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Chinese Investments in Latin America: Disputes along the Non-Conventional Belt and Road

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Introduction

In October 1865, Sir Robert Hart, a former British diplomat and by then an official in the Qing Chinese Government, wrote to Empress Dowager Cixi expressing his opinion that China should desperately seek progress through investments in mining, the telegraph, the telephone and especially in railways. The reaction of Empress Cixi's closest advisors was harsh. The words of Earl Li well describe the mood of Chinese officials towards the measures Hart advocated: "they deface our landscape, invade our fields and villages, spoil our *feng-shui*, and ruin the livelihood of our people".[1)]

Who could imagine that, 150 years later, China would be the world's most passionate advocate of the same progress it once admonished. With the Belt and Road Initiative (BRI), China unleashes a bold plan to invest between US$ 1 and 8 trillion in infrastructure and other means to connect over 65 different countries which collectively represent more than 60% of the global population and 30% of global GDP.

Conventionally, the BRI refers primarily to the terrestrial *belt* linking China to Central and South Asia and onward to Europe, and the maritime *road* linking China to the nations of South East Asia, the Gulf Countries, North Africa and on to Europe. And yet recent statements by President Xi Jinping and a declaration signed during the Second China-CELAC Ministerial Forum in January 2018 indicate that Latin America is a "natural extension" of the Maritime Silk Road. In fact, over the past 10 years, Latin America has been second only to Asia as a destination of Chinese investments. This is why one can also think of a *non-conventional* BRI, one more associated to a *mindset* than to a strict geopolitical plan of investments.

The purpose of this article is not to offer a one-size-fits-all dispute resolution method for conflicts arising from the *non-conventional* BRI, but rather to raise some of the issues that might be addressed in the future on a case-by-case basis.

Judiciary or Arbitration?

The less likely dispute resolution mechanism to be sought in BRI disputes is the Judiciary. With the exception of Mexico, no Latin American country has ratified the Hague Choice of Court

Convention. China, on the other hand, signed it in 2017, but has not yet ratified it. That means that starting proceedings in the court of choice will not prevent any of the parties from starting proceedings in the courts of their own state.

What is more, the choice of court is a "tough sell", especially when it falls upon the national courts of one of the parties' state. Lack of impartiality will often be raised, be it because of the weak civil justice system in some Latin American countries, be it, in the case of China, because of the direct submission of the Supreme People's Court (SPC) to the Standing Committee of the National People's Congress (article 67[6] of the Constitution of the People's Republic of China).

With the recent creation of the China International Commercial Courts (CICC) in Shenzhen and Xi'an, China proposes a one-stop platform for BRI disputes. However, these courts hardly qualify as "international": they have no foreign judges and only Chinese law-qualified lawyers are allowed to represent the parties. Besides, saving rare exceptions, even if the parties choose the CICC to solve their conflicts, there is a threshold of RMB 300 million (approximately USD 42 million) for a case to be heard.

Regardless, the CICC will still play an important role in BRI disputes, especially given their jurisdiction to hear cases "involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards" (article 2[4] of the CICC provisions).

That leaves the parties with arbitration. Though mediation and other amicable methods of dispute resolution should evidently be encouraged, a provision for arbitration in case those methods fail is highly desirable. Arbitration is perhaps the only stable and predictable framework for solving disputes involving so many different nationalities and geopolitical interests.

Investment and Commercial Arbitration

Despite the fact that most Latin American states offer great resistance to the ICSID state-investor dispute mechanism, many of them have signed Bilateral Investment Treaties with China that are still in force, such as Argentina, Barbados, Bolivia, Chile, Colombia, Cuba, Ecuador, Guyana, Mexico, Peru, Trinidad and Tobago and Uruguay. An important exception is Brazil, China's largest partner in the region, having received a staggering 55% of all Chinese investment in Latin America over the past 10 years.

Therefore, BRI disputes may give rise to investment or commercial arbitration, depending on the existence of said treaties and on the nature of the dispute.

Seats

BRI disputes will likely have a foreign element, allowing for arbitration either in mainland China or abroad. In addition, the SPC tends to adopt a more liberal interpretation of the term "foreign-related relationship" when faced with BRI disputes (see Typical Case 12, *Siemens v. Golden Landmark*).

