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**CHINA AND FOREIGN DIRECT INVESTMENT:  
LOOKING AHEAD**

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**PART 2**

***Specific Issues in International  
Commercial Arbitration***





## China and Foreign Direct Investment: Looking Ahead

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### 6.1 Introduction

China is responsible for huge inbound and outbound foreign investment, guided by a sophisticated international investment treaty program.<sup>1</sup> According to a World Bank Report on the New Global Economy published in May 2011, by 2025, Brazil, China, India, Indonesia, South Korea and Russia will be responsible for more than half of the global growth in investment.<sup>2</sup> A further Special Report of the Asia Society indicates that foreign direct investment ('FDI') from

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1 On the development of China's model investment agreements, see Wenhua Shan and Norah Gallagher, "China", in *Commentaries on Selected Model Investment Treaties*, edited by Chester Brown, (Chicago: University of Chicago Press, 2013), Chapter 4. On the difficulties faced by investors bringing claims against China, see e.g. Peter J. Turner, "Investor-State Arbitration", in *Managing Business Disputes in Today's China-Dueling with Dragons*, edited by Michael J. Moser, (Kluwer Law International, 2007), Chapters 2, 3, 4. On the costs of arbitration generally, see Susan D. Franck, "Rationalizing Costs in Investment Treaty Arbitration", WASH. U. L. REV. 88(2011): 769, 789, 815–16 (providing an economic rationalization of the costs of arbitration under investment treaties); Anthony Sinclair, Lousie Fisher and Sarah Macrory, "ICSID Arbitration: How Long Does It Take?", Vol. 4, GLOBAL ARB. REV. 5 4, <http://www.goldrserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf>. (Accessed Oct. 31st, 2014)

2 World Bank, *Multipolarity: The New Global Economy* (2011), [http://siteresources.worldbank.org/INTGDH/Resources/GDH\\_CompleteReport2011.pdf](http://siteresources.worldbank.org/INTGDH/Resources/GDH_CompleteReport2011.pdf). (Accessed Oct. 31st, 2014)

China to the USA is more than doubling annually.<sup>3</sup> China's projected investment is expected to reach close to 2 trillion USD by 2020. China's investments are diverse and global. It is a net importer of, among other products, oil, gas, and coal. It is investing significantly in Africa, Asia and South America, to meet its energy supply needs.<sup>4</sup>

China's growth as an importer and exporter of FDI in the last two decades is reflected in a pattern of investment practices.<sup>5</sup> It often negotiates investment treaties on a one to one basis with other countries. It focuses increasingly on investment quality, rather than investment quantity; and it is concerned about outbound not only inbound investments, such as the investments by state owned enterprises abroad.<sup>6</sup>

As a result, China has concluded over 130 BITs to date. Among these are 26 BITs with African countries including among others, Ghana, Tunisia, Egypt,

3 See Daniel H. Rosen and Thilo Hanemann, "An American Open Door? Maximizing the Benefits of Chinese Foreign Direct Investment", Center on U.S.-China Relations and Kissinger Institute on China and the United States (May 2011): 35–52, 68–75, [http://www.ogilvypr.com/files/anamericanopendoor\\_china\\_fdi\\_study.pdf](http://www.ogilvypr.com/files/anamericanopendoor_china_fdi_study.pdf). (Accessed Nov. 1st, 2014)

4 See J. Gu, J. Humphrey and D. Messner, "Global Governance and Developing Countries: The Implications of the Rise of China", *World Development* 36(2) (2008): 274; E. Neumayer and L. Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" *World Development* 33(10) (2005): 1567.

5 On the growth in Chinese FDI, see Ministry of Commerce, People's Republic of China, Statistics of FDI In January–July 2012 (Aug. 20, 2012) <http://english.mofcom.gov.cn/aarticle/statistic/foreigninvestment/201208/20120808295811.html>. (Accessed Nov. 1st, 2014.) On China's growing leadership in international investment law and practice generally, see Wang Guiguo, "China's Practice in International Investment Law: From Participation to Leadership in the World Economy", *YALE J. INT'L L.* 34(2009): 575, 584–85; see also Stephan W. Schill, "Tearing down the Great Wall: The New Generation Investment Treaties of the People's Republic of China", *CARDOZO J. INT'L & COMP. L.* 15 (2007): 73.

6 See Yang Shu-Dong, "Investment Arbitration and China: Investor or Host State?" (2012) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1973744](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973744) (Accessed Feb. 13, 2014), Qing Jiang Kong, "U.S.-China Bilateral Investment Treaty Negotiations: Context, Focus, and Implications", *Asian J. WTO & Int'l Health L. & Pol'y* 7 (2012): 18. See generally, Lauge N. Skovgaard Poulsen, "Investment Treaties and the Globalisation of State Capitalism: Opportunities and Constraints for Host States", in *Prospects in International Investment Law and Policy*, edited by R. Echandi and P. Sauvé (Cambridge University Press, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2050919](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2050919) (Accessed Oct. 13, 2014). On China as a driving force in outward bound investments across the developing world, see P.J. Buckley, J. Clegg, A.R. Cross, X. Liu, H. Voss, and P. Zheng, "The Determinants of Chinese Outward Foreign Direct Investment", *J. INT'L BUS. STUDIES* 38(4) (2007): 499; R. Kaplinsky and D. Messner, "Introduction: The Impact of Asian Drivers on the Developing World", *World Development* 36(2)(2008): 197.

Kenya, South Africa, Mozambique and Mali.<sup>7</sup> China also has BITs with various Western countries, notably with Germany, concluded in 2004. It concluded nine new free trade agreements in the last decade, with others under negotiation. China is currently engaged in negotiations with the Gulf Cooperation Council, ASEAN, Singapore, Iceland, Norway, the South African Customs Union and Closer Economic Partnership Arrangements' with Hong Kong and Macao. China recently entered into an investment agreement with Korea and Japan, as well as with Canada. It is negotiating further agreements, with Australia, Turkey and Chile, which are not yet signed. Other FTAs with India and Switzerland are under consideration.<sup>8</sup>

China is aware that the price of attracting global investment is the prospect that investor claims are likely to be lodged against it in the future. However, China is also aware that the benefits may well outweigh the costs. After all, China has grown into the second largest economy in the world. It is the largest recipient of foreign investment and fifth in outward FDI, recently overtaking the United States as the world's largest trading nation.<sup>9</sup> It well

7 For a list of China's BITs, see [http://www.unctad.org/sections/dite\\_pceb/docs/bits\\_china.pdf](http://www.unctad.org/sections/dite_pceb/docs/bits_china.pdf) (Accessed Oct. 13, 2014); The text of each BIT is available at [http://www.unctadxi.org/templates/docsearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/docsearch____779.aspx) (Accessed Oct. 13, 2014); On China's investment treaty partners, see <https://icsid.worldbank.org/ICSID/FrontServlet> (Accessed Oct. 13, 2014). See too Peter Kragelund, "Knocking on a Wide Open Door: Chinese Investments in Africa", *REV. AFRICAN POL. ECON.* 36(122)(2009): 479; P. Bennell, "Foreign Direct Investment in Africa: Rhetoric and Reality", *SAIS REV.* 17(2) (1997): 127; C. Alden and M. Davies, "A Profile of the Operations of Chinese Multinationals in Africa", *SOUTH AFRICAN JNL INT'L AFF.* 13(1) (2006): 83; M. Davies, "China's Developmental Model Comes to Africa", *REV. AFRICAN POL. ECON.* 35(1) (2008): 134; A. Huliaras and K. Magliveras, "Truths, Lies and Misperceptions: United States and European Union Reactions to the Growing Chinese Presence in Africa", paper presented at *Second European Conference on African Studies*, University of Leiden; UNCTAD *Asian Foreign Direct Investment in Africa*, UNCTAD (2007).

8 On China's various bilateral investment agreements, see [bilaterals.org](http://bilaterals.org), *China* (May 2012), <http://www.bilaterals.org/spip.php?rubrique118> (Accessed Oct. 13, 2014). China has also signed over ninety Double Taxation Avoidance Treaties (DTTs), See <http://www.chinatax.gov.cn/n8136506/n8136593/n8137537/n8687294/8688432.html> (Accessed Oct. 13, 2014).

9 See e.g. <http://www.bloomberg.com/news/2013-02-09/china-passes-u-s-to-become-the-world-s-biggest-trading-nation.html>. (Accessed Nov. 1st, 2014) See too UNCTAD World Investment Report 2010 (Jul. 22, 2010), [www.unctad.org](http://www.unctad.org) (Accessed Nov. 1st, 2014). China's ranking as an ODI State is set to rise in the coming years with the increase in consumer demand of a growing middle class. China has been a net importer of oil, gas and coal for several years and is investing around the world to secure energy supplies to meet this demand in Africa, South America and Asia. See Spencer Swartz and Shai Oster, "China Tops US in Energy Use", *WALL ST. J.*, Jul. 18, (2010). Recently, Petrochina purchased a 50% stake from EnCana in

appreciates the economic rationalist reasons for promoting foreign direct investment, as well as the risks.

This paper has three primary purposes. The first purpose is to explore these developments primarily in relation to China's history and practice in concluding bilateral investment agreements ('BITS') with foreign countries. The second purpose is to scrutinize China's approach to resolving investment disputes in light of China's limited experience with investor-state arbitration. The third purpose is to identify how China is likely to develop its investor-state treaties and agreements and dispute resolution regime through strategic investment alliances with other states, without sacrificing its distinctive national interests including those of its investors abroad. In issue is the prospect of China further developing its distinctive model BIT program to apply strategically to FDI generally and to assess the kind of model BIT it will adopt. Alternatively, is China likely to formulate a two or multi-tiered BIT program in which it differentiates between BITS with liberalized investor protections and BITS with strong national protection provisions, depending on its BIT partner state? In formulating such varied BIT program, China is also likely to consider whether its BIT partners are primarily inbound or outbound capital investor states and the nature of the investments that are in issue in relation to them.

## 6.2 Investment Claims and China

China has concluded the second largest number of BITS to date, following Germany.<sup>10</sup> This is a significant development considering that China concluded its first BIT in 1982 with Sweden, its second BIT in 1989. It only ratified the ICSID Convention in 1993.<sup>11</sup> Equally striking is the development of China's

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natural gas deposits in Western Canada: Bernard Simon and Leslie Hook, "PetroChina in \$5.4 bn Canada gas buy", *FIN. TIMES*, Feb. 10 (2011).

10 The number of Chinese and German BITS are not exceptional in themselves, given that BITS have grown from 1 in 1959 to well over 3,000 today. See *ICSID Caseload-Statistics* (Issue 2012-2), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics> (Accessed Nov. 1st, 2014). See too UNCTAD, "Total Number of Bilateral Investment Agreements concluded", June 1, 2012, [http://www.unctad.org/sections/dite\\_pccb/docs/bits\\_china.pdf](http://www.unctad.org/sections/dite_pccb/docs/bits_china.pdf). (Accessed Nov. 1st, 2014) See generally Leon E. Trakman, "The Proliferation of Free Trade Agreements: Bane or Beauty?", *J. WORLD TRADE* 42(2008): 367, 378, 385-386.

11 See, e.g., ICSID, "List of Contracting States and Other Signatories of the Convention" (as of April 18, 2012), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> (Accessed Nov. 1st, 2014). See too

three model BITs, the first initiated in the early 1980s, the second developed in the mid-1990s, and the third in 1998. A notable feature of the current Model BIT is in the emphasis it gives to investor protection over market accession; China's endorsement of investor-state arbitration under the ICSID Convention and the UNCITRAL's ad hoc rules of arbitration; and China's sanctioning of umbrella clauses protecting the rights of investors from treaty partner states.<sup>12</sup>

Despite these developments, there is no decided investor-state arbitration ('ISA') in which China was the respondent. There are also no current investor claims pending against China, although claims by Chinese investors abroad against foreign governments are growing, including a recent claim for USD 2.2 billion brought by China's Ping An insurance company against Belgium.

There are various explanations for this paucity of investor claims against China. First, foreign investors do not want to proceed against China and jeopardize their future dealings there, or risk a run-in with the Chinese legal system, such as happened with the Stern Hu case, albeit in distinctive circumstances.<sup>13</sup> As an EU Report of 7 March 2012 reflects, initiating ISA against China is likely to be a "last resort".<sup>14</sup> Second, China is well resourced to defend itself against foreign investors including by engaging in costly, dilatory and fractious

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Jane Y. Willems, "The Settlement of Investor State Disputes and China New Developments on ICSID Jurisdiction", *SOUTH CAROLINA J. INT'L. LAW & BUSINESS* 8 (2011): 1; Monika C E. Heymann, "International Law and the Settlement of Investment Disputes relating to China", *Journal of International Economic Law* 11(3)(2008): 507–526; Christoph Schreuer, *The ICSID Convention: A Commentary* (London: Cambridge University Press, 2011), Chapters 1–2; James Crawford and Karen Lee, "ICSID Reports" (vol. 6, 2004).

12 An example of China's endorsement of ISA under the ICSID and UNCITRAL is contained in Article 5 and 9 of the Germany-China BIT which came into force on December 11 2005. Article 10(2) of that BIT provides an umbrella clause, providing that each state party shall respect its treaty obligations relating to investors from the other state party. On the provisions in China's Model BIT, see *infra* Sections IX and X. See also Wenhua Shan and Norah Gallagher, *Chinese Investment Treaties: Policies and Practice*, (London: Oxford University Press, 2009).

13 Stern Hu, an Australian businessman of Chinese origins, was found guilty in 2010 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, <http://www.eastasiaforum.org/2010/03/28/the-chinese-legal-system-and-the-stern-hu-case/> (Accessed Nov. 1st, 2014).

14 See Leopoldo Rubinacci, "EU-China Investment Relationship, Update on State of Play", *DC Trade Civil Society Dialogue* 7 March (2012), [http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc\\_149185.pdf](http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149185.pdf) (Accessed Nov. 1st, 2014). See European Commission, "Public Consultation on the future relationship between the EU and China", Jul. 6 (2011), [http://trade.ec.europa.eu/consultations/?consul\\_id=153](http://trade.ec.europa.eu/consultations/?consul_id=153) (Accessed Nov. 1st, 2014).



ISA proceedings. Thirdly, at least under first generation Chinese BITS, foreign investors could only claim compensation, but could not raise a claim based on the fact that expropriation has occurred.<sup>15</sup> As a result, any investor claim against a host state would likely fail *ab initio* on grounds that, given the exclusion of a legally determined expropriation, an ISA tribunal would lack jurisdiction to hear the investor's claim. Adding to this absence of ISA jurisdiction are tribunal decisions involving BIT treaty language that restricts compensation claims by investors against state parties to those BITS.<sup>16</sup>

Fourth and quite differently, inbound investors conceivably benefit more from negotiation or conciliation with China than through ISA. According to this fourth view, foreign investors have less reasons to bring ISA against China because China often accords foreign investors better than "national treatment", offsetting concerns that they receive less than fair and equitable treatment or are subject to indirect expropriations.<sup>17</sup> China has also committed itself to recognizing and enforcing arbitration awards, *inter alia*, as a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards ('New York Convention').<sup>18</sup> It has undertaken to submit ISA disputes to

- 15 See Gordon Smith, "Chinese Bilateral Investment Treaties Restrictions on International Arbitration", *ARB.* 76(2010): 58, [http://www.kennedys-law.com/files/Uploads/Documents/GordonSmithChineseBilateralInvestment\\_122010.pdf](http://www.kennedys-law.com/files/Uploads/Documents/GordonSmithChineseBilateralInvestment_122010.pdf) (Accessed Nov. 1st, 2014).
- 16 See "Vladimir and Moise Berschader v. Russian Federation", award in Stockholm under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, Apr. 21, 2006, *available at* <http://italaw.com/cases/documents/142> (Accessed Nov. 1st, 2014); "Ros Invest Co UK Ltd. v. The Russian Federation", award in Stockholm under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, Sept. 12, 2010, *available at* <http://italaw.com/documents/RosInvestCoAward.pdf> (Accessed Nov. 1st, 2014).
- 17 See Wenhua Shan, Norah Gallagher and Sheng Zhang, "National Treatment for Foreign Investment in China: A Changing Landscape", *ICSID REV.* 27(2012): 120; Leon E. Trakman, "Enter the Dragon IV: China's Proliferating Investment Treaty Program", UNSW Centre for Law, Markets and Regulation, *available at* <http://www.clmr.unsw.edu.au/article/deterrence/public-v-private-enforcement/enter-dragon-iv-chinas-proliferating-investment-treaty-program> (Accessed Nov. 1st, 2014); Julia Ya Qin, "WTO-Plus Obligations and their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol", *J. WORLD TRADE* 37(3)(2003)483, 490; Y.Y. Kueh ed., *The Political Economy of Sino-American Relations: A Greater China Perspective*, (Hong Kong University Press, 1997); Meg Kinnear, "The Continuing Development of the Fair and Equitable Treatment Standard", in *Investment Treaty Law: Current Issues III. Remedies in International Investment* edited by Andrea K. Bjorklund, Ian A. Laird and Sergey Ripinsky, (BRIICL, 2009), 209.
- 18 See Xiaohong Xia, "Implementation of the New York Convention in China", *INT'L COM. ARB. BRIEF* 1(2011): 20.

the ICSID and acceded to the ICSID Convention.<sup>19</sup> Perhaps most importantly, China has an image to project and protect, namely, as being “friendly” towards foreign investors including being perceived to be fair; while foreign investors in China have usually received handsome returns on their investments there.<sup>20</sup> Whatever the criticisms that are directed at China’s image in relation to foreign investment, China has succeeded in attracting huge amounts of FDI over several decades and is perceived as economically and politically positioned to further extend its global influence over FDI markets.<sup>21</sup>

The problem is that it is difficult to verify which of these reasons are most likely to account for China’s limited experience with ISA to date. The negotiation and conciliation of investor-state disputes circumventing or preceding an investor filing an ISA claim with an institution like the ICSID is ordinarily done confidentially. Even the general proposition that engaging in dispute prevention and resolution measures with China are likely to be secretive in China. Arbitration claims heard by Chinese arbitration institutions such as the China International Economic and Trade Arbitration Commission (‘CIETAC’) are likely to remain confidential. This is comparable to the arbitration practices adopted by international arbitration associations in the United States and Europe.<sup>22</sup> Claims brought by foreign investors before Chinese courts may also not be reported. Alternatively, if such cases are reported, they may include few details, not unlike terse civil law case reporting more generally. Finally, Chinese courts may decline to hear investor claims against China or against Chinese state-owned corporations on jurisdictional grounds, in particular because China has sovereign immunity from such claims.<sup>23</sup>

19 But see Kim M. Rooney, “ICSID and BIT Arbitrations and China”, J. INT’L ARB., 24 (2007): 704 (arguing that, even after China’s accession to the Washington Convention became effective, it was some years before China provided for ICSID arbitration in early BITs). On the ICSID, see generally Leon E. Trakman, “The ICSID Under Siege”, CORNELL INT’L L.J. 45(3) (2012).

20 See Luke Nottage and Romesh Weeramantry, “Investment Arbitration in Asia: Five Perspectives on Law and Practice”, in *Foreign Investment and Dispute Resolution Law and Practice in Asia*, edited by Vivienne Bath and Luke Nottage, (Routledge, 2011): 25.

21 On China’s shifting position in regard to investment arbitration, see Vivienne Bath, “The Quandary for Chinese Regulators: Controlling the Flow of Investors into and out of China”, in Bath and Nottage, *id.*

22 See Michal J. Moser, “CIETAC Arbitration: A Success Story?”, J. INT’L ARB. 1(1998): 30.

23 See e.g. *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* (FACV Nos. 5, 6 & 7 of 2010) in which the Hong Kong Court of Final Appeal, in a judgment regarding the ability of states to claim sovereign immunity before Hong Kong courts, decided by majority

However, despite the secrecy associated with commercial arbitration proceedings in China as elsewhere, there are a number of indications that Chinese arbitration institutions strive for arbitral independence and impartiality, similarly to the American Arbitration Association ('AAA'), the International Chamber of Commerce ('ICC') or the London Court of International Arbitration ('LCIA').<sup>24</sup> For example, the Rules of the China International Economic Trade Association Commission (CIETAC) provide explicitly that "[T]he arbitral tribunal shall independently and impartially render a fair and reasonable arbitral award based on the facts of the case and the terms of the contract, in accordance with the law, and with reference to international practices."<sup>25</sup> Article 34 of the CIETAC Rules stipulates further for the withdrawal or challenge of an arbitrator if that arbitrator (a) is a party to the arbitration, or a close relative of any party or any party's authorized representatives; (b) has a personal interest in the dispute; (c) has any other relationship with any party or its authorized representatives which may affect the arbitrator's impartiality; or (d) met with any party or its authorized representatives in private, or accepted from any party or its authorized representatives an offer of entertainment or a gift.<sup>26</sup> These rules governing the conduct of arbitrators are comparable to those prescribed by arbitration institutions in the West.<sup>27</sup>

There is also at least some record of challenges to arbitration awards, notably through the judicial review of Chinese arbitral decisions, albeit more in domestic than international arbitration cases. For example, in *Beijing Yingjia Real Estate Development Ltd. v. Third Branch of the Beijing Union Construction*

that foreign states enjoy absolute immunity from jurisdiction. See generally Xiaodong Yang, *State Immunity in International Law* (London, Cambridge University Press, 2012).

