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International Commercial Courts And The Interplay Between Realism And Institutionalism – A Look At China And Singapore

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INTERNATIONAL COMMERCIAL COURTS AND THE INTERPLAY BETWEEN REALISM AND INSTITUTIONALISM – A LOOK AT CHINA AND SINGAPORE

I. INTRODUCTION

International commercial courts reflect the role of the state in administering public and private goods to the international and domestic community, and reflect the interplay between realism and institutionalism in its transboundary economic relations. International economic law and relations are historically built on a realist foundation under the Westphalian system[1] as states seek to cannibalise and extend their market share of trade and investment flows in an ostensible zero-sum game. Consequently, international commercial disputes between private actors have been largely resolved by state courts with reference to the respective forum's conflict of law rules or alternatively by commercial arbitration.

At the same time, increasing economic globalization and regionalism with a high mobility of capital have fostered competition amongst legal systems in the setting of global governance standards.[2] Cross-border economic transactions and activities also trigger the regulatory interests and jurisdiction of more than one state, catalyzing regulatory competition and jurisdictional conflicts amongst states. This globalization of the marketplace has generated a need for "global governance" for the transboundary settlement of disputes in accordance with the institutionalist tradition in international

[1] See Anne-Marie Slaughter, 'International Relations, Principal Theories' in *Max Planck Encyclopedia off Public International Law* (2011).
[2] Matthias Herdegen, *Principles of International Economic Law* (Oxford University Press 2016) at 22-23.

relations.[3] This is best exemplified by the establishment of the International Centre for Settlement of Investment Disputes for the resolution of state-investor disputes.[4]

In the absence of an international treaty establishing a genuinely international (or supranational) commercial court, in the truest sense of the word,[5] 'international' (or may be more appropriately termed 'transnational') commercial courts (ICCs) have been set up by individual states to fill in the void. Being "particularly attuned to the needs and realities of international commerce", as the Singapore Chief Justice has noted,[6] they purport to administer rules and decision-making procedures to mitigate the effects of economic anarchy, and facilitate cooperation amongst state investors to exchange mutual benefits in pursuit of common ends and market access by reducing their transaction costs of doing so.[7] In this sense, ICCs are akin to the institutionalist school of thought insofar as they serve (or purportedly serve) to facilitate the governance of cross-border private or transactional relations between state nationals and indirectly enhance trade and investment and welfare gains between states. One would think, however, that the provision of a transnational infrastructure delivering centralized private dispute settlement and enforcement would solely benefit private traders, and would not incentivize states to invest in such a public good.[8] The question, therefore, is what is the state's interest in assuming jurisdiction for disputes it would otherwise have little connection to?

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[3] See Slaughter, *supra* note 1.
[4] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965* (1965) 4 ILM 524.
[5] Maren Heidemann, *Transnational Commercial Law* (Macmillan 2019) at 19.
[6] Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution", Opening lecture for the DIFC Courts Lecture Series 2015, at para 17, https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf.
[7] "International Commercial Courts: Unicorns on a Journey of a Thousand Miles", Address by Justice Kannan Ramesh, Conference on the Rise of International Commercial Courts in Qatar, https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/international-commercial-courts-unicorns_23108490-e290-422f-9da8-1e0d1e59ace5.pdf.
[8] Heidemann, *supra* note 5 at 25.

II. CHINA INTERNATIONAL COMMERCIAL COURT

It is a fair assumption that every state has her own objectives in setting up ICCs, which serve both public (or state) and private interests. In the case of China, it is the need to balance the protection of local industries from legal risks and harm by foreign competitors and the encouragement of trade and investment flows across its borders as part of the Belt and Road Initiative (BRI). These twin realist and institutionalist objectives have filtered into the design and constitution of the CICC itself,[9] which may be viewed in the context of a rising China as an increasingly assertive economic actor on the world stage. A beneficiary of the liberal international order, China is an active player in the WTO dispute settlement mechanism, but where strategic issues of its sovereignty are concerned, it is generally resistant to international adjudication and prefers consensual diplomatic approaches, as seen in its handling of the South China Sea disputes. China has thus been prepared to accept adjudicative methods of dispute settlement – as opposed to its traditional preference for diplomatic means – when it considers the benefits to outweigh the political and economic costs of doing so.[10]

