RESOLVING THE TENSION BETWEEN STATE SOVEREIGNTY AND LIBERALIZING INVESTOR-DISPUTES: CHINA'S DILEMMA

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Abstract

China has grown into the largest global destination for foreign investment and the second largest outbound investment state. These developments underscore China's centrality to the expansion and stability of the international economic order, not limited to the economic impact of its inbound and outbound investors.

An ensuing question is the extent to which China protects its national interests in resolving investor-state claims through the process known as investor-state dispute settlement (ISDS). This paper explores, firstly, China's past experiences with ISDS, secondly, its methods of addressing these issues, and thirdly, the regulatory directions it might adopt in the future. In doing so, the paper comments on China's historical and current ISDS experience and practice. It evaluates prospective regulatory measures by which it can avoid and resolve ISDS claims.

Keywords

China investment · Foreign direct investment · Investment treaties · Investor-state disputes · Investor-state arbitration · State courts · Mediation · Waiting period · Investment reform · China's choices · Investment liberalization · Planned economy

Introduction

This paper examines China's limited exposure to investor-state arbitration (ISA) under its bilateral investment treaties (BITs), notable in the few investor claims brought against it. It will examine this lack of claims brought against China in the context of China's seeming insulation from foreign investor claims as not exceptional, given its capacity as an economically and politically powerful state to defend itself against foreign investor claims. The paper then gauges China's more challenging investor-state dispute settlement (ISDS) future. It considers how China has, and is likely to, develop its ISDS regime, inter alia, through strategic investment alliances with other states and contracts with inbound foreign investors. It considers China's need to protect domestic markets from the economic and social challenges of inbound foreign investors. It also evaluates how China can redress governmental incursions imposed by foreign states on its outbound investors, extending beyond its state-owned enterprises (SOEs) to its outbound investors more generally.

The reality for China is to recognize that, despite being economically dominant, it is unlikely to retain its largely unblemished record in avoiding or defending ISDS claims. The stark reality is that international corporations with deep pockets are increasingly able to aggressively pursue ISDS claims against developed states, like Germany and Canada, and achieve success in those claims. Such investor successes extend well beyond their historical victories over poor developing states.

China has responded to the challenges posed by the socioeconomic hazards of large-scale investment claims by inbound investors against it, as well as its outbound investors losing claims against foreign states, by honing institutional and functional methods of avoiding and resolving investor-state disputes through mediation and investor-state arbitration (ISA). For example, China has redesigned its BIT model to

parallel and arguably improve on investment models adopted by other states. China has achieved these ends without sacrificing its domestic public policy defenses, not least of all by shielding local industries from debilitating foreign competition. It has also ensured the protection of its outbound investors through BITs that include investor protections, while also benefitting the inbound investors of partner BIT countries. In addition, China has enhanced its reliance on the management of ISA disputes by international institutions, such as the International Center for the Settlement of Investment Disputes (ICSID).

Evaluating international norms and practices relating to international investment, the paper examines China's aim of improving its legal structures to resolve investor-state disputes. It considers China's strategic investment alliances with other states, notably though BITs. It considers China's national interests in regulating inbound investment and, less evidently, in protecting outbound investors from adverse judicial rulings. The paper also considers China's level of compliance both with international investment and trade norms.

Part I examines China's historical experience with ISDS and ISA. Part II evaluates the significance of China's limited exposure to ISDS, including its evolving model BITs, claims brought against it by inbound foreign investors, and claims brought by its outbound investors against foreign host states. Part III examines China's planning for ISDS, through its evolving model BITs and competing methods of interpreting those BITs. It considers claims to date brought by Chinese outbound investors against China's BIT partners. It also examines perceived obstacles arising in the application of BITs, including issues which are likely to emerge when Chinese SOEs are treated as foreign investors for the purpose of lodging claims against China's BIT partner states. Part IV analyzes and comments on ISDS claims brought by foreign investors against China under an applicable BIT. Part V evaluates challenge to China in developing and applying its BIT regime to resolve ISDS disputes going forward. Part VI reflects on the alternative methods of resolving disputes to which China may resort, the perceived strengths and limitations of these competing measures and China's likely responses to them. Part VII concludes on the issues addressed earlier in the paper.

