to at the time.⁹⁵ However, the Intermediate People's Court of Nanjing considered a judgment rendered by itself in 2014, which had subsequently been enforced by the Singapore High Court.⁹⁶ Given the recognition of a Chinese judgment in Singapore, the Intermediate People's Court of Nanjing determined that reciprocity had been established *de facto* and recognized the Kolmar judgment.⁹⁷

The underlying principles of the Kolmar decision are significant in the context of the BRI because the opinion is aimed at facilitating trade and investment between Singapore and China through the BRI.⁹⁸ As a result, Kolmar has been coined a key case in encouraging lower courts to apply reciprocity in BRI cases, and it also displays China's recognition of the need to engage in judicial cooperation to further its economic motives.⁹⁹ Similar to the Kolmar case, in 2017, China recognized a judgment rendered by a U.S. court in the absence of a treaty or arrangement of reciprocity.¹⁰⁰ Although the United States is not a BRI target country, the following case is an example which illustrates China's growing liberalization of enforcing foreign judgments, as well as its growing reputation as a nation committed to providing fair and predictable legal protections.¹⁰¹

In *Liu Li v. Tao Li et al. for Recognition and Enforcement of a Civil Judgment of a Foreign Court* ("Liu Li"), the suit, first brought in California Superior Court for the County of Los Angeles, concerned the transfer of equity of JiaJia Management Inc. and the misappropriation of consideration for its shares.¹⁰² Defendants Tao Li and Tong Li entered into a contractual relationship with Liu Li, in which the defendants were to transfer 50% equity interest in JiaJia Management Inc. to Liu in exchange for consideration in the amount of

92. Kolmar Group AG, *supra* note 89.

93. *Id.*

94. *Id.*

95. *Id.*

96. Ronald A. Brand, *Recognition of Foreign Judgments in China: The Liu Case and the "Belt and Road" Initiative*, 37 J.L. & COM. 29, 39 (2018), <https://doi.org/10.5195/jlc.2018.152>.

97. Kolmar Group AG, *supra* note 89.

98. See Huang, *supra* note 80, at 116–17.

99. *Id.*

100. Brand, *supra* note 96, at 30.

101. *Id.* at 48.

102. *Id.* at 31; Liu Li v. Tao Li et al., for Recognition and Enforcement of a Civil Judgment of a Foreign Court, (Wuhan City Interm. People's Ct. June 30, 2017) [hereinafter Liu Li].

\$150,000 USD.¹⁰³ Shortly after Liu paid the defendants \$125,000 USD, the defendants “disappeared with the money” without transferring the shares.¹⁰⁴ Liu sued for the return of her funds, prejudgment interest on the funds, and court costs.¹⁰⁵

The court entered a default judgment for Liu, and Liu applied directly to the Intermediate People’s Court in Wuhan, Hubei, where the defendants own property.¹⁰⁶ The judgment was given effect on June 30, 2017, based on three key factors. First, the applicant provided evidence of precedent in which “an American court has recognized and enforced a civil judgment of a [Chinese court].”¹⁰⁷ Second, the ruling did not “violate the basic principles of the laws of the People’s Republic of China and the sovereignty, security and public interest of the People’s Republic of China.”¹⁰⁸ Third, the Wuhan court had jurisdiction over the defendants due to the location of their property in Hubei.¹⁰⁹

While these are the first foreign judgments to be enforced in China on a basis of de facto reciprocity, China’s acceptance of these judgments ultimately illustrates the ability of foreign jurisdictions to establish reciprocity absent an international agreement. Although reciprocity does not guarantee enforcement of foreign judgments, the SPC’s most recent opinion on judicial services and guarantees for the BRI addresses reciprocity and calls for gradual promotion of the principle.¹¹⁰ The opinion states:

[The courts] shall positively explore and strengthen regional judicial assistance . . . and promote the mutual recognition and enforcement of judgments rendered by countries along the “Belt and Road.” Under the circumstance where some countries have not concluded judicial assistance agreements with China, on the basis of the international judicial cooperation and communication intentions and the counterparty’s commitment to offering mutual judicial benefits to China, the people’s courts of China may consider the prior offering of judicial assistance to parties of the counter party, positively promote the formation of reciprocal relationship, and actively initiate and gradually expand the scope of international judicial assistance.¹¹¹

The current rules and application of reciprocity are vague, but the increased attention on the principle and extended use of de facto reciprocity, on the whole, suggests a step forward toward predictability in enforcement. If China continues on this path, the expanded use of this power will ultimately have a major impact

103. *People’s Republic of China Recognizes Commercial Judgment Entered by California Superior Court*, WILSON ELSE: INSIGHTS (Sept. 28, 2017), https://www.wilsonelser.com/news_and_insights/insights/2972-peoples_republic_of_china_recognizes_commercial.

104. Liu Li, *supra* note 102.

105. *Id.*

106. *See id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Several Opinions, *supra* note 3.

111. *Id.*

on the BRI, because it will enable foreign parties to litigate in their home country, should they so choose, without fear of not having their judgment recognized and enforced in China.

III. CHALLENGES PURSUANT TO COURT JUDGMENTS

It is evident that China has undertaken extensive efforts to transform the legal system to be more international business-friendly and facilitate disputes arising from transactions along the Belt and Road. Despite these efforts, the vagueness of the SPC opinions governing the reforms presents a distinct set of logistical challenges to achieving fair, predictable and consistent judgments. This ultimately leaves foreign parties who choose to litigate vulnerable to potentially unfair judgments in Chinese courts.

In *Several Opinions*, it is stated:

[The judiciary] shall implement the legal principle of legal equality in a comprehensive manner, uphold the equal protection of the lawful rights and interests of Chinese and foreign parties, and make efforts to effectively maintain the regional cooperation environment for fair competition, integrity, and harmony and win-win . . . the people's courts shall follow unswervingly the socialist road of rule by law with Chinese characteristics and actively carry out international judicial cooperation.¹¹²

The necessity of providing legal equality to further economic development is becoming increasingly important, and the CCP is aware of this. However, without substantive rules that effectively guide institutions in achieving these goals, these plain statements hold little credibility in the eyes of those affected. As commonly seen in many of the BRI-related opinions issued by the SPC, China does not provide clear meanings for what constitutes seemingly cooperative terms such as “legal equality,” “win-win,” or “socialist road of rule by law.”

These vague and idealistic sounding assertions may be advantageous to China, by giving courts interpretive flexibility to avoid adjudicating or enforcing judgments when the outcome will not benefit China or its people. On the other hand, this vagueness also presents great potential for inconsistent judgments, which operate to the detriment of international businesses that choose to litigate their BRI-related disputes. Without a clear understanding of how these principles precisely operate in court, China may undermine its commitment to safeguard BRI participants and create a fair and predictable business environment for foreign parties. Currently, there are two broad categories of challenges based on the vague standards in the SPC opinions: the potential for bias in the CICC and the SPC's process of enforcing a foreign judgment.

112. *Id.*

A. POTENTIAL ISSUES IN THE INTERNATIONAL COMMERCIAL COURTS

The *Provisions* characterize the establishment of the CICC as serving the purpose of providing an impartial forum for international commercial cases arising from the Belt and Road, which “equally protect[s] the legal rights and interests of Chinese and foreign parties.”¹¹³ The addition of these courts in itself is a major development for China, but the unclear scope of jurisdiction, the vague guidance in application of law, and the overarching control of the CCP presents potential barriers to impartiality and equal protection for foreign parties who want to make use of the CICC.

