

# The impact of The Belt and Road Initiative on investment arbitration



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## What is the Belt and Road Initiative?

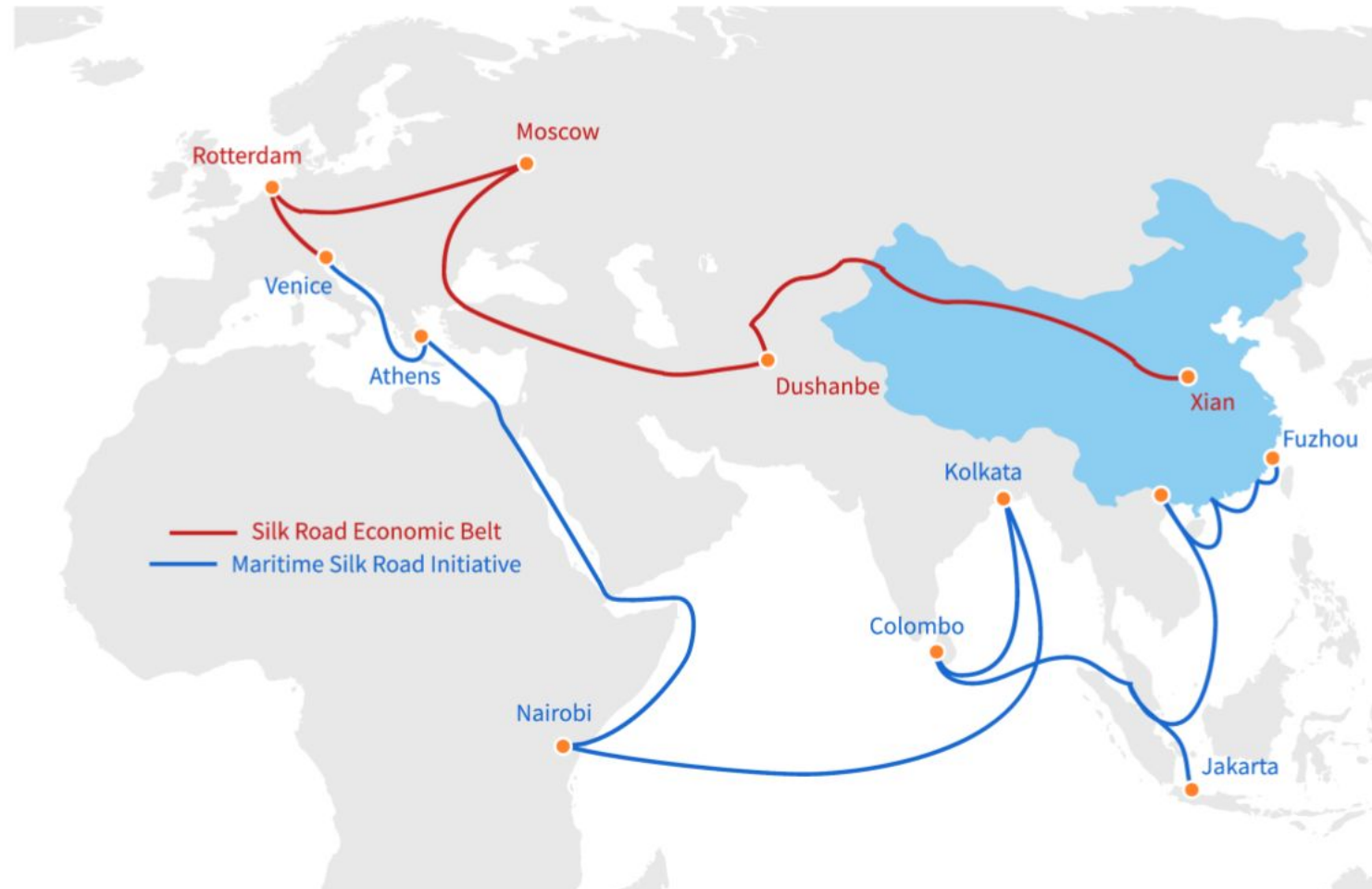
The Belt and Road Initiative ("BRI") is an ambitious project led by China and aimed at strengthening infrastructure, trade, and investment links between China and more than 65 other countries. BRI was launched by China's President Xi Jinping in late 2013.

