



Arbitration on the One Belt, One Road

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Roadmap to my 10 to 15 mins of fame

- China's new International Commercial Court
- China updating / revising its arbitration laws?
- Role of BITs and other treaties / agreements
- Enforcement of arbitration awards in Hong Kong SAR, Macau SAR and Taiwan

Topic #1

China's new International Commercial Court

China International Commercial Court



Inauguration of CICC on 29 June 2018

China International Commercial Court

- International Commercial Court with branches in Shenzhen and Xi'an
 - Shenzhen: maritime disputes
 - Xian: land based disputes
 - Beijing: supervisory role
- Bench of 8 Chinese judges assisted by an International Commercial Expert Committee
- International commercial disputes – not investment disputes or investor-state disputes.
- Court will work with international mediation and arbitration institutions.

International Commercial Law Expert Committee



Role of CICC's in resolving BRI disputes

- The future?
- Will CICC's make Chinese choice of forum clauses more attractive?
- Neutrality and independence.
- International enforcement of judgments, *cf* ease and certainty of enforcement under NY Convention.



Topic #2

China updating / revising its
arbitration laws?

Proposed Amendment to PRC's Arbitration Law



NPCSC's 5 year legislative plan issued on 7 September 2018 includes plan to amend both (i) the Arbitration Law of the PRC and (ii) the Civil Compulsory Enforcement Law – which could include provisions dealing with the enforcement of arbitral awards.

Current Arbitration Law

- Effective on 1 September 1995.
- Judicial interpretations addressing gaps in the Arbitration Law:
 - Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration law of the PRC (2006 Interpretation), effective as of 8 September 2006; and
 - Official replies issued by the Supreme People's Court to address questions arising from specific cases.

Potential Areas for Reform

Commercial Arbitration

- Ad hoc arbitration
- Foreign arbitral institutions
- Interim measures.

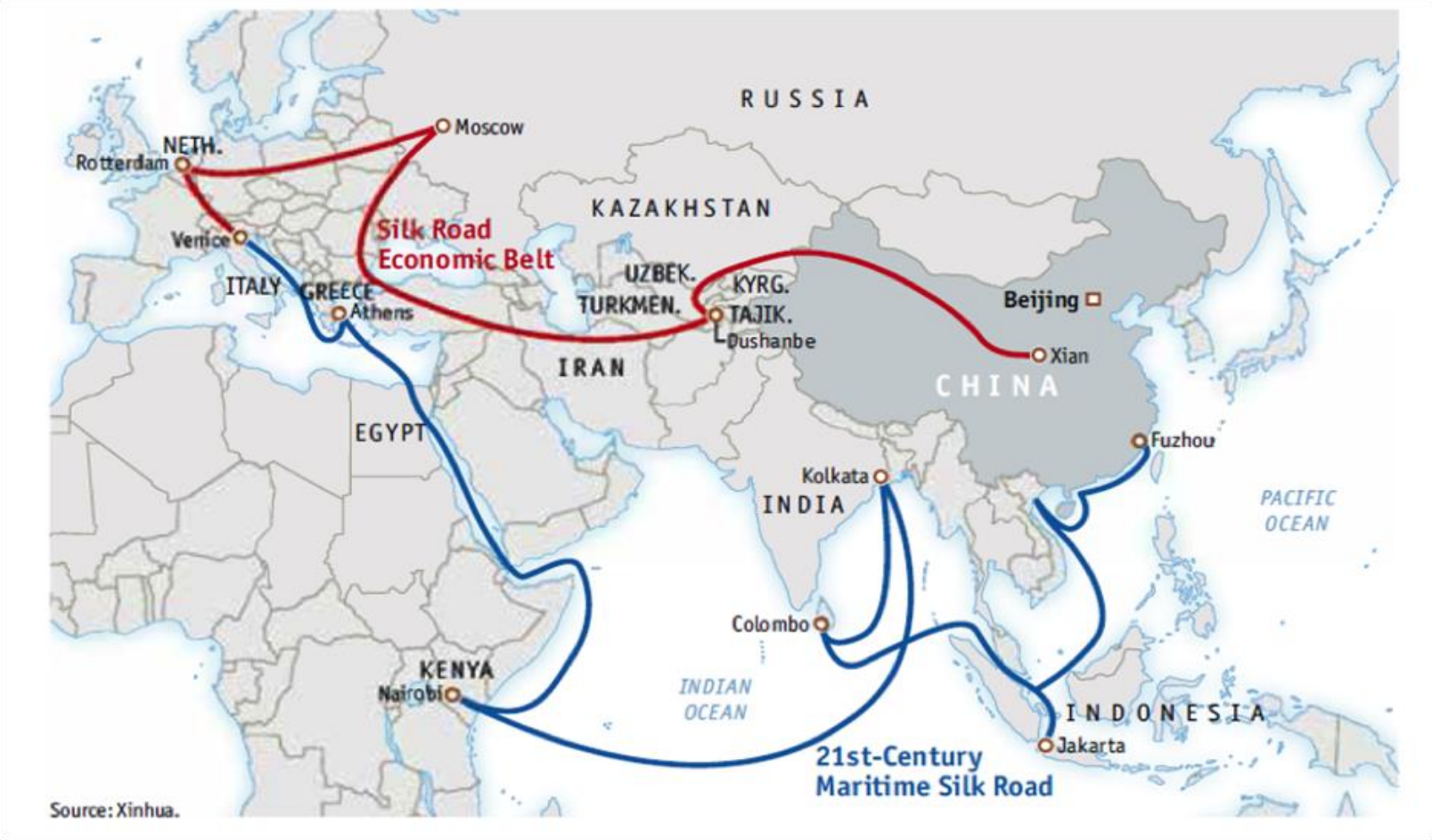
Investment Arbitration

- Fork-in-the-road clauses.

