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Global reform of investor-state arbitration: A tentative roadmap of China's emergent equilibrium

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Global Reform of Investor-State Arbitration: A Tentative Roadmap of China's Emergent Equilibrium

Mark McLaughlin[1]

Abstract - *Investor-state arbitration is in a state of flux. In recent years, doubts about its adequacy have become apparent: questions of coherence, consistency, legitimacy and utility have rendered fragile the central place of investor-state arbitration in global FDI governance. Three threads of reform have been advanced as a corrective to these deficiencies, encompassing incremental reform, institutional reform and fundamental reform. China is perhaps the most influential nation not to have declared a preference for one future or another.*

For over a decade, the Chinese approach to investor-state arbitration has been in a state of disequilibrium: bilateral investment treaties have routinely made provision for investor-state arbitration, and yet these provisions have lain dormant. Though still in its infancy, recent developments in China-related arbitrations suggest a new willingness to utilise these provisions, setting the course for a convergence of Chinese law and practice. In the context of substantial FDI inflows, growing FDI outflows, and an extensive web of international investment agreements, China has the potential to assume a leading role in the development of dispute-settlement mechanisms around the globe. This article considers whether China's interests are best served by the promotion of investor-state arbitration, and whether this approach is likely to involve incremental reform, institutional reform or fundamental reform.

I. INTRODUCTION

The right to settle disputes is the foundation upon which the global governance architecture of foreign direct investment (FDI) is built.[2] It is perhaps the most important element of investor protection, facilitating widespread adherence to substantive provisions. More specifically, investor-state arbitration (ISA) has become a central feature of the existing international framework for foreign direct investment, and the most frequently used method for settling disputes.[3] Its advantages are oft-repeated: the delocalisation of investment disputes and the (relative) enforceability of arbitral awards. In recent years, doubts about its adequacy have become similarly apparent: questions of coherence, consistency, legitimacy and utility have rendered fragile the central place of investor-state arbitration in global FDI governance.[4] Recent international discourse bears the scars of this fragility, with divergent correctives being proposed by the traditional rule-makers of international law. Investor-state arbitration is in a state of flux.

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1 PhD Candidate in International Law, China University of Political Science and Law, Beijing, China. I am grateful to three anonymous reviewers for their comments on an earlier draft of this article. Further thanks are due to Dilini Pathirana for insightful discussions on this topic. Responsibility for all errors rest with the author.

2 August Reinisch and Loretta Malintoppi, 'Methods of Dispute Resolution' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law*, (Oxford University Press, Oxford 2008), 694.

3 For an account of the development of investor-state arbitration, see Muthucumaraswamy Sornarajah, R*esistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015); Rudolf Dolzer and Christoph Schreuer *Principles of International Investment Law* (2nd ed, Oxford University Press, 2012) 214.; Antonio Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment treaties and Multilateral Instrument on Investment', (1997) 12 ICSID Rev-FILJ, 287.

4 Susan D Franck, 'The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law through Inconsistent Decisions', (2005) 73 Fordham L Rev 1521

It is unsurprising, therefore, that the trend towards liberalisation in the bilateral investment treaty (BIT) practice of the People's Republic of China has been the subject of considerable scholarly attention.[5] China's transition from a capital-importing to a capital-exporting State presents a unique case-study as to how shifting priorities in the investor/state relationship manifests both in legal instruments and in practice.[6] Through the proliferation of international investment agreements and exponential growth in both inward and outward FDI, China has carved out an influential role as a regional and global power.[7] The absence of a consensus amongst the traditional rule-makers of international law in relation to ISA has left a vacuum in which China's preferred system of dispute-settlement could be the king-maker. A comprehensive understanding of the Chinese approach to ISA should therefore be a central aspect of any discussion about its global future.

For over a decade, China's approach to investor-state arbitration has been in a state of disequilibrium.[8] The development of dispute settlement provisions in Chinese BITs has signalled a relative embrace of investor-state arbitration.[9] There is a clear and unambiguous trend away from the restrictive dispute settlement clauses that are limited to the amount of compensation for expropriation in the first generation of Chinese BITs, and towards the inclusion of more comprehensive ISA clauses.[10] However, the practical effect of this embrace is difficult to determine conclusively; there was no immediate rise in the number of publicly-available investor-state arbitrations to which China was a respondent.[11] The expansive and expanding portfolio of outward foreign direct investment similarly failed to rouse a corresponding number of Chinese investors as claimants. Indeed, there were no China-related arbitral awards until 2011. As of August 2017, there have been eight such cases, five of which were instigated by Chinese investors against foreign host-states. China's arbitral practice remains in its infancy, but there may be an emergent equilibrium in

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5 Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practices* (Oxford University Press 2009); Stephan Schill, 'Tearing Down the Great Wall: the New Generation Investment Treaties of the People's Republic of China' (2007) 15 Cardozo J Int'l & Comp L 73; Elodie Dulac 'Chinese Investment Treaties: What Protection for Foreign Investment in China?' in Michael J. Moser and Yu Fu (eds) *Doing Business In China* (Juris Publishing, 2014); Qingjiang Kong, 'Bilateral Investment Treaties: The Chinese Approach and Practice' (1998–99) 8 Asian YB Intl L 105; Cai Congyan, 'Outward FDI Protection and the Effectiveness of Chinese BIT Practice' (2006) J World Inv & Trade 627; Axel Berger, 'China and the Global Governance of Foreign Direct Investment: The Emerging Liberal Bilateral Investment Treaty Approach' (2008) German Development Institute Discussion Paper 10/2008; Li Shishi, 'Bilateral Investment Promotion and Protection Agreements: Practice of the People's Republic of China' in Paul J. de Waart, Paul Peters, and Erik Denters (eds), *International Law and Development* (Martinus Nijhoff Publishers 1988); Wenhua Shan, *The Legal Framework of EU-China Investment Relations – A Critical Appraisal* (Hart Publishing, 2005) 83.

6 United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2016: Investor Nationality: Policy Challenges (United Nations 2016); On China's increase in outbound FDI generally, see Dilip K Das, 'China's Outbound Foreign Direct Investment: Sources of Growth and Transformation' (2014) Indiana University, RCCPB Working Paper No 35.

7 On China's evolving relationship with international investment law, see Martin Endicott, 'China and International Investment Law: An Evolving Relationship' in Wenhua Shan and Jinyuan Su (eds) *China and International Investment Law: Twenty Years of ICSID Membership* (Brill Nijhoff 2015) 215.

8 Wei Shen, 'The Good, the Bad or the Ugly? A Critique of the Decision on Jurisdiction and Competence in Tza Yap Shum v. The Republic of Peru' (2011) Chinese Journal of International Law 55.

9 This is embrace is 'relative' because it has not been matched by the number of arbitrations in practice, see Luke Nottage and J Romesh Weeramantry, 'Investment Arbitration in Asia: Five Perspectives on Law and Practice' (2012) 28 Arbitration International 19.

10 J Romesh Weeramantry and Claire Wilson, 'The Scope of 'Amount of Compensation' Dispute-Resolution Clauses in Investment Treaties', in Chester Brown and Kate Miles (eds), Evolution in Investment Treaty Law and Arbitration (Cambridge University Press 2011) 409; Jane Y. Willems, 'The Settlement of Investor State Disputes and China New Developments on ICSID Jurisdiction' (2011) South Carolina Journal of International Law and Business Vol 8.1

11 Tong Qi, 'How Exactly Does China Consent To Investor-State Arbitration: On The First ICSID Case Against China' Contemporary Asia Arbitration Journal 265; Leon Trakman, 'China and Investor-State Arbitration' UNSW Law Research Paper No. 2012-48 14.

its approach to investor-state arbitration.

This article explores the impact of this emergent equilibrium on the future of investor-state arbitration worldwide. Numerous failed attempts to establish a multilateral framework for FDI regulation has left vacant the regulatory space in which China's expansive web of investment agreements and government-directed outbound investments command considerable influence.[12] There is no global consensus in relation to reforming investor-state arbitration to address its deficiencies, nor indeed whether it is a mechanism worth pursuing at all. Proposals for reform fall into three broad categories: incremental reform, institutional reform, and fundamental reform.[13] China is perhaps the most influential nation not to have declared a concrete position as to the extent of its preferred reform.

Part II maps the distinctive features of incremental reform, institutional reform and fundamental reform, exemplifying the states in support of each. Part III will contextualise China's evolving approach to investor-state arbitration clauses, identifying the historical reasons for the initial hesitancy, and the economic reasons behind more recent reforms. Part IV contrasts the frequency of comprehensive ISA clauses in Chinese BITs with a relative lack of arbitral activity. Recent developments in China-related arbitral awards may signal the beginning of an emergent equilibrium. Part V compares China's modern experience in investor-state arbitration with the approaches referenced in Part II, in order to assess the extent to which China strategic interests are likely to align with the three different threads of reform.