24 See International Centre for Dispute Resolution, <http://www.adr.org/icdr> (Accessed Oct. 13, 2014); International Chamber of Commerce, <http://www.iccwbo.org> (Accessed Nov. 1st, 2014); London Court of International Arbitration, <http://www.lcia.org/> (Accessed Nov. 1st, 2014); Leon E. Trakman, "Legal Traditions and International Commercial Arbitration", *AM. REV. INT'L. ARB.* 17(2006): 1, 19–20, 26–28 (discussing private international commercial arbitration associations). See further Leon E. Trakman, "Arbitrating Options: Turning a Morass into a Panacea", *UNSW L.J.* 41(1) (2008): 292–305.

25 See CIETAC Art. 47(1), <http://cieta.org/index.com> (Accessed Oct. 13, 2014).

26 These stipulations are replicated in Rule 21 of the Beijing Arbitration Center [BAC].

27 On the rules governing the appointment and conduct of arbitrators internationally, see e.g. Hong Kong Arbitration Ordinance 2000; Article 16, Arbitration Act 1996, UK; Article. 12–18. Sweden Arbitration Act; and Chapter 3, Commercial Arbitration Rules, Japan Commercial Arbitration Association 1997. See too Leon E. Trakman, "The ICSID under Siege", *CORNELL INT'L L.J.* 34(3) (2012).

*Group Corporation Ltd.*,<sup>28</sup> a Beijing court held that the failure of a presiding arbitrator to disclose her relationship with the attorney of the defendant in a significant number of prior arbitrations violated “legal procedure”, contrary to Article 32 of the CIETAC Rules; and set aside the arbitration award.<sup>29</sup> Similarly, the Hong Kong Court of Appeal declined to enforce a CIETAC award on grounds that the Tribunal had deprived the defendant of the right to question the evidence arising from the presiding arbitrator’s inspection of a factory in the absence of the other arbitrators, expert witnesses and the defendant,<sup>30</sup> contrary to Article 32 of the CIETAC Rules.<sup>31</sup> While the Hong Kong Court of Final Appeal reversed this decision, holding that the Respondent had waived such right by not objecting during arbitral proceedings,<sup>32</sup> the scrutiny of the arbitral award by each Hong Kong court is consistent with judicial review for procedural irregularities in commercial arbitration.

Similarly, concerns about Chinese arbitration tribunals denying natural justice to a party are comparable to concerns expressed in other jurisdictions.<sup>33</sup>

28 *Beijing Yingjia Real Estate Development Ltd. v. Third Branch of BUCC (Beijing Union Construction Group Corporation) Ltd.*, Beijing Second Intermediate People’s Court, 2003, see “Newest Commercial Arbitration and Judicial Practical Cases on Specific Issues”, edited by Yifei, 42 (2008, vol. 1).

29 But see “Beijing Longrun Huizhitong Real Estate Developments Ltd. Corp. v. Beijing Second Construction Projects Ltd. Corp”, Beijing Second Intermediate People’s Court, 2004; see Yifei, *supra* note 28, at 43 (in which it was held that an arbitrator’s failure to disclose that the defendant had nominated that arbitrator to another prior arbitration did not violate the BAC Rules.)

30 “Polytek Engineering Company Ltd. v. Hebei Import & Export Corporation”, Jan. 16, 1998, High Court of the Hong Kong Special Administrative Region, Court of Appeal, Civil Appeal No. 116 of 1997 in *Yearbook Commercial Arbitration 1998—Volume XXIII*, edited by Albert Jan van den Berg.

31 Article 32 of CIETAC Rules: “The arbitration tribunal shall hold oral hearings when examining a case. At the request of the parties or with their consent, oral hearings may be omitted if the arbitration tribunal also deems that oral hearings are unnecessary, and then the arbitration tribunal may examine the case and make an award on the basis of documents only.” See also Article 45 of the Chinese Arbitration Association [CAA]: “The evidence should be demonstrated only at the tribunal section, and the parties have the right to question the evidence.”

32 Feb. 9, 1999, Court of Final Appeal of the Hong Kong Special Administrative Region, FACV No. 10 of 1998 in *Yearbook Commercial Arbitration 1999—Volume XXIV* 652–677 (Albert Jan van den Berg ed., 1999). See further *id.*, section 6.9.

33 See e.g. Han Jian, “The Obligation of an Arbitrator”, *Theory and Practice of Modern International Commercial Arbitration* (UK: Bath Press, 2000): 191.

In the case of *Gao Haiyan et al. v. Keeneye Holdings Limited*,<sup>34</sup> a Hong Kong court refused to enforce an arbitral award of the Xi'an Arbitration Commission in Mainland China on grounds that the Tribunal had shown "favoritism and malpractice"<sup>35</sup> towards one party, a lack of impartiality and had failed to exercise procedural fairness in conducting a mediation-arbitration. In declining to enforce the award, the Hong Kong court described it as "an affront to this Court's sense of justice".<sup>36</sup> Yet, in 2011, the Court of Appeal overruled this decision and enforced the Xi'an Arbitration Commission's award.<sup>37</sup>

These cases all deal with determinations reached by Chinese tribunals in commercial arbitration in general, and not investor-state disputes in particular.<sup>38</sup> A more difficult question relates to investor-state arbitration in which China is a defendant, or Chinese nationals are claimants against foreign host countries under a BIT with China. First, such disputes focus on the action of host states, rather than on private parties to an international commercial dispute. Second, such investor-state disputes ordinarily although not invariably, are brought before investor-state tribunals, such as under the ICSID rules, although the ad hoc UNCITRAL Rules apply to both international commercial and investor-state disputes. Third, there is a need to assess the manner in which ISA proceedings are conducted, given that they are often private and that the publication of comprehensive ISA awards is subject to the consent of the disputing parties.<sup>39</sup>

Finally, even the contention that ISA tribunals lack jurisdiction to hear an investor complaint under a "first generation" BIT that provides only for investor claims to compensation, and not for a determination on expropriation, is not self-evident. In the case of *Tza Yap Shum v. The Republic of Peru*, involving a first generation China-Peru Free Trade Agreement, the Tribunal upheld the Chinese investor's claim, despite Peru's challenge to its jurisdiction to determine whether an expropriation had occurred.<sup>40</sup> Further affirming the

34 HCCT, No. 41, 2010.

35 *Id.* § 30.

36 See *id.* §§ 92–96.

37 [2011] HKEC 514.

38 On similarities and differences between international commercial arbitration and investment arbitration, see Luke Nottage and Kate Miles, "Back to the Future" for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests, University of Sydney Legal Research Paper No 08/62 (June 25, 2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1151167](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1151167) (Accessed Nov. 1st, 2014).

39 See further *infra* Section XI.

40 See *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, June 19, 2009. See too *Renta 4 S.A. v. The Russian Federation*, award on jurisdiction in Stockholm under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, March 20,

jurisdiction of ISA tribunals in a “first generation” BIT are the decisions of at least some ISA tribunals that a Most-Favored-Nation (‘MFN’) clause in a BIT accords the same protection to an investor from a BIT partner state as the most favored protection accorded to investors of any other BIT partner of that host state. As a result, ISA tribunals may interpret the claims of an inbound investor in China under a first generation BIT the MFN treatment that China accords to investors from any other BIT partner state.<sup>41</sup> Given the significant number of Chinese BITs that provide for MFN treatment, the scope for investors from a BIT partner state to lodge an ISA claim against China under a MFN clause is all that much greater. That right, arguably, entitles an investor to bring an ISA claim without first having to exhaust local remedies under a BIT that may restrict the scope of an MFN claim on jurisdictional grounds.<sup>42</sup>

### 6.3 ISA Claims by Chinese Investors Abroad

Given the geometric increase in outbound investments by Chinese investors including Chinese state enterprises, it is reasonable to expect a comparable

2009; *Czech Republic v. European Media Ventures SA* [2007] EWHC 2851, Dec. 5, 2007. See further *infra* Section 11.

- 41 On such an expansive interpretation of a MFN clause, see e.g. *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/07, Award, May 25, 2004; *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, Jan. 25, 2000. On limits placed on the scope of an MFN clause in a BIT, see *Siemens v. Republic of Arg.*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004). See generally on controversy associated with the meaning and scope of MFN clauses, Julie A. Maupin, “MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?”, *J. Int’l Econ. L.* 14(2011): 157; Yas Banifatemi, “The Emerging Jurisprudence on the Most Favored Nation Treatment in Investment Arbitration”, *Investment Treaty Law: Current Issues III; Remedies in International Investment Law, Emerging Jurisprudence of International Investment Law*, edited by British Institute of International and Comparative Law, (London, The British Institute of International and Comparative Law 2009).
- 42 On the history and development of MFN clauses, including in relation to China, see Yi, Seong Deong, Commemorative Edition in Honour of Professor Paik, Choong-Hyun on His Retirement: Articles; “Most-Favoured Nation Treatment: Its Historical Development and Concept”. Vol. 11, No. 1(2004). On an expansive interpretation of a MFN clause, see e.g. “*Emilio Agustin Maffezini*”, ICSID Case No. ARB/97/7 at [54]–[56]; “*Siemens AG v. The Republic of Argentina*”, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004. But see “*Plama Consortium Ltd. v. Republic of Bulgaria*”, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005.



increase in claims brought by Chinese investors against host BIT states. The extent to which these observations are borne out in practice is analyzed below.<sup>43</sup>

An initial caution is to avoid overstating the volume of ISA arbitrations in general. For example, the ICSID caseload has grown geometrically, from a single case in 1972 to approximately 10 cases in 1990, to 38 new cases filed between January and July 2012.<sup>44</sup> However, despite this growth, the absolute number of ICSID cases is limited compared to international commercial arbitration cases. For example, 1,435 claims have been filed with the China International Economic and Trade Arbitration Commission ('CIETAC'), 994 cases with the International Center for Dispute Resolution ('ICDR') of the AAA and 795 cases with the International Chamber of Commerce ('ICC').<sup>45</sup>

The limited number of decided ISA cases also makes it difficult to draw definitive conclusions about the application of ISA to claims by outbound Chinese investors against host states and claims by foreign investors against China in particular. In addition, Chinese foreign investors have brought only a few ISA cases against host states under BITs in which China is the investor's home state.

Included among claims by Chinese outbound investors is the 2011 ICSID case of *Tza Yap Shum v. Peru* brought by a Hong-Kong resident against Peru.<sup>46</sup> There, the investor, purporting to expand a fish factory in Peru, alleged that the Peruvian taxation authority had breached the expropriation provision in

43 For background discussion of these issues, see Shan and Gallagher, *supra* note 12; Wenhua Shan, "The Legal Framework of EU-China Investment Relations: A Critical Appraisal" (2005); Michael Moser, *Managing Business Disputes in Today's China: Duelling with Dragons*, edited by Michael J. Moser, (Kluwer Law International, 2007), Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Oxford: Hart Publishing, 2009); Kong Qingjiang, "Bilateral Investment Treaties: The Chinese Approach and Practice", *Asian Yearbook of International Law*, 8(2003); Wenhua Shan, Norah Gallagher and Sheng Zhang, "National Treatment for Foreign Investment in China: A Changing Landscape", *ICSID Review* 27(2012): 120.

44 See ICSID, The ICSID Caseload—Statistics (2012), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics> (Accessed Nov. 1st, 2014).

45 *Id.*; see also Andrea M. Steingruber, *Consent in International Arbitration* (London: Oxford University Press, 2012).

46 ICSID Case No ARB/07/6, "Decision on Jurisdiction and Competence", June 19, 2009, Award on Merits, July 7, 2011 ('*Tza Yap Shum*'). See also Nils Eliasson, "China's Investment Treaties: A Procedural Perspective", *Foreign Investment and Dispute Resolution Law and Practice in Asia*, edited by Vivienne Bath and Luke Nottage, (UK: Taylor & Francis Group, 2011).

the China-Peru BIT of 1994<sup>47</sup> by investigating his business and levying liens on his firm's bank accounts that "ended up destroying [his] business operations and economic viability."<sup>48</sup> He claimed that this constituted an "indirect expropriation."<sup>49</sup>

The case raised jurisdictional issues, namely, whether a Hong Kong national was qualified as an investor under the Peru-China BIT;<sup>50</sup> whether a prescribed waiting period of six months for amicable settlement had taken place;<sup>51</sup> and whether the Claimant was required to exhaust local remedies before proceeding to ISA.<sup>52</sup> The Tribunal also considered the significance of a MFN clause in Article 3(2) of the China-Peru BIT, providing that: "The treatment and protection referred to in Paragraph 1 of this Article [the fair and equitable guarantee] shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State."<sup>53</sup>

Peru lost the case. The Tribunal ruled that interim measures imposed by the tax authority of Peru were arbitrary in failing to comply with Peru's own internal procedures.<sup>54</sup> It ruled further that the provision in Article 8(3) of the Peru-China BIT "involving the amount of compensation for expropriation" included a determination whether the property was actually expropriated, in addition to the amount of compensation.<sup>55</sup> In its decision on the merits on 7 July 2011, the Tribunal awarded the Claimant over \$700,000 in damages and \$200,000 in interest.<sup>56</sup> Peru filed to have the award annulled.<sup>57</sup>

The Tribunal decided that the Claimant, a resident of Hong Kong, was a national of the People's Republic of China for the purpose of bringing a claim

47 Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments done at Beijing on June 9, 1994, entered into force Feb. 1, 1995, 1901 U.N.T.S. 257 (hereafter 'Peru-China BIT'), art. 1(2)(a).

48 Tza Yap Shum, *supra* note 46, § 31.

49 *Id.* at §31.

50 *Id.* at §32.

51 Peru-China BIT, *supra* note 47, ch. 10, art. 126.

52 ICSID Convention, Regulations and Rules, art. 26.

53 Peru-China BIT, art. 3(5). See also Eliasson, *supra* note 46.

54 Tza Yap Shum, *supra* note 46, at § 218.

55 *Id.* at § 88.

56 Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Feb. 12, 2007); Final Award on the Merits (July 7, 2011), summary available at <http://www.italaw.com/documents/TzaYapShumAwardIACLSummary.pdf>, (Accessed Nov. 1st, 2014).

57 *Id.*



under the ICSID. In that regard, it did no more than affirm the legal relationship between a Hong Kong resident and the PRC. In reaching a determination that the Peruvian authorities had expropriated the claimant's property, the Tribunal construed the China-Peru BIT expansively. However, the Tribunal construed the specific wording of Article 8(3) in that BIT governing MFN treatment, restrictively. This flies in the face of the general application of an MFN clause, namely, that investors are entitled to the most favorable treatment accorded to investors under any other BIT to which the host state, here Peru, is a signatory. Insofar as the treatment Peru accorded to Tza Yap Shum fell below the MFN treatment accorded to investors from any other BIT partner state that ought to have served as a further basis for deciding in favor of the Claimant.<sup>58</sup>

In the case of *Heilongjiang v. Mongolia*,<sup>59</sup> a Chinese investor brought a claim against Mongolia under the China-Mongolia BIT. The issue before the ISA tribunal was to determine whether that tribunal had jurisdiction to determine that an expropriation had occurred in a "first generation" Chinese BIT that did not provide a claim for expropriation, but only for compensation. The case is pending before the Permanent Court of Arbitration.<sup>60</sup>

Finally, and of note, Chinese insurer Ping An recently filed an ICSID claim against Belgium. Ping An, China's second largest insurer, lost approximately \$3 billion when failed Belgo-Dutch bank, Fortis, was nationalized and sold during the 2008 financial crisis. The collapse of the price of Fortis Bank and its subsequent sale significantly diminished Ping An's interest in the European financial services of the Bank. While the details of the case are not yet known, other than the names of the appointed arbitrators, this is the first mainland Chinese company to file a claim in the ICSID. It is also the first claim by a Chinese national against the government of a developed economy.<sup>61</sup>

58 On the general applicability of an MFN clause, see "Renta 4 S.V.S.A. v. The Russian Federation", SCC Case No. ARB V024/2007, at § 101; "Ros Invest Co UK Ltd. v. The Russian Federation", SCC Case No. ARB V079/2005, at § 130.

59 "China Heilongjiang International Economic & Technical Cooperative Corp., et al. v. Mongolia", PCA Case (China-Mongolia BIT 1991), [http://www.pca-cpa.org/showpage.asp?pag\\_id=1378](http://www.pca-cpa.org/showpage.asp?pag_id=1378), (Accessed Oct. 13, 2014).

60 *Id.* See Article 8 of the China-Mongolia BIT. See too Article 4(iv) of China's Model BIT, discussed *infra* Section x.

61 David A.R. Williams (New Zealand) as appointed as arbitrator by the Claimant. Philippe Sands (British/French) was appointed as arbitrator by the Respondent. See Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium (ICSID Case No. ARB/12/29). See too, Agreement between the Government of the People's Republic of China and the Belgian-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments done

No case involving a Chinese outbound investor proceeding against one of China's BIT partner states has significantly embellished investment arbitration jurisprudence. None to date, other than the pending Ping An claim against Belgium has involved substantial claims for compensation. What the cases do demonstrate is the greater willingness of Chinese foreign investors to mount claims against host states. It would be more telling if a Chinese multinational, particularly a state enterprise, were to bring a multimillion dollar claim against a host state, focusing on the nature and impact of an expropriation upon that complainant under a treaty based on China's Model BIT.<sup>62</sup> The probability of this occurring presumably will also depend somewhat on the prospects of China's BIT partners negotiating with large scale Chinese investors to avoid formal ISA claims brought by those investors against them. The Ping An case may also represent a turning point in the readiness of large China's companies to bring substantial claims against China's BITs partners, commencing with a claim against a developed country, here Belgium.

#### 6.4 ISA Claims Bought Against China

There is no ISA award on record in which China was the Respondent. The only recorded ISA case against China to date is the *Ekras Berhad v. China*, brought under the Rules of the ICSID Convention.<sup>63</sup> That claim was brought by a Malaysian construction company. In issue was the right of the local government to revoke the Claimant's license to construct on leasehold property of 90,000 hectares of land in the Hainan Province of China. The Malaysian Claimant subsequently withdrew the claim and the case was suspended.<sup>64</sup> Had it proceeded to an award, it would have required an ISA tribunal to consider the meaning and significance of a provision in the China-Malaysia BIT, based on the China Model BIT, under which an ISA Tribunal is required to follow "domestic legal procedure" in engaging in a direct or indirect expropriation.<sup>65</sup>

at Brussels on June 4, 1984, entered into force Oct. 5, 1986, 1938 U.N.T.S. 305. See generally Myles Neligan, "China Insurer Ping An Files Claim for Fortis Loss", REUTERS, Sept. 24, 2012, <http://in.reuters.com/article/2012/09/24/pingan-fortis-idINL5E8KO9V520120924>, (Accessed Oct. 13, 2014).

<sup>62</sup> See *infra* Section x.

<sup>63</sup> ICSID ARB/11/15.

<sup>64</sup> ICSID Case No. ARB/11/15 proceedings suspended pursuant to the Parties' agreement on July 22, 2011. See <http://icsid.worldbank.org> (Accessed Nov. 1st, 2014).

<sup>65</sup> The provision for an ISA tribunal to adhere to "domestic legal procedure" is contained in Article 4(ii) of China's Model BIT. See *infra* Section x.

Much would also have hinged on the Tribunal's interpretation of Article 7(4) of the China-Malaysia BIT, particularly in relation to the nature and limits of a compensation claim.<sup>66</sup> If the withdrawn claim signifies anything, it is that a single foreign investor was willing to initiate a claim against China; China may have responded aggressively; and the investor withdrew the claim.<sup>67</sup>

Drawing any salutary conclusion from this case would be suspect, except to lend some credence to the assumption that China is likely to be a tenacious adversary; and that only a well-financed foreign investor would likely prevail in a potentially protracted and costly dispute with China. However, much would also depend on the nature and terms of the investment treaty in issue and the specific claim and defense. In issue would also be a tension between China's need to demonstrate its willingness to defend the national good from foreign intrusion and its countervailing interest in mollifying skittish foreign investors who might retreat from investing in China to avoid its regulatory regime.

## 6.5 Chinese Arbitrators

To date, five Chinese investment arbitrators have been appointed in five different ISA cases.<sup>68</sup> Two arbitrators have served on an annulment committee, while three have served on ISA tribunals.<sup>69</sup> These numbers are sparse. However, they are reasonably offset by the limited number of cases in which China has been involved in an ISA dispute.<sup>70</sup> The numbers may well increase, given China's heightened participation in BITs, the impact of those BITs on both inbound and outbound investors and the greater likelihood ISA claims being lodged against China and its BIT partners.<sup>71</sup> Given that nationals cannot preside over

66 This BIT article is modeled on Article 4(iv) of China's Model BIT providing for compensation. See *infra* Section x.

67 The terms of any settlement reached by the disputing parties is not publicly known.

68 See <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending>, (Accessed Oct. 13, 2014); See generally UNCTAD, "Latest Developments in Investor-State Dispute Settlement" (April 2012), [http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf), (Accessed Nov. 1st, 2014).

69 *Id.* An Chen, from Mainland China, was appointed to 1 arbitration tribunal and 2 annulment proceedings. Teresa Cheng from Hong Kong SAR was appointed to 1 arbitration tribunal and 1 annulment proceeding.

