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## East v. West: The United States' Indo-Pacific Economic Vision takes on China's Belt and Road Initiative

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EAST V. WEST: THE UNITED STATES' INDO-PACIFIC ECONOMIC VISION TAKES ON CHINA'S  
BELT AND ROAD INITIATIVE

By  
Jaime D. Fell\*

I. INTRODUCTION

Historically, arbitration in China has been a controversial subject. The government system, coupled with the private nature of the Chinese government, made arbitration a difficult concept to take hold.<sup>1</sup> Hong Kong and Singapore are two notable countries that have become deeply involved in international arbitration.<sup>2</sup> Both countries are now classified as international arbitration hotspots.<sup>3</sup> However, China, the country with the most powerful economy in Asia, has been slow to embrace arbitration.<sup>4</sup>

China's family-run business empires and state-owned enterprises (SOEs), which were adverse to trans-border commercial ventures, made China hesitant to join the international arbitration scene.<sup>5</sup> The traditional beliefs held by family-run businesses and SOEs focused on confidential and face-to-face negotiations that "saved face."<sup>6</sup> However, as China, and Asia in general, became more involved in the international community, these countries saw their businesses grow and integrate.<sup>7</sup> The increase in intra-Asian and Asian trans-border relations with other countries, saw Asian countries begin to embrace arbitration.<sup>8</sup>

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<sup>1</sup> See generally THOMAS E. CARBONNEAU, ARBITRATION LAW IN A NUTSHELL 352-5 (4th ed., West Academic Publishing) (2009).

<sup>2</sup> *Id.* at 368.

<sup>3</sup> *Singapore v. Hong Kong: The Arbitration Battle Intensifies*, ASIAN LEGAL BUS. (Dec. 1, 2011), <https://www.legalbusinessonline.com/features/singapore-v-hong-kong-the-arbitration-battle-intensifies/57638>.

<sup>4</sup> See generally CARBONNEAU, *supra* note 1, at 352-55.

<sup>5</sup> Patrick M. Norton, Comment, *China's Belt and Road Initiative: Challenges For Arbitration In Asia*, 13 U. PA. Asian L. Rev. 73-4 (2018).

<sup>6</sup> *Id.* (Traditional Chinese business owners were focused on keeping a strong reputation within the community, which made any known dispute resolutions unattractive).

<sup>7</sup> See Dan Harris, *Arbitration in China: It's Just Fine, Thank You*, China Law Blog (Aug. 4, 2018) <https://www.chinalawblog.com/2018/08/arbitration-in-china-its-just-fine-thank-you.html>.

<sup>8</sup> See *id.*

Arbitration has since taken hold in Asia. In recent years, the China International Economic and Trade Arbitration Commission has reported the largest number of international arbitrations in the world.<sup>9</sup> China has realized the benefits of international arbitration that have been lamented by Europe and the United States: (1) a neutral forum compared to national courts, (2) more confidentiality compared to national courts, and (3) the ease of award enforcement in arbitral proceedings compared to court judgments.<sup>10</sup> Additionally, China's recent Belt and Road Initiative (BRI), an economic undertaking of great ambition, has made arbitration a necessity for the Chinese government.<sup>11</sup>

China's aggressive overseas development policies have prompted the United States to respond with a development program of their own, albeit several years later.<sup>12</sup> The Indo-Pacific Economic Vision is an aggressive investment initiative by the United States government to combat the extensive and powerful reach of China's BRI.<sup>13</sup>

China has come a long way in arbitration, while the United States has already embraced the practice. The two investment and development initiatives by the two world powers are going to have a major effect on international arbitration. Countries that have not utilized arbitral agreements may be thrust into the international arbitration scene. Additionally, the two initiatives can highlight and potentially help solve longstanding disputes that China and the United States have with each other, and with other countries.<sup>14</sup> Finally, with the unprecedented amount of arbitral proceedings that are likely to follow from the two initiatives, international arbitration hubs like Singapore and Hong Kong may become overwhelmed, prompting a need for more countries to step up and assist with the overload.<sup>15</sup>

#### A. *China's Belt and Road Initiative*

China's President Xi Jinping announced the Belt and Road Initiative in 2013.<sup>16</sup>

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<sup>9</sup> See Norton, *supra* note 5, at 73-4.

<sup>10</sup> See *id.*

<sup>11</sup> *Arbitrators share views on Belt and Road and more*, GLOBAL ARBITRATION REVIEW (June 14, 2018), <https://globalarbitrationreview.com/article/1170568/arbitrators-share-views-on-belt-and-road-and-more>.

<sup>12</sup> See Shi Jiangtao & Owen Churchill, *US Competes with China's 'Belt and Road Initiative' with US\$113 million Asian Investment Programme*, SOUTH CHINA MORNING POST, Aug. 2, 2018.

<sup>13</sup> See *id.*

<sup>14</sup> See generally CARBONNEAU, *supra* note 1, at 355.

<sup>15</sup> See Norton, *supra* note 5, at 94.

