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Belt and Road Disputes

RAGHAV SETHI¹

ABSTRACT

This article deals with a relatively newer topic of belt and road disputes which have arisen from belt and road initiative of the Chinese government. Often called as the modern silk road, the belt and road initiative or the one belt one road project is an ambitious Chinese project to facilitate trade and commerce in not only China but the whole of South eastern and Central Asia. Given the vast nature of the plan along with the ever-going politics in this region, it was not a cake walk to bring together countries to invest their resources or give their land for this project. This article details with various aspects of this initiative - in light of the opportunities it would bring in for the region and also in light of the disputes which arise from time to time in making this project a reality. The article discusses the mechanisms which are deployed by the countries involved for solving their problems. The mechanism of arbitration has been dealt with in great detail.

Keywords: *belt, road, OBOR, Arbitration, Mediation, project, China, countries, commercial, trade, economy*

I. INTRODUCTION TO BELT AND ROAD INITIATIVE

The Belt and Road Initiative (BRI) is a much-hailed project by China to link the continents of Asia, Africa and Europe by roadways and waterways by six corridors with the purpose of increasing regional integration, trade and commerce and improving the economic growth rate of the region. This name was put forth in the year 2013 by China's President Xi Jinping.² He had derived the idea of BRI from the ancient Silk Road which was established during the Han Dynasty's rule around 2,000 years ago. The Silk road was an ancient roadway or rather several roadways which connected China to the Mediterranean region via Eurasia for several centuries. The original Silk Road came into existence during the expansion of China's Han Dynasty which had trade relations throughout the Central Asia that is the countries of Kyrgyzstan, Kazakhstan, Tajikistan, Afghanistan, Turkmenistan, and Uzbekistan and the modern countries of India and Pakistan in South East Asia. The entire route spanned around a

¹ Author is an Advocate at Delhi High Court, India.

² Andrew Chatzkey and James McBride, "China's Massive belt and road Initiative", Council for Foreign Relations (November 27, 2020, 01:07 am) China's Massive Belt and Road Initiative | Council on Foreign Relations (cfr.org)

total of 4,000 miles.³ Central Asia can thus be called the centre of globalization in the ancient era. Vision of Chinese president was that such network would increase the international use of Chinese currency and thus “ break the bottleneck in Asian connectivity, ” In addition to the aforesaid infrastructural entities, China has planned to construct fifty special economic zones at par with the Shenzhen Special Economic Zone which been launched in 1980 by China during its economic reformation under the then leader Deng Xiaoping. The BRI is often also referred to as ‘One Belt One Road’ initiative.⁴ The five main reasons due to which the OBOR project is of great significance to China are as follows:

1. Coordinating policies of the country
2. Linking of Infrastructure
3. Trade and Business without any hindrance to far off countries
4. Integrating financial resources
5. Connecting people

This project has been expected to be of US \$ 1 trillion in terms of investments made for infrastructure, port development, power plants and telecommunications networks.⁵ One of the aims of OBOR is to tackle China’s increasing regional backwardness so as to bring it at par with the rising economy of the country. Beijing hopes to spur growth in the underdeveloped parts of China by providing such route which would facilitate trade. The Chinese Government also aims at utilizing OBOR as a medium to address the country’s chronic excess capacity. OBOR is not only about importing surplus production made in China but is more about shifting surplus factories. A hardly understood dimension of OBOR is the desire of policymakers to utilize this initiative to export China’s technological and engineering standards.

II. BELT AND ROAD DISPUTE: INTRODUCTION

A period of almost seven years has passed since the announcement of BRI or OBOR project by China which is an international project as it involves around sixty four countries which constitute almost fifty percent of the world population and thirty percent of the global economy. Though China had announced this project in lieu of economic developed, it did not put forth any proper or concrete plan to implement it. However, China had brought forth

³ Ibid.

⁴ Ibid.