70 The only annulment procedure to date involving China was Peru seeking an annulment of an ISA award in the case of Tza Yap Shum, *supra* note 46.

71 See [bilaterals.org](http://www.bilaterals.org), "China" (May 2012), <http://www.bilaterals.org/spip.php?rubriquen8>, (Accessed Nov. 1st, 2014).

an ISA dispute involving their home or host state, China could not appoint Chinese arbitrators to preside over disputes in which it is the respondent. However, the likelihood of China's wider participation in ICSID and UNCITRAL proceedings is likely to raise its profile in ISA disputes; it could also serve as an inducement to other states and investors to appoint Chinese nationals to preside over their ISA disputes in the strategic arena of global investment politics.

However, the case for an increased numbers of Chinese arbitrators being appointed to ISA tribunals is more complex. There is a limited pool of ICSID arbitrators available; a few arbitrators from developed countries repeatedly are appointed to ISA tribunals; and widening the pool of ISA appointed arbitrators is ultimately determined by the disputing parties and the arbitrators they appoint, usually through their nomination to the ICSID or the Permanent Court of Arbitration.<sup>72</sup>

## 6.6 Withdrawing from ISA?

Considering the resent backlash against ISA, it is important to examine whether China is likely to reject ISA. For example, it could insist, in regard to inbound FDI, that investor-state claims against it should be resolved by Chinese arbitration institutions, administrative agencies, or by Chinese courts. It could also decline to include ISA provisions in its BITs, impacting on both inbound and outbound investors. It could do so on grounds that ISA favors developed states and their investors; and that international investment law and practice is biased against developing states and their investors, including China.<sup>73</sup>

The prospect of China requiring domestic courts to decide investor-state disputes has some foundation, as distinct from providing foreign investors with the option of proceeding to a domestic court or to ISA. China could insist that, as a sovereign state, its domestic courts ought to preside over claims brought against Chinese enterprises within its territorial jurisdiction; that Chinese courts have the jurisdiction, legal competence and substantive knowledge to decide such disputes under Chinese law; and that Chinese law does not

<sup>72</sup> *Id.*

<sup>73</sup> See e.g., Latha Jishnu, "Secretive Tribunals, Hidden Damages" (Interview) (Jan. 31, 2012), <http://www.downtoearth.org.in/content/secretive-tribunals-hidden-damages>, (Accessed Nov. 1, 2014). In this interview, Van Harten observes that developing countries sometimes are the target of treaties directed at enhancing opportunities for foreign investors from other states and on occasions, leading to significant losses for those target countries. See too Leon E. Trakman, "The ICSID Under Siege", CORNELL INT'L L.J. 45(3) (2012).

accord special constitutional status to foreign investors under treaties that prevail over domestic legal duties<sup>74</sup> China could also modify its BIT practices of providing foreign investors with a choice between domestic courts and ISA by providing that domestic courts preside over investor-state disputes generally, negotiating exceptions to this in specific BITs. It could point to other countries, most recently Australia, that have seemingly discarded ISA in favor of domestic courts deciding international investment disputes,<sup>75</sup> and the undertaking by others, like South Africa, to do so as well.<sup>76</sup> It could provide for domestic courts to resolve investor-state disputes based on a lack of faith in ISA proceedings, or its confidence in the domestic courts of partner states resolving such disputes.

However, China is unlikely to follow Australia's lead. Relying on Chinese courts may well satisfy some domestic public policy interests. But, should China modify its BITs practice by providing for resort to domestic courts generally, it would place its growing numbers of investors abroad at the mercy of the domestic courts of BIT partner states whose courts it would prefer its outbound investors, including state-owned enterprises, to avoid.<sup>77</sup> China could

74 An assertion of sovereignty would not be exceptional, given the historical practices of states. See e.g. *Redefining Sovereignty in International Economic Law*, Edited by Wenhua Shan, Penelope Simons and Dalvinder Singh, (Oxford: Hart Publishing, 2008), Part 4. (commenting on the complexity of sovereignty in international investment law); Robert Stumberg, "Sovereignty by Subtraction: The Multilateral Agreement on Investment", *CORNELL INT'L L.J.* 31 (1998): 491, 503–04, 523–25 (discussing sovereignty). On the absence of special treaty status under Chinese constitutional law, see Wenhau Shan, "China and International Investment Law", in *Regionalism International Investment Law*, Edited by Leon E. Trakman and Nicola W. Ranieri, (Oxford, Oxford University Press 2012): 219–222. See generally *International Economic Law and National Autonomy*, edited by Meredith Kolsky Lewis and Susy Frankel, (Cambridge University Press, 2010); Robert H. Jackson, *Quasi-states: Sovereignty, International Relations and the Third World* (Cambridge University Press, 1990); John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations*, (Cambridge University Press, 2000): Chapter 18; Michael Reisman, "International Arbitration and Sovereignty", *ARB. INT'L (LCIA)* 18 (2002): 231; *Oppenheim's International Law*, edited by Sir Robert Jennings and Sir Arthur Watts (London: Longman, 1992): 927.

75 See Leon E. Trakman, "Rejecting Investor-State Arbitration In Favor Of Domestic Courts: The Australian Example", *J. WORLD TRADE* 46 (2012): 83.

76 See Luke Eric Peterson, "South Africa Pushes Phase-Out Of Early Bilateral Investment Treaties After at Least Two Separate Brushes with Investor-State Arbitration", *Inv. Arb. Reporter*, [http://www.iareporter.com/articles/20120924\\_1](http://www.iareporter.com/articles/20120924_1). (Accessed Nov. 1, 2014)

77 There is empirical data confirming such concerns. See Mark Kantor, "The Transparency Agenda for UNCITRAL Investment Arbitrations: Looking in All the Wrong Places" (2011) 10, <http://www.ijl.org/research/documents/IF2010-11> (Accessed Nov. 1, 2014) (demonstrating

carve out middle ground. It could provide that domestic courts resolve investor-state disputes involving investors from BIT partner states whose courts it trusts. It could revert to ISA in respect of the other BIT partner states, or to a system requiring exhaustion of domestic remedies first, with a specified waiting period before ISA can be initiated. China could also restrict the application of ISA by incorporating general exemptions from ISA claims into its BITs. However, China would need to frame changes to its BIT its negotiating strategy carefully to avoid alienating existing and prospective BIT partners, such as the African states with which it has built extensive BIT partnerships more to bolster diplomatic alliances than develop immediate investment opportunities.<sup>78</sup> China would also need to redress its perceived preference for arbitration in respect of outbound Chinese investors.<sup>79</sup>

In some measure, China may already have chosen the most feasible dispute resolution option. In giving investors the option of choosing between domestic courts or ISA, foreign investors can assess the costs and benefits of each including in light of the treatment anticipated before the domestic courts of some of China's BIT partner states. However, the risk to China is that inbound foreign investors will choose ISA over Chinese domestic courts due to investor concerns, among others, that Chinese courts may endorse China's sovereign immunity from suit to deny investor claims on jurisdictional grounds, or a narrow compensation to severely limit the quantum of an award.

Could China conceivably reject ISA for political or economic reasons, not now, but at some later juncture, should it not fare well in inbound ISA claims? Circumspection about ISA institutions and proceedings are not entirely novel.

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that approximately 76% of the cases in which investment treaty awards were rendered up to June 2006 involved states that fell at or below Number 50 on the Transparency International's 2008 Corruption Perception Index.) See too Susan Franck, "Empirically Evaluating Claims about Investment Treaty Arbitration", N.C. L. REV. 86 (2007): 1. The World Bank's Worldwide Governance Indicators demonstrated further that 68% of those States were in the bottom 60% of its Index for the "rule of law": World Bank, Worldwide Governance Indicators (2012), <http://info.worldbank.org/governance/wgi/index.asp>. (Accessed Nov. 1st, 2014).

78 See *infra* note 153. See generally Lorenzo Cotula, "Law and Power in Foreign Investment in Africa: Shades of Grey in the Shadow of the Law" (2011); A.A. Agyemang, "African States and ICSID Arbitration", CILSA 21(1988): 177, (discussing the African signatories, particularly their consent to jurisdiction, their position in the institution, and the appointment of African arbitrators); Alec R. Johnson, Comment, "Rethinking Bilateral Investment Treaties in Sub-Saharan Africa", EMORY L.J. 59(2010): 919 (discussing BITs in relation to African countries).

79 See sources cited *supra* note 78.

In recent years a number of countries have challenged the ICSID: Ecuador in 2009,<sup>80</sup> Bolivia shortly afterwards and in 2012, Venezuela.<sup>81</sup> Each country withdrew from the ICSID Convention.<sup>82</sup> The alleged affront, starting with Ecuador, is that the ICSID is a creature of the World Bank,<sup>83</sup> and the United States in particular.<sup>84</sup> The sub-text is historical antagonism towards multinationals, a fear of neo-colonial sublimation, but more specifically, a reaction to adverse ISA determinations against developing states in particular.<sup>85</sup>

- 80 See generally Antonios Tzanakopoulos, "Denunciation of the ICSID Convention under the General International Law of Treaties", in *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?*, edited by Rainer Hofmann and Christian J. Tams (Nomos Verlagsges. MBH Company, 2011); Michael Waibel et al., *The Backlash Against Investment Arbitration*, (Kluwer Law International: 2010); Karsten Nowrot, "International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism", *Beiträge Zum Transnationalem Wirtschaftsrecht* 96 (May 2010): 5; Tor Krever, "The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model", *HARV. INT'L L.J.* 52 (2011): 287; Ignacio A. Vincentelli, "The Uncertain Future of ICSID in Latin America", *LAW & BUS. REV. AM.* 16 (2010): 409; UNCTAD, *Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims*, IIA Issues Note No. 2 (Dec. 2010), <http://www.unctad.org/diae>. (Accessed Nov. 1st, 2014)
- 81 See e.g. ICSID, Venezuela Submits a Notice under Article 71 of the ICSID Convention, Washington DC, (26 January 2012) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100> (Accessed Nov. 1, 2014); See Luis Britta Garcia, "We have to get out of the ICSID" last modified Jan. 24, 2012, <http://venezuelanalysis.com/analysis/6766>, (Accessed Nov. 1, 2014). See generally Scott Appleton, "Latin American Arbitration: The Story Behind the Headlines", International Bar Association, London, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78296258-3B37-4608-A5EE-3C92D5DoB979>. (Accessed Nov. 1, 2014)
- 82 For commentary on these events, as well as investment arbitration in Latin America generally, see Appleton, *supra* note 81.
- 83 Compare ICSID, List of Contracting States and Other Signatories to the Convention, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main> (Accessed Nov. 1, 2014) with World Bank, Member Countries, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:22427666~menuPK:8336899~pagePK:51123644~piPK:329829~theSitePK:29708,00.html>. (Accessed Nov. 1, 2014)
- 84 See 'ICSID in "Crisis: Straight-Jacket or Investment Protection?", Bretton Woods Project, London, July 10, 2009, <http://www.brettonwoodsproject.org/art-564878>. (Accessed Nov. 1st, 2014)
- 85 See Leon E. Trakman and Nicola W. Ranieri, *Regionalism in International Investment Law*, (Oxford University Press: February, 2013): Chapter 10. (discussing the consequences



In contrast, China is unlikely to withdraw from the ICSID, at least not in the immediate future. Certainly, China can identify with the assertion that the ICSID is a creature of the World Bank, while the Bank is a creature of the United States and its allies. In particular, China has endured the ills of colonialism and its subjugation by developed countries.<sup>86</sup> However, China has not had negative experiences with ISA comparable to those of Ecuador, Bolivia and Venezuela. China is also in a global economic growth spurt as both an inbound and an outbound investment destination that distinguishes it from these Latin American countries.<sup>87</sup> In addition, China's bureaucratic and legal apparatus is more sophisticated than almost any other developing country. China also has the capacity to determine the most tactical manner of proceeding to ISA, whether administered by the ICSID, or by such bodies as the Permanent Court of Arbitration administering the UNCITRAL Rules.<sup>88</sup> China is fully cognizant of the nuances of ISA proceedings and their potential economic and political consequences.<sup>89</sup>

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of these comments for international investment law, ICSID, and the World Bank). See T. Krever, "The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model", *HARV. INT'L L.J.* 52 (2011): 287; UNCTAD, Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims, IIA Issues Note No 2, Dec. 2010, <http://archive.unctad.org/Templates/Page.asp?intItemID=5519&lang=1>. (Accessed Nov. 1st, 2014)

86 See *infra* Section VII.

87 For statistics on China's FDI between January–June 2012, see Ministry of Commerce, People's Republic of China, *Statistics of FDI In January–July 2012* (Aug. 20, 2012), <http://english.mofcom.gov.cn/aarticle/statistic/foreigninvestment/201208/20120808295811.html> (Accessed Nov. 1st, 2014)

88 While the ICSID administers ISA, the UNCITRAL is *not* an administering authority. The UNCITRAL website states: 'UNCITRAL does not administer arbitration or conciliation proceedings, nor does it provide services... in connection with dispute settlement proceedings.' See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration\\_faq.html#dispute](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html#dispute). (Accessed Nov. 1st, 2014) Other institutions, most notably the Permanent Court of Arbitration ('PCA'), administer investor-State disputes under the UNCITRAL Rules. A recent UNCTAD reports that '[b]y the end of 2011, the total number of ISDS cases administered by the PCA was 65, of which 32 are pending.' See [http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf). (Accessed Nov. 1st, 2014) For more recent PCA statistics, see [http://www.pca-cpa.org/showpage.asp?pag\\_id=1029](http://www.pca-cpa.org/showpage.asp?pag_id=1029) (Accessed Nov. 1st, 2014), referencing 37 pending ISAs administered by the PCA.

89 See Ibrahim F.I. Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA", in *Investing with Confidence: Understanding Political Risk Management in the 21st Century*, edited by Kevin W. Lu et al., (The World Bank Group and MIGA, 2009): 2–35 (discussing old world views); Susan D. Franck, "Foreign Direct



Still, one should never say “never”. Were China to suffer a significant defeat in ISA proceedings, coupled with a loss of international reputation and investment opportunity, it could reconsider its endorsement of ISA in whole or in part. The greatest difficulty it would have in rejecting ISA across the board, however, stems from it having concluded over 140 BITS to date. Not only are the vast majority of these BITS still in force; the most recent generation of BITS provide investors with a choice between ISA and domestic courts.

A salutary caution is not to overstate the extent to which foreign investors from developed states prevail over developing states in ISA proceedings generally, despite the concern that ISA tends to be investor-centric. For example, the latest 2012 ICSID statistics demonstrate that 62% of the cases filed with the ICSID were decided by arbitration tribunals, while 38% were settled or otherwise discontinued. Of the cases decided by a tribunal, respondent states won ICSID disputes approximately half the time. ICSID tribunals dismissed 52% of the cases, primarily on jurisdictional grounds. They upheld 48% of investor claims in whole or part.<sup>90</sup> These macro statistics are by no means definitive. Nor do they differentiate between claimants from developed and developing states, or between developed and developing respondent states. However, given that a majority of ISA claims are brought by investors from developed states against developing states, the statistics does suggest that ISA decision-making is more balanced between states and investors than is presumed by ISA detractors; they also offset the sometimes summary dismissal of ISA as being more responsive to the commercial interests of investors than the public policy interests of states.<sup>91</sup>

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Investment, Investment Treaty Arbitration, and the Rule of Law” PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 19 (2007): 337 (analyzing different views of the rule of law).

90 *The ICSID Caseload—Statistics* (Issue 2012–2), 13 (Figure 7), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics> (Accessed Nov. 1st, 2014). See too OECD, *Public Consultation on Investor-State Dispute Settlement*, 16 May–23 July 2012, <http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/publicconsultationisds.htm> (Accessed Nov. 1st, 2014).

91 See Susan D Franck, “The ICSID Effect? Considering Potential Variations in Arbitration Awards”, VA. J. INT’L L. 51 (2011): 977. Franck undertakes a quantitative analysis of awards with Latin American countries as parties, and finds that “on the whole, . . . ICSID arbitration awards were not statistically different from other arbitral processes, which is preliminary evidence that ICSID arbitration was not necessarily biased or that investment arbitration operated in reasonably equivalent ways across forums.” See also *id.* at 898. On ICSID’s figures, including that foreign investors have won 48% of ICSID/Additional Facility cases, see Chart 9 on p. 13 ICSID, *The ICSID Caseload—Statistics* (Issue 2012–2),

### 6.7 A “China-Made” Investment Jurisprudence?

Will China influence investment jurisprudence in the future, including the principles and practice of investment law upon which ISA tribunals rely? Given China’s formidable growth in inbound and outbound investment, the country is likely to play a significant role in the development of a “new” FDI International Economic Order that is evolving in the wake of the recession of 2008. China’s FDI “leadership” is also likely to grow with declining outbound investment from the European Union and the United States.<sup>92</sup> However, these prognoses are difficult to pronounce with any degree of specificity, not only because they invite contention over projected FDI flows, but also because global economic trends are often volatile and difficult to predict over the intermediate term, notwithstanding doomsday prognoses for the free market economies of the West.

Difficult, too, is predicting how China’s growing FDI capacity as an inbound and outbound source of FDI will translate into the development of international investment law as distinct from investment practice. First, China’s economic influence does not necessary infer that China will radically transform the liberal foundations of free competition in global investment markets. China arguably has good reason to preserve such traditions, given its dynamic growth as a source of outbound investment. Secondly, economic determinants of FDI often direct the political agendas of states, including China. Third, an often touted positivist view is that *a priori* principles of law ought to regulate FDI prospectively in the interests of commercial planning and ought not to be

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>. (Accessed Nov. 1st, 2014) Based on Chart 12 in the same document, ICSID appears to have issued 150 awards in the aggregate.

92 See Joseph Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy* (WW Norton, 2010) (providing an account of these recessionary forces and their global consequences). On the New International Economic Order through the General Assembly of the United States, a Charter of Economic Rights and Duties of States, and a Declaration on the Permanent Sovereignty of States over Natural Resources, see G.A. Res. 3281(xxix), U.N. GAOR, 29th Sess., Supp. No. 3150, UN Doc. A/9631 (Dec. 12, 1974) (Charter of Economic Rights and Duties of States); G.A. Res. 3201 (S-VI), U.N. Doc. A/res/S-6/3201 (May 1, 1974) (New International Economic Order). See also Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997); Leon E. Trakman, “Foreign Direct Investment: Hazard or Opportunity?”, *Geo. Wash. Int’l L. Rev.* 41(2010): 1, 15–16, 20.

transformed by reconstituted principles applied retroactively on geo-political grounds.<sup>93</sup>

However, a principled conception of FDI law grounded in promoting investor certainty and predictability is aspirational only. Rather than operate transparently, arbitration processes sometimes are closed to public scrutiny; ISA awards produce *ad hoc* determinations are often difficult to predict.<sup>94</sup> The principles governing investor protection and state intervention are sometimes too amorphous to produce consistent ISA determinations. A less than heartening observation is that ICSID annulment proceedings are “not designed to bring about consistency in the interpretation and application of international investment law.”<sup>95</sup>

Nevertheless, China’s influence over treaty and customary investment jurisprudence is likely to gain traction. In a treaty regime in which ISA tribunals interpret BITs and FTAs literally rather than liberally and textually rather than contextually, jurists are likely to interpret carefully frame Chinese treaties according to the ordinary meaning of the language used. In defining an ‘investment’, or an ‘expropriation’, China well appreciates the prospect of

93 By far the most dominant view is that investment law is based on determinative principles of law. See, e.g., Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, (Oxford University Press, 2008), Chapter 1. But see M. Sornarajah, “The Case Against an International Investment Regime”, in Trakman and Ranieri, *supra* note, at chapter 17 and Appendix (providing a critique of this principled approach).

94 See generally Jason W. Yackee and Jarrod Wong, “The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns”, in *Yearbook on International Investment Law & Policy 2009–2010* (Oxford University Press, 2010) (discussing transparency in international investment arbitration); Cornel Marian, “Balancing Transparency: The Value of Administrative Law and Mathews-Balancing to Investment Treaty Arbitrations”, *PEPP. DISP. RESOL. L.J.* 10 (2010) 275 (discussing transparency in international investment arbitration). But see James Harrison, “Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration” (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1739181](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739181) (Accessed Nov.1, 2014) (providing a balanced defense of transparency in ICSID proceedings).

95 See *M.C.I. Power Grp. L.C. & New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6, Annulment Decision, ¶ 24 (Oct. 19, 2009); see also *Hochtief AG v. Arg.*, ICSID Case No. ARB/07/31 (Oct. 7, 2011) (providing different interpretations of a treaty in the same case in the dissent of Christopher Thomas, Q.C.). See generally Sergio Puig and Meg Kinnear, “NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration”, *ICSID L. REV.* 25 (2010): 225 (providing a systematic approach towards investment arbitration, through the prism of Chapter 11 of the NAFTA).

jurists according a 'plain word' meaning to those concepts.<sup>96</sup> As China develops a further Model BIT and concludes investment agreements in light of it, the interpretation of those BITS is likely to become an expanding source of international investment law.<sup>97</sup> However, much will hinge on the kind and variety of Chinese BITS that eventuate, how distinctive they are from other BITS, the extent to which other countries replicate them in whole or in part, and the interpretation that ISA tribunals accord to them in particular cases. Much will also depend on the capacity of Chinese treaty drafters and ISA tribunals that craft this new jurisprudence, each with a distinct mandate, to develop a homogeneous body of investor-state law based on widely endorsed principles, standards of investor treatment, and state protections that accommodate China's distinctive interests. Especially difficult for ISA tribunals is determining how to derive common norms of investment law from different kinds of governmental action in investment contexts that are complicated by cultural and ideological differences as they relate to China, and by divergent investment treaties.<sup>98</sup>

The more likely inference is that, whatever China's influence may be on the development of BITS, a uniform body of investment law will remain elusive.