II. REFORM OF INVESTOR-STATE ARBITRATION: INCREMENTAL, INSTITUTIONAL AND FUNDAMENTAL

The traditional model of investor-state arbitration is the subject of rising skepticism. Claims of pro-investor bias, divergent interpretations of IIA provisions, uncertainty as to arbitrators' independence, lack of transparency and questionable utility have all eroded the possibility of global consensus. However, no alternative system has common assent. Three competing reform agendas have been identified in regard to investor-state arbitration: incremental reform, institutional reform and fundamental reform.[14] Most of the world's major powers adhere to of one of these threads, but China is as yet undeclared. Part III will explore the extent to which China could be influential in this regard, and identify the camp into which it would fall, if any.

A. *Incremental Reform*

States who propose incremental reform to investor-state arbitration do not deny its deficiencies; only that the benefits outweigh the costs. Two major proponents of incremental reform are Japan and the United States.

There are two objections raised against ISA in Japan: that it should only be available in relation to developing states in order that Japanese companies are protected, and that it should be excluded in relation to the United States as it is a “highly litigious society”.[15] However, these concerns have not become manifest in Japan's treaty-practice; all BITs signed after 2012 contain

12 Karl Savant and Michael Nolan, 'China’s Outward Foreign Direct Investment and International Investment Law' (2015) 18 Journal of International Economic Law 893

13 Anthea Roberts, 'The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds' EJIL: Talk! 15 June 2017.

14 Ibid.

15 Shotaro Hamamoto, 'Debates in Japan over Investor-State Arbitration with Developed States' (2016) CIGI Investor-State Arbitration Series, citing Koji Hata (People’s Life Party), (address delivered to the Committee on Agriculture, Forestry and Fishery, House of Representatives, 4 June 2014) 10.

provisions relating to investor-state arbitration,[16] except in an Economic Partnership Agreement with Australia.[17] For countries with high levels of investment in Japan, dispute settlement provisions tend to be more narrowly defined, the Maffezini interpretation of the MFN clause is excluded, provisions regarding indirect expropriation are highly detailed, and specific provision is made for greater transparency.[18] A similar pattern can be observed in the United States. Opponents of investor-state arbitration are comprised of organized labour, environmental groups and other NGOs, and prominent members of Congress. Primary objections centre around the disparity of access to justice in relation to US nationals, lowering labour standards, and public policy being subject to the judgement of arbitrators at the behest of foreign corporations. However, these too have been met with incremental reform in international investment agreements. Most notable in this regard are the issuance of a Chapter 11 interpretation of NAFTA that all arbitral documents would be made "available to the public in a timely manner"[19], and revision of the 2012 US Model BIT to reflect concerns about the influence of state-owned enterprises, labour standards and environmental standards.[20] There does not appear to be an appetite in the US for an 'investment court' - perhaps a reflection of a more general US aversion to "international courts".[21] The investment chapter of the Trans-Pacific Partnership provides for preliminary consideration of procedural issues, transparency in respect of arbitral pleadings and open hearings, and amicus curiae submissions. Crucially, it recognises:

"*(The Parties) inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals."*[22]

However, recent developments require that pause be taken before drawing policy conclusions from the United States' existing network of IIAs. The Trump administration has withdrawn from the TPP and has been vocal in its opposition to NAFTA.[23] However, few specific criticisms have been advanced as to exactly why the Trump administration seeks a renegotiation of NAFTA. An argument was made in a letter by over 200 academics in the United States, urging the Trump administration to remove ISDS from NAFTA and refrain from including it in any future

16 Art 16 2014 Japan-Kazakhstan BIT , art 17 2012 Japan-Iraq BIT .

17 In place of ISA, the 2014 Australia-Japan EPA article 14.19 provides that: The Parties shall also conduct such a review if, following the entry into force of this Agreement, Australia enters into any multilateral or bilateral international agreement providing for a mechanism for the settlement of an investment dispute between Australia and an investor of another or the other party to that agreement, with a view to establishing an equivalent mechanism under this Agreement. The Parties shall commence such review within three months following the date on which that international agreement entered into force and will conduct the review with the aim of concluding it within six months following the same date." Both the Trans Pacific Partnership and Australia-China FTA have hence been signed. Japan and Australia are now supposed to undertake the review.

18 China-Japan-Korea Trilateral Investment Agreement 2012.

19 Free Trade Commission, "Notice of Interpretation of Certain Chapter 11 Provisions" (31 July 2001), para A(1-2), online: <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> accessed 18 August 2017.

20 US State Department/USTR, "United States Concludes Review of Model Bilateral Investment Treaty" (20 April 2012), online: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2012/april/united-states-concludes-review-model-bilateral-inves> accessed 18 August 2017.

21 David Gantz, 'The United States and Dispute Settlement under the North American Free Trade Agreement: Ambivalence, Frustration and Occasional Defiance' in Cesare Romano (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge: Cambridge University Press, 2009) 356.

22 Preamble, Trans-Pacific Partnership, 4 February 2016.

23 For a useful summation, see David Earnest, 'The Trump Administration's Current Policy on Investor State Dispute Settlement' *Investment Claims,* 24th April 2017, Oxford University Press, available <http://oxia.ouplaw.com/page/trump-ISDS> accessed 3rd February 2018.

trade or investment pact.[24] Moreover, there is a growing body of opinion across the political and legal establishment in the United States, from Republican Members of Congress to Democratic Senator Elizabeth Warren, to Supreme Court Justice John Roberts, to Labour organisations, opposing ISDS.[25] They argue that it "undermines the important roles of our domestic and democratic institutions, threatens domestic sovereignty, and weakens the rule of law".[26] Consequently, it is entirely possible that the United States is on the cusp of a substantial policy shift as regards the availability of investor-state arbitration to foreign investors. The existing treaties suggest a preference for incremental reform; extra-legal indicators point to a more fundamental reform.

From the foregoing treaty practice, it is possible to carve out some distinctive features of incremental reform. Firstly, it keeps faith with investor-state arbitration in principle, accepting that its deficiencies can be addressed within current structures. Second, treaty-based innovations seek to limit the discretion of arbitrators in relation to the definition of an investment, substantive provisions and specific exceptions, ensuring that the public interest is sufficiently balanced against private rights. Thirdly, there is a marked step towards transparency in investor-state arbitration, providing for the publication of awards. Finally, greater flexibility for amending the agreements allow states to react to an arbitral tribunal's interpretation without condemning the system in its entirety. In doing so, it attempts to confer on the parties a level of control beyond that which exists in the traditional model of ISA.

B. *Institutional Reform*

Institutional reforms, such as an investment court or an appellate mechanism, are mooted by states in the belief that incremental reforms are insufficient to address the flaws of investor-state arbitration. Canada and the European Union are advocates of such an approach. The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union provides the roadmap for future institutional reform likely to be pursued by both influential parties. There are two aspects to this roadmap: one is the substantive protections and exceptions provided in CETA, and the other is its arbitration-related provisions. As to the former, specific mention is made of the parties' right to regulate to achieve legitimate policy objectives,[27] protection standards are precisely drafted, and the FET standard is comprised of specific parts - denial of justice, breach of due process including transparency, manifest arbitrariness, targeted discrimination, and abusive treatment.[28] Further restrictions include the limitation of the full protection and security clause to physical security,[29] protection against expropriation subject to specific clarifications in an index on expropriation,[30] the exclusion of the Maffezini criteria for the interpretation of the MFN clause,[31] and the creation of a NAFTA Chapter 11-like joint committee for amendments to the treaty.[32]

In addition to the clear and unambiguous attempts to carve out regulatory space for host states, CETA addresses several common criticisms of investor-state arbitration: lack of transparency, appellate review and arbitrator independence. Parallel proceedings are prohibited

24 The letter and its signatories are available at <https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf> accessed 3rd February 2018.
25 Ibid.
26 Ibid.
27 Art 8.9 CETA.
28 Art 8.10 CETA.
29 Ibid.
30 Art 8.12 CETA.
31 Art 8.7 CETA.
32 Art 8.44 CETA.

under CETA in order that investors do not have recourse to both domestic and international fora.[33] In an attempt to introduce coherence into the system, CETA envisions an appellate mechanism "to review, on points of law, awards rendered by a tribunal, but stops short of establishing it.[34] Transparency is increased by virtue of the induction of the 2013 UNCITRAL transparency rules, even mentioning the possibility of open hearings,[35] and introduces a code of conduct for arbitrators.[36] Further attempts are made to discourage frivolous claims by the adoption of the "loser pays" principle and the conferral on tribunals of the power to dismiss a case on the basis that it is "manifestly without legal merit".[37]

The most radical reform proposed by the European Commission in CETA, and also in the EU-Vietnam FTA, is the establishment of two-tiered 'investment court' comprised of a Tribunal of First Instance and an Appeal Tribunal.[38] It is proposed that Judges would serve six year terms, be prohibited from 'double-hatting' and the awards rendered would be enforceable under ICSID or the New York Convention.[39] The random allocation of cases, as opposed to the selection of arbitrators, is a major departure from the current ISA system, and resembles the system adopted in the Iran-US Claims Tribunal.[40]

The institutional reforms advocated by Canada and the European Union share some ground with the proponents of incremental reform. This is perhaps inevitable, as they share similar diagnoses, but have different cures. Therefore, treaty-based definitions seek to limit the scope of arbitrators, particular public-interest exceptions are included to limit private rights, and there is an emphasis on flexibility and transparency. However, the proposed reforms of an appellate mechanism and investment court are more structurally transformative than the treaty-based reforms of Japan and the United States. Implementation of the investment court in particular is a highly ambitious endeavour, particularly if the European Union seeks to include this innovation in all of its trade agreements going forward. The search for cohesion is no doubt an admirable one, but other states question the efficacy of a system that could introduce long delays and substantial costs, quite beside the absence of a global consensus as to substantive protections even among the states who have adopted ISA. These states do, however, share the principle that investors should be able to rely on an international venue for the settlement of disputes, rather than on (foreign) domestic courts. In this respect, incremental and institutional reforms are a great deal closer to each other than they are to fundamental reform.

