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Selecting an Investor-State Arbitration Mechanism for Disputes Arising Under China's Belt and Road Initiative Projects

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SELECTING AN INVESTOR–STATE ARBITRATION MECHANISM FOR DISPUTES ARISING UNDER CHINA'S BELT AND ROAD INITIATIVE PROJECTS

INTRODUCTION

Investor–state arbitration (ISA) is a popular way to resolve investment law disputes and has become a common component of bilateral investment treaties (BITs) and other international investment agreements.[1] As China promotes its cooperation among the countries in Asia, Europe, and Africa under its Belt and Road Initiative (BRI), an inter-state investment plan led by the Chinese government, an increasing number of ISA cases among Chinese investors and the countries along the ancient silk roads are foreseeable because the investment in those countries are potentially risky.[2] Also, the BRI is an investment plan between states signed under memorandums of understanding (MOUs), which do not have legal binding power.[3] There is no treaty that specifically targets BRI investments, and there are limited numbers of BITs between the BRI participants.[4] Because the features of the arbitration rules might affect the outcome,[5] it is important for BRI participants to incorporate the proper arbitral forum for ISAs in future treaties.

This Comment begins with a brief description of the Belt and Road Initiative and investor-state arbitration. This Comment then compares the disadvantages and advantages for having arbitration under three institutions: the International Centre for Settlement of Investment Disputes (ICSID), the U.N. Commission on International Trade Law (UNCITRAL), and the China International Economic and Trade Arbitration Commission (CIETAC). Some advantages of ICSID and UNCITRAL include the institutions' familiarity with Chinese law, incorporation of Chinese legal features, and low costs. Although UNCITRAL and ICSID are widely applied and included in most BITs between China and BRI countries, Chinese investors might choose CIETAC to resolve the investment disputes that arise under BRI projects.

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[1] U.N. Conference on Trade and Development, *Investor–State Disputes Arising from Investment Treaties: A Review*, at 3–4, U.N. Doc. UNCTAD/ITE/IIT/2005/4 (Feb. 2006).

[2] HUI LU ET AL., CHINA BELT AND ROAD INITIATIVE 2 (RAND Europe, 2018).

[3] Alfred Wu et al., *Belt and Road Initiative Managing Risk When Working with States and SOEs in Infrastructure and Construction Projects*, 2019 NORTON ROSE FULBRIGHT 8.

[4] *Id*.

[5] LATHAM & WATKINS, GUIDE TO INTERNATIONAL ARBITRATION 13, 21 (2019).

I. BELT AND ROAD INITIATIVE AND THE RISKS UNDER BRI INVESTMENT PROJECTS

The BRI, also known as One Belt One Road or *yi dai yi lu*, is a massive trade and infrastructure project with an ambitious effort "to improve [regional] connectivity and cooperation on a transcontinental scale."[6] The idea of the BRI was raised in September and October 2013, when Chinese President Xi Jingping visited Central Asia and Southeast Asia.[7] The name of the plan has its origin from the Silk Road because it mimics the ancient Silk Road, which traversed Eurasia and the seas between China and Africa.[8]

The BRI consists primarily of the Silk Road Economic Belt and the New Maritime Silk Road.[9] The Silk Road Economic Belt refers to the infrastructure and investment plan along the ancient Silk Road that starts from China and ends in Europe. The New Maritime Silk Road refers to the cooperation plan along the Indian Ocean, from Southeast Asia to East Africa.[10] However the scope of the initiative is not limited to those areas, rather it is claimed to be open for all countries and international organizations for engagement.[11] So far, seventy-six countries from Asia, Africa, and Europe have participated in the BRI.[12] These projects are a "coherent enterprise of unprecedented scale: $4 trillion dollars of promised investments … representing 70 percent of the world's population, 55 percent of its GNP, and 75 percent of its energy reserves."[13]

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[6] *Belt and Road Initiative*, WORLD BANK (Mar. 29, 2018), https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative; *see* Lily Kuo & Niko Kommenda, *What Is China's Belt and Road Initiative?*, GUARDIAN (July 30, 2018), https://www.theguardian.com/cities/ng-interactive/2018/jul/30/what-china-belt-road-initiative-silk-road-explainer; Alexandra Ma, *Inside 'Belt and Road,' China's Mega-Project That Is Linking 70 Countries Across Asia, Europe, and Africa*, BUS. INSIDER (Jan. 31, 2018), https://www.businessinsider.com/what-is-belt-and-road-china-infrastructure-project-2018-1.

[7] *Action Plan on the Belt and Road Initiative*, ST. COUNCIL CHINA (Mar. 30, 2015), http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm.

[8] *China's Belt and Road Plans Are to Be Welcomed and Worried*, ECONOMIST (July 26, 2018), https://www.economist.com/leaders/2018/07/26/chinas-belt-and-road-plans-are-to-be-welcomed-and-worried-about.

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

[10] *Id*.

[11] *Full Text: Action Plan on the Belt and Road Initiative*, ST. COUNCIL CHINA (Mar. 30, 2015), http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm.

[12] Frank Holmes, *China's Belt and Road Initiative Opens Up Unprecedented Opportunities*, FORBES (Sept. 4, 2018), https://www.forbes.com/sites/greatspeculations/2018/09/04/chinas-belt-and-road-initiative-opens-up-unprecedented-opportunities/#2084d96d3e9a.

[13] Thomas Cavanna, *What Does China's Belt and Road Initiative Mean for US Grand Strategy?*, DIPLOMAT (June 5, 2018), https://thediplomat.com/2018/06/what-does-chinas-belt-and-road-initiative-mean-for-us-grand-strategy/.

The BRI is comprised of various cross-border, bilateral, and multilateral agreements.[14] The BRI first put large emphasis on the industries of energy and infrastructure. The scope of the BRI then expanded to trade, manufacturing, tourism, and the Internet.[15] Chinese state-owned entities—the companies in which the Chinese government is a dominant stockholder—together with the Chinese banks, are the most active participants and investors in BRI projects.[16] The Reconnecting Asia Project, a research project led by the Center for Strategic and International Studies, tracks $90 billion of Chinese funding for BRI railway, road, and port construction projects from 2014 to 2017.[17] The American Enterprise Institute and Heritage Chinese Global Investment Trackers report a total of roughly $340 billion Chinese BRI investment across all sectors from 2014 to 2017.[18] A senior Chinese official at the National Development and Reform Commission, which is a top economic planning body, said "China would spend a further $600–800 billion more over the next five years on outbound investment," with a large proportion of the money going into BRI projects.[19]

Geographically, most BRI investment has gone to Southeast Asia and South Asia.[20] However, Africa, South America, and Europe are also benefiting.[21] Marc Merlino, Citibank's Global Head of the Global Subsidiaries Group, stated that there are "multiple levels" of potential opportunities for investors, especially infrastructure and activities surrounding major projects under the plan.[22] Merlino further stated, "It's the opportunities for micro infrastructure beyond the core projects. All the knock-on effects … if building a railroad, there's going

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[14] Rupert Walker, *Is China's Ambitious Belt and Road Initiative a Risk Worth Taking for Foreign Investors?*, SOUTH CHINA MORNING POST (Mar. 11, 2018), https://www.scmp.com/business/companies/article/2136372/chinas-ambitious-belt-and-road-initiative-risk-worth-taking.

[15] *Embracing the BRI Ecosystem in 2018: Navigating Pitfalls and Seizing Opportunities*, DELOITTE (Feb. 12, 2018), https://www2.deloitte.com/insights/us/en/economy/asia-pacific/china-belt-and-road-initiative.html.

[16] David Bateson, *One Belt, One Road—Construction and Investor Risks, and Disputes*, EXPERT GUIDES (Apr. 25, 2018), https://www.expertguides.com/articles/one-belt-one-road-construction-and-investor-risks-and-disputes/ARINSWHT.

[17] Jonathan Hillman, *How Big is China's Belt and Road?*, CTR. FOR STRATEGIC & INT'L STUD., (April 3, 2018), https://www.csis.org/analysis/how-big-chinas-belt-and-road.

[18] *Id.*

[19] *Embracing the BRI Ecosystem in 2018: Navigating Pitfalls and Seizing Opportunities*, *supra* note 15.

[20] *Id.*

[21] *Id.*

[22] Weizhen Tan, *China's Belt and Road Initiative May Have Risks, but Citi Still Sees Big Opportunities*, CNBC (May 3, 2018), https://www.cnbc.com/2018/05/03/chinas-belt-and-road-has-risks-but-banks-see-opportunities.html.

to be a lot of goods and services moving. You need warehouses … distribution capabilities. That's where private investors are getting more involved."[23]

While there are huge opportunities involved in BRI investment, weak governance and compliance, undefined or poorly executed rule of law, and corruption—which are not uncommon in the countries where large, debt-financed, long-term infrastructure projects are located—increase the risk of default on loans and payments, or even damages to physical assets.[24] According to one study, sixty-three countries covered under the BRI projects are at the risk of "debt distress," which means they have high possibilities of not being able to repay the loan.[25] Another study finds that eight BRI countries, including Tajikistan, Kyrgyzstan, Laos, Pakistan, and Mongolia, have a particularly high risk of default.[26] For example, a Chinese corporation built Hambantota International Port in Sri Lanka under the BRI project but Sri Lanka failed to repay the Chinese loans that built the port.[27] Although media often used the Sri Lanka port as an example to illustrate that the Chinese government purposefully puts countries in debt to control these countries, Chinese investors suffered from the defaulting of the loan as well.[28] Chinese investors not only lose money but also lose bargaining power and sometimes even need to renegotiate the terms for the projects that have already started.[29] For instance, Malaysia recently put off a rail project under the BRI and renegotiated to reduce the cost to one third of the original loan.[30]

Also, most of the projects that involve BRI investors are large-scale projects, which require a long time to finish and intense capital investments.[31] According to a study, the large-scale infrastructure investors are "particularly vulnerable to regulatory changes that can undermine their profitability."[32] More than half of the investor–state disputes involve utilities, constructions, and real estate

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[23] *Id*.

[24] Andrew Cainey, *Managing Risk to Build a Better Belt and Road*, CHATHAM HOUSE (July 5, 2018), https://www.chathamhouse.org/expert/comment/managing-risk-build-better-belt-and-road.