In this regard, some are of the view that the CICC, along with the BRI, is China's institutionalist contribution to "global governance"[11] by facilitating inclusive cooperation between public and private actors in the areas of policy coordination, facility

[9] See Zachary Mollengarden, '"One-Stop" Dispute Resolution on the Belt and Road: Toward an International Commercial Court with Chinese Characteristics" (2019) 36 Pacific Basin Law Journal 6.
[10] Harriet Moynihan, China's Evolving Approach to International Dispute Settlement (Chatham House 2017), https://www.chathamhouse.org/sites/default/files/publications/research/2017-03-29-chinas-evolving-approach-international-dispute-settlement-moynihan-final.pdf.
[11] Gong Hongliu, 'The Belt and Road Initiative (BRI): A China-specific Approach for Global Governance' (2018) 8 Journal of WTO and China 36. See also Meng Chen, *The Reforming Chinese Chapter of International Dispute Resolution Under The Belt And Road Initiative* (2019) The Pacific Review, DOI: 10.1080/09512748.2019.1677749; Jinghou Tao & Mariana Zhong, 'Resolving Disputes in China: New and Sometimes Unpredictable Developments' in Peter Quayle & Xuan Gao (eds), *International Organizations and the Promotion of Effective Dispute Resolution* (Brill 2019).

connectivity, trade and investment, financial integration and people-to-people bonds, as the five stated objectives of the BRI.[12] In 2015, the Supreme People's Court (SPC) issued an opinion calling upon Chinese courts to improve their adjudicatory functions under the BRI – in particular, it provided that the adjudication of international commercial disputes is subject to the principle of equal protection and international customs in the determination of appropriate jurisdiction.[13] Zhang argues that China is likely to invest heavily in two key areas in the near future: (i) regionalism in East Asia and Central Asia, and (ii) interregional cooperation and coordination, both of which are integrated into the BRI.[14]

At the same time, China skeptics question whether the BRI is a geopolitical tool for China to extend its dominance by building a separate and parallel system of governance. As an important economic player and exporter of capital, China faces an increasing risk of international disputes and conflicts in the near future and the need to protect its economic investments overseas, in light of the BRI and its experience with the US-China trade war.[15] China is ranked second in FDI outflow, behind Japan, and needs to safeguard its investments and assets overseas.[16] Consequently, the CICC has a strategic meaning for China though its role in protecting the interests of domestic companies and moving the focus of China-related dispute resolution to

[12] 'Vision and Actions on Jointly Building the Silk Road Economic Belt and the 21st-Century Maritime Silk Road', jointly issued by the National Development and Reform Commission, the Ministry of Foreign Affairs and the Ministry of Commerce on 28 March 2015.
[13] 'Several Opinions on Providing Judicial Services and Safeguards by the People's Court for Building the "Belt and Road"', Fa Fa [2015] No. 9, issued by the SPC on 16 June 2015.
[14] Shiping Tang, 'China and the Future International Order(s)' (2018) 21 Ethics & International Affairs 31 at 40.
[15] Jiangyu Wang, 'Between Power Politics and International Economic Law: Asian Regionalism, the Trans-Pacific Partnership and U.S.-China Trade Relations' (2018) 30 Pace International Law Review 383.
[16] UNCTAD, 'Global Foreign Direct Investment Slides For Third Consecutive Year' (12 June 2019), https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2118.