<sup>16</sup> Lily Kuo & Niko Kommenda, *What is China's Belt and Road Initiative?*, THE GUARDIAN, <https://www.theguardian.com/cities/ng-interactive/2018/jul/30/what-china-belt-road-initiative-silk-road-explainer>.

The initiative is of unprecedented proportions, with the focus being on using the enormous foreign currency reserves that China has generated through trade surpluses to finance investment and infrastructure developments across Europe and Southeast Asia.<sup>17</sup> The name of the initiative comes from the ancient “Silk Road” land routes and the ancient sea routes linking the Middle East and Europe.<sup>18</sup> The result is intended to be a railroad linking China to Europe through Russia, and commercial seaports connecting Southeast Asia, the Middle East, Africa, and Europe.<sup>19</sup> The investments are being made in the areas of energy, mining, industrial innovations, and agriculture.<sup>20</sup>

The total BRI investments in 2017 were \$890 billion with President Xi promising an additional \$124 billion in that year.<sup>21</sup> There were over 600 BRI contracts signed by parties through 2017.<sup>22</sup> Additionally, fifty SOEs were participating in roughly 1,700 projects through the BRI.<sup>23</sup> Investments aside, Chinese corporations had made approximately \$64 billion in corporate acquisitions through the BRI.<sup>24</sup>

Chinese corporations have the central role in all planning and implementation of BRI projects, as well as managing the resulting facilities.<sup>25</sup> Chinese banks are also the central focus of all financing of BRI projects, with additional assistance from foreign and international banks.<sup>26</sup> Finally, most of the project construction is being completed by Chinese construction companies.<sup>27</sup> Although the Chinese are at the center of all BRI projects, they are not exclusive to the Chinese.<sup>28</sup> All third world countries are welcomed, and even encouraged, to participate in the projects. For example, Hong Kong and Singapore have already become active in developing roles, particularly in the realm of

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<sup>17</sup> Kuo, *supra* note 16.

<sup>18</sup> *Id.*

<sup>19</sup> *See generally id.*

<sup>20</sup> *Id.*

<sup>21</sup> Norton, *supra* note 5, at 76.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 77.

<sup>25</sup> *See id.*

<sup>26</sup> Norton, *supra* note 5, at 77.

<sup>27</sup> *Id.*

<sup>28</sup> *See* Kuo, *supra* note 16.

international finance and arbitration.<sup>29</sup> Additionally, Japan and GE Financial Services<sup>30</sup> have recently become involved in BRI projects.<sup>31</sup> The involvement of third party countries added to the already impressive expertise on BRI projects, but also spreads the financial risk for those parties involved.

As of 2018, BRI projects require an estimated US five trillion dollars of capital.<sup>32</sup> The BRI also involves sixty-five different countries, totaling sixty-five per cent of the world's population.<sup>33</sup> The involvement of sixty-five different countries, over 600 contracts and counting signed, and the vast amount of capital required for the projects, the international arbitration community has begun to feel the effects of such an initiative.<sup>34</sup> As the contracts mature, the projects grow, and more capital is required, the effect of the initiative has will only continue to have an impact on all parties involved.

### *B. The United States' Indo-Pacific Economic Vision*

Secretary of State Mike Pompeo announced The Indo-Pacific Economic Vision Initiative on July 30.<sup>35</sup> The plan outlines how the United States will attempt to become a key economic player in Asia. Becoming economically involved in Asia is a significant challenge faced by both former presidents George Bush and Barack Obama.<sup>36</sup> President Obama attempted to solve the problem by the creating the controversial Trans-Pacific Partnership, which was ultimately undone by current president Donald Trump.<sup>37</sup> The major difficulty is balancing the vast economic power, and high economic and trade standards, of the United States with many of the lower standards Asian countries adhere

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<sup>29</sup> See Norton, *supra* note 5, at 77.

<sup>30</sup> GE Energy Financial Services is a division of General Electric. This division provides financial and technological investment in energy infrastructure projects around the world.

<sup>31</sup> Norton, *supra* note 5 at 77.

<sup>32</sup> Christopher Chan, Patrick Cheung, Henry Fung, & Catherine Smith, *The Belt and Road Initiative: Dispute Resolution along The Belt and Road*, LEXOLOGY (Aug. 9, 2018), <https://www.lexology.com/library/detail.aspx?g=9b9d0486-d87a-4d22-99f1-9a56c39f976e>

<sup>33</sup> *Id.*

<sup>34</sup> See generally *id.*

<sup>35</sup> Prashanth Parameswaran, *Trump's Indo-Pacific Strategy: Confronting the Economic Challenge*, THE DIPLOMAT (July 31, 2018), <https://thediplomat.com/2018/07/trumps-indo-pacific-strategy-confronting-the-economic-challenge/>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

to.<sup>38</sup> The economic imbalances between the two geographic areas makes it difficult for United States' policies to take hold in Asia.<sup>39</sup> The economic imbalance also highlights the difficulties that budget constraints have on American corporations attempting to establish themselves in Asia.<sup>40</sup> For example, many Asian countries are not developed economically to the point where they can sustain the United States investment strategies.<sup>41</sup>