1. Unclear Scope of Jurisdiction

Under Article 2 of the *Provisions*, there are five types of international commercial cases over which the CICC has jurisdiction.¹¹⁴ Under the definition of “international commercial case,” the CICC appears to have broad jurisdiction over commercial cases involving one or more foreign parties regardless of whether the parties have any affiliation with China.¹¹⁵ In reality, the blueprint for the scope of CICC jurisdiction contains a number of restrictions and vague terms that create ambiguity as to what types of cases may be tried by the CICC.

For example, first instance commercial cases where (1) the amount in controversy is at least 300,000,000 Chinese yuan, and (2) the parties have submitted to CICC jurisdiction may be tried by the CICC. However, the ability to submit to the CICC under these circumstances is dually governed by Article 34 of CPL.¹¹⁶ Under Article 34 of CPL, parties to an agreement are limited to choosing a forum based on where the plaintiff or defendant is domiciled, where the contract is executed or performed, or anywhere with a connection to the dispute.¹¹⁷ As a result, the plaintiff would have to know what constitutes a proper connection to the forum if the other two options are unavailable, yet there is no

113. *Provisions*, *supra* note 49.

114. The CICC has jurisdiction over the following cases:

- (1) First instance international commercial cases (“Cases”), in which the amount in controversy is at least 300,000,000 Chinese yuan and parties have submitted to CICC jurisdiction
- (2) First instance Cases that are subject to the jurisdiction of the higher people’s court and have received permission to be tried by the CICC
- (3) First instance Cases that are whose nationwide impact is significant
- (4) Cases for enforcement, review, or setting aside arbitration international commercial arbitration awards
- (5) Other Cases which the SPC finds to be appropriate to be tried by the CICC.

Provisions, *supra* note 49; Lance Ang, *International Commercial Courts and the Interplay Between Realism and Institutionalism: A Look at China and Singapore*, HARV. INT’L L.J. (Nov. 14, 2019), <https://harvardilj.org/2020/03/international-commercial-courts-and-the-interplay-between-realism-and-institutionalism-a-look-at-china-and-singapore>.

115. See *Provisions*, *supra* note 49; see also *A Brief Introduction of China International Commercial Court*, CHINA INT’L COM. CT. (June 28, 2018) <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (laying out the features, scope of jurisdiction, and definition International Commercial Cases of the CICC).

116. See *Provisions*, *supra* note 49; Ang, *supra* note 114.

117. CPL, *supra* note 74, at art. 34.

guidance as to what establishes a connection to the forum.¹¹⁸ Similarly, the definition of “major impact” under Article 2(3) provides no clarity as to what would constitute a major impact nationwide. Overall, these ambiguities make it difficult for foreign parties to know whether they can make use of the CICC as a forum for litigation, and consequently make the CICC appear less accessible and less international.¹¹⁹

2. Challenges Among Judges and in Application of Law

Another potential issue is embedded in the guidelines for judges in applying law. Article 8 of the *Provisions* guides the application of foreign law in international commercial cases.¹²⁰ When choice of law is not provided in the contract of the parties in dispute, CICC judges are given great latitude to ascertain the governing foreign law.¹²¹ This is reaffirmed by the catch-all provision allowing judges to ascertain the appropriate law through “reasonable ways.”¹²² Understandably, judges need access to a variety of resources to be able to find and apply the appropriate law for a given dispute. However, there is no guidance as to when one method of ascertaining foreign law prevails over another. Furthermore, there is also no clarification as to what “reasonable” in the catch-all provision means, and thus no clear limit on how judges decide to discover and apply foreign law. This power is particularly significant in cases where the outcome would be affected based on the foreign law chosen to be applied.

As evidenced by the creation of the ICEC and addition of guiding cases, the SPC has taken great measures to furnish judges with expert knowledge to make fair, appropriate judgments. Judges are urged to maximize the use of the

118. In short, the CICC has no jurisdiction over cases that are not connected to China. See HOLMAN FENWICK WILLAN LLP, *THE BELT AND ROAD INITIATIVE: DISPUTE RESOLUTION ALONG THE BELT AND ROAD 2* (2018), <https://www.hfw.com/downloads/HFW-The-Belt-and-Road-Initiative-Dispute-Resolution-along-The-Belt-And-Road-August-2018.pdf>.