China's Investment History

What is remarkable is that China, a comparable newcomer to both BITs and ISDS,[1] now ranks second only to Germany in the number of BITs it has concluded. It entered into its first BIT in 1982 with Sweden; its second BIT in 1989; and it only

[1] *See*, e.g., Rooney KM (2007) ICSID and BIT arbitrations and China. J Int Arbitration 24:704 (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* Parra AR (2017) The history of ICSID, 2nd edn; Kinnear M (2014) ICSID and international investment treaty arbitration: progress and prospects. In: Shan W, Su J (eds) China and international investment law: twenty years of ICSID membership; Trakman LE (2012) The ICSID under siege. Cornell Int Law J 45:603.

ratified the ICSID Convention in 1993.[2] During that time, China has developed three model BITs to guide it in reaching international investment disputes and is finalizing its fourth model BIT. It adopted its first model BIT in the early 1980s, its second in the mid-1990s, and its third in 1998. Today, China has concluded 130 BITs with other countries, including the latest BIT signed with Turkey in 2015 (which is yet to enter into force). Among these are 34 BITs with African countries including, inter alia, Ghana, Tunisia, Egypt, Kenya, South Africa, Mozambique, and Mali.[3] China also has BITs with various Western countries, and comparatively recently in a 2012 BIT with Canada. China has also concluded 23 trade agreements with investment provisions, including with both Australia and Korea in 2015.

The proliferation of these model treaties and initiation of treaties with partner countries is comprehensible given that China is now the second largest economy in the world, the second largest recipient of foreign investment, and the second largest source of outward direct foreign investment.[4] Concluding free trade and investment treaties are therefore very much part of China's new identity, as a dominant economic power, engaging with other states that depend on its inbound and outbound investments.

China's increasing dominance as a global economic superpower is demonstrated in its third and current model BIT adopted in 1998, which emphasizes investor protection over market accession; endorses investor-state arbitration under the ICSID Rules or ad hoc arbitration under the UNCITRAL Rules;[5] and sanctions

[2] *See,* e.g., Schreuer C (2001) The ICSID convention: a commentary 10–69; Willems JY (2011) The settlement of investor state disputes and China new developments on ICSID jurisdiction. S C J Int Law Bus 8:1; Heymann MCE (2008) International law and the settlement of investment disputes relating to China. J Int Econ Law 11:507; and Database of ICSID Member States. International Centre for Settlement of Investment Disputes. https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx. Last visited 21 May 2019.

[3] *See* Kragelund P (2009) Knocking on a wide open door: Chinese investments in Africa. Rev Afr Pol Econ 36:479; Bennell P (1997) Foreign direct investment in Africa: rhetoric and reality. SAIS Rev 17:127; Alden C, Davies M (2006) A profile of the operations of Chinese multinationals in Africa. S Afr J Int Aff 13:83; and Davies M (2008) China's developmental model comes to Africa. Rev Afr Pol Econ 35:134. Huliaras A, Magliveras K. Truths, lies and misperceptions: United States and European Union reactions to the growing Chinese presence in Africa. In: Second European conference on African studies address at the University of Leiden Second European Conference on African Studies; UNCTAD (2007) Asian Foreign Direct Investment in Africa.

[4] UNCTAD (June 6, 2018) World Investment Report 2018. https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2130

[5] *See*, e.g., Frequently asked questions – UNCTRAL and private disputes, UNCITRAL. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html#dispute. Last visited 21 May 2019 (for explanation that 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."). Other institutions, most notably the Permanent Court of Arbitration ("PCA"), administer investor-state disputes under the UNCITRAL Rules. *See generally* Daly B, Goriatcheva E, Meighen H (2017) A guide to the PCA arbitration rules.

umbrella clauses that protect the rights of investors from treaty partner states.[6] Given these developments, it is likely that, as part of China's growing stature as a trading and investment superpower, its most recent BIT will likely encompass more extensive investor protections than in the past, somewhat in response to its mounting dominance over foreign direct investment (FDI) flows internationally.