Pompeo stated that investment is to become a pillar of President Trump's strategy in Asia.<sup>42</sup> The United States' plan is to increase the financial support in Asia through a proposed agency, the United States International Development Finance Corporation.<sup>43</sup> Direct government investment will receive \$113 million.<sup>44</sup> The current global spending cap is to be doubled to \$60 billion and invested in the development finance corporation, which is used to provide private companies loans to embark on projects overseas.<sup>45</sup>

Additional money will be divided up to expand United States' technology in Asia (\$25 million), and assisting countries in storing their energy resources and boosting infrastructure (\$50 million combined).<sup>46</sup> The Indo-Pacific Economic Vision includes a trilateral investment agreement with Japan and Australia, a \$350 million investment deal to develop new sources of clean water with Mongolia, and an agreement to invest millions in projects within Sri Lanka through the Millennium Corp, a development agency of the United States' government.<sup>47</sup>

Although the Indo-Pacific Economic Vision does not compare to China in terms of amounts of money; the United States believes the quality of their investments will make them considerably more competitive in Asia.<sup>48</sup> One of the primary critiques of the BRI is the lack of focus on Asian countries, however, the United States believes they can

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<sup>38</sup> See Parameswaran, *supra* note 36..

<sup>39</sup> *See id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See generally id.*

<sup>42</sup> See Jiangtao, *supra* note 12.

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Parameswaran, *supra* note 36.

<sup>47</sup> *Id.*

<sup>48</sup> *See generally* Peter Pham, *How America's Indo-Pacific Strategy Can Reshape The Region And The Economy*, FORBES (Nov. 26, 2018), <https://www.forbes.com/sites/peterpham/2018/11/26/how-americas-indo-pacific-strategy-can-reshape-the-region-and-the-economy/#1fb85b4c3571>.

fill that gap.<sup>49</sup> By focusing on countries in Asia that are seemingly forgotten by the BRI, most notably, Vietnam, Indonesia, and the Philippines, the United States believes they can help establish a stronger rule of law in those countries and create a foothold in Asia that will benefit all of the countries in the area.<sup>50</sup>

## II. THE UNITED STATES AND CHINA'S OVERSEAS DEVELOPMENT AND INVESTMENT IMPACTING ARBITRATION

### *A. Contracts and Agreements being a Necessity for both Initiatives to Utilize*

Arbitration has become the preferred method of dispute resolution for BRI projects in contracts.<sup>51</sup> Arbitration is preferred as it minimizes the risk of “(1) resolving disputes in potentially less favorable local courts on the BRI and/or (2) being unable to enforce an award or judgment once obtained.”<sup>52</sup>

The Hong Kong International Arbitration Centre (HKIAC) has been the mainstay for arbitral disputes arising out of BRI projects to date for many reasons, including its maintenance as a pro-arbitration state and its location along the route of many of the BRI countries.<sup>53</sup> Therefore, Hong Kong is a good example of how contracts and agreements will be utilized by the BRI. Since the BRI began, HKIAC has already handled a significant amount of BRI cases.<sup>54</sup>

To make the HKIAC a fairer forum for BRI disputes, the HKIAC now allows parties to choose their arbitrator, or arbitrators.<sup>55</sup> The list of arbitrators is not limited to arbitrators already on a panel or to the HKIAC's list of maintained arbitrators.<sup>56</sup> China has worked with the HKIAC to allow for reciprocal recognition of monetary judgments in regards to final arbitration awards and enforcement.<sup>57</sup> The pro-arbitration steps taken

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<sup>49</sup> See generally Pham, *supra* note 49.

<sup>50</sup> See *id.*

<sup>51</sup> See Josephine Ma, *Is this just the beginning of 'belt and road' disputes between China and its partners?*, SOUTH CHINA MORNING POST (Oct. 8, 2018), <https://www.scmp.com/news/china/diplomacy/article/2164105/just-beginning-belt-and-road-disputes-between-china-and-its>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See generally *id.*

<sup>55</sup> Norton, *supra* note 5, at 91.

<sup>56</sup> *Id.*

<sup>57</sup> See *id.*

by the HKIAC allows parties involved in BRI contracts to arbitrate their disputes in a neutral forum, knowing that the decision rendered will be respected and enforced by China.<sup>58</sup> Without arbitration clauses in contracts, the BRI would likely not be possible because of the complex contract disputes arising between international parties.

International arbitration is essentially the only means to settle international disputes.<sup>59</sup> Because of arbitration's importance, the Indo-Pacific Economic Vision will need to follow the example set out by the BRI, which is to find a neutral arbitral forum to solve disputes and implement a forum selection clause into the arbitration agreement.<sup>60</sup> If the United States intends for their private corporations to enter into agreements with business entities in Asia, they will need to make use of arbitration clauses as these clauses have worked effectively with BRI project contracts.

