Adjudication of Investor-State Investment Disputes in the 'One Belt, One Region': Is the China-EU Bilateral Investment Treaty a Likely Model?

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Abstract

The prospect of an enhanced relationship between China and the European Union as resulting from, first, their future bilateral investment treaty and, second, the closer interconnection produced by China's Belt and Road Initiative holds exhilarating possibilities for the global investment regime. Given that the United Nations Commission on Trade Law is currently working on reforming the harshly criticized instrument of investor-state dispute settlement, the foreseeable China–EU treaty might represent a model for a new generation of bilateral investment treaties, which also paves the way to a new fashion of settling investment disputes. Upon assessing China's investment treaty practice and with a view to the various dispute settlement mechanisms in place, it seems likely that China, consistent with its flexible treaty-making manner, will find common ground with its European counterpart on the innovative establishment of a permanent bilateral investment court – as desired by the EU. The author, however, deems compromise on the implementation of a unified appellate mechanism, as opposed to a two-tiered standing court system, much more feasible, leaving the first instance of investor-state dispute settlement to the institutions chosen by the parties. Thus, the Investment Court System might just be a complementary dispute resolution option in the Belt and Road Region, at least in the medium term.

I. Introduction

The currently negotiated Bilateral Investment Treaty (BIT) between two of the world's largest economies, the People's Republic of China (China) and the European Union (EU), is destined to be a significant milestone in the evolution of BITs. Once successfully implemented, it is expected to epitomize a new generation of BITs.[2] And since dispute settlement, in particular the Investor-State Dispute Settlement (ISDS) mechanism as an important component in the existing BITs, has moved to the center of the debates in international investment law during the past years, it likewise represents an integral element of negotiation between China and the EU.

In the present paper, the author aims to connect the dispute resolution mechanism proposed for the China-EU BIT to the China-led Belt and Road Initiative (BRI), also known as *'One Belt, One Road'* (一带一路).[3] In the course of this effort, the author puts the presently known BRI into a wider context by pushing existing boundaries towards an inclusive approach which also covers the European region. To remain a step ahead of the current state of development, the author additionally establishes the term 'One Belt, One Region' (一带一区, OBOR), which is more akin to the prospects in the China-EU relationship, intensified especially through the future China-EU BIT.[4] With regard to the declared purpose, the author will, *first*, reflect on the developments related to dispute settlement mechanisms within the investment regimes of China, the China-led BRI, and the EU. She will thereby specifically take into account the 'legitimacy crisis' of the ISDS system. *Secondly*, the author will assess the possible impact that will be projected by the China-EU BIT, notably in the area of international dispute settlement. This will be done to, *thirdly*, apply the China-EU BIT as a 'new model' of BIT to OBOR, so that one can ultimately determine the likelihood that the China-EU BIT will serve as a model for solving prospective disputes between investors and states inside OBOR. In a wider context, the likelihood-assessment will give further insight into the level of investor protection within the future, intertwined investment regimes of China and the EU. This degree of protection, for its part, is a crucial aspect for the two jurisdictions' respective goals in attracting foreign direct investment and in increasing their outward foreign direct investment, both vital and pivotal contributors to economic growth and development.

II. Investment Treaty Arbitration under Various Frameworks

1. The Network of BITs

BITs, alongside multilateral investment treaties, are one form of international investment agreement. As opposed to global trade, which is supervised by the world trading system under the World Trade Organization (WTO) and a comprehensive set of multilateral

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[2] *SHAN Wenhua/WANG Lu*, The China-EU BIT and the Emerging 'Global BIT 2.0', in: ICSID Review – Foreign Investment Law Journal, Vol. 30(1) (2015), pp. 260–267.

[3] *National Development and Reform Commission* (NDRC), Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road (March 2015); <http://www.china-botschaft.de/det/zt/yidaiyilude/t1250293.htm> visited 24 February 2020.

[4] Consequently, the author will use the term BRI to refer to the initiative as is and will use the newly introduced term of OBOR only when talking about the initiative in a prospective context.

investment treaties, the regulation of international investment is fragmented into over 3,000 BITs and small regional agreements, metaphorically described as a 'noodle bowl' of international investment agreements.[5]

a) Provisions

Towards the underlying aim of promoting foreign investment by encouraging and protecting foreign investors in host-states, BITs commonly contain similar standards for substantial protection, including the following clauses listed in the order of their frequency of adoption: The fair and equitable treatment (FET) clause obliges the host-state to maintain a stable and predictable investment regime that fulfills investors' legitimate expectations.[6] The most-favored-nation clause requires the host-state to provide investors with the same treatment as it does to third parties under other international investment agreements.[7] The national treatment clause prohibits the host-state from making any distinction between foreign and national investors.[8] Further, clauses on protection from expropriation also provide investors with the security that the host-state will not confiscate their foreign assets or property without adequate compensation for losses.[9]

A vast majority of BITs in force also contain a clause laying down an irrevocable offer by the host-state to arbitrate, mostly under the guidelines of the International Centre for Settlement of Investment Disputes (ICSID), established by the ICSID Convention, and under the United Nations Commission on International Trade Law (UNCITRAL) ad hoc Arbitration Rules.[10] Unlike with the ICSID, ad hoc arbitration leaves parties to decide on their arbitral situs. And while both international commercial arbitration and investment treaty arbitration can fall under the UNCITRAL Rules, the ICSID can be used only in investment treaty arbitration, see Article 25(1) ICSID Convention.

In general, investment treaty arbitration is crucial as it provides access to a neutral forum to settle disputes. It most often relates to ISDS as a procedural mechanism, which in turn has administered more than 70 % of all known international investment proceedings.[11] In detail, a BIT providing for ISDS allows a foreign investor to bring a case directly against the host-state before an arbitration tribunal without any intervention of the home-state. It further allows the arbitral tribunal to interpret and review sovereign state acts and affairs of the host-state, thus most often giving the tribunal a wide jurisdiction in the regulatory space of the host-state.[12]

b) The Legitimacy Crisis of the ISDS System

The international legal community has raised serious doubts about the status quo of the ISDS regime. In connection with the increasing number of investment treaty arbitration cases, some stakeholders argue that ISDS fails to balance investment protection with the host-states' right to regulate.[13] Due to heightened public scrutiny, in July 2017 the UNCITRAL Commission mandated its Working Group III to work on a possible ISDS reform.[14] Widely acknowledged concerns identified by the Working Group have been categorized under three main areas:

(1) Arbitral Outcomes: Concerns pertain to the lack of consistency, coherence, predictability, and 'correctness' of arbitral decisions made by ISDS tribunals.[15] These relate to matters such as divergent interpretations and procedural inconsistency,[16] often attributed to the fact that investment arbitration rules mainly provide for an ad hoc tribunal which, in turn, is typically constituted to decide on one specific case only.[17] Problematically, different tribunals have ruled on certain past cases with significant divergences even though the cases were brought under similar factual circumstances and the same substantive and procedural rules.[18] The lack of a framework to address multiple proceedings

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5 *SHAN Wenhua,* Towards a Multilateral or Plurilateral Framework on Investment, in: E15Initiative (2015), p. 2; <http://e15initiative.org/publications/toward-a-multilateral-or-plurilateral-framework-on-investment/ > visited 24 February 2020.

6 See the definition in Tecmed v Mexico (ICSID Award, 29 May 2003). Most recently, the FET has been clarified in NAFTA, Art. 1105 and narrowed in CETA, Art. X 9.

7 *Rudolf Dolzer/Christoph Schreuer,* Principles of International Investment Law, 2nd edition, United Kingdom 2012, p. 206 f.

8 Ibid., p. 198.

9 Ibid., p. 100.

10 See *UNCTAD*, Recent Trends in IIAs and ISDS (Feb 2015), IIA Issues Note No. 1; <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> visited 24 February 2020.

11 *World Bank Group,* ICSID 2017 Annual Report (Oct 2017); <https://openknowledge.worldbank.org/handle/10986/28558> visited 24 February 2020.

12 *UNCTAD*, Reform of Investor-State Dispute Settlement: In Search of a Roadmap (2013), IIA Issues Note No. 2, pp. 1–3; <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf> visited 24 February 2020.

13 *UNCTAD*, Reform of the IIA Regime: Four Paths of Action and a Way Forward (2014), IIA Issues Note No. 3, pp. 1 f.; <http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf> visited 24 February 2020.

14 Working Group III is composed of the 60 elected Member States of the Commission and includes the participation of other non-Member States ("observer States"), intergovernmental organizations, and invited non-governmental organizations; see *UNCITRAL*, Mandate and History; <https://uncitral.un.org/en/about/faq/mandate_composition/history#members> visited 24 February 2020.

15 *UNCITRAL*, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (A/CN.9/964) (2018) (hereinafter "36th Session Report"), paras. 25 ff.; <https://undocs.org/en/A/CN.9/964> visited 24 February 2020.

16 *UNCITRAL*, 36th Session Report (supra note 15), para. 39.

17 *Geneva Center for International Dispute Settlement* (CIDS), Working Group No. 3: Lack of Consistency and Coherence in the Interpretation of Legal Issues; Academic Forum on ISDS, Concept Paper on Issues of ISDS Reform (2019), p. 1; <https://www.cids.ch/images/Documents/Academic-Forum/3_Inconsistency_-_WG3.pdf> visited 24 February 2020.

18 Ibid.; see e. g. the ISDS cases interpreting the exceptions clause in Art. XI of the United States–Argentina BIT: CMS Gas Transmission Company v Argentine Republic (ICSID Case No ARB/01/8, Award of 12 May 2005), paras. 304–394; LG&E Energy Corp v Argentine Republic (ICSID Case No ARB/02/1, Decision on Liability of 3 Oct 2006), para. 226; and Continental Casualty Corporation v Argentine Republic (ICSID Case No ARB03/9, Award of 5 Sept 2008), paras. 304–305.

is yet another issue.[19] The lack of consistency and coherence raises further challenges to the efficiency of ISDS.[20] Other concerns include the limited mechanisms for addressing inconsistency and incorrectness of decisions.[21]

(2) Arbitrators: Issues relating to decision-makers are expressed in two contexts. On the one hand, concerns relate to arbitrators' independence, impartiality, and neutrality.[22] This includes limitations in existing challenge mechanisms[23] and the practice of 'double hatting', where involved arbitrators simultaneously serve as counsel in other cases with similar legal issues.[24] Many critics of ISDS further argue that there is an implicit pro-investor bias due to the structure of ISDS, leading to arbitrators favoring their appointing side.[25] However, some international academics vehemently rebut such a notion, referring *inter alia* to empirical statistics.[26] On the other hand, concerns have been voiced regarding the lack of diversity among arbitrators and regarding their qualifications.[27] While the diversity issue touches upon factors such as gender, nationality, and professional experience,[28] another problematic observation in this regard is the repeat appointment of arbitrators whose sentiments and tendencies are already known to the appointers.[29]

(3) Costs and Duration: Concerns pertain to the significant costs and the extensive timeframes of ISDS proceedings. They are related to the lack of mechanisms to address frivolous or unmeritorious claims,[30] the allocation of costs by tribunals,[31] and the difficulties faced by successful respondent states in recovering costs.[32] In this regard, the average case length amounts to 3.73 years while the average duration of an annulment procedure is around two years.[33] Recent data further show that the average total of claimants' and respondents' legal costs – combined – exceed the startling amount of 11 million USD.[34]

c) Reform Options

In general, issues constituting the 'legitimacy crisis'[35] of ISDS have been addressed with a range of reform proposals.[36] In addition to the approach of an improved ISDS system, other options consider the introduction of an appellate mechanism to the current regime, the establishment of a Multilateral Investment Court, or the scenario of no ISDS at all, which would mean recourse to domestic courts only and to State-to-State arbitration.[37] Despite all criticism voiced against the regime, recent international investment agreements continue to adopt ISDS provisions – but with modifications.[38] For instance, changes have been made regarding the need for a hearing open to the public so as to counter the transparency deficit,[39] and there have been amendments in respect of the qualification of tribunal members to address concerns about their independence and impartiality.[40] Many agreements have included provisions to limit ISDS, be it through a narrowing of the scope of ISDS subject matter (e. g. limiting treaty provisions subject to ISDS, excluding policy areas from the ISDS scope) or by the setting of a time limit for submitting ISDS claims.[41] Some agreements have enhanced the efficiency of dispute settlement through clauses providing for early dismissal of frivolous claims, consolidation of claims, maximum time limits on the duration of proceedings, or voluntary alternative dispute resolution procedures.[42] Other investment agreements include a fork-in-the-road clause, according to which an investor or the host-state is requested to make a definite choice between domestic and international remedies.[43]

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19 *UNCITRAL*, 36th Session Report (supra note 15), para. 53.