However, China has faced only three publicized investor claims from inbound investors since it has endorsed ISA as its preferred model of ISDS. These ISA cases include claims brought against China by Ekran Berhad and by Ansung Housing.[7] A third, more recent investor claim was brought by Hela Schwarz.[8] The *Ekran Berhad* claim against China was settled during the course of ISA proceedings. The ISA tribunal decided the *Ansung Housing* claim in favor of China. The *Hela Schwarz* case is still to be decided on the merits.

There is also evidence of Chinese outbound investors making ISA claims against partner states under Chinese BITs. These reflect China's evolving intention to reconcile the protections accorded to its outbound investors, consistent with comparable protections being accorded to inbound investors. Increasingly in issue for China is its ability to provide protection not only for inbound investors but for its outbound investors as well, in light of the growing volume of outbound Chinese investments.[9] The further implication is that such China-oriented treaty protections also extend to its BIT partner states and their investors in China. However, insofar as China is the largest source of inbound investment and the second largest outbound investor state, the probability is that it will exceed the size and quantum of both inbound and outbound investments of most of its treaty partner states.[10]

Given the geometric increase in outbound Chinese investments, including Chinese SOEs, a comparable increase in claims brought by Chinese investors against foreign states could be expected. However, there are only a limited number of such ISAs on the public record, and few involving large investor claims and awards. These cases still deserve scrutiny as some are supported by detailed reasoning, such as relating to the jurisdiction of ISA tribunals and their interpretation of the applicable BIT.[11]

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[6] 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 is 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* Parts IV and V.

[7] Ekran Berhad v. People's Republic of China (*Ekran Berhad*), ICSID Case No. ARB/11/15 and Ansung Housing Co., Ltd. v. People's Republic of China *(Ansung Housing)*, ICSID Case No. ARB/14/25

[8] Hela Schwarz GmbH v. People's Republic of China (*Hela Schwarz)*, ICSID Case No. ARB/17/19

[9] *See* Bath V (2011) The quandary for Chinese regulators: controlling the flow of investment into and out of China. In: Bath V, Nottage L (eds) Foreign investment and dispute resolution law and practice in Asia. p 67.

[10] *See* Statistics of FDI in China in January – May 2018. Ministry of Commerce People's Republic of China (Mar 6 2019). http://english.mofcom.gov.cn/article/statistic/foreigninvestment/201807/20180702767267.shtml

[11] *See infra* Part III and note 111.

Significant too is the likelihood of China being subject to increasing inbound investor claims and outbound investor claims brought against China's treaty partner states. This stems from both the geometric expansion of China's inbound and outbound investment, the growing boldness of foreign investors after successes suing affluent and powerful states, such as Germany, and the potential for such claims to grow with the greater transparency of ISA awards.[12]

Nevertheless, inbound ISA claims and outbound ISA claims by Chinese investors are on an early growth trajectory, albeit at too early a stage to draw definitive conclusions, as is discussed below.

China's Limited Exposure to Investor-State Arbitration

Notwithstanding the more recent extension of state protection accorded to both inbound investors into China and its outbound investors, there are historical reasons why inbound investors avoided bringing ISA claims against China. A related obstacle, both historical and conventional, is the reluctance of foreign investors to lodge claims against China for fear of jeopardizing their future dealings, including wishing to avoid the review of ISA proceedings before Chinese courts. Alternatively, inbound investors may worry about Chinese courts assuming jurisdiction in the first instance, not wholly unlike the *Stern Hu* case, albeit in different circumstances.[13] As an EU report of 7 March 2012 noted, initiating ISA against China is likely to be a "last resort," due to a fear of retaliation.[14] Even though it is difficult to establish, in the absence of public evidence and confidentiality, China's inbound investors have every strategic reason to avoid lodging claims against it, namely, fear of losing access to inbound investment into China. These inbound investors appreciate that China is a well-resourced country that can defend itself against foreign investors who, justifiably, fear costly, confrontational, and protracted ISA proceedings.[15]

[12] *See generally* ICSID, *The ICSID Caseload – Statistics (Issue 2018-1)*, (2018), https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf (discussing the ICSID caseload, noting that the ICSID caseload has grown from a single case in 1972 to approximately 10 cases in 1990, to 53 new cases filed in 2017).