C. *Fundamental Reform*

Proponents of fundamental reform to investor-state arbitration reject the basic tenet of the system –

33 Art 8.22 CETA.
34 Art 8.29 CETA.
35 Art 8.36 CETA.
36 Art 8.30 CETA.
37 Art 8.39 CETA; see also Trans-Global Petroleum, Inc. v Jordan, ICSID Case No ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, in which some claims were dismissed as "manifestly without legal merit".
38 Art 8.29 CETA.
39 The compatibility of these institutional reforms with the ICSID Convention is a contested issue, see N. Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime,' (2017) 18 Journal of World Investment & Trade 585 ; Cf August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration'(2016) 19 Journal of International Economic Law 76.
40 Iran-US Claims Tribunal, Tribunal Rules of Procedure, 3 May 1982 online <http://www.iusct.net/General%20Documents/5-TRIBUNAL%20RULES%20OF%20PROCEDURE.pdf> accessed 18 August 2017.

that investors should have recourse to international tribunals at all. Adherents of this view include Brazil, India and South Africa. A number of countries have withdrawn from ICSID altogether: Ecuador, Bolivia and Venezuela.[41] Australia briefly forswore investor-state arbitration in light of the *Phillip Morris* case, but the new administration appears to be less hostile.[42] A common thread among the arbitration-skeptics is the negative reaction to adverse ISA awards, or indeed heightened public awareness that such awards can take place at all.[43] Therefore, a State's practical experience in relation to investor-state arbitration may be a better indicator of future policy directions than its treaty practice. While it is not within the ambit of this article to do so, perhaps further reflection is needed on the idea that bilateral investment treaties are being concluded with highly technical provisions, the details of which only burst into the public consciousness when the state must defend a claim. If the general public only crosses paths with investor-state arbitration in the context of compromised sovereignty, it is perhaps understandable that its central place in global governance is so fragile. Political leaders should be prepared to make the case for investor-state arbitration, and the trade-off of state sovereignty and investor protection that it demands, if this is indeed the policy being pursued.

Alternative forms of dispute-settlement are contained in investment agreements signed by proponents of fundamental reform. Brazil has concluded Cooperation and Facilitation of Investment Agreements (CFIA) with Mozambique, Angola, Malawi, Mexico, Colombia, Chile and Peru, and Cooperation and Facilitation of Investment Protocols (CFIP) with other Mercosur nations as an alternative to traditional BITs.[44] Investor-state arbitration is notably absent from CFIAs; preference is instead given to the Focal Point (an investment ombudsman) with a specific mandate to prevent disputes and the Joint Committee (comprised of representatives of both parties) as a form of state-state arbitration, should a dispute arise. Provision is also made for the promotion of investment based on sustainable development goals, such as the introduction of clauses for social responsibility based on OECD Guidelines for Multinational Enterprises, specific regulation of corruption and exceptions for the protection of human, animal and plant life.[45] Short term and speculative investments are explicitly excluded from the scope of CFIAs.[46] The central thesis behind these innovations is to reject an adversarial approach in favour of a cooperative one. In doing so, the approach taken in CFIAs and in the Mercosur investment agreement have established an alternative model to traditional investor-state arbitration.

Whether through incremental, institutional or fundamental reform, investor-state dispute settlement is in the midst of an evolution. The extent to which any of these evolutions come to

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41 See generally Scott Appleton, 'Latin American Arbitration: The Story Behind the Headlines', International Bar Association (2010) <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=78296258-3B37-4608-A5EE-3C92D5D0B979> accessed 18 August 2017.

42 Jurgen Kurtz, 'Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication' (2012) ICSID 27 Rev-FILJ.

43 The *Phillip Morris Asia Ltd v The Commonwealth of Australia* case was decided in favour of the host state, yet still provoked a backlash against investor-state arbitration. The United States revised its Model BIT as a direct result of experience in investor-state arbitration, even though the case had not been decided against it, see North American Free Trade Agreement (concluded 17 December 1992, entered into force 1 January 1994) 32 ILM 289 (NAFTA) Chapter 11 claims.

44 See further Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'Comparative commentary to Brazil's cooperation and investment facilitation agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi' (2015) online <http://www.iisd.org/library/comparative-commentary-brazil-cooperation-and-investment-facilitation-agreements-cifas> accessed 18 August 2017; Fabio Morosini and Michelle Ratton Sanchez Badin, 'The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?' (2015) online <https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/> accessed 18 August 2017.

45 Vivian Gabriel, 'The New Brazilian Cooperation and Facilitation Investment Agreement: An Analysis of the Conflict Resolution Mechanism in Light of the Theory of the Shadow of the Law' (2016) Conflict Resolution Quarterly, 34: 141–161

46 Ibid.

dominate the international landscape will depend on their adoption by states most widely engaged with the international regime. Consequently, should the United States enact the policy shift proposed in the letter from 200 academics and abandon ISDS altogether, this would be significant for the perception of more fundamental reform amongst the world's developed economies. Should the notion that ISDS is fundamentally unfit for purpose become embedded in the psyche of one of the world's foremost rule-makers in international law, the future of the ISDS mechanism will be heavily dependent on the response of other nations with similar stature. In particular, the rise of China as a global power therefore places a high value on her endorsement of one thread of reform or another. With no explicit declaration as to a preferred vision for the future of investor-state arbitration, it is necessary to trace the development of China's approach to the settlement of investment disputes, both in treaty provisions and arbitral practice.

III. DISEQUILIBRIUM: THE DEVELOPMENT OF DISPUTE-SETTLEMENT CLAUSES IN CHINA

A. *The Isolation Period*

China's historical reluctance to embrace foreign investment was rooted in its perceived role as a form of neo-colonial sublimation and a regime incompatible with Marxist ideology.[47] In general, the former view was not without justification; the protection of citizens' property on foreign territory was of pressing concern to economically nationalist States who were prepared to used armed force to recoup private loans.[48] In particular, China's experience with 'gunboat diplomacy', the Opium Wars and the proceeding 1842 Treaty of Nanking and 1852 Sino-British Treaty of Tianjin cast the concept of international law in a coercive rather than a cooperative light.[49] Marxist rejection of property rights produced a tendency to favour expropriatory measures on a more arbitrarily-defined basis than customary international law provides. Inevitably, the raft of expropriations undertaken by China during the 1950s in the form of 'hostage capitalism' and 'retaliatory confiscation' fell short of international standards.[50] Compensation was not 'prompt, adequate and effective', in accordance with the Hull rule, but was instead provided in the form of fixed rate interest.[51] China was not an active participant in the early development of foreign investment protection in international law.[52]

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47 See further, Kong (n 5); Vivienne Bath, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China' (2012) 34 Sydney Law Review 6; Leon Trakman, 'China and Investor-State Arbitration; (2012). UNSW Law Research Paper No. 2012-48 24.

48 Kenneth J Vandevelde, 'Sustainable Liberalism and the International Investment Regime', (1998) 19 Michigan Journal of International Law 373, at 378–79.

49 For a more comprehensive treatment of the influence of gunboat diplomacy on perceptions of international investment law, see Kate Milles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital*, (Cambridge University Press 2013); On the history of China's unequal treaties, see J.K. Fairbank, 'The Creation of the Treaty System' in *The Cambridge History of China* (Cambridge University Press, 1978); Dong Wang, *China's Unequal Treaties: Narrating National History* (Lexington Books, 2005) 11; Kong (n 5), 108; For a discussion on Chinese attitudes to international law more generally, see Wang, Tieya, 'International Law in China : Historical and Contemporary Perspectives', in *Collected Courses of the Hague Academy of International Law*, (Brill/Nijhoff, 1990) 205.