### *B. Contract Maturation Creating a Significant Caseload for Arbitral Institutions*

Sarah Grimmer, secretary general of the HKIAC, warned those involved with the BRI to “be prepared to see a lot more business disputes on projects linked to China’s ‘Belt and Road Initiative.’”<sup>61</sup> This is because most contracts arising out of similar initiatives typically occur during the first year.<sup>62</sup> Grimmer stated that between the two to five year mark is when disputes typically arise from those contracts.<sup>63</sup> The BRI was announced in 2013, and roughly five and a half years into the initiative, the number of disputes continues to rise.<sup>64</sup>

Contracts are constantly being made, withdrawn from, and disputed. These contract issues have kept the HKIAC busy. In 2014, the HKIAC dealt with 252 arbitration matters arising out of BRI projects, in 2015 they dealt with 271, and in 2016, the disputes totaled 262.<sup>65</sup> Many of these disputes involved jurisdictional issues and trade cases involving minerals and materials required for BRI projects.<sup>66</sup> The HKIAC has yet to deal with an issue arising out of public disputes which occur when a BRI project has

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<sup>58</sup> See generally Norton, *supra* note 5, at 91.

<sup>59</sup> See generally CARBONNEAU, *supra* note 1, at 352-5.

<sup>60</sup> See Norton, *supra* note 5, at 91.

<sup>61</sup> Ma, *supra* note 52.

<sup>62</sup> *Id.*

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> *Id.*

<sup>66</sup> See Weixia Gu, China’s Belt and Road Development and a New International Commercial Arbitration Initiative in Asia, 51 VNJTL 1305, 1317-9 (2018).



gone wrong.<sup>67</sup> It is only a matter of time, however, before an issue directly concerning a BRI project makes its way into the HKIAC, which is likely to be an extremely complex issue.<sup>68</sup>

Adding to the caseload will be the Indo-Pacific Economic Vision. The initiative was announced during the summer of 2018.<sup>69</sup> Within the first year, the Indo-Pacific Economic Vision will likely see many contracts arising out of agreement with Asian parties. If the same holds true for the Indo-Pacific Economic Vision contracts as held true for BRI projects, disputes are likely to arise within the next one to four years.<sup>70</sup>

Arbitration experts expect that in the next ten years the BRI alone will increase the number of arbitral proceedings occurring, not only within the HKIAC, but other arbitral institutions in Asia.<sup>71</sup> With the Indo-Pacific Economic Vision expecting contract disputes to arise from their parties within that same time frame, the HKIAC, and other Asian arbitral institutions, may become heavily burdened.<sup>72</sup> To alleviate some of the expected caseload a solution is required. Predicting the uptick in contract disputes gives participating countries time to choose an alternative, non-Asian institution for their contracts.<sup>73</sup>

### *C. The Initiatives Furthering International Arbitration in Asian Countries that have been Hesitant to Embrace Arbitration*

The embracement of international arbitration has been a slow process in Asia. Aside from Singapore and Hong Kong, many other Asian countries view arbitration with some skepticism. This skepticism is likely the result of two major components. First, some Asian countries such as Vietnam, Indonesia, Thailand, the Philippines, and numerous others, are considered developing countries, as they have been slow to develop economically.<sup>74</sup> It is difficult for developing countries to become major players in international arbitration because these countries lack the funds and institutions to conduct

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<sup>67</sup> See Gu, *supra* note 68, at 1317-19.

<sup>68</sup> See generally *id.*

<sup>69</sup> Parameswaran, *supra* note 36.

<sup>70</sup> See generally Paul F. Kirgis, *The Contractarian Model of Arbitration and its Implications for Judicial Review of Arbitral Awards*, 85 Or. L. Rev. 1, 4-5 (2008). Implying that strict adherence or contractarian models for arbitration can potentially overload the arbitration system and render it ineffective and increase the potential for abuse.

<sup>71</sup> Ma, *supra* note 52.

<sup>72</sup> See generally Kirgis, *supra* note 72, at 4.

<sup>73</sup> See generally Gu, *supra* note 68, at 1319-20.

<sup>74</sup> See Ibrahim Shihata, *Obstacles Facing International Arbitration*, 4 Int'l Tax and Bus. Law. 209, 210-11 (1986).

international arbitral proceedings properly.<sup>75</sup> Additionally, developing countries tend to lack the rule of law required for arbitration to take hold.<sup>76</sup>

The nature of select Asian governments is the second major reason for international arbitration struggling to take hold in Asia. Again, this is prevalent in the developing Asian countries. These particular countries tend to see power switch hands frequently, with each new power being leery of the concept of arbitration.<sup>77</sup> Arbitration thrives on freedom and privacy, something that leaders of small, developing countries fear as a threat.<sup>78</sup>

Both the BRI and the Indo-Pacific Economic Vision can potentially counter the issues international arbitration faces in Asia. The introduction of both Chinese and United States investment can bring funds to the developing countries that can then be used to create proper arbitral institutions and further develop their economy, thereby combatting the development issue.<sup>79</sup> Parties seeking an arbitral forum for proceedings through BRI and the Indo-Pacific Economic Vision investment opportunities will find developing arbitral institutions and creating stronger economies attractive.<sup>80</sup>

The same solution can be used to solve the rule of law issue. The economic opportunities that the initiatives will create can counter the leerness of leaders in developing countries.<sup>81</sup> If leaders of developing Asian countries are willing to sacrifice some power to bring economic opportunities to their countries, international arbitration can thrive in those countries.<sup>82</sup>

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<sup>75</sup> See Shihata, *supra* note 74.