[13] *See* Bath V (Mar 28, 2010) The Chinese legal system and the Stern Hu case. East Asia Forum. https://www.eastasiaforum.org/2010/03/28/the-chinese-legal-system-and-the-stern-hu-case/ (discussing the Stern Hu case where an Australian businessman of Chinese origins was found guilty in 2010 by a Chinese court of stealing commercial secrets and accepting bribes).

[14] *See* Rubinacci L (Mar 7 2012) EU-China investment relationship, update on state of play. DC Trade Civil Society Dialogue. http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149185.pdf. *See also* European Commission, *Public Consultation on the future relationship between the EU and China* (July 6, 2011) http://trade.ec.europa.eu/consultations/?consul_id=153

[15] Rubinacci, *supra* note 14 at 13

It is arguable that at least some of the reasons for inbound foreign investors to avoid ISA are based on the view that China is increasingly receptive to attracting and retaining inbound investors, and there is a view that such a relationship would be jeopardized by ISA claims. The collateral argument is that ongoing and fruitful relations between China and inbound investors have enabled disputes to be resolved by mechanisms other than ISA. This assertion is already apparent in the huge amounts of FDI that China has attracted over several decades and in its exponential economic development, as compared to economic growth in the so-called Western world. Importantly, inbound investors into China, for the most part, are enjoying healthy profits from their investments there. The inference is that, given these developments, foreign investors have fewer strategic and economic reasons to resort to investor-state arbitration claims against China.[16]

Also pertinent is the observation that China is likely to continue extending BIT protections to inbound investors in order to protect its growing cadre of outbound investors from being denied investor protections by BIT partners.[17] China is also under growing economic and political pressure to grant inbound investors "national treatment," consistent with its treatment of local investors. China's ongoing need is to reduce restrictions on inbound investors to foster its evolving integration into the global economy, including by granting inbound investors fair and equitable treatment and protection from both direct and indirect expropriation.[18]

However, China's shifting receptiveness to ISA, not only formally by treaty but also in its state practice, remains sometimes difficult to substantiate. The extent to which China and inbound investors resort to negotiation and conciliation proceedings as ISDS processes that are directed at avoiding ISA is not easily verified, because ISA proceedings, historically, were not subject to public scrutiny. While institutional developments have taken place, such as in signatories to the ICSID agreeing to publish ISA awards and make ISA proceedings more public, these are subject to qualifications. Protecting the national security, and related state and commercial interests, remains fall back positions by which states (and investor claimants) can avoid public hearings, limit amicus involvement in ISA disputes,

[16]Trakman L (2014) China and foreign direct investment: does distance lend enchantment to the view? Chin J Comp Law 1:1. https://doi.org/10.1093/cjcl/cxt015

[17]*See* Bath, *supra* note 9 (discussing China's shifting position in regard to investment arbitration).

[18]See Shan W, Gallagher N, Zhang S (2012) National treatment for foreign investment in China: a changing landscape. ICSID Rev 27:120; Qin JY (2003) WTO-Plus obligations and their implications for the World Trade Organization legal system: an appraisal of the China accession protocol. J World Trade 37:483, 490; YY Kueh (ed) (1997) The political economy of Sino-American relations: a greater China perspective; Kinnear M (2009) The continuing development of the fair and equitable treatment standard. In: Bjorklund AK, Laird IA & Ripinsky S (eds) Investment treaty law: current issues III. Remedies in international investment.

and decline to publish significant parts of ISA awards.[19] A further obstacle to assessing China's stance on these issues is its limited experience with ISA claims and the uncertain extent of its unpublicized settlements with foreign investors that avoid resort to ISA. It is also likely that the number and extent of such claims will remain speculative, given the negotiated settlements are likely to be subject to confidentiality agreements.

The ensuing parts will examine China's historical experience with investor-state arbitration, how it has determined the limits of ISA through its model BITs; how these model BITs are reflected in China's investment treaties; and how Chinese investment arbitrators have interpreted and applied these investment treaties to discrete investor-state disputes.