China.[17] Overseas investors have previously avoided submitting commercial disputes with Chinese companies to the jurisdiction of Chinese courts, and have instead relied on litigation or arbitration outside China. This, Chinese companies fear, places them in a disadvantageous position. It has thus been observed that the CICC is part of an initiative to safeguard the interests of the large numbers of Chinese firms actively participating in BRI trade and investment projects, under which it can design the rules and procedures suited for the Chinese context.[18] In short, the CICC is an insurance policy to mitigate the legal risks for Chinese businesses arising from the BRI and enhance their bargaining power. Concurrently, the CICC is also a pilot programme for China to increase its international legitimacy and demonstrate its capacity to establish a credible dispute resolution institution and modernize its legal system, as well as gain further leverage in international business activities.[19] This matters because the continued capacity of China to integrate successfully into the global economy and sustain its legitimacy with the West depends on whether it can effect structural change to its national constitutional order for an effective market economy. Questions may therefore be raised about whether the CICC's constitution and structure are sufficiently robust to meet global governance standards and the rule of law? The answers to this would determine whether the CICC and the broader BRI would fulfil their objectives of building China's international legitimacy.

[17] See Matthew S Erie, 'The China International Commercial Court: Prospects for Dispute Resolution for the "Belt and Road Initiative"' (ASIL Insights, 31 August 2018), https://www.asil.org/insights/volume/22/issue/11/china-international-commercial-court-prospects-dispute-resolution-belt.
[18] Dr Stephan Wilske, International Commercial Courts and Arbitration – Alternatives, Substitutes or Trojan Horse? (2018) 11 Contemporary Asia Arbitration Journal 153.
[19] *Ibid.*

III. COMPARISON WITH THE SINGAPORE INTERNATIONAL COMMERCIAL COURT

With this framework in mind, one may juxtapose the CICC with its other Asian counterpart, the Singapore International Commercial Court (SICC) that was set up three years earlier and served as a model for the CICC. Both the Singapore and Chinese judiciaries have stepped up mutual exchanges and cooperation under the BRI[20] and signed a Memorandum of Guidance on the Recognition and Enforcement of Money Judgments in Commercial Cases in 2018.[21] A fair amount has been written about the SICC and this paper does not purport to survey the existing literature.[22] As compared with the relatively opaque objectives of the CICC, the SICC was set up for the clear purpose of positioning Singapore as a centre for commercial dispute resolution and reputable neutral third party forum as an alternative to international arbitration in view of the surge in economic activity in Asia, following the success of the Singapore International Arbitration Centre and the launch of the Singapore International Mediation Centre.[23] As a small trading state, Singapore is a strident defender of the international rule of law[24] and a beneficiary of the international dispute

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[20] Opening Address by Singapore Senior Minister of State for Law and Health Edwin Tong at the China-Singapore International Commercial Dispute Resolution Conference (Beijing, China, 24 January 2019), https://www.gov.sg/~/sgpcmedia/media_releases/minlaw/speech/S-20190124-1/attachment/SMS%20Speech%20China%20Singapore%20International%20Commercial%20Dispute%20Resolution%20Conference%20240119%20.pdf.

[21] Supreme Court, 'Enforcement of Money Judgments', https://www.supremecourt.gov.sg/publications/enforcement-of-money-judgments.

[22] Gary F Bell, 'The New International Commercial Courts – Comparing with Arbitration? The Example of the Singapore International Commercial Court' (2018) 11 Contemp. Asia Arb. J. 193; Man Yip, 'The Singapore International Commercial Court: The Future of Litigation?' (1 October 2019) (2019) 12 Erasmus Law Review, available at SSRN: https://ssrn.com/abstract=3479250; Andrew Godwin, Tan Ramsay & Miranda Webster, 'International Commercial Courts: The Singapore Experience' (2017) 18 Melbourne Journal of International Law 219; Man Yip, 'The Resolution of Disputes before the Singapore International Commercial Court' (2016) 65 ICLQ 439.

[23] Supreme Court, 'Response by Chief Justice Sundaresh Menon Opening of the Legal Year 2015 (5 August 2015), https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sjc/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015-(final).pdf; SICC, 'Establishment of the SICC', https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc.

