ISDS As a Means of Addressing Challenges for the BRI in Central Asia

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Background

Since its announcement in 2013, China has invested more than US $120 billion into the target countries along the Belt and Road Initiative ("**BRI**") on infrastructure projects ranging from ports and railroads to pipelines. Central Asia will become part of nearly the entire major trade corridor identified under the BRI. Hence the BRI presents a rare opportunity for Central Asian countries to attract foreign investment and to upgrade their Soviet-era infrastructure. Yet, at the Second Belt and Road Forum held in Beijing during the last weekend in April, Chinese President Xi Jinping went to great lengths to reassure foreign leaders, many of them from Central Asia, that the BRI was not a debt-trap amid growing fear of loan defaults in BRI-related projects. Specifically, Xi promised to establish a "debt-sustainability framework" and to encourage compliance with international infrastructure-contracting standards.

These reassurances notwithstanding, the debt fears associated with the BRI are very much alive and are cited by many observers as the primary basis for potential legal disputes arising out of the BRI. Particularly in Central Asia, China's dominance in inbound FDIs and imports means that a number of Central Asian states bear an unusually high debt burden to Chinese investors.[fn]The Council on Foreign Relations have published an index on BRI countries' debt to China. In 2017, debts to China represent 12.1%, 42.3%, 24.0%, 16.9% and 7.1% of GDP for Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan, respectively.[/fn]

This post considers challenges and solutions for these tensions and draws from the analysis presented at a panel discussion called "China's New Route to the Silk Road: Challenges and Opportunities for the Eurasian Region" held in April 2019 in Washington, DC as part of the American Bar Association's Section of International Law Annual Conference ("**ABA Conference**"). The panel consisted of **Olga Boltenko** (Partner, Fangda LLP – Hong Kong), **Matthew Erie** (Associate Professor, University of Oxford), **Dmitry Lysenko** (Counsel, Baker McKenzie LLP – Moscow), **Richard Hoagland** (former U.S. Ambassador), and **Madina Tursunova** (Partner, Legalmax Law Firm – Tashkent), and was moderated by **Diana Tsutieva** (Associate, Foley Hoag LLP – Washington, DC).

A. Challenges Presented by the BRI in Central Asia

Legal disputes arising in the BRI context present several unique challenges:[fn]As many of the

challenges that BRI poses for the Central Asian countries remain uncertain, some of the panelists have interestingly drew comparisons to the experience of some Southeast Asian countries to provide some insights. For example, Sri Lanka's handing over of the Hambantota port to a Chinese SOE for failure to pay off its debt and Malaysia's renegotiation of its East Coast Rail Link suggested that the debt fear would only continue, and that future disputes, especially investor-state ones, would be a very likely outcome.[/fn]

- First, the BRI disproportionately involves state-backed players or sovereign governments themselves. At the ABA Conference, Ms. Boltenko observed that BRI projects are predominantly built by Chinese investors, and such projects are disproportionately backed by Chinese state financiers, especially the China Development Bank, the Silk Road Fund and the China EXIM Bank. On the other side, many of the projects are directly backed or guaranteed by the BRI-targeted countries, especially in Central Asia.
- Second, legal institutions along the BRI routes are still embracing international dispute resolution. It would take time for investors to build confidence in these domestic legal systems. There are also significant challenges created by the different legal systems involved in the cross-border BRI projects. Ms. Tursunova pointed out that the BRI creates significant risks for investors because many of the large projects' contracts are negotiated and executed separately on a country-by-country basis, meaning that investors sometimes have to fight in different fora with different countries at the same time.
- Third, the Chinese's preferred way of friendly consultation, rooted deeply both in culture and in its international legal instruments, remains a barrier for non-Chinese counterparts to bring the Chinese parties before an arbitration panel, rather than a negotiation table. While the Chinese Government has signed dozens of MOUs with BRI countries, these MOUs are not legally binding, and almost none of them introduce any specific or new dispute resolution mechanism. This is not unique for bilateral or multilateral agreements signed between China and Central Asian countries. As pointed out by Mr. Lysenko at the ABA Conference, no agreement within the Eurasian Union framework or any of the economic cooperation agreements between Russia and the Eurasian countries contain any form of binding dispute resolution mechanism.