20 *CIDS* (supra note 17), p. 2.

21 *UNCITRAL*, 36th Session Report (supra note 15), para. 63.

22 Ibid, para. 83.

23 Ibid., para. 90.

24 Ibid, para. 72.

25 See e. g. the experimental survey by *Sergio Puig/Anton Strezhnev*, Affiliation Bias in Arbitration: An Experimental Approach (2017), The Journal of Legal Studies Vol. 46 (2), pp. 371–398.

26 See *Rahul Donde/Julien Chaisse*, The Future of Investor-State Arbitration: Revising the Rules?, p. 216, in: *Julien Chaisse et al.*, Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration, Singapore 2017, pp. 209–227. See also *KAO Chi-Chung*, The inclusion of investment court system into the EU-China BIT: innovations, prospects and problems (2018), pp. 259 ff., in: *Julien Chaisse*, China-EU Investment Relations: Towards a New Leadership in Global Investment Governance?, Cheltenham, UK/Northhampton, USA 2018, Chap. 14, pp. 247–266; available at <https://doi.org/10.4337/9781788971904.00023> visited 24 February 2020.

27 *UNCITRAL*, 36th Session Report, paras. 97–98, 106.

28 See *CIDS*, Working Group No. 5: The Diversity Deficit, Academic Forum on ISDS, Concept Paper on Issues of ISDS Reform (2019), p. 8; <https://www.cids.ch/images/Documents/Academic-Forum/5_Diversity_-_WG5.pdf> visited 24 February 2020.

29 *CIDS*, Working Group No. 7: Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?, Academic Forum on ISDS, Concept Paper on Issues of ISDS Reform (2019), pp. 40 f.; <https://www.cids.ch/images/Documents/Academic-Forum/7_Empirical_perspectives_-_WG7.pdf> visited 24 February 2020.

30 *UNCITRAL*, 36th Session Report (supra note 15), paras. 122–123.

31 Ibid., para. 127.

32 Ibid., para. 133.

33 *CIDS*, Working Group No. 7 (supra note 29), p. 16.

34 Ibid., p. 7, with further information on the various data sets provided by different international academics.

35 With further references on this issue, see *SHAN Wenhua/WANG Lu* (supra note 2), p. 264.

36 Cf. *UNCTAD*, World Investment Report 2019, pp. 104–115; <https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf> visited 24 February 2020.

37 *Gabrielle Kaufmann-Kohler/Michele Potestà* (CIDS), Introduction, Academic Forum on ISDS, Concept Papers Project: Matching Concerns and Reform Options (2019); <https://www.cids.ch/images/Documents/Academic-Forum/0_Introduction_to_project_-_Kaufmann-Kohler_Potest.pdf> visited 24 February 2020.

38 Extensively, *UNCTAD*, World Investment Report 2019 (supra note 36), p. 106.

39 13 out of the 29 international investment agreements concluded in 2018.

40 9 out of the 29 international investment agreements concluded in 2018.

41 23 out of the 29 international investment agreements concluded in 2018.

42 This describes 13 out of the 29 international investment agreements concluded in 2018.

43 *Julien Chaisse et al.*, The Changing Patterns of Investment Rule-Making Issues and Actors, p. 18, in: *Julien Chaisse et al.*, Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration, Singapore 2017, pp. 13–23.

2. China's Investment Framework

> China is a sleeping giant. Let her sleep, for when she wakes she will move the world.
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> — Napoléon Bonaparte

a) Chinese Investment and Model BITs

The giant has awoken. Since the adoption of the open-door policy in 1978, China has grown into the second-largest economy worldwide.[44] This success has to a great extent been facilitated by China's efforts in refining its legal investment framework,[45] along with its establishment of the world's second-largest BIT-network, following Germany.[46] At present, China has signed over 130 BITs, with more than 125 in force.[47] These BITs are generally categorized into three generations based on model BITs.[48] In this regard, model BITs commonly serve as guides for prospective BIT negotiations, at the same time reflecting the country's investment treaty practice. With a view to China's evolution since its very first BIT with Sweden in 1982, a shift from a 'restrictive' to a 'legalized'[49] approach towards international investment protection can be observed,[50] with significant development in its ISDS provisions.

China's earlier BITs (1980s–1990s), modeled after the European BIT approach, already provided high standards of protection through fair and equitable treatment and most-favored-nation status, but they did not (or only restrictedly) include national treatment.[51] While very few earlier BITs left out ISDS provisions completely,[52] most of them restricted ISDS to "disputes involving the amount of compensation for expropriation".[53] This reflects China's initial reluctance to accept international arbitration as a means of dispute resolution due to its suspicions towards international law and its emphasis on national sovereignty.[54] Also, the first generation(s) of BITs including ISDS refer solely to ad hoc arbitration since China ratified the ICSID Convention only in 1993, following which, however, China gradually began to agree to ICSID arbitration.[55]

The second model BIT (post-1998) introduced treaty innovations such as a less restrictive approach towards national treatment.[56] Most strikingly, it is the first to include an expansive ISDS option, which covers "any dispute arising out of an investment"[57] or "[any dispute] in connection with an investment".[58] This pioneering ISDS provision, which is consistent with global BIT practice, marks China's turn away from its earlier models of 'restriction'. It was first incorporated into the China-Barbados BIT (1998) and adopted in almost all ensuing BITs. During this phase, China concluded BITs with more countries around the world and also renegotiated its BITs with several major developed countries in Europe, such as Germany, France, and Spain.

At present, the China-Mexico BIT (2008) displays the most comprehensive ISDS provision, which was, however, based more on the North American Free Trade Agreement (NAFTA) than on earlier Chinese BITs.[59] In detail, this new, highly prescriptive ISDS provision limits the scope of disputes to certain types of breaches of treaty provisions.[60] While some ISDS clauses generally refer to breaches of any state obligation under the treaty,[61] or only make a few exceptions from certain obligations,[62] others specifically list all treaty provisions covered by an ISDS in an enumerative way.[63] This NAFTA-like approach constitutes the third model BIT (post-2007) that largely addresses innovative provisions in a more deliberative manner and provides for

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44 See *UNCTAD*, World Investment Report 2017, pp. 8–9, 49, Annex Tables 1 and 2.

45 *SHAN Wenhua*, China and International Investment Law, p. 214, in: *Leon Trakman and Nicola Ranieri*, Regionalism in International Investment Law (2013), New York 2013, pp. 214–252.

46 *UNCTAD*, Investment Policy Hub, International Investment Agreements Navigator (2019); <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy> visited 24 February 2020.

47 Ibid.

48 For a comprehensive review, see *Axel Berger*, Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China following the global trend towards comprehensive agreements?, Discussion Paper, German Development Institute (GDI), Germany 2013, pp. 6–12; see also *Nora Gallagher/SHAN Wenhua*, Chinese Investment Treaties: Policies and Practice (2009), Chap. 1.

49 A legalized BIT approach includes broad definitions of investment, comprehensive standards of treatment (absolute and relative), provisions on compensation for expropriation, and the free transfer of funds as well as unrestricted ISDS mechanisms; see *European Commission* (EC), Sustainability Impact Assessment in support of an Investment Agreement between the European Union and the People's Republic of China: Final report (hereinafter "SIA", 2017), pp. 25 f., Fn. 38; <http://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156862.pdf> visited 24 February 2020.

50 *EC*, SIA (supra note 49), p. 25 f.

51 See *Axel Berger* (supra note 48), pp. 7–8.

52 See e. g. China-Sweden BIT (1982), China-Norway BIT (1984), and China-Austria BIT (1985).

53 See e. g. Art. 8(3) China-Mongolia BIT (1991).

54 *EC*, SIA (supra note 49), p. 25.

55 *Vivienne Bath*, "One Belt, One Road" and Chinese Investment, Sydney Law School Legal Studies Research Paper No. 16/98, p. 7; available at <http://ssrn.com/abstract=2866169> visited 24 February 2020. Also published in: *Lutz-Christian Wolff, XI Chao* (eds.), Legal Dimensions of China's Belt and Road Initiative, Hong Kong 2016, pp. 165–217.

56 Extensively, *Axel Berger*, China's new bilateral investment treaty programme (2008), GDI, pp. 11 f.; <https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf> visited 24 February 2020.

57 E. g. Art. 9(1) China-Finland BIT (2004).

58 Art. 8(1) China-Uganda BIT (2004).

59 Cf. *Axel Berger* (supra note 48), pp. 7–8.

60 *ZHANG Shu*, Developing China's Investor-State Arbitration Clause, Discussions in the Context of the 'Belt and Road' Initiative, pp. 155, 157 f., in: *SHAN Wenhua et. al.*, Normative Readings of the Belt and Road Initiative, Road to New Paradigms, Switzerland (2018), pp. 147–181.

61 See e. g. Arts. 9(1), (5) China-Korea BIT (2007); Art. 12.12 China-Korea FTA (2015).

62 See e. g. exceptions specified in Art. 15(12) China-Japan-Korea Trilateral Investment Treaty (TIA) (2012), referring to the establishment and maintenance of transparent intellectual property rights regimes [Art. 9 (1)(b)], and on prudential matters taken in regulating financial services [Art. 20].

63 See e. g. Art. 14(1) China-ASEAN IIA (2009); Art. 12.12 China-Chad BIT (2010); Art 12.12 China Uzbekistan BIT (2011); and most extremely, China-Australia BIT (2015), which covers only claims for breaches of national treatment.

a more carefully drafted set of rules.[64] The new model is also characterized by the specifications made on the meaning of substantive provisions, which aim at reducing the room for interpretation by arbitral tribunals.[65] For instance, the term "in like circumstances" has been adopted in the clauses for most-favored-nation status,[66] national treatment,[67] and compensation for losses.[68]

Additionally, China is slowly but steadily moving towards greater liberalization of investment flows by extending most-favored-nation treatment to the term "admission"[69]/"establishment".[70] Such an extension at least entitles foreign investors to 'best endeavors' regarding the approval of investments.[71] Notably, in ongoing BIT negotiations with the US and the EU, China has already agreed to provide for national treatment and most-favored-nation treatment not only in the 'post-establishment stage' but also in the phase before the investment has been permitted.[72] This would mean an essential relaxation of the market access barrier to foreign investment. Most recent Chinese treaties display further modifications, such as the adoption of greater transparency in dispute resolution. For instance, Article 28(1) of the China-Canada BIT (2012) provides for public access to tribunal awards; also, non-disputing contracting parties can request publication of other written documents provided that public interest is involved. As one of the most detailed agreements concluded by China so far,[73] the China-Canada BIT also includes environmental measures in its clauses,[74] thereby addressing – to some extent – the highly topical environmental concerns of our time.

Looking at China's treaty practice in a wider frame, there are indications that China embraces a 'flexible approach' in treaty drafting.[75] As pinpointed by deviations of BITs from the general timeline outlined above,[76] China seems to tailor its treaties to the models adopted by their partner countries.[77] One example is the China-Switzerland BIT (2009), which did not follow the NAFTA-inspired model but rather relied on the traditional European model with its untailored investment provisions.[78] Observations like this lead to the assumption that China's international investment agreements deviate according to the status and nature of their partner countries, i. e. if their partners are developed, traditional capital-exporting states, or developing countries.[79] This perception is further supported by the differing national treatment clauses in Chinese BITs, where treaties with developed countries are in fact less restrictive than the ones concluded with developing countries.[80] Overall, China's shift in BIT practice is to be seen within the context of its own development from a host-state seeking to attract investment to an economy that is now focusing also on the protection of outward investment.[81] This, in turn, was facilitated by China's accession to the WTO in 2001 and the implementation of its "Going Abroad Policy" (走出去战略).[82] The shift in investment practice has resulted in enhanced legal protection for both foreign investors in China and Chinese investors abroad.[83]

b) Territorial Application of BITs in Hong Kong and Macao

Another point of interest might be the application of China's BITs to its Hong Kong and Macao Special Autonomous Regions (SARs). Here, on the issue of territorial treatment, there is no uniform approach in China's BIT framework. However, the following approaches can be identified: (1) BITs without a definition of territory,[84] (2) BITs defining territory but without reference to the SARs,[85] (3) BITs referring to the SARs without an explicit carve-out,[86] and (4) BITs specifically carving out the SARs.[87]

At ICSID, two cases have addressed this issue so far, both concluding that the BITs in question applied to the SAR-investors. In *Tza Yap Schum v Peru*, the tribunal decided that all Chinese nationals, including Hong Kong residents, are covered by the ICSID Convention and the China-Peru-BIT (1994).[88] In *Sanum Investment Ltd.*

64 Cf. *Nora Gallagher*, Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy, pp. 97, 101, in: ICSID Review – Foreign Law Journal, Vol. 31(1) (2016), pp. 88–103; available at <https://doi.org/10.1093/icsidreview/siv060> visited 24 February 2020.