<sup>76</sup> See Justin Bordacahar, *The Rule of Law As Created by Arbitrators – An Update on the Discussions At The Recent IBA Arbitration Day in Buenos Aires*, KLUWER ARBITRATION BLOG (Apr. 8, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/04/08/iba-buenos-aires-report/>. (Because developing countries lack rule of law, arbitration in these countries is unattractive, as proceedings can be unfair, awards are difficult to enforce, and skilled arbitrators are difficult to employ).

<sup>77</sup> See Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279, 288–89 (2004).

<sup>78</sup> See generally *id.*

<sup>79</sup> See Jason Fry, *Arbitration and Promotion of Economic Growth and Investment*, 13 Eur. J.L. Reform 388, 391 (2011).

<sup>80</sup> See generally *id.*

<sup>81</sup> See generally *id.*

<sup>82</sup> See generally *id.*

### III. THE INITIATIVES IMPACTING INTERNATIONAL ARBITRATION IN A POSITIVE MANNER

#### *A. Arbitration Venues in Asia and Around the World will be Incentivized to Improve their Arbitral Forums to Attract Parties of the BRI and the Indo-Pacific Economic Vision*

With a large number of contracts being made through the BRI, and the Indo-Pacific Economic Vision creating potential arbitration agreements, the need for appropriate venues will continue in Asia. Singapore and Hong Kong are already international arbitration hubs, but with the vast number of potential arbitral disputes, the two countries may not be enough. A desirable venue has three main criteria: (1) the local laws support arbitration and the courts will not interfere or hinder the arbitral process; (2) the host country of the arbitral proceeding is a part of the New York Convention which is crucial for award enforcement; and (3) logistical support for the proceeding will be provided, such as translation, proper facilities, and proper access to the country for the proceeding.<sup>83</sup>

Hong Kong and Singapore have already established the three criteria of a desirable arbitral venue. Each country has a well-established legal system, which supports arbitration, enforces awards, has proper facilities, and has logistical support.<sup>84</sup> Additionally, arbitral decisions rendered in Hong Kong and Singapore are recognized by China, making the two venues desirable and crucial for the BRI and the Indo-Pacific Economic Vision.<sup>85</sup> Many other countries in Asia are members of the New York Convention, such as: Cambodia, Myanmar, Philippines, South Korea, Thailand, Vietnam, and several others. However, many of these countries fail one of the other desired criteria.<sup>86</sup> The logistical support is lacking in many Asian countries, as many do not have proper translation support and dedicated arbitration centers.<sup>87</sup> On top of failing to meet the three criteria, these countries lack the experience desired by parties seeking an arbitral forum.<sup>88</sup> Even fewer countries have records of awards rendered that were enforced

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<sup>83</sup> Norton, *supra* note 5, at 89.

<sup>84</sup> Gu, *supra* note 68, at 1321.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

<sup>87</sup> *See generally id.*

<sup>88</sup> *See* Piyush Prasad, *Arbitration in Singapore and Hong Kong*, INTERNATIONAL IMMERSION PROGRAM PAPERS, 57 (2017).

elsewhere.<sup>89</sup> In their current state, these countries do not make extremely attractive arbitral forums.<sup>90</sup>

The presence of the United States and China will prompt these countries to take the final step and improve their arbitral venues, which will make them attractive to parties.<sup>91</sup> More arbitration proceedings will give these countries the experience in international arbitral proceedings that they crucially need. The result will be improved international arbitration in Asia, which will improve international arbitration.

*B. Arbitral Institutions Around the World will need to Improve to Handle the Number of Disputes that will Arise from the two Initiatives*

Hong Kong and Singapore are desirable arbitral institutions for parties, because the parties know that the proceeding will be handled fairly and the award will be enforced. Although the HKIAC and SIAC will likely soak up many of the arbitral proceedings that arise under the BRI and the Indo-Pacific Economic Vision, the two institutions will unlikely be able to handle the potential proceedings.<sup>92</sup> Unless other institutions can rise and make themselves attractive to international parties, the lack of attractive institutions will put a major strain on both the BRI and the Indo-Pacific Economic Vision.

Because the BRI is an initiative that spreads throughout Europe, the BRI will have more flexibility than the Indo-Pacific Economic Vision. London, Paris, Geneva, Stockholm, and New York are all traditional venues that are favorable to arbitration. The greater access of the BRI will lead to the International Chamber of Commerce, London Court of International Arbitration, International Center for Dispute Resolution, Stockholm Chamber of Commerce, or the Permanent Court of Arbitration to handle many of the arbitral proceedings that arise under the BRI.<sup>93</sup> All of these institutions have extremely desirable venues, and the institutions residing within have vast experiences dealing with complex international arbitration issues.<sup>94</sup> Greater access to additional institutions opens up possibilities for contracts under the BRI, but severely limits the capabilities of contracts under the Indo-Pacific Economic Vision. The BRI, being the larger initiative, will make it difficult for the Indo-Pacific Economic Vision to seek the desirable HKIAC and SIAC in Asia.