Choosing a seat in mainland China narrows the choice of institutions. Foreign institutions are not considered *arbitral commissions* according to article 10 of the People's Republic of China's (PRC) Arbitration Law. In general, they cannot administer arbitration proceedings on the Mainland, even though case law seems to be evolving towards a more liberal view (see *Duferco SA. v. Ningbo Arts*

& Crafts. Imp. & Exp. Co. Ltd.). Choice of seat also attracts the PRC Arbitration Law to the procedure, which entails relevant differences in relation to the UNCITRAL Model Law (largely adopted in Latin American countries).

The main differences are: (i) no *ad hoc* arbitration is allowed, (ii) the *Kompetenz-Kompetenz* principle is a matter for the arbitral institution rather than for the arbitral tribunal (there can be delegation, though), (iii) the time limit to challenge arbitral jurisdiction is *until before the first hearing* rather than *not later than the submission of the statement of defence* (Model Law), (iv) applications for interim measures or preliminary orders are submitted by the Parties to the arbitral institution, which shall submit them to the competent court; neither the institution nor the tribunal can issue such orders, (v) the presiding arbitrator is either chosen jointly by the parties or by the chairman of the arbitral institution; not by the co-arbitrators, and (vi) the time period to apply for an award to be set aside is 6 months, instead of the 3 months provided by the Model Law.

Finally, the choice of seat entails the court's jurisdiction to set aside the award. A Chinese court may not set aside a foreign award (to which enforcement can still be denied), yet it may set aside a domestic award or a foreign-related award issued in mainland China. In either case, for the award to be set aside or denied enforcement, the Prior Reporting System requires a decision from the SPC.

Provided that Latin American parties have the necessary leverage to negotiate arbitration agreements with their Chinese counterparts, traditional seats such as London, Paris, Hong Kong and Singapore will likely be sought (arbitration in a US seat is seldom accepted by Chinese parties). This is especially true given that China is a contracting party to the New York Convention, allowing for foreign awards to be enforced on the Mainland as long as they are issued in the territory of another contracting party.

Institutions

International arbitral institutions soon realised the importance of tending to BRI disputes.

With offices in the Shanghai Pilot Free Trade Zone (FTZ), in Hong Kong and in Singapore, the ICC has created a Belt and Road Commission[2)] to raise awareness of the Court as "the go-to" institution for BRI disputes.

After opening a representative office in Shanghai FTZ in 2016, SIAC has recently signed a MOU with CIETAC to promote joint efforts to provide services to BRI players.

HKIAC has a Belt and Road Advisory Committee in place and extensive experience administering arbitrations involving Chinese and non-Chinese parties.

If the LCIA lags behind in terms of specific efforts to market itself as an option to BRI countries, it still draws particular strength from the fact that parties in all regions see London as a preferred seat, according to recent research.

On the other hand, when it comes to the *non-conventional* Belt and Road, especially when Latin American parties are involved, the ICC is by far the institution with the closest connection to the region.

In 2017, none of the top 10 foreign users of SIAC or of the LCIA were from Latin America. The

same goes for the HKIAC in 2016 (last available report). At the ICC, however, parties from Latin America and the Caribbean held an impressive share of 15.8% in 2017, with Brazil ranking fourth with 115 parties and Mexico holding the twelfth place with 55 parties. Furthermore, it is the only institution with an office in Latin America (São Paulo), not to mention its national committees in 15 Latin American countries.

Conclusion

As Confucius teaches us, "[r]eal knowledge is to know the extent of one's ignorance". It is still early to assess the future of BRI disputes and thus it is quite important to keep an open mind at this point. The sage also said that wisdom may be learned by three methods: "first, by reflection, which is noblest; second, by imitation, which is easiest; and third, by experience, which is the most bitter". This may be a good beacon to the (belt and) road that lies ahead.

References

?1 This episode is described in the biography “Empress Dowager Cixi: The Concubine Who Launched Modern China”, by Jung Chang.

?2 An important disclaimer: the author of this article is an ambassador to said Commission.

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