65 *Axel Berger* (supra note 48), pp. 10 f.

66 See e. g. Art. 4 China-Mexico BIT (2008), Art. 5 China-Canada BIT (2012).

67 See e. g. Art. 3 China-Mexico BIT (2008), Art. 6 China-Canada BIT (2012).

68 See e. g. Art. 11 China-Canada BIT (2012).

69 See e. g. Art. 3(3) China-Korea BIT (2007); Art. 4(1) China-Korea-Japan TIA (2012).

70 See e. g. Art. 3(3) Finland-China BIT (2004); Art. 5(1) China-ASEAN IIA (2009).

71 *Julien Chaisse/Christian Bellak*, Navigating the Expanding Universe of International Treaties on Foreign Investment: Creation and Use of a Critical Index, pp. 10 f., in: Journal of International Economic Law (2015), pp. 7–115; available at <https://doi.org/10.1093/jiel/jgv008> visited 24 February 2020; extensively, *SHEN Wei*, Evolution of Non-discriminatory Standards in China's BITs in the Context of the China-EU BIT Negotiations, pp. 810 ff., 820 ff., in: Chinese Journal of International Law (2018), pp. 779–840; available at <https://doi.org/10.1093/chinesejil/jmy018> visited 24 February 2020.

72 Cf. *EC*, SIA (supra note 49), pp. 23, 26.

73 *Axel Berger* (supra note 48), p. 11.

74 Arts. 18, 33 China-Canada BIT (2012); see also Art. 23 China-Japan-Korea TIA (2012).

75 *Axel Berger* (supra note 48), p. 11. *Julien Chaisse/Christian Bellak* (supra note 71), pp. 32–35, Table 6.

76 See *ZHANG Shu* (supra note 60), p. 155.

77 *Axel Berger* (supra note 48), p. 11.

78 Ibid.

79 Ibid.

80 See *Axel Berger* (supra note 56), p. 12.

81 Ibid., pp. 10 f.; *SHAN Wenhua* (supra note 45), p. 224.

82 *Central People's Government of the PRC*, 更好地实施"走出去"战略 (15 March 2006); <http://www.gov.cn/node_11140/2006-03/15/content_227686.htm> visited 24 February 2020.

83 *EC*, SIA (supra note 49), p. 25.

84 This is mostly applicable to China's first-generation BITs.

85 See e. g. Art. 1(4) China-Netherlands BIT (2001).

86 See e. g. Art. 1(1) China-Mexico BIT (2008).

87 See on this point only Art. 1(5) China-Russia BIT (2006); on the aforementioned, see in detail *Odysseas G. Repousis*, On Territoriality and International Investment Law: Applying China's Investment Treaties to Hong Kong and Macao, pp. 122–127, in: Michigan Journal of International Law, Vol. 37(1) (2015), pp. 113–190.

88 Tza Yap Schum v Republic of Peru, ICSID Case No. ARB/07/6, Award on Jurisdiction (19 June 2009).

v Laos,[89] a Macao-registered company filed a claim against Laos under the China-Laos BIT (1993). The BIT was concluded when Macao was still under Portuguese sovereignty and provided for ad hoc arbitration. Laos directly challenged jurisdiction on the grounds that the BIT did not apply to Macao. However, the tribunal held the BIT applicable to the Macanese investor with reference to the absence of an express exclusion as appears in the China-Russia BIT. It concluded that the China-Laos BIT applies to all territory sovereign to the PRC. Laos was able to challenge the tribunal's jurisdiction at the High Court of Singapore, but ultimately the Singaporean Court of Appeal unanimously upheld the tribunal's decision.[90] China's Ministry of Foreign Affairs has publicly voiced its disagreement with the findings of the Court of Appeal, reiterating that Macao is not covered by Chinese BITs.[91] In conclusion, the issue of territorial application remains subject to a case-by-case analysis of circumstantial indicia.[92]

3. Investment in the Belt and Road Region

Proposed by China's President XI Jinping in 2013, the BRI describes a titanic and ambitious scheme which will promote trade and investment flows for several decades to come.[93] In this regard, the BRI consists of two major components: On the one side, the Silk Road Economic Belt ('One Belt', 一带) refers to the road by land, stretching from China over the Middle East to Europe; and on the other, the 21st Century Maritime Silk Road ('One Road', 一路) describes the Silk Road connection over waterways. Together, the Silk Roads by land and by sea give rebirth to the ancient Silk Road in a contemporary fashion, aiming "to carry [the] invaluable legacy forward",[94] which the glorious Chinese past once created under the Han Dynasty.

a) 'One Region'

As stated above, the present author is taking a further step by establishing the terminology of 'One Region' (一区, OR), this being done for the following reasons: *First*, the wording OR seems more akin to the underlying goal of the BRI to create a substantial connection between BRI participants under one development model. *Secondly*, given the present article's aim to remain a step ahead of the current development stage and to provide an outlook on future mechanisms, OR also appears to be better suited to describe the interconnected investment regimes that we can expect to develop. Since this paper is linking the future China-EU BIT to the BRI, the term OBOR, as 'One Belt, One Region', appears to more closely reflect the development in the China-EU relationship, and it captures the essence of a single unified region encompassing both of these two major economies.[95]

b) From China to Europe

The BRI region, constituted out of 65 nations/economies, already accounts for approximately 70 % of the world's population, 30 % of global GDP, and more than 35 % of the world's merchandise trade.[96] As of March 2019, China has signed cooperative documents with 123 countries.[97] However, it remains unclear how the BRI will develop in the future and what the scope of the OBOR will ultimately be. But undoubtedly, the EU is a target destination of the BRI. This China-EU connection must now be elaborated further.

In 2015, China and the EU signed a Memorandum of Understanding (MoU) in which both expressed their willingness to cooperate in the BRI.[98] Further, in December 2016, fourteen EU Member States, including Germany, France, and Italy, joined the Asia Infrastructure Investment Bank ('AIIB'), which is the central institution for financing BRI projects.[99] Recently, the G7-industrial nation Italy became an official partner of the project by signing an MoU with China in April 2019,[100] following MoUs entered by China with Greece (August 2018) and Portugal (January 2019). This marks another major step towards EU integration into the BRI.

An additional platform for Chinese and European cooperation in place is the *16+1 Group*, which was initiated with the 2012 release of 'China's Twelve Measures for Promoting Friendly Cooperation with Central and Eastern European States'.[101] This platform between China and the sixteen Central and Eastern European

89 Sanum Investment Limited v Lao People's Democratic Republic, ICSID Case No. ADHOC/17/1, Award on Jurisdiction (13 Dec 2013).

90 Court of Appeal of the Republic of Singapore, [2016] SGCA 57; <https://arbitration.org/sites/default/files/awards/arb3545.pdf> visited 24 February 2020.

91 *FMPRC*, Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 21 October 2016 (2016); <https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1407743.shtml> visited 24 February 2020.

92 *SUN Huawei*, China: Investor-State Arbitration 2019, International Comparative Legal Guides (IGLG), Global Legal Group, London 2018; <https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/china> visited 24 February 2020.

93 See *NDRC*, BRI: Vision and Actions Plan (supra note 3).

94 *Permanent Mission of the PRC to the UN*, The Silk Road–From the Past to the Future (4 March 2014); <http://www.china-un.org/eng/gyzg/SilkRoad1/t1134206.htm> visited 24 February 2020.

95 To avoid any confusion in the use of terminology, please see supra note 4.

96 *HKTDC*, One Belt, One Road – Navigating New Opportunities (21 Aug 2017); <https://beltandroad.hktdc.com/tc/experts-advice/article/one-belt-one-road-navigating-new-opportunities#_ftn1> visited 24 February 2020.

97 *ZHU Wenqian*, Belt and Road Portal (中国一带一路网）(7 March 2019); <https://eng.yidaiyilu.gov.cn/qwyw/rdxw/81686.htm> visited 24 February 2020.

98 *EC*, Investment Plan for Europe goes global: China announces its contributions to #investEU (28 Sept 2015); <http://europa.eu/rapid/press-release_IP-15-5723_en.htm> visited 24 February 2020.

99 For further information on the AIIB and its function, see *OBOReurope*, AIIB and OBOR; <http://www.oboreurope.com/en/beltandroad/aiib-and-obor/> visited 24 February 2020.

100 MoU between Italy and China on Cooperation within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative (March 2019); <http://www.governo.it/sites/governo.it/files/Memorandum_Italia-Cina_EN.pdf> visited 24 February 2020.

101 *FMPRC*, China's Twelve Measures for Promoting Friendly Cooperation with Central and Eastern European States (26 Apr 2012); <http://www.fmprc.gov.cn/mfa_eng/topics_665678/wjbispg_665714/t928567.shtml> visited 24 February 2020.

countries[102] has also been described as an 'auxiliary route' within the BRI.[103] Against the skepticism of numerous EU countries towards China and their perception of the 16+1 Group as a 'divide and rule' project,[104] it can reversely be argued (and fondly hoped) that the region may create new incentives for China to improve its image and deepen European understanding towards its politics. This, in turn, would also be crucial in bringing forward the BRI. Likewise, it might ease tensions that have arisen during the negotiation of the China-EU BIT.

c) Belt and Road Dispute Settlement Mechanisms

Under the BRI, many different types of disputes may emerge, broadly to be categorized into (1) *commercial disputes* between two private parties for breach of commercial contracts; (2) *investment disputes* between a foreign investor and a host state, typically for violation of a BIT; (3) *sovereign disputes* between states which fall under the governance of the WTO; and (4) *other disputes*, e. g. concerning human rights, governed by international or regional treaties.[105] The author is specifically focusing on investment dispute settlement options while also giving insights into commercial dispute resolution inside the BRI region so as to better understand China's practice and the recent innovations in its dispute resolution system.

(1) The Chinese International Commercial Courts

The development of investment and trade within the BRI has inevitably led to more disputes between participants, thereby causing a 'boom' of foreign-related disputes in China.[106] This might have been a trigger for China's announcement in late January 2018 to establish the 'International Commercial Courts of the Supreme People's Court of China' (CICC，国际商事法庭)[107] that specifically deal with a wide range of commercial disputes arising out of projects under the BRI.[108] The CICC successfully came into force on 1 July 2018.

(a) Basic Structure and Benefits

As permanent adjudication organs of the Supreme People's Court of China (SPC),[109] the CICC are based in Xi'an and Shenzhen. While Xi'an manages commercial cases relating to land routes, Shenzhen is responsible for the maritime routes.[110] In general, the courts are modeled after the Singapore International Commercial Court and the Dubai International Finance Centre Courts, which both operate under their respective national jurisdiction, as opposed to the ICC Courts, which run under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[111] But unlike Singapore and Dubai, which are "products of constitutional amendments",[112] no special jurisdiction has been created for the CICC, signifying that the CICC are bound by existing Chinese law.[113]

Resembling the courts in Singapore and Dubai, the CICC are designed to provide parties with the ability to choose between litigation and non-litigation mechanisms, i. e. mediation and arbitration,[114] thus embodying a 'one-stop shop' (一站式) for cross-border commercial dispute resolution, also called a 'New Legal Hub'.[115] This offer of a wider range of reputable dispute resolution mechanisms is to be looked on favorably. SPC Judge LIU Guixiang has also argued that providing legal services in a one-stop fashion results

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102 The CEE countries include Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia (EU Member States); Albania, Bosnia and Herzegovina, Macedonia, Montenegro, and Serbia (non-EU Member States).

103 *Julien Chaisse/Mitsuo Matsuhita*, China's "Belt and Road" Initiative – Mapping the World's Normative and Strategic Implications (2018), p. 164.

104 Ibid., pp. 2 f.

105 *TAO Jinzhou/Mariana Zhong*, The Changing Rules of International Dispute Resolution in China's Belt and Road Initiative, pp. 308 f., in: *ZHANG Wenxian et al.* (eds.), China's Belt and Road Initiative, Palgrave Studies of Internationalization in Emerging Markets, Switzerland 2018, pp. 305–320; available at <https://doi.org/10.1007/978-3-319-75435-2_16> visited 24 February 2020.