[25] Yasheng Huang, *Can the Belt and Road Become a Trap for China?*, NIKKEI ASIAN REV. (May 23, 2019), https://asia.nikkei.com/Opinion/Can-the-Belt-and-Road-become-a-trap-for-China.

[26] Priyanka Kher & Trang Tran, *Investment Protection Along the Belt and Road*, 12 MTI GLOBAL PRAC. 28, (Jan. 2019).

[27] Barry Sautman & Yan Hairong, *The Truth About Sri Lanka's Hambantota Port, Chinese "Debt Traps" and "Asset Seizures,"* SOUTH CHINA MORNING POST (May 6, 2019), https://www.scmp.com/comment/insight-opinion/article/3008799/truth-about-sri-lankas-hambantota-port-chinese-debt-traps.

[28] Huang, *supra* note 25.

[29] *Id*.

[30] *Id*.

[31] Kher & Tran, *supra* note 26.

[32] *Id*.

sectors.[33] Scholars also concluded that investors are less likely to invest in the countries that provide weak property rights protections, which bring high uncertainty for the investors.[34]

Finally, the level of protection the investment laws in the BRI countries provide to the foreign investors vary.[35] According to the analysis, most of the investment laws in the BRI countries do not include an explicit provision for fair and equitable treatment.[36] Turkey and Russia have particularly low levels of protection for foreign investors under all the provisions.[37] Given the high likelihood for disputes between investors and states under the BRI as well as minimal protections for investors under the current legal mechanism, it is essential to find an effective way to reduce potential risks and protect investors moving forward.

II. OVERVIEW OF INVESTOR–STATE ARBITRATION

Investor–state arbitration (ISA) is the mechanism that solves disputes when an investee-government makes discriminatory regulations or policies against foreign investors including expropriating foreign investors' property without compensation, denying foreign investors' justice in criminal, civil, or administrative adjudicatory proceedings, or declining to transfer foreign investors' capital.[38] When a foreign investor "feels that its rights under the treaty been violated, it can bring a complaint for redress before an international arbitration tribunal, normally composed and administered under the auspices of a prominent arbitral institution but occasionally created ad hoc."[39] Investment arbitration permits a foreign investor to sue the country that receives the investment and guarantees the investor will have access to independent and qualified arbitrators who can solve the dispute and render an enforceable award.[40] The foreign investor is thus allowed to bypass national jurisdictions,

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[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *Id*.

[38] *See* Lise Johnson et al., *Investor–State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get Us There?*, COLUM. CTR. ON SUSTAINABLE INV. (Dec. 11, 2017), http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/.

[39] Christopher Dugan et al., INVESTOR–STATE ARBITRATION 2 (Oxford University Press 2011).

[40] *See International Arbitration Information*, INT'L ARB. INFO., https://www.international-arbitration-attorney.com/investment-arbitration/ (last visited Jan. 9, 2020).

which may be biased or lack independence, to resolve the dispute in accordance with different protections afforded under international treaties.[41]

Investment arbitration involves "public international law grafted onto a substructure of private commercial arbitration," which means a host state must give consent before foreign investors are able to initiate investment arbitration.[42] Consent to ISA takes many forms, including provisions to agree to have ISA in investment contracts, domestic investment law, and bilateral investment treaties (BITs).[43] A BIT, a type of an international investment agreement, is signed by two countries and lists out the standards of protection for investors from one country to invest in the other country.[44]

Since the 1960s, there have been approximately 3000 BITs, which cover most of the countries in the world.[45] A BIT not only requires the countries to provide protection to foreign investors, but also creates the possibility for those investors to bring claims against the investee country under international arbitration instead of in the local courts.[46] Investor–state disputes between two countries that have signed a BIT would be governed by international law and relevant treaties instead of the laws referred to in the investment contract.[47] More than 150 states are parties to the New York Convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.[48] The New York Convention "establishes a regime of quick and easy enforcement of arbitration awards without re-litigating the dispute on its merits." [49]

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[41] *Id.*

[42] Andrea Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PA. ST. L. REV. 1269, 1270 (2009).

[43] Lise Johnson et al., *Withdraw of Consent to Investor–State Arbitration and Termination of Investment Treaties*, INV. TREATY NEWS (Apr. 24, 2018), https://www.iisd.org/itn/2018/04/24/withdrawal-of-consent-to-investor-state-arbitration-and-termination-of-investment-treaties-lise-johnson-jesse-coleman-brooke-guven/.

[44] *International Investment Agreements*, MINISTRY TRADE & INDUSTRY SINGAPORE, https://www.mti.gov.sg/Improving-Trade/International-Investment-Agreements (last visited Jan. 9, 2020).

[45] Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality*, 42 YALE J. INT'L L. 1, 6 (2017).

[46] *The Basics of Bilateral Investment Treaties*, SIDLEY AUSTIN LLP, https://www.sidley.com/en/us/services/global-arbitration-trade-and-advocacy/investment-treaty-arbitration/sub-pages/the-basics-of-bilateral-investment-treaties/ (last visited Jan. 9, 2020).

[47] *Id*.

[48] Justin D'Agostino & Briana Young, *Negotiating Roadblocks? Resolving Disputes on the Belt and Road*, HERBERT SMITH FREEHILLS (Feb. 21, 2018), https://www.herbertsmithfreehills.com/latest-thinking/negotiating-roadblocks-resolving-disputes-on-the-belt-and-road.

[49] *Id.*

China is already party to 128 BITs, including many with BRI countries.[50] However, earlier BITs that China signed with BRI countries mostly focused on foreign investment in China but provided little protection for Chinese investors overseas.[51] Recent BITs signed between China and BRI countries contain vague definitions and are broad in scope.[52] For instance, the asset-based definitions of investment in some of these BITs do not exclude the public debt when defining the investment, which would make the interpretation difficult.[53] Most importantly, some of the treaties do not even include the dispute settlement mechanisms. For example, Turkmenistan does not provide any type of investor–state dispute settlement mechanism and Georgia does not provide any alternatives to arbitration or list the forum for arbitration.[54]

Without an effective dispute settlement mechanism, the de jure legal provisions "are merely promises on paper."[55] Therefore, having an effective mechanism to settle the disputes is crucial to ensure the protection and rights of the investors would be achieved.[56] The reason to use arbitration is to bring a degree of clarity and effectiveness among countries with diverse legal traditions.[57] While there are a lot of options for dispute settlement mechanism under arbitration, incorporating appropriate arbitration forum while signing or amending the investment treaties would be helpful to the investors by ensuring the clarity and consistency in the dispute settlement mechanisms.[58]

III. COMPARISON OF INVESTOR–STATE ARBITRATION INSTITUTION FOR BRI PROJECTS

This section describes the two most commonly used investor–state arbitration forum, the International Centre for Settlement of Investment Disputes and the U.N. Commission on International Trade Law, along with the China International Economic and Trade Arbitration Commission, a Chinese arbitration institution, which just began to handle the investor–state disputes.[59]

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[50] Patrick Norton, *China's Belt and Road Initiative: Challenges for Arbitration in Asia*, 13 U. PA. ASIAN L. REV. 72, 100.

[51] *Id*.

[52] Kher & Tran, *supra* note 26.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] *See* Joe Zhang, *China's Largest Arbitration Institution Adopts Its First Investment Arbitration Rules*, INT'L INST. FOR SUSTAINABLE DEV., https://www.iisd.org/library/china-s-largest-arbitration-institution-adopts-

This section also analyzes the advantages and disadvantages for Chinese investors when using different arbitration rules when conducting ISA to resolve disputes arising from BRI projects.

A. International Centre for Settlement of Investment Disputes

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States was formed by the World Bank.[60] The Convention established the International Centre for Settlement of Investment Disputes (ICSID) in 1965.[61] ICSID does not issue the arbitration itself, it provides procedural and institutional rules for each independent arbitral tribunal that forms for each different arbitration case.[62] The party initiates the ICSID arbitration by submitting a request, which describes the facts and legal issues that the party wants to address to the Secretary-General of ICSID.[63] Once the ICSID decides the issue is within its jurisdiction and registers the request, parties begin to nominate the arbitrators that form the arbitration tribunal.[64] Independent jurists from different countries serve as ICSID arbitrators.[65] The parties involved in the dispute appoint their arbitrators from a list of these ICSID arbitrators to decide their case.[66] After the arbitral forum is created, the arbitration process is deemed to have begun.[67] The ICSID proceeding may be held at any location according to the parties' agreement, including World Bank facilities or arbitration centers like Hong Kong International Arbitration Centre.[68] The parties deal with procedural questions typically within sixty days of the formation of the tribunal.[69] Then the parties may have a written procedure and in-person hearings to present the case.[70] The tribunal issues the award after this

its-first-investment-arbitration-rules (last visited Sept. 18, 2019).

[60] Gautami S. Tondapu, *International Institutions and Dispute Settlement: The Case of ICSID*, 22 BOND L. REV. 81, 81 (2010).

[61] *Id.*

[62] Christoph Schreuer, *International Centre for Settlement of Investment Disputes (ICSID)*, UNIVERSITÄT WIEN, https://www.univie.ac.at/intlaw/wordpress/pdf/100_icsid_epil.pdf.

[63] World Bank Grp., *Background Information on the International Centre for Settlement of Investment Disputes (ICSID)*, WORLD BANK GROUP, https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf.

[64] *Id*.

[65] *Id.*

[66] *Id*.

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Id*.

whole process and the award is "binding and not subject to any appeal or other remedy except those provided by the [ICSID]."[71]

China signed the ICSID Convention in 1993 with a reservation that "it would only consider submitting to the jurisdiction of ICSID disputes over compensation resulting from expropriation or nationalization after the domestic court already established liability."[72] Since 1998, China's BITs began granting consent to ICSID dispute settlements without this restriction.[73] However, some BITs that were signed before 2000 still contain language that treaties extend jurisdiction only to disputes "relating to the amount for compensation for expropriation."[74] Debate exists regarding the application of the jurisdiction under BITs.[75] One interpretation of this provision is that the domestic court needs to determine if expropriation has happened before the tribunal procedure.[76] The other interpretation is whether the dispute relate to the compensation for expropriation is an issue for the arbitration tribunal to decide.[77] Recently, two investor–state arbitration cases brought before the ICSID by Chinese investors addressed this jurisdiction issue.[78]

1. Advantages of ICSID

a. Independence and Autonomy

One of the major advantages, for both investor claimants and responding states to use ICSID for BRI investment arbitration, is that ICSID is an institutionalized system, which is completely independent from any domestic legal system.[79] The ICSID has total control over the interpretation and revision of the rules, and annulment of awards.[80]

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[71] *Id*.