[24] Grace Ho, 'International rule of law an existential necessity for small states like Singapore: CJ Sundaresh Menon' *The Straits Times* (15 October 2019).

settlement process.[25] Both countries are highly dependent on trade, but given the relative disparity in size between both economies, Singapore is much more vulnerable to protectionist measures and is highly dependent on the inflow and outflow of goods and services. Singapore, in fact, imports more services than it exports[26] and is ranked as the most open and competitive economy in the world.[27] The institutional design of the SICC itself reflects the open characteristics of Singapore's economy and outlook. The following provides a non-exhaustive summary of the salient differences between the CICC and SICC.

Table 1: Summary of Key Differences between the SICC and CICC

	Jurisdiction	**International Judges**	**Foreign Lawyers**	**Language of Proceedings**	**Appeal**
SICC	Forum-acentric	Yes	Yes	English	Yes
CICC	Forum-centric	No	No	Chinese	No

A. Jurisdiction

The issue of the CICC's jurisdiction is presently not entirely clear, but a few observations may be made. As its jurisdictional rules stem from a judicial interpretation issued by the Supreme People's Court, it is technically subject to the broad civil procedural rules under the Civil Procedure Law. Under the *Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International*

[25] Tommy Koh, 'Singapore and International Law: A 50 Year Review' (Centre for International Law 2015), https://cil.nus.edu.sg/wp-content/uploads/2015/10/Tommy-Koh-Speech-Singapore-and-International-Law-A-50-Year-Review.pdf.

[26] Singapore Department of Statistics, 'Singapore's International Trade', https://www.singstat.gov.sg/modules/infographics/singapore-international-trade.

[27] World Economic Forum, 'The Global Competitiveness Report 2019' (2019), http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf.

Commercial Courts ("CICC Provisions"), the CICC has jurisdiction over five types of cases:

(i) first-instance international commercial cases where the parties have, in accordance with Article 34 of the Civil Procedure Law, agreed to select the jurisdiction of the Supreme People's Court and where the subject amount is at least RMB 300 million;

(ii) first-instance international commercial cases where a high people's court has jurisdiction but believes that it is necessary for the Supreme People's Court to handle the case and obtains permission [to transfer the case];

(iii) first-instance international commercial cases that have a significant impact on the country as a whole;

(iv) [cases] where preservation [of evidence, property, etc. before or during] arbitration is applied for in accordance with Article 14 of these Provisions, or where revocation or enforcement of an international commercial arbitral award is applied for [in accordance with the same provision]; and

(v) other international commercial cases that the Supreme People's Court believes should be handled by an international commercial court.[28]

[28] Article 2.

On a plain reading, these provisions reflect forum centricity by largely requiring cases to have an actual connection with China notwithstanding the broad definition of an "international commercial case" under Article 3 of the CICC Provisions.[29] With respect to (i), notwithstanding a consensual agreement between the parties, the CICC is only seized of jurisdiction if Article 34 of the Civil Procedure Law is complied with. The provision requires the court chosen by the parties to have a connection with the dispute depending on "where the defendant is domiciled, where the contract is performed or signed, where the plaintiff is domiciled, where the subject matter is located, etc." Similarly, with respect to (ii), the wording appears to presuppose that the high people's court's jurisdiction at the provincial level must first be seized in the first instance, and hence appears to be subject to the Civil Procedure Law, under which, where a foreign defendant is involved, the people's court must have a connection with the dispute depending on, inter alia, where the contract was executed or performed, or where the subject matter of the action is located.[30] With respect to (iii), it is not clear what "a significant impact on the country" is intended to refer to but it reflects similar language under section 1 of the Civil Procedure Law.[31]

In contrast, the SICC departs from the narrow conception of the *forum non conveniens* principle and does not require the dispute to have actual connection with the forum, in view of its objective to compete with other courts for dispute resolution

[29] It provides that: "A commercial case with one of the following circumstances may be determined to be an international commercial case as referred to in these Provisions: (i) one or both party/-ies is/are (a) foreigner(s), stateless person(s), or foreign enterprise(s) or organization(s); (ii) the habitual residence(s) of one or both party/-ies is/are outside the territory of the People's Republic of China; (iii) the subject property is outside the territory of the People's Republic of China; (iv) the legal facts that generated, changed, or eliminated the commercial relationship occurred outside the territory of the People's Republic of China."