- 96 See Huan Qi, "The Definition of Investment and Its Development: For the Reference of the Future BIT between China and Canada", *Revue Juridique Themis* 45(2011): 541. See generally Stephan W. Schill, *The Multilateralization of International Investment Law*, (Cambridge University Press, 2014), at VI–VII (discussing non-ICSID methods of multilateralization and investment jurisprudence); Steffen Hindelang, "Bilateral Investment Treaties, Custom and a Healthy Investment Climate: The Question of Whether BITS Influence Customary International Law Revisited", *J. WORLD INV. & TRADE* 5 (2004): 789; Jeswald W. Salacuse, "The Treatification of International Investment Law", *LAW & BUS. REV. AM.* 13 (2007): 155.
- 97 On the customary nature of international investment law and its contest with treaty made law, see for example, Campbell McLachlan, "Investment Treaties and General International Law", *INT'L & COMP. L.Q.* 57(2008): 361; Stephen Schwebel, "The Influence of Bilateral Investment Treaties on Customary International Law", *TRANSNAT'L DISP. MGMT.* 1 (November 2005); Patrick Dumberry, "Are BITS Representing The 'New' Customary International Law in International Investment Law?", *PA. ST. INT'L L. REV.* 28(2010): 675, 701 (for a rejection of the proposition that BITS represent customary law).
- 98 On the development of such international investment norms, see Foreign Investment Review Board, Current International Investment Issues: OECD Investment Committee, [http://www.firb.gov.au/content/international\\_investment/current\\_issues.asp?NavID=60](http://www.firb.gov.au/content/international_investment/current_issues.asp?NavID=60) (Accessed Nov. 1, 2014) See generally Leon E. Trakman, "Legal Traditions and International Commercial Arbitration", *AM. REV. INT'L. ARB.* 17 (2006): 1; Andreas von Staden, "Towards Greater Doctrinal Clarity in Investor-State Arbitration: The CMS, Enron and Sempra Annulment Decisions", *CZECH Y.B. INT'L L.* 2 (2011): 207 (discussing how different investment policies can influence investment law).

First, investment treaty jurisprudence will necessarily be circumscribed by the words used in different treaties.<sup>99</sup> Second, ISA tribunals will interpret different words in different treaties differently, and even the same words in the same treaties differently. Third, ISA will not subscribe to arbitral precedent as common lawyers conceive of judicial precedent.<sup>100</sup> So long as ISA tribunals do not have to agree in interpreting the words of BITs, the unification of BIT jurisprudence, whether led by China or not, is unrealistic.<sup>101</sup> Greater uniformity might stem from the global community of states eventually endorsing a new multilateral investment agreement ('MIA'), but it is difficult to fathom how such a movement would be led, let alone whether it would receive global endorsement.<sup>102</sup>

What Chinese BITs may add to investment treaty law in the short term is a layer of ISA jurisprudence to an already multi-layered and sometimes inconsistent body of international investment law.<sup>103</sup> Yet that influence will

99 On different interpretations of words used in BITs, see e.g. Clint Peinhardt and Todd Allee, "Devil in the Details? The Investment Effects of Dispute Settlement Variation in BITs", in *Yearbook on International Investment Law & Policy 2010–2011* (Oxford, Oxford University Press, 2012); J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford, Oxford University Press, 2012). See *infra* Section XI.

100 See e.g., Christoph Schreuer and Matthew Weiniger, "A Doctrine of Precedent?", in *The Oxford Handbook of International Investment Law*, edited by Peter Muchlinski, Federico Ortino and Christoph Schreuer, (Oxford, Oxford University Press, 2008), 1188 (discussing the absence of binding precedents, at least in principle, in international investment law); Andrea K. Bjorklund, "Investment Treaty Arbitral Decisions as Jurisprudence Constante", in *International Economic Law: The State and Future of the Discipline*, edited by Colin Picker et al. (Oxford, Hart Publishing, 2008), 265.

101 See generally, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, (Oxford University Press, 2008) (investment treaties); Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, (Martinus Nijhoff Publishers 1995); Schreuer, *supra* note 11, at 89–91 (1st ed. 2001).

102 See generally, Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law*, (Oxford University Press, 2008), Chapter 1; Stephan W. Schill, *The Multilateralization of International Investment Law*, (Cambridge University Press, 2009), Chapters 1–2; see Organisation for Economic Co-operation and Development, The Multilateral Agreement on Investment Negotiating Text (Apr. 24, 1998), <http://italaw.com/documents/MAIDraftText.pdf> (Accessed Nov. 1st, 2014); Katia Tieleman, "The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network", *Global Public Policy Institute*, (2000): 17–20, [http://www.gppi.net/fileadmin/gppi/Tieleman\\_MAI\\_GPP\\_Network.pdf](http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf), (Accessed Nov. 1st, 2014).

103 For commentaries on selected model BITs, see Chester Brown, *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013). On attempts to redress inconsistencies in international investment arbitration, see *International Investment Law and*

be hampered by the tendency of ISA tribunals to construe the language in BITS restrictively, not expansively.<sup>104</sup> Further complicating the development of a uniform ISA jurisprudence will be the accentuated difficulty of construing conflicting conceptions of property law, already diffuse across mainstream legal systems,<sup>105</sup> so as to accommodate China's particular variant of customary law and Civil Law of property.<sup>106</sup>

Added to these jurisprudential challenges will be the need to delineate the scope of "national treatment" and "fair and equitable" treatment accorded to foreign investors in China who may complain that they are being disadvantaged

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*General International Law: From Clinical Isolation to Systemic Integration?*, edited by Rainer Hofmann and Christian Tams, (Nomos Verlagsges. MBH Company 2011); Jan Paulsson, "International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law", (International Council for Commercial Arbitration Congress Series No. 13), in *International Arbitration 2006: Back to Basics?*, edited by Albert Jan van den Berg, (Kluwer Law International, 2007): 879.. On the critique of allegedly inconsistent ICSID decisions in a series of investment claims against Argentina, commencing with the *CMS*, *Enron*, and *Sempra* cases, see *supra* note 98 and *infra* note 252.

<sup>104</sup> For concerns that ISA arbitrators who are commercial, not public, lawyers will pay less attention to the public policy consequences of their awards for developing states than to the plain words of treaties devised by dominant treaty see generally *International Investment Law and Comparative Public Law*, edited by Stephan W. Schill (Oxford University Press, 2010); Gus Van Harten, *Investment Treaty Arbitration and Public Law*, (Oxford University Press, 2007): 122–151; see too August Reinisch, "How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?" *J. INT'L DISP. SETTLEMENT* 2 (2011): 115 (discussing the restrictive construction of investment agreements).

<sup>105</sup> See e.g., Dolzer and Schreuer, *supra* note, Chapters 1–2 (discussing the alleged foundations of investment law in contract and property); Luzius Wildhaber and Isabelle Wildhaber, "Recent Case Law on the Protection of Property in the European Convention on Human Rights", in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, edited by Christina Binder et al. eds., (Oxford, Oxford University Press, 2009), 657.

<sup>106</sup> On such differences, see, e.g., Salini Costruttori SpA and Italstrade "SpA v. Kingdom of Morocco" (Decision on Jurisdiction), ICSID Arbitral Tribunal, Case No. ARB/00/4, July 23, 2001; (2003) 42 ILM 609. See too Monique Sasson, "Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law" (2010) (see especially Chapter Four for a discussion of property in investment treaty context); Omar E. Garcia-Bolivar, "Protected Investments and Protected Investors: The Outer Limits of ICSID's Reach", *Trade Law & Development* 2 (2010): 145 (discussing the requirements that must be met in order to invoke the ICSID's jurisdiction); Schreuer, *The ICSID Convention*, *supra* note 11, at 90–91 (discussing jurisdictional requirements under Article 25 of the ICSID Convention).



in favor of state owned enterprises.<sup>107</sup> ISA tribunals will also need to determine the “legitimate” expectations of foreign investors in relation to China’s expropriation practices, in respect of which ISA tribunals are unlikely to agree.<sup>108</sup> These challenges will be compounded in relation to outbound investment from China, such as in deciding on the application of doctrines like the “margin of appreciation” to Chinese BITs, for example in treaties between China and the EU.<sup>109</sup>

- 107 Illustrating these variable conceptions of ‘fair and equitable’ treatment is a series of cases commencing with the ICSID award in *Maffezini v. Kingdom of Spain (Award on the merits)* (ICSID Arbitral Tribunal, Case No ARB/97/7, 13 Nov. 2000) [64], available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC566\\_En&caseId=C163](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC566_En&caseId=C163) > (Accessed Nov. 1st, 2014); *MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile* (ICSID Arbitral Tribunal, Case No ARB/01/7, 25 May 2004) [178]; and Ian A Laird, *MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile—Recent Developments in the Fair and Equitable Treatment Standard*, *Transnational Dispute Management* (October 2004).
- 108 On such ‘legitimate expectations’, see *Saluka Investments BV (The Netherlands) v. The Czech Republic (Partial Award)* (Arbitration under the UNCITRAL Rules, 17 March 2006) [304], available at <http://italaw.com/documents/Saluka-PartialAwardFinal.pdf> > (Accessed Nov. 1st, 2014); *Waste Management, Inc. v. The United Mexican States (Final Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/3 (NAFTA), 30 April 2004) [98], available at [http://italaw.com/documents/laudo\\_ingles.pdf](http://italaw.com/documents/laudo_ingles.pdf) (Accessed Nov. 1st, 2014); *International Thunderbird Gaming Corporation v. The United Mexican States (Arbitration under the UNCITRAL Rules (NAFTA), 26 January 2006)* [147] (*‘Thunderbird’*), available at <http://italaw.com/documents/ThunderbirdAward.pdf> (Accessed Nov. 1st, 2014); *GAMI Investments Inc v. The Government of the United Mexican States (Final Award)* (Arbitration under the UNCITRAL Rules, 15 November 2004) [100], available at <http://www.state.gov/documents/organization/38789.pdf>. (Accessed Nov. 1st, 2014) See also Stephan W. Schill, ‘Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law’, *Transnational Dispute Management* 16 (December 2006), available at: <http://www.transnational-dispute-management.com/article.asp?key=890> (Accessed Oct 31st, 2014); Stephan W. Schill, “The Relation of the EU and Member States in Investor-State Arbitration”, in Trakman and Ranieri, *supra* note 85, at Chapter 13.
- 109 On the ‘margin of appreciation’ doctrine, see for example, Onder Bakircioglu, “The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases”, *GERMAN L.J.* 8(2007): 711; Yuval Shany, “Toward a General Margin of Appreciation Doctrine in International Law?”, *EUR. J INT’L L.* 16 (2005): 907; Eyal Benvenisti, “Margin of Appreciation, Consensus, and Universal Standards”, *N.Y.U. J. INT’L L. & POL.* 31 (1999): 843; R. St. J. Macdonald, “The Margin of Appreciation”, in *The European System for the Protection of Human Rights*, edited by R. St. J. Macdonald, F. Matscher and H. Petzold, (M. Nijhoff Publishers, 1993), 125.

The result of proliferating BITS, not limited to Chinese BITS, is likely to be an even more varied and inconsistent investment jurisprudence,<sup>110</sup> accentuating rather than allaying disparities in ISA determinations.<sup>111</sup> This variance in investment jurisprudence is likely to grow as ISA tribunals accord different constructions to ever more diverse generations of BITS. The challenges are likely to be offset by efforts to unify BITS, such as the EU's recent effort to reign in the proliferation of differently worded BITS of its member states, notably the BITS of Germany, France, Italy and the UK under the EU's umbrella.<sup>112</sup>

<sup>110</sup> On the varied and inconsistent interpretations of investment treaties, see Jurgen Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis", *INT'L & COMP. L.Q.* 59 (2010): 325 (Kurtz identifies three different methodologies of interpretation). But see William W. Burke-White and Andreas von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", *VA. J. INT'L L.* 48(2008): 307 (considering the interpretive challenges posed by provisions for non-precluded measures, such as for maintenance of security and public order).

<sup>111</sup> On inconsistent ISA decisions in the CME/Lauder cases against the Czech Republic, see *Lauder v. Czech Republic* (Final Award), ad hoc (UNCITRAL Arbitration Rules, 3 September 2001); *CME Czech Republic BV v. Czech Republic* (Partial Award), ad hoc (UNCITRAL Arbitration Rules, 13 September 2001); *CME Czech Republic BV v. Czech Republic* (Final Award) (UNCITRAL Arbitration Rules, 14 March 2003); (2003) 62 IIC. See also Susan D. Franck, "The ICSID Effect? Considering Potential Variations in Arbitration Awards" *VA. J. INT'L L.* 51 (2011): 825, 826, 909–14; Frank Spoorenberg, "Conflicting Decisions in International Arbitration", *The Law and Practice of International Courts and Tribunals* 8 (2009): 91.

<sup>112</sup> The EU is currently in the process of restricting its member states from concluding BITS on the grounds that the EU represents EU states. On the EU's proposed restriction on investment treaties, see European Commission, Proposal for a Regulation of the European Parliament and of the Council, Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to which the European Union is Party (June 21, 2012), [http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc\\_149567.pdf](http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf). (Accessed Nov. 1, 2014) See also Nathalie Bernasconi-Osterwalder, Analysis of the European Commission's Draft Text on Investor-State Dispute Settlement for EU Agreements, *Investment Treaty News*, IISD, (Jul. 19, 2012), <http://www.iisd.org/itn/2012/07/19/analysis-of-the-european-commissions-draft-text-on-investor-state-dispute-settlement-for-eu-agreements/> (Accessed Nov. 1st, 2014). See too Stephen Schill, "The Relation of the EU and Member States in Investor-State Arbitration", in *Regionalism in International Investment Law*, edited by Leon E. Trakman and Nick Ranieri, (Oxford University Press, 2013): Chapter 13; Anna de Luca, "The Legal Framework for Foreign Investments in the EU: The EU Internal Market Freedoms, the Destiny of Member States' BITS, and Future European Agreements on Protection of Foreign Investments", edited by Trakman and Nick Ranieri, *id.* in note, chapter 6.



However, it remains to be seen whether these developments, both economically and politically motivated, will stem the tide of proliferating investment law and practice. Nor is it clear whether China will subscribe to a uniform BIT policy. It might well liberalize BITs in relation to partner states in which a primary purpose is to protect Chinese outbound investors. In contrast, it might strengthen national interest protections in other BITs in which China's primary concern is to protect itself from inbound FDIs. Finally, it is not clear that it is in China's self-interest to promote a new Multilateral Investment Agreement (MIA), not only because such an agreement may falter, but also because investment bilateralism might suit China's global investment agenda best, at least for the immediate future.

## 6.8 China's Distinctive History of "Liberalization"

If growing leadership in the regulation of inbound and outbound investment is to shift to China and its investors, it is necessary to understand China's particular investment history, its investment partnerships, their significance and limitations, and how China is likely to conceive of them in the future.<sup>113</sup>

It is important to appreciate at the outset that, historically, China has had a very different history to that of the West. China was a struggling developing country for centuries including during and after the inception of communism. A beleaguered economy, it was consistently hampered by a desperately low per capita income, an ever growing population and in some regions, rural destitution.<sup>114</sup> China was subject to a number of treaties in which investment practices were dictated to it by one or another dominant treaty party upon which China was dependent for its economic development. Some of those treaties were as much declarations of its surrender to colonial powers as agreements to co-operate in trade and investment, such as the Treaty of Nanking of 1842 following the first Opium War between Great Britain and China. Other treaties, including the Treaty of Wanghia of 1844 between Qing China and the US, and the Treaty of Huangpu of 1844 with France may be similarly described.<sup>115</sup> Of

<sup>113</sup> See Vivienne Bath, "Foreign Investment, The National Interest and National Security—Foreign Direct Investment in Australia and China", *Sydney Law Review* 34 (2012): 5.

<sup>114</sup> Wenhua Shan and Norah Galligher, *China's Investment Treaties: Policies and Practice* (Oxford, Oxford University Press, 2009), Chapters 1–2; See Dong Wang, *China's Unequal Treaties: Narrating National History* (Lexington Books, 2005).

<sup>115</sup> Treaty of Nanking, signed 29 August 1842 (for historical background, see R. Derek Wood, "The Treaty of Nanking: Form and the Foreign Office", 1842–1843, *J. IMPERIAL &*

note and a point of resentment in China, the Treaty of Wanghia and the Treaty of Huangpu both granted “most-favored-nation” treatment to US and French interests.<sup>116</sup>

Nor, unlike the developed West, did China have the benefit of centuries of treaties of Friendship, Commerce and Navigation (‘FCN’) upon which to rely in embarking on a BIT era in the late twentieth century. For example, the US had signed over 100 FCNs, some centuries old, starting with the Treaty of Amity and Commerce with France in 1782 and continuing until well after World War II and before the global BIT era commencing in 1959.<sup>117</sup> In contrast, China’s political and economic alliances were prescribed by its most basic economic needs, not the luxury of sophisticated, albeit sometimes benign, treaties of friendship with one or another great power of the day.

It is not surprising therefore that, after the Second World War, China viewed trade and investment treaties as imperialistic impositions which were not negotiated, but “imposed” upon it.<sup>118</sup> It is also understandable that China, in transforming itself into a communist state, would negotiate treaties with its then closest ally, the Soviet Union, first by signing a Treaty of Friendship, Alliance and Mutual Assistance with it on 14 February 1950. The purpose, expressed in Article 5, was to “develop and strengthen the economic

COMMONWEALTH HISTORY 181–96 May 1996); J.K. Fairbank, “Chinese Diplomacy and the Treaty of Nanking”, J. MODERN HIST. 1842 12 (1940): 1; Treaty of Wanghia, signed 3 July 1844, reproduced in *Treaties, Conventions, etc between China and Foreign States* vol. 1, 677–712 (2d ed., 1917); Treaty of Huangpu, signed 24 October 1844; S. Hoe and D. Roebuck, *The Taking of Hong Kong: Charles and Clara Elliot in China Waters* 203 (1999); See I.C.Y. Hsü, *The Rise of Modern China* 168 (6th ed., 2000).

116 For the full text of these treaties, see [http://www.archive.org/stream/cu31924023464278/cu31924023464278\\_djvu.txt](http://www.archive.org/stream/cu31924023464278/cu31924023464278_djvu.txt), (Accessed Nov. 1st, 2014). See too Kuo, Ping Chia, “Caleb Cushing and the Treaty of Wanghia”, 1844, *Journal of Modern History* 5 (1933): 34–54; Library of Congress Catalog Reference, available at <http://lcn.loc.gov/12033773> (Accessed Nov. 1, 2014). On the Treaty of Huangpu [Whampoa], see John Frank Cady, *The Roots of French Imperialism in Eastern Asia* (Literary Licensing, LLC, 1967); Angelus Francis J. Grosse-Aschhoff, *The Negotiations Between CH’I-YING and LAGRENÉ, 1844–1846* (1950).

117 See H. Walker Jr., “Modern Treaties of Friendship, Commerce and Navigation (1957–58)”, *Minn. L. Rev.* 42(1958), 805; J. Salacuse, *The Law of Investment Treaties*, (Oxford University Press, 2010): 81–95.

118 See Dong Wang, *China’s Unequal Treaties: Narrating National History*, (Lexington Books, 2005): 2; Q. Kong, “Bilateral Investment Treaties: The Chinese Approach and Practice”, *Asian Yearbook of Int’l Law* 8 (1998–1999): 105, 108; T. Wang, “International Law in China: Historical and Contemporary Perspectives”, *Chinese Yearbook of International Law* 1 (1991): 1.

and cultural ties” between these two nations.<sup>119</sup> China and the Soviet Union signed a further Treaty of Trade and Navigation in 1958 granting each Party most-favored-nation treatment “in all trade, navigation” and “other economic relations.”<sup>120</sup> Accentuating that partnership was Article 16 of the Treaty providing that the Parties would guarantee enforcement of arbitral awards “with regard to disputes arising out of the commercial or other contracts of their corporate bodies or institutions, where the Parties have duly agreed to refer the dispute to an *ad hoc* or permanent arbitral tribunal for settlement.”<sup>121</sup>

Equally comprehensible is the observation that China’s first BIT concluded with the West was with Sweden, a country that China perceived to be more neutral than the United States, France, or West Germany. However, consistent with that era of BITs, the agreement did not provide any investor-state dispute resolution mechanism, only state-to-state dispute settlement.<sup>122</sup>

Only in the late 1970s did China embark on its now familiar and global investment treaty agenda. In 1979, China concluded two sequential trade treaties with the then Economic Commission for Europe (‘EEC’). The first, in 1978, sought to foster closer economic relations with the EEC.<sup>123</sup> The second, the Agreement for Trade and Economic Cooperation in 1985, provided more explicitly for such relations between the EEC and China.<sup>124</sup> China concluded a further BIT with the United Kingdom in 1986 and with the Netherlands in 1987. Both treaties allowed investors to refer disputes to international arbitration, which was an exception to China’s practice until then of providing for host and

119 Treaty of Friendship, Alliance and Mutual Assistance between the Union of Soviet Socialist Republics and the People’s Republic of China, signed 14 February 1950, UNTS No 3103, Art. 5 (entered in force 11 April 1950).