Topic #3

Role of BITs and other treaties / agreements

Role of BITs and other treaties / agreements in OBOR Projects



Types of treaties / agreements

- MOUs between Governments about OBOR: Memoranda of Understanding with Mongolia, Pakistan, Nepal, Croatia, Montenegro, Bosnia and Herzegovina, Albania, East Timor, Singapore, Myanmar, Malaysia
- MITs
- BITs
- Existing relevant Conventions:
 - NY Convention
 - Washington Convention

Role of BITs in OBOR Projects #1

- Geographic scope: initiative covers over 60 countries.
- Nature of projects: high-value, high-risk, complex, international.
- Geopolitical uncertainties.
- Role of BITs:
 - BIT is an agreement between two countries protecting investments made by investors from one contracting state in the territory of the other contracting state.
 - BITs form an important part of risk planning – helping to protect the investor's interests against unfair treatment by the host country's government.

Role of BITs in OBOR Projects #2

- Access to BITs is driven by nationality of investor.
- Important to consider BITs at outset of project when structuring investments.
- Parties usually look at nationality planning for tax purposes when making an investment. Tax should usually drive structure - tax is a certainty while BIT is insurance against the worst case
- An investor can benefit from two or more BITs at different corporate or shareholder levels. For example a Chinese investor sets up a subsidiary in Belgium and the Belgian subsidiary makes investments in Kazakhstan. Both China and Belgium have BITs with Kazakhstan

Role of BITs in OBOR Projects #3

- China has BITs with most states along the OBOR.
- Existing BITs provide limited investment protection and unclear whether PRC government policy is to rely on BITs.
- Chinese government policy to focus on strategic partnerships, currency swap agreements and private financing agreements.

The OBOR BITs

- Currently 57 effective BITs between China and the OBOR countries.
- Different BITs have different protections and limitations.
- Most explicitly provide for FET and MFN treatment but the terms are not exactly the same.
- Access to BITs is driven by nationality of investor.
- Definitions of “national” and “investment” will vary from BIT to BIT and between projects.

Essential Features of BITs #1

- Each State agrees to provide specified protections to investments made by investors from the other State party.
- BITs provide free-standing substantive rights and protections to investors which may not otherwise exist, and a procedural framework for settling disputes.
- BITs have teeth: through them, investors can seek compensation directly from the host State through international arbitration.
- BITs are a powerful tool against abuses of sovereign power and can provide valuable protection for large cross-border investments

Essential Features of BITs #2

- **Expropriation:** no expropriation without prompt, adequate and effective compensation.
- **Fair and Equitable Treatment (FET):** investor to be accorded minimum standard of treatment, regardless of how local and other investors are treated.
- **National Treatment:** investor to be treated no worse than local investors.
- **Most Favoured Nation Treatment (MFN):** investor to be treated no worse than other foreign investors.
- **Umbrella clause:** host state agrees to observe all obligations entered into with respect to investments and allows investor to have a contract claim decided at the BIT level.

Investor State Dispute Settlement

- Generally, each state party agrees to arbitrate disputes with investors from the other state party.
- Often, each state party agrees to ICSID arbitration, where they are both parties to the Washington Convention:
 - ICSID is a branch of the World Bank
 - ICSID has dedicated arbitration secretariat, arbitration rules and access to experienced arbitrators
 - ICSID annulment procedure
 - Enforcement of ICSID awards is very powerful
- BITs often also offer UNCITRAL and/or Stockholm Chamber of Commerce as alternative arbitral options

Mediation and Med/Arb



The Blue Book advocates a Med/Arb approach to BRI disputes.

Topic #4

Enforcement of arbitration awards in Hong Kong SAR, Macau SAR and Taiwan

International Enforcement of Arbitral Awards

New York Convention



Separate Regimes for Hong Kong, Macau and Taiwan



Hong Kong and Macao

- Special Administrative Regions of PRC
- Therefore, both are parties to NY Convention
- BUT – “one country, two systems”
- HK common law; Macao civil law
- HK a Model Law jurisdiction and Macao moving that way
- Can enforce foreign arbitration awards in both
- Special arrangements for intra-enforcement between PRC, HK and Macau
- HK pro-arbitration and pro-enforcement jurisdiction

Taiwan

- Status as an independent country or a province?
- Not a signatory to NY Convention
- Pragmatic ad hoc arrangements for enforcement within Taiwan of foreign arbitration awards
- Broadly a Model Law jurisdiction, with some local modifications



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This document provides a general summary only and is not intended to be comprehensive. Specific legal advice should always be sought in relation to the particular facts of a given situation.