Through the BRI, China will finance infrastructure projects across Asia, Europe and Africa in order to develop:

- i. rail and road links across Central Asia and Russia into Europe (the *Silk Road Economic Belt*);
- ii. and a network of commercial seaports across South Asia, connecting to the Middle East, Africa and Europe (the *New Maritime Silk Road*).

As a part of the BRI, China will also finance infrastructure projects, among others, in the power, energy, mining, industrial and agricultural sectors.

Chinese corporations (namely state-owned enterprises, or SOEs but also



Source: World Bank

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## As of 2017 there were over 1,700 BRI projects, more than 600 BRI-related contracts had been signed, and China had committed over USD 926 billion in BRI-related projects

private corporations) and banks will play a major role in planning and implementing BRI projects. In particular, it is expected that Chinese construction companies will perform much of the construction necessary to implement the BRI and Chinese corporations will assist in managing the resulting facilities. Chinese banks (along with financial institutions and international banks, specially the Asian Infrastructure Investment Bank) will structure the financing.

According to the World Bank, BRI countries account for over 30% of global GDP, 62% of the population, and 75% of known energy reserves.<sup>1</sup> As of 2017 there were over 1,700 BRI projects, more than 600 BRI-related contracts had been

signed, and China had committed over USD 926 billion in BRI-related projects.<sup>2</sup>

The purpose of this article is to analyse the current and potential impact of the BRI on investment arbitration.

### The impact of the BRI on Arbitration Institutions<sup>3</sup>

One of the first consequences of the BRI for investment arbitration has been the adoption by Chinese arbitration institutions of rules to administer investor-state disputes.

For instance, the China International Economic and Trade Arbitration Commission ("CIETAC"), a well-known Chinese arbitration institution, has:

- i. issued international committed arbitration rules, effective since 1 October 2017,<sup>4</sup> and
- ii. established an Investment Dispute Resolution Center in Beijing to hear investment disputes. Nevertheless, these disputes may also be administered by CIETAC's Hong Kong Arbitration Centre.<sup>5</sup>

The Shenzhen Court of International Arbitration ("SCIA"), another Chinese arbitration institution, has also adapted its arbitration rules to enable it to administer investor-state arbitrations under the UNCITRAL Arbitration Rules.

It is worth mentioning that awards issued in the framework of arbitration proceedings are becoming more and

more recognised and enforced by Chinese judicial institutions. In this regard, China has adopted several measures to enhance supervision over local courts when it comes to the recognition and enforcement of foreign arbitration awards. For instance, the Supreme Court of China requires local courts to inform their higher courts before making any decision by which they refuse to enforce a foreign arbitration award.<sup>6</sup>

### The likely increase in Investor-State Dispute Settlement

Another likely consequence of the BRI is an increase in investor-state dispute settlement ("ISDS").

China is currently party to 108 BITs and to 19 treaties with investment provisions that are in force. This makes China the country with the second highest number of BITs in force, behind Germany. China is also party to the New York and ICSID Conventions.<sup>7</sup>

<sup>6</sup> Source: Notice of the Supreme People's Court on the Handling of Issues Concerning Foreign-related Arbitration and Foreign Arbitration by People's Courts

<sup>7</sup> A full list of the BITs, Treaties with Investment Provisions and Investment Related Instruments entered into by China can be found in the following link: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iialnnerMenu>.

<sup>2</sup> NORTON, Patrick M.: *China's belt and road initiative: challenges for arbitration in Asia*, Penn Law Legal Scholarship Repository, 2018.

<sup>3</sup> We will refer only to those changes or adaptations by arbitral institutions that could be relevant for investment arbitration. Hence, we will not refer to other significant developments arising as a consequence of the BRI, such as the establishment by China of International Commercial Courts to hear international commercial disputes.

<sup>4</sup> An English version of CIETAC's International Investment Arbitration Rules may be accessed in the following link: <http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en>.