120 Treaty of Trade and Navigation between the Union of Soviet Socialist States and the People’s Republic of China, signed 23 April 1958, UNTS No 4534, Art. 2 (entered into force 25 July 1958).

121 Treaty of Trade and Navigation between the Union of Soviet Socialist States and the People’s Republic of China, signed 23 April 1958, UNTS No 4534, Art. 16 (entered into force 25 July 1958).

122 See Exchange of notes constituting an agreement between Sweden and the People’s Republic of China on the establishment of consular relations, signed Peking, 26 June 1955, Vol. 228 (11) UNTS 3148 (1956).

123 See Trade Agreement between the EEC and the People’s Republic of China (OJ L123, 11/05/1978). On China-EU agreements see F. Snyder, *The European Union and China, 1949–2008: Basic Documents and Commentary* (2009).

124 See Council Regulation (EEC) No 2616/85 of 16 September 1985, [http://europa.eu/legislation\\_summaries/external\\_relations/relations\\_with\\_third\\_countries/asia/r14206\\_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/asia/r14206_en.htm) (Accessed Nov. 1st, 2014).

home states to resolve investment disputes including involving home investors in the host state. However, neither treaty provided for disputes to be submitted either to the ICSID or to the Permanent Court of Arbitration.<sup>125</sup>

In 1979, China also entered trade negotiations with the US, following their restoration of diplomatic relations and their Agreement on Trade Relations. Those negotiations also provided for MFN treatment.<sup>126</sup> In addition, the US and China signed a double taxation treaty,<sup>127</sup> but could not agree on a BIT.<sup>128</sup> In 2008, the US and China launched new BIT negotiations as part of the US China Strategic Economic Dialogue. That draft Agreement made provision for ISA; it provided for controls over ISA tribunals, including requiring a committee appointed by the parties to interpret the Agreement, not unlike the NAFTA.<sup>129</sup> However, the draft was not finalized due significantly to political tensions at

<sup>125</sup> The Netherlands-China BIT came into force on February 1, 1987. The UK-China BIT came into force on May 15, 1986. See Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China Concerning the Promotion and Reciprocal Protection of Investments done at London on May 15, 1986, entered into force on May 15, 1986, 1462 U.N.T.S. 255. On a more recent BIT between China and the Netherlands, see Agreement on Encouragement and Reciprocal Protection of Investments Between the Government of the Kingdom of the Netherlands and the Government of the People's Republic of China done at Beijing on November 26, 2011, 2369 U.N.T.S. 219. Article 12(3) of the Singapore-China BIT of February 7 1986 provided that, if the amount of compensation could not be settled within six months "it may be submitted to an international arbitral tribunal established by both parties."

<sup>126</sup> See Agreement on Trade Relations between the United State of America and Republic of China, signed 7 July 1979, TIAS 9630, 31 UST 4651; see also W.S. Morrison, "China-US Trade Issues' in Congressional Research Service" (30 September 2011), [www.fas.org/sgp/crs/row/RL33536.pdf](http://www.fas.org/sgp/crs/row/RL33536.pdf) (Accessed Nov. 1st, 2014); M.R. Weiner and S. Ying, "The Need for a Bilateral Investment Treaty between the United States of America and the People's Republic of China", *International Legal Perspectives* 2 (1990): 33, 41.

<sup>127</sup> See Agreement on for the Avoidance of Double Taxation and the Prevention of Tax Evasion with respect to Taxes on Income, signed 30 April 1984, entered into force 1 January 1987, [www.irs.gov/pub/irs-trty/china.pdf](http://www.irs.gov/pub/irs-trty/china.pdf). (Accessed Nov. 1st, 2014).

<sup>128</sup> See Qing Jiang Kong, "U.S.-China Bilateral Investment Treaty Negotiations: Context, Focus, and Implications", *Asian J. Wto & Int'l Health L. & Pol'y* 7 (2012): 181; Immanuel C.Y. Hsu, *The Rise of Modern China*, (USA: Oxford University Press, 1999); T.A. Steinert, "If the BIT Fits: The Proposed Bilateral Investment Treaty between the United States and the People's Republic of China", *J. Chinese L.* 2 (1988): 405.

<sup>129</sup> This is a function exercised by the NAFTA Free Trade Commission, [http://www.naftanow.org/about/default\\_en.asp](http://www.naftanow.org/about/default_en.asp) (Accessed Nov. 1st, 2014).

the time.<sup>130</sup> A growing tension then related to human rights, notably following the Tian'anmen Square episode in June 1989, and more contemporaneously, over regional and global economic leadership.<sup>131</sup> That competition is reflected in both China and the US's efforts to build investment beachheads into Africa.<sup>132</sup> It is imbedded more recently in the US led Transpacific Partnership Agreement to which China is not a negotiating Party.<sup>133</sup> It is also embodied in the development of a potentially countervailing Free Trade Agreements ('FTA') between China, Japan, South Korea and possibly the ASEAN countries.<sup>134</sup>

- 130 See C. Congyan, "China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications", J. Int'l Econ. L. Vol. 12 (2009): 457; Q. Kong, "US-China Bilateral Investment Treaty Negotiations", East Asian Institute, NUS, 2010.
- 131 The hesitation of the US government to conclude BITs with China is controversial, not least of all because the US Chamber of Commerce favors concluding BITs with China and also, India. See e.g. China Daily, 14 January 2012; Q. Kong, *id.*, at p ii; Karl P. Sauvant and A.S. Huiping Chen, "China-US Bilateral Investment Treaty: A Template for a Multilateral Framework for Investment?", Vale Columbia Centre on International Environmental Sustainability, (No. 85, December 17, 2012), <http://www.vcc.columbia.edu/content/china-us-bilateral-investment-treaty-template-multilateral-framework-investment>, (Accessed Nov. 1st, 2014).
- 132 See H. Campbell, *China in Africa: Challenging US Global Hegemony*, (Taylor & Francis Group, 2008): 29(1); Third World Quarterly (2008): 89–105; J.G. Frynas and M. Paulo, "A New Scramble for African Oil? Historical, Political and Business Perspectives", African Affairs 106 (2007): 229; M. Klare and D. Volman, "America, China & the Scramble for Africa's Oil", Rev. Afr. Pol. Economy 33 (2006): 297.
- 133 See Department of Foreign Affairs and Trade, Trans Pacific Partnership Negotiations, <http://www.dfat.gov.au/fta/tpp/> (Accessed Nov. 1st, 2014, see the 'News' Tab). See also The Trans Pacific Partnership Agreement, Public Knowledge, <http://tppinfo.org/2012/07/13/tpp-recap-san-diego-negotiations> (Accessed Nov. 2, 2014); SICE, Trans Pacific Partnership Agreement, [http://www.sice.oas.org/TPD/TPP/TPP\\_e.asp](http://www.sice.oas.org/TPD/TPP/TPP_e.asp) (Accessed Nov. 2, 2014); Meredith Kolsky Lewis, "The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?" B.C. Int'l & Comp. L. Rev. 34 (2011): 27. See too Leon E Trakman, "International Investment Law and the Transpacific Partnership Agreement in TANIA VOON", The Transpacific Partnership Agreement, (EDWARD ELGAR, 2013).
- 134 See e.g. "Signing of the Japan-China-Korea Trilateral Investment Agreement, Ministry of Foreign Affairs of Japan", May 13, 2012, [http://www.mofa.go.jp/announce/announce/2012/5/0513\\_01.html](http://www.mofa.go.jp/announce/announce/2012/5/0513_01.html). (Accessed Nov. 1st, 2014) On the text of that Treaty, see <http://www.bilaterals.org/spip.php?article21500> (Accessed Nov. 1st, 2014). See too Aurelia George Mulgan, "Why Japan is Lagging on the TPP", East Asia Forum, May 30 2012, <http://www.eastasiaforum.org/2012/05/30/why-japan-is-lagging-on-the-tpp/>. (Accessed Nov. 2, 2014)

To date, China has entered into nine FTAs and most recently, an investment agreement with Australia.<sup>135</sup> A tenth Agreement, with Korea and Japan is waiting ratification.<sup>136</sup> Each FTA has an investment chapter,<sup>137</sup> except for the China–Chile FTA (2005) which has an article on the promotion of investment and a commitment to negotiate a future agreement on trade in services and investment.<sup>138</sup> China signed a supplementary Agreement on Trade in Service with Chile in 2008, and recently concluded negotiations on investment-related supplementary provisions to the FTA.<sup>139</sup> The chapter on investment in the China–Singapore FTA does not include any express investment provisions, other than through incorporation by reference to the ASEAN – China Investment Agreement.<sup>140</sup> That Agreement is also questioned for its limited scope of investment “liberalization.”<sup>141</sup>

China’s most recent investment treaty, with Korea and Japan, provides for temporary safeguards, the denial of benefits, and for ISA. It also includes detailed protections for investors from partner host states.<sup>142</sup> A further Treaty is currently being negotiated between China and the European Union.<sup>143</sup>

<sup>135</sup> The other seven FTAs are with ASEAN, Pakistan, Chile, New Zealand, Singapore, Peru and Costa Rica: Ministry of Commerce, People’s Republic of China, China FTA Network, [http://fta.mofcom.gov.cn/english/fta\\_qianshu.shtml](http://fta.mofcom.gov.cn/english/fta_qianshu.shtml). (Accessed Nov. 1st, 2014)

<sup>136</sup> See *supra* note 134.

<sup>137</sup> See China–Costa Rica FTA, (2010), Chapter 9; China – New Zealand FTA (2008), Chapter 11; China–Pakistan FTA (2006), Chapter 9; China – Peru (2010) FTA, Chapter 10; China–Singapore FTA (2008), Chapter 10; Agreement on Investment included in China–ASEAN FTA (2009). These treaties are available at <http://fta.mofcom.gov.cn/english/index.shtml>. (Accessed Nov. 1st, 2014)

<sup>138</sup> Articles 112 and 120, respectively.

<sup>139</sup> “China, Chile to establish strategic partnership, boost trade”, *Xinhua*, June 27, 2012.

<sup>140</sup> Article 84.

<sup>141</sup> See Wei Shen, “*Is This a Great Leap Forward? A Comparative Review of the Investor-State Arbitration Clause in the ASEAN-China Investment Treaty: From BIT Jurisprudential and Practical Perspectives*”, J. INT’L ARB. 27(4) (2010): 379; Vivienne Bath, “ASEAN: The Liberalization of Investment through Regional Agreements”, in *Regionalism in International Investment Law*, edited by Trakman and Ranieri, (Oxford University Press, 2013): Chapter 8.

<sup>142</sup> Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People’s Republic of China for the Promotion, Facilitation and Protection of Investment, at May 13, 2012.

<sup>143</sup> See e.g. Sébastien Falletti, “Beijing Dragging Feet on Investment Treaty”, *Europolitics*, edited by Jesse Russell and Ronald Cohn, 19 September 2012, <http://www.europolitics.info/external-policies/beijing-dragging-feet-on-investment-treaty-art343080-44.html> (Accessed Nov. 1st, 2014).

China is negotiating a FTA with Australia that, apparently, provides for ICSID arbitration.<sup>144</sup> In addition, China is involved in FTA negotiations with the Gulf Cooperation Council, Iceland, Norway and the Southern African Customs Union.<sup>145</sup> It is also studying the feasibility of concluding trade and investment agreements with India and Switzerland.<sup>146</sup>

### 6.9 China's "Liberalization" of Its BITS

A particular challenge for China relates to lingering concerns over whether, despite its recent flurry of bilateral and regional activism, it has adequately liberalized its international investment regime. A traditional criticism is that China has taken an unduly restrictive view of the rights of foreign investors to receive "national treatment".<sup>147</sup> China is reproached for imposing rigidifying constraints upon foreign investors, notably a "one-by-one" method of approving applications for FDI.<sup>148</sup> This practice is sometimes criticized for leading to a dilatory and selective investment entry process through which Chinese regulatory authorities evaluate each FDI project, in apparent order, before approving them. A related concern is that China conceives of sovereign immunity

<sup>144</sup> The status of this FTA between China and Australia is also uncertain. See e.g. Matthew Franklin and Michael Sainsbury, "China Raises Ownership Hurdle in FTA Talks", *The Australian*, 1 August 2012 <http://www.theaustralian.com.au/national-affairs/foreign-affairs/china-raises-ownership-hurdle-in-fta-talks/story-fn59nm2j-1226439876661> (Accessed Nov. 1st, 2014).

<sup>145</sup> Ministry of Commerce, People's Republic of China, China FTA Network: Free Trade Agreements under Negotiation, [http://fta.mofcom.gov.cn/english/fta\\_tanpan.shtml](http://fta.mofcom.gov.cn/english/fta_tanpan.shtml). (Accessed Nov. 1st, 2014)

<sup>146</sup> Ministry of Commerce, People's Republic of China, China FTA Network: Free Trade Agreements under Consideration, [http://fta.mofcom.gov.cn/english/fta\\_yanjiu.shtml](http://fta.mofcom.gov.cn/english/fta_yanjiu.shtml). (Accessed Nov. 1st, 2014)

<sup>147</sup> See e.g. *China NDRC Denies the "National Treatment" for RMB Funds with Foreign GPs* 18 July 2012 (maintaining that China's National Development and Reform Commission [NDRC], a major regulatory authority in charge of foreign investments in the PRC has recently denied "national treatment" to RMB funds in the form of a limited liability partnership with a foreign-invested company as general partner ("GP") and with only PRC domestic investors as limited partners [LPs], <http://www.shearman.com/files/Publication/16515980-0f05-4aad-8ca1-d74066eb8b90/Presentation/PublicationAttachment/0a664bco-53c2-4b6c-b1f5-738c047ffa11/China-NDRC-Denies-the-%E2%80%9CNational-Treatment%E2%80%9D-for-RMB-Funds-with-Foreign-GPs-IF-071812.pdf> (Accessed Nov. 2, 2014).

<sup>148</sup> *supra* note 74, 228.



and state privilege, not limited to state enterprises, too expansively and as a measure of regulating not only the entry, but also the day-to-day activities of foreign investors.<sup>149</sup> In contention is China's alleged failure to enshrine the "liberty" of inbound investors and for supposedly unduly interfering with their "rights" as investors.<sup>150</sup>

These criticisms of China's alleged approach towards foreign direct investment are significantly overstated and often misconstrued. Given the size and diversity of the Chinese population, its perceived need for ordered regulation is not that difficult to conceive, or appreciate. Nor is the bureaucratic regulation of inbound investment peculiar to China. Nor should China be expected to embrace the exact same kind of liberalization of investment as the US or the EU has done, given China's discrete cultural, legal and political traditions.<sup>151</sup> Even in the purportedly enlightened West, the liberalization of dispute resolution under BITs took at least three incremental stages to develop. In the initial stage, commencing in 1959 in an agreement between West Germany and Pakistan, investment agreements and disputes were solely between states. Investors from home states had no rights to proceed directly against host states.<sup>152</sup> In the second stage, foreign investors acquired those rights, including the right to bring ISA claims against host states. This stage also entailed institutional changes, such as the establishment of the ICSID through which foreign investors could bring such claims. The West is now in the third stage of BITs development, in which BITs have proliferated, exceeding 3,000 at the end of 2012. However the extent to which the proliferation of BITs in the West has liberalized international investment in fact is debatable, given the growing arsenal of BIT exceptions, such as are directed at national security, and protecting the environment, domestic capital and labor markets.<sup>153</sup>

<sup>149</sup> On China's conception of absolute sovereign immunity, see *supra* note 74.

<sup>150</sup> See Leon E. Trakman, "The Twenty-First Century Law Merchant", *Am. Bus. L. J.* 48 (2011): 775, 800–803.

<sup>151</sup> See Becky Shelley, *Democratic Development in East Asia* (Routledge, 2004); ICSID, 50th Anniversary of the First Bilateral Investment Treaty: An Occasion for Celebration or Reflection? December 3 2009, <http://www.iisd.org/media/press.aspx?id=13> (Accessed Nov. 2, 2014).

<sup>152</sup> See Gordon Smith, "Chinese Bilateral Investment Treaties Restrictions on International Arbitration", *supra* note 15.

<sup>153</sup> A different, and dated, conception of the three stages in the development of BITs is as follows. The first stage involved Germany and Switzerland signing agreements with a variety of less developed countries in the early 1960s. The second stage occurred throughout the 1960s and into the 1970s when France, the United Kingdom, the Belgo-Luxembourg Economic Union, the Netherlands, and Norway involved themselves in the program. The



Nor have these three stages in the so called liberalization of BITs in the West applied self-evidently to China. China, arguably, “skipped” the first stage in the development of BITs, concluding its first BIT with Sweden only in 1982, some years after the first BIT between West Germany and Pakistan in 1959. China only concluded its second BIT in 1989.<sup>154</sup> At best, China began participating in BITs in the second stage of BIT development. In addition, China’s early BITs only permitted disputes to proceed to arbitration in relation to the amount of compensation for expropriation and not over whether China had engaged in an expropriation. The underlying assumption was that China’s regulation of foreign investment was not subject to legal challenge under the doctrine of sovereign immunity.<sup>155</sup> China also did not include substantive “national treatment” obligations in its earlier BITs.<sup>156</sup> Significant, too, was Chinese adherence to a two tier policy. It concluded BITs with developed states primarily to build its economic infrastructure through both inbound and increasingly, outbound investment. It signed BITs with developing countries primarily to build diplomatic alliances and to satisfy its resource needs and only secondarily to promote outbound investment, at least in the short term. This dual track approach which China adopted is understandable. China was still predominantly an inbound investment destination and not yet a major exporter of capital. It had to carve out an effective international investment regime at a time in which it was undergoing significant transformation, economically, politically and socially.<sup>157</sup>

All this changed formally in 1999 when China adopted its “Going Abroad” strategy, followed by its 2001 Outline of the Tenth Five-Year Plan for National

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final stage began in the late 1970s and continued into the early 1980s when Japan and the United States became increasingly involved. See Patricia M. Robin, “The BIT Won’t Bite: The American Bilateral Investment Treaty Program”, *Am. U. L. Rev.* 33 (1984): 931, 941–942.

<sup>154</sup> See Smith, *supra* note 15, at 58–60.

<sup>155</sup> On China’s early BIT practice of providing for ISA only in respect of compensation, as distinct from the State’s right to regulate property, see Chinese Model BIT, reprinted in Wenhua Shan and Norah Gallagher, *Chinese Investment Treaties, Policies and Practice*, appendix 4 (Loukas Mistelis series Editor, Oxford International Arbitration Series, 2009). See too e.g. art. 12(3) of the Singapore-China Free Trade Agreement, *supra* note 137.

<sup>156</sup> See generally, L. Li, “Chinese BIT Practice and Challenges”, Address at the 2010 Chinese Society of International Economic Law Annual Conference, Nanjing, China, published in *Chinese Journal International Economic Law*, 17(4)(2010).

<sup>157</sup> See e.g., China-Romania BIT (1983), China-Thailand (1985), China-Sri Lanka (1986) and China-Poland (1988). Li, *supra* note 156, at 114–125.

Economy and Social Development.<sup>158</sup> China's BITS program thereafter focused increasingly on outbound investment.<sup>159</sup> Notable results following China's "Going Abroad" strategy was its accession to the ICSID in 1993; the provision for ISA in its BITS; and the provision that foreign investors receive "national treatment" in its more recent BITS.<sup>160</sup>

Accordingly, China only really became active as an inbound and outbound participant in the third stage of the global development of BITS,<sup>161</sup> with a meteoric rise to pre-eminence as the country with the most BITS,<sup>162</sup> the significant majority still being in force.<sup>163</sup>

In order to better understand China's current BIT program, the next section will briefly discuss the history of its BITS.<sup>164</sup>

#### 6.10 The History of Chinese BITS

The beginning of China's BITS program coincided with its "open-door" policy to the West which it propagated in the mid-1970s.<sup>165</sup> The purpose at that time was primarily to promote inbound investment from abroad.<sup>166</sup> However,

<sup>158</sup> The Outline of this Plan is available at [http://english.gov.cn/official/2005-07/29/content\\_18334.htm](http://english.gov.cn/official/2005-07/29/content_18334.htm) (Accessed Nov. 2, 2014). For some of the effects of China's "Going Abroad" Policy, see "China's go abroad policy produces effects" (July 18 2011), available at <http://english.peopledaily.com.cn/90001/90778/90861/7443645.html> (Accessed Nov. 1st, 2014).

<sup>159</sup> See C. Congyan, "Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice", *J. World Investment & Trade* 7 (2006): 62.

<sup>160</sup> See Shan Gallagher, *supra* note 12, at §§ 1.77–1.82.

<sup>161</sup> See Ministry of Commerce, People's Republic of China, Department of Treaty and Law, <http://tfs.mofcom.gov.cn/column/2010.shtml> (Accessed Nov. 2, 2014).