106 *CAO Yin*, Courts handling 'a boom' of Belt and Road Cases (15 March 2017), China Daily; <http://www.chinadaily.com.cn/china/2017twosession/2017-03/15/content_28559326.htm> visited 24 February 2020.

107 *CICC*, Introduction; <http://cicc.court.gov.cn/html/1/219/193/195/index.html> visited 24 February 2020.

108 Cf. *GUO Liqin* (郭丽琴), 中国将在北京、西安、深圳设全新国际商事法庭 (24 Jan 2018); <http://www.yicai.com/news/5395142.html> visited 24 February 2020.

109 Art. 1 of the Provisions of the SPC on Several Issues regarding the Establishment of the International Commercial Court (最高人民法院关于设立国际商事法庭若干问题的规定, 法释〔2018〕11 号, hereinafter "CICC Provisions"), passed by the Adjudication Committee of the SPC on 25 June 2018, effective as of 1 July 2018; available in English at: <http://cicc.court.gov.cn/html/1/219/199/201/817.html> visited 24 February 2020.

110 *CICC*, Introduction; <http://cicc.court.gov.cn/html/1/219/193/195/index.html> visited 24 February 2020.

111 *OBOReurope*, New Courts for the Belt and Road Initiative (6 Feb 2018); <http://www.oboreurope.com/en/bri-courts/> visited 24 February 2020.

112 *Matthew S. Erie*, The China International Commercial Court: Prospects for Dispute Resolution for the "Belt and Road Initiative" (2018), American Society of International Law, Vol. 22(11); <https://www.asil.org/insights/volume/22/issue/11/china-international-commercial-court-prospects-dispute-resolution-belt> visited 24 February 2020.

113 Ibid.

114 Art. 1 of the Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation), (最高人民法院办公厅关于印发《最高人民法院国际商事法庭程序规则（试行）》的通知，法释〔2018〕11 号, hereinafter "CICC Procedural Rules"), passed by the Adjudication Committee of the SPC on 29 October 2018, effective as of 5 December 2018; available in English at: <http://cicc.court.gov.cn/html/1/219/208/210/1183.html> visited 24 February 2020.

115 Cf. *Matthew S. Erie*, The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution (2019), forthcoming in: Virginia Journal of International Law. 59(3); available at <https://dx.doi.org/10.2139/ssrn.3333765> visited 24 February 2020.

in greater efficiency and lower costs of proceedings.[116] The proclaimed ability to speed up the settlement procedures could further prevent the *ad interim* 'freezing' of BRI projects.[117] And according to the CICC Establishment Provisions, the courts can hear any case the SPC deems "appropriate",[118] as long as the matter exceeds 300 million RMB and has a "significant nationwide impact".[119] This implies that the CICC are not exclusively focused on BRI disputes, but it also inhibits the ability to take on other cases as well. As a matter of fact, the first few cases heard by the CICC so far were transferred to them from the SPC and were not tied to any BRI project.[120]

Fundamentally, the CICC are staffed with eight judges; they are required to be judges of Chinese courts with legal experience in international commerce and they should have bilingual (Chinese-English) language capability.[121] Despite such restriction on foreign nationals serving as judges, the CICC further feature an 'International Commercial Expert Committee' of reputable professionals from around the globe,[122] recently renamed the 'Coordination and Guidance Office for the CICC' (国际商事法庭协调指导办公室).[123] With Office members giving strategic advice and advisory opinions on foreign laws, this setup not only strengthens international cooperation but also facilitates a higher level of professionalism. Notably, members of the Office may also mediate cases.[124] Overall, the author sees this feature as a great opportunity for having international expertise 'flow into' the CICC, considering also that the CICC are newcomers on the 'dispute resolution market'.

(b) Confusions and Concerns

Despite the presumed benefits, it remains unclear under which authority the Chinese claim jurisdiction over BRI disputes or how this dispute resolution mechanism will be agreed upon between parties who have entered into agreements.[125] In a worst-case scenario, the Chinese could perhaps start to (mis-)use China's weight as BRI-leader (along with the financial power attached thereto) so as to pressure parties to resort to the CICC. Yet more advisable and also more likely would be China's ratification of the 'Hague Convention on the Choice of Court Agreements', which it signed in September 2017. Its ratification would lead to greater legal certainty for commercial parties involved in trade business with China since the Hague Convention provides a tool for the assignment of jurisdiction in commercial cases where parties have agreed to an exclusive choice of court agreement in favor of a contracting state court.[126]

Concerning the procedural language, neither the CICC Regulations nor the Procedural Rules make any specifications. Consequently, this means that proceedings are to be conducted in Chinese pursuant to Article 262 of the Chinese Civil Procedure Law.[127] While particularly the use of English renders the courts in Singapore and Dubai attractive institutions to foreign parties, the CICC seem to be less appealing in this regard. Moreover, it is quite conspicuous that a range of dispute settlement mechanisms already exists in the BRI region. Chinese BITs and multilateral agreements equally include dispute resolution mechanisms for the different types of disputes which may arise in the BRI region, including the commercial disputes which the CICC focuses on. Further, China and the Association of Southeast Asian Nations signed the 'Agreement on Dispute Settlement Mechanisms of the Framework Agreement on Comprehensive Economic Cooperation' in 2012. In this context, many international observers have raised concerns that the CICC might challenge the previous agreement(s) and create an imbalance between China and other BRI states due to a presumed pro-Chinese bias.[128] The fact that the CICC are established under the SPC already raises a bright red flag for many corporations as it generates fear of favoritism towards Chinese BRI-participants, making many foreign investors question the legitimacy of the courts.[129]

While in earlier years all eyes were on Hong Kong to serve as a center for BRI dispute resolution, especially with respect to the Hong Kong International Arbitration Center,[130] this recent establishment of the

116 *Susan Finder*, SPC reveals new Belt & Road-related initiatives (7 Oct 2017); <https://supremepeoplescourtmonitor.com/2017/10/07/spc-reveals-new-belt-road-related-initiatives/> visited 24 February 2020.

117 *OBOReurope*, New Courts for the Belt and Road Initiative (6 Feb 2018); <http://www.oboreurope.com/en/bri-courts/> visited 24 February 2020.

118 Art. 2 (3) CICC Provisions.

119 Art. 2(1), (5) CICC Provisions.

120 Cf. *Matthew S. Erie*, Update on the China International Commercial Court (13 May 2019); <http://opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court%EF%BB%BF/> visited 24 February 2020.

121 Art. 4 CICC Provisions.

122 Art. 11 CICC Provisions; see the profiles of Committee members at *CICC*, 专家名录; <http://cicc.court.gov.cn/html/1/218/226/234/index.html> visited 24 February 2020.

123 *CICC*, 最高人民法院"国际商事专家委员会办公室"更名为"国际商事法庭协调指导办公室" (9 Aug 2019); <http://cicc.court.gov.cn/html/1/218/149/192/1312.html> visited 24 February 2020.

124 Art. 17 CICC Procedural Rules.

125 Cf. *Matthew S. Erie*, The China International Commercial Court: Prospects for Dispute Resolution for the "Belt and Road Initiative" (31 Aug 2018), American Society of International LawVol. 22(11); <https://www.asil.org/insights/volume/22/issue/11/china-international-commercial-court-prospects-dispute-resolution-belt> visited 24 February 2020.

126 Arts. 3, 5 Convention of Choice of Court Agreements; full text available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> visited 24 February 2020.

127 中华人民共和国民事诉讼法 (Civil Procedure Law of the People's Republic of China), Revised in 2017, effective as of 1 July 2017; English version available at: <https://www.pkulaw.com/en_law/d33df017c784876fbdfb.html> visited 24 February 2020.

128 *OBOReurope*, New Courts for the Belt and Road Initiative (6 Feb 2018); <http://www.oboreurope.com/en/bri-courts/> visited 24 February 2020.

129 Cf. *Nyshka Chandran*, China's plans for creating new international courts are raising fears of bias (1 Feb 2018); <https://www.cnbc.com/2018/02/01/china-to-create-international-courts-for-belt-and-road-disputes.html> visited 24 February 2020.

130 See e. g. *Sarah Grimmer/Christina Charemi* (HKIAC), Dispute Resolution along the Belt and Road (22 May 2017), Global Arbitration Review 2018.

CICC by the Chinese Central Government generally seems to shift the focus on the matter. However, a new milestone in China-related arbitration has been reached with the 'Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings' between Mainland-China and Hong Kong, signed on 2 April 2019 and effective as of 1 October 2019.[131] This Arrangement enables Mainland Chinese courts to order interim relief in favor of Hong-Kong-seated arbitrations, hereby making Hong Kong the sole beneficiary of such support outside the Mainland.[132] In conjunction with the Arrangement, the SPC and the Hong Kong Department of Justice further released a list of arbitral institutions, including *inter alia* the Hong Kong International Arbitration Center and the International Court of Arbitration of the International Chamber of Commerce (Asia Office), which will exclusively benefit from the Arrangement.[133] Altogether, the Arrangement lays the groundwork for greater legal cooperation and intensified mutual support between Mainland-China and Hong Kong – in a way that might even lead to greater incentives for parties to choose a listed Hong Kong arbitral institution for settling disputes where Mainland-Chinese parties are involved.

(c) Interim Findings

The CICC have the potential to complement existing institutions in the BRI region specifically for commercial disputes. The courts are part of China's strategy to reform its dispute settlement regime. They also accentuate the comprehensiveness of China's vision for the BRI. Nonetheless, the author anticipates follow-up problems. For instance, this myriad of possible dispute resolution options in the BRI region could at the same time create a problem of choice for investors, and they might face increasing costs as various options must be evaluated in the deal-making phase. The ratification of the Hague Convention by China would be a great relief in this regard. First and foremost, it needs to be stressed that the CICC exclude ISDS, for which investors need to resort to a different arbitral institution.

(2) Solving Investment Disputes

Currently, there are 51 ICSID member states among all participating countries in the BRI for whom ICSID arbitration will be available.[134] For investments in BRI countries which are not a member of the ICSID Convention,[135] parties can opt for ad hoc or other institutional investment arbitration covered by applicable international investment agreements. Options include, for example, the International Court of Arbitration of the International Chamber of Commerce as well as various Chinese institutions that have started to offer themselves as alternative fora for BRI-related investment disputes. China has, in fact, been actively innovating its platforms for ISDS in recent years, particularly by extending the jurisdiction of existing commercial arbitration institutions to also accept international investment disputes.[136] This, for instance, is illustrated by the China International Economic and Trade Arbitration Commission (CIETAC), the Shenzhen Court of Arbitration (SCIA), and the Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC).

Notably, CIETAC has been in place since 1957, rendering it the oldest arbitral institution in China, while also being the largest.[137] Given its background, CIETAC has good chances of becoming a go-to choice, particularly for Chinese investors. It recently implemented its Investment Arbitration Rules, effective as of 1 October 2017,[138] which aim to promote the development of ISDS in China based on the latest international practice.[139] Countering the legitimacy crisis of the ISDS regime, the new Rules put special emphasis on the provision of greater transparency.[140] CIETAC further created centers in Beijing and Hong Kong for hearing ISDS cases.[141]

Apart from CIETAC, the SCIA (established in 1995, formerly CIETAC's Shenzhen Sub-commission until 2012) had in 2016 already revised its Arbitration Rules to be able to accept and administer ISDS under the UNCITRAL Arbitration Rules.[142] In December 2017, SCIA merged with the Shenzhen Arbitration Commis-

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131 Official English translation available at: <https://gia.info.gov.hk/general/201904/02/P2019040200782_307637_1_1554256987961.pdf> visited 24 February 2020.

132 Cf. Government of the Hong Kong SAR, Press Release: HKSAR and Mainland sign arrangement on interim measures in aid of arbitral proceedings (2 Apr 2019); <https://www.info.gov.hk/gia/general/201904/02/P2019040200782.htm> visited 24 February 2020.

133 *Department of Justice Hong Kong SAR*, Contact Details of Institutions and Permanent Offices Which Are Qualified under Article 2(1) of the Arrangement; <https://www.doj.gov.hk/pdf/2019/list_of_institutions_e.pdf> visited 24 February 2020.

134 *TAO Jinzhou/Mariana Zhong* (supra note 105), p. 318.

135 Non-members include, for example, Bhutan, Djibouti, India, Iran, Laos, Maldives, Myanmar, Palestine, Poland, Tajikistan, and Vietnam.

136 Cf. *CHEN Huiping*, China's Innovative ISDS Mechanisms and their Implications, p. 1, in: American Journal of International Law Vol. 112 (2018), pp. 207–211; available at <https://doi.org/10.1017/aju.2018.57> visited 24 February 2020.