50 Pat K Chew, 'Political Risk and U.S. Investment in China: Chimera of Protection and Predictability?' (1994) 34 Virginia J Intl L 615, 626; Shan (n 5) 5; On the Hull formula, see generally R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), 100.

51 Kong (n 5) 108.

52 Andreas F. Lowenfeld, *International Economic Law* (2nd ed, Oxford University Press 2008) 391; Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad or the Law of International Claims (The Banks Law Publishing, 1916) online

Indeed, the maturation of many aspects of international investment law absent the input of developing States provoked a backlash in the form of the New International Economic Order, with which China became aligned.[53] Conceived in the shadow of colonialism, the primacy of State sovereignty over protections for foreign investment was at the heart of the NIEO school of thought, whose intellectual roots can be traced to the Calvo Doctrine.[54] China's 'Five Principles of Peaceful Coexistence" were based on the same rationale, consisting of "mutual respect for each other's sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful co-existence".[55] Viewed through the lens of these 'five principles', foreign investment was subject to the exclusive competence of the host State in relation to admission, operation and the terms of its expropriation. Consequently, China's attitude to foreign investment until 1979 can be described as antagonistic at best, with no discernible investment policy, no bilateral investment treaties, and certainly no provision for investor-state arbitration.

B. *The Opening Up Period*

The promulgation of Deng Xiaoping's "open-door" policy in 1979 is the provenance of inbound FDI liberalization in China's domestic and international legal instruments.[56] Economic development was the motivating factor behind a series of legislative reforms that overturned decades of orthodoxy around the desirability of foreign investment in China and its compatibility with a socialist market economy.[57] In particular, the reference to 'international practice' in China's "three guiding principles of economic cooperation and exchange" belied a hitherto unacknowledged regard for international standards. On the basis that the function of bilateral investment treaties was to attract foreign investment, China signed its first BIT with Sweden in 1982.[58]

The conclusion of the first BIT was a great leap forward in China's attitude to foreign investment in general, but the implications for its approach to investor-state arbitration are far narrower. No provision was included that would allow for recourse to investor-state arbitration; only state-state dispute settlement was included.[59] This is a distinguishing feature of the first

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<https://archive.org/stream/diplomaticprotec00borcuoft/diplomaticprotec00borcuoft_djvu.txt> accessed 18 August 2017.

53 Kong (n 5) 109 ; On the NIEO more generally, see Jagdish N. Bhagwati, *The New International Economic Order: The North-South Debate* (MIT Press, 1978); Jeffrey A. Hart, *The New International Economic Order: Conflict and Cooperation in North-South Economic Relations, 1974-77* (Palgrave Macmillan, 1983).

54 On sovereignty in international investment law, see Wenhua Shan, Penelope Simons and Dalvinder Singh, *Redefining Sovereignty in International Economic Law* (Hart, 2008)*;* Robert Stumberg, 'Sovereignty by Subtraction: The Multilateral Agreement on Investment' (1998) 31 Cornell International Law Journal 491-598; For the importance of the Calvo Doctrine for the development of international investment law in developing states, see Donald R Shea, 'The Calvo Clause – A Problem of Inter-American and International Law and Diplomacy' (University of Minnesota Press, 1955); Kurt Lipstein, 'The Place of the Calvo-Clause in International Law'(1945) 22 British Yearbook of International Law 139.

55 Kong (n 5) 109.

56 Samuel PS Ho & Ralph W Henemann, *China's Open Door Policy—The Quest for Foreign Technology & Capital:* A Study of China's Special Trade, (U. British Columbia Press, 1984).

57 Kong (n 5) 108; Randall Peerenboom, *China's Long March Toward Rule of Law*, (Cambridge University Press 2002) 27; Susan L Shirk, *The Political Logic of Economic Reform in China* (University of California Press 1993).

58 Agreement on the Mutual Protection of Investments between the Government of the Kingdom of Sweden and the Government of the People's Republic of China (signed 29 March 1982, entered into force 29 March 1982); on developing countries concluding BITs to attract foreign investment, see Andrew T Guzman, 'Why LDCS Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1997) 39 Virginia Journal of International Law 639.

59 An attached note between China and Sweden stated that upon China's accession to the Washington Convention, the there would be a supplementary agreement making provision for the settlement of investment disputes with the

generation of Chinese BITs, though its inclusion is relatively rare amongst the totality of Chinese BITs currently in force.[60]

Conversely, dispute settlement clauses that permit investor-state arbitration exclusively in relation to the amount of compensation for expropriation is the distinguishing characteristic of second-generation Chinese BITs. Disputes as to the determination of an expropriation were required to be settled amicably through negotiations within six months, and then submitted to the competent court of the state party accepting the investment.[61] The assorted pre-conditions and textual variations in these clauses have been the subject of extensive treatment by scholars and arbitral tribunals.[62] In general terms, the inclusion of restrictive dispute-settlement clauses was an incremental advance in bringing China's BIT practice into line with international standards. However, the continued absence of provision for investor-state arbitration in relation to the substantive aspects of BITs necessarily restrict their scope.[63] Questions over the impartiality of the competent dispute-settlement mechanisms, in particular the independence of China's judiciary, rendered toothless the investor protections whose final guarantor was a domestic court.[64] The 'opening up' period can therefore be described as a tentative foray into the realm of investor-state arbitration.

Whether there is a causal link between the conclusion of BITs and an increase in foreign investment is the subject of considerable academic controversy.[65] However, China's 'open-door' policy, and the evolution in BIT practice accompanying it, must be regarded as an unqualified success when measured it against its original aims.[66] Growing investor confidence in the sincerity and substance of China's 'opening up' policy meant that inward FDI flows gained traction, doubling

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ICSID framework.

60 Another example is the Thailand BIT 1975. The Romania BIT provides for ISA 'if the parties to a dispute so agree', therefore allowing for arbitration, but is toothless in the face of one disputing parties' refusal to allow it. See further J Romesh Weeramantry, 'Investor–State Dispute Settlement Provisions in China's Investment Treaties' (2012) 27 ICSID Rev-FLIJ 194; Gallagher and Shan (n 5) 37.

61 Art 9 China-Kuwait BIT 1985

62 Weeramantry and Wilson (n 10); Willems (n 10); Stanimir Alexandrov, Geoffrey Antell, Marinn Carlson and Jennifer Haworth McCandless, 'Wider prospects for ICSID arbitration under China's BITs' (2010) The Asia-Pacific Arbitration Review 2nd December 2009; An Chen, The Voice from China: An Chen on International Economic Law (Springer 2013) 364; Yuxin Fan, 'Protecting Chinese Investment under BITs and ICSID Arbitration' Tilburg University LLM Thesis 20, online <http://arno.uvt.nl/show.cgi?fid=136678> accessed 18 August 2017.; on the treatment of 'amount of compensation for expropriation' clauses in Chinese BIT, see below Part IV.

63 This may not necessarily be the case. Narrow and broad interpretations have been applied by arbitral tribunals, see below Part IV.

64 Albert P Melone, 'Judicial Independence in Contemporary China' (1998) 81 Judicature 257.; Jianli Song, 'China's Judiciary: Current Issues' (2007) 59 Maine Law Review 141.

65 For a finding that BITs have little or no effect on inward investment, see Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit … and They Could Bite' in Karl P. Sauvant and Lisa E. Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009); Jennifer Tobin and Susan Rose-Ackermann, 'Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties' (2003) William Davidson Institute Working Paper Number 587; World Bank, World Development Report 2005-A Better Investment Climate for Everyone, World Bank and Oxford University Press, 2004, 177; For a finding that BITs do attract inward investment, see Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33(10) World Development 1567;Salacuse and Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain' in Karl P. Sauvant and Lisa E. Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009)

66 Yi Li, 'Legal and Financial Framework of Promoting FDI in Capital-Importing and Capital-Exporting Countries – China' in: Daniel Bradlow and Alfred Escher (eds.), *Legal Aspects of Foreign Direct Investment* (Kluwer 1999) 281; Susan L Shirk, 'How China Opened its Door: The Political Success of the PRC's Foreign Trade and Investment Reforms' (Brookings Institution Press, 1994).

from $1.6bn in 1985 to $3.2bn in 1988. By 1997, FDI in China had soared to $45bn.[67] Consequently, economic liberalisation, of which the introduction of investor-state arbitration was a part, was successful in bolstering China's economic strength and establishing its status as a leading destination for inward investment. Strengthening the rights of foreign investors proved to be in China's national interest.

C. *The Going Global Period*

China's adoption of the 'Going Global' strategy in the late 1990s was the inception of its emergence as a major capital-exporting nation.[68] At the core of 'Going Global' is a transition from mere regulation of outbound FDI to active encouragement of particular forms of investment. The protection of strategically significant natural resources, the acquisition of advanced technologies to enhance the international competitiveness of Chinese enterprises, and the promotion of Chinese exports are among its key aims. In particular, next-generation IT, energy conservation, environmental protection, new energy, biotechnology, high-end equipment manufacturing, new materials and new-energy vehicles have been identified as "strategic emerging industries" that will be the focus of China's outward investment policy.[69] Therefore, ODI is an independent economic policy that is aligned with national development priorities.