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<sup>89</sup> See Prasad, *supra* note 88, at 57.

<sup>90</sup> See generally *id.*

<sup>91</sup> See generally Kirgis, *supra* note 72, at 4.

<sup>92</sup> See Norton, *supra* note 5, at 91.

<sup>93</sup> See *id.* at 74.

<sup>94</sup> See *id.* at 74-5.

China's desire to keep the United States out of the geographical location adds to the United States' problem of trying to find an appropriate arbitral institution in Asia.<sup>95</sup> As two of the world leaders, China and the United States have a tense relationship.<sup>96</sup> Among many concerns,<sup>97</sup> China will likely try to block the United States out of Asia and halt the Indo-Pacific Economic Vision by ensuring that most of their contracts have clauses prompting arbitration in Hong Kong or Singapore.<sup>98</sup> Because China will prefer arbitrating in Asia, as opposed to Europe, alienating the United States in Asia becomes a viable strategy.

The United States will have the ability to arbitrate proceedings in New York.<sup>99</sup> However, many Asian parties may be hesitant to leave Asia, and come to the United States, to arbitrate disputes.<sup>100</sup> Furthermore, because the BRI is the larger initiative, and is likely to have a greater impact on the economy of the respected Asian countries, those countries may be more likely to adhere to China and the BRI, as opposed to the Indo-Pacific Economic Vision.

*C. Geopolitical Conflicts will be Stimulated which will help Alleviate Tension Between Adverse Countries*

Many countries that are off-putting, or even hostile, to either China or the United States may find themselves entering arbitral agreements to benefit both countries due to the BRI and the Indo-Pacific Economic Vision. Potential agreements can lead to discussions that would otherwise not have occurred.

The United States has had a rocky history in Asia. Some countries, such as South Korea and Japan, have become some of the United States' closest allies. Others, such as China and Vietnam, have strained relationships with the United States. The Indo-Pacific Economic Vision is an attempt by the United States to open themselves up to Asia and

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<sup>95</sup> Harini V, 'America first' policy in Asia could result in 'America last,' expert says, CNBC (Oct 9, 2018) <https://www.cnbc.com/2018/10/10/america-first-policy-in-asia-could-result-in-america-last.html>.

<sup>96</sup> See generally Joshua P. Meltzer & Neena Shanai, *The US-China economic relationship: A comprehensive approach*, BROOKINGS (Feb. 28, 2019), <https://www.brookings.edu/research/the-us-china-economic-relationship-a-comprehensive-approach/>.

<sup>97</sup> Many concerns hang over the US-China relationship. These include US tariffs on Chinese goods, relationships with North Korea, political differences, the struggle for control in the South China Sea, and world economic differences.

<sup>98</sup> See generally Meltzer, *supra* note 98.

<sup>99</sup> See John Savage, *Navigating The Pitfalls Of Arbitration With Chinese Parties*, CORPORATE COUNSEL BUSINESS JOURNAL (Dec. 6, 2010) <http://ccbjournal.com/articles/13294/navigating-pitfalls-arbitration-chinese-parties>.

<sup>100</sup> See *id.*

the economies that reside within.<sup>101</sup> The initiative can help combat the rough history that the United States has had with these countries and attempt to build a relationship that can benefit both countries. Many Asian countries fall on the lower end of the world rankings based on their economies.<sup>102</sup> The United States consistently ranks near the top, giving many of the less developed Asian countries a chance to engage with a world economic power.<sup>103</sup> The United States will utilize the Indo-Pacific Economic Vision to attempt to invest and develop within these countries.<sup>104</sup> Although the history between the United States and some Asian countries has been strained in the past, the initiative gives the countries a chance to reconcile those differences, set aside political differences, focus on the future, and help develop an economic relationship that can aid both countries well into the future.

The same argument can be made between China and many European countries, and, also, other countries in Asia. China, and some European countries have had tense relationships. Furthermore, China has had a tense history with some Asian countries such as South Korea, Japan, and the Philippines, predominantly due to the conflict in the South China Sea.<sup>105</sup> The BRI could have a similar political effect that the Indo-Pacific Economic Vision will likely have with the United States and some of its historical adversaries.<sup>106</sup> However, the BRI is likely to have a greater impact because it is a significantly larger initiative and countries may be more inclined to participate for the potential economic benefits. Examples of the BRI's advantage are already showing, as BRI projects have found their way into Japan.<sup>107</sup>

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<sup>101</sup> See MIL-OSI: *East Asia and the Pacific: Remarks on "America's Indo-Pacific Economic Vision"*, FACTIVA (July 30, 2018), <https://advance.lexis.com/document/?pdmfid=1000516&crd=a5c06afb-6134-4430-a543-05807bee50b7&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A5SYF-X9T1-JCGD-C4NN-00000-00&pddocid=urn%3AcontentItem%3A5SYF-X9T1-JCGD-C4NN-00000-00&pdcontentcomponentid=415945&pdteaserkey=sr1&pditab=allpods&comp=byvLk&earg=sr1&prid=70d840ae-9383-4ae6-828a-a97c9be6a775>.