137 For further information, see *CIETAC*, About Us; <http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en> visited 24 February 2020.

138 中国国际经济贸易仲裁委员会国际投资争端仲裁规则（试行）, passed by the China International Economic and Trade Arbitration Commission on 12 September 2017, effective as of 1 October 2017; available in Chinese at: <http://www.cietac.org/Uploads/201709/59c8d60367bb5.pdf> visited 24 February 2020.

139 中国一带一路网 (Belt and Road Portal), 中国国际经济贸易仲裁委员会国际投资争端仲裁规则（试行）(Explanatory Note Regarding CIETAC International Investment Arbitration Rules; hereinafter "Explanatory Note") (26 Sept 2017); <https://www.yidaiyilu.gov.cn/zchj/zcfg/29165.htm> visited 24 February 2020.

140 Cf. *Belt and Road Portal*, CIETAC Explanatory Note (supra note 139).

141 Art. 4 CIETAC International Investment Arbitration Rules.

142 Art. 2(2) SCIA Arbitration Rules, passed on 26 October 2016 and effective as of 1 December 2016; available in English at: <http://www.sccietac.org/web/doc/view_rules/861.html> visited 24 February 2020; SCIA Guidelines for the Administration of Arbitration under the UNCITRAL Arbitration Rules, effective as of 1 December 2016.

sion.[143] This represents the first-ever merger between two Mainland-Chinese arbitral institutions, showing their joint ambition to become a leading forum for international dispute resolution.[144] With yet another updated version of the SCIA Arbitration Rules, which took effect on 21 February 2019,[145] SCIA also made its best efforts to serve the needs of dispute resolution in the Asian-Pacific region.

Effective as of 1 October 2019, the BAC/BIAC (established 1995) introduced its new International Investment Arbitration Rules (BAC Rules).[146] Among several innovative features that the BAC Rules include for addressing the ISDS crisis,[147] the BAC distinctively offers a new provision which is (so far) unmatched by other arbitral institutions: It is the very first institution to include an appellate mechanism in its arbitration rules.[148] Pursuant to Article 46 of the BAC Rules, parties are given 60 days to submit an appeal notice from the date on which the award is made. The appeal procedure then follows Appendix E of the BAC Rules. Unlike the ICSID Convention and the New York Convention, which solely permit scrutiny of procedural irregularities in connection with arbitral awards, the BAC rules also allow parties to appeal on the grounds of alleged substantive errors, such as errors in the interpretation and/or application of rules of law.[149] Given the long-standing principle of the finality of arbitral awards, the author sees the BAC Rules as a pioneer in the ISDS reform process, mirroring also China's stance in ISDS reform negotiations.[150] The inclusion of the appellate mechanism will very likely contribute to BAC's competitiveness with other institutions and its attractiveness to investors.

Altogether, it becomes obvious that Chinese arbitral institutions are stepping up their game in the BRI region. While BAC holds a great persuasive power by offering highly innovative features and by being the first to do so, CIETAC is already credited as China's leading arbitral institution. Also, history has shown the possibility of merging existing institutions.

(3) Gaining Perspective: A Look to Africa

Zooming out onto the global map, in the author's opinion, the long-term Sino-African investment relationship is another fruitful area for very briefly investigating yet another form of Chinese practice. The relationship is likely to give some hints on China's vision of a sustainable dispute resolution regime within the China-led BRI, which aims at building infrastructure for connecting Asia and Europe – and Africa as well.

As Chinese investment in Africa steadily increases in scale and complexity, it is no surprise that commercial disputes are also on the rise.[151] Noting that China has become Africa's largest trading partner,[152] there currently are 36 signed Sino-African BITs, 20 of them in force.[153] More recently, however, a need for an adjustment in these BITs has arisen following the "Johannesburg Consensus" in August 2015, which created the China-Africa Joint Arbitration Centers (CAJACs) for solving commercial and investor-state disputes.[154] CAJACs were first established in Johannesburg and Shanghai in 2015, followed by openings in Nairobi, Beijing, and Shenzhen in 2017. These CAJACs currently strive for adoption of their arbitration rules into the existing BITs in the form of a dispute settlement clause.[155] In this context, the arbitral situation that surrounded the *Addax Petroleum* case, in which Chinese-owned Addax Petroleum brought Gabon before the International Court of Arbitration of the International Chamber of Commerce in Paris,[156] poses a good example of what triggered this Sino-African legal movement: the lack of efficiency in bringing the case to Europe, followed by escalating legal costs.[157]

Besides helping to enrich international arbitration rules, the CAJACs also serve as advisory centers for

143 *Shenzhen Court of Arbitration* (SCIA), Merger Announcement (8 Jan 2018); <http://www.sccietac.org/web/news/detail/1723.html> visited 24 February 2020.

144 Cf. *Herbert, Smith, Freehills*, Arbitration Notes: SCIA and SAC Arbitration Institutions to Merge to Form New Arbitration Centre in Shenzhen (14 Feb 2018); <https://hsfnotes.com/arbitration/2018/02/14/scia-and-sca-arbitration-institutions-merge-to-form-new-arbitration-centre-in-shenzhen/> visited 24 February 2020.

145 深圳国际仲裁院仲裁规则 (SCIA Arbitration Rules), effective as of 21 February 2019; Chinese version available at: <http://www.scia.com.cn/web/doc/view_rules/913.html> visited 24 February 2020.

146 *BAC/ BIAC*, Rules for International Investment Arbitration, adopted on 4 July 2019 and effective as of 1 October 2019 (hereinafter 'BAC Rules'); available in English at <http://www.bjac.org.cn/page/data_dl/2019%E6%8A%95%E8%B5%84%E4%BB%B2%E8%A3%81%E8%A7%84%E5%88%990905%20%E8%8B%B1%E6%96%87.pdf> visited 24 February 2020.

147 For a summary of the highlights, see *BAC/BIAC,* Statement on the Making of the Beijing Arbitration Commission/ Beijing International Arbitration Center International Investment Arbitration Rules 2019 (13 Sept 2019); <https://www.bjac.org.cn/english/news/view?id=3544> visited 24 February 2020.

148 Arts. 42(8), 46 BAC Rules; Appendix E: Rules of Appeal Proceedings for International Investment Arbitration.

149 Rule 3, Appendix E of the BAC Rules.

150 Cf. *UNCITAD Working Group III*, Submission by the Government of China, Note by the Secretariat (A/CN.9/WG.III/WP.177) (2019); <https://undocs.org/en/A/CN.9/WG.III/WP.177> visited 24 February 2020.

151 *African Business Magazine*, China-Africa Arbitration bodies sidestep international courts (9 May 2017); <https://africanbusinessmagazine.com/uncategorised/continental/china-africa-arbitration-bodies-sidestep-international-courts/> visited 24 February 2020.

152 For more detailed information on the relationship and investment motivations, see e. g. *Forum on China-Africa Cooperation*, Sino-African Relations; <https://www.focac.org/eng/> visited 24 February 2020.

153 See *UNCTAD*, Investment Policy Hub, IIAs Navigator (2019); <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search> visited 24 February 2020.

154 *Sasha Baker*, China-Africa partnership for dispute resolutions in Africa (Sept 2015); Hogan Lovells Publications; <https://www.hoganlovells.com/en/publications/chinaafrica-partnership-for-dispute-resolutions-in-africa> visited 24 February 2020.

155 Ibid.

156 Addax Petroleum Corporation (Sinopec Group) v. Gabon (2013).

157 *African Business Magazine*, 'China-Africa Arbitration bodies sidestep international courts' (9 May 2017); <http://www.followcn.com/africa/2017/05/11/china-africa-arbitration-bodies-sidestep-international-courts/> visited 24 February 2020.

businesses in China and Africa. The 2017 Sino-African Conference in Beijing even included a symposium on dispute resolution in regard to Sino-African infrastructure construction projects.[158] In this regard, CAJACS might further contribute to mitigating risks inherent in the African region and its judicial systems. In a broader context, this demonstrates how CAJACs will be particularly needed and used for promoting as well as supporting the China-led BRI.

(4) From the Issue of Justice to Global Incentives

While Western institutions still dominate the alternative dispute resolution landscape, China has shown great determination in building and innovating its dispute settlement mechanisms and institutions, creating more diversified dispute resolution options for the BRI.[159] Looking at the Sino-African CAJACs and the extensive modifications within existing Chinese arbitral institutions, the recently established CICC are also clearly in line with China's objective to move jurisdiction specifically to China. Through the aforementioned institutions – providing for commercial or investment dispute resolution, or both – China is somewhat 'pushing' parties to accept Chinese arbitration. Essentially, this further reflects China's ambition to also become a great judicial power in the current world order.

Besides China's ambition to gain further weight in the global judicial world, one must still keep in mind that the choice of arbitration situs as well as the choice of law, both procedural and substantive, is commonly left to the parties. Thus, it remains to be seen how attractive these Chinese institutions will be in the future. The success of the Singapore International Commercial Court, for instance, is largely derived from its strong political independence and its inclusion of international judges. The new CICC and ISDS-providing institutions like BAC and CIETAC would need to offer similar levels of international independence so as to initially convince BRI participants.[160] In this regard, CIETAC epitomizes the global skepticism towards China, having kept alive the somewhat reasonable fear of China favoring its own. Meanwhile, some international alternatives have already been revealed. For example, in January 2018, the International Chamber of Commerce created a Belt and Road Commission, which has been designated to promote the institution's potential in the BRI region.[161] This Commission aims to create and offer a new dispute resolution infrastructure to support parties involved in BRI disputes.[162]

d) Assessing Risk Mitigation Options

Certainly, the various dispute resolution mechanisms covering investment as well as commercial disputes, whether under contract or treaty, are powerful means for BRI investors to enforce their rights under the protection provisions included in the various treaties and agreements applicable to them. Given the great legal, political, economic, and cultural diversity in the region, a sound investment protection infrastructure is key.

Investors themselves are well-advised to pay heightened attention as to what kind of investment protection mechanisms are provided to them under their treaties. Also, the definitions included therein need to be carefully examined. Investors from China's SARs should, for example, ensure that they qualify as Chinese 'nationals'. Furthermore, the great diversity in the BRI region also comes with the reality that some countries along the Silk Roads are much more difficult to maneuver through, considering, for example, the civil war in Syria, the profound political and economic risks in the '-stan'-countries,[163] and the general lack of legal infrastructure and regulation in some parts of Asia and Africa. As a rule of thumb, the greater the risks, the better investors need to, first, be aware of their rights during contract drafting procedures and, second, take active steps to mitigate determined risks.[164]

Given China's lead in the BRI, Chinese entities, whether private or state-owned, will most often be involved in BRI-related projects and, thus, are also more prone to the risks within the region. When structuring their investments, they might want to ensure that their investment contracts can take advantage of the Chinese BIT network. Notably, most of the BITs concluded between China and BRI states are still from the older generation and have not adopted any changes. As a result, Chinese investors' ability to initiate ISDS for solving investment disputes is also restricted. While China and Uzbekistan pose a good example of progress by having entered into a new BIT in 2011, it remains to be seen how China and other BRI states will proceed.[165] In general, there have been very few arbitral awards rendered against China, which is said to be due to the Chinese government's preference to settle most investment claims before they lead to arbitration.[166] ISDS has so far not been actively used in connection

158 Ibid.

159 Cf. 最高人民法院 (SPC), 关于人民法院进一步深化多元化纠纷解决机制改革的意见 (Opinion on the Supreme People's Courts More Deeply Reforming the Dispute Resolution Mechanism, 29 June 2016); <http://www.court.gov.cn/fabu-xiangqing-22742.html> visited 24 February 2020.

160 Cf. *OBOReurope*, New Courts for the Belt and Road Initiative (6 Feb 2018); <http://www.oboreurope.com/en/bri-courts/> visited 24 February 2020.

161 *International Chamber of Commerce*, Belt and Road Commission; <https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/belt-and-road-commission/> visited 24 February 2020.

162 *International Chamber of Commerce*, ICC Court launches Belt and Road Initiative Commission (5 March 2018); <https://iccwbo.org/media-wall/news-speeches/icc-court-launches-belt-road-initiative-commission/#english> visited 24 February 2020.

163 This refers to countries such as Kazakhstan and Turkmenistan.

164 See the guideline provided by *Paul Starr* (KWM), One Belt One Road, Protecting your investment on China's new pan-continental superhighway (10 May 2018); <http://www.kwm.com/en/hk/knowledge/insights/one-belt-one-road-protecting-your-investment-on-chinas-new-pan-continental-superhighway-20160419#id-here> visited 24 February 2020.