[72] Mihaela Papa, *Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field?*, 4 J. INT'L DISP. SETTLEMENT 83, 83 (2013).

[73] *China-Related Investment Arbitrations: Three Recent Developments*, HERBERT SMITH FREEHILLS (July 17, 2017), https://hsfnotes.com/arbitration/2017/07/17/china-related-investment-arbitrations-three-recent-developments/.

[74] *Id*.

[75] *Id*.

[76] *Id*.

[77] *Id*.

[78] *Id.*

[79] *See Process Overview*, INT'L CTR. FOR SETTLEMENT INV. DISP., https://icsid.worldbank.org/en/pages/process/overview.aspx (last visited Jan. 10, 2020).

[80] *See* Katharina Diel Gligor, Comment, *Competing Regimes in International Investment Arbitration: Choice Between the ICSID and Alternative Arbitral Systems*, 22 AM. REV. INT'L ARB. 677, 680 (2011); *see also* OECD Secretariat, *Improving the System of Investor–State Dispute Settlement: An Overview*, ¶ 9 (Dec. 12, 2015), *available at* http://www.oecd.org/daf/inv/internationalinvestmentagreements/35808448.pdf; Georges

The ICSID is comprised of two operational agencies—the Secretariat and the Administrative Council.[81] The Secretariat is a permanent body of the ICSID and it executes the daily administrative functions of ICSID.[82] The Secretariat will take part in the arbitration procedure,

> acting as registrar in proceedings (for example, receiving, reviewing and registering requests for arbitration and conciliation and authenticating awards); assisting in the constitution of Conciliation Commissions, Arbitral Tribunals and ad hoc Committees; assisting parties and Commissions, Tribunals and Committees with all aspects of case procedure; organizing and assisting at hearings; administering the finances of each case; and providing other administrative support as requested by Commissions, Tribunals and Committees.[83]

The Administrative Council supervises the operational activities of ICSID, including creation of rules of procedure for ICSID cases, adoption of the administrative and financial regulations for the Centre and approval of the financial budget for the Centre.[84] The ICSID Secretary-General and Deputy Secretary-General are both elected by the Council.[85] The President of the World Bank serves as the Chairman of the Administrative Council.[86] Each member state of the ICSID has one representative on the Administrative Council.[87] Member countries to the Council are allowed one vote each for the decisions made by the Administrative Council.[88] The self-running organization and structure of ICSID ensures the independence and autonomy of ICSID arbitration decision.

b. A Final and Binding Award

Moreover, the ICSID award is final and binding upon the parties, which is an advantage for both the investor-claimant and the state-respondent.[89] ICSID

Delaume, *ICSID Arbitration in Practice*, 2 INT'L TAX & BUS. L. 58, 67 (1984).

[81] *See Administrative Council*, INT'L CTR. FOR SETTLEMENT INV. DISP., https://icsid.worldbank.org/en/Pages/about/Administrative-Council.aspx (last visited Jan. 10, 2020); *Secretariat*, INT'L CTR. FOR SETTLEMENT INV. DISP., https://icsid.worldbank.org/en/Pages/about/Secretariat.aspx (last visited Jan. 10, 2020).

[82] *Secretariat*, *supra* note 81.

[83] *Id.*

[84] *See Administrative Council*, *supra* note 81.

[85] *Id*.

[86] *See id.*

[87] *Id.*

[88] *Id*.

[89] *Recognition and Enforcement—ICSID Convention Arbitration*, INT'L CTR. FOR SETTLEMENT INV. DISP., https://icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-Convention-Arbitration.aspx (last visited Jan. 10, 2020).

Convention Article 53(1) provides that, "The award shall be binding on the parties and shall not be subject to any appeal or any other remedy except for those provided for in this Convention."[90] The state domestic court is not able to reconsider the ICSID arbitration award.[91] After the ICSID award is recognized in accordance with ICSID procedural rules, the award is valid and should be recognized immediately without any judicial interference.[92] This feature makes the ICSID award a more favored approach to reach a final result when compared with domestic law or other conventions which requires the recognition and enforcement of a foreign judgment by a judicial body.[93]

The only way to challenge the final decision of the ICSID is by the procedure stated in ICSID Convention, Article 52(1):

> (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.[94]

Failure to comply with the judgment of the ICSID constitutes a breach of ICSID Convention obligations.[95] The Convention does not provide any exception for the member state to not recognize and enforce the arbitration award issued by the ICSID, even for reasons based on public policy.[96] These features ensure the whole arbitration process will be recognized in all member countries without interference from the domestic jurisdiction once the parties recognize the arbitration will be held under the ICSID and the issue falls under the jurisdiction of the ICSID.[97]

c. ICSID's Network Externalities Effect

The final argument for choosing the ICSID is because it is widely adopted in BRI countries and a lot of BITs between China and BRI countries refer to ICSID as the proper institution to settle the investor–state disputes.[98] There have

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[90] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 53, ¶ 1, Apr. 10, 2006 [hereinafter ICSID Convention].

[91] Georges Delaume, *ICSID Arbitration in Practice*, 2 INT'L TAX & BUS. L. 58, 67 (1984).

[92] *Id*.

[93] *Id*.

[94] ICSID Convention *supra* note 90, art. 52, ¶ 1.

[95] *See* Katharina Diel Gligor, *Competing Regimes in International Investment Arbitration: Choice Between the ICSID and Alternative Arbitral Systems*, 22 AM. REV. INT'L ARB. 677, 685 (2011).

[96] Delaume, *supra* note 80, at 92.

[97] *Id*. at 76–77.

[98] *Bird & Bird & One Belt One Road and Investment Treaty Disputes: Investment Treaty Arbitration for*

been several cases initiated by Chinese investors who chose ICSID as the arbitration institution. Examples include, *Tza Yap Shum v. Peru* where the tribunal found for the claimants, *China Heilongjiang v. Mongolia* in which the award not was public and the tribunal reportedly dismissed the claim on jurisdictional grounds, and *Ping An Life Insurance v. Belgium* in which the claims were dismissed for lack of jurisdiction.[99]

The current market dominance of the ICSID should continue as the emergence of other institutional competition is constrained by network externalities.[100] Network externalities occur when the market has settled with a single standard for a service, like arbitration.[101] With all competitors significantly marginalized, it creates a monopoly-type situation that prevents potential rivals from successfully challenging the market dominance of the prevailing standard.[102] This argument comes from the concept of "institutional lock-in," first put forth by 1993 Nobel Prize winner Douglass C. North.[103] North argues, "institutions that already enjoy a foothold 'generate powerful inducements that reinforce their own stability and future development.'"[104] Because the ICSID "presently dominates the investment arbitration service world," network externalities are being generated further bolstering the ICSID's market dominance and precluding other arbitration institutions from entering the investment arbitration service market.[105]

2. Disadvantages of ICSID

a. High Cost and Lack of Efficiency

While the ICSID has many advantages, criticism against the ICSID exist as well. The length and costs of arbitral proceedings are rising "due to the growing complexity of ICSID cases, the fragmented nature of investor protection

Disputes on the Silk Road, BIRD & BIRD, https://www.twobirds.com/~/media/pdfs/one-belt-one-road-and-investment-treaty-disputes.pdf?la=en&hash=41BE06F0D2208FFC9401F5A817F9D52DF3D42B4D (last visited Jan. 10, 2020).

[99] Diane Desierto, *China as a Global ISDS Power*, INV. CLAIMS (Aug. 2018), http://oxia.ouplaw.com/page/715.

[100] Andrea K. Bjorklund & Bryan H. Druzin, *Institutional Lock-In Within the Field of Investment Arbitration*, 39 U. PA. J. INT'L L. 707, 711 (2018).

[101] *Id.*

[102] *Id*.

[103] *Id.* at 712.

[104] *Id.* (quoting Paul Pierson, *Coping with Permanent Austerity: Welfare State Restructuring in Affluent Democracies*, *in* THE POLITICS OF THE WELFARE STATE 410, 415 (Paul Pierson ed., 2001)).

[105] *See* Bjorklund & Druzin, *supra* note 101, at 712.

provisions and multiplication of interlocutory proceedings."[106] The average length for a case arbitrated before the ICSID is 3.6 years.[107] Although the amount and complexity of cases has risen dramatically in past years, the ICSID structure has remained the same—small and staffed with about a dozen attorneys.[108] Thus, it is hard for such a small staff to efficiently adjudicate the highly technical ISA process.[109] Moreover, research shows that the costs are unequally distributed and the state bears a heavier burden.[110] According to an ICSID arbitration rule, both parties share the cost of proceedings even when no fault is found on the respondent state.[111] Thus, "the allocation of cost almost always operates to the disadvantage of the respondent state because the private investor is almost always the party who initiates the process."[112]

Developing countries, including China and many BRI countries, should take greater consideration of the costs of the arbitration procedure.[113] Such states resort to spending money on law firms to represent them in the arbitration, which is usually extremely expensive.[114] Arbitration is highly lucrative for law firms—390 cases have been filed by law firms on behalf of multinational companies against governments.[115] Governments have spent tens of millions of dollars to pay law firms to represent them in arbitration on top of billions of dollars of compensation to arbitrators and for arbitration fees.[116]

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[106] Justine Touzet & Marine Vaublanc, *The Investor–State Dispute Settlement System: The Road to Overcoming Criticism*, KLUWER ARB. BLOG (Aug. 6, 2018), http://arbitrationblog.kluwerarbitration.com/2018/08/06/the-investor-state-dispute-settlement-system-the-road-to-overcoming-criticism/.

[107] Anthony Sinclair, *ICSID Arbitration: How Long Does It Take?*, 4 GLOBAL ARB. REV. 18, 20 (2009).

[108] Andrew Tuck, *Investor–State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 LAW & BUS. REV. AM. 885, 910 (2007).

[109] *Id*.

[110] Won Kidane, *The China–Africa Factor in the Contemporary ICSID Legitimacy Debate*, 35 U. PA. J. INT'L L. 559, 621 (2014).