119. See Wall, *supra* note 76, at 302.

120. *Provisions*, *supra* note 49.

121. “If an extraterritorial law shall apply to the case tried by an international commercial court, the court may ascertain the law through the following ways:

- (1) Provided by the parties;
- (2) Provided by Chinese and foreign legal experts;
- (3) Provided by law ascertaining service institutions;
- (4) Provided by expert members of an international commercial committee;
- (5) Provided by the central organ of the opposite party who has concluded judicial assistance convention with China;
- (6) Provided by our embassy in the country;
- (7) Provided by the embassy of the foreign country in China;
- (8) Other reasonable ways.”

See *Provisions*, *supra* note 49, at art. 8.

122. *Id.*

expert committee in accordance with Chinese policy goals,¹²³ and guiding cases are a great resource to support court decisions. However, the broadness and lack of formality in determining when one method presides over another ultimately opens the door to inconsistent application at the discretion of the judge. Additionally, there is little guidance as to what extent judges are required to rely on the ICEC or guiding cases. In the *2018 Judicial Application Report of the Guiding Cases of the Supreme People's Court*, an SPC release report, the data showed since its conception in 2010, over one-fourth of the guiding cases have not been referred to, and only roughly one-third of adjudicated cases have referred to guiding cases.¹²⁴ Apart from the vague guidance on judges' use of these resources, there is also little guidance on the authority of the ICEC to intervene should the judge disregard an applicable law. Additionally, because guiding cases are not sources of law, the authority of guiding cases is also unclear, ultimately leaving the courts free to continue issuing inconsistent judgments.

In effect, it seems as though judges are furnished with unfettered discretion to ignore these resources and determine the outcome of cases based on foreign laws that were discovered through "reasonable ways." This is not to say that CICC judges will and do in fact take advantage of their discretion. However, the potential for injustice and inconsistency given the lack of limitations or detailed guidance is simply another consideration for international businesses who want assurance of fair, consistent case outcomes.

3. CCP's Overarching Control of the CICC

It seems to be that a broader goal in establishing the CICC is to encourage foreign parties to conduct business with and through China.¹²⁵ By providing adequate legal services for parties regardless of their preferred method of dispute resolution, international businesses are more likely to feel comfortable engaging in transactions on the Belt and Road, and China upholds the policies the BRI purports to achieve. But regardless of China's promotion of independence and predictability in the judiciary, the Chinese legal system still lacks meaningful independence from the political system.¹²⁶ With the CCP's overarching control, the current legal framework in the CICC presents potential for corruption and political interference in court decisions. This is a vexing issue in courts because

123. Opinions, *supra* note 6.

124. Chen Luming & Gong Suni, *A Short Review of the Case Guidance System of the Chinese Judiciary*, ASIA L. (Sept. 4, 2019), <https://www.asialaw.com/NewsAndAnalysis/a-short-review-of-the-case-guidance-system-of-the-chinese-judiciary/Index/332>.

125. David Holloway, *The New Chinese International Commercial Court and the Future of Dispute Resolution in the Belt and Road Initiative*, in *DISPUTE RESOLUTION IN CHINA, EUROPE AND WORLD* 51, 62 (Lei Chan & André Janssen eds., 2020).

126. *Id.* at 104. Several Opinions, *supra* note 3. This is based on the principle that the CCP is leader of the legislature, as well as the leader in enforcing the law. Therefore, although the Constitution is the supreme law of the land, there is no conflict between the power of the CCP and the power embedded in the Constitution. Chen, *supra* note 1, at 10.

judges in the CICC are effectively chosen by the CCP's top-down chain political regime. The lack of a check on the appointing governmental branch ultimately has the potential to limit the judiciary's discretion and autonomy to make just decisions based on rule of law.