165 *Vivienne Bath* (supra note 55), p. 11.

166 *TAO Jinzhou/Mariana Zhong* (supra note 105), p. 316.

with Chinese investment disputes, either. Five out of the eight recorded claims (some pending) were brought under restrictive BITs,[167] with three being under liberalized BITs.[168] Meanwhile, many BRI states already had a number of cases filed against them that included ISDS arbitration. Taking some of the CEE-countries as an example, as of 2019 the Czech Republic counted 38 cases, Poland 30, Hungary 16, Romania 15, and Slovakia 13.[169] Most likely, this will also raise some concerns amongst Chinese enterprises as they perceive these numbers as reflections of a dissatisfactory investment climate in those (future) investment destinations.

Yet, given the restrictions in the existing BITs applicable to the BRI region, Chinese investors have so far relied more on the guidance and regulation by the Chinese government than on the enforcement of their legal rights through the ISDS mechanism.[170] This is supported by a 2015 study on Chinese investment overseas, which identifies permanent institutions of the Chinese government as a top-five overseas stakeholder since they provide for on-site assistance and support to Chinese investors abroad.[171] Also, a continued role of the government in mitigating risks for Chinese investors is even more likely when considering that government approval is to be obtained for all projects involving 'sensitive countries',[172] a definition that seems to apply to numerous BRI countries. Some authors have provided further insight into how the Chinese government has enhanced the safety of Chinese state-owned enterprises by obtaining *de facto* guarantees on political risks from some host-states.[173] Besides that, the mentioned establishment of the CAJACs and also China's recent introduction of the CICC are efforts to further reassure Chinese enterprises as regards their investments abroad.

4. EU's Investment Policies and Reform Proposals

EU Member States currently account for almost half of all BITs worldwide.[174] With the introduction of the Lisbon Treaty, in force since 2009, foreign direct investment has been brought under the EU's exclusive competence.[175] Accordingly, the existing BITs between EU Member States and third countries will be replaced by future agreements concluded by the EU. At present, the EU is gradually expanding its network of trade and investment agreements and is adopting innovative approaches to reform the existing regime and to stay up-to-date with the global investment climate. With reference to the earlier-mentioned 'legitimacy crisis' of the ISDS regime, controversies over the system have been voiced by the EU and other stakeholders particularly in the context of the Trans-Atlantic Trade and Investment Partnership (TTIP) and the EU-Canada Comprehensive Economic Trade Agreement (CETA). In order to address the numerous problems surrounding the ISDS, the EU has proposed an innovative approach to reform the current system.[176]

a) The Investment Court System

In a nutshell, the EU's new policy proposal aims to institutionalize the current dispute settlement mechanism through the creation of a permanent Investment Court System (ICS). The ICS will include a permanent Tribunal of Instance with an inherent appeal mechanism.[177] As a result, the ICS would replace the existing system of ad hoc arbitral tribunals with its standing International Investment Court.[178] This approach is based on the view that investment treaty arbitration is analogous to domestic judicial review in public law and, thus, a private model of adjudication would be inappropriate for dealing with such matters of public law nature.[179] Further, this policy envisages clearer and more precisely drafted investment protection standards to avoid excessive interpretations.[180] Overall, the EU has already made considerable progress in the implementation of this new policy, which was "developed within the context of the TTIP but being applied beyond".[181] At present, the ICS is included in CETA

167 Cases related to restrictive BITs include: Tza Yap Schum v Peru (BIT 1994), Ekran Berhad v China (Malaysia BIT 1988), China Heilongjiang & Ors v Mongolia (BIT 1997), Beijing Urban Construction Group Co. v Yemen (Yemen BIT 1998), and Sanum Investments Ltd. v Lao People's Democratic Republic (Laos BIT 1993).

168 Ping An Life Insurance Company v Belgium (BIT 2005), Ansung Housing Co. Ltd. v China (China-Korea BIT 2007), Hela Schwarz GmbH v China (Germany BIT 2003).

169 The named countries are also EU Member States and only the China-Czech Republic BIT (2005) was concluded post-1997. For a more detailed listing, see *UNCTAD*, Investment Policy Hub, Concluded Arbitration Proceedings; <https://investmentpolicy.unctad.org/investment-dispute-settlement> visited 24 February 2020.

170 *Vivienne Bath* (supra note 55), p. 12.

171 Cf. *UNDP*, 2015 Report on Sustainable Development of Chinese Enterprises Overseas (10 Nov 2015), p. 42; <https://www.cn.undp.org/content/china/en/home/library/south-south-cooperation/2015-report-on-the-sustainable-development-of-chinese-enterprise.html> visited 24 February 2020.

172 See 企业境外投资管理办法 (Administrative Measures for Enterprise Outbound Investment), passed by the Chinese National Development and Reform Commission on 26 December 2017, effective as of 1 March 2018; available at: <http://www.fdi.gov.cn/1800000121_23_74119_0_7.html> visited 24 February 2020.

173 Examples include Cambodia and Kazakhstan. With further references, see *Vivienne Bath* (supra note 55), pp. 12 f.

174 The number is close to 1,400 (out of 3,000 BITs worldwide), excluding intra-EU BITs; cf. *EC*, Concept Paper: Investment in TTIP and beyond – the path for reform, Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court (5 May 2015); <https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> visited 24 February 2020.

175 Cf. Art. 207 Treaty on the Functioning of the EU.

176 Cf. *EC*, Concept Paper (supra note 174), pp. 1 ff.

177 Ibid.

178 *UNCTAD* (supra note 12), p. 9. Please note further that the term 'court' is misleading as the ICS is generally based on an arbitration model.

179 Ibid.

180 *EC*, Concept Paper (supra note 174), pp. 2, 5 f.

181 *EC*, SIA (supra note 49), p. 26. Please note further that the term 'ICS' has seen its first formal use in the TTIP draft. The EU-Vietnam FTA (Chap. 8: 'Trade in Services, Investment and E-Commerce', Chap. II: 'Investment', hereinafter just 'EVFTA'), for instance, refers to the system as the 'Investment Tribunal System', cf. Sub.-Sec. 4 EVFTA.

(2016),[182] the EU-Singapore FTA/Investment Protection Agreement (IPA) (2018),[183] and the EU-Vietnam FTA/IPA (2019).[184] Similarly, the currently negotiated EU-Mexico Agreement provides for ICS. In order to obtain a greater understanding of what special features the ICS comprises in detail, the author will specifically examine CETA, the EU-Vietnam FTA, and the TTIP draft.

(1) Innovative Features

As noted before, the ICS is designed as a two-tier system, which consists of a Tribunal of Frist Instance ('Tribunal')[185] and an Appellate Tribunal.[186] The latter is empowered to uphold, modify, or reverse an award. The reviewable grounds include errors of law or misinterpretation of facts.[187] This addresses a key issue of the current ISDS regime, under which a final arbitral award made by the tribunal on the merits of the dispute is fully binding on the parties and, thus, not subject to appeal.[188]

At present, the appointment of arbitrators conventionally follows the decision of the parties. In ICS, tribunals are comprised of permanent and pre-installed Members of the Tribunals,[189] who are appointed by a special Committee for a fixed term of office.[190] In the EU-Vietnam FTA, the Tribunal is composed of 15 permanent judges, with five judges being nationals of EU Member States, five being Vietnamese nationals, and another five judges being nationals from third countries.[191] Also, each individual dispute is heard by a division of judges randomly appointed by the Head of the Tribunal.[192] Transparency is further enhanced by the ICS with the mandatory and unconditional application of the UNCITRAL Transparency Rules.[193] At the moment, only BITs concluded on or after 1 April 2014 that provide for ad hoc arbitration under the UNCITRAL Arbitration Rules are subject to these transparency rules.[194] Lastly, the ICS also embraces the 'loser pays' principle, which serves as a tool to prevent frivolous claims. It will apply to both the Tribunal as well as the Appellant Tribunal.[195] This method was also proposed by UNCTAD as a means to reform the ISDS regime.[196]

(2) Overcoming Obstacles

As favorable as this new policy by the EU appears, a decision by the Court of Justice of the European Union (CJEU) on 6 March 2018 has also impacted the general view on the ICS: In the *Achmea* case,[197] the CJEU found the ISDS mechanism in intra-EU BITs incompatible with Arts. 18, 267, and 344 Treaty on the Functioning of the European Union (TFEU). While this only affects investment treaty arbitration between EU Member States, arbitration representatives and scholars foresaw more far-reaching consequences following the case, especially on the future of the ICS.[198] In fact, the Belgian government has filed a request with the CJEU to examine the compatibility of the ICS with EU law.[199] Luckily, the CJEU has now already confirmed the compatibility of the ICS with the EU treaties.[200] In the words of EU Commissioner for Trade, Cecilia Malmström: "This Opinion confirms that the citizens can have full confidence in the Commission's new approach to investment protection."[201]

b) Interim Findings and Outlook

Overall, the future reception of the ICS across the globe is still unknown. However, having already managed to overcome some serious questioning inside the EU, it seems likely that the EU will ultimately be rewarded for its continued efforts in the promotion and export of this innovative model. In fact, the EU has proposed the ICS in the ongoing negotiations with all partners, including China. Additionally, the EU continues its work on creating a multilateral mechanism for settling investment disputes, namely a Multilateral Investment Court (MIC).[202] Currently, the MIC is also being discussed in detail inside the UNCITRAL Working Group III as one

182 Signed on 30 October 2016, CETA entered into force provisionally on 21 September 2017, as of which date most of the agreement applies; see <https://ec.europa.eu/trade/policy/in-focus/ceta/> visited 24 February 2020.

183 The FTA and IPA were signed on 15 October 2018. They are not yet in force.

184 The FTA and IPA were signed on 30 June 2019. They are not yet in force.

185 Art. 8.27(1) CETA; Art. 12(1) EVFTA; TTIP Draft, II. Sec. 3, Art. 9(1).

186 Art. 8.28(1) CETA; Art. 13(1) EVFTA; TTIP Draft, II. Sec. 3, Art. 10(1).

187 Art. 8.28(2) CETA; Art. 28(1)–(3) EVFTA; TTIP Draft II. Sec. 3, Art. 29(1)–(2).

188 UNCITRAL Arbitration Rules, Art. 34(2); ICSID Convention, Art. 53(1).

189 The terminology varies: TTIP, for instance, refers to the tribunal members as 'judges'.

190 Art. 8.27(2)–(5) CETA; Arts. 12(2)–(5), 13(2)–(5) EVFTA; TTIP Draft, II. Sec. 3, Arts. 9(3)–(5), 10(2)–(5).

191 Art. 12(2) EVFTA.

192 Art. 8.27(6)–(7) CETA; Arts. 12(6)–(7), 13 (8)–(9) EVFTA; TTIP Draft, II. Sec. 3, Arts. 9(6)–(7), 10(8)–(9).

193 Art. 8.36.1 CETA; Art. 20(1) EVFTA; TTIP Draft, II. Sec. 3, Art. 18(1).

194 For the current status of implementation, see *UNCITRAL*, Status: UNCITRAL Rules of Transparency (2018), <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html> visited 24 February 2020.

195 Arts. 8.32, 8.33, 8.39(5) CETA; Art. 27(4) EVFTA; TTIP Draft, II. Sec.3, Art. 28(4).

196 *UNCTAD*, Investment Policy Framework (2015), 107.

197 The Slovak Republic v Achmea B.V. (C-284/16)

198 Cf. *Kristina Wittkopp*, Comment: EU should put a brake on multilateral investment court talks (23 Apr 2018); <http://borderlex.eu/comment-multilateral-investment-court/> visited 24 February 2020.

199 *Government of the Kingdom of Belgium*, CETA: Belgian Request for an Opinion from the European Court of Justice (6 Sept 2017); <https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf> visited 24 February 2020.

200 CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341.

201 *EC*, Trade: European Court of Justice confirms compatibility of Investment Court System with EU Treaties (Apr 2019); <https://europa.eu/rapid/press-release_IP-19-2334_en.htm> visited 24 February 2020.