[111] *Practice Notes for Respondents in ICSID Arbitration*, INT'L CTR. FOR SETTLEMENT INV. DISP. (2015), https://icsid.worldbank.org/en/Documents/resources/Practice%20Notes%20for%20Respondents%20-%20Final.pdf.

[112] Kidane, *supra* note 110, at 622.

[113] *See* Hansel T. Pham, *Developing Countries and the WTO: The Need for More Mediation in the DSU*, 9 HARV. NEGOT. L. REV. 331, 390 (2004).

[114] *See ICSID and Latin America: Criticisms, Withdrawals, and Regional Alternatives*, ISDS PLATFORM (June 2013), https://isds.bilaterals.org/?icsid-and-latin-america-criticisms.

[115] *See* Nick Buxton et al., *Legalized Profiteering? How Corporate Lawyers Are Fueling an Investment Arbitration Boom*, TRANSNAT'L INST. (Nov. 2011), https://www.tni.org/files/download/legalised_profiteering-web.pdf.

[116] *Id.*

b. Lack of Jurisprudential Coherence

Another disadvantage of the ICSID is that it lacks jurisprudential coherence, which might make a claimant hesitant to bring a case before the ICSID.[117] When the legal system produces coherent results, it contributes to the system's credibility and legitimacy.[118] However, ICSID tribunals, unlike common law courts, are not bound to their own precedent.[119] For example, the ICSID Convention does not explicitly define the term *investment*, and the tribunals have established a variety of investment qualification frameworks, construing *investment* both narrowly and broadly.[120] The *Salini* test has been considered as a general doctrine about the definition of investment.[121] However, "tribunals have used their discretion in applying and articulating the *Salini* test."[122]

Another criticism of the ICSID focuses on the interpretation of the annulment process.[123] As mentioned previously, the arbitral awards made by the tribunals are final and not subject to any appellate process except as provided in the Convention.[124] The annulment mechanism was designed to focus only on correcting procedural mistakes.[125] However, an increasing number of cases have made contradictory interpretations regarding the annulment process.[126] Two cases brought against Argentina illustrate this confrontation.[127] In *CMS Gas Transmission Co. v. Argentine Republic* the annulment committee, which is the body of the ICSID that decides the annulment issues, intensely analyzed and criticized the legal reasoning and ruling of the arbitral decision.[128] Although the

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[117] *See* William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor–State Arbitrations*, 35 YALE J. INT'L L. (2010).

[118] *Consistency, Efficiency, and Transparency in Investment Treaty Arbitration*, INT'L B. ASS'N (Nov. 2018).

[119] *See* Joseph Boddicker, *Whose Dictionary Controls?: Recent Challenges to the Term "Investment" in ICSID Arbitration*, 25 AM. U. INT'L L. REV. 1031, 1069 (2010).

[120] *See, e.g.*, Fedax N. V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, Objections to Jurisdiction, ¶ 22 (July 11, 1997) (stating that "loans, suppliers' credits, outstanding payments, ownership of shares, and construction contracts" have all qualified as "investments").

[121] Alex Grabowsky, Comment, *The Definition of Investment Under the ICSID Convention: A Defense of* Salini, 15 CHI. J. INT'L L. 287, 287 (2014). The *Salini* test defines an investment as having four elements: (1) a contribution of money or assets; (2) a certain duration; (3) an element of risk; and (4) a contribution to the economic development of the host state. *Id.*

[122] *See* Boddicker, *supra* note 120, at 1041.

[123] Christopher Smith, *The Appeal of ICSID Awards: How the Aminz Appellate Mechanism Can Guide Reform of ICSID Procedure*, 41 GA. J. INT'L & COMP. L. 567, 572 (2013).

[124] ICSID Convention *supra* note 90, art. 52, ¶ 1.

[125] Smith, *supra* note 123, at 573.

[126] Eun Young Park, *Appellate Review in Investor–State Arbitration*, 1 TDM 443 (2014).

[127] *Id*.

[128] *Id*. at 6 (citing CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Annulment Proceeding, (Sept. 25, 2007)).

committee in this case did not annul the arbitral award due to lack of jurisdiction, this case was seen as an attempt by the annulment committee to question the lack of appellate review in the ICSID.[129] In contrast, the annulment committee in *Sempra Energy Int'l v. Argentine Republic* "took a more active approach and decided to annul the arbitral award based in part on the logic provided by the *CMS* Committee."[130]

Many experts have advocated for reforming the annulment procedure in the ICSID committee and replacing it with a real appellate system.[131] Interpretation of annulment procedure adds another layer of inconsistency to the ICSID tribunal awards, further threatening the ICSID system.[132] While some scholars argue that investors prefer a final and binding result, placing less value on the certainty of the arbitration decision, the unpredictability has already driven countries including Ecuador, Bolivia, and Venezuela away from the ICSID Convention, specifically because large monetary damages resulting from ICSID arbitrations lack consistent precedent and are not subject to review.[133]

c. Low Confidentiality

Investor–state arbitration has long been a confidential process lacking public hearings between disputing parties.[134] Accordingly, there are strong reasons for both investors and states to be concerned with the confidentiality of the arbitration process. Investors are especially worried about "forced disclosure of confidential business information, trade secrets, and investment strategies" that could harm the commercial interests of the investors' business.[135] Similarly, governments fear that exposing the inner workings of their administrative and regulatory institutions will have a potential adverse impact on their reputations as hosts of foreign investment and on their domestic political figures.[136]

Some people believe that—unlike commercial arbitration, which resolves disputes between private parties—ISA involves public interests because the host state enters as a party during the arbitration and the result of arbitration might

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129 *Id*.

130 *Id*. (citing Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Annulment Proceeding, (June 29, 2010)).

131 Smith, *supra* note 123, at 574.

132 *Id*.

133 *Id*. at 575.

134 Leon Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L L.J. 604, 635 (2012).

135 Samuel Levander, Note, *Resolving "Dynamic Interpretation": An Empirical Analysis of the Transparency*, 52 COLUM. J. TRANSNAT'L L. 506, 514 (2014).

136 *Id.*

have a significant impact on the economic and public welfare of that state, thus arguing that ISA's ought to require a more transparent procedure.[137] After the revision of the ICSID rules in 2006, revised Rule 32 allows the tribunal to permit persons other than the parties and attorneys to attend hearings and even open up hearings to the public without both parties' consent, provided the tribunal considers the views of the disputing parties and consults with the Secretariat.[138] Open hearings could provide the public with greater transparency of ICSID's ISA process.[139]

Modification has also been made since 2006 regarding the publication of ISA awards.[140] Under the original ICSID Rule 48, the publication of arbitral awards without the consent of both parties was prohibited.[141] A text change added in 2006 has the ICSID Secretariat promptly publish excerpts of the tribunal's legal reasoning for every award, regardless of the parties' agreement.[142] The transparency and low confidentiality feature of ICSID will make Chinese investors hesitate to choose ICSID for fear of disclosure of their trade secrets.

B. United Nations Commission on International Trade Law

Together with ICSID, the U.N. Commission on International Trade Law (UNCITRAL) Arbitration Rules serve as the procedural basis for more than eighty percent of all investment arbitration cases brought on the basis of international investment agreements.[143] The UNCITRAL was established by the U.N. General Assembly by Resolution 2205 (XXI) on December 17, 1966.[144] The rules have been used for the settlement of a variety of disputes, including commercial ad hoc arbitration (arbitration that the parties need to decide all

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[137] *See* OECD, *Transparency and Third Party Participation in Investor–State Dispute Settlement Procedures*, Statement (OECD Investment Committee, Working Paper on International Investment No. 2005/1, 2005), 2, 13 ¶ 49.

[138] Tuck, *supra* note 108, at 897.

[139] ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* (ICSID Secretariat Discussion Paper, Oct. 22, 2004), at 10 [hereinafter ICSID Discussion Paper].

[140] Georgetown Univ. Law Library, *International Investment Law Research Guide*, GEO. L., https://guides.ll.georgetown.edu/InternationalInvestmentLaw (last updated Aug. 27, 2019 8:49 PM).

[141] Gligor, *supra* note 95, at 684.

[142] *Id.*

[143] *See, e.g.*, U.N. Conference on Trade and Development, *Latest Developments in Investor–State Dispute Settlement, IIA Issues Note No. 1*, UNCTAD/WEB/DIAE/IA/2010/3 (2010) (ICSID cases 63%; UNCITRAL cases 25%).

[144] *A Guide to UNCITRAL: Basic Facts About the United Nations Commission on International Law*, UNCITRAL (2013), http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf.

aspects of the arbitration themselves), commercial institutional arbitration (arbitration administered by the institution), and ISA.[145]

UNCITRAL is not an institution that administers arbitrations, like the ICSID, but instead sets up the arbitration rules to guide the parties to set up their own independent arbitration process. [146] UNCITRAL identifies three different usages of the UNCITRAL Arbitration Rules by arbitration institutions and other similar bodies. First, the rules serve as a model for institutions to draft their own arbitration rules.[147] Second, institutions have offered to resolve disputes or provide administrative services in ad hoc arbitration under the rules.[148] Third, the institutions may be requested by the parties in the disputes to act as an appointing authority as provided for under the rules.[149]

The parties give consent to be governed under UNCITRAL Arbitration Rules by including an arbitration clause in the individual investment agreement or an ad hoc agreement after the disputes arise.[150] Some BITs contain an arbitration clause that exclusively provides for an ad hoc arbitration under the UNCITRAL Arbitration Rules.[151] One example of referring the utilization of UNCITRAL Arbitration Rules is the North American Free Trade Agreement (NAFTA), which states that investors may initiate arbitration against a NAFTA party under the UNCITRAL Arbitration Rules[152] In 2006, it was recognized that the 1976 Rules needed to be revised to meet changes in arbitral practice.[153] In 2010, UNCITRAL approved a revised version of the rules which became effective on August 15, 2010.[154] China has broadened its consent to arbitration for investment since its agreement with Barbados in 1998.[155] The majority of

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145 *UNCITRAL Arbitration Rules*, UNCITRAL, https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration (last visited Jan. 12, 2020).

146 Ulrich G. Schroeter, *Ad Hoc or Institutional Arbitration—A Clear-Cut Distinction? A Closer Look at Borderline Cases*, 10 CONTEMP. ASIA ARB. J. 141, 155 (2017).