CICC judges are appointed by the SPC, and as a branch of the SPC, CICC judges are ultimately subject to the purview of the NPC and CCP.¹²⁷ More importantly, the NPC and CCP's Political-Legal Committees can interfere and guide courts on how to handle cases.¹²⁸ This lack of judicial independence from the CCP ultimately opens the door to potential corruption. Additionally, Article 5 of the *Notice of the General Office of the Supreme People's Court on Issuing the Working Rules of the International Commercial Expert Committee of the Supreme People's Court (for Trial Implementation)* holds that the SPC has broad power to terminate members of the expert committee for essentially any reasons the SPC finds fit.¹²⁹ This broad power to terminate at will, like the issues surrounding the application of law, ultimately leaves the door open to abuse. Should the opinions of foreign members of the ICEC be unaligned with the views and goals of the CCP, the SPC may effectively censor the voices of other nations in the name of attempting to create a fairer and more consistent legal system.

Another potential issue connected to the CCP's overarching control is the qualifications for judges in the CICC. Under Article 4 of the *Provisions*, the courts are to be furnished with senior judges familiar with international treaties, practices, and trade.¹³⁰ On its face, there seems to be no issue. However, because CICC judges must currently be Chinese judges and Chinese nationals, they may carry inherent bias under CCP control. As discussed earlier, the ICEC, to some extent, holds judges accountable for disregarding the committee when deference is applicable would publicize partiality. At the same time, there are no restrictions that prevent judges from ascertaining foreign law based on another permitted action. Consequently, if judges frequently opt for the latter, the creation of the ICEC, for the purposes of promoting fairness in judgments would be diminished. Although somewhat attenuated, it is also worth noting that members of the ICEC are chosen by the SPC, thus making the comingling of the CCP and the CICC inescapable.¹³¹

127. Keyuan, *supra* note 28, at 1047–49; see also *Judicial Independence in the PRC*, CONG. EXEC. COMM'N CHINA, <https://www.cecc.gov/judicial-independence-in-the-prc> (last visited Jan. 24, 2022).

128. See Keyuan, *supra* note 28, at 1048 n.49 (example of the CCP intervening in the courts).

129. Article 5 states that the SPC may terminate the appointment of any committee member “who fails to continue to serve as an expert member because of personal willingness, physical health or other reasons during the employment period, or who is not suitable to continue to serve as an expert member due to other reasons.” *Working Rules*, *supra* note 51, at art. 5.

130. *Provisions*, *supra* note 49.

131. Wall, *supra* note 76, at 305–07.

B. CHALLENGES IN ENFORCING FOREIGN JUDGMENTS

The principle of reciprocity provides international businesses with an alternative to litigating in China. While it seems easy to simply submit a claim and demand enforcement in China based on reciprocity, there are three key procedural elements before enforcement can take effect: (1) China must issue a judicial opinion; (2) the proposed judgment must be consistent with Chinese policy, domestic law, sovereignty, and security; and (3) the judgment must be final.¹³² Therefore, the predictability of enforcing a judgment when there is established reciprocity or de facto reciprocity between China and the adjudicating jurisdiction is not as clear cut as the Kolmar and Liu Li cases made it out to be.

Even in the presence of a reciprocal arrangement with another country under the HCCC or other relevant agreements, the SPC must provide a judicial opinion to give effect to the judgment obtained, and the judgment in question must be consistent with Chinese policy, domestic law, sovereignty and security.¹³³ However, given the SPC's tendencies for issuing opinions with vague language—for example, “legal equality,” “win-win,” or “socialist road of rule by law,”¹³⁴—there is little insight as to whether the SPC can and will construe certain judgments as violating Chinese policy, sovereignty, or security, simply to avoid recognizing and enforcing the judgment of a given country.