202 *EC*, Concept Paper (supra note 174), p. 11.

possible reform option for ISDS. The following insightful observation has been made:

> A standing investment court would be an institutional public good serving the interests of investors, States and stakeholders. The court would address most of the problems outlined above [...]. However, this solution would also be the most difficult to implement as it would require a complete overhaul of the current regime through a coordinated action by a large number of states."[203]

III. A Next-Generation Model: The China-EU BIT

Once in place, the China-EU BIT will be the EU's first-ever stand-alone investment agreement which will include both market access and investment protection provisions.[204] It will replace the BITs currently in force between China and all EU Member States except for Ireland, serving as the first 'fitting-test' of the EU's foreign direct investment competence.[205] Also, in a broader context, this BIT's impact will most likely go far beyond the boundaries of the two economies, becoming a symbol of the emerging 'BIT 2.0'.[206]

1. 'Global BIT 2.0'

Both the EU and China already carry massive weight within the global BIT network, be it through the historical European BIT prototype, which was conventionally used as a model for various BITs of developing countries, including China,[207] or through China's position as one of the most successful developing economies, which in turn explains its considerable influence also on other developing nations.[208] Against this background, the future BIT between these two economies will very likely have a tremendous impact on BIT practice worldwide. It might even serve as a stepping stone in harmonizing the international investment system by establishing a consensus within the BIT framework. The negotiation process has already indicated how the China-EU BIT will include distinct features that constitute a new generation of BITs, the 'Global BIT 2.0'.[209] With a view also to recently enforced BITs like CETA and other, still ongoing treaty negotiations, the features of this newly-emerging BIT model evidently include: (1) concrete market access commitments, (2) clarifications on substantive provisions, such as on the definition of 'investment', (3) inclusion of clauses addressing social concerns such as public health, safety, and the environment, and – most importantly for the author – (4) detailed and more refined investment dispute resolution mechanisms, specifically with reformations of the ISDS regime.[210]

2. Prospects in Dispute Resolution

As explained earlier, numerous BITs concluded by China pre-1998 granted access to ISDS only for disputes concerning the amount of compensation for expropriation, an approach that has greatly shifted.[211] At present, however, the earlier approach is still incorporated in several BITs between China and EU Member States. The time and opportunity for change have now come. In recent years, both China and the EU have been proactive in reforming their dispute resolution mechanisms. It has become clear that both parties share similar concerns and, in principle, also agree on the necessary measures in reforming the ISDS regime, in the sense of refining the ISDS scope and exploring the possibility of an appellate mechanism.[212] Accordingly, an extensively reformed dispute settlement system in the China-EU BIT appears highly likely. Nonetheless, the details of what kind of reform approach this BIT will ultimately adopt are not yet clear. The author considers the possible adaption of the ICS in line with the EU's recent treaty practice. China will certainly take the EU's proposal into consideration, given that the EU has officially declared that its objective and the key provisions of the agreement will be guided by CETA and the EU text proposal for the Investment Chapter of the TTIP.[213] Some international academics have already given some thought to the question of whether China will say 'yes' to the ICS.[214] Altogether, it seems likely that China will give a positive response for the following reasons:

First, there already appears to be a mutual consensus on the need for an appellate mechanism.[215] Not only would such a system support the overall legal correctness of cases, but it would also contribute to consistency in decision making and the predictability of dispute resolution results.[216] And being based on the WTO Appellate Body,[217] the two-tier design of the ICS further comes with a level of familiarity, which in turn might help parties to better adapt to the changes. *Secondly*, regarding enhanced transparency, China should not be concerned at all, considering its emphasis on this aspect.[218] And even without the adaption of the ICS, a simple reference, as is common, to ad hoc arbitration

203 *UNCTAD*, Reform of Investor-State Dispute Settlement: In Search of a Roadmap (supra note 12), p. 9.
204 *EC*, SIA (supra note 49), p. 12.
205 Art. 207 TFEU in connection with Arts. 2(1), 3(1) TFEU.
206 *SHAN Wenhua/WANG Lu* (supra note 2), p. 265 (Fn. 32).
207 Cf. II.2.a): 'Chinese Investment and Model BITs'.
208 *SHAN Wenhua/WANG Lu* (supra note 2), pp. 266–267.
209 Ibid., p. 265.
210 On dispute settlement, see in particular: CETA, Chap. 8 and Annex X; China–Japan–Korea TIA, Arts. 4(3) and 15; China–Canada BIT (2012), Arts. 5(3), 20–26 and Annex C.21; China–ASEAN Investment Agreement, Art. 14; TPP, Chap. 28, Sec. A; TTIP Draft, Chap. II, Sec. 3.
211 Cf. II.2.a): 'Chinese Investment and Model BITs'.
212 *SHAN Wenhua/WANG Lu* (supra note 2), p. 264.
213 *EC*, SIA (supra note 49), p. 28. For the EU textual proposal on TTIP, Chap. II – Investment, see <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> visited 24 February 2020.
214 See e. g. *KAO Chi-Chung* (supra note 26), pp. 247–266.
215 *SHAN Wenhua/WANG Lu* (supra note 2), p. 264.
216 *UNCITAD Working Group III*, Submission by the Government of China (supra note 150).
217 Cf. *Laura Puccio/Roderick Harte*, From arbitration to the investment court system (15 June 2017), EP Research Service, p. 15.
218 *Belt and Road Portal*, CIETAC Explanatory Note (supra note 139).

under the UNCITRAL Arbitration Rules would imply the application of the UNCITRAL Transparency Rules as this BIT was concluded post-2014. Further, Article 7 of the UNCITRAL Transparency Rules provides for the protection of confidential documents and information. If disclosure of certain information is, for example, prohibited under Chinese law, then such information would also stay concealed under the UNCITRAL Transparency Rules.[219]

Thirdly, the author admits that stripping investors of their conventional right to appoint an arbitrator creates a significant controversy, particularly as China generally wishes to retain this right of appointment in the ISDS reform process.[220] Nonetheless, this obstacle might not be as significant as it appears as the absence of this right would also mean more regulatory capacity being given to China (and the EU), both with regard to the selection of judges and in the role as a responding host-state.[221] For instance, Article 26.1. of the CETA establishes the Joint Committee which "shall be co-shared by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees". Following this provision, the Chinese government as a contracting party to the China-EU BIT would likewise be given an adequate playing field in the ICS. It could actively participate in the establishment of the Committee, which in turn appoints the judges.[222] Moreover, the author believes that the adaption of the ICS might altogether be considered a good compromise between China and the EU, easing concerns of the EU with regard to China's recent policy of shifting jurisdiction specifically towards China, as has been seen with the establishment of the CAJACs and the CICCs. In conclusion, the pre-appointment of arbitrators does not appear as an exclusion-criteria for the adaption of ICS into the China-EU BIT, though it might be recommended that some modifications to this element are made.[223]

Last but not least, as stated earlier in this paper, previous Chinese investment agreements and also the ISDS clauses included therein demonstrate quite a high degree of divergence and flexibility in China's treaty drafting.[224] It can be anticipated that China will keep such a flexible and conformable approach also in formulating future ISDS provisions. Having made the further observation that China often adapts the BIT models preferred by contracting partners, the author concludes that China's answer to the EU on the matter of the ICS will probably be "yes". Correspondingly, the following discussion presumes that the China-EU BIT will indeed include the ICS as its dispute settlement mechanism.

IV. China-EU BIT meets OBOR – A Likely Model?

The outcome of the China-EU BIT negotiation will certainly serve as an indicator for the future treaty practice worldwide. Having assessed the possible ISDS reform option that might accompany the future China-EU BIT, this BIT – as a likely representative of a new generation of BITs – may be considered as representing an additional model in solving investor-state disputes that arise in OBOR. How high the likelihood is of this kind of model-function in the future OBOR will be evaluated below.

The likelihood-question might be rephrased into the question: *Will the ICS, as the EU's reform option for ISDS, challenge the dominance of other OBOR dispute resolution mechanisms?* This author expresses the view that to serve as a 'likely model', the ICS which potentially will be implemented in the China-EU BIT would first need to be a viable competitor to existing mechanisms and institutions on the 'ISDS market', which is currently clearly dominated by the ICSID.

1. Application of the ICS to OBOR: A Short Example

First, how the ICS functions and how it would be applied to OBOR needs to be clarified. For this purpose, a short 'case study' will be discussed on a purely fictional claim filed by a German investor (G) against China arising out of a contract that concerns an OBOR construction project in China. In general, both G, as a German national, and China, as the host-state, are covered by the China-EU BIT. Given that all amicable settlement procedures and consultations have already failed, G initiates the dispute settlement procedure under the ICS. G fulfills all prerequisites, namely that she is a national of an EU Member State and that her investment in an OBOR project with and in China falls under the definition of "investment" under the China-EU BIT.

G now wonders about the tribunal venue: The EU Commission generally does not intend to create new standing institutions for its ICS.[225] The ICS is thus dependent on 'hosts', i. e. one or several institutions designated to administer the organizational and logistical issues in connection with the ICS arbitration proceedings.[226] Under both the EU-Vietnam FTA and the TTIP Draft, either ICSID or the Permanent Court of Arbitration has been designated to take on the task of the 'administrative secretariat'.[227] Meanwhile, ICSID alone has been chosen for administering CETA,[228] which was said to be related to the ICSID's current role

219 Art. 7(2)(d) of the UNCITRAL Transparency Rules.

220 Cf. *UNCITAD Working Group III*, Submission by the Government of China (supra note 150).

221 *KAO Chi-Chung* (supra note 26), p. 258.

222 Regarding the aforementioned, similar thoughts in this direction were presented at the *Asia FDI Forum II: China's Investment Three-Pong Strategy: Bilateral, Regional, and Global* (29–30 Nov 2016), Hong Kong, organized by the Faculty of Law, Chinese University of Hong Kong.

223 Elaboratively *KAO Chi-Chung* (supra note 26), pp. 259 ff.

224 *Julien Chaisse/Christian Bellak* (supra note 71), pp. 32–35; *ZHANG Shu* (supra note 60), pp. 147–181.

225 *Laura Puccio/Roderick Harte* (supra note 217), p. 20.

226 Ibid.

227 Art. 12 (8) EVTA; TTIP Draft, II. Sec.3, Art. 9(16).

228 Art. 8.27(16) CETA.

in NAFTA as well as the fact that it currently remains the dominant forum for ISDS worldwide.[229] However, scholars have speculated that any number of institutions could be selected to function as an administrative secretariat for the ICS.[230] This feature supports an incremental establishment of the ICS in OBOR, given that many well-established arbitral centers already exist in the region that could host the ICS, for instance the Singapore International Commercial Court, the Hong Kong International Arbitration Center, or the Mainland-seated CIETAC.

In G's case, however, her investment court is hosted by ICSID. G's claim is heard by the Tribunal of First Instance as established under the China-EU BIT. G is aware that she was excluded from the possibility of selecting an arbitrator. G also realizes that the tribunal follows a 'pick-and-choose'-application.[231] Her claim was to be heard either under the rules of the ICSID, the ICSID Additional Facility, UNCITRAL, or "any other rules agreed by the disputing parties at the request of the claimant".[232] In G's case, the tribunal follows the arbitral rules under ICSID.

Ultimately, the Tribunal grants G an award for monetary damages for her losses suffered against the respondent,[233] China, which will also bear the costs of proceedings. G sees no reason and has no ground to use the appellate mechanism and neither does China. The enforceability of her ICS award, which appears like an ICSID award, now depends on whether Chinese national courts recognize the ICS award as an enforceable award.[234] Given the fact that China has committed to the enforcement of only commercial arbitral awards under the New York Convention pursuant to Article I(1) of the New York Convention, there is no possibility for a foreign investor like G to seek enforcement of ISDS arbitral awards against China by relying on the New York Convention.[235] Nonetheless, the SPC's BRI Opinion has encouraged the lower Chinese courts to improve the mutual recognition and enforcement of arbitral awards with BRI countries that are not party to the New York Convention. [236] This Opinion might serve as a rough indication that China's highest judiciaries are still pondering about expanding the application of the New York Convention also to ISDS disputes.[237]

2. ICS - A Viable Competitor?

While the ICS will be one possible 'newbie' on the ISDS market, other firmly established institutions in OBOR have already started to adapt to the dynamic climate in the region. Overall, investor protection mechanisms are quite diverse in OBOR, considering the great variety of BITs in place, which help to regulate OBOR projects. In this regard, Chinese BITs with developing African nations, in which China's focus is still more on enhancing diplomatic relationships and acquiring natural resources, certainly include investor protection mechanisms that are quite different from the ones provided in its BITs with more advanced nations, such as with the EU.[238] Thus, when assessing the likelihood of ICS serving as a model, one must also take into account the different investment climates within OBOR, in which not every OBOR country might be ready to adapt to such a hundred-and-eighty-degree change in the foreseeable future.

a) ICS vis-à-vis the OBOR Climate

Given that an interconnectedness of BITs seems rather unlikely, the ICS would need to find other ways to extend its leverage. First and foremost, its future depends on how successful the EU is in implementing this model into different bilateral or multilateral agreements.[239] Assuming that the ICS is established, it then would depend on several factors for it to gain weight in OBOR – and beyond.