⁵ Supra note 1, pg 1.

several guidelines to promote cooperation between the countries involved in this project. The country called for cooperation in particularly five areas which are as follows:

1. Coordination between policies of all countries
2. Connectivity by way of infrastructure
3. Facilitating trade
4. Integration of financial resources
5. Bonding between the general public

Since all the elements for the success of OBOR project or BRI involved various countries, it was an obvious fact that disputes were bound to arise. Three types of disputes have arisen because of BRI. The first category is of State to State disputes which have arisen from China invested BRI projects. Though the trade related disputes are meant to be solved as per the dictates of World Trade Organization, it won't be surprising if the BRI countries would come up with their own dispute resolution mechanism given the fact the WTO's dispute resolution mechanism continues to work in its present ways. These State to State disputes consists mainly of disagreements which emerge due to the large scale projects invested in by China in the other BRI nations. Such large scale agreements include the inter State agreements and contracts between private individuals as well as those involving government enterprises. The disagreements between the Chinese parties and the stakeholders in the other BRI countries with respect to infrastructural developments soon took the form of inter-governmental disputes.⁶

The second category of disputes is the transaction related disputes arising between the participant countries. Several such signs exist which denote that level of OBOR project has gradually shifted from a colossal infrastructural project a medium level project. By virtue of the nature of the OBOR project, the contracts involving it shall ordinarily consist of one Chinese party. Relatively small scale disputes are meant to be solved by courts of competent jurisdiction by referring to the rules of international commercial law or domestic laws as the case may be. Issues in high level commercial activities arise when the participating countries lack coordination about combining their resources, investing their land, etc. Lack of knowledge about each others infrastructure is also a reason for the same. The third category of disputes includes international trade and investment disputes in the Belt and Road Initiative area. Investor state issues are usually dealt with in accordance with Investor-State dispute settlement (ISDS) mechanisms specified under different international investment agreements

⁶ *Supra* note 1, pg 1.

(IIAs) which includes bilateral and multilateral investment treaties (BITs and MITs) and free-trade agreements (FTAs). By the end of April 2018, there were already several multilateral investment treaties and an exact of 61 bilateral investment treaties between China and OBOR countries.⁷ Also, forty nine OBOR countries have signed the Convention on the Settlement of Investment Disputes which dealt with the enforcing of arbitral awards.

III. BELT AND ROAD DISPUTE RESOLUTION MECHANISMS

Disputes which arise out of BRI are mostly resolved by such mechanisms which allow the parties to indulge actively themselves in the resolution processes. Such resolution procedures have been enumerated below:⁸

1. Mediation: Mediation has also been a favourable form of dispute resolution for the Asian countries who prefer non-adversarial and non-complex resolution of BRI disputes. It is also an inexpensive mechanism which can be easily conducted and if it turns out to be successful, it saves the parties financial resources which would have otherwise gone into solving the dispute by regular judicial processes. As BRI disputes involve different countries, it is quite natural that the disputes shall be initially attempted to be solved by holding talks between the governments of the countries involved. However, in cases when the governments of the countries concerned are rather indirectly involved, mediation is considered to be the best form of dispute solving method.

2. National Courts: Some disputes are bound to be reach the traditional courts. Disputes like the real estate or tax disputes, are usually covered under the local laws or rather in the jurisdiction of courts in host countries. This naturally gives rise to probability of bias among other countries. Thus, China and third country parties who are part of commercial agreements for OBOR project may probably agree to submit their dispute to the courts of neutral jurisdictions like Hong Kong, Singapore or other international jurisdictions like London in England or New York in USA. The courts in the aforesaid jurisdictions have experience in handling international transactions as their legal systems are formulated to adjudicate such large scale disputes. Many of the countries involved in BRI are of relatively newer existence and thus have a judiciary which has almost no idea of deciding international commercial dispute. As opposed to the other countries, China's judicial system is much older and has

⁷ Jiangyu Wang, "Dispute Settlement in Belt and Road Initiative", Research gate (27th November 27, 2020, 01:11 am) (PDF) Dispute Settlement in the Belt and Road Initiative: Progress, Issues, and Future Research Agenda (researchgate.net)

⁸ Patrick M Norton, "China's Belt and road Initiative: Challenges For Arbitration in Asia", Upenn Law Scholarship (27th November 27, 2020, 01:14 am) China's Belt and Road Initiative: Challenges for Arbitration in Asia (upenn.edu)

quite an experience in tackling such complex commercial disputes. Thus, it is practically impossible that host countries would be willing enough to submit to a Chinese court's jurisdiction. Thereby, a practical solution to this issue was found to be arbitration as it eliminated any possibility of bias. China itself endorses arbitration as an ideal manner of dispute resolution for OBOR project.