While there is potential for corruption via the discretion of the SPC to determine whether a foreign judgment violates Chinese laws and national interests, the less discretionary issue stems from the ambiguity of the finality requirement. As promulgated by judicial interpretations, just as multilateral treaties must be final to be enforced, foreign judgments must be final to be enforced under the principle of reciprocity.¹³⁵ The question is who determines the finality of the judgment?¹³⁶ Under Chinese law, a judgment is considered final when the case is unappealable.¹³⁷ As a result, parties litigating in another country may experience setbacks from having their opinion enforced in China because the judgment has not reached the highest possible court in the jurisdiction making the judgment. In other words, even if the parties have determined that a judgment from a lower court should take effect in China, the judgment is insufficient for enforcement in China under reciprocity.

132. CPL, *supra* note 74; Jie (Jeanne) Huang, *Reciprocal Recognition and Enforcement of Foreign Judgments in China: Promising Developments, Prospective Challenges and Proposed Solutions*, 14 (Sydney L. Sch., Research Paper, No. 19/23, 2019).

133. CPL, *supra* note 74, at art. 282.

134. *See Several Opinions*, *supra* note 3.

135. *See Song Jianli: Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments*, CHINA INT'L COM. CT. (Aug. 30, 2018), <http://cicc.court.gov.cn/html/1/219/199/203/1048.html>.

136. Huang, *supra* note 132, at 14.

137. *Id.*; *cf.* NEIL A. F. POPOVIC, FOREIGN MATTERS: HOW TO OBTAIN RECOGNITION OF FOREIGN-COURT JUDGMENTS (2009), https://www.sheppardmullin.com/media/article/725_Foreign%20Matters.pdf (finality is met when the judgment is enforceable under the law of foreign country it was obtained in).

Lastly, it is important to remember that all these potential challenges to enforcing foreign judgments must be viewed from a bird's eye view, because the SPC must first determine whether reciprocity actually exists between the two nations. Although *Kolmar* and *Liu Li* suggest de facto reciprocity may be sufficient to enforce foreign judgments, the thin precedent on what qualifies as reciprocity under the SPC does not provide adequate assurance that judgments that may fall within the de facto category will be enforced.

CONCLUSION

The expansion of dispute resolution mechanisms and court reform to safeguard international businesses transacting on the Belt and Road has been a great demonstration of China's commitment to opening up to and cooperating with foreign nations. China's recognition of foreign laws and international legal needs appears to be beneficial to China's reputation in the international order, as well as beneficial for international businesses looking to access new markets. Under the New York Convention and Singapore Mediation Convention, China offers fair and predictable legal protections by means of arbitration and mediation. Additionally, the creation of the CICC, BRI guiding cases, and examples of foreign judgment enforcement under the principle of reciprocity has demonstrated China's active role in creating a more credible, consistent, and fair litigation service.

While the courts in China have been developing in a way that provides greater access to non-socialist dispute resolution mechanisms, such judicial reforms have not provided the same level of assurance in court as they do outside of court just yet. Currently, the expanding framework still appears to inherently give preferential treatment to parties who arbitrate or mediate. Parties who choose to litigate face potential issues in inconsistent application of law, unfairness due to the CCP's overarching control, and lack of clarity in enforcement of foreign judgments. Despite China's efforts to provide extensive legal resources to BRI parties, without safeguards to ensure consistent application of law and ease of access to fair legal protections across all dispute resolution mechanisms available to BRI participants, China may have a difficult time encouraging participation in BRI commercial transactions for parties who prefer litigation. More specifically, to some extent, these challenges are hurdles to China's stated commitment to "create an international, law-based and convenient business environment with more stability, fairness, transparency and predictability."¹³⁸ Despite China's advancement toward the harmonious, idealistic portrayal of the BRI promoting cooperation and economic development, the BRI has yet to measure up to these goals. For China to continue to further its commitment to these policies and retain a credible reputation in the

138. Opinions, *supra* note 7.

international order, it will need to surpass the hurdles that stand in the way of fair, transparent, and predictable legal protections for parties choosing to litigate.