



# RESEARCH BRIEF

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## Update on the China International Commercial Court

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### Key Points:

- China is establishing an international commercial court to facilitate cross-border commercial transactions.
- The expanding Chinese judiciary is part of a broader debate on China's global governance.
- Questions remain as to the operation of the court given its integration of litigation, mediation, and arbitration mechanisms.
- The CICC No. 2 in Xi'an held its first trial on May 29, 2019.

In 2018, China began setting up the China International Commercial Court (CICC), the first judicial institution in the People's Republic of China (PRC) specifically designed to adjudicate cross-border commercial disputes touching on matters of foreign law. The CICC is also regarded as the first legal institution designed to support

the "Belt and Road Initiative," China's multi-trillion dollar project to promote economic integration across Eurasia, and beyond, through infrastructure and energy projects as well as digital connectivity. The BRI has generated a lively debate about whether China provides an "alternative Asian model" of development or whether it is a "neo-colonial power." The CICC has become one focus of this debate in terms of China's judicial influence, a possibility with implications for global governance. Supporters hail "BRI jurisprudence" as a means for developing nations' to introduce their norms to the global level;<sup>1</sup> critics view the CICC as a possible extension of Chinese political control beyond the borders of the PRC.<sup>2</sup>

In an earlier essay,<sup>3</sup> I have written about the basic structure of the CICC, its jurisdiction, enforcement concerns, and specific issues such as procedural

<sup>1</sup> See e.g., Joel Slawotsky, *The Longer-Term Ramifications of China's BRI Jurisprudence*, LAW AT THE END OF THE DAY (ed. Larry Cata Backer) (Apr. 15, 2019), <http://lcbackerblog.blogspot.com/2019/04/joel-slawotsky-longer-term.html>.

<sup>2</sup> See e.g., David Rennie, *A Belt-and-Road Court Dreams of Rivalling the West's Tribunals*, THE ECONOMIST (June 6, 2019),

<https://www.economist.com/china/2019/06/06/a-belt-and-road-court-dreams-of-rivalling-the-west-s-tribunals>.

<sup>3</sup> Matthew S. Erie, *The China International Commercial Court: Prospects for Dispute Resolution for the 'Belt and Road Initiative'*, ASIL INSIGHTS, (Aug. 31, 2018), <https://www.asil.org/insights/volume/22/issue/11/china-international-commercial-court-prospects-dispute-resolution-belt>.

language, foreign expertise, and intake. In this Research Brief, I want to update that earlier essay and to briefly discuss the most recent regulations that further define the structure and operations of the CICC and the first batch of cases accepted by the courts.

By way of background, the CICC, a product of regulations issued by the Supreme People's Court (SPC), is billed as a "one-stop shop" (*yizhanshi*) for resolving "international commercial disputes" of amounts of over 300 million yuan, between Chinese parties and their counterparts, through litigation, arbitration, and mediation.<sup>4</sup> There are two observations about its jurisdictions: one, the CICC is intended for cases not limited to those stemming from the BRI. Two, the CICC is not mandatory for BRI deals; rather it is one option amongst an increasingly competitive field of dispute resolution forums in Asia. As such, the CICC is part of a new generation of hybrid dispute resolution mechanisms, part of what I the "new legal hubs."<sup>5</sup> The CICC seeks to draw on the strengths of different channels of dispute settlement, yet in doing so, there is some lack of clarity. Confusion is apparent in the name of the institution. Whereas the SPC has translated the institution's English name as "courts," in reality, they are "tribunals" (*fating*) as the SPC has authority only to establish tribunals and not

courts. The difference is that a decision of a tribunal is effectively a decision of the SPC, and there is no appeal, although parties can apply for a retrial in the SPC's No. 4 Civil Division.

In terms of venue, the CICC is comprised of two courts, one in Shenzhen ("No. 1") and the other in Xi'an ("No. 2"). These two municipalities correspond to the maritime "road" and the overland "belt," respectively. In terms of dispute settlement, on the litigation side, the courts feature fifteen judges, all from the SPC. To internationalize the institution, the CICC also features an International Commercial Expert Committee of twelve PRC and twenty non-PRC legal professionals, experts mainly in mediation and arbitration.