<sup>5</sup> See CIETAC's International Investment Arbitration Rule n° 4,4.

<sup>1</sup> Source: World Bank, <https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative>.

## Another likely consequence of the BRI is an increase in investor-state dispute settlement

China's involvement in ISDS has remained scarce to date, especially if the volume of Chinese Foreign Direct Investment is considered. China has been party to only three known ISDS proceedings as a host state.<sup>8</sup> Chinese investors, on their part, have only initiated five known ISDS proceedings against other states.<sup>9</sup> All these proceedings were started in the late 2000s.

<sup>8</sup> *Ekran v. China in 2011, Ansung Housing v. China in 2014 and Hela Schwarz v. China in 2017*. Source: <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/42?partyRole=2>

<sup>9</sup> *Tza Yap Shum v. Peru in 2007, China Heilongjiang and others v. Mongolia in 2010, Ping An v. Belgium in 2012, Beijing Urban Construction v. Yemen in 2014 and Sanum Investments v. Laos (II) in 2017*. Source: <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/42?partyRole=1>

Many of the BRI projects are complex, long-term projects that will require the investment of large sums of money. Additionally, many of the BRI countries face political and/or economic instability, a lack of regulation, or arguably the absence of a fair and impartial legal system. Hence, it is quite likely that investment disputes with the host states will arise during the implementation of these projects.

The possibility of initiating investor-state arbitrations as a consequence of these disputes will depend on the terms of China's Bilateral Investment treaties ("BITs") with the host country. China has entered into BITs with most BRI countries. Hence, it seems reasonable

to anticipate that the implementation of BRI will entail a significant increase in investor-state arbitration.

### The possible renegotiation by China of its BITs with BRI countries

China's BITs can be classified into three different generations:

- I. the first generation of BITs (concluded between 1982 and 1989) either do not permit ISDS or limit its availability to disputes concerning the amount of compensation for expropriation;
- II. the second generation (1990 - 1997) also provide for limited access to ISDS but contain references to ICSID arbitration.
- III. the third generation (1997 - present) generally contain comprehensive ISDS provisions granting access to international arbitration for all investor-state disputes.<sup>10</sup>

Some of the BITs entered into with BRI countries belong to the first generation and, as a result, do not generally authorise investor-state arbitration or they limit arbitration to valuation issues in case of expropriations, excluding questions of liability.<sup>11</sup>

These limitations have been raised, sometimes successfully, against

<sup>10</sup> TAHBAZ, Christopher K et al. *Investment Treaty Arbitration in the Asia-Pacific*, Global Arbitration Review, 25 May 2018, link: <https://globalarbitrationreview.com/chapter/1169962/investment-treaty-arbitration-in-the-asia-pacific>.

<sup>11</sup> NORTON, Patrick M.: note 2.

Chinese investors. For instance, in *China Heilongjiang and others v Mongolia* the arbitral tribunal dismissed the Chinese investors' claims against Mongolia due to a lack of jurisdiction. The Tribunal concluded that the BIT's dispute settlement clause restricted its jurisdiction only to disputes over the amount of compensation for expropriation and hence the Tribunal did not have jurisdiction to decide on the legality of an expropriation.<sup>12</sup> In other cases (*Tza Yap Shum v Peru, Sanum Investments v Laos and Beijing Urban Construction Group v Yemen*), however, BITs have been interpreted somewhat more broadly.

It is possible that, in light of the expected increase of claims by Chinese investors arising out of BRI projects, China will begin negotiating new BITs with BRI States or amending existing BITs to ensure that its investors are protected by BITs.

### Conclusion

The BRI will likely have a significant impact on investment arbitration. Chinese arbitration institutions have already adapted their rules in order to hear investor-state disputes. It is also likely that the BRI will cause the number of investment arbitrations in BRI countries to rise. However, the impact of the BRI on investment arbitration may only be known in the years to come.

<sup>12</sup> The award can be accessed in the following link: <http://investmentpolicyhub.unctad.org/ISDS/Details/602>. Annulment proceedings against this award are currently pending.

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