[30] Section 2, Articles 265-266 of the Civil Procedure Law.

[31] See also Wei Cai & Andrew Godwin, Challenges and Opportunities for the China International Commercial Court (2019) 68 ICLQ 869 at 881-889; Zhengxin Huo & Man Yip, 'Comparing the International Commercial Courts of China with the Singapore International Commercial Court' (2019) 68 ICLQ 930 at 913-918. It has been argued that many "international commercial cases" as defined may actually be domestic cases: *ibid.*

business.[32] Under the Supreme Court of Judicature Act and the Rules of Court, the SICC has jurisdiction where:

(i) all of the following requirements are met:

(a) the action is international[33] and commercial in nature;

(b) the action is one that the High Court may hear and try in its original civil jurisdiction;

(c) the original plaintiffs and defendants have all submitted to the SICC's jurisdiction under a written jurisdiction agreement; and

(d) the parties do not seek any relief in the form of, or connected with, a prerogative order;

(ii) the case is transferred from the High Court;

(iii) an originating summons is sought for leave to commit a person for contempt in respect of any judgment or order made by the SICC; or

(iv) the case involves proceedings relating to international commercial arbitration that the High Court may hear and that satisfy such conditions as the Rules of Court may prescribe.[34]

In particular, the SICC is restricted from declining to assume jurisdiction "solely on the ground that the dispute between the parties is connected to a jurisdiction other

[32] Huo & Yip, *ibid* at 920.
[33] The action is international if (i) the parties to the claim have their places of business in different States; (ii) none of the parties to the claim have their places of business in Singapore; (iii) at least one of the parties to the claim has its place of business in a different State from — (A) the State in which a substantial part of the obligations of the commercial relationship between the parties is to be performed; or (B) the State with which the subject matter of the dispute is most closely connected; or (iv) the parties to the claim have expressly agreed that the subject-matter of the claim relates to more than one State.
[34] Section 18D of the Supreme Court of Judicature Act; Order 110, Rule 2 of the Rules of Court.

than Singapore, if there is a written jurisdiction agreement between the parties."[35] Further, the Singapore Court of Appeal has held that the possibility of transferring a case to the SICC is a relevant consideration for the Singapore High Court in determining whether it should exercise international jurisdiction under a broad application of the *forum non conveniens* principle. In principle, therefore, Singapore may assume international jurisdiction which it would not otherwise have had (such as in circumstances where Singapore law is not involved) in view of the international capabilities of the SICC, such as the presence of international judges and the possibility of determining foreign law on the basis of submissions instead of proof.[36]

B. Judges

The judges appointed to the CICC are restricted to: (i) current judges of the Chinese courts; and (ii) Chinese nationals, who must have experience in international commerce and investment, along with the ability to work in both English and Chinese.[37] In accordance with these requirements, the first eight judges appointed to the CICC are all existing judges of the Supreme People's Court and are Chinese nationals. Instead of foreign judges, the CICC has constituted an "International Commercial Expert Committee" (ICEC) with a term of engagement of 4 years who consist mainly of foreign nationals particularly experts from other jurisdictions along the "Belt and Road".[38] With the establishment of the ICEC, the SPC seeks to involve

[35] Order 110, Rule 8(2) of the Rules of Court.
[36] *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265; [2017] SGCA 27 [113]-[124].
[37] Article 4 of the CICC Provisions.
[38] SPC, 'Decision on the Establishment of International Commercial Expert Committee of the Supreme People's Court' (24 August 2018), http://cicc.court.gov.cn/html/1/219/235/243/index.html; Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For Trial Implementation), Fabanfa [2018] No. 14, issued by the SPC and updated on 5 December 2018.