In the latter half of 2018, the SPC issued a number of regulations that provide further details about the workings of the CICC. The most notable features are the following:

1. According to the "Notice Regarding the First Batch of "One-Stop Shop" International Commercial Disputes [to be Settled] by an International Commercial Arbitration and Mediation Organ under the Plural Resolution Mechanism,"<sup>6</sup> the CICC coordinates with other arbitral and mediation institutions, including the China International Economic and Trade Commission, the Shanghai

<sup>4</sup>Zuigao renin fayuan guanyu sheli guoji shangshi fating ruogan wenti de guiding (最高人民法院关于设立国际商事法庭若干问题的规定) [Regulations on Certain Issues in Establishing an International Commercial Court], passed by the Supreme People's Court Judiciary Committee on June 25, 2018 and effective July 1, 2018, arts. 2, 3 and 11.

<sup>5</sup> Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, VA. J. INT'L L. (forthcoming) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3333765](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3333765)).

<sup>6</sup>Guanyu queding shoupi naru "yizhanshi" guoji shangshi jiufen duoyuanhua jie jue jizhi de guoji shangshi zhongcai jiti tiao jie jigou de tongzhi (关于确定首批纳入 "一站式" 国际商事纠纷多元化解决机制的国际商事仲裁及调解机构的通知) [Notice Regarding the First Batch of "One-Stop Shop" International Commercial Disputes [to be Settled] by an International Commercial Arbitration and Mediation Organ under the Plural Resolution Mechanism], issued by the Supreme People's Court on Nov. 13, 2018 and effective on Dec. 5, 2018.

International Arbitration Center (SHIAC), the Shenzhen Court of International Arbitration, the Beijing International Arbitration Centre, the China Maritime Arbitration Commission, the China Council for the Promotion of International Trade (CCPIT) Mediation Center, and the Shanghai Commercial Mediation Centre.

2. Pursuant to the “(Trial) Notice of the General Office of the SPC’s Working Rules for the International Commercial Expert Committee,” the members of the International Commercial Expert Committee serve a four-year term, are appointed by the SPC, and are serving mainly a mediation function.<sup>7</sup>
3. The “(Trial) Notice of the SPC on the Rules of Procedure of the International Commercial Court” specifies pre-trial mediation as an initial procedure, which parties may opt out of.<sup>8</sup>
4. There is a “case management office” to coordinate dispute resolution between the different channels of dispute resolution.

There are a number of implications of and questions raised by the regulations. First, as each of the arbitration and mediation institutions is a domestic PRC organ, it is clear that the CICC operates as a platform to further internationalize these institutions. Second, procedurally and institutionally, there is an emphasis on mediation. This emphasis accords with the creation of the

International Commercial Dispute Prevention and Settlement Organization, under the CCPIT, announced at the Second Belt and Road Forum for International Cooperation in Beijing on April 25-27, 2019.<sup>9</sup> While details about this most recent institution are forthcoming, it is known that it will prioritize mediation.

However, the relationship between the CICC and the existing institutions is still nascent. Specifically, it is unclear why parties would opt for arbitration under, for example, SHIAC via the CICC when they could go directly to SHIAC. It is further unclear if an award given by a body like SHIAC would be converted to or recognized as a judgment by the SPC and, second, what this recognition would give the parties provided that arbitral awards given by arbitration institutions have greater likelihood of enforcement abroad under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards than do SPC judgments. This matters when drafting the dispute resolution clause in the relevant commercial contracts. To date, CICC has not issued language for a model clause, as is customary among arbitration institutions. Additionally, it is uncertain, given that the CICC has privileged party autonomy, what the role of the “case management office” is.

<sup>7</sup>Zuigao renmin fayuan guoji shangshi zhuanjia weiyuanhui gongzuo guize (shixing) de tongzhi (最高人民法院国际商事专家委员会工作规则（试行）的通知) [(Trial) Notice of the General Office of the SPC’s Working Rules for the International Commercial Expert Committee], issued by the Supreme People’s Court on Nov. 21, 2018 and effective on Dec. 5, 2018, arts. 3, 5, and 10.

<sup>8</sup>Zuigao renmin fayuan guoji shangshi fating chengxu guize (shixing) (最高人民法院国际商事法庭程序规则

（试行）的通知) [(Trial) Notice of the SPC on the Rules of Procedure of the International Commercial Court], issued by the Supreme People’s Court on Nov. 21, 2018 and effective on Dec. 5, 2018, ch. 4.

<sup>9</sup>List of Deliverables of the Second Belt and Road Forum for International Cooperation (Apr. 27, 2019), <http://www.beltandroadforum.org/english/m100/2019/0427/c36-1312.html>.