Implementation of the 'Going Global' strategy has been through a series of domestic and international reforms. As to the former, the approval procedure for ODI was streamlined, administrative support was increased and financial resources were made available to prospective Chinese investors.[70] The State Administration of Foreign Exchange increased permissible foreign exchange from US$3 billion in 2002, to US$5 billion in 2005. From 2001, the China Export and Credit Insurance Corporation (SINOSURE) became the first and only wholly state-owned, policy-oriented export credit insurance firm, providing a preferential insurance rate for targeted overseas investments and streamlining underwriting formalities.[71]

Implementation at an international level is by way of BITs and investment chapters in FTAs. More specifically, the 'Going Global' period has been marked by the inclusion of more comprehensive investor-state dispute resolution provisions. More than 40 bilateral investment treaties signed by China contain such provisions. There are several notable features of China's more expansive dispute settlement clauses. Definitions of a 'dispute' are broad in scope, the waiting period is six months from either formal notification or commencement of negotiations, and the prevailing forum is ICSID, closely followed by ad hoc arbitration under UNCITRAL Arbitration rules.[72] Other notable features of this new generation of BITs can also be identified: a provision for the consolidation of claims; a time limitation period in which to file an arbitration claim; a State

67 Unless otherwise stated, all data relating to investment inflows or outflows are based the UNCTAD World Investment Report 2017 Annex Tables, online <http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx> For further analysis of China's inward FDI during this period, see Francoise Lemoine, 'FDI and the Opening up of China's Economy' CEPII Working Paper June 2000.

68 Huang Wenbin and Andreas Wilkes, 'Analysis of China's Overseas Investment Policies', CIFOR Working Paper No 79 (2011); Axel Berger, 'China and the Global Governance of Foreign Direct Investment: The Emerging Liberal Bilateral Investment Treaty Approach' Discussion Paper 10/2008 15, German Development Institute 2008; David Shambaugh, *China Goes Global - Understanding China's Global Impact* (Oxford University Press, 2013).

69 Wen Jiabao, Report on the Work of the Government, XinhuaNet website, 5 March 2013, online <https://china.usc.edu/sites/default/files/legacy/AppImages/wen-jiabao-2013-work-report.pdf> 5.

70 Cai Congyan, 'Outward FDI Protection and the Effectiveness of Chinese BIT Practice' (2006) 7(5) the Journal of World Investment and Trade 630.

71 Ibid.

72 For a more comprehensive analysis of expansive investor-state arbitration provisions, see J Romesh Weeramantry, 'Investor–State Dispute Settlement Provisions in China's Investment Treaties' (2012) 27 ICSID Rev-FILJ, 197.

party's right to object that a claim is manifestly without merit; specific exclusions for public health, safety and environmental measures; a State party's right to publish tribunal documents; restrictions on punitive damages; limitations as to a tribunal's binding force; and the exclusion of the *Maffezini* interpretive approach to the importation of dispute-resolution provisions through MFN clauses.[73] China's modern provisions therefore seek to restrict the interpretive discretion afforded to arbitrators, give more prominence to the public interest and provide specificity as to the scope of private rights. The China-Australia FTA even envisions negotiations for establishing an appellate mechanism. Consequently, these BITs are analogous to those signed by developed states.[74] In particular, the recent reforms to China's BITs, such as the FTA with New Zealand, closely resemble the incremental reforms proposed by Japan and the United States.[75]

The root of this evolution in approach to investor-state arbitration is China's emergence as a capital-exporting state, and the shift in priorities that this entails. Before 1998, dispute resolution had been viewed through the prism of investment in China. Consequently, the restrictive (or indeed absent) dispute settlement provisions were the inevitable consequence of prioritising sovereignty over investor protection. Since the Going Global strategy was envisioned, China's ODI flows have soared from US$3 billion in 1998, to US$183 billion in 2016, emerging as the second highest source of ODI globally.[76] Mergers and acquisitions by Chinese MNCs and SOEs comprise the lion's share of China's ODI.[77] Crucially, the priorities of capital-exporting states - facilitating an investment's admission and operation, and ensuring the settlement of disputes arising from this operation - differ from that of a capital-importing state. The creation of the Department of External Security Affairs in 2004 has been identified as an indicator of China's willingness to protect its overseas interests.[78] The adoption of comprehensive investor-state arbitration clauses affirms this shift in priorities.

During the 'Going Global' period, inward investment increased from US$45 billion in 1998 to US$134 billion in 2016. China has retained a top-three position in the A.T. Kearney FDI Confidence Index since its creation, and was third highest recipient for FDI inflows in 2016, behind the United States and the United Kingdom. FDI inflows remain an indispensable feature of Beijing's economic policy. Consequently, there is lingering concern among some Chinese scholars about the exposure to arbitral proceedings engendered by third-generation Chinese BITs.[79] Theoretical objections are advanced utilising a rationale similar to China's 'five principles of mutual coexistence'; namely that it undermines the principles of mutual respect for sovereignty, non-interference in each other's internal affairs, and equality and mutual benefit in particular. Practical objections cite sub-optimal outcomes for developing countries who have yielded broad consent to arbitration, and argue that China's significant FDI inflows raise the potential for extensive liabilities should consent to arbitration be granted as a matter of course. China's embrace of investor-state arbitration is not, therefore, without its hesitancies.

As to the theoretical objections, this analysis relies on ideological foundations that have long

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73 Ibid 203.

74 Stephan W Schill, 'Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China' (2007) 15 Cardozo Journal of International & Comparative Law 73.

75 Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China 2008.

76 For analysis of China's growth in outward FDI and the global and regional implications, see Kevin G Cai, 'Outward Foreign Investment: A Novel Dimension of China's Integration into the Regional and Global Economy' (1999) 160 The China Quarterly 856; Jing Gu, John Humphrey and Dirk Messner, 'Global Governance and Developing Countries: The Implications of the Rise of China' (2008) 36(2) World Development 274.

77 Dilip K Das, 'China's Outbound Foreign Direct Investment: Sources of Growth and Transformation' (2014) Indiana University, RCCPB Working Paper No 35, 10.

78 Congyan (n 67).

79 Chen, An 'Should the Four "Great Safeguards" in Sino-foreign BITs Be Hastily Dismantled? Comments on Critical Provisions Concerning Dispute Settlement in Model US and Canadian BITs') in *The Voice from China: An Chen on International Economic Law* (Springer 2013) 273.

been supplanted by a pragmatic national interest. The development of Chinese investment policy is indicative of a desire to advance national development priorities; it is not shaped to conform to ideological purity. Assumption of the risk that arbitration claims will be filed against China is the price of admission for becoming the world's largest economy. At each stage of China's evolving approach to investor-state arbitration, there has been regard for striking a balanced approach not necessarily between investor interests and State interests, but between Chinese interests and foreign interests. As FDI inflows and outflows have balanced, the Chinese interest has required a rebalancing of the investor/state relationship through the prism of dispute-settlement clauses. However, the relative embrace of investor-state arbitration in legal instruments does not correspond with a similar embrace of arbitration in practice. Recent developments suggest that China's historical aversion to investor-state arbitration in practice may be softening.

IV. TOWARDS EQUILIBRIUM: CHINA'S INCREASED ENGAGEMENT WITH INVESTOR-STATE ARBITRATION

A. *Lack of China-Related Arbitral Practice*

China is the signatory to 129 BITs and 21 FTAs with investment provisions; it has been a primary destination for FDI for over three decades and recently emerged as a major source of FDI; and yet there have only been eight reported cases brought pursuant to a Chinese BIT: five by Chinese investors against foreign states, and three by a foreign investor against China.[80] While there is not necessarily a linear relationship between the quantity of BITs, volume of FDI and the quality of investment protection, the paucity of activity is nonetheless striking. Attempting to draw firm conclusions from the lack of China-related investor claims - to seek insight in absence - is fraught with difficulty. The relative dearth of investors willing to initiate investor-state arbitration could be a consequence of many first generation BITs remaining in force, a reluctance to jeopardise carefully cultivated relationships within China, and the desire to avoid recriminations through the Chinese legal system.[81] The motivations behind instigating an arbitration are necessarily fact-specific, and the current rules on transparency are not conducive to robust scrutiny.[82] Thus, the publicly-available quantitative data is not a representative sample of relations between a host-state and an investor; it is merely the tip of the 'dispute resolution pyramid'.[83]

Nevertheless, two theoretical perspectives can be applied to account for the paucity of investor claims.[84] The first is the culturalist theory, which cites a preference for cordial relations, hierarchy, and diffuse social relationships to explain the relative lack of claimant activity in Asia. Identifying culture as a driver of behaviour in this context is imprecise and imperfect; it requires the aggregation of disparate attitudes across China and then attributes this aggregation to the

80 The applicability of China's BITs to Hong Kong and Macao is unsettled, see generally Odysseas G Repousis, 'On Territoriality and International Investment Law: Applying China 's Investment Treaties To Hong Kong And Macao' (2015) 37 Michigan Journal of International Law 114. For the purposes of this article, the Phillip Morris case and Standard Chartered Bank case (Hong Kong) Limited v. United Republic of Tanzania) are excluded.