147 Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitration Under the UNCITRAL Arbitration Rules (As Revised in 2010), UNCITRAL, https://www.uncitral.org/pdf/english/texts/arbitration/arb-recommendation-2012/13-80327-Recommendations-Arbitral-Institutions-e.pdf [hereinafter UNCITRAL Recommendations].

148 *Id.*

149 *Id.*

150 Norbert Horn, *Current Use of the UNCITRAL Arbitration Rules in the Context of Investment Arbitration*, 24 ARB. INT'L 587, 588 (2008).

151 *Id*. at 589.

152 *NAFTA Investor–State Arbitrations*, U.S. DEP'T. ST., https://www.state.gov/s/l/c3439.htm (last visited Jan. 12, 2020).

153 *Id.*

154 Rep. of the U.N. Comm. on Int'l Trade Law, U.N. Doc. A/65/17, ¶ 187 (2010).

155 Julian G. Ku, *Enforcement of ICSID Awards in the People's Republic of China*, 6 CONTEMP. ASIA ARB. J. 31 (2013).

bilateral treaties signed by China between 1998 and 2008 recognize arbitral tribunals under the administration of the ICSID or an ad hoc UNCITRAL arbitration to resolve investment related disputes.[156]

UNCITRAL arbitration comes with a presumption that the tribunal for resolving investment arbitration consists of three arbitrators, unless the parties agree to choose the arbitrators another way within thirty days after the respondent receives notice of the arbitration.[157] More importantly, according to UNCITRAL Article 7, each party has the right to appoint one arbitrator, and the two arbitrators appointed by both parties have the chance to select the presiding arbitrator.[158] There are no specific requirements set out in the UNCITRAL Rules with respect to the qualifications or nationality of arbitrators.[159] However, an appointing authority is obliged to consider "the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."[160] Because parties can designate an appointing authority, the UNCITRAL rule of appointment prevents the deadlock that might lead to the need for an application to a national court.[161]

1. Advantages of UNCITRAL's Arbitration Rules

a. Parties Bear Less Burden to Challenge the Arbitrator's Impartiality

UNCITRAL has a lower standard of proof to challenge the impartiality of the appointed arbitrator comparing with ICSID.[162] UNCITRAL Article 12 requires the appointed arbitrators to disclose any circumstances that are likely to give rise to justifiable doubts about their impartiality or independence.[163] A prospective arbitrator should disclose such circumstances to the party that

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156 Karl P. Sauvant & Michael D. Nolan, *China's Outward Foreign Direct Investment and International Investment Law*, 18 J. INT'L ECON. L. 893, 915 (2015).

157 *UNCITRAL Arbitration Rules (as revised in 2010)*, UNCITRAL, art. 7 (Apr. 2011), https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf [hereinafter *UNCITRAL Arbitration Rules 2010*].

158 *Id.*

159 *See generally id.*

160 Jeffery Sullivan & Manthi Wickramasooriya, *Investment Arbitration: A Comparison of ICSID and UNCITRAL Arbitration for Investment Arbitration*, 20 CROAT. ARB. Y.B. 135, 140 (2013).

161 *See generally* Paul Darling, *Who Do You Want. Who Do You Get: Appointment the Right Arbitrator*, 12 ASIAN DISP. REV. 19, 20 (2010).

162 Al-Hawamdeh et al., *The Effects of Arbitrator's Lack of Impartiality and Independence on the Arbitration Proceedings and the Task of Arbitrators Under the UNCITRAL Model Law*, 11 J. POL. & L. 66 (2018).

163 Diana-Loredana Hogas, *Insights on the Arbitrator's Requirement of Independence*, J.L. & ADMIN. SCI. (SPECIAL ISSUE) 235 (2015).

approaches him or her, and an appointed arbitrator should disclose such circumstances to the parties or the other arbitrators in so far as they have not already been informed.[164] "The notion for challenging the arbitrator's lack of impartiality and independence under UNCITRAL is the existence of the circumstance, which is likely to give rise to 'justifiable doubts' rather than actual existence of partiality and dependence."[165]

Proving the existence of circumstances is easier than showing actual partiality or dependence, which is the historical practice of the ICSID.[166] Historically, challenges to the independence and impartiality of the arbitrator have been rare and set a relatively high burden of proof for the challenging party.[167] Although there have been few recent decisions, such as *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* and *Burlington Resources, Inc. v. Republic of Ecuador*, that have relied on the "appearance" instead of a "manifest" lack of independence or impartiality, it is still quite uncertain whether the trend of ICSID cases would change the substantive interpretation of challenge of the impartiality under ICSID.[168]

b. Jurisdictional and Procedural Simplicity

In contrast to the ICSID, the establishment of arbitration jurisdiction under the UNCITRAL does not require joining a convention, it just requires consent of jurisdiction in the arbitration clause of a contract, treaty, or domestic law.[169] Because the UNCITRAL Arbitration Rules do not contain any other jurisdictional hurdles, there is more legal certainty about the eligibility of conflict for settlement through the chosen form of arbitration than exists under the ICSID.[170]

UNCITRAL also has simpler procedural requirements. In particular, the 2010 UNCITRAL Arbitration Rules no longer require an arbitration agreement to be "in writing."[171] The 2010 UNCITRAL Arbitration Rules also do not

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164 Sullivan & Wickramasooriya, *supra* note 160.

165 Al-Hawamdeh et al., *The Effects of Arbitrator's Lack of Impartiality and Independence on the Arbitration Proceedings and the Task of Arbitrators Under the UNCITRAL Model Law*, 11 J. POL. & L. 66 (2018).

166 *See id*.

167 Peter Horn, *A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration*, 11 N.Y.U. J.L. & BUS. 349, 349 (2014).

168 *Id*. at 349–53.

169 G.A. Res. 31/98, UNCITRAL Arbitration Rules, sec. 1 art. 1.1 (Dec. 15, 1976) [hereinafter UNCITRAL Arbitration Rules 1976].

170 *See* Gligor, *supra* note 95, at 688.

171 *UNCITRAL Arbitration Rules 2010*, *supra* note 157, art. 1(2).

require that "the parties to arbitration be 'parties to a contract' as was stated in the 1976 Rules."[172] Such requirements allow "a dispute arising from any kind of legal relationship to be referred to arbitration under the UNCITRAL Rules …. [and makes] the UNCITRAL Rules … directly applicable to investor–state arbitration."[173]

c. Reduced Costs

The costs of arbitration grow with the complexity of the cases.[174] One of the most important issues to investors and parties involved in a dispute is costs. Such costs include arbitrator, expert witness, and administrative fees.[175] The parties would prefer a "cost & time-efficient" procedure.[176]

Under the 2010 UNCITRAL Arbitration Rules, arbitral tribunals are allowed to "direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference)."[177] The use of technology in the arbitration process could improve procedural efficiency of parties to arbitrating in front of the UNCITRAL and could decrease costs to BRI parties by reducing administrative and witness fees through telecommunication.[178]

The parties even have the opportunity to review the arbitrators' fees and expenses. Article 41(3) provides that the tribunal must inform the parties of its proposal as to how it will determine its fees and that, within fifteen days of receiving the tribunal's proposal, the parties may refer this proposal to the appointing authority for review.[179] Within forty-five days of the receipt of such a referral, the appointing authority shall adjust the fees and expenses and this shall be binding upon the tribunal.[180] If the appointing authority fails to act

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[172] Doug Jounes & Timothy Zahara, *Highlights of the New 2010 UNCITRAL Arbitration Rules*, CLAYTON UTZ (Oct. 2011), https://www.claytonutz.com/knowledge/2011/october/highlights-of-the-new-2010-uncitral-arbitration-rules.

[173] *Id.*

[174] Kenneth Reisenfeld & Joshua Robbins, *The Achilles' Heel of Investor–State Arbitration Awards*, LAW 360 (Dec. 6, 2016), https://www.bakerlaw.com/webfiles/Litigation/2016/Articles/12-07-2016-Law360-Robbins-Reisenfeld.pdf.

[175] *Id*.

[176] *Id*.

[177] *UNCITRAL Arbitration Rules 2010*, *supra* note 157, art. 28(4).

[178] Gabrielle Kaufmann-Kohler & Thomas Schulz, *The Use of Information Technology in Arbitration*, JUSLETTER (Dec. 5, 2005), http://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf.

[179] *UNCITRAL Arbitration Rules 2010*, *supra* note 157, art. 41(3).

[180] *Id*.

within those forty-five days or refuses to do so, a party may refer the review of the tribunal's proposal to the Secretary-General of the Permanent Court of Arbitration in the Hague.[181]

2. Disadvantages of UNCITRAL's Abritration Rules

a. Lack of Enforcement Procedure

Unlike the ICSID Convention, the UNCITRAL Arbitration Rules are model laws that do not include a binding enforcement procedure to make an arbitral award final and valid without judicial interference.[182] The only way to enforce the UNCITRAL arbitral award is through the enforcement and recognition provisions under the New York Convention.[183] The New York Convention, also called the U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards, is a convention that provides a uniform standard to enforce arbitral awards in signatory countries.[184] However, according to the New York Convention Article V, national courts may refuse to recognize and enforce an arbitral award if a party brings the request and proves the opposition grounds listed in the Convention.[185] For instance, Article V(2)(b) states that the state might not enforce an arbitration award if "[t]he recognition or enforcement of the award would be contrary to the public policy of that country."[186] However, courts in different countries may make inconsistent decisions, which could create uncertainty, and harm the corporations and countries.[187] For example, China may refuse to enforce an arbitral award made by a UNCITRAL tribunal based on public policy if the Chinese domestic court finds the investment is a cover for bribery or corruption.[188]

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[181] *Id.* art.41(4)(b).

[182] Kamal Huseynli, *Enforcement of Investment Arbitration Awards: Problems and Solutions*, 3 BAKU ST. U. L. REV. 40, 60 (2017).

[183] *Id.*

[184] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, intro., June 7, 1959, 330 U.N.T.S. 38 [hereinafter New York Convention].

[185] *Id.* art. V(1).

[186] *Id.* art. V(2).

[187] Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1558 (2005).