<sup>102</sup> *World Economic Outlook Database*, THE INTERNATIONAL MONETARY FUND (April 2018) <https://www.imf.org/external/pubs/ft/weo/2018/01/weodata/weorept.aspx>

<sup>103</sup> *See id.*

<sup>104</sup> *See generally id.*

<sup>105</sup> See Wade Shepard, *India and Japan Join Forces to Counter China and Build Their Own New Silk Road*, FORBES (July 31, 2017).

<sup>106</sup> *See id.*

<sup>107</sup> See Norton, *supra* note 5, at 79.

#### IV. THE CHALLENGES THE INITIATIVES WILL FACE AND POTENTIAL NEGATIVE IMPACTS

##### *A. Political Ramifications may Arise Between Countries due to the Competitive Nature of the two Initiatives*

Although the United States and China may be able to reconcile some of their differences with other countries through their respected initiatives, the potential exasperation of political tension between the United States and China could occur. China may look at the Indo-Pacific Economic Vision as an attempt by the United States to gain control in Asia, undermine the BRI, and potentially gain influence over the South China Sea situation.<sup>108</sup> If China views the initiative in this manner, the conflict between the United States and China could get much worse before it gets better.

The competition created by the BRI and the Indo-Pacific Economic Vision could create political divides between the United States, China, and the countries involved in each respective initiative. Because many of the contracts will involve at least one Asian party, finding a neutral forum for both parties will be difficult.<sup>109</sup> Asian countries will prefer Asian institutions and the United States and European countries will prefer their respective institutions.<sup>110</sup> The current practice indicates that parties can find a neutral location, however, this can prove to be difficult with the initiatives because of the political nature of the projects.<sup>111</sup> Additionally, political tensions can be strained when contracting parties from different countries have a dispute.

Due to the location and reputation of HKIAC and SIAC, many arbitral proceedings will likely be conducted in Asian countries. However, the enormous amount of money that is likely to be invested through each respected initiative can call into question the HKIAC and SIAC, particularly if Asian parties seemingly end up on the preferred side of the arbitral award.<sup>112</sup>

Finally, it is common BRI contract practice for each party to appoint an arbitrator for the proceedings; the third being neutral. It is likely that the neutral arbitrator will consistently make the final arbitral decision.<sup>113</sup> The United States, China, and the parties of BRI and the Indo-Pacific Economic Vision contracts will likely take issue with large

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<sup>108</sup> Julian Borger & Lily Kuo, US-China tensions soar as “new cold war” heats up, *THE GUARDIAN* (Oct. 16, 2018) <https://www.theguardian.com/world/2018/oct/16/us-china-new-cold-war-tensions>.

<sup>109</sup> Ing Loong Yang, 6 Key Considerations in China-Related Arbitrations, *LAW 360* Oct. 30, 2017.

<sup>110</sup> *Id.*

<sup>111</sup> See Latham & Watkins, LLC, *Guide to International Arbitration*, LW.COM, (2017), <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017>.

<sup>112</sup> See generally Norton, *supra* note 5, at 93-4.

<sup>113</sup> See JAN PAULSSON, *THE IDEA OF ARBITRATION* (1st ed. 2014). Jan Paulsson is the Michael Klein Distinguished Scholar Chair at the University of Miami School of law and has been a longstanding critic of parties choosing one arbitrator in a three-arbitrator panel.

contract disputes being decided by a small group of neutral arbitrators “ . . . operating under the auspices of independent, non-governmental arbitral institutions.”<sup>114</sup> When one country feels that its parties are being shorted by neutral arbitrators, especially concerning large-scale investment projects, political ramifications can quickly arise.

*B. Determining the Applicable Law and Applying it to Complex Disputes can Create a Large Number of Problems for Arbitral Institutions*

Identifying an agreed upon choice of law provision is potentially the most difficult issue that the BRI and the Indo-Pacific Economic Vision arbitral proceedings will experience. Countries likely to host BRI and the Indo-Pacific Economic Vision proceedings have laws that are of recent origin and not completely fleshed out.<sup>115</sup> Contrast this to countries, such as the United States and the many European countries, who have laws that are old, tried, and consistently applied. Projects arising out of the two initiatives will be dealing with common law, civil law, customary law, or sharia law.<sup>116</sup>

The acceptance and promotion of freedom of contract can combat the choice of law problem. In the United States, freedom of contract is widely promoted, yet countries such as China with strong government intervention prefer to maintain control of such practices.<sup>117</sup> If countries move towards the allowance of freedom of contract, the parties will have the ability to compromise and choose a choice of law provision that best suits each party.<sup>118</sup>

Allowing the freedom of contract is crucial, as it will allow arbitral institutions to follow the choice of law provisions decided upon by the parties and apply it in the proceeding. However, freedom of contract is not a foolproof solution, as even the most complex and well-designed contracts cannot foresee every possible dispute that may arise.<sup>119</sup> Parties often purposely leave contracts open ended to allow for a more flexible application of the law.<sup>120</sup> Furthermore, these unforeseeable problems are likely to arise from exceedingly complex and difficult issues that make the arbitral tribunals’ decision

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<sup>114</sup> Norton, *supra* note 5, at 94.