3. Arbitration: Arbitration clauses can be included in the contracts between the countries involved so as to ensure clarity regarding the manner in which a dispute if arises shall be solved. Any arbitral clause thus needs to include the following entities:

a) Seat of Arbitration: Selection of seat for arbitration involves three basic concepts which are explained below: (1) It must be ensured that local laws of the country which is the seat of arbitration shall merely support the procedure of arbitration and not interfere in it.

(2) It is mandatory that the country which is the seat of arbitration is a signatory to the New York Convention. This is necessary so that the award given at the end of arbitration is enforceable in nature.

(3) All form of logistic support and facilities must be provided so that the procedure is completed smoothly.

The most common venue for arbitration in South and Southeast Asia is either Hong Kong or Singapore as both of them have a tremendous record of being a venue for international commercial arbitration and also fulfil the aforesaid yardsticks. Both these countries have no dearth of interpreters and translators and has abundance of resources which are necessarily needed to conduct arbitration.⁹

b) Arbitration Institutions: Several independent institutions known as arbitral institutions administer the majority of international arbitration cases. Each institution has its own set of rules and regulations. It is only in a handful of cases that the rules and procedures of the arbitral institutions have a consequential impact on the decision of a case ; most of the arbitral institutions have more or less the same rules and thus it is hardly of any impact on the arbitral award. the factors which are paramount in deciding the arbitral institution is geographical proximity and credibility of the institution. The HKIAC and SIAC, the arbitral institutions of Hong Kong and Singapore respectively as mentioned aforesaid are best options for the South Asian countries in light of the reasons stated earlier. This is the reason why HKIAC and the SIAC attract a huge of international commercial disputes from South Asian countries. Other well known institutions like ICC, LCIA and ICDR have also taken cue from HKIAC and

⁹ Supra note 7, pg 3.

SIAC are tried to make themselves much more Asian friendly in nature. All the aforesaid institutions are great options for administering arbitration proceedings with respect to disputes from BRI projects in Southern Asia. Because of experience in tackling complex international arbitration cases, the established arbitral institutions have a credibility which increases the chances of their inclusion in arbitration clauses. Also when a matter is to be tried by arbitration, it is not wise for any country to refuse a credible arbitration institution in lieu of its own benefit.¹⁰

IV. LEGAL CHALLENGES TO COMMERCIAL ARBITRATION IN CONTEXT OF BRI

1. It is a difficult task to arrive at a conclusion in extremely politically influenced commercial cases as in such cases apart from the commercial aspects of the case, several factors affecting world politics is to be kept in mind. In such cases, there is an inexplicable pressure on the institution to live up to the pressure of safeguarding their personal credibility.
2. An important issue which is to be addressed is the limited capacity of such institutions in conducting effective arbitration proceedings in light of the unpredictable number of BRI disputes which may arise in the future.
3. The institution has to face the pressure from the participating countries laws on commercial matters. Inconsistencies which exist in the contract in question regarding a forum's jurisdiction in a dispute is another source of headache for the institutions.
4. The most important task which is a nightmare for the arbitrator in such cases is to identify the relevant law for a dispute and its applicability on the same.

V. CONCLUSION

The Belt and Road Initiative is indeed an ambitious project which is the brain child of China but will also benefit other countries if implemented properly. To amalgamate the resources of several countries, that too of several of those countries which are less than hundred years old is a mammoth task. It involves various meetings, discussions, drafting of contracts, etc. In such a complex initiative involving many countries, disputes are bound to arise. Due to cross border nature of the disputes, local laws of a country cannot be adhered to and thus methods like arbitration and mediation are adopted although a minuscule number of cases do get tried I traditional courts of a country involved. Thus, it is a relatively newer practice to include arbitration clause in the contracts along with the relevant details to remove any discrepancies regarding same. The role of arbitral institutions is thus of great importance in the success of

¹⁰ Supra note 7, pg 3.

the BRI because it is their job to ensure a hassle and bias free arbitral award in any commercial dispute.
