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China’s bilateral investment treaties

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China's Bilateral Investment Treaties

Wang Heng & Wang Lu

Abstract

This chapter focuses on the changes and trends in Chinese bilateral investment treaties and relatedly investment rules of China's free trade agreements. It analyzes a number of questions: what is the changing context of China's bilateral investment rulemaking? How to understand the evolution of China's bilateral investment treaties? What are the major features in China's recent practice? What are the shifts on investment dispute settlement?

Keywords

Chinese bilateral investment treaties, Chinese free trade agreements, Investment rules, Changing context, Investor-State dispute settlement

Introduction

Investment has played a key role in China's domestic economic development since the opening up of the country, and in its external initiatives, such as the Going Out Policy and later the unprecedented Belt and Road Initiative (BRI).[1] It explains why China has enacted the new Foreign Investment Law and its implementation measures to promote investment. That said, China did not join all international treaties related to investment. China became a member of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) in 1993 but did not join the Energy Charter Treaty.[2]

Bilateral investment treaties (BITs) are a crucial part of twenty-first century regionalism.[3] China's international investment agreements (IIAs) are fast developing, including BITs, the trilateral China-Japan-Korea Investment Treaty, and investment rules in free trade agreements (FTAs). At the time of writing, China has one of the highest number of international investment agreements, consisting of an "inconsistent" but "unique" web of 126 BITs (including updated or new BITs with Czech Republic, Korea, Uzbekistan, and Germany) and 23 FTAs or treaties with investment rules.[4] China's BIT network is particularly dense.[5]

China's international investment rulemaking has undergone dramatic changes. There are needs for stronger investment protection since China's outbound investment has exceeded its inbound investment.[6] Meanwhile, it is not common for China's BITs to contain strong commitments to economic liberalism, and they traditionally omit national treatment and the prohibition on performance requirements.[7] The substantial provisions on national treatment and the prohibition on performance requirements are found in some of the more recent IIAs. In IIAs, China has "cautiously guarded its state sovereignty and tried to minimize sovereignty costs" through reservations to provisions on national treatment and dispute settlement, among others.[8]

The purpose of this chapter is to contribute toward a fuller understanding of changes and trends in Chinese bilateral investment treaties and relatedly FTA investment rules. This chapter analyzes IIAs concluded by China, in particular BITs. It consists of four parts, following this introduction. Part II analyzes the changing context of

China's bilateral investment rulemaking. Part III examines the evolution of China's BITs, while Part IV explores major features in China's recent practice. Part V concludes.

The Changing Context of China's Bilateral Investment Rulemaking

The context of China's bilateral investment rulemaking is changing and continues to affect the practice of China in international investment law. Foremost, China's role has shifted from that of a capital importer to that of both a capital importer and exporter. China's BITs are affected by this as seen in the shift from investment promotion toward foreign direct investment (FDI) regulation[9] and protection.

China's BITs vary, with the latest agreements generally providing for enhanced investment protection and investor-State dispute settlement (ISDS) with a broader coverage. To illustrate, China's BITs with African States are observed to largely resemble those between African countries and advanced economies, which may be explained by the fact that the BITs are not really reciprocal and investments "generally predominantly flow one way."[10] China is a capital exporter in Africa and therefore has an incentive to strengthen investment protection. That said, the BITs are affected by economic and political considerations, demonstrated in "the frequent lack of correlation between China's BITs and its investment relationships with states."[11]

Second, investment rules are increasingly provided for in FTAs over BITs, with the exception being the EU-China BIT negotiations (as it is premature for the EU and China to negotiate a trade pact). According to the UNCTAD Investment Policy Hub, 9 FTAs with investment rules and 3 BITs (the latest one is 2015 China-Turkey BIT) have been signed by China since 2012.[12] A major reason for this is the fast development of FTAs across the world such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. These FTAs provide for preferential treatment to businesses. China intends to catch up in this regard, since China's external economic engagement goes beyond investment. The increasing use of FTAs is also attributable to the broader coverage of FTAs, the stronger role of FTAs in developing bilateral relationships, and the preexisting large number of BITs that China has concluded, among other reasons.

Third, the BRI further promotes China's role in international investment law. China announced the BRI in 2013, which involves investment along the BRI jurisdictions. The BRI is an unprecedented extra-regional initiative, which involves investment, trade, finance, dispute settlement, and other issues. This means that China's outbound investment will often be closely intertwined with other legal issues. To illustrate, infrastructure investment under the BRI differs markedly from other investments. It may bring new or upgraded investment rules as China's current BITs with BRI States contain low levels of market access and investment protection.[13] China has the incentive to address investment issues in the BRI such as dispute settlement.

Last but not least, there are other changing contextual factors, ranging from the cautious attitude of certain countries facing various ISDS disputes, to the increasingly fierce competition in attracting investment. As a prime example, Indonesia and India have terminated their BITs with China since they faced a number of ISDS cases.[14] According to the World Investment Report 2017 of United Nations Conference on Trade and Development, half of the twelve most frequent respondent States during the period from 1987 to 2016 are BRI States.[15] These countries may be cautious regarding ISDS.

Generally speaking, China's recent IIAs reflect a partial "NAFTA-ization,"[16] and to some extent converge with deep FTAs regarding investment protection and incrementally move toward investment liberalization.[17]

Meanwhile, the development of investment law will be affected by these changing contextual factors, which may not always provide a uniform direction.