[188] Alfred Wu, et al., *Belt and Road Initiative Managing Disputes Risk When Working with States and SOEs in Infrastructure and Construction Projects*, NORTON ROSE FULBRIGHT (May 2019), https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/international-arbitration-report—-issue-12.pdf?la=en&revision=2af60927-1ed7-46ae-b317-5af59b72c270.

b. Lack of an Appellate System

The enforcement through New York Convention has a potential problem of uncertainty because of a reciprocity reservation under Article I(3).[189] "[A]ny State may … declare that it will [only] apply the [New York] Convention to the recognition and enforcement of awards made only in the territory of another Contracting State."[190] The New York Convention requires the country where the arbitral award is made to give consent to be bound under the Convention in order for the rules of the New York Convention to apply.[191] To ensure enforcement of the arbitral award the party involved should elect to arbitrate in a country that is a signatory to the New York Convention.[192]

However, courts in some jurisdictions would interpret the reciprocity reservation clause differently.[193] For example, China would only enforce arbitral awards made in countries that recognize arbitral awards made in China.[194] Bulgaria would enforce the award made in non-signatory countries if those countries would enforce arbitration made in Bulgaria.[195] Cuba would enforce the arbitration if there is a signed mutual reciprocity agreement between the two parties in the dispute.[196] Inconsistent application of the reciprocity principle, as it relates to the enforcement of the New York Convention, creates a barrier to enforce arbitration awards and increases legal uncertainty for parties involved.[197]

Additionally, UNCITRAL Arbitration Rules do not include an appellate system for reconsideration of the reasoning and decision-making made by a arbitral tribunal.[198] Instead, the parties need to appeal to the court in the place where the arbitration was held.[199] There is inconsistency regarding the national court's power over annulment of arbitral awards made outside of their

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189 Courtney Furner, *Uncertainty Regarding the Existence and Future of the Reciprocity Reservation Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)*, TERRALEX CONNECTIONS (Dec. 6, 2018), https://www.lalive.law/data/publications/Terralex_Connections.pdf.

190 New York Convention, *supra* note 185, art. I(3).

191 Furner, *supra* note 189.

192 DAVID D. CARRON & LEE M. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 86 (2d ed. 2013).

193 Furner, *supra* note 189.

194 Wu, et al., *supra* note 188.

195 Furner, *supra* note 189.

196 *Id*.

197 *Id*.

198 Paul Stothard & Jenna Anne de Jong, *Request for Reconsideration in ICSID and UNCITRAL Arbitrations*, NORTON ROSE FULBRIGHT (June 2017), https://www.nortonrosefulbright.com/en/knowledge/publications/5fc4ee47/requests-for-reconsideration-in-icsid-and-uncitral-arbitrations.

199 *Id*.

territory.[200] For instance, countries involved in BRI projects, like Hungary, Sri Lanka, and Russia ruled that only the court where the arbitral award is made has the power to annul the arbitral award.[201] BRI countries such as Bangladesh and Pakistan believe their national courts are able to exercise jurisdiction to annul arbitral awards made outside of their countries.[202] Some BRI countries including Indonesia and Tanzania have not yet made any decision on this issue.[203] The uncertainty about the annulment issue resulting from UNCITRAL's lack of an appellate system provided countries with discretion to decide this issue themselves.[204] However, as stated, neither investors nor sovereign states want uncertainty in the ISA process.[205]

c. Inefficiency

While claimants want to get a final ruling in a relatively short amount of time, the UNCITRAL Arbitration Rules do not provide a strict deadline for when arbitrators need to come up with procedural rules or final arbitral awards.[206] Parties involved in investment arbitration held under the UNCITRAL Arbitration Rules have the sole discretion to come up with the procedural rules. Compliance of the parties or the attorneys in UNCITRAL arbitral tribunals to such rules are not supervised by any institution.[207] The effectiveness of the tribunal ultimately depends on the speed and willingness of the parties to cooperate and comply the procedural rule.[208]

Whereas in ICSID arbitration there is a supervisory institution in the ICSID Secretariat, under the UNCITRAL Arbitration Rules no such institution exists.[209] The parties involved in arbitration, especially the government, might

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[200] *See* HAMID GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL 12–19 (2002).

[201] *See id*. at 12–15.

[202] *See id*. 17–20.

[203] *See id*. at 21.

[204] *See id*. at 22.

[205] *See* Furner, *supra* note 189.

[206] Huang Tao & Dai Yue, *Forum Shopping in China: CIETAC vs. UNCITRAL*, CHINA L. INSIGHT (July 29, 2011), https://www.chinalawinsight.com/2011/07/articles/dispute-resolution/forum-shopping-in-china-cietac-vs-uncitral/.

[207] Alyssa Grikscheit, Book Note, 92 MICH. L. REV. 1989, 1992 n.20 (1994) (reviewing ISSAK I. DORE, THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE (1993)) (citing MARTIN HUNTER ET AL., THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR: CLAUSES IN INTERNATIONAL CONTRACTS 3 (1993)).

[208] *Id*.

[209] Diana Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT'L BUS. & L. 239, 275. (2012).

delay the proceedings.[210] Parties might appear late or fail to appear at all.[211] Without proper supervision, parties or their attorneys might become emotional or outrageous during hearings which would be difficult to control.[212] Arbitrators may not provide a final award on schedule. The parties have no recourse because there is no supervisory institution.[213] As William Park states:

> *Ad hoc* arbitration may be problematic due to the lack of institutional oversight. The supervisory vacuum will often serve to delight a defendant wishing to drag its feet. Moreover, courts asked to enforce awards obtained by default in *ad hoc* arbitration may be more concerned that the defaulting party did in fact obtain proper notice of the proceedings than they would be if the award bears the imprimatur of an institution ….[214]

UNCITRAL tried to improve the efficiency of arbitration proceedings in the 2010 update to the rules. However, some of the updated provisions, such as the regulation regarding multiple claimants and respondents, seem inconceivable for ISAs.[215] Article 17(5) of the 2010 UNCITRAL Arbitration Rules allows for the joinder of other parties to the arbitration if the inclusion of these parties would not prejudice any other party.[216] However, the investment arbitration proceedings of UNCITRAL are primarily based on bilateral investment treaties (BITs).[217] If multiple states are allowed to become joint-parties in a single case, especially the situation when joint-parties are not from the same country of the original claimant and they all bring claim against a single country government, it would mean difficult to use a single BIT agreement as a legal basis for such ISA.[218]

d. Difficulties in Chinese Practice

China favors institutional arbitration.[219] Ad hoc arbitration tribunals, like those under the UNCITRAL, in early BITs between China and other countries

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[210] *Id*.

[211] Austin Amjssah, *Choice of Arbitration Rule—The Dilemma of an African Advisor*, LEX MERCATORIA (Mar. 21, 1997), https://www.jus.uio.no/lm/choice.of.arbitration.rules.march.1997.austin.amissah.a/doc.html.

[212] *Id*.

[213] *Id*.

[214] *Id*. (quoting WILLIAM PARK, INTERNATIONAL FORUM SELECTION 70 (1995)).

[215] *Contra* Markert Lars, *Improving Efficiency in Investment Arbitration*, 4 CONTEMP. ASIA ARB. J. 215, 239 (2011).

[216] *UNCITRAL Arbitration Rules 2010*, *supra* note 157, art. 17(5)(f).

[217] Horn, *supra* note 150.

[218] Lars, *supra* note 215.

[219] Tietie Zhang, *Enforceability of Ad Hoc Arbitration Agreements in China: China's Incomplete Ad Hoc Arbitration System*, 46 CORNELL INT'L L.J. 361, 368 n.26 (2013).

could only address compensation issues surrounding state seizure of private property for public use. [220] Although, China has broadened use of international arbitration to govern disputes and many Chinese BITs choose ad hoc tribunals under UNCITRAL Rules as a forum of solving disputes, there is an incompatibility between Chinese domestic law and ad hoc arbitration.[221]

Chinese Arbitration Law does not recognize ad hoc arbitration.[222] If the parties agree to solve the disputes by ad hoc arbitration but do not specify an international arbitration institution to administer the arbitration in the agreement, the Chinese court can deem the agreement void.[223] Although Chinese Arbitration Law was greatly influenced by the UNCITRAL Model Laws,[224] Chinese arbitration law does not exactly follow the UNCITRAL Model Law.[225]

Chinese Arbitration Law has provisions that contradict the UNCITRAL Model Law.[226] For instance, UNCITRAL Model Laws only grant annulment power to the national court if the court finds serious procedural problems. Under Chinese Arbitration Law, the national court has the power to annul the arbitral award based on serious procedural issues and substantive legal issues.[227] Another example is that the UNCITRAL Model Laws give the arbitral tribunal the power to decide issues of jurisdiction.[228] However, Chinese Arbitration Law provides that only permanent arbitration committees have the power to decide jurisdictional issues.[229]

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220 Yunxin Fan, *Protecting Chinese Investment Under BITs and ICSID Arbitration*, TILBURG U. 21, http://arno.uvt.nl/show.cgi?fid=136678.

221 *Id*. at 22.

222 Fu Chenyuan, *China's Prospective Strategy in Employing Investor–State Dispute Resolution Mechanism for the Best Interest of Its Outward Oil Investment*, 2 PEKING U. TRANSNAT'L L. REV. 266, 296 (2014).

223 Tietie Zhang, *China's Incomplete Ad Hoc Arbitration System*, 46 CORNELL INTL' L.J. 362, 381 (2013).

224 UNCITRAL Model Laws are sample law designed to help the legislators in the sovereigns to incorporate the modern international arbitration features and needs to help the international arbitration procedures.

225 Fang Zhao et al., *Arbitration*, GETTING THE DEAL THROUGH (Feb. 2018), https://gettingthedealthrough.com/area/3/jurisdiction/27/arbitration-china/; *Commission on International Trade Law*, UNITED NATIONS, https://uncitral.un.org/ (last visited Jan. 20, 2020).