81 Trakman (n 11) 6.

82 Issues of transparency in investor-state arbitration are swiftly developing, see Esme Shirlow, 'Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration' (2016) 31 ICSID Rev-FILJ 622.

83 Nottage and Weeramantry (n 9) 26.

84 Five theories were evaluated for paucity of investment claims raised against States in Asia by Nottage and Weeramantry (n 9) 31. As the two most viable, only the culturalist thesis and the institutional barriers thesis will be explored here.

Government and its investors. However, research has indeed noted psychological differences between 'Asians' and 'Westerners' in this regard.[85] There is no robust evidence of a causal relationship between cultural attitudes and investor activity, but the correlation is noteworthy. Secondly, the 'institutional barriers' theory emphasises the financial burden of formal proceedings, direct and indirect, as a repelling factor of investment arbitration. In the Chinese context, there is particular concern about the cost of jeopardising relationships within China or provoking the kind of legal trouble as befell those involved in the Stern Hu case.[86] From the perspective of a host state, China has spent three decades cultivating an investor-friendly image and is cognisant of upending this perception; negotiation would always be preferable to formal proceedings in this regard. The long-term cost of imperilling diplomatic relations by instigating arbitration would be of relevance, particularly in relation to state-owned enterprises. Given that both the culturalist theory and the institutional barriers theory have some validity in explaining the lack of China-related investment arbitration, a hybrid encompassing a balance between the two seems most feasible. Both culture and cost discouraged formal proceedings prior to 2011.

The exponential rise in China's outward direct investment necessarily alters the cost/benefit analysis of instigating arbitration to protect overseas investments. A Chinese investor's disinclination to incur the costs of formal proceedings would subside if the value of the expropriated investment was many times greater. As arbitral awards involving Chinese investors become more frequent, the cultural aversion to formal proceedings would also swiftly erode. Whether this would affect China's response to the lodging of a claim against it as a host state is yet to be seen. Consequently, the idea of a step-change in the Chinese attitude to the practice of investor-state arbitration is theoretically plausible. The recent uptick in China-related investment arbitrations suggests that there may be developments in this regard.

B. *Chinese Investors as Claimants*

As of February 2018, five Chinese investors have brought claims against foreign states pursuant to a Chinese BIT. Before addressing the specifics of these cases, it is pertinent to make a few preliminary remarks. Firstly, their mere existence is inherently noteworthy. The lack of China-related investment arbitrations prior to 2011 compared to its outward direct investment indicates that the policy was not just one of hesitancy but of aversion. That these arbitrations took place at all is therefore a departure. Secondly, the approach taken by arbitral tribunals are necessarily situation-specific, as are the BITs on which they rely. The latter sit at the crossroads of international law, international relations and economics. Consequently, drawing sweeping conclusions about specific treaty interpretations is unwise. Finally, five cases in the context of China's voluminous outward FDI does not equate to a trend. However, these arbitrations may, a decade from now, be identified as the green shoots of a more substantive shift.

Tza Yup Shum v The Republic of Peru	This was the first case brought against a foreign host state under a Chinese BIT.[87] Mr. Tza, a Chinese national resident in Hong Kong, instigated arbitration under the 1994 China–Peru BIT, alleging that measures adopted by

85 Richard E Nisbett, *The Geography of Thought: How Asians and Westerners Think Differently - And Why* (Nicholas Brealey, 2003) cited in Nottage and Weermantry (n 9) 36.

86 Stern Hu, an executive of Rio Tinto mining group, and Australian businessman of Chinese origins, was found guilty by a Chinese court of stealing commercial secrets and accepting bribes. See Vivienne Bath, The Chinese Legal System and the Stern Hu Case, East Asia Forum, Mar. 28, 2010, online <http://www.eastasiaforum.org/2010/03/28/the-chinese-legal-system-and-the-stern-hu-case/>

87 *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009; Decision on Annulment 12 February 2015.

	Peru's national tax authority constituted an indirect expropriation of his investment in TSG del Perú S.A.C, and was in violation of the standards of fair and equitable treatment and full protection and security. Peru challenged the jurisdiction of the tribunal on the basis that the dispute settlement clause at issue only provided for arbitration in relation to 'the amount of compensation for expropriation'. In rejecting Peru's submission, the tribunal held that this clause must be interpreted in a way that includes concerns associated with expropriation, and that to hold otherwise would be to deprive of meaning the provision for arbitration under Article 8 (3) of the BIT. In annulment proceedings, the Committee held that the word 'involving' is sufficiently ambiguous to permit the consideration of issues beyond mere compensation. The tribunal found in favour of Mr Tza.
Ping An Life Insurance Company v. The Government of Belgium	*Ping An* is another case in which a Chinese investor initiated arbitration based on a Chinese BIT.[88] The claimant alleged that the corporate rescue plans implemented by Belgium with respect to Fortis Bank SA/NV expropriated their investment, and initiated arbitration under Article 10(1) of the 1986 China-BLEU BIT. Before the tribunal was constituted, the 2009 China-BLEU BIT entered into force, replacing the 1986 BIT. The former contained a comprehensive ISA clause in Article 8; the latter contained a second-generation ISA clause, which was limited to the amount of compensation for expropriation. The claimant sought to rely on the 2009 BIT, and Belgium challenged its jurisdiction on the basis that the 2009 BIT does not apply to disputes arising before its entry into force. The tribunal accepted Belgium's objection that the claim was time-barred. Notably, the tribunal also adopted a restrictive interpretation of the 'amount of compensation for expropriation' clause, unlike the expansive interpretation accepted in Tza.
Sanum Investments Ltd v Lao People's Democratic Republic	In *Sanum Investments Ltd v Lao People's Democratic Republic*, a Chinese investor lodged a claim against a host state pursuant to a Chinese BIT.[89] Sanum, an investment firm incorporated in Macau, brought a claim against Laos before the Permanent Court of Arbitration under the 1993 China-Laos BIT. The claimant alleged that taxes were levied in violation of multiple substantive treaty provisions in relation to the investment in Laos' gaming industry. Laos' objection relating to the applicability of the BIT to Macau was dismissed in light of the fact that there was no competing Laos-Macau treaty, and it was consistent with the object and purpose of the BIT that it be applicable. Laos also raised a jurisdictional objection on the basis of a narrow interpretation of the 'restrictive' ISA clause. Rejecting this submission, the tribunal applied similar reason as in the Tza case in concluding that the word 'involving' was sufficiently ambiguous as to allow for a more expansive interpretation. The tribunal also held that the conjunctive 'or' in paragraph 2(a) of Article 10 acted as a fork in the road, and thus a narrow interpretation of the ISA clause would necessitate engaging a domestic court in the determination of an expropriation, therefore depriving the ISA provision of meaning.

88 *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, 30th April 2015

89 *Sanum Investments Limited v Government of the Lao People's Democratic Republic*, PCA Case No 2013-13, Award on Jurisdiction (13 December 2013).

	Challenging the award before the Singaporean High Court, an exchange of letters between China and Laos stipulating the non-applicability of the BIT to Macau, and a rejection of a broad interpretation of the ISA clause was the basis of a decision in favour of Laos.[90] This was overturned by the Singapore Court of Appeal, which relied on the 'critical date doctrine' to diminish the importance of the letters exchanged after the dispute had crystallised, and agreed with the original tribunal's broad interpretation of the ISA clause.[91] A new ICSID ad-hoc tribunal has been constituted to address the merits of the claims.
Beijing Urban Construction Group (BUCG) v Republic of Yemen	*Beijing Urban Construction Group (BUCG) v Republic of Yemen* is the fourth claim brought against a foreign host state by a Chinese investor.[92] BUCG, a company incorporated in China, brought a claim against Yemen before ICSID under the 1998 China-Yemen BIT. The claimant alleged a forced deprivation of assets and contract concerning a project for the construction of an airport terminal. Yemen raised jurisdictional objections. The first was that BUCG was a state-owned enterprise, and therefore was not a national of a contracting state under Article 25 of the ICSID Convention. The tribunal rejected this submission, holding that BUCG neither acted as an agent of the Chinese government, nor discharged governmental functions. Yemen's second objection involved a narrow interpretation of Article 10 of the China-Yemen BIT, limiting arbitration to 'any dispute relating to the amount of compensation for expropriation'. The tribunal held that the ISA clause would be deprived of meaning if the narrow interpretation was applied, as it would allow for recourse to a domestic court only. Consequently, the tribunal was consistent with the Tza case in concluding that the 'restrictive' ISA clause in the China-Yemen BIT includes the determination as to whether an expropriation has occurred.
China Heilongjiang ITCC v Mongolia	The most recent award in which a Chinese investor raised a claim against a host state pursuant to a Chinese BIT is *China Heilongjiang ITCC v Mongolia*.[93] The award has not been made public. However, Mongolia's counsel has stated that the tribunal adopted a narrow view of the ISA clause related to a dispute 'involving the amount of compensation for expropriation', to exclude determination as to whether an expropriation had occurred.[94] The tribunal's reasoning in relation to fork-in-the-road provisions in the China-Mongolia BIT is not yet known.