On December 29, 2018, the CICC announced it has received its first batch of cases.<sup>10</sup> The Shenzhen court has received approximately five cases and the one in Xi'an approximately four. All of these were cases that had been received by the SPC and were subsequently handed down to the CICC, as no case yet is the result of specification for the CICC in the parties' contracts. This pattern is not surprising for international commercial courts. For instance, it took the Singapore International Commercial Court (SICC) some three years before it heard its first case that was the result of the parties choosing the SICC as their forum for dispute resolution. Prior to that, the SICC received all its cases by transfer from the Singapore High Court.

In terms of the nature of disputes, three of the Shenzhen cases concern applications concerning the validity of arbitration agreements, one is a dispute over product liability and another concerns unjust enrichment. For the Xi'an cases, two concern disputes over liability for damage of a company's interests and the others concern equity determination and profit distribution disputes.<sup>11</sup> Interestingly, none of the cases is necessarily a "BRI dispute;" for example, a Xi'an case is a continuation of a drawn-out legal battle between Thailand-based T.C. Pharmaceutical Industries Co. Ltd. (which makes the energy drink Red Bull) and its Chinese counterpart.

On May 29 the CICC No. 2 in Xi'an held its first trial in the case of *Ruoychai International Group Co. Ltd. vs. Red Bull Vitamin Drink Ltd. Co. and Inter-Biopharm Holding Ltd.*<sup>12</sup> The hearing centered on the issue of the shareholder qualifications of Ruoychai International Group Co. Ltd. and Inter-Biopharm Holding Ltd. in the Chinese company Red Bull Vitamin Drink Co. Ltd. The hearing, held before five judges, and argued by lawyers from King & Wood (*Jin Du*), Global Law (*Hua Qiu*), and Han Kun, lasted about four hours. Perhaps more interesting than the substance of the hearing were the accompanying procedures: the hearing was preceded by a press conference for domestic and foreign reporters and the hearing itself was broadcast live by webcast. Such measures demonstrate the CICC's strong commitment to transparency, with transparency as a precondition for legitimacy in the eyes of international audiences.

Looking ahead, it is likely that the CICC will grow slowly. Among seasoned lawyers in China, there is skepticism towards the CICC as to whether it can gain international legitimacy and also provide dispute resolution services that are otherwise unmet by existing options for international commercial arbitration. This is somewhat striking given that in the U.S. and its allies, among some experts, there is a kind of fascination with the

<sup>10</sup> Zhongguo guoji shangshi fating (中国国际商事法庭) [China International Commercial Court], *Zuigao fayuan guoji shangshi fating yi shouli yipi guoji shangshi jiu fen anjian* (最高法院国际商事法庭已受理一批国际商事纠纷案件) ["The SPC's CICC already received its first batch of international commercial dispute cases"], ZHONGGUO GUOJI SHANGSHI FATING (中国国际商事法庭) [China International Commercial Court] (Dec. 12, 2018), <http://cicc.court.gov.cn/html/1/218/149/192/1150.html>.

<sup>11</sup> *Id.*

<sup>12</sup> Zhongguo fayuan wang (中国法院网) [China Court Net], *Guoji shangshi fating "di yi pi chui" wenzi shilu* (国际商事法庭 "第一批槌" 文字实录) [China International Commercial Court's First Batch Gavel: A Written Record], WEIXIN (微信) [Micro-Letters] (May 30, 2019), [https://mp.weixin.qq.com/s?\\_\\_biz=MzU2OTM2MTcwNw==&mid=100009904&idx=1&sn=0e6a9d6ae58c6d2ce1fdccb6f643649c&chksm=7cfd73f44b8afae22be7c6c3c3d4f60762ea906fa871c2b4f8aa5a33f22b0dda74b4e861162&mpshare=1&scene=1&srcid=0529aaw8MkQDAJqKYSQfXoUL%23rd](https://mp.weixin.qq.com/s?__biz=MzU2OTM2MTcwNw==&mid=100009904&idx=1&sn=0e6a9d6ae58c6d2ce1fdccb6f643649c&chksm=7cfd73f44b8afae22be7c6c3c3d4f60762ea906fa871c2b4f8aa5a33f22b0dda74b4e861162&mpshare=1&scene=1&srcid=0529aaw8MkQDAJqKYSQfXoUL%23rd).

institution.<sup>13</sup> Nonetheless, beyond the symbolism of establishing an international commercial court, the CICC will potentially serve as a learning device writ large, a means of two-way socialization to both increase foreign parties' awareness of and appreciation for Chinese legal institutions and Chinese legal and judicial experts' exposure to best practices in international commercial law.

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<sup>13</sup> See Slawotsky *supra* note 1.