<sup>162</sup> Li, *supra* note 156. See Ministry of Commerce, *supra* note 161.

<sup>163</sup> Li, *supra* note 156.

<sup>164</sup> On China's investment treaties, see Ministry of Commerce, People's Republic of China, China FTA Network, <http://fta.mofcom.gov.cn/english/index.shtml>. (Accessed Nov. 1st, 2014).

<sup>165</sup> On China's evolving history in international investment law practice, see Wenhua Shan and Norah Gallagher, *Chinese Investment Treaties: Policies and Practice*, (Oxford, Oxford University Press, 2009): Chapter 1. See Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge University Press, 2002): 450. (arguing that "[o]ne of the main motivating forces behind China's turn toward rule of law has been the belief that legal reforms are necessary for economic development."); Yan Wang, *Chinese Legal Reform: The Case of Foreign Investment Law* (Routledge, 2002).

<sup>166</sup> See K. Sauvant & L.E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford,

China's first BIT with Sweden, concluded on 29 March 1982, included various protections for inbound and outbound foreign investors: fair and equitable treatment, 'most-favored-nation' treatment, no expropriation without compensation, and a guarantee to freely transfer funds. While that treaty only provided for arbitration between the home and host state over that treaty's interpretation and application, and did not provide for investor-state arbitration, a letter from the Swedish Government noted that, once China became a member of the ICSID Convention, the parties would supplement the treaty and provide for binding arbitration for investor-State disputes.<sup>167</sup> However, as noted above, the Agreement provided for arbitration only in determining compensation for expropriation. In addition, no provision was made for the "national treatment" of foreign investors.<sup>168</sup>

Chinese domestic laws also include declarations favoring the protection for investors in China from expropriation and nationalization and the payment of appropriate compensation for a government taking. For example, China so stipulated in Article 5 of its Law on Wholly Owned Foreign Enterprises in 1986.

China does not carry out expropriations or nationalisations of WFES. Under special circumstances, in the public interest, WFES can be expropriated in accordance with legal procedures and appropriate compensation will be provided.<sup>169</sup>

Certainly, one can question the restrictive conception of an "expropriation" or "nationalization" in Chinese domestic law, the nature of "special circumstances, in the public interest" and the extent to which "appropriate compensation" diverges from just, fair and reasonable or "full" compensation, as well as the significance of China expropriating "in accordance with legal procedures".

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Oxford University Press, 2009); J.W. Salacuse and N.P. Sullivan, "Do BITS Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain", *Harvard International Law Journal* 46(2005): 67, D.L. Swenson, "Why Do Developing Countries Sign BITS?" *University of California Davis Journal of International Law & Policy* 12 (2005): 131, and UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* 6 (1998).

<sup>167</sup> See Agreement on the Mutual Protection of Investments, Mar. 29, 1982, Swed.-P.R.C., at <http://www.unctad.org/sections/dite/ia/docs/bits/china-sweden.pdf>. (Accessed Nov. 2, 2014)

<sup>168</sup> *Id.*

<sup>169</sup> Adopted by the Fourth Session of the Sixth National People's Congress on April 12, 1986, and amended by the 18th Session of the Standing Committee of the 9th National People's Congress on October 31, 2000).

Nor is China's property law regime entirely helpful in answering these questions. Its 2007 Property Law provides for expropriation of collectively-owned land, premises of enterprises and individuals and other immovable properties.<sup>170</sup> That law stipulates, again, that expropriation of such properties shall take place for a public purpose and in accordance with the procedures stipulated under the law. However, it does not provide a specific standard of compensation.<sup>171</sup>

Insofar as a foreign investor in China is concerned, compensation presumably will depend on the standard specified in an applicable BIT between China and that investor's home state. If the BIT does not so provide and an ISA dispute eventuates, the ISA tribunal inferentially will apply a standard of compensation under customary international law,<sup>172</sup> conceivably a "just and reasonable" standard.<sup>173</sup> But there is no decided ISA case filed by an investor against China to assist in determining how an ISA tribunal might so decide. A further challenge is for an ISA tribunal to determine a remedy among a number of potential alternatives.<sup>174</sup>

These challenges are not peculiar to China. Other than the narrow conception of an "expropriation" to which China traditionally has subscribed, circumspection over the nature and extent of "compensation" is global.<sup>175</sup> Nor

<sup>170</sup> See Property Law of the People's Republic of China (adopted at the 5th session of the Tenth National People's Congress, 16 March 2007) ('Property Law'). The expropriation clause is located in Art. 42.

<sup>171</sup> See Property Law, Art. 42(1) and Art. 42(2)–(4) respectively.

<sup>172</sup> See Steffen Hindelang, "Bilateral Investment Treaties, Custom and a Healthy Investment Climate—The Question of Whether BITS Influence Customary International Law Revisited", *J. World Investment & Trade* 5 (2004): 789; Jeswald W. Salacuse, "The Treatification of International Investment Law", *Studies in International Financial Economic and Technology Law* 8 (2007): 241.

<sup>173</sup> On just and reasonable compensation in Chinese BITS, see Article 2(2) of the China-Bosnia and Herzegovina BIT 2002 and Article 2(2) of the China-Guyana BIT 2003. These treaties are available at <http://fta.mofcom.gov.cn/english/index.shtml>. (Accessed Nov. 1st, 2014)

<sup>174</sup> See Patrick Dumberry, "Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States in Investor-State Arbitration Disputes", *J. Int'l Disp. Settlement* 3 (2012): 1; P. Dunaud and M. Kostytska, "Declaratory Relief in International Arbitration", *J. Int'l Arb.* 29 (2012): 18.

<sup>175</sup> Some of China's earlier BITS cover only investments in their MFN clause and do not refer to "investment-related activities." See e.g., Article 2(2) of the China-Sweden BIT 1982. However, the 2008 China-Mexico BIT expressly protects both investors and investments, in Article 4(1) and (2) respectively. See <http://unctad.org/sections/dite/iaa/docs/bits/>

is there anything strange about China wanting to protect its vulnerable rural sectors, public health and environment, among other national interests. Western democracies, too, often earnestly protect their vulnerable domestic industries from FDI inroads.<sup>176</sup>

China is also not out of sync with the West in its conception and treatment of international law. For example, Article 142 of its General Principles of Civil Law ('GPCL') provides:

If an international treaty concluded or acceded to by the PRC contains provisions differing from those in the civil laws of the PRC, the provisions of the international treaty shall apply, unless the provisions are ones on which the PRC has made reservations thereon.<sup>177</sup>

An objection may be that Chinese domestic laws that defer to international law are made to be disregarded, particularly in the absence of constitutional law principles in Chinese law governing the relationship between international law and domestic law. Whether that objection applies significantly more to China than another country in light of the actual practices of states is subject to debate. What is telling, however, is that China has devised a model BIT regime that, in its most recent form, extends substantive protections to foreign investors, and provides those with a choice between domestic courts and ISA. This will be discussed in Section x below.

Given that ISA tribunals are chosen by both investor and state parties, and not by the state party alone, the issue is not simply whether China as a sovereign state chooses to disregard the substantive principles of international investment law, or procedural process of law, but how ISA tribunals the terms of discrete BITS and FTAs including the protections they accord state policies over investor interests.

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mexico\_china.pdf. (Accessed Nov. 2, 2014) Whether this expansion in the protection of investments and investors is the sign of a new trend in Chinese BITS is uncertain.

<sup>176</sup> For an analysis of the view that, if investment arbitration privileges foreign investors, it undermines the national interest and democracies "promise"; if it denies foreign investors access to its markets, see David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press, 2008): Chapters 2 and 6.

<sup>177</sup> *General Principles of Civil Law*, Article 142.

### 6.11 Modelling China's Model BIT

China's accession to over 140 BITs has rekindled interest in China's current model BIT and what provisions it may include in a fourth Model BIT, which is expected as early as 2014. This interest gives rise to several questions. First, how distinctive is China's current Model BIT from the model BITs adopted by other countries, such as the United States and Canada? Second, to what extent does China incorporate its Model BIT into its negotiated BITs, and how do its negotiated BITs vary from its current Model BIT? Thirdly, what inferences can one draw from China's short but intensive Model BIT history?

China devised its first Model BIT in the early 1980s. It adopted its second model BIT in 1992 and its third in 1998. China's negotiated BITs have gone through generational changes, mostly in accordance with its changing Model BITs. Most of these generational changes are not particularly significant. However, China's current Model BIT is distinct in some respects.

First it is important to appreciate that China's first Model BIT did not provide for ISA. Its second Model BIT provided for ISA, but China chose not to incorporate ISA in all its ensuing BITs that were otherwise based on that Model BIT. China's third and current Model BIT provides for ISA for all investor-state disputes, which it also embodies in its negotiated BITs. Second, China's early Model BITs limited investor claims to compensation, as distinct from claims relating to the nature of an expropriation. China's current Model BIT entertains claims based on both the nature of an expropriation and the extent of compensation. Third, despite this second development, ISA tribunals are likely to interpret the scope of such an expropriation narrowly, particularly in relation to an indirect expropriation. However, it is difficult to so argue with conviction despite the tradition of ISA tribunals construing BITs narrowly because of the absence of ISA awards to date against China under its current Model BIT to date.<sup>178</sup>

The preamble to China's current Model BIT includes three principles: (i) to facilitate and attract investment; (ii) to contribute to the prosperity of both Contracting States; and (iii) to cooperate on the basis of equality and for mutual benefit.<sup>179</sup> It is clear that the purpose is not only to enhance trade and investment, but also to add to the prosperity of the contracting states. Other Model BITs adopted by North American and European countries may not articulate their national interest in similar language, but it is reasonable to infer that the

<sup>178</sup> See Brown, *supra* note 103.

<sup>179</sup> See Preambles in the three versions of the Chinese Model BITs respectively.

prosperity of the host state is likely to be identified with the national interest of any state party to a BIT.<sup>180</sup>

Article 1(1) of the Chinese Model BIT adopts an asset-based definition of investment that is comparable to definitions of investment adopted in the West. It states: “1. The term ‘investment’ means *every kind of asset invested* by investors of one Contracting Party *in accordance with the laws and regulations of the other Contracting Party* in the territory of the latter, and particularly, though not exclusively” followed by an enumeration of different asset classes of such investments.<sup>181</sup> One can question the nature and non-exhaustive character of the list of investments. One can also query the reference to, “in accordance with the laws and regulations” of the host state. However, open-ended language in defining or circumscribing the scope of an investment, including through a list of asset classes, is not uncommon in BITs, notwithstanding the paucity of ISA disputes interpreting that language under a Chinese BIT in particular.<sup>182</sup>

China’s Model BIT also does not include an objective measure of an “investment”. However, China’s Model BIT provides illustrations of investments from which ISA tribunals can draw in determining the boundaries of an investment, such as in distinguishing between movable and immovable property, interests in companies, contractual rights, intellectual property rights and business concessions. In addition to the US Model BIT 2012 also adopting an illustrative measure of an “investment”, there is ISA jurisprudence in which tribunals have implied an objective measure of an investment, involving third party BITs and FTAs.<sup>183</sup>

180 On distinctive “national interest” and “national security” issues relating to FDI in Asia and China in particular, see Vivienne Bath, “Foreign Investment, the National Interest and National Security: Foreign Direct Investment in Australia and China”, *Sydney Law Review* 34 (2012): 5.

181 Emphasis added.

182 See e.g., Tony Cole & Anuj Kumar Vaksha, “Power-Conferring Treaties: The Meaning of ‘Investment’ in the ICSID Convention”, *Leiden J. Int’l L.* 24 (2011): 305.

183 See United States Model Bilateral Investment Treaty (2012), <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>. (Accessed Nov. 1st, 2014) On the illustrative measure of “investment” in the US Model BIT, see K. Scott Gudgeon, “United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards”, *Berkeley Journal of International Law* 4 (2012): 105. On different methods of determining an “investment” in international investment law, see E. Gaillard, “Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice”, in *International Investment Law for the 21st century Essays in Honour of Christoph Schreuer*, edited by Christina Binder, (Oxford University Press, 2009): 403;



Article 2 of the Chinese Model BIT delineates: fundamental standards for the promotion and protection of FDI; the principles governing the admission of an investment; provision for constant protection and security measures; and obligations of non-discrimination. There is nothing particularly unusual about this Article. The principles governing the admission of investments that focus less on market access to FDI than on subjecting FDI to the traditional sovereignty rights of the host state is not peculiar to China.<sup>184</sup>

Article 3(1) of the Model BIT provides that foreign investors enjoy the constant protection and security in the territory of the other Contracting Party. This is also unremarkable. Nor is Article 3(2), providing for “national treatment” of investors from home partner states, unusual.<sup>185</sup> What is noteworthy, however, is that the “national treatment” of foreign investors is not invariably included in Chinese BITs.<sup>186</sup> One explanation is that China historically resisted a “national treatment” standard, despite incorporating it into its current Model BIT, and that it continues to resist incorporating it into specific BITs. Another explanation is that China sometimes accords foreign investors more than “national treatment”; and indeed, rejects a minimal standard of treatment accorded to foreign investors as imperialist and colonialist and in conflict with contemporary international law.<sup>187</sup> Article 3(3) stipulates for “most-favored-nation” treatment. That article is unremarkable, and is incorporated into Chinese BITs generally.

Article 4 provides for expropriation. It is probably the most controversial article in the Model BIT. It sets out four conditions to legitimate an

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Katia Yannaca-Small, “Definition of ‘Investment’: An Open-ended Search for a Balanced Approach”, in *Arbitration Under International Investment Agreements: A Guide to the Key Issues* edited by Katia Yannaca-Small (Oxford University Press, 2010): 248–250.

184 See e.g. Wenhua Shan, *supra* note 74, 229. But see the US-China BIT which subjects the admission of FDI to both MFN and national treatment clauses. See Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* 49 (1995). See also UNCTAD, Key Issue 1, at 143–44; Shan, *ibid.* in note. See generally, Michael D. Goldhaber, Big Arbitrations, *Focus Eur.*, Summer 2003, at 22, <http://www.americanlawyer.com/focuseurope/bigarbitrations.html>. (Accessed Nov. 2, 2014)

185 “Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors.”

186 Shan, *supra* note 148, at 233–4.

187 Meizhen Yao, *International Investment Law*, [in Chinese] (Wuhan University Press, 1987): 334–338, cited in Wenhua Shan, *supra* note 74, 232. See too Shan, Gallagher and Zhang, *supra* note 17, at 120.

expropriation, namely, the expropriation must: (i) be in the public interest; (ii) be in accordance with domestic legal procedure; (iii) be on a non-discriminatory basis; and (iv) compensation must be paid. It is likely that, in setting out these four conditions governing an expropriation, the Model BIT purports to legitimate other forms of regulatory action over foreign investors that fall short of such an expropriation. This would effectively restrict the range of actions that foreign investors can bring against a host state under a Chinese BIT. In addition, Article 4 does not specifically accord due process of law to a foreign investor. What is also uncertain is the extent to which the requirement that an expropriation be in accordance with “domestic legal procedure” replicates a due process standard. If that “procedure” guarantees a foreign investor procedural justice, it would mirror some aspects of due process as an American constitutional lawyer might conceive of due process. Even if a “domestic legal procedure” falls short of such due process, that deficiency arguably would be offset somewhat by the requirement that an expropriation should not be discriminatory under Article 2 and that compensation should be paid under Article 4(iv) of the Chinese Model BIT.<sup>188</sup>

Two provisions in China’s Model BIT deal with dispute resolution. Article 8 regulates the settlement of disputes between contracting parties. Article 9 deals with the settlement of disputes between host states and foreign investors. Neither provision is particularly unusual. Article 8 provides that state parties must first attempt to settle their dispute through consultation. Failing that, provision is made for an *ad hoc* arbitration; should that also fail, resort can be had to the International Court of Justice. Such an incremental approach to resolving disputes between states is not particularly unusual, and arguably, is quite defensible in relation to investment disputes between states parties.

Regarding investor-state disputes, Article 9(2) requires the parties to try to settle their dispute amicably through negotiations. Should that fail, an investor can apply to a competent court of the contracting party, or to the ICSID.<sup>189</sup> Providing an investor with the choice of bringing a claim to a domestic court is investor “friendly”; however, it is also strategic. Chinese investors abroad may well appreciate the option of applying to a domestic court, depending on such

<sup>188</sup> On limitations associated with compensation in ISA proceedings and in international investment law generally, see M. Sornarajah, “The Norman Paterson School of International Affairs Simon Reisman Lecture in International Trade Policy: The Clash of Globalizations and the International Law on Foreign Investment (12 September 2002), as reprinted in (2003) 10 *Canadian Foreign Policy* 1.

<sup>189</sup> Article 13 provides for the settlement of disputes between investors and a contracting party.

factors as the reputation of that court, and the time, cost and convenience of proceeding there. Foreign investors in China may do the same. Again, there is little experience upon which to draw any definitive conclusions about which path foreign investors will choose in the absence of significant litigation or ISA under BITS based on China's Model BIT.<sup>190</sup>

A controversial issue historically and involving China's 1992 Model BIT was that ISA tribunals would only determine the amount of compensation on the request of an investor which itself did not explicitly provide for prompt, adequate, and effective compensation. All other matters beyond compensation could only be submitted to ISA with the consent of both parties. The presupposition was that a state was entitled to exercise its sovereign authority in expropriating; and that such action was not itself subject to a legal challenge, unless that state so consented. It would seem, albeit not with certainty, that the current Model BIT resolves that issue in favor of ISA tribunals being empowered to make both determinations. However, China is not obliged to follow its own Model BIT and may decide, depending on the context, to vary from it in specific investment treaties. Much will also depend on how such a provision is interpreted by arbitration tribunals, should ISA claims against China eventuate.

How will a new Chinese Model BIT address these issues? Much has changed on the FDI landscape globally as well as for China since it devised its current Model BIT 15 years ago. In particular, newer models of BITS, including in Asia but also in the United States, provide more elaborate defenses to investor claims. This is typified in the NAFTA case of *Methanex v. United States of America*,<sup>191</sup> in the US and Canadian Model Treaties,<sup>192</sup> and in the India-Singapore Economic

<sup>190</sup> But see *supra* Sections III and IV.

<sup>191</sup> See *Methanex Co. v. US*, Final Award, (Aug. 7, 2005), <http://www.state.gov/documents/organization/51052.pdf> (Accessed Nov. 2, 2014); see also *Methanex Corporation and the United States of America*, NAFTA Claims, [http://www.naftaclaims.com/disputes\\_us\\_6.htm](http://www.naftaclaims.com/disputes_us_6.htm) (Accessed Nov. 2, 2014); Courtney Kirkman, "Fair and Equitable Treatment: *Methanex v. United States* and the Narrowing Scope of NAFTA Article 1105," *Law & Pol'y Int'l Bus.* 34 (2002): 343.

<sup>192</sup> See United States Trade Representative, 2012 U.S. Model Bilateral Investment Agreement, <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>. (Accessed Nov. 1st, 2014) This replaces the Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, <http://www.state.gov/documents/organization/117601.pdf> (Accessed Nov. 1st, 2014) (American 2004 Model Bilateral Investment Treaty). See also Andrew Newcombe, "Canada's New Model Foreign Investment Protection Agreement", *Investment Treaty Arbitration* (Canadian Council of International Law

Cooperation Agreement.<sup>193</sup> In particular, each treaty includes defenses to investor claims on such extensive grounds as public health, public morality, social welfare and sustainable development.<sup>194</sup> ICSID tribunals have also accommodated these defenses.<sup>195</sup> They have rejected investor claims that such defenses deny foreign investors “fair and equitable treatment”, or that a signatory state has exceeded the limits of the “margin of appreciation” in protecting its public interests over the investment interests of foreign investors.<sup>196</sup>

It is conceivable that China will reframe its third Model BIT to accommodate these developments, including by widening the scope of state exemptions under a new Model BIT and by further narrowing the ambit of an “expropriation”. However, China may decide not to follow the lead of the West, not only to maintain its independence pathway as an inbound and outbound investment regime. It may appreciate the economic and political benefit of further liberalizing its international investment regime in contradistinction to Western countries that have retreated from such liberalization.

Insofar as the articles in China’s Model BIT are comparable, in whole or in part, to provisions in Model BITs devised by developed Western countries, ISA tribunals may apply determinations arising out of the latter BITs by analogy to Chinese BITs. This practice is subject to the observation that there is no

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Bulletin, 2004), <http://ita.law.uvic.ca/documents/CanadianFIPA.pdf> (Accessed Nov. 1st, 2014) (Canadian Model Bilateral Investment Treaty).

193 See Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore, <http://commerce.nic.in/ceca/toc.htm>. (Accessed Nov. 2, 2014)

194 See Andrew Newcombe, “General Exceptions in International Investment Agreements BIICL Eighth Annual WTO Conference Draft Discussion Paper”, 4 (May 13 & 14, 2008), [http://www.biicl.org/files/3866\\_andrew\\_newcombe.pdf](http://www.biicl.org/files/3866_andrew_newcombe.pdf). (Accessed Nov. 2, 2014)

195 A series of cases illustrate these variable conceptions of “fair and equitable” treatment. See *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7. Award on the Merits, ¶ 64 (Nov. 13, 2000), <http://italaw.com/documents/Maffezini-Award-English.pdf> (Accessed Nov. 1st, 2014); *MTD Equity Sdn Bhd & MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, ¶ 178 (May 25, 2004), <http://italaw.com/documents/MTD-Award.pdf> (Accessed Nov. 1st, 2014); Laird, *supra* note 107.