C. *China as the Respondent Host State*

90 *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15
91 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57
92 *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, 31 May 2017.
93 *China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia*, UNCITRAL, PCA, 30 Jun 2017.
94 'Millbank Secures Significant Victory for Mongolia over Chinese SOEs in Treaty-based Arbitration' 5 July 2017, online <https://www.milbank.com/en/news/milbank-secures-significant-victory-for-mongolia-over-chinese-soes-in-treaty-based-arbitration.html>.

Ekran Berhad v People's Republic of China	The first claim filed against China as the respondent host state was *Ekran Berhad v People's Republic of China*.[95] Ekran Berhad, a construction and development company incorporated in Malaysia, brought a claim before the ICSID against China under the 1988 China-Malaysia BIT. It concerned the revocation of Ekran Berhad's seventy-year lease of nine hundred hectares of land in China's Hainan province. The case was suspended pursuant to a settlement agreement between the two parties. The terms of this agreement are unknown.
Ansung Housing Co., Ltd. v. People's Republic of China	The *Ansung Housing* case was the second claim filed against China as the respondent host state, and the first to reach award stage.[96] Ansung, a property developer incorporated in South Korea, brought a claim before ICSID against China under Article 9(5) of the 2007 China-Korea BIT. Ansung alleged that measures taken by Chinese local government in relation to the provision of land were in violation of an investment contract to develop that land for a golf resort. China objected that the claims 'manifestly lack legal merit', on the basis that more than three years at elapsed from the date on which the investor acquired knowledge that he had incurred a loss. Ansung contended that the beginning of the time limitation period was at a later date, when the plan for the 27-hole golf course was frustrated. The tribunal agreed with China's argument, stating that the 'limitation period begins with an investor's first knowledge of the fact that it has incurred loss or damage, not with the date on which it gains knowledge of the quantum of that loss or damage'. It also held that the wording of the MFN clause is sufficiently clear to prevent an interpretation that would widen access to ICSID arbitration. Therefore, the claim was dismissed in accordance with China's objection that it was time-barred.
Hela Schwarz GmbH v People's Republic of China	A German company, *Hela Schwarz GmbH*, registered a claim against China on 21 June 2017 under the 2003 PRC-Germany BIT.[97] The tribunal has not yet been constituted.

D. *Tentative Conclusions*

Notwithstanding the aforementioned caveats about the sample size and relative paucity of investor claims in the context of China's outward FDI, it is possible to draw some tentative conclusions about recent developments in China-related investment arbitrations.

Firstly, China and Chinese investors are becoming increasingly engaged in investor-state arbitration. That the latter have demonstrated a preference for arbitration over litigation in a domestic court is of particular importance, and could be indicative of the Chinese approach in the future. This is particularly the case if reliance on arbitration is adopted as the default dispute-resolution mechanism of China's state-owned enterprises, which play a key role in the strategic targeting of China's outward FDI. Secondly, investors' access to investor-state arbitration under

95 *Ekran Berhad v. People's Republic of China*, ICSID Case No. ARB/11/15.
96 *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25
97 *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19

China's BITs is potentially more extensive than first thought. Divergent approaches have been taken in regard to whether disputes involving the amount of compensation for expropriation permits the determination of whether an expropriation has taken place at all. Narrow and broad interpretations have been practiced in different cases, and indeed different forums in the same case. Thirdly, the applicability of BITs to China's administrative regions requires further clarification. Whether a mere unilateral declaration would provide legal certainty is doubtful. Modification of China's BITs may be required to confirm the position. Finally, China has not had any major arbitral awards be decided against it. High profile arbitrations, even where they have been settled or indeed won by the host state, have occasionally provoked a substantial shift in policy as regards investor-state arbitration, but this is not always the case.[98] Therefore, the robustness of the Chinese approach has not been tested. On the current trajectory, China's appears to be increasingly content with the principle of investor-state arbitration, even if her role in reforming the mechanism is yet to be determined.

V. THE FUTURE FOR INVESTOR-STATE ARBITRATION AND CHINA

China's role in the future development of investor-state arbitration is difficult to determine conclusively. Approximation of China’s future role relies on analysis of both China’s most recent practice, and the compatibility of ISDS with her strategic interests.

As to the former, the most recent Chinese practice in both international investment agreements and in practice allow for the extrapolation of some broad themes. Firstly, China's most recent bilateral investment treaties provide for investor-state arbitration, and a preference for ICSID in particular. There has also been a marked increase in engagement with the practice of investor-state arbitration by Chinese investors and as a respondent state. Forms of alternative dispute resolution, such as reliance on an investment ombudsman or a Joint Committee analogous to the Brazilian ACFI, shows no sign of being included in Chinese bilateral investment treaties. Indeed, treaty provisions alone would suggest that China has embraced the principle of investor-state arbitration, although arbitral practice is still in its infancy. Thus, alignment with proponents of fundamental reform seems unlikely. While China has a close affiliation to the BRICS countries, a renaissance of the New International Economic Order as a bulwark against investor-state arbitration is some way off. This is not to dismiss the idea entirely; should a major arbitral award go against China, it is not inconceivable that a backlash could take the form of major innovations akin to those pursued by many countries in Latin America.[99] Indeed, the negotiations that took place during the Ekran Berhad arbitration suggest that an informal cooperative approach already runs parallel to the system of investor-state arbitration contained in Chinese bilateral investment treaties. However, there is little to suggest that China is likely to pursue such reforms at treaty-level in the near future.

The position in relation to institutional reforms is less clear. There are currently no provisions relating to the innovation of a permanent investment court in Chinese international investment agreements, nor in President Xi's utterances. The institutional reforms proposed by the European Commission have little support in Chinese treaty practice. On the basis of the exponential

98 South Africa terminated its BITs after settling a claim. Indonesia began cancelling their BITs after a series of cases brought against it from 2011, despite not losing any of them. The *Phillip Morris Asia* case was decided in favour of Australia, yet still provoked a backlash against investor-state arbitration. The United States revised its Model BIT as a result of experience in investor-state arbitration, even though the case had not been decided against it, see 32 ILM 289 (NAFTA) Chapter 11 claims. However, Canada has been the respondent state in 26 such cases, despite losing 4 and having other major settlements, and has not withdrawn from ICSID. Argentina similarly has not withdrawn from ICSID despite being a respondent state in 60 cases.

99 The United States revised its Model BIT as a direct result of experience in investor-state arbitration, even though the case had not been decided against it, see North American Free Trade Agreement (concluded 17 December 1992, entered into force 1 January 1994) 32 ILM 289 (NAFTA) Chapter 11 claims.

growth of China's outward FDI, and the diplomatic influence China continues to wield in the recipient countries of this FDI, further institutionalism may not be in the Chinese interest. The lack of convergence in approach to foreign investment in general may not lend itself to the level of cooperation required to establish a world investment court at a multilateral level. This has been the experience of those who have attempted it thus far, by way of the OECD's Multilateral Agreement on Investment.[100] Indeed, the establishment of an investment court would require the kind of multilateralism to which China has previous looked askance, such as her hesitance to engage with UNCLOS.[101] However, the appellate mechanism envisioned in CETA may provide more fertile ground for consensus. The recent China-Australia FTA provides that negotiations in relation to an appellate mechanism will commence within three years of the entry into force of the agreement.[102] The agreement entered into force in December 2015. Given China's success in defending her interests before the WTO appellate mechanism, such an innovation could be palatable, particularly if it advances the cohesion and predictability of investor-state arbitration.[103]

Conversely, the treaty-based incremental reforms preferred by Japan and the United States have considerable support in China's recent BIT practice. Provisions for the exclusion of the Maffezini criteria from most favoured nation treatment, detailed description of indirect expropriation, specific reference to "healthy, stable and sustainable economic development and to improve the standard of living of nationals" in the preamble, and specific exceptions for health, safety and environmental measures within the text of the agreement, all indicate that China is addressing the deficiencies in investor-state arbitration by incremental reform of its treaties. Contained in the China-Uzbekistan BIT is a NAFTA-style Chapter 11 procedure for amending the agreement by mutual consent. Improving transparency is also specifically addressed in the recent BIT with Canada, and the FTAs with Korea and Australia. Consequently, China's treaty-practice bears the hallmarks of those who propose incremental reforms to investor state arbitration.