The Evolution of China's BIT Program

While China has established the world's second-largest treaty web for international investment,[18] the majority (over 75%) of Chinese BITs contain broad and vague formulations following the so-called "older-generation" investment treaties.[19] As China's inbound and outbound investment evolves, Chinese BIT practice has changed dramatically over the past decades in relation to both substantive and procedural rules. As noted, the development of Chinese investment rulemaking is driven or motivated by a combination of internal (both economic and political reforms) and external factors.[20] From the perspective of political-economic development, we may divide the evolution of China's BIT program into the following phases.[21]

Early 1980s–late 1990s

The first period of China's BIT program started in the early 1980s and lasted until the late 1990s. In the late 1970s, China decided to commence the economic reform program and open itself up in order to help its collapsing economy, and attract foreign investment.[22] Accordingly, China promulgated a number of laws and regulations regarding FDI and committed itself to protecting foreign investment under Chinese law in the Constitution.[23] Moreover, it was believed that international legal commitments in bilateral treaties could "strengthen domestic promise and reduce mistrust" from foreign investors.[24] Against this backdrop, the very earlier Chinese BITs were concluded with western developed or capital-exporting countries,[25] including Sweden (1982), Germany (1983), France (1984), Finland (1984), and Norway (1984). From 1985, Chinese BITs became diversified with agreements made with both developed countries and developing economies.[26] Nonetheless, some argue that China's BITs with developing and transition economies were signed more for diplomatic purpose,[27] rather than for economic development need, and the primary purpose of Chinese BITs at that time was to promote inward FDI.[28]

It is therefore not surprising that early Chinese BITs were relatively "conservative" or "restrictive,"[29] especially in terms of national treatment and ISDS.[30] Although these early BITs generally incorporated basic provisions such as fair and equitable treatment (FET), most-favored-nation treatment (MFN), and protection against expropriation, most of them contained no or "highly qualified" national treatment provisions.[31] Likewise, most of the earlier Chinese BITs included no ISDS provisions or restricted ISDS only to disputes concerning the "amount of compensation for expropriation," in contrast with the approach adopted by most capital-exporting States that regularly included broad ISDS in BITs.[32]

Some scholars argue that Chinese BIT practice in the 1990s – compared to the BITs in the 1980s – moved toward "conditional" or "optional" national treatment[33] and included direct reference to the ICSID jurisdiction especially after China ratified the Convention in 1993.[34] Despite such developments, China's BITs before 1998 were generally conservative, with a persistent reluctance to accepting national treatment and ISDS.[35]

Late 1990s–late 2000s

The period from the late 1990s to the late 2000s saw the implementation of the great "Going Abroad" strategy which was formally established in the 10th Five-Year Plan for National Economy and Social Development, reflecting a desire to integrate into the international community and entrenched outward investment as a separate national economic strategy.[36] Furthermore, China's accession to the World Trade Organization (WTO) in 2001 gave impetus to China's economic development and rise as a global power.[37]

Accordingly, China started to adopt a more "liberal" approach after 1998, including notably substantial national treatment and full access to ISDS.[38] The Barbados BIT (1998) was the first Chinese BIT to permit all investor-State disputes access to ICSID arbitration.[39] After this treaty, many Chinese BITs concluded with developed countries in earlier years were re-negotiated to reflect China's new economic agenda, political position, and BIT policy. The China-Germany BIT (2003) and the China-Netherlands BIT (2001), for instance, contain national treatment qualified only by a "grandfather clause"[40] and provide broad ISDS provisions covering "any disputes…concerning investments."[41]

Nonetheless, China's BIT policy in this phase was developed to promote and protect both inward and outward investment, although reflecting the shift to "a sizeable outward direct investment nation."[42] In other words, the Chinese BIT practice during the 1990s and 2000s was driven by its role as a net-capital importing State.

Late 2000s-present

Alongside China's participation in regional economic integration and conclusion of FTAs,[43] a new generation – or the so-called fourth generation – of Chinese BITs has seemed to emerge in the new century.[44] These BITs are generally more detailed and balanced treaties that are influenced by newer generation IIAs worldwide.[45] China's fourth generation investment rules have shifted toward the "more extensive and nuanced North American model," following a world trend of rebalancing investment treaties given the ISDS cases and arbitration tribunals' broad readings of substantive provisions (e.g., FET and indirect expropriation clauses).[46] Subsequently, China declared to (re)start the BIT negotiations with the USA and the EU in 2008 and 2013 separately. These two BITs, once successfully concluded, will be considered to represent a new era of the so-called "Chinese BIT 4.0" and "Global BIT 2.0."[47] However, the China-US BIT negotiations have been suspended under the Trump Administration.

A critical change in China's role in international investment regime occurred during this period as the 2013 World Investment Report by UNCTAD stated that China was expected to become a net capital exporter in the near future.[48] Against this background and the initiation of the BRI, it is natural for China to think more proactively about upgrading its BIT practice to provide sufficient support and safeguards for both outward and inward FDI.[49] In November 2013, the Chinese government announced its intention to establish "a unified, open, competitive and orderly market system" for "all kinds of market players."[50] Consequently, China has continued to liberalize its FDI regime with a notable development of introducing a system based on preestablishment national treatment plus a Negative List approach.[51]

At present, China's emergence as a global power and the growing importance of outward FDI are driving China toward a more liberal approach to investment treaties that in turn can serve as strategic tools to promote China's economic and political agenda.Footnote52 In the future, China is very likely to shift the trajectory of its international BIT policy by becoming a rule shaker in the beginning,Footnote53 and then gradually formulating a new model BIT with Chinese characteristics as an alternative to BIT standards set by the USA and the EU.Footnote54 This is linked with China's practices under the BRI.

Key Features in Recent BIT Practice

China's BIT practice has evolved significantly during the past decades, corresponding to domestic economic reform and policy shift regarding international investment and relevant activities. As China is playing a dual role in international investment both as a capital-importer and exporter, the recent Chinese BIT practice tends

to adopt a tailored approach so as to reflect the advanced international practice on balancing investment protection with a State's right to regulate in the public interest and pursue sustainable development.Footnote55 Such a trend may be described as a "selective adaptation" to the Western practice with consideration for Chinese characteristics and concerns regarding political, economic, and social developments.[56] More recently, China appears to have even started with the "selective reshaping" of investment rules regarding investment facilitation through FTA, WTO, and other negotiations (such as G20 and BRICS).[57] This section will discuss the salient features of China's recent BIT practice, showing the changes in China's approach to international investment treatymaking and challenging issues to be addressed in future BIT negotiations.

A. Increasing and Clarifying Substantive Protections

Like many other BITs, Chinese BITs include a set of "standard" substantive rules on investment protections, such as FET, full protection and security (FPS), expropriation and compensation, and (postestablishment) nondiscriminatory treatment.

The FET has been one of the most contested issues in international investment law and arbitration. Earlier Chinese BITs subject investment protection to the law and regulations of host States which allow considerable flexibility for the Chinese government to exercise its sovereign policy power.[58] Although this qualification has been removed in many subsequent BITs, China has been very cautious to subject FET standards to the principles of international law.[59] Such an approach, however, has gradually changed in recent Chinese BITs. For example, the China-Mexico BIT grants the FET treatment "in according with international law."[60] The recent Canadian BIT generally follows the US approach and links the FET and FPS to the "international law minimum standard of treatment of aliens,"[61] which effectively refers to the "customary international law." The China-Colombo BIT rarely uses the term "customary international law" in the FET standards.[62]

As noted, the vague and imprecise terms adopted in FET standards under most IIAs leave a great degree of discretion to arbitral tribunals in interpretation and application. China's recent BITs appear to clarify the FET standards to avoid them being misused or misinterpreted. For instance, the Canadian BIT requires that FET and FPS do not go beyond the minimum standard of treatment under international law accepted by "general state practice."[63] The trilateral investment treaty with Japan and Korea refers FET and FPS to "any reasonable and appropriate standard of treatment accorded in accordance with generally accepted rules of international law."[64] Nonetheless, China's existing practice is distinguishable from the US and the EU new models regarding the term "customary international law" and the listed measures for breaching FET.[65] While China moves toward the Western-style of defining FET, it remains to be seen which approach China will adopt in further clarifying the standard and whether China should specify the "customary international law" and "denial of justice" in its future investment treaties.[66]

Likewise, the expropriation clauses in recent Chinese BITs expressly apply to indirect expropriation,[67] which has significantly enhanced State obligations against expropriation compared to previous treaties. For example, the Canadian BIT and the China-Tanzania BIT have further clarified "indirect expropriation" with factors for determination,[68] which generally conform to the global trend on expropriation provisions.[69] In addition, Chinese BITs clarify that except in "rare circumstances," nondiscriminatory regulatory actions by States do not constitute indirect expropriation.[70] Notably, Chinese BIT practice on expropriation does not refer to "payment of prompt, adequate and effective" compensation – namely, the "Hull formula" – and "minimum standard of treatment" in accordance with customary international law.[71] However, this difference in treaty language may not necessarily result in significant divergence in practice, especially considering that some Chinese BITs require compensation to be made "effectively realizable, freely transferable and without delay" and amount to "fair market value."[72]

Another example of China's efforts in enhancing investment protection reflects in nondiscriminatory treatment. All Chinese investment treaties afford MFN obligations to foreign investment.[73] Hence, foreign investors subject to investment protections of earlier Chinese BITs are able to enjoy the enhanced protection of newer treaties through invoking the MFN clause, at least to a substantial degree, and if no imposed restrictions or exceptions provided otherwise.[74] Recent Chinese BITs tend to extend the MFN obligation to the admission stage. For example, the China-Finland BIT requires that foreign investment shall receive no less favorable treatment from the host State than other investments by investors from any third country relating to the "establishment, acquisition, operation, management, maintenance, use, enjoyment, expansion, sale or other disposal of investments."[75] To clarify the scope of the MFN standard, more recent BITs provide explicitly that MFN treatment does not apply to dispute settlement provisions, which conform to the global trend on restricting the expansive interpretation of MFN obligations.[76]

The postestablishment national treatment obligation has been routinely included in Chinese newer BITs, albeit with significant caveat like "without prejudice to its laws and regulations" or subject to a "grandfather clause."[77] Although the China-Korea BIT and the Canadian BIT extend the national treatment obligation to the "expansion" of existing investment, such expansion is still arguably limited as it either excludes any existing nonconforming measure or applies only to "sectors not subject to a prior approval process under the relevant sectoral guidelines and applicable laws, regulations, and rules in force at the time of expansion."[78] In the Korean BIT, China agrees to "take all appropriate measures to progressively remove all nonconforming measures."[79] Such a measure reflects China's recent reform on the FDI regime, especially the new Foreign Investment Law and its Implementation Measures, while an international commitment is expected to be fulfilled in the ongoing BIT negotiations with the EU.

Progressing Toward Investment Liberalization

IIAs traditionally do not contain binding liberalization rules on foreign investment.Footnote80 However, some recent BITs have followed the US approach to extend guarantees of national treatment and MFN to the preestablishment phase, except as provided in the explicit reservation list.[81] China's recent BIT practice tends to offer preestablishment MFN, but not national treatment.[82] Remarkably, China has committed to granting national treatment "at all phases of investment" on the basis of a negative list approach in its BIT negotiations with the USA and the EU. Such a provision, if concluded, will not only extend national treatment obligations to the preestablishment phase, but also shift China's investment management from a "positive list" to a "negative list" approach.

Moreover, the performance requirement prohibition is often associated with preestablishment rights in BIT practice. This is because performance requirements could make investment not feasible and therefore compromise the right of establishment.8[3] China's older BITs do not explicitly contemplate performance requirements.[84] However, some recent BITs agree to incorporate the relevant obligations under the WTO Agreement on Trade-Related Investment Measures into the treaties.[85] Some scholars consider that such a performance requirement prohibition rule implies enforcing WTO obligations via investment arbitration, rather than imposing WTO-plus obligation from a substantive perspective.[86]

In terms of investment liberalization, China's approach arguably appears to be more proactive. As Shan and Chen assert, China's acceptance of preestablishment nondiscrimination at a relatively early stage in the BIT negotiations with the USA was based on "domestic needs and circumstances" rather than external pressure, and the preestablishment nondiscriminatory treatment could play a positive role in the process of reform and opening up.[87] Nonetheless, negotiating preestablishment national treatment provisions to the "high standard" demanded by the USA and the EU is perhaps neither easy nor realistic. In this regard, China should not only assess carefully whether and to what extent each sector or industry is internationally competitive for opening up to international

investment, but also take care to consider the reality of an economy in transition and diversity at both the central and local levels.[88]

Addressing States' Rights to Regulate for Sustainable Development

Concerns about a lack of balance in existing investment treaties are driving many countries to revise their treaty policy and reaffirm the States' rights to regulate in the public interest in new generation treaties.[89] China is not an exception. In recent BIT practice, China has taken actions to address the balance between investor protection and States' rights to regulate in public interests.

As mentioned earlier, recent BITs tend to clarify substantive provisions, such as FET and indirect expropriation, in response to unexpected broad interpretations in investment arbitration. While Chinese BITs adopt a broad asset-based definition of "investment," recent treaties tend to narrow the scope of investment by explicitly excluding certain assets and/or incorporating the "characteristics of investment" requirement.[90] Moreover, some Chinese BITs include certain exceptions and carve-outs to safeguard governments' rights to regulate. For instance, the China-Japan-Korea Investment Treaty contains exceptions to "essential security" measures and transfer-of-funds obligations and carves-outs for prudential measures and taxation measures under prescribed circumstances.[91] The China-Canada BIT provides specific exceptions to MFN treatment, national treatment and senior management, boards of directors, and the entry of personnel.[92]

More importantly, some of China's recent BITs explicitly refer to sustainable development issues, including the right to regulate for sustainable development-oriented policy objectives.[93] For example, the Tanzania BIT provides that "it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures… Contracting Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor."94 The Canadian BIT contains "general exceptions" for measures "necessary to protect human, animal, or plant life of health" or "relating to the conservation of living or nonliving exhaustible natural resources."[95] A few Preambles include declarations to "promote health, stable and sustainable development of economy" and "improve-welfare of peoples."[96] The China-Canada BIT recognizes "the need to promote investment based on the principles of sustainable development" in the Preamble. The China-Tanzania BIT further refers to encouraging investors to "respect corporate social responsibilities" in its Preamble. Notably, such provisions on sustainable development are not subject to dispute settlement.

Shifts on Investment Dispute Settlement

While earlier Chinese BITs on dispute settlement were "rather short and lack detail," recent treaties appear to contain more refined dispute settlement rules, particularly on ISDS.[97] Overall, China's approach has changed dramatically from "limited" or "restrictive" ISDS provisions – namely, no ISDS option or limited to disputes involving the amount of compensation for expropriation – to "expansive" or "comprehensive" ISDS provisions – namely, available to "all disputes" relating to investment.[98] The China-Barbados BIT, signed in July 1998, marks the significant shift.[99] This practice, as scholars argue, was driven by several factors, including China's ratification of the ICSID Convention in 1993 and its policy shift toward international law and international arbitration.[100] While China filed a notification under Article 25 (4) of the ICSID Convention at the time of ratification indicating that it "would only consider submitting to the jurisdiction of the [ICSID] disputes over compensation resulting from expropriation and nationalization,"[101] the Barbados and subsequent Chinese BITs would arguably supersede this notification with broad ISDS provisions.

Typically, disputing investors who meet prescribed conditions are able to submit a claim to arbitration under the ICSID Convention, the Additional Facility Rules of ICSID, and the UNCITRAL Arbitration Rules.[102] The conditions precedent to ISDS arbitration vary depending on the specific treaty. In most (if not all) Chinese BITs, amicable settlement through consultation is the first option and a mandatory obligation.[103] Before submitting a claim to arbitration, the disputing investor is usually required to wait for a prescribed "cooling-off" period, like six months in the Canadian BIT,[104] and make use of the domestic administrative review procedures within a certain period; additionally, investors must withdraw their existing claims in Chinese courts before pursuing third party arbitration.[105] In practice, however, it is uncertain whether and to what extent a tribunal would be persuaded to forge these conditions by applying the MFN provisions.[106] A related controversial issue is whether investors could invoke MFN to avail themselves of broader procedural rights for "any dispute" in the newer BITs, as occurred in the Tza Yap Shum v Peru case.[107] Some more recent treaties have clarified this issue by expressly excluding ISDS procedures from the scope of MFN provisions.[108]

Notably, the Canadian BIT is considered to make an "innovative" development on the settlement of disputes relating to financial regulation.[109] According to Article 20 (3), if an investor submits an ISDS claim and the disputing State invokes the prudential regulation exception as a defense, the issue of whether and to what extent the defense is valid shall be decided by the financial services authorities of the two parties, or a State-to-State arbitral tribunal if the financial services authorities are unable to reach a joint decide after 60 days. The joint decision or the State-to-State arbitral tribunal's decision is binding on the ISDS tribunal.

Despite China's expanded web of IIAs and acceptance of more liberal ISDS provisions, the ISDS cases under Chinese BITs are limited. To date, there are six cases initiated by Chinese investors but only three cases brought against Chinese government.[110] Nearly all of these six cases involve old-generation BITs with restrictive terms of investment, investor, dispute, and fork-in-the-road provisions.[111] China's rare exposure to ISDS has attracted broad debates on the possible reasons which, as some scholars have identified, include limitations on dispute resolution provisions in many treaties, alternative mechanisms available to settle investment disputes, cultural reasons, and concerns over the relationship with the Chinese government.[112] Nonetheless, the number of ISDS cases involving China is likely to increase in the future given the policy shift in favor of international arbitration within the last 10 years, though their impacts on China's BIT practice remain to be seen. What is clear now is that China needs to consider and balance the interests of being both a home State (i.e., protecting the rights of investors) and a host State (i.e., safeguarding legitimate regulatory power). As Chinese FDI outflows increase, it is more likely that Chinese investors will need to seek redress through ISDS to protect their investment abroad.[113] This may be the case with the huge investment in the BRI if the investment disputes cannot be addressed in a timely and efficient manner.

Over the past years, many countries have proposed different approaches to reform the ISDS regime.[114] As a significant player in international investment, China has been actively involved in the multilateral discussions on ISDS reforms in the UNCITRAL and arbitration rules amendment in the ICSID. Remarkably, China's submission to the UNCITRAL on 18 July 2019 demonstrated its position on ISDS reform – namely, the ISDS mechanism is "a generally worth maintaining mechanism" for settling investment dispute, but it has also created problems to be resolved by "improving the structure of multilateral ISDS rules and mechanism, along with a review and formulation of balanced rules for dispute resolution."[115] In this submission, China States that it supports the study of a permanent appeal mechanism as a reform proposal, particularly based on formulating multilateral rules like the WTO dispute settlement mechanism, while the right to appoint arbitrator at the first-instance stage of investment arbitration as a widely accepted institutional arrangement should be retained in any reform process. Meanwhile, China has not been critical of the following aspects of the ISDS processes in the ISDS reform: the pro-investor jurisprudence at the cost of regulatory autonomy and its potential chilling effect on host State's regulations as suggested by many States.[116]

Moreover, China's approach to ISDS reform is to some extent "innovative" as it tends to improve the current ISDS while being open to an appellate body. Robert and John consider that China's approach "may better represent the current temperature of the negotiating room than any of the other declared powers."[117] More importantly, given the support by China and the EU as the world's two largest economies of a permanent appellate mechanism, the China-EU BIT is expected to mark a breakthrough in not only Chinese BIT practice but also global BIT practice.[118] If so, it remains to be seen how the details of such a plan will be worked out. China intends to retain the right of investors to appoint arbitrators and has not supported the EU's two-tier permanent multilateral investment court proposal.[119]

It is worth noting that China is actively exploring alternative dispute resolution mechanisms, particularly mediation, complaint handling mechanisms, and investment conciliation. Signed in 2017, the Investment Agreement of Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) provides for (i) mediation by mediation institutions of both sides regarding ISDS, and (ii) complaint handling mechanisms.[120] In its proposal on ISDS reform to UNCITRAL, China proposed investment conciliation mechanism as alternative dispute resolution measures (highlighting "a high degree of flexibility and autonomy" in this mechanism) and compulsory pre-arbitration consultation procedures.[121] The respondent government is likely to have more control of these processes compared with investor-State arbitration.

Essentially, the more favorable approach for China to IIA practice may be "explained by reference to its desire to integrate into the international community, and its intention to protect increasing Chinese investment activity and create the perception of a country that is friendly to FDI."[122] This explains why China shifts to comprehensive ISDS provisions, which help to protect Chinese investor and investment. ISDS reform offers China a great opportunity to "voice its ideals" in international investment law and policy.[123] Additionally, Chinese government is likely to play its role in assisting dispute settlement like that under the BRI.[124] The practice of investment dispute settlement involving China deserves attention, which ranges from transparency to the role of the government.[125]

Concluding Remarks

China's IIA practice is affected by both domestic factors (e.g., the promotion of outbound investment) and interdependent policymaking at the international level.[126] China's BITs have reflected both interpretative and substantive balancing in the latest practice. The former includes the incorporation of a "like circumstances" criteria to limit the application of nondiscrimination provisions, and clarified wording to restrict the findings of indirect expropriation, and qualification of the FET, while the latter includes the increased general exception clauses and the inclusion of noninvestment objectives in the preambles.[127]

China's shifted approach in the new generation BITs is likely to have broader implications. As noted by some scholars, "in the light of global efforts toward encouraging sustainable FDI, it is possible that China will jump on the bandwagon and follow along the lead of other capital-exporting nations... If this is the future trajectory of China's IIAs, then there is a hope for a largely uniform international investment law and policy regime."[128] Meanwhile, there are uncertainties particularly when there is an economic crisis (such as a possible one following the COVID-19 outbreak) or economic slowdown. Many issues remain open. For instance, could a government rely on a necessity defense under a BIT to justify its expropriation of a foreign investment as part of its restraints on inbound investment to respond to an economic crisis?[129] In a broader context, this involves the balancing of the protection of outbound investment and regulatory control of inbound investment in rule interpretation and making (e.g., investment liberalization). Therefore, the practice of China's investment treaties needs close and continuing attention.

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The Future of Investor-State Dispute Settlement: Exploring China's Changing Attitude

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17. Wang H (2017) The RCEP and its investment rules: learning from past Chinese FTAs. Chin J Glob Gov 3:160, 160–181

18. Notably (2019) 16 Chinese BITs were terminated or replaced by newer treaties. For a full list of Chinese treaties, see UNCTAD, International Investment Agreement Navigator. https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china

19. The "older-generation" (or the "first-generation") investment treaties refer to the majority of IIAs concluded before 2010, most of which contain broad and vague formulations. https://unctad.org/meetings/en/SessionalDocuments/ciimem4d14_en.pdf.

20. Shan W, Chen H (2016) China–US BIT negotiation and the emerging Chinese BIT 4.0. In: Lim CL (ed) Alternative visions of the international law on foreign investment: essays in honour of Muthucumaraswamy Sornarajah. Cambridge

University Press, p 224; Bungenberg M, Chi M (2015) Chinese investment treaties. In: Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International investment law: A handbook. Hart, pp 223–225

21. The authors admit that scholars have different classifications. For example, Gallagher N, Shan W (2009) Chinese investment treaties: policies and practice. Oxford University Press. pp 35–42. Chaisse J, Kirkwood J (2020) Chinese puzzle: anatomy of the (invisible) belt and road investment treaty. J Int Eco Law 23:250

22. Congyan C (2009) China–US BIT negotiations and the future of investment treaty regime: a grand bilateral bargain with multilateral implications. J Int Econ Law 12(2):457, p 459. Schill S (2007) Tearing down the great wall – the new generation of investment treaties of the People's Republic of China. pp 78–79. Shan W, Gallagher N (2013) China. In: Brown C (ed) Commentaries on selected model investment treaties. Oxford University Press, p 132. Cohen T, Schneiderman D (2017) The political economy of Chinese bilateral investment treaty policy. Chin J Comp Law 5(1):115

23. See Art 18 of the 1982 Constitution of the People's Republic of China. Other Chinese laws and regulations regarding FDI include the Chinese-Foreign Equity Joint Venture Law, the Chinese-Foreign Contractual Join Venture Law, the Wholly Foreign Owned Enterprises Law, etc. See Shan W, Gallagher N (2013) China. In: Brown C (ed) Commentaries on selected model investment treaties. Oxford University Press, pp 134–135

24. See Shishi LI (1988) Bilateral investment promotion and protection agreements: practice of the People's Republic of China. In: International law and development (eds: de Waart P, Peters P, Denters E). p 165. Gallagher N, Shan W (2009) Chinese investment treaties: policies and practice. Oxford University Press, pp 35–36

25. Gallagher N, Shan W (2009) Chinese investment treaties: policies and practice. Oxford University Press, p 36; Cohen T, Schneiderman D (2017) The political economy of Chinese bilateral investment treaty policy. Chin J Comp Law 5(1):116

26. For example, Thailand (1985) was the first developing country to sign a BIT with China. In 1994, China signed its first BIT with another socialist economy, Romania. As pointed by Gallaher and Shan, "Chinese BITs started to spread, from merely Western Europe to reach Eastern Europe, Asia and Africa" during that period, see Gallagher N, Shan W (2009) Chinese investment treaties: policies and practice. Oxford University Press, p 36.

27. According to Cohen and Schneiderman, the majority of Chinese BITs with non-developed countries in earlier years were concluded for "deepening ties with strategic allies for geo-political purposes." Cohen T, Schneiderman D (2017) The political economy of Chinese bilateral investment treaty policy. Chin J Comp Law 5(1):117.

28. Shan W, Gallagher N (2013) China. In: Brown C (ed) Commentaries on selected model investment treaties. Oxford University Press, p 132

29. Gallagher N, Shan W (2009) Chinese investment treaties: policies and practice. Oxford University Press, p 37

30. Bungenberg M, Chi M (2015) Chinese investment treaties. In: Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International investment law: A handbook. Hart, p 226

31. For example, the first Chinese BIT with Sweden-which remains in force today- provides MFN protection but no national treatment. The China-UK BIT (1986) and the China-Japan BIT (1988) provide national treatment, but that was qualified "in accordance with laws and regulations" of the host State. See Wang G (2009) China's practice in international investment law: from participation to leadership in the world economy. Yale J Int'l L 34:577. Shan W, Chen H (2016) China–US BIT negotiation and the emerging Chinese BIT 4.0. In: Lim CL (ed) Alternative visions of the international law on foreign investment: essays in honour of Muthucumaraswamy Sornarajah. Cambridge University Press, p 225.

32. Ibid.

33. For example, Kidane W (2016) China's bilateral investment treaties with African states in comparative context. Cornell Int Law J 147; Yongjie LI (2014) Factors to be considered for China's future investment treaties. In: Shan W, Su J (eds) China and international investment law: twenty years of ICSID membership. BRILL, p 174

34. China formally signed the ICSID Convention on 9 February 1990 and ratified it on 7 January 1993. The significance of China's accession to the ICSID Convention is to make it possible for investment treaty negotiators to make direct reference to ICSID jurisdiction. Shan W, Gallagher N (2013) China. In: Brown C (ed) Commentaries on selected model investment treaties. Oxford University Press, p 39. Kidane W (2016) China's bilateral investment treaties with African states in comparative context. Cornell Int Law J 149.

35. Gallagher N, Shan W (2009) Chinese investment treaties: policies and practice. Oxford University Press, p 39. Burger A (2011) "The politics of China" investment treaty-making program. In: Broude T, Busch M, Porges A (eds) The politics of international economic law. Cambridge University Press, p 174. Gallagher N (2014) China's BIT and arbitration practice:

progress and problems. In: Shan W, Su J (eds) China and international investment law: twenty years of ICSID membership. BRILL, p 182. In accordance with Article 25(4) of the ICSID Convention, China notified the Center when ratifying the Convention that it would only consider submitting to ICSID jurisdiction for disputes over compensation for expropriation.

36. Cohen T, Schneiderman D (2017) The political economy of Chinese bilateral investment treaty policy. Chin J Comp Law 5(1):121. Davies K p 5; Berger A. China's new bilateral investment treaty programme. p 6

37. Cohen T, Schneiderman D (2017) The political economy of Chinese bilateral investment treaty policy. Chin J Comp Law 5(1):122–123

38. Shan W, Chen H (2016) China–US BIT negotiation and the emerging Chinese BIT 4.0. In: Lim CL (ed) Alternative visions of the international law on foreign investment: essays in honour of Muthucumaraswamy Sornarajah. Cambridge University Press, pp 225–226. Berger A Chin's new bilateral investment treaty program. p 10. Schill S. p 76

39. The China-Barbados BIT (1998) Art 8.

40. The China-Netherland BIT (2001) Art 3 (3). The China-Germany BIT (2003) Art 3 (3)

41. The China-Netherland BIT (2001) Art 9 (1)-(2). The China-Germany BIT (2003) Art 9 (1)-(2)

42. Shan W, Gallagher N (2013) China. In: Brown C (ed) Commentaries on selected model investment treaties. Oxford University Press, p 132

43. Hu Jintao, for the first time declared that China would "implement free trade area strategy, strengthen bilateral and multilateral economic and trade cooperation." See Congyan C (2009) China–US BIT negotiations and the future of investment treaty regime: a grand bilateral bargain with multilateral implications. J Int Econ Law 12(2):457, p 460

44. Bungenberg M, Chi M (2015) Chinese investment treaties. In Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International investment law: A handbook. Hart, p 229. Valentine Vadi pp 711–713

45. The typical examples of the newer generation investment treaties arguably modelled after the 2004 Model BITs of the USA and Canada.

46. Berger (2019) The political economy of Chinese investment treaties. 157

47. Shan W, Chen H (2016) China–US BIT negotiation and the emerging Chinese BIT 4.0. In Lim CL (ed) Alternative visions of the international law on foreign investment: essays in honour of Muthucumaraswamy Sornarajah. Cambridge University Press; Shan W, Wang L (2015) The China–EU BIT and the emerging "Global BIT 2.0", ICSID Review – Foreign Invest Law J 30(1)

48. UNCTAD WIR 2014.

49. Shan W, Chen H (2016) China–US BIT negotiation and the emerging Chinese BIT 4.0. In: Lim CL (ed) Alternative visions of the international law on foreign investment: essays in honour of Muthucumaraswamy Sornarajah. Cambridge University Press, pp 227–228

50. Decision of the Central Committee of the Communist Part of China on some Major Issues Concerning Comprehensively Deepening the Reform, adopted by the third Plenary Session of the 18th CPC Central Committee in Beijing on 12 November 2013.

51. See Article 6 of the Foreign Investment Law.

52. Zeng K, Lu Y (2016) Variation in bilateral investment treaty provisions and foreign direct investment flows to China, 1997–2011. Int Inter 42:5, 820–848, p 823; Shen W (2018) Evolution of non-discriminatory standards in China's BITs in the context of EU-China BIT negotiations. Chin J Int Law 800–801

53. Levine M (2019) Towards a fourth generation of Chinese treaty practice: substantive changes, balancing mechanisms, and selective adaption. In: China's international investment strategy. p 219; Wang H The RCEP investment rules and China: learning from the malleability of Chinese FTAs, see id. at 252–257, (ed: Chaisse J)

54. Shan W, Chen H (2016) China–US BIT negotiation and the emerging Chinese BIT 4.0. In: Lim CL (ed) Alternative visions of the international law on foreign investment: essays in honour of Muthucumaraswamy Sornarajah. Cambridge University Press, p 228

55. Berger A (2013) Investment Rules in Chinee preferential trade and investment agreements: is China following the global trend towards comprehensive agreements? DIE, pp 10–11

56. See Potter P (2003) Globalisation and economic regulating in China: selective adaptation of globalised norms and practice. Washington Univ Glob Stud Law Rev 2(1):119. Shan W, Chen H (2016) China–US BIT negotiation and the emerging Chinese BIT 4.0. In Lim CL (ed) Alternative visions of the international law on foreign investment: essays in honour of Muthucumaraswamy Sornarajah. Cambridge University Press, pp 247–251

57. Wang H (2020) Selective reshaping: China's paradigm shift in international economic governance. J Int Econ Law 23 (forthcoming)

58. For example, Art 3 of the China-Finland BIT. Notably, this qualification has been removed in the new Finland BIT in 2004.

59. Gallagher N, Shan W (2009) Chinese investment treaties: policies and practice. Oxford University Press, p 130

60. Article 5 (1) of the China-Mexico BIT (2008).

61. The China-Canada BIT (2012) Art 4.

62. Art 2 of the China-Colombia BIT (2008).

63. Art 4 (2) of the China-Canada BIT (2012).

64. Art 5 (1) of the China-Japan-Korea TIT (2012).

65. The 2012 US Model BIT provides that FET includes the obligation not to deny justice in accordance with the principle of due process and further defines the term "customary international law" in Annex A as "all customary international law principles that protect the economic rights and interests of aliens." The EU provides an "expansive" list of measures that may constitute a violation of FET – namely, "a breach of any future element of the FET obligation adopted by the Parties" – see Art X.9 of CETA.

66. Shan W, Wang L (2015) The China–EU BIT and the emerging "global BIT 2.0. ICSID Rev – Foreign Invest Law J 30(1)

67. For example, Art 6 of the China-Uzbekistan BIT.

68. For example, Annex B.10 of the China-Canada BIT (2012) Art 6 (2) of the China-Tanzania BIT (2013).

69. For example, Annex B.4 of the 2012 US Model BIT; Annex 8-A.2 of the CETA.

70. Art 6 (3) of the China-Tanzania BIT provides: "Except in rare circumstances, such as where the measures adopted substantially exceed the measures necessary for maintaining reasonable public welfare, legitimate regulatory measures adopted by one Contracting Party for the purpose of protecting public health, safety and the environment, and that are for the public welfare and are non-discriminatory, do not constitute indirect expropriation." Similar provision in China-Canada BIT.

71. For example, Art 6 (1)(c) & (d) of the 2012 US Model BIT.

72. See Art 10 of the China-Canada BIT.

73. Gallagher N, Shan W (2009) Chinese investment treaties: policies and practice. Oxford University Press, p 173

74. Sauvant KP, Nolan MD (2015) China's outward foreign direct investment and international investment law. J Int Econ Law 18(4):922

75. Article 3 (3) of the China-Finland BIT.

76. See e.g., Article 4 of the China-Tanzania BIT, Article 5 of the China-Canada BIT.

77. Sauvant KP, Nolan MD (2015) China's outward foreign direct investment and international investment law. J Int Econ Law 18(4):923. See e.g., Article 3 (2) of the China-Malta BIT (2009); Article 3 of the China-Uzbekistan BIT (2011); Article 3 (2) of the China-Tanzania BIT (2015).

78. Article 3 (1) of the China-Korea BIT; Article 6 of the China-Canada BIT.

79. Article 3 (2) of the China-Korea BIT. Similar provision see Art 3 (3) of the China-Korea-Japan TIT.

80. Bonnitcha, Poulsen, Waibel. The political economy of the investment treaty regime. Oxford University Press, p 18

81. Bonnitcha, Poulsen, Waibel. The political economy of the investment treaty regime. Oxford University Press, p 103

82. As noted, the BITs and PTIA concluded by China after 2007 all offer pre-establishment MFN.

83. Mann H (2007) Investment liberalization: some key elements and issues in today's negotiating context, issues in international investment law: background papers for the developing country investment negotiators' forum, 5.

84. See e.g., Article 3 (3) of the China-Finland BIT.

85. See e.g., Article 9 of the China-Canada BIT; Article 7 of the China-Korea-Japan TIT.

86. Levine M (2019) Towards a fourth generation of Chinese treaty practice: substantive changes, balancing mechanisms, and selective adaption. In: Chaisse J (ed) China's international investment strategy: bilateral, regional, and global law and policy. Oxford University Press, p 213

87. Shan W, Chen H (2016) China–US BIT negotiation and the emerging Chinese BIT 4.0. In: Lim CL (ed) Alternative visions of the international law on foreign investment: essays in honour of Muthucumaraswamy Sornarajah. Cambridge University Press, p 233

88. Shan W, Wang L (2015) The China–EU BIT and the emerging "Global BIT 2.0". ICSID Rev – Foreign Invest Law J 30(1):262

89. For example, Art 8.9 of the CETA.

90. For example, Article 1 of the China-Mexico BIT, Article 1 of the China-Uzbekistan BIT, Article 1 (1) of the China-Tanzania BIT, Article 1 of the China-Japan-Korea TIT, and Article 1 of the China-Canada BIT, etc.

91. Articles 18 - 21 of the China-Japan-Korea TIT.

92. Article 8 of the China-Canada BIT.

93. Sustainable development orientation is also a key feature of substantive clauses in new generation of IIAs, see UNCTAD, Taking Stock of IIA Reform: Recent Development, IIA Issues Note (June 2019), p 2.

94. Article 10 of the China-Tanzania BIT. Similar provisions see also Article 18 (3) of the China-Canada BIT, Article 23 of the China-Japan-Korea TIT. For general discussion on Chinese BIT practice on environmental protection.

95. Article 33 of the China-Canada BIT.

96. For example, Preamble of the China- Uzbekistan BIT and the China-Tanzania BIT.

97. For example, the China-Canada BIT contains 14 provisions on establishing the investor-State arbitration mechanism (Part C Articles 19–32), in addition to ad hoc arbitration with a three-member tribunal for State-State disputes (Article 15).

98. For general discuss see Weeramantry JR (2012) Investor-State dispute settlement provisions in China's investment treaties. ICSID Rev 27(1):192–206.

99. Cai C (2006) Outward foreign direct investment protection and effectiveness of Chinese BIT practice. J World Invest Trade 7(5):621, p 646

100. Gallagher N, Shan W (2009) Chinese investment treaties: policies and practice. Oxford University Press, p 320.

101. Notification of China, 7 January 1993.

102. For example, Article 22 of the China-Canada BIT.

103. Gallagher N, Shan W (2009) Chinese investment treaties: policies and practice. Oxford University Press, p 332.

104. Article 21 (2) of the China-Canada BIT.

105. For example, Article 21 (2) and Annex C. 21 of the China-Canada BIT.

106. In Maffezini v Spain, for example, the tribunal applied the MFN provision to permit the claimant to proceed directly to international arbitration without having to attempt to resolve the dispute in the local courts for 18 months as stipulated in the basic treaty.

107. For a general discussion see Shen W (2011) 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, Chin J Int Law 10(1):55–95.

108. For example, Article 5 (3) of the China-Canada BIT, Article 4 of the China-Japan-Korea BIT, Article 4 (3) of the China-Uzbekistan BIT, etc.

109. Shan W, Wang L (2015) The China–EU BIT and the emerging “Global BIT 2.0”. ICSID Rev – Foreign Invest Law J 30(1):264. Shan W, Chen H (2016) “China–US BIT negotiation and the emerging Chinese BIT 4.0. In: Lim CL (ed) Alternative visions of the international law on foreign investment: essays in honour of Muthucumaraswamy Sornarajah. Cambridge University Press, pp 246–247

110. 6 cases initiated by Chinese investors include Jetion and T-Hertz v Greece (2019, Pending), Sanum Investments v Laos (2017, pending), Beijing Urban Construction v Yemen (2014, settled), Ping An v Belgium (2012, decided in favour of State), Bejing Shougang and others v Mongolia (2010, decided in favour of state) and Tza Yap Shum v Peru (2007, decided in favor of investor). 3 cases against China are Hela Schwarz v China (2017, pending), Ansung Housing v China (2014, decided in favour of State), and Ekran v China (2011, settled).

111. Ming Du, Wei Shen (2019) The future of investor-State dispute settlement: exploring China’s changing attitude. In: Julien Chaisse et al (eds) Handbook of international investment law and policy 4

112. See e.g., Trakman L (2015) Geopolitics, China and Investor-State Arbitration. In: Toohey L, Picker C, Greenacre J (eds) China in the international economic order: new directions and changing paradigms. Cambridge University Press, p 280; Wang G (2011) Chinese mechanisms for resolving investor-State disputes. Jindal J Int Aff 1(1):204–233; Global Arbitration Review, First ICSID case filed against China, 26 May 2011; Pathiranan D (2017) A look into China’s slowly increasing appearance in ISDS Cases. Investment Treaty News. Sauvant KP, Nolan MD (2015) China’s outward foreign direct investment and international investment law. J Int Econ Law 18(4):931–932

113. Gallagher N, Shan W (2009) Chinese investment treaties: policies and practice. Oxford University Press, p 349

114. See UNCTAD (2019) Taking stock of IIA reform: recent development, IIA issues note., pp 3–4

115. Possible reform of investor-State dispute settlement (ISDS)- Submission from the Government of China, A/CN.9/WG.III/WP.177. https://undocs.org/en/A/CN.9/WG.III/WP.177

116. Du & Shen (2019) 22.

117. Roberts A, John T (2019) UNCITRAL and ISDS reform: China’s proposal, EJIL:Talk!, 5 August 2019. https://www.ejiltalk.org/uncitral-and-isds-reform-chinas-proposal/

118. Roberts A, John T (2019) UNCITRAL and ISDS reform: China’s proposal, EJIL:Talk!, 5 August 2019. https://www.ejiltalk.org/uncitral-and-isds-reform-chinas-proposal/. Shan W, Wang L (2015) The China–EU BIT and the emerging “Global BIT 2.0”. ICSID Rev – Foreign Invest Law J 30(1):265–267

119. Du & Shen (2019) 23.

120. Mainland-Hong Kong CEPA investment agreement, Articles 19, 20 (2017).

121. UNICTRAL Working Group III (2019) Possible reform of Investor-State Dispute Settlement (ISDS) Submission from the government of China: Note by the Secretariat. p 5

122. Wei D (2012) “Bilateral investment treaties: an empirical analysis of the practices of Brazil and China. Eur J Law Econ 33(3):663

123. Du & Shen (2019) 24.

124. Bath (2016) “One belt and one road” and Chinese investment. 189

125. See, e.g., Trakman LE (2017) China’s regulation of foreign direct investment. In: Asia’s changing international investment regime: sustainability, regionalization, and arbitration (eds: Chaisse J, et al). pp 84–88

126. Berger (2019) The political economy of Chinese investment treaties. p 162

127. Levine (2019) pp 213–217.

128. Sauvant KP, Nolan MD, (2015) China’s outward foreign direct investment and international investment law. J Int Econ Law. 18(4):934

129. Trakman (2017). 91.

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