<sup>115</sup> See Yeshnah D. Rampall & Ronan Feehily, The Sanctity of Party Autonomy and the Powers of Arbitrators to Determine the Applicable Law: The Quest for an Arbitral Equilibrium, 23 Harv. Negotiation L. Rev. 347, 354-5 (2018).

<sup>116</sup> See *id.*

<sup>117</sup> See generally CARBONNEAU, *supra* note 1, at 389.

<sup>118</sup> See Rampall, *supra* note 117, at 354-5.

<sup>119</sup> See *id.* at 355.

<sup>120</sup> *Id.* at 374-5.



more difficult to ascertain. The confusion surrounding choice of law provisions can lead to rulings based on undeveloped laws that may not be satisfactory to both parties.<sup>121</sup>

Identifying a choice of law provision is not a new issue for international law. However, due to the vast number of arbitral disputes that are likely to arise out of the BRI and the Indo-Pacific Economic Vision initiatives, this issue is exasperated.

### *C. Overwhelming Case Loads for Asian Institutions can Lead to Poor Efficiency and a Lack of Qualified International Arbitrators*

With the United States moving quickly into Asia and China making agreements with countries all around the world, Hong Kong and Singapore, the desirable arbitration hubs, can quickly become overwhelmed with cases.<sup>122</sup> The number of disputes arising out of BRI projects is projected to increase due to contract maturation.<sup>123</sup> Since the BRI and the Indo-Pacific Economic Vision contracts are maturing on a consistent basis, the increase in disputes can overrun arbitral institutions, particularly in Asia.<sup>124</sup> Although the HKIAC and SIAC are experienced institutions and have handled the typical yearly increase in arbitral disputes, the potentially drastic uptick in disputes arising from the two initiatives can be too much for the institutions to predict and, eventually, handle.

Experienced institutions may potentially be able to predict the increase in arbitral disputes.<sup>125</sup> However, having an adequate supply of arbitrators is also a cause for concern for the international arbitration community.<sup>126</sup> There is a limited pool of experienced international arbitrators, which is further limited by those who have experience dealing with contracts of BRI size.<sup>127</sup> Reliance on a limited pool of arbitrators can slow proceedings and make arbitration ineffective in Asian institutions.<sup>128</sup> The HKIAC and SIAC can find themselves among undesirable institutions because of inefficiency arising out of overwhelming disputes and a limited arbitrator pool.

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<sup>121</sup> See Rampall, *supra* note 118, at 375.

<sup>122</sup> See generally Yang Lu, *The Establishment of “Belt and Road” International Investment Disputes Settlement Institution*, 37 J.L. & Com. 1, 13-14 (2018).

<sup>123</sup> See Ma, *supra* note 52.

<sup>124</sup> See generally Lu, *supra* note 124, at 14.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 Am. Rev. Int’l Arb. 297, 361-2 (2014).

<sup>128</sup> *Id.*

Simple supply and demand concepts can likely solve the problem of overwhelming disputes and a limited arbitrator pool.<sup>129</sup> As previously discussed, Asian countries that are typically not engaged in arbitration or have poor institutions may find themselves improving in these areas to attract parties to arbitral in their country. Furthermore, there is no shortage of attorneys in the world, and a limited arbitrator pool can be satisfied by young attorneys with knowledge of international law and a desire to become an arbitrator.<sup>130</sup> The result is an overall benefit for international arbitration as the practice will see an influx of improved arbitral institutions and more young minds entering the field.

## V. CONCLUSION

The international community has yet to see an initiative the size of the Chinese Belt and Road Initiative. The BRI is already having a substantial impact on international arbitration due to the contracts entered into by foreign parties. With the recent announcement of the United States' Indo-Pacific Economic Vision, international arbitration can change for the better. Furthermore, the initiatives will create competition and economic opportunities for countries that have stifling economies or are in the process of developing.

The initiatives are not without their potential problems, as tensions between the United States and China can become strained due to competition in Asia, and conflicting beliefs over desired arbitral forums and applicable law. Furthermore, once contracts begin to mature, arbitral institutions can quickly become overwhelmed and experience inefficiency due to slow proceedings and a limited arbitral pool. However, the positive outcomes created by the two initiatives can solve the problems that may arise. The potential economic opportunities the initiatives bring will prompt countries to improve their arbitral institutions and more young minds to enter the field of international arbitration. The net benefit will be a positive impact on the international arbitral community.

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<sup>129</sup> See generally Stipanwich, *supra* note 127, at 362-3, 366.

<sup>130</sup> See generally *id.*