226 Zhao et al., *supra* note 225.

227 *Id.*

228 *Id.*

229 *Id.*

C. China International Economic and Trade Arbitration Commission

The China International Economic and Trade Arbitration Commission (CIETAC) was established in 1956.[230] It was originally called the Foreign Trade Arbitration Commission of the International Trade Promotion Commission.[231] Originally, CIETAC settled foreign trade related disputes.[232] However, with increasing in-bound and out-bound international investments and economic development in China, CIETAC became the institution to settle a wide variety of investment and commercial disputes between Chinese entities and foreign parties.[233] In October 2017, CIETAC became an international investment arbitration institution.[234] Currently CIETAC is designed to better support Chinese investors in BRI projects.[235] CIETAC now has jurisdiction over "international investment disputes arising out of contracts, treaties, laws and regulations, or other instruments" between investors and states.[236]

CIETAC arbitration begins when one party presents a claim to CIETAC and the other party involved in the dispute gives consent to arbitration by CIETAC or participates in the arbitration without objection.[237] The BITs signed in the past would be well suited for CIETAC arbitration.[238] For instance, the China–Uzbekistan BIT signed in 2011 states that claims may be solved in domestic court, ICSID arbitration, ad hoc UNCITRAL tribunals, or other arbitration institutions/ad hoc tribunals agreed to by the parties.[239] This agreement gives the possibility of settling the disputes in front of the CIETAC. Not only do modern BITs have the possibility to be referred to the CIETAC, but also the CIETAC

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230 Li Zhang, *The Enforcement of CIETAC Arbitration Awards*, 4 ASIAN DISP. REV. 157, 157 (2002).

231 *Id.*

232 *Id*.

233 *Id.*

234 *CIETAC Publishes Rules for Investor–State International Investment Arbitration*, DAVIS POLK (Oct. 27, 2017), https://www.davispolk.com/files/2017-10-27_cietac_publishes_rules_for_investor-state_international_investment_arbitration.pdf (client memorandum).

235 Brandon Reilley et al., *CIETAC Investment Arbitration Rules—View from Australian Lawyers*, SQUIRE PATTON BOGGS (Aug. 2018), https://www.squirepattonboggs.com/~/media/files/insights/publications/2018/08/cietac-investment-arbitration-rules-view-from-australian-lawyers/cietac-investment-arbitration-rules-view-from-australian-lawyers.pdf.

236 Huiping Chen, *The BRICS Approach to the Investment Treaty System: China's Innovative ISDS Mechanisms and Their Implications*, 112 AM. J. INT'L L. 207, 208 (2018).

237 *Facilitating the Belt and Road: CIETAC Launches Investment Arbitration Rules*, HERBERT SMITH FREEHILLS (Dec. 4, 2017), https://www.herbertsmithfreehills.com/latest-thinking/facilitating-the-belt-and-road-cietac-launches-investment-arbitration-rules [hereinafter *Facilitating the Belt and Road*].

238 *Id.*

239 Agreement on the Promotion and Protection of Investments, China–Uzb., Apr. 19, 2011 [hereinafter China–Uzbekistan BIT].

rules can be applied to investor–state disputes based on BIT that was signed before 2001.[240]

1. Advantages of CIETAC

a. Choice of Arbitrator

According to Article 11 of the CIETAC rules, the arbitral panel should be comprised of ethical and independent arbitrators who are well-known experts in the practice of international investment law.[241] CIETAC allows the parties involved in dispute to choose arbitrators from a list provided by CIETAC.[242] The parties also have the freedom to nominate arbitrators who are not on the list under mutual agreement.[243] However, nominated arbitrators are subject to confirmation from the Chairman of CIETAC.[244] Most arbitrators on the CIETAC list are of Chinese nationality.[245] The availability of Chinese arbitrators might be attractive for Chinese investor-claimants.

b. Low Cost and Efficiency

The fees for seeking arbitration at CIETAC are much lower than the ICSID. CIETAC only charges RMB 10,000 (approximately USD $14,000) as registration fee after the CIETAC accept an arbitration case under its jurisdiction.[246] The arbitration fee varies according to the amount in dispute.[247] The ICSID, by comparison, charges a non-refundable fee of USD $25,000 when the request for arbitration is lodged and charges USD $42,000 in administrative fees when a request for arbitration is registered.[248] The ICSID charges and additional USD $3000 per day for the administrative works related to the

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[240] *Facilitating the Belt and Road*, *supra* note 237.

[241] China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (For Trial Implementation), art. 11 (promulgated by the China Council for the Promotion of Int'l Trade (China Chamber of Int'l Com.), Sept. 12, 2017, effective Oct. 1, 2017), CLI.6.302452(EN) (Lawinfochina) [hereinafter CIETAC Rules].

[242] Jiong (John) Liu et al., *Briefing of Fees and Important Rules Under CIETAC Arbitration Rules (2015)*, LEXOLOGY (Aug. 10, 2017), https://www.lexology.com/library/detail.aspx?g=af3dd91f-4015-48dd-8abb-1d0473aa0b4d.

[243] *Id.*

[244] *Id*.

[245] *See Panel of Arbitrators*, CHINA INT'L ECON. & TRADE ARB. COMMISSIONI (May 1, 2017), http://www.cietac.org/Uploads/201705/59074e909a6a7.pdf.

[246] *Schedule of Fees*, CHINA INT'L ECON. & TRADE ARB. COMMISSION, http://www.cietac.org/index.php?m=Page&a=index&id=191&l=en [hereinafter *CIETAC Schedule of Fees*].

[247] *Id*.

[248] *Schedule of Fees*, INT'L CTR. FOR SUSTAINABLE INV. DEV. (Jan. 1, 2019), https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx [hereinafter *ICSID Schedule of Fees*].

arbitration proceedings.[249] Under the UNCITRAL Arbitration Rules, the tribunal considers the circumstances in each case in deciding the arbitration fees.[250] However, according to one study, which analyzes and compares the amount of arbitrations fees in cases arbitrated by ICSID and UNCITRAL, the arbitration fees for a UNCITRAL arbitration are ten percent more than for an ICSID arbitration.[251] A unique feature of CIETAC is early dismissal of a claim which provides the possibility for the parties to save the time and money spent on arbitration.[252]

Moreover, parties may consolidate two or more disputes when the disputes "involve common questions of law or fact, and such disputes arise out of the same events or circumstances."[253] Without consolidation, the party who has two disputes with similar facts and issues would have to spend double the amount of time on hearings and other administrative procedures.[254] The parties would also need to spend twice as much on costs for presenting the expert witnesses and arbitration fees.[255] Costs of arbitrators usually are the largest expenses that the party has to spend on arbitration.[256]

Furthermore, unlike under the ICSID or UNCITRAL, third-party funding is allowed under the CIETAC.[257] Third-party funding refers to when one party is financed by a party who is not involved in the proceeding.[258] According to CIETAC rules, a "party must notify the Tribunal and the other Parties as soon as any third party funding agreement is concluded, including the nature of the agreement and the identity of the funder. The Tribunal may also order disclosure of any other relevant information."[259] Due to the size of claims in investment arbitration, both the costs and compensation that a winning party may receive

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[249] *Id*.

[250] Diana Rosert, *The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration*, INT'L INST. FOR SUSTAINABLE DEV. (July 2014), https://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf.

[251] *Id*.

[252] *Facilitating the Belt and Road*, *supra* note 237.

[253] *Id.*

[254] Lara Pair, *Efficiency at All Cost—Arbitration and Consolidation?*, KLUWER ARB. BLOG (Mar. 14, 2014), http://arbitrationblog.kluwerarbitration.com/2014/03/14/efficiency-at-all-cost-arbitration-and-consolidation/.

[255] *Id*.

[256] *Id*.

[257] Richard Allen & Leng Sun Chan, *Comparative Chart of International Investment Arbitration Rules*, GLOBAL ARB. NEWS (May 29, 2018), https://globalarbitrationnews.com/comparative-chart-of-international-investment-arbitration-rules/.

[258] Frank J. Garcia & Kirrin Hough, *Third Party Funding in International Investor–State Arbitration*, AM. SOC'Y INT'L L. (Nov. 1, 2018), https://www.asil.org/insights/volume/22/issue/16/third-party-funding-international-investor-state-arbitration.

[259] Allen & Chan, *supra* note 257.

are sizeable.[260] The third-party funder pays for the arbitration costs in return for a certain percentage of the compensation.[261] Third-party financing is attractive for investors because it reduces the costs of arbitration and decreases the risks associated with the expensive arbitration.[262] Funders analyze the claims before financing the arbitration costs, ultimately helping the claimants to better assess their claims, to avoid bringing invalid claims that waste money.[263]

Also, according to CIETAC Investor–State Arbitration Rules, the parties automatically give consent to jurisdiction of CIETAC as arbitration institution for ISA if they agree to arbitrate under the CIETAC Arbitration Rules.[264] If parties agree to be bound by the CIETAC Arbitration Rules, they also give consent to use CIETAC as the arbitration institution.[265] For instance, when parties choose CIETAC's Hong Kong Arbitration Center as the arbitration institution or Hong Kong as the seat of arbitration, CIETAC's Hong Kong Arbitration Center may handle investment dispute arbitration cases brought under the Rules.[266]

c. Familiarity with Chinese Law and Incorporation of Chinese Culture

Choosing CIETAC to form the arbitral tribunal would be beneficial for Chinese investors in BRI projects because CIETAC is more familiar with Chinese law and practice. This familiarity would bring more assurance to investors and avoid possible bias due to a lack of legal understanding.[267] For infrastructure investments that require a concession agreement between the host state and Chinese investors, the latter may insist that any dispute arising under the agreement be referred to Chinese arbitral institutions, like CIETAC. Choosing "a Beijing-located forum for the settlement of investment disputes … would be favored by Chinese investors over other available forums such as domestic courts in host states and Washington-based ICSID."[268]

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260 Garcia & Hough, *supra* note 258.

261 *Id*.

262 *Third Party Funding in International Arbitration*, ASHURST (June 21, 2019), https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/.

263 *Id*.

264 *CIETAC Publishes Rules for Investor–State International Investment Arbitration*, *supra* note 234.

265 *Id*.

266 *Arbitration of Disputes in China and Hong Kong: Challenges and Opportunities*, MAYER BROWN (Nov. 3, 2008), https://www.mayerbrown.com/public_docs/Event_FinalBook.pdf.

267 Dilini Pathirana, *Rising China and Global Investment Governance: An Overview of Prospects and Challenges*, 4 CHINESE J. GLOBAL GOVERNANCE 122, 150 (2018).

268 *Id*. at 150–51.