foreign legal experts in the dispute settlement process, who will provide advice and aid CICC judges in ascertaining the content of foreign laws.[39] The ICEC may also mediate cases when the parties agree to mediation.[40]

The SICC, by comparison, prides itself of its unique mix of eminent international jurists from common and civil law jurisdictions, along with judges of the Singapore Supreme Court.[41] This large proportion of foreign judges is intended to enhance the international character of the SICC and strengthen its ability to handle offshore matters including those originating from civil law systems and develop procedures reflecting the best practices from both common and civil law jurisdictions.[42]

C. Legal Representation and Procedure

Consistent with the international character of the SICC, parties to SICC proceedings may be represented by registered foreign lawyers, who can make submissions on foreign law, in offshore cases with no substantial connection to Singapore.[43] Parties to a dispute before the CICC can only be represented by Chinese law-qualified lawyers, as foreign lawyers do not have a right of audience in Chinese courts.[44] In any event, the CICC is subject to Chinese procedural law, which restricts the language of court proceedings to Chinese,[45] unlike most international commercial courts including the SICC, which uses English. As part of the Supreme People's Court, CICC

[39] Article 8 of the CICC Provisions.
[40] Article 12 of the CICC Provisions.
[41] SICC, 'Judges', https://www.sicc.gov.sg/about-the-sicc/judges.
[42] Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution' (Opening Lecture for the DIFC Courts Lecture Series 2015), https://www.supremecourt.gov.sg/Data/Editor/Documents/opening-lecture---difc-lecture-series-2015.pdf, paras 28-29.
[43] SICC, 'Singapore International Commercial Court Practice Directions' (effective 22 July 2019), para 26. Foreign counsel may seek full or restricted registration under the Legal Profession (Foreign Representation in SICC) Rules 2014.
[44] Article 263 of the Civil Procedure Law.
[45] Article 262 of the Civil Procedure Law.

judgments cannot be appealed from, but are subject to possible retrial under the Civil Procedure Law.[46] As part of the Singapore High Court, SICC decisions at the first instance are generally appealable to the Court of Appeal, subject to any written agreement between the parties to waive, limit or vary the right to appeal.[47]

IV. CONCLUDING THOUGHTS AND FURTHER RESEARCH

The above are but a few of the salient differences between the CICC and SICC, and the scope of inquiry may be extended to include further issues such as the differences between how foreign law may be ascertained, coram and judicial reasoning, procedure and the admissibility of evidence, the enforceability of judgments, the types of cases brought, and the relationship with arbitration and mediation. Broader questions may also be raised about the CICC's decision-making where the state's interests are involved,[48] and China's rule of law and judicial system itself.[49] The author's tentative views on the basis of the foregoing discussion are that given the conservative design of the CICC, particularly in comparison with the SICC, it is less of an international or transnational commercial court than an extension of its domestic court and runs counter to the internationalist objectives of the BRI.[50] While it is a step toward increasing cooperation between Chinese and foreign jurists, it is more parochial and protectionist, and is consistent with Chinese views of its sovereignty and foreign interference. It is also consistent with its traditional aversion to litigation and preference for informal and private mechanisms such as mediation for dispute

[46] Article 16 of the CICC Provisions.
[47] SICC, 'Singapore International Commercial Court Practice Directions' (effective 22 July 2019), para 139.
[48] 'A belt-and-road court dreams of rivalling the West's tribunals', *The Economist* (6 June 2019).
[49] Lance Ang & Jiangyu Wang, 'Judicial Independence in Dominant Party States: Singapore's Possibilities for China' 14 Asian J. Comp. Law (forthcoming Dec. 2018).
[50] See generally Cai & Godwin, *supra* note 31; Huo & Yip, *supra* note 31.

resolution.[51] At the same time, the CICC is clearly a work in progress and its continuing reforms and greater internationalization would influence and determine the international legitimacy and credibility of the CICC and BRI in the long term.

[51] Mollengarden, *supra* note 9 at 72.