China Experience with ISDS

It is difficult to assess how China will regulate ISA through its model BITs and treaties. Historically, the publication of ISA awards was subject to the consent of the disputing parties, but this has changed more recently with states agreeing en masse to publicize public awards, subject to confidentiality requirements.[20] Contrarily, China has significant economic incentives to liberalize its investment regime, including its model BITs and treaties, not only to protect its outbound and inbound investors on a case-by-case basis but also to demonstrate its economic and political leadership in a China-dominated twenty-first century.

A Restrictive Interpretation of ISA Jurisdiction

In its early or "first generation" model BIT, claimant investors were and are not (insofar as the "first generation" treaty is still applicable) entitled to bring a claim against China for having expropriated their property. Investors could or can claim compensation, but not on grounds of expropriation. However, the question remains as to how ISA tribunals would interpret this jurisdictional limit, such as in construing foreign investor claims to compensation restrictively or expansively. More realistically, tribunals could arguably avoid jurisdictional limits on their authority to rule on expropriation through their interpretation of other treaty provisions. This is most evident in tribunals interpreting a most favored nation ("MFN") clause in a treaty to provide an inbound investor with the same treatment that it accorded investors from any partner state under a treaty to which China is a party (unless explicitly excluded

[19] *See* Sheppard A (2016) The approach of investment treaty tribunals to evidentiary privileges. ICSID Rev 31:670, 682.

[20] See further *infra* section "Challenges to ISA?"

by the applicable treaty).[21] A significant number of Chinese BITs provide for MFN treatment.

There are two perspectives from which it can be understood that the scope for investors from any one of China's BIT partners to lodge an ISA claim under an MFN clause is made greater. First, the scope for foreign investors to identify the treaty that accords the inbound investor the most extensive MFN is likely to expand the scope of investor claims and the jurisdiction of ISA tribunals. This is particularly pertinent given the number of BITs to which China is a signatory.[22] Second, in so expanding the jurisdiction of ISA tribunals, foreign investors have less reason to exhaust local remedies under a BIT that restricts the ambit and application of ISA claims, or that is perceived as being overly protective of the host state.[23]

A response to whether an ISA tribunal could take account of an alleged expropriation under a "first generation" BIT arose under the China-Mongolia BIT. In the 1991 case of *Heilongjiang v. Mongolia*,[24] an ISA tribunal appointed under the UNCITRAL Rules considered a claim brought by Chinese state-owned entities against the Mongolian People's Republic. The tribunal held that it did have jurisdiction to determine whether Mongolia had expropriated the claimants' iron ore mining license under the "first generation" China-Mongolia BIT, and in doing so, ruled in favor of Mongolia.[25]

Central in delineating the jurisdiction of an ISA tribunal is its authority to construe the regulatory powers of a state, here Mongolia, under a "first generation" BIT. This issue is evaluated in Part (b) below, namely, in the interpretation of the "first generation" China-Peru BIT in the case of *Tza Yap Shum v. The Republic of Peru.*[26]

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[21] *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) (for an expansive interpretation of an MFN clause); *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Jan. 25 2000) (Decision on Jurisdiction) at [54]-[56]; *Siemens v. Republic of Arg.,* ICSID Case No. ARB/02/8, Aug. 3, 2004) (on the limits placed on the scope of an MFN clause in a BIT). *See generally,* Maupin JA (2011) MFN-based jurisdiction in investor-state arbitration: is there any hope for a consistent approach? J Int Econ Law 14:157 (on the controversy associated with the meaning and scope of MFN clauses); Banifatemi Y (2009) The emerging jurisprudence on the most favored nation treatment in investment arbitration. In: British Institute of International and Comparative Law (ed) Investment treaty law: current issues III, remedies in international investment law, emerging jurisprudence of international investment law.

[22] *See generally*, Shan W, Gallagher N (2009) Chinese investment treaties: policies and practice. Oxford (for discussion of the second and third generation BITs).

[23] *See Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2003). *But see Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Decision on Jurisdiction) (Feb. 8, 2005).

[24] China Heilongjiang International Economic & Technical Cooperative Corp., et al v. Mongolia (*Heilongjian v. Mongolia)*, PCA Case (China-Mongolia BIT 1991).

[25] China-Mongolia BIT at rt. 8. *See too* China's Model BIT at rt. 4(iv).