Also, the CIETAC Rules incorporate Chinese cultural features, which might make it more appealing to Chinese investors.[269] For instance, the concept of acting in good faith is incorporated in China's Civil Code and China's Civil Procedural Code.[270] Article 6 of the CIETAC Arbitration Rules imposes an obligation on the parties involved to act in good faith.[271] A feature of the Chinese culture is that parties involved in disputes are more likely to resolve these disputes in a more peaceful way, such as through mediation and negotiation, instead of intense debate and litigation in a court or arbitral tribunal.[272] Articles 6 and 43 of the CIETAC Arbitration Rules give parties a choice to conduct mediation before entering into an arbitration proceeding.[273] The tribunal makes a judgment about whether mediation is appropriate.[274] If the arbitrators approve, the mediation will be held confidentially and a settlement agreement may be reached between the parties during the mediation.[275]

The Chinese government supports extending CIETAC's jurisdiction in international investment arbitration.[276] China expressly stated its concern about incorporating unique legal features into ISAs during the UNCITRAL Working Group sessions:

> The current arbitration proceedings are carried out in some specific languages and most arbitrators use several specific languages or come from certain specific backgrounds, they may lack the relevant knowledge about the legal cultures of other countries. So for many developing countries including China, currently, we are facing difficulties related to language in terms of translation of our documents and this may also cause some extra delay and extra costs.[277]

China's State Council, the highest administrative authority in China, supports the CIETAC Arbitration Rules to better protect Chinese investors overseas and facilitate BRI projects.[278]

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269 Claudia Annacker, et al., *CIETAC Rules for Investment Arbitration*, CLEARY GOTTLIEB (Nov. 14, 2017), https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/2017/publications/alert-memos/cietac-rules-for-investment-arbitration-11-14-17.pdf.

270 *Id*.

271 *Id*.

272 *Id*.

273 *Id*.

274 *Id*.

275 *Id*.

276 Chen, *supra* note 236, at 208.

277 Anthea Roberts & Zeineb Bouraoui, *UNCITRAL and ISDS Reforms: Concerns About Costs, Transparency, Third Party Funding, and Counterclaims*, EJIL:TALK! (June 6, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/.

278 Chen, *supra* note 236, at 208.

2. Disadvantages of CIETAC

a. Default Transparency

Under the CIETAC Arbitration Rules, all hearings are transparent by default if neither party nor the tribunal raises opposition.[279] Information related to the arbitration, except confidential and other "protected information" of the parties, may also be publicly disclosed by CIETAC unless the parties agree otherwise.[280] This includes the request for arbitration, the answer to the request, counterclaims, parties' written submissions, transcripts, and awards.[281] Parties selecting the CIETAC Investment Arbitration Rules have the opportunity to negotiate their desired level of transparency to be included in their arbitration agreement.[282] However, if an agreement cannot be reached, the default will be transparency.[283] As mentioned earlier, investors and governments have a reserved attitude towards transparency during ISA.[284] Therefore, investors who would prefer to have a confidential proceeding might have concerns about the transparency feature of the CIETAC arbitration institution.[285]

b. Inexperience and Difficulty in Promoting New Institutions

Finally, although China has been involved in some ISAs, China does not have much experience in handling and making arbitral awards for ISAs.[286] There are relatively few Chinese arbitrators who have experiences in the major international investment arbitration institutions.[287] It may take a long time for the CIETAC to establish its credibility and reputation for making the entities willing to be bind under the CIETAC Investment Arbitration Rules and bring the case to CIETA for arbitration.[288] Also, the CIETAC Investment Arbitration Rules were specifically designed to protect Chinese investors in BRI projects.[289] It may be difficult for the rest of the world to believe that CIETAC is a multilateral legal framework that provides sufficient protection for anyone other

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279 CIETAC Rules, *supra* note 241, art. 32.

280 *See* CIETAC Rules, *supra* note 241, art. 55.

281 *Id.* art. 55(2)(a), (b), (d), (f)–(i).

282 *Facilitating the Belt and Road*, *supra* note 237.

283 CIETAC Rules, *supra* note 241, art.32.

284 *CIETAC Publishes Rules for Investor–State International Investment Arbitration*, *supra* note 235.

285 *Id.*

286 Anran Zhang, *CIETAC Investment Arbitration Rules*, LEIDEN L. BLOG (Sept. 29, 2017), https://leidenlawblog.nl/articles/cietac-investment-arbitration-rules.

287 *Id*.

288 *Id*.

289 *Id.*

than Chinese investors because of its stated intent to protect Chinese investors.[290] The goal of CIETAC is to counter the "backlash against economic globalization and multilateralism in international economic governance in general, and … the existing international system for the protection of foreign investment."[291]

CONCLUSION

While Chinese investors have only asserted a total of five claims against other governments, this number is certain to increase with increasing outbound investments.[292] While no specific treaty provides legal protection for BRI investors, the degree of protection to foreign investors in investment laws vary among BRI countries.[293] Given the risks associated with large infrastructure projects and the likelihood of legal disputes, it is important for Chinese investors to choose the most appropriate investment arbitration institution to protect their interests.[294]

A lot of countries participating in BRI project include ICSID and UNCITRAL arbitration in their BITs with China.[295] ICSID and UNCITRAL are the most widely recognized arbitration mechanisms in the world. This has an externality net effect that makes it hard for a new arbitration institution, like CIETAC, to attract parties to bring investment disputes before it.[296] At the same time, CIETAC does not have enough experience and expertise in dealing with investment arbitrations.[297] These features make it difficult for CIETAC to establish international recognition.[298] However, dominance of the ICSID and UNCITRAL does not mean that they monopolize the ISAs.[299] Ecuador, Bolivia, and Venezuela have already withdrawn from ICSID convention.[300] Many African and Latin American countries are establishing their own mechanisms, like the Union of South American Nations to handle the ISAs.[301] Bolivia and

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290 Pathirana, *supra* note 267, at 152–53.

291 *Id*.

292 *China-Related Investment Arbitrations: Three Recent Developments*, *supra* note 73.

293 Kher & Tran, *supra* note 26.

294 *Id*.

295 *China-Related Investment Arbitrations: Three Recent Developments*, *supra* note 73; Sauvant & Nolan, *supra* note 157.

296 *See* Bjorklund & Druzin, *supra* note 101.

297 Zhang, *supra* note 219.

298 Pathirana, *supra* note 267, at 152–53.

299 *See, e.g.*, Smith, *supra* note 123, at 575.

300 *Id*.

301 Diane Desierto, *China as a Global ISDS Power*, INV. CLAIMS (Aug. 2018), http://oxia.ouplaw.com/page/715.

Ecuador have developed their own national mechanism to deal with international investment disputes.[302]

Moreover, although CIETAC does not have much ISA experience, CIETAC has been widely recognized as a trustworthy commercial arbitration institution with few opposing voices from foreign lawyers.[303] CIETAC is an independent organization, which mainly gets its income from arbitration fees instead of from the Chinese government.[304] The CIETAC Rules incorporate Chinese legal features, one of the biggest concerns for Chinese entities during international arbitration.[305] The majority of the arbitrators provided by CIETAC are Chinese nationals and likely have a better understanding of Chinese legal norms and domestic rules.[306] The Chinese government also has a positive attitude towards the use of the CIETAC Investment Arbitration Rules in BRI project documents. As most of the investors involved in BRI projects are Chinese state-owned entities, Chinese investors may prefer an arbitration institution that can better satisfy their needs.[307]

One of the concerns for investors is the finality and enforceability of an ISA arbitral award.[308] However, as mentioned earlier, UNCITRAL cannot provide such certainty because UNCITRAL does not have its own enforcement mechanism. Rather, the enforcement of UNCITRAL arbitral awards is based on the New York Convention enforcement procedure.[309] However, a lot of enforcement uncertainties remain in the New York Convention since different nations have various interpretations regarding the enforcement provisions in the New York Convention.[310] China has reciprocity reservation to the New York Convention, but some BRI participants are not parties to the Convention (e.g., East Timor, Maldives, Iraq, Turkmenistan, and Yemen) or have different attitudes on reciprocity reservation.[311] China also can reject the arbitral award due to public policy concerns.[312] Meanwhile, China has conservative attitude towards ad hoc arbitration.[313]

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302 *Id*.

303 Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L L. & COMP. L. REV. 38, 46 (2005).

304 *Id*.

305 Annacker, et al., *supra* note 269.

306 *See Panel of Arbitrators*, *supra* note 245.

307 Chen, *supra* note 237, at 208.

308 Wu, et al., *supra* note 188.

309 Huseynli, *supra* note 182.

310 Franck, *supra* note 187.

311 Wu, et al., *supra* note 188.

312 *Id*.

313 Zhang, *supra* note 219.

Although the ICSID does not have the enforcement problem, and has efficient procedures, the cost of conducting ICSID arbitration is much higher than CIETAC arbitration.[314] The arbitration costs using UNCITRAL arbitration is also high.[315] The costs for investment arbitration, including the payments to attorneys and arbitrators, are usually substantial.[316] Compared to the ICSID and UNCITRAL, CIETAC has low administrative costs related to arbitration proceeding and incorporates features that are beneficial to investors.[317] Third-party funding for arbitration proceedings reduces the burden on investors and also helps investors to better evaluate their chances of success before entering into arbitration.[318] Consolidating similar disputes also helps reduce spending on arbitrators and expert witness.[319] CIETAC adopts a transparent procedure rule, like ICSID and UNCITRAL, a feature investors do not prefer.[320]

CIETAC may need more time to establish expertise in handling ISAs.[321] However, the CIETAC Investment Arbitration Rules adopt Chinese features, have low costs and provide familiarity with Chinese law that the other two ISA institutions and rules do not. BRI investors, particularly Chinese state-owned entities, are likely to choose CIETAC for arbitration to solve ISAs in future agreements.

YUWEI LIU[*]

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314 *See CIETAC Schedule of Fees*, *supra* note 246; *ICSID Schedule of Fees*, *supra* note 248.

315 Rosert, *supra* note 250.

316 Garcia & Hough, *supra* note 258.

317 *See generally* Allen & Chan, *supra* note 257; *Facilitating the Belt and Road*, *supra* note 237.

318 *Third Party Funding in International Arbitration*, *supra* note 262.

319 *Facilitating the Belt and Road*, *supra* note 237.

320 *CIETAC Publishes Rules for Investor–State International Investment Arbitration*, *supra* note 234.

321 Zhang, *supra* note 219.

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