B. Possible Solutions

Faced with these unique challenges, the choice on venues and choice of the appropriate dispute resolution mechanism are critical questions.

1. Venues for Dispute Resolution

Both China and the Central Asian countries recognize the potential of BRI disputes. China has been establishing ISDS options, including the establishment of a new International Commercial Court and CIETAC's publication of new investment arbitration rules. At the same time, two newly established arbitration centers are filling in the vacuum in Central Asia, *i.e.*, the Astana International Financial Centre (AIFC) and International Arbitration Centre and the Tashkent International Arbitration Centre (TIAC).

However, as discussed previously on this Blog, while the Chinese and Central Asian governments have high hopes for the value of these new institutions, many traditional challenges associated with these options, including perceived lack of trust, transparency or judicial experience, cannot be effectively addressed any time soon.

As such, it remains unlikely that major players would choose these new institutions over more established arbitration seats, given that the new institutions not only lack experience and expertise, but also could see potential difficulties for parties in enforcing their awards. In my view, the preferred venues would likely continue to be HKIAC and SIAC, where BRI-oriented programs and rules are well-established. Through its BRI Commission the ICC could also see an increased caseload based on disputes coming out of this Central Asian region.

2. **Protection through Regional BITs**

In addition, BITs are particularly valuable for addressing cross-border disputes. As recognized by some, consistent with the rise of Chinese outbound investment and the development of BRI, Chinese investors may increasingly choose to take advantage of protection measures under international investment treaties for their investments. This trend arguably reassures Chinese investors in using dispute resolution mechanisms in BITs to resolve BRI disputes.

Within the Central Asian region, China has BITs with the following countries:

		BIT with China	Effective date	Generation
Central Asian countries	Kazakhstan	Y	1994	2nd
	Uzbekistan	Y	2011 (updated)	3rd
	Kyrgyzstan	Y	1995	2nd
	Turkmenistan	Y	1995	2nd
	Tajikistan	Y	1994	2nd
	Afghanistan	X	–	–
Caspian countries/regional players	Russia	Y	2009	3rd
	Turkey	Y	1994	2nd
	Iran	Y	2005	3rd
	Azerbaijan	Y	1995	2nd
	Armenia	Y	1995	2nd
	Georgia	Y	1995	2nd
	Mongolia	Y	1993	2nd

A key issue with the many BITs that China signed with Central Asian countries is that they are mostly the so-called 2nd generation BITs, those that was negotiated and signed by China and its partners during the 1990s after China accession to ICSID.[fn]See also Gallagher & Shan, China Investment Treaties: Policies and Practice, Oxford University Press 2009.[/fn] These 2nd generation BITs provide better protection for investors under the National Treatment standard. While 2nd generation BITs are not as toothless as the 1st generation ones, which usually cover amount-of-compensation disputes arising out of expropriation cases only, the terms of these 2nd generation BITs remain vague and are difficult to interpret. Chinese BITs also did not adopt the U.S. model of using negative lists for BIT negotiations until the late 2000s.

While these Chinese BITs, as do many legal instruments executed by the Chinese government, have their unique “Chinese characteristics”, including the emphasis on consultation and mediation, and

many carve-outs for investment protections (especially in the older BITs), they do provide a framework for investors to seek relief from State actors. For example, Huawei's recent attempt to build a case against the Czech Republic under the China-Czech BIT could be seen as a bellwether on the potential for settling BRI disputes under IIAs.

Concluding Thoughts

While Chinese BITs are often textually ambiguous and frequently overlooked, they do provide an available avenue for ISDS under the BRI framework. As debt fear continues and legal uncertainty persists, BIT-based dispute resolution in traditional venues might be one of the more credible choices for ISDS in the region.