Taking as an example the ICSID, which currently dominates the ISDS regime, its continued success has been explained through a combination of factors, altogether referred to as the 'network effect'.[240] *Firstly*, a decisive aspect is the overall impression on the legitimacy of the institution. It is implied that the bigger its client pool is, the better its reputation will be. *Secondly*, predictability and familiarity, especially regarding arbitral rules and procedures, will also play an important role in expanding the client pool. This might further be explained with human nature preferring "the devil we know". *Thirdly*, the general quality and scope of services provided by the institution will contribute greatly to reassuring and to expanding the number of clients

229 *Laura Puccio/Roderick Harte* (supra note 217), pp. 20 f.

230 Cf. *Andrea K. Bjorklund/Bryan H. Druzin*, Breaking the Market Dominance of ICSID? An Assessment on the Likelihood of Institutional Competition, Especially from Asia, in the Near Future, p. 243, in: *Julien Chaisse et al.*, Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration, Singapore 2017, pp. 243–260.

231 Cf. *Sophie Nappert*, The 2015 EFILA Inaugural Lecture: Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism (26 Nov 2015), European Federation for Investment Law and Arbitration, p. 10; <https://efila.org/wp-content/uploads/2015/11/Annual_lecture_Sophie_Nappert_full_text.pdf> visited 24 February 2020.

232 Cf. Art. 8.23(2) CETA; Art. 7(2) EVFTA; TTIP Draft, II, Sec. 3 Art. 6(2).

233 Cf. Art. 8.39(1) CETA; Art. 7(2) EVFTA; TTIP Draft, II, Sec. 3 Art. 6(2).

234 See *August Rheinisch*, Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? (19 Dec 2016), pp. 782 f., in: Journal of International Economic Law, 2016 (19), pp. 761–786; available at <https://doi.org/10.1093/jiel/jgw072> visited 24 February 2020.

235 *Gao Xiaoli* (高晓力), SPC 中国法院对仲裁持积极态度 (May 2018); <http://cicc.court.gov.cn/html/1/218/62/164/1054.html> visited 24 February 2020.

236 最高人民法院 (SPC), 最高人民法院关于人民法院为"一带一路"建设提供司法服务和保障的若干意见 (16 June 2015); <http://gongbao.court.gov.cn/Details/b10a1d30141bc4a4c7886b00d759c3.html> visited 24 February 2020.

237 Cf. *TAO Jinzhou/Mariana Zhong* (supra note 105), pp. 306 f.

238 *Leon Trakman*, China's Regulation of Foreign Direct Investment, p. 75, in: *Julien Chaisse et al.*, Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration, Singapore 2017, pp. 67–95.

239 *Cf. Andrea K. Bjorklund/Bryan H. Druzin* (supra note 230), p. 243.

240 Ibid., p. 246.

willing to submit their claim to one institution.[241] With regard to this, it can be assessed for the ICS that the EU will face great challenges in establishing this system and in rendering it a viable alternative to other existing arbitral mechanisms. At the same time, some have speculated that the likelihood of ICS becoming a success story remains questionable because so many factors are still unknown and unpredictable.[242]

In this context, China now has the opportunity to hop onto the ICS-train and to make its contributions in refining it. Given China's leading position in OBOR and its influential power over developing OBOR countries as resulting from that position, the ICS could instantly gain weight within the ISDS regime. The ICS could especially benefit the numerous developing and least developed countries within OBOR, as several features have already been proposed on the part of the EU to care for them,[243] including measures such as ensuring geographical representation concerning arbitrators,[244] differential treatment on cost allocation,[245] and the possible creation of an advisory center.[246] Against this background, the ICS might become more than just a viable competitor to the ICSID for investment dispute settlement – that is to say, once the EU's core proposal on the ICS has overcome its initial obstacles and has possibly even crystallized into a permanent, multilateral institution after thorough negotiations on the UNCITRAL-platform. If functioning efficiently, it could then constitute a unique dispute settlement framework that also addresses the particular needs of OBOR countries.

However, especially Chinese scholars have already expressed their fundamental concerns as to how far such a standing investment court as proposed by the EU could effectively administer potential disputes arising from OBOR countries. In view of the vast dimension of OBOR projects in conjunction with their geographical coverage and long duration, it has been put to question what size such standing court would need for it to be able to successfully deal with the sheer volume of OBOR cases.[247] In the meantime, China itself is building and innovating its own ISDS regime, as has been elaborated on earlier. This development matches the prognosis that China's presence in ISDS will assuredly increase with the range of commencing OBOR projects. Some academics have even set forth the possibility that the "current multilateral reform efforts at UNCITRAL may eventually be outpaced by the practical and operational realities of China's dominance in foreign investment and rule-making around the world".[248] Accordingly, one could argue that Chinese support towards the ICS might be detrimental to China's efforts in making its arbitral institutions leading international fora for ISDS.

b) An 'OBOR ISDS Model 1.0'?

Having stressed the extreme diversity inside OBOR, the metaphor 'salad bowl'[249] could probably (also) be applied to OBOR, suggesting the integration of many jurisdictions, various BIT models, and different ISDS options into the 'OBOR-bowl' – without merging, but with great mutual efforts in creating the best possible setting for a peaceful co-development. Meanwhile, the various ISDS-options integrated therein come in different shapes and sizes according to their market dominance. Given this background and given OBOR's magnitude, the general conclusion is that a unified 'OBOR ISDS Model' is rather unlikely. Nonetheless, this first-instinct conclusion might also be a little deceptive. Fast forwarding, a revolution of ISDS is inevitable. Subsequently, a certain approximation in the ISDS provisions worldwide will most likely follow. The question remains as to what form the prospective ISDS Model provision(s) will take on. While there might not be the 'one and only OBOR ISDS Model', at least some aspects and features will probably converge.

Following the most recent Chinese approach in the ISDS reform process and with reference especially to the 2019 Arbitration Rules of the Mainland-seated BAC,[250] China is already embracing the option of an 'inbuilt' appellate mechanism. The China-Australia FTA (2015) also foresees the possibility of establishing an appellate mechanism,[251] though it has so far not been specified. Taking a step further, this author considers and favors the possible establishment of a 'unified appellate mechanism'. [252] Such a mechanism would be a mixture of China's current inbuilt appellate mechanism and the two-tiered ICS. The author deems such an option to be much more feasible than implementing the ICS 'as is' into OBOR.[253] The compromising nature of such a unified appellate mechanism would be a 'win-win' for both the followers of the ICS and supporters of the more moderate reform approaches. Notwithstanding China's general flexibility in drafting international investment agreements, such a feature would also be

241 On the aforementioned, cf. ibid.

242 Ibid., p. 244.

243 *EC*, The European Union's approach to investment dispute settlement, The 3rd Vienna Investment Arbitration Debate (22 June 2018); <https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf> visited 24 February 2020.

244 Ibid., p. 11.

245 Ibid.

246 Ibid. p. 12.

247 *YEE Sienho*, Dispute Settlement on the Belt and Road: Ideas on System, Spirit and Style, p. 909, in: Chinese Journal of International Law, Vol. 17(3) (2018), pp. 907–914; available at <https://doi.org/10.1093/chinesejil/jmy024> visited 24 February 2020.

248 *Diane A. Desierto*, China as a Global ISDS Power (24 Aug 2018); <https://oxia.ouplaw.com/page/715> visited 24 February 2020.

249 The metaphor generally relates to the cultural and ethnic diversity in the United States.

250 BAC Rules (supra notes 146, 148).

251 Chap. 9, Art. 9.23 China-Australia FTA.

252 Such a mechanism is also being discussed by the EC and UNCITRAL; see in detail *Marc Bungenberg/August Reinisch*, Standalone Appeal Mechanism "Multilateral Investment Appeals Mechanism" (MIAM); in: From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, European Yearbook of International Economic Law, Berlin/Heidelberg 2020, Chap. 9, pp. 197–216; available at <https://doi.org/10.1007/978-3-662-59732-3_9> visited 24 February 2020.

253 Cf. *YEE Sienho* (supra note 247), p. 910.

more in line with China's present preference for ad hoc arbitration.[254] According to this approach of a unified appellate mechanism, first instance decision-making could remain decentralized, and only appeals from the other dispute settlement institutions inside OBOR would follow a newly introduced appeals mechanism that also allows the scrutiny of errors on substantive law matters.

3. Implications

Altogether, it is not *per se* unlikely that the ICS – given that it is incorporated into the China-EU-BIT 'as is' – will one day serve as a reasonable model for solving investor-state disputes in OBOR. However, the ICS comes with great uncertainty. Having also assessed the concerns and challenges in rendering the ICS a viable alternative to other existing arbitral mechanisms inside the highly dynamic and diverse OBOR, the author considers other reform proposals – and specifically the establishment of a unified appellate mechanism as opposed to the two-tiered ICS – to be more likely because their establishment and introduction to the current system would be much easier and therefore also more feasible.

V. Conclusion

The global investment regime is currently experiencing exciting times as it faces great prospects in its development. Noticeably, states worldwide are adopting a more refined approach to the harshly criticized ISDS regime, which in turn is a core mechanism for protecting investors by serving as a risk mitigation device. While some countries are taking smaller bites from the 'reform plate', focusing on specific issues each time, other economies, like the EU, have already proposed innovative options that would replace the current system of ISDS altogether.

As the EU is promoting its idea of introducing a permanent bilateral investment court to China as its current negotiation partner, this author anticipates a favorable response from the 'dragon of the east'. Given the further enhanced relationship between China and the EU as resulting from their future BIT as well as a closer interconnection provided through OBOR, this – in combination with China's enormous influence on other developing nations – could render the ICS a likely model for OBOR. However, given the already firmly established dispute resolution institutions inside the region, the implementation of a unified appellate mechanism appears to be more likely and more feasible, leaving the first instance of ISDS to the institutions chosen by the parties. Hence, the ICS might become just another complementary dispute resolution option in OBOR, at least in the short and medium-term. How the globally intertwined investment regime will develop in the long run is yet to be seen. Major factors are particularly the findings of UNCITRAL Working Group III on the ISDS reform and also China's prospects in establishing itself as a global judicial power whose ISDS regime might itself serve as an anchor in the wide, wide sea of dispute settlement mechanisms inside OBOR. We shall observe these developments with excitement.

254 *UNCITAD Working Group III*, Submission by the Government of China (supra note 150), p. 2.

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Investor-Staat-Schiedsverfahren in der Region der „Neuen Seidenstraße": Stellt der bilaterale Investitionsschutzvertrag zwischen China und der EU ein wegweisendes Modell dar?

Mit der Aussicht auf eine intensivierte chinesisch-europäische Beziehung als Resultat des aktuell noch auszuhandelnden bilateralen Investitionsabkommens sowie der engeren Vernetzung durch das chinesische Megaprojekt der „Neuen Seidenstraße" stehen dem globalen Investitionssystem aufregende Zeiten bevor. Vor dem Hintergrund der laufenden Reformierung des scharf kritisierten Investor-Staat-Schiedsverfahrens durch die Kommission der Vereinten Nationen für internationales Handelsrecht könnte der künftige Investitionsvertrag zwischen China und der EU als Vorreitermodell für eine neue Generation bilateraler Investitionsabkommen dienen, der ferner den Weg ebnet für einen neuen modus operandi betreffend der Schlichtung von Streitigkeiten zwischen Investoren und einem Staat. Nach einer Analyse der Investitionsvertragspraxis Chinas und einer Skizzierung der diversen vorhandenen Streitbeilegungsmechanismen in der Region der Neuen Seidenstraße scheint es naheliegend, dass China – in seiner flexiblen Vertragsgestaltungspraxis – mit der EU übereinkommt in dem seitens der EU vorgeschlagenen, innovativen bilateralen Gerichtshof für Investitionsstreitigkeiten. Die Verfasserin hält als Kompromisslösung jedoch die Einführung einer ständigen Berufungsinstanz für deutlich praktikabler als die eines zweistufigen Investitionsgerichtssystems. Die erste Instanz der Streitbeilegung bliebe damit den durch die Parteien gewählten Institutionen überlassen. Demzufolge würde das vorgeschlagene Gerichtssystem zumindest mittelfristig nur eine weitere, ergänzende Option zur Beilegung von Investitionsstreitigkeiten entlang der Neuen Seidenstraße bieten.