However, it is inadequate to view the future of China's relationship with investor-state arbitration purely through the lens of legal instruments. Important, too, are their strategic interests, and the extent to which ISDS helps or hinders the fulfilment of China's long-term goals. China's approach to international adjudication generally is somewhat unsettled, often declining or accepting jurisdiction on a case-by-case basis.[104] In relation to matters which are engaged with the assertion of sovereign rights or territorial integrity, negotiation or conciliation remain the preferred methods of dispute settlement from the Chinese perspective. A contemporary case-study in this regard is that of the South China Sea, in relation to which China issued a position paper denying jurisdiction under UNCLOS, stating instead that ''negotiations is (sic) always the most direct, effective and universally used means for peaceful settlement of international disputes'.[105] China went on to reject

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100 'Lessons from the MAI', UNCTAD Series on issues in international investment agreements, UNCTAD/ITE/IIT/MISC. 22.

101 Nong Hong, *UNCLOS and Ocean Dispute Settlement: Law and Politics in the South China Sea* (Routledge 2012)

102 Article 9.23 China-Australia FTA

103 See statistics and further information at WTO, 'Disputes by Country/Territory' <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm> For Commentary, see Junzhai Ma, *China and the WTO—A Critical Analysis* (Grin Verlag, 2013) and Wang Luolin, *China's WTO Accession Reassessed* (Routledge 2015)

104 See generally, Julian G. Ku, 'China and the Future of International Adjudication' 27 Maryland Journal of International Law 154 (2012). Dapo Akande 'China's View of International Litigation: Is the WTO Special?' EJIL:Talk! 13th November 2015.

105 Ministry of Foreign Affairs of the People's Republic of China (2014), 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines', 7 December 2014, http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml (accessed 3 February 2018).

the findings of the tribunal.[106] However, it has also been suggested that the case has galvanised Chinese attempts to shape a rules-based international order, rather than provoke a retreat from it.[107]

Furthermore, international adjudication in relation to trade and investment issues has proved more amenable to China than matters directly relating to territorial sovereignty. This is particularly the case in relation to the WTO dispute settlement mechanism. Since accession in 2001, China has been an active participant in WTO proceedings, and indeed has instigated 15 cases.[108] It is a permanent member on the WTO Appellate Body, and has intervened in 142 cases.[109] Consequently, talk of a Chinese approach to international adjudication is insufficient. A distinction should be drawn between tribunals directly engaging territorial issues, and those which do not. From a Chinese perspective, international tribunals involving trade and investment issues do provide somewhat of a level playing field, and China has reaped the rewards of aligning their interests with the furtherance of peaceful, reliable, dispute settlement mechanisms. The question, then, is whether China's strategic interests are best served by investor-state arbitration in particular.

There are two strategic interests which are perhaps the most illustrative in this regard. The first is China's One Belt, One Road strategy, and the second is the retreat of the United States from investor state dispute settlement. As to the former, the 2015 OBOR Vision Document issued by the National Development and Reform Commission makes explicit reference to enhancing investment facilitation, eliminating investment barriers and advancing negotiations on bilateral investment protection agreements.[110] There is no multilateral agreement providing for investment protection along the Belt and Road, nor is one proposed in the Vision Document. There is, crucially, no dispute settlement body such as an investment court or appellate mechanism proposed in the Vision Document. The existing legal frameworks will therefore be the legal basis for investment protection in relation to the OBOR.[111] Crucially, around three quarters of OBOR states have legal frameworks with China that are absent a comprehensive clause for investor-state arbitration; most investors along the Belt and Road will be relying on BITs with restrictive dispute settlement clauses limited to the amount of compensation for expropriation.[112]

However, the trend in China's most recent practice has shown a loose correlation between the level of outbound investment by China, and the strength of investment protection demanded in bilateral investment treaties.[113] Given that the OBOR project involves substantial investment in infrastructure projects, the evidence thus far would suggest that the protection of Chinese interests would be best served by the continuance of investor-state arbitration where it is available, and the promotion of investor-state arbitration where it is not. Following this line of argument, Chinese strategic interests are not necessarily disadvantaged by stronger institutionalisation, such as an investment court or appellate mechanism. The former may encroach too far into what China regards as an issue of sovereignty, but the appellate mechanism does have limited support in Chinese treaty practice, and enhancing the predictability and apparent legitimacy of investor-state arbitration

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106 Ministry of Foreign Affairs of the People's Republic of China (2016), 'Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines', 12 July 2016, http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml, (accessed 3 February 2018).

107 China's Evolving Approach to International Dispute Settlement, 5

108 World Trade Organisation website, China and the WTO, https://www.wto.org/english/thewto_e/countries_e/china_e.htm (accessed 3 February 2018).

109 Ibid.

110– PRC National Development and Reform Commission/PRC Ministry of Foreign Affairs/PRC Ministry of Commerce (with State Council authorisation), Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, News Release, 28 March 2015, English version available at NDRC, http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html. (accessed 3rd February 2018)110

111 111Vivienne Bath, *'One Belt One Road' and Chinese Investment,* Chapter 14 in X. Chao, L-C.Wolff eds, Walters Kluwer Hong Kong Limited, Hong Kong 2016, Sydney Law School Research Paper No. 16/98

112 Ibid.

113 See Part III above.

would sit comfortably with the aims set out in the OBOR vision document. This conclusion is necessarily tentative; if one regards the OBOR as much of a political project as an economic one, China may be reluctant to engage dispute settlement mechanisms against a host state. However, the trend in Chinese practice thus far suggests a desire to have stronger legal protections for substantial investments, and investor-state arbitration has proved to be an important aspect of this framework, in legal instruments if not yet in actual proceedings.

As to the effect of the pivot of the United States away from investor-state arbitration, China could respond in two ways. The first is to conclude that modern, developed economies do not require investor-state dispute settlement in order to be considered a hospitable environment for investment, and thus join the United States in rejecting the institution. Conversely, China could step into the vacuum left by the American retreat and become an advocate of ISDS around the world. On the basis of the substantial programme of outbound investments that will serve China's strategic interests, that latter is far more likely. Recent responses by President Xi to the U.S. withdrawal from the Paris Climate Agreement, and President Trump's anti-globalisation rhetoric more generally, suggest that China stands poised to take the lead, where the U.S. has decided to withdraw.[114] In that context, the notion of China becoming the foremost promoter of investor-state arbitration around the world is entirely plausible.

V. CONCLUSION

The system of investor-state arbitration, as currently constituted, has waning global support. In order to correct its deficiencies, three different futures have been proposed for the settlement of investment disputes. Proponents of incremental reform, such as Japan and the United States, address issues of transparency, predictability and pro-investor bias by limiting the scope of arbitral discretion by way of more detailed treaty provisions. Institutional reform takes the form of either an appellate mechanism or an investment court, as advanced by Canada and the European Commission respectively. Rejection of investor-state arbitration in favour of dispute prevention and state-state dispute settlement constitutes fundamental reform. The system of investor-state arbitration is in a state of flux. China has not taken a concrete position as to its preferred future.

China's approach to investor-state arbitration has evolved considerably since its pre-1979 isolation period. Treaty clauses providing for investor-state arbitration are more comprehensive in recent Chinese BITs, when compared the second-generation Chinese BITs, which made provision for investor-state arbitration only in relation to the amount of compensation for expropriation. In terms of treaty practice alone, China can be said to have embraced investor-state arbitration as a method for settling investment disputes. However, arbitral practice is still in its infancy. The 'disequilibrium', comprising advancements in arbitration clauses but limited activity in practice, may be shifting. Recent arbitral awards, by virtue both of their existence and China's willingness to engage, suggest there may be an emergent equilibrium in China's approach to investor-state arbitration. The limited number of arbitral awards, accompanied by the fact that no major awards have been decided against China renders these conclusions tentative, but it may indeed be the beginning of a more substantive shift.

Consequently, China's approach to the future of investor-state arbitration is likely to be somewhere between incremental reform and institutional reform. There is evidence of such incremental reforms within Chinese treaty practice. The China-Australia FTA does, however, make provision for the negotiation of an appellate mechanism, and China's experience with the WTO may lend credence to the notion that China could cooperate in establishing such an innovation. Fundamental reform through state-state arbitration and an investment ombudsman seems unlikely,

114 The full text of President Xi's keynote at the World Economic Forum at Davos on 17 January 2017 is available at https://america.cgtn.com/2017/01/17/full-text-of-xi-jinping-keynote-at-the-world-economic-forum.

given China's extensive portfolio of overseas investments. Thus, China’s treaty-practice and limited experience with arbitration indicates that engagement with investor-state arbitration looks set to continue in the short term. China’s strategic interests similarly favour the promotion of investor state dispute settlement. With the preponderance of China’s One Belt One Road initiative comprising outbound investment, the trend by which China seeks investor-state arbitration as a means by which to secure their investments looks set to continue. At the same time, there are signs of more limited discretion for arbitrators in the application of substantive protections, and the emergence of an appellate mechanism remains feasible.