[26] Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6 (Feb. 12, 2015) (Annulment Proceeding) https://www.italaw.com/sites/default/files/case-documents/italaw4371.pdf, at 57 *et seq*

An Expansive Interpretation of ISA Jurisdiction

There is no legal requirement that an ISA tribunal interpret an investment treaty restrictively, unless the treaty explicitly provides so, subject to international investment law. It is expected that at least some ISA tribunals will interpret Chinese "first generation" treaties expansively, not least of all on account of ISA and investment law developments embodied in later generations of treaties. Such an expansive interpretation was tested by the ISA tribunal in *Tza Yap Shum v. The Republic of Peru* in determining the jurisdiction of the "first generation" China-Peru BIT[27] and in the ensuing ad hoc annulment proceedings. [28]

In the 2011 ICSID case of *Tza Yap Shum v Peru,* a Chinese investor purporting to expand a fish factory in Peru alleged that the Peruvian taxation authority had breached the expropriation provision contained in the China-Peru BIT of 1994.[29] The claim was that, in investigating Tza Yap Shum's business and levying liens on his firm's bank account, it had "ended up destroying [his] business operations and economic viability."[30] Tza Yap Shum alleged that, acting through its tax authority, Peru had engaged in an "indirect expropriation" of his property. [31]

The case raised several jurisdictional issues, namely, whether a Hong Kong national was qualified as a Chinese investor under the Peru-China BIT;[32] whether a prescribed waiting period of 6 months for amicable settlement had taken place before the claim had been lodged;[33] and whether the claimant was required to exhaust local remedies before proceeding to ISA.[34] The tribunal, notably, also considered the significance of an 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 favorable than that accorded to investments and activities associated with such investments of investors of a third State."[35]

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[27]*See* Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, (June 19, 2009) (Decision on Jurisdiction and Competence); Tza Yap Shum v. The Republic of Peru ICSID Case No. ARB/07/6, (Jul. 7, 2011) (Award on Merits). *See* Renta 4 S.V.S.A. v. The Russian Federation, SCC Arb No. 024/2007 (Mar. 20, 2009) (Award on Jurisdiction); Czech Republic v. European Media Ventures SA EWHC 2851, (Dec. 5, 2007). *See also* Eliasson N (2011) China's investment treaties: a procedural perspective. In Bath V, Nottage L (eds) Foreign investment and dispute resolution law and practice in Asia.

[28]*Tza Yap Shum v. Republic of Peru,* ICSID Case No. ARB/07/6 (Annulment Proceeding)

[29]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, concluded in Beijing on June 9, 1994, entered into force Feb. 1, 1995, 1901 U.N.T.S. 257 (*Peru-China BIT*), at art. 1(2)(a).

[30]*Tza Yap Shum*, *supra* note 27, ¶ 31

[31]*Id*. ¶ 31

[32]*Id*. ¶ 32

[33]Peru-China BIT, *supra* note 29, at ch. 10, art. 126

[34]ICSID Convention, Regulations and Rules, at art. 26

[35]Peru-China BIT, *supra* note 29, at art 3(5). See also Eliasson, *supra* note 27.

Peru lost the case. The tribunal ruled that the imposition of interim measures by the tax authority of Peru was arbitrary in failing to comply with Peru's own internal procedures.[36] It ruled further that the provision in Article 8(3) of the Peru-China BIT, "involving the amount of compensation for expropriation," included both a determination of the amount of compensation and a determination whether the property was actually expropriated and ruled that the latter was contrary to the China-Peru BIT.[37] In its decision of July 7, 2011, on the merits, the ISA tribunal awarded the claimant over $700,000 in damages and $200,000 in interest.[38] Peru filed to have the award annulled.[39]

What is questionable about the decision is the tribunal's restrictive construction of the MFN clause in favor of the more specific wording in Article 8(3), which specified when an investor could resort to ISA. This, arguably, converges from the general applicability of an MFN clause which should entitle investors to the most favorable treatment accorded to investors under *any other* BIT to which the host state, here Peru, is a signatory.[40]

In the annulment proceedings that followed, Peru argued, inter alia, that the ISA had exceeded its jurisdiction under the China-Peru BIT by evaluating the reasonableness and propriety of the Peruvian