196 See generally Macdonald, *supra* note 109, at 83; Onder Bakircioglu, “The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases”, *German L.J.* 8 (2007): 711; Yuval Shany, “Toward a General Margin of Appreciation Doctrine in International Law?”, *Eur J. Int’l L.* 16(2005): 907; Eyal Benvenisti, “Margin of Appreciation, Consensus, and Universal Standards” *N.Y.U. J. Int’l L. & Pol.* 31 (1999): 843.

formal precedent in international ISA jurisprudence and therefore no duty of ISA tribunals to adhere to prior decisions.<sup>197</sup>

What is reasonably arguable at this time is that China's current Model BIT potentially provides foreign investors with as much, if not more, protection than does the 2012 US Model BIT.<sup>198</sup> The 2012 US Model BIT restricts the scope of its earlier 2004 US Model BIT in linking a regulatory expropriation to the fair and equitable treatment of foreign investors, to a minimum standard of justice, and to equal treatment of domestic and foreign investors.<sup>199</sup> The 2012 US Model BIT also includes subjective national security provisions and more expansive measures taken by governments to protect public health and related public interests.<sup>200</sup> These developments are also embodied in recent US BITs such as Chapter 11 of the US-Peru Free Trade Agreement.<sup>201</sup> They demonstrate a desire by the US to retain greater regulatory control over inbound investment,

197 On the absence of binding precedents, at least in principle, in international investment law, see Christoph Schreuer and Matthew Weiniger, "A Doctrine of Precedent?" in Muchlinski, Ortino & Schreuer, *supra* note 100, 1188. See generally Foreign Investment Review Board, Current International Investment Issues: OECD Investment Committee, [http://www.firb.gov.au/content/international\\_investment/current\\_issues.asp?NavID=60](http://www.firb.gov.au/content/international_investment/current_issues.asp?NavID=60). (Accessed Nov. 2, 2014)

198 United States Model Bilateral Investment Treaty (2012), <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>. (Accessed Nov. 1st, 2014) See also Kenneth J. Vandavelde, "Model Bilateral Investment Treaties: The Way Forward", Sw. J Int'l L. 18 (2011): 307. Cf. American Model Bilateral Investment Treaty (2004) <http://www.state.gov/documents/organization/117601.pdf>. (Accessed Nov. 1st, 2014) On Canada's Model Investment Treaty, see Andrew Newcombe, Canada's New Model Foreign Investment Protection Agreement, Investment Treaty Arbitration (Aug. 2004), <http://ita.law.uvic.ca/documents/CanadianFIPA.pdf>. (Accessed Nov. 1st, 2014)

199 On the application of minimal standards of treatment to a variety of specific defenses earlier US Model BITs, see Patrick Dumberry, "The Quest to Define 'Fair and Equitable Treatment' for Investors Under International Law: The Case of the NAFTA Chapter 11 Pope & Talbot Awards", J. World Inv. 3(2002): 657, 663; see also Directorate for Financial and Enterprise Affairs, Fair and Equitable Treatment Standard in International Investment Law 11–12 (Organization for Economic Co-operation and Development, Working Paper No. 2004/3, 2004), <http://www.oecd.org/dataoecd/22/53/33776498.pdf> (Accessed Nov. 2, 2014).

200 *Id.*

201 See Peru Trade Promotion Agreement, US-Peru, 12 April 12 2006 (entered into force 1 Feb 2009) art. 10.21; Free Trade Agreement, US-Colombia, 22 November 2006 (anticipated entry into force, 2012) art. 10.21; Free Trade Agreement, Korea-US, 30 June 2007 (Approved by Congress, 12 October 2011) art. 11.21 [hereinafter KORUS FTA].

somewhat in response to intrusive investor claims brought against developed countries.<sup>202</sup>

In contrast, China's current model BIT, arguably, has less invasive national security, public order and financial exigency exemptions. It also does not link the protection accorded to foreign investors so explicitly to these regulatory defenses.<sup>203</sup> Nevertheless, China's Model BIT does adhere to a restrictive definition of an "investment," directed at limiting the scope and application of asset classes.<sup>204</sup> Some investor protections in China's current Model BIT have also not found their way into all of China's BITs, notably the "national standard" of treatment.<sup>205</sup> Some of China's negotiated BITs also include more elaborate national interest protections than China's Model BIT, such as more elaborate protection of the environment directed at sustainable development, public health and human rights.<sup>206</sup> In addition, some of China's BITs provide for the interpretation of investment treaties through interpretative committees set up by the Parties which bind ISA tribunals, which is also more likely to narrow than widen the scope of investor protection.<sup>207</sup> These developments are understandable as China tailors variations in its BITs to its

202 See generally Mark Kantor, "The New Draft Model U.S. BIT: Noteworthy Developments", *J. Int'l Arb.* 21 (2004): 383.

203 See e.g. Kurtz, *supra* note 110.

204 The Department of Foreign Trade of the Ministry of Commerce ('MOFCOM') identifies two categories of investment. The one is FDI, which includes equity joint ventures, contractual joint ventures, wholly foreign-owned enterprises, holding companies with foreign investment, joint exploration and others). The other is 'other foreign investments' which includes shares, international lease, compensation trade and processing and assembling. See further, Investment in China, Statistics about Utilisation of Foreign Investment in China from Jan to Oct 2010 (Nov. 16, 2010), [www.fdi.gov.cn/pub/FDI/wztj/wstztj/lywztj/t20101116\\_128338.htm](http://www.fdi.gov.cn/pub/FDI/wztj/wstztj/lywztj/t20101116_128338.htm). (Accessed Nov. 1st, 2014)

205 Shan, *supra* note 148, chapter 9, p 20 (word version).

206 See generally Luke Eric Peterson, "Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration". *Rights & Democracy* (International Center for Human Rights and Development, 2009), available at [http://www.dd-rd.ca/site/\\_PDF/publications/globalization/HIRA-volume3-ENG.pdf](http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf) (Accessed Nov. 3, 2014); Gus Van Harten, *Investment Treaty Arbitration and Public Law*, (Oxford University Press, 2007); Aaron Cosbey, Howard Mann, Luke Eric Peterson, Konrad Von Moltke. "Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements", (International Institute for Sustainable Development, 2004) available at [http://www.iisd.org/pdf/2004/investment\\_invest\\_and\\_sd.pdf](http://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf). (Accessed Nov. 3, 2014)

207 For an empirical study on trends, and biases, in the behavior of investment arbitrators, see Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical

relationships with different BIT partners, making or extracting concessions as the case justifies.<sup>208</sup>

Finally and not least of all, is the realization that BITs in general are controversial. BITs sometimes are criticized for granting preferential concessions to investors from particular partner states; for leading to greater market share by investors from wealthy states;<sup>209</sup> for undermining human rights;<sup>210</sup> for promoting uneven economic and political free trade and investment zones across the global community of states; and for treating foreign investors in similar cases not only differently but also unequally.<sup>211</sup> Variations among BITs are also critiqued for fragmenting investment jurisprudence; for rendering the legal effect

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Study of Investment Treaty Arbitration", OSGOOD HALL L.J. (2012) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2149207](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149207) (Accessed Nov. 3, 2014).

208 See J. Romesh Weeramantry, "Investor-State Dispute Settlement Provisions in China's Investment Treaties", *ICSID Review* 27(2012): 192.

209 Cf. id. But see Kevin P. Gallagher and Elen Shrestha, "Investment Treaty Arbitration and Developing Countries: A Re-Appraisal", *Global Development and Env't Inst.*, Working Paper No. 11-01, 2011, <http://www.ase.tufts.edu/gdae/Pubs/wp/11-01TreatyArbitrationReappraisal.pdf> (Accessed Nov. 1st, 2014). See also Bretton Woods Project, *ICSID—International Centre for Settlement of Investment Disputes*, <http://www.brettonwoodsproject.org/item.shtml?x=537853> (Accessed Nov. 3, 2014) ("Reasons for the vocal and mounting critiques against ICSID peg around its governance, its biasness in favour of rich countries and its role in crisis.")

210 See Moshe Hirsch, "The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective", in *Multi-Sourced Equivalent Norms in International Law*, edited by Tomer Broude and Yuval Shany (Oxford: Hart Publishing, 2011): 211–214; Sara L. Seck, "Conceptualizing the Home State Duty to Protect Human Rights", in *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives*, edited by Karin Buhmann et al., (Palgrave Macmillan, 2011): 34.

211 On the perceived dominance by developed states over international trade and investment and challenges faced by developing states generally, see James O. Gump, "The West and the Third World: Trade, Colonialism, Dependence, and Development (review)", *J. World History* 11 (2000): 396; *The Theory of Capitalist Imperialism*, edited by D.K. Fieldhouse, (Longmans Green and Co, 1967); *Free Trade and Other Fundamental Doctrines of the Manchester School*, edited by Francis Wrigley Hirst, (London, Harper and Brothers, 2009) [1902] (for a collection of speeches from the nineteenth century advocating the development of free trade); P.J. Cain, J A Hobson, "Cobdenism, and the Radical Theory of Economic Imperialism", 1898–1914, *Econ. Hist. Rev.* 31(1978): 565, 576–580; Michael Freeden, "J.A. Hobson as a New Liberal Theorist: Some Aspects of his Social Thought until 1914", *Journal of the History of Ideas* 34 (1973): 421.



of regulatory action uncertain; and for undermining the security of foreign investors.<sup>212</sup>

Whether China's Model BIT or its BITS in general stand up to such scrutiny is likely to continue to be contentious, but no more contentious than many other BITS to which it is not a party. The dual dilemma for China is in being seen as liberalizing its BITS generally in the interests of the free flow of FDI, but also in protecting its national interests from inbound foreign investors. In practice, China may follow a pragmatic pathway in which it liberalizes its negotiated BITS incrementally and not necessarily generally. In particular, it is likely to agree to more extensive protection for foreign investors in treaties in which its primary purpose is to benefit its outbound investors in discrete partner states. It is likely to limit such protection in treaties in which its primary purpose is to regulate FDI flows into China. A Chinese BIT with a developing African country in which China is focused on building a diplomatic alliance and acquiring raw materials, is also likely to include state exemptions and investor protections that are quite different to a BIT China concludes with Canada, Australia, or Singapore. What is clear is that China is a great student of history and has learnt from the BIT practices of the West including about their economic, political and legal consequences.

## 6.12 “Alternative” Dispute Resolution

A difficult issue is to determine the influence of the institution and process of dispute resolution upon the result of an investor-state claim. In particular, there is perceptible global support for using ISA to resolve investor-state disputes, notably under the rules of the ICSID and the UNCITRAL<sup>213</sup> and limited

212 See J.W. Salacuse, N.P. Sullivan, “Do BITS Really Work: An Evaluation of Bilateral Investment Treaties and their Grand Bargain”, *Harv. Int'l LJ* 46 (2005): 67.

213 The UNCITRAL Rules are a general set of rules that can be applied flexibly and ad hoc to resolve any type of international dispute and are adopted widely globally, including for resolving investor-state disputes. Some of the 2010 amendments to the UNCITRAL rules were inspired by the rising use of the Rules in ISA. See the UNCITRAL website at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html). (Accessed Nov. 3, 2014) On the flexibility of UNCITRAL proceedings, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html) (Accessed Nov. 1st, 2014). For the text of the UNCITRAL Model Law and in particular, Article 34, see [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf). (Accessed Nov. 3, 2014)

resort to international commercial arbitration.<sup>214</sup> The extent to which China follows this global development is difficult to determine conclusively. This is due, in part, to China's limited exposure to publicly known investor-state disputes, because of the sometimes blurred line between foreign and domestic investment under Chinese law, and because disputes with some foreign elements are heard confidentially by CIETAC, and the Beijing International Arbitration Centre, among other arbitration centers within China.<sup>215</sup>

What is clear, however, is that China's most recent BITs provide generally for choice between domestic courts and ISA under the ICSID Convention, or under the UNCITRAL Rules.<sup>216</sup> China has also not negotiated BITs that provide exclusively for recourse to domestic courts, as Australia provided in April 2011.<sup>217</sup> However, Chinese domestic law is likely to influence international investment law arising from investor-state disputes with some foreign elements heard by domestic courts in China and where foreign investors elect to submit

<sup>214</sup> On similarities and differences between international commercial arbitration and investment arbitration, see Luke Nottage and Kate Miles, *supra* note 38.

<sup>215</sup> See generally Jingzhou Tao, *Arbitration Law and Practice in China*, (Kluwer Law International, 2012); Raymond Hai Ming Leung, *China Arbitration Handbook*, (Sweet & Maxwell, Limited, 2011).

<sup>216</sup> On the case for investor-state arbitration, see generally Christopher Dugan, Don Wallace, Jr and Noah Rubins, *Investor-State Arbitration* (Oxford University Press, 2008); *Oxford Handbook of International Investment Law*, edited by Peter Muchlinski, Federico Ortino and Christoph Schreuer, (Oxford, Oxford University Press, 2008); Campbell McLachlan, Lawrence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford, Oxford University Press, 2008); *New Aspects of International Investment Law*, edited by Philippe Kahn and Thomas W Walde, (Brill, 2007); Gus Van Harten, *Investment Treaty Arbitration and Public Law*, (Oxford University Press, 2007); R. Doak Bishop, James Crawford and W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary*, (Kluwer Law International, 2005); *Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, edited by Todd Weiler, (Cameron May Ltd., 2005); *Arbitrating Foreign Investment Disputes*, edited by Norbert Horn, (Kluwer Law International, 2004).

<sup>217</sup> See Trading Our Way to More Jobs and Prosperity (Government Trade Policy Statement, released by Australia's Trade Minister, Craig Emerson, Apr. 2011), <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state> (Accessed Nov. 3, 2014) (hereinafter 'Policy'). See Leon E. Trakman, "Investor-State Arbitration: The Australian Case", in *Regionalism in International Investment Law* edited by Leon E. Trakman and Nick Ranieri,, (Oxford University Press, 2013); "Jurgen Kurtz, Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication", ICSID Review 1 (2012); Leon E. Trakman, "Investor State Arbitration or Local Courts: Will Australia Set a New Trend?" *Journal of World Trade* 46 (2012): 83.

investor-state disputes to domestic Chinese courts under an applicable BIT.<sup>218</sup> Again, the prospect of Chinese courts and domestic law influencing the interpretation of investment treaty law is not peculiar to China. The domestication of international investment law pervades investment jurisprudence generally.<sup>219</sup>

Concerns are also likely to arise about the conduct of ISA proceedings in which China is the respondent, such as over China's reluctance to permit third party intervention in proceedings; its possible refusal to consent to hold public hearings; and its insistence on confidential documentation and unpublished awards.<sup>220</sup> However, the transparency concerns arising from such action is not an indictment peculiar to China. Other states have adopted comparable measures in the past.<sup>221</sup> ISA is initiated with the consent of both direct parties to ISA disputes. Third parties, such as public interest groups, until comparatively recently were not permitted to participate in ISA proceedings, such as under the ICSID.<sup>222</sup> Nor could ISA awards ordinarily be published without the

<sup>218</sup> Shan, *supra* note 148, at 221, 245, 251.

<sup>219</sup> See K. Vandevelde, "A Brief History of International Investment Agreements", U.C. Davis J Int'l L. & Pol'y 12(2005): 157, 172. See also United Nations Conference on Trade and Development, World Investment Report 2010, UNCTAD/WIR/2010, 22 July 2010, xxv, <http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx> (Accessed Nov. 1st, 2014).

<sup>220</sup> See further *supra*, Section XI. See too Michal J. Moser, "CIETAC Arbitration: A Success Story?" J. Int'l Arb. 1 (1998): 30.

<sup>221</sup> See generally Jason W. Yackee and Jarrod Wong, "The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns", in *Yearbook on International Investment Law & Policy 2009–2010*, edited by Karl P. Sauvant (Oxford University Press, 2010) (discussing transparency in international investment arbitration); Cornel Marian, "Balancing Transparency: The Value of Administrative Law and Mathews-Balancing to Investment Treaty Arbitrations", Pepp. Disp. Resol. L.J. 10 (2010): 275 (discussing transparency in international investment arbitration).

<sup>222</sup> Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. the Republic of Argentina (Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission), ICSID Arbitral Tribunal, Case No ARB/03/19, 12 February 2007; (Order in Response to a Petition for Transparency and Participation as Amicus Curiae) ICSID Arbitral Tribunal, Case No ARB/03/19, 19 May 2005. The petition challenged the decision by the Government of Argentina to accede to the ICSID treaty on grounds that it violates the constitutional guarantees of citizens of Argentina to participate in proceedings. While the government of Argentina was willing to hear the petition, the complainant company was not. However, the Attorney General of Argentina published on the internet the information in his possession on the related cases. See too Carlos E. Alfaro and Pedro M. Lorenti, "The Growing

consent of both ISA parties.<sup>223</sup> Typically, the Secretary General of the ICSID could publish reports of conciliation commissions or awards rendered by arbitral tribunals in ICSID proceedings, but only “with the consent of both disputing parties.”<sup>224</sup> There were also explanations, and not always convincing ones, for limiting the transparency of ISA proceedings and awards. For example, in *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Republic of Argentina*, the arbitration tribunal acknowledged that the case “potentially involved matters of public interest and human rights” and that the public access “would have the additional desirable consequence of increasing the transparency of ISA.”<sup>225</sup> It nevertheless declined to permit public participation under the petition.

Much has changed in ISA practice over the last decade, commencing with greater transparency and open hearings under Chapter 11 of the NAFTA and including efforts to redress the economic, social and political costs of

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Opposition of Argentina to ICSID Arbitral Tribunals: A Conflict between International and Domestic Law?” J. World Investment & Trade 6 (2005): 417.

223 See e.g., *GEA Group Aktiengesellschaft v. Ukraine* (Award) (ICSID Arbitral Tribunal, Case No ARB/08/16, 31 March 2011); *Talsud, S.A. v. United Mexican States* (Award) (ICSID Arbitral Tribunal, Case No ARB(AF)/04/4, 16 June 2010); *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States* (Award) (ICSID Arbitral Tribunal, Case No ARB(AF)/04/3, 16 June 2010).

224 See e.g., *GEA Group Aktiengesellschaft v. Ukraine* (Award) (ICSID Arbitral Tribunal, Case No. ARB(AF)/04/4, 16 June 2010); *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States* (Award) (ICSID Arbitral Tribunal, Case No. ARB(AF)/04/3, 16 June 2010). *Aguas del Tunari, S.A. v. Republic of Bolivia* (Order Taking Note of Discontinuance) (ICSID Case No ARB/02/3, 28 March 2006), [http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng\\_000.pdf](http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf) (Accessed Nov. 1st, 2014). These requirements, replicated on the ICSID website, are available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases\\_Home](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home) (Accessed Nov. 3, 2014). See too ICSID Procedural Order of 2 February 2011 inviting third parties to apply to submit amici curiae briefs under ICSID Arbitration Rule 37(2). See further Kenneth J. Vandavelde, *Aguas del Tunari, “S.A. v. Republic of Bolivia”*, Am. J. Int’l L. 101 (2007): 179 (providing an overview and analysis of the case); A. de Gramont, *After The Water War: The Battle for Jurisdiction in Aguas Del Tunari, S.A. v. Republic of Bolivia*, Transnational Dispute Management, (December 2006), [http://www.crowell.com/documents/After-the-Water-War\\_The-Battle-for-Jurisdiction-in-Aguas-del-Tunari\\_v\\_Bolivia.pdf](http://www.crowell.com/documents/After-the-Water-War_The-Battle-for-Jurisdiction-in-Aguas-del-Tunari_v_Bolivia.pdf). (Accessed Nov. 1st, 2014)

225 Order in Response to a Petition for Transparency and Participation as Amicus Curiae (ICSID Case No ARB/03/19, 19 May 2005), at [19], [22].

protectionism.<sup>226</sup> In 2006, the ICSID revised its rules, adding a new Rule 37 which provides for the admission of third parties to proceedings and the submission of amicus curiae briefs.<sup>227</sup> Some of these changes are qualified. For example, provision is made for the publication of ICSID awards;<sup>228</sup> albeit subject to the consent of the direct parties to the ISA dispute.<sup>229</sup> However, the ICSID Arbitration Rules do state that “the Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.”<sup>230</sup> A review committee with limited authority, which includes no right to

226 On public statements by the NAFTA parties on open hearings, see Foreign Affairs and International Trade Canada, NAFTA—Chapter 11—Investment Settlement of Disputes between a Party and an Investor of Another Party: Transparency (Sept. 9, 2009), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-transparency-alena-transparence.aspx?lang=en&view=d>. (Accessed Nov. 3, 2014) This practice is further reflected in the interpretation of Chapter 11 by the Free Trade Commission, confirming the decision in *Metalclad Corp. v. Mexico* that “[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration”, *id.*

227 See Katia Fach Gómez, “Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest”, *Fordham Int’l L.J.* 35 (2012): 510.

228 ICSID tribunals began to admit third party interventions in 2007, after the ICSID’s new rule 37 came into force. See eg. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (2 February 2007); *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 (12 February 2007). See International Center for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules 95–96 (2006), [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) (accessed Nov. 3, 2014); Edward Baldwin, Mark Kantor and Michael Nolan, “Limits to Enforcement of ICSID Awards”, *J. Int’l Arb.* 23 (2006): 1 (discussing ‘tactics’ that may be employed in attempts to ‘delay’ or ‘avoid’ compliance with ICSID Awards).

229 See e.g., Aurélia Antonietti, “The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules”, *ICSID Rev.—Foreign Investment L.J.* 21 (2006): 427.

230 See ICSID Rules of Procedure for Arbitration Proceedings, ICSID/15 (Apr. 2006), Art. 48(4). cf. ICSID Additional Facility Arbitration Rules, Art. 53(3), <http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp> (Accessed Nov. 3, 2014) (almost identical text). See also Susan D. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions”, *Fordham L. Rev.* 73(2004–05): 1521, 1616; Julie A. Maupin, “MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?”, *J. Int’l Econ. L.* 14(2011): 157, 162.

overturn an ICSID award on its merits, continues to be able to review ICSID decisions, but falls short of an appeal.<sup>231</sup>

Whether China and/or “its” state enterprises abroad will deny consent or otherwise resist public interest petitions, amicus briefs or other forms of participation by third parties in ISA proceedings, is uncertain. Much will depend on the nature of the dispute, the interests of the parties, and the anticipated consequences of intervening events.

An equally difficult issue is how ISA tribunals will decide disputes in which inbound foreign investors claim that China has advantaged state owned enterprises over them.<sup>232</sup> However, if the liberalization of international investment law is to be truly evenhanded, it also needs to focus on the functional advantages of large-scale Western investors, not limited to multinational corporations, over developing countries, not only the functional advantages countries like China may give to their state owned enterprises.

A further concern is that China will use diplomatic measures to intimidate foreign states to submit to claims by outbound Chinese state enterprises. This has currently arisen in China’s reaction to Australia’s exclusion of Huawei, a Chinese telecommunication company, from Australia’s broadband program on the alleged grounds that Huawei engaged in cybercrimes against foreign

<sup>231</sup> See, e.g., K.V.S.K. Nathan, *The Law of the International Centre for Settlement of Investment Disputes*, (Kluwer Law International, 2000). For discussion on the merits of an appellate body to resolve investment disputes under Chapter 11 of the NAFTA, see Charles Brower and Lee Steven, “NAFTA Chapter 11: Who then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11”, *Chicago J. Int’l L.* 2(2001): 193, 193–195; Jack J. Coe, Jr., “Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel within NAFTA and the Proposed FTAA”, *J. Int’l Arb.* 19 (2002): 185; David A Gantz, “An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges”, *Vanderbilt J. Transnat’l L.* 39 (2006): 39. But see William S Dodge, “Case Report: Waste Management, Inc. v. Mexico”, *Am. J. Int’l L.* 95 (2001): 186 (presenting the case for modeling Chapter 11 on the WTO appellate process). See too Gary R. Saxonhouse, “Dispute Settlement at the WTO and the Dole Commission: USTR Resources and Success”, in *Issues and Options for U.S.-Japan Trade Policies*, edited by Robert M. Stern, (University of Michigan Press, 2002): 363.

<sup>232</sup> See Vivienne Bath, “The Quandary for Chinese Regulators: Controlling the Flow of Investment into and out of China”, in *Foreign Investment and Dispute Resolution Law and Practice in Asia*, edited by Vivienne Bath and Luke Nottage, (Routledge, 2011); Yang Shu-Dong, “Investment Arbitration and China: Investor or Host State?”, *OPINIO JURIS IN COMPARATIONE* (2011–2) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1973744](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973744). (Accessed Nov. 1st, 2014)



companies and cyber-espionage on behalf of the Chinese government.<sup>233</sup> This was followed by the US and EU blacklisting Huawei as a security risk, and the UK investigating whether to maintain its relationship with Huawei.<sup>234</sup> China's reaction to the Australian Government's decision was that Huawei was a highly regarded international telecommunications company; it had passed an intense security clearance in the UK; members of its Board included past members of the Australian Government; and China was considering retaliating against Australia for its treatment of Huawei.<sup>235</sup>

A key issue is to determine when and to what degree China is likely to intervene, diplomatically or otherwise, on behalf of private outbound investors. In the Huawei case, the alleged economic loss of the Australian broadband contract alone exceeded one billion US dollars. The political risk included damage to China's reputation on alleged grounds that it collaborated with Huawei in cyber-espionage. In choosing whether to intervene diplomatically, China undoubtedly will engage in a cost-benefit analysis, in weighting the benefit of defending a prominent outbound investor, together with China's reputation in the multilateral community, against the cost of antagonizing the Australian and other Governments that followed suit and also blacklisted Huawei.<sup>236</sup>

A further concern is that a well-resourced country like China will use conflict prevention and avoidance measures to force inbound investors into submission, including following an ISA claim against it. The ancillary concern is that such negotiations will take place privately and will lead to take-it-or-leave-it results dictated by China. This may have occurred in the only ISA case against China, *Ekrans Berhad v. People's Republic of China*.<sup>237</sup> However, investor-state negotiations ordinarily do not take place on a level playing field. Nor is it unusual for a BIT to require investor-state parties to first attempt to resolve their differences through negotiation, or failing that, conciliation, before

233 See [http://www.afr.com/p/technology/china\\_giant\\_banned\\_from\\_nbn\\_9U9zioc3FXBF3BZdRD9mJ](http://www.afr.com/p/technology/china_giant_banned_from_nbn_9U9zioc3FXBF3BZdRD9mJ) (Accessed Nov. 1st, 2014); <http://www.theaustralian.com.au/national-affairs/opinion/good-reason-for-ban-on-huawei/story-e6frgdox-1226503441514>. (Accessed Nov. 1st, 2014)

234 See <http://au.news.yahoo.com/thewest/a/-/world/15623498/eu-report-urges-action-against-chinese-telecom-firms/> (Accessed Nov. 3, 2014); <http://www.guardian.co.uk/technology/2012/oct/10/huawei-international-blacklisting> (Accessed Nov. 1st, 2014).

235 See [http://www.afr.com/p/national/chinese\\_govt\\_plays\\_no\\_role\\_in\\_huawei\\_SJEkkWcm6e4VS8Iqf4kbVO](http://www.afr.com/p/national/chinese_govt_plays_no_role_in_huawei_SJEkkWcm6e4VS8Iqf4kbVO) (Accessed Nov. 1st, 2014).

236 See, above note 239.

237 ICSID Case No. ARB/11/15. Proceedings were suspended pursuant to the Parties' agreement on 22 July 2011. See <http://icsid.worldbank.org> (Accessed Nov. 3, 2014).



resorting to arbitration.<sup>238</sup> The purpose in requiring negotiation and conciliation measures is to encourage conflict avoidance albeit complicated by structural bargaining disparities between investor-state parties.<sup>239</sup> The fact that a state party may enjoy a positional bargaining advantage over an inbound investor in such negotiations or conciliation inheres in international investment practice, not unlike the positional advantage enjoyed by multinational corporations over many developing states.<sup>240</sup>

Finally, more controversial is provision for “conciliation during arbitration”.<sup>241</sup> The conception of arbitrators acting as conciliators is controversial, not least of all because it can lead a party to make disclosures during conciliation proceedings that would ordinarily not be disclosed during arbitration proceedings.<sup>242</sup>

<sup>238</sup> See H. Tang, “Combination of Arbitration with Conciliation: Arb/Med”, in *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12, edited by Albert Jan van den Berg, (Kluwer Law International, 2005): 547.

<sup>239</sup> UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD Series on International Investment Policies for Development (May 2010), xxiii, [http://www.unctad.org/en/docs/diaeia200911\\_en.pdf](http://www.unctad.org/en/docs/diaeia200911_en.pdf) (Accessed Nov. 3, 2014); See UNCTAD, *Developments: Investor-State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD Series on International Investment Policies (UN Sales No E.10.II.D.11, 2010), xvii–xix; [http://unctad.org/en/docs/diaeia200911\\_en.pdf](http://unctad.org/en/docs/diaeia200911_en.pdf) (Accessed Nov. 3, 2014). See also UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration II*, Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, Lexington, Virginia (Susan D. Franck and Anna Joubin-Bret, eds., 29 March 2010), [http://www.unctad.org/en/docs/webdiaeia20108\\_en.pdf](http://www.unctad.org/en/docs/webdiaeia20108_en.pdf). (Accessed Nov. 3, 2014) On the UNCTAD’s most recent report on investor state dispute settlement, see UNCTAD, *Latest Developments in Investor-State Dispute Settlement* (IIA Issues Note No 1, April 2012), [http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf) (Accessed Nov. 1st, 2014).

<sup>240</sup> See e.g. art. 12(3) of the Singapore–China BIT, providing: “If a dispute involving the amount of compensation resulting from expropriation, nationalization or other measures having effect equivalent to nationalization or expropriation cannot be settled within six months after resort to negotiation, it may be submitted to an international arbitral tribunal established by both parties.” The Singapore–China BIT came into force on February 7, 1986.

<sup>241</sup> M. Schneider, “Combining Arbitration with Conciliation. in *International Dispute Resolution: Towards an International Arbitration Culture*”, ICCA Congress Series No. 8, edited by Albert Jan van den Berg, (Kluwer Law International, 1996): 57.

<sup>242</sup> See Qiao Xing, “The Different Right in Arbitration and Mediation”, in *The Research on Arbitration Right*, (September 2000): 27; S.F. Ali, “The Morality of Conciliation: An Empirical Examination of Arbitrator “Role Moralities” in East Asia and the West”, *Harv. Negot. L. Rev.* 16(1) (2011): 1.

Again, this controversy is not peculiar to China, but arises in both institutional and *ad hoc* arbitration in general.<sup>243</sup>

### 6.13 Conclusion

The sometimes loud trumpet call from the West that China should further liberalize its investment regime is ahistorical at worst and disingenuous at best. Even the process of investment liberalization in the West, presented as an example of good state practice, has evolved incrementally, unevenly and often, incompletely. Western countries were—and often are—protectionist in trade and investment and reluctant to surrender their sovereignty through treaties with other states.<sup>244</sup> Not only is there a history of reticence in granting foreign states most-favored-nation-treatment. There is also a history of a reluctance to grant foreign investors national treatment.<sup>245</sup>

China's liberalization of its BITs is not entirely different from historical developments in the West. Given China's late participation in BITs, its ideological differences from the West, and its developing economy, it is unrealistic to expect it to embrace the liberalization of investment that most Western

243 See Ali, *supra* note 242. But see Gabrielle Kaufmann-Kohler and Fan Kun, "Integrating Mediation into Arbitration: Why It Works in China", J. Int'l Arb. 25(4) (2008) 479–492; T. Nakamura, "Brief Empirical Study on Arb-Med in the JCAA Arbitration", JCAA News Letter 22 (2009): 10–12.

244 On the complexity of sovereignty in international investment law, see for example, Wenhua Shan, Penelope Simons and Dalvinder Singh, *Redefining Sovereignty in International Economic Law*, (Hart Publishing Limited, 2008) (see especially Part Four for commentary on the complexity of sovereignty in international investment law); Robert Stumberg, "Sovereignty by Subtraction: The Multilateral Agreement on Investment", Cornell Int'l L.J. 31 (1998): 491, 503–04, 523–25. See too Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, (Cambridge University Press, 1990); John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press, 2000); Michael Reisman, "International Arbitration and Sovereignty", Arb. Int'l (LCIA) 18 (2002): 231; Jennings and Watts, *supra* note 74, at 927 (1992).

245 See e.g., Kurtz, *supra* note 215. Kurtz relies on the commentary of Joseph Stiglitz to assert that "all countries engage in some discrimination" against foreign investors', and concedes that 'protectionism is a political temptation that is not confined to any political or legal tradition' (at 11).

countries themselves initially did not do either, and from which some have retreated, notwithstanding their liberal traditions.<sup>246</sup>

China's liberalization of its BITs is also significantly influenced by a shift in its status from a capital importer to a capital exporter.<sup>247</sup> As a capital importer, China had significant historical reasons to regulate inbound capital including through BITs, domestic laws, administrative regulation, its court system and commercial arbitration. As a growing capital exporter today, China has the countervailing need to extend BIT protections for the benefit of its outbound investors in BIT partner states.

China's growing interest in concluding FTAs and BITs that enable its investors to profit abroad is also consistent with the aspirations of other capital exporters.<sup>248</sup> Nor should one expect otherwise, from China or any other capital exporter. Investment protectionism is the other side of the investment liberalization coin. It is a coin that liberal states of the West repeatedly flip when it comes to the rights of foreign investors. It is not a coin whose use should be treated as abhorrent because China is increasingly flipping that coin.<sup>249</sup>

At the same time, it would be misleading to suggest that China has not continued to adopt a protectionist stance towards vulnerable sectors of its economy, notably its struggling rural sectors.<sup>250</sup> In addition, the Supreme Peoples' Court of China has affirmed the virtue of such protectionism in principle in the national interest and beyond the demands of China's rural sector.<sup>251</sup> However,

246 See Sharun W. Mukand, "Globalization and the 'Confidence Game'", J. Int'l Econ. 70 (2006): 406.

247 See, e.g., Ted Planfker, *Doing Business In China: How to Profit in the World's Fastest Growing Market*, (Grand Central Publishing, 2008); Li Yong and Jonathan Reuvid, *Doing Business With China*, (GMB Publishing Ltd., 2006).

248 On the history of this division between capital exporter and importer states, see generally M. Sornarajah, *The International Law on Foreign Investment*, (Cambridge University Press, third edition, 2010): 142, 177.

249 On the history of this division between capital exporter and importer states, see generally Sornarajah, id, at 142, 177.

250 See Karl P. Sauvant et al., *FDI Perspectives: Issues in International Investment*, Part 2 (Vale Columbia Center on Sustainable International Investment, 2011); Olivier De Schutter and Peter Rosenblum, "Large-Scale Investments in Farmland: The Regulatory Challenge", in *Yearbook on International Investment Law & Policy 2010–2011*, (Oxford University Press, 2011).

251 See, e.g., Lutz-Christian Wolff, "Pathological Foreign Investment Projects in China: Patchwork or Trendsetting by The Supreme People's Court?", *International Law* 44(2010): 1001, 1003, 1110–1111. (noting China's protectionism); see also Wei Shen, "Case Note, Beyond the Scope of 'Investor' and 'Investment': Who can Make an Arbitration Claim under a

it would be an overstatement to suggest that China and its courts are unique in erecting national interest and security barriers to intrusion from foreign investors.<sup>252</sup> China is also reasonably expected to invoke the defense of necessity in ISA proceedings under a Chinese BIT or customary international law; and ISA tribunals are likely to evaluate that defense in light of existing investment jurisprudence on the subject.<sup>253</sup>

Ascribing the lack of decided ISA cases between inbound investors and China to its failure to liberalize FDI is equally tenuous. The rarity of investors bringing ISA claims against China is also not exceptional. The United States and many European countries that historically were capital exporters seldom were targets of ISA claims. Germany has had only one ISA claim brought against it, despite having concluded the largest number of BITs to late-2012.<sup>254</sup> This is not to deny that foreign investors that lodge ISA claims against China may face

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Chinese BIT?—Some Implications from a Recent ICSID Case”, *Asian Int’l Arb. J.* 6(2010): 164, 183–185. (discussing limits placed on complainants under bilateral investment agreements with China).

252 On governmental bureaucracies faced by foreign investors in Asia, in particular in China and Australia, see Vivienne Bath, “Foreign Investment, the National Interest and National Security: Foreign Direct Investment in Australia and China”, *Sydney Law Review*, 34(2012): 5.

253 On the successful use of the defense of necessity, see e.g. *Continental Casualty Company v. Argentine Republic* ICSID Case No. ARB/03/9, ¶ 28 (Sep. 5, 2008). But see *Pope & Talbot Inc. v. Can.*, Award, part III. (Apr. 10, 2001) (UNCITRAL Award). See also *Pope & Talbot Inc. v. Gov’t of Canada*, Foreign Affairs & Int’l Trade Canada, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/pope.aspx?lang=en> (Accessed Nov. 3, 2014). See too Eric David Kasenetz, “Desperate Times Call for Desperate Measures: The Aftermath of Argentina’s State of Necessity and the Current Fight in the ICSID”, *Geo. Int’l L. Rev.* 41(2010): 709, 721–723; Matthew Parish, “On Necessity”, *J. World Inv. & Trade* 11 (2010): 169, 173; Antoine Martin, “International Investment Disputes, Nationality and Corporate Veil: Some Insights from Tokios Tokelés and TSA Spectrum De Argentina”, *Transnat’l Disp. Mgmt* 8 (2011): 1; José E. Alvarez and Tegan Brink, Revisiting the Necessity Defense: *Continental Casualty v. Argentina* 6–11 (Int’l Law & Justice Working Paper No. 2010/3, 2010), <http://www.iilj.org/publications/documents/2010-3.Alvarez-Brink.pdf> (Accessed Nov. 3, 2014); Tarcisio Gazzini, “Necessity in International Investment Law: Some Critical Remarks on *CMS v. Argentina*”, 26 *J. Energy & Nat. Resources L.* 26 (2008): 450, 452–453; José Rosell, “The CMS Case: A Lesson for the Future?”, *J. Int’l Arb.* 25 (2008): 493.

254 On the Vattenfall case against Germany, see Nathalie Bernasconi-Osterwalder & Rhea Tamara Hoffmann, *The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute Vattenfall v. Germany* (II) (IIISD Briefing Note, June 2012), available at [http://www.iisd.org/pdf/2012/german\\_nuclear\\_phase\\_out.pdf](http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf) (Accessed Nov. 1st, 2014). On the bilateral investment treaties still in force

formidable resistance from a centrally directed economy, and not least of all from China's well-financed and consolidated defense of its national interest. What is contended is that the legitimacy crisis imputed to ISA,<sup>255</sup> in pitting the public interests of states against the private interests of foreign investors, is not peculiar to China.<sup>256</sup> Nor does the absence of mass ISA claims by foreign investors against China infer investor temerity. It may well infer that foreign investors are receiving fair and equitable treatment and also, prospering there.

In contrast, the tide of investor-state claims brought by Chinese investors against China's BIT partners is changing significantly. Historically, outbound Chinese investors brought only a small number of claims and only against developing states. However, the recent claim by China's second largest insurance company, Ping An, against Belgium for USD 2.2 billion represents a significant increase in the quantum of a claim from an outbound Chinese investor and in targeting a developed state. It is reasonable to expect a growing number of large scale Chinese investors, including state owned enterprises, to bring other substantial claims against China's BIT partners in the future.

The fact that China has expanded the grounds for investor claims in its more recent BITs beyond compensation is a sign of investment liberalization that benefits Chinese investors in foreign host states. Whether China will further liberalize investor protections, inter alia, to protect its capital exporters in its fourth Model BIT, remains uncertain. However it frames its Model BIT, China is likely to rely on its capacity to dissuade inbound investors from lodging investor claims against it, either by accommodating foreign investor interests, or by demonstrating its formidable capacity and tenacity in defending against such claims. Whether China will be able to rely on ISA tribunals to adopt an

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on a country-by-country basis, see UNCTAD, *Bilateral Investment Treaties*, [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch___779.aspx) (Accessed Nov. 1st, 2014).

255 On this legitimacy crisis, see Franck, *supra* note 230, at 1543–44.

256 On the tension between private and public interests in investor-state arbitration in regard to the publication of awards, see Joshua D.H. Karton, "A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards", *Arb. Int'l* 28(2012). On the public interest rationale for amicus curiae interventions, see Eric De Brabandere, "NGOs and the 'Public Interest': The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes", *Chi. J. Int'l L.* 12 (2011): 85; Alex Mills, *The Public-Private Dualities of International Investment Law and Arbitration*, in *Evolution In Investment Treaty Law And Arbitration* edited by Chester Brown and Kate Miles, (Cambridge, Cambridge University Press, 2011): 97–116; Catherine A. Rogers, *International Arbitration's Public Realm*, in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Martius Nihoff Publishers, 2010).

expansive interpretation of a necessity defense under an applicable Chinese BIT or customary international law, remains uncertain. However, China and its outbound investors will share that uncertainty with the rest of the global community. It is unlikely that such an ISA solution will be “made” in China, or for that matter, in any other country.<sup>257</sup>

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<sup>257</sup> On the defense of necessity in investment arbitration including under customary investment law, see Alberto Alvarez-Jiménez, “Foreign Investment Protection and Regulatory Failures as States’ Contribution to the State of Necessity under Customary International Law”, *J. Int’l Arb.* 27 (2010): 141; Andrea K. Bjorklund, “Emergency Exceptions: State of Necessity and Force Majeure, in Muchlinski”, Ortino & Schreuer, *supra* note 100, at 459; Nicholas Song, “Between Scylla and Charydis: Can a Plea of Necessity Offer Safe Passage to States in responding to an Economic Crisis without Incurring Liability to Foreign Investors?”, *Am Rev. Int’l Arb.* 19 (2008): 235; Panel Discussion: “Is There a Need for the Necessity Defense for Investment Law?” in *Investment Treaty Arbitration and International Law*, edited by T.J. Grierson Weiler, (Juris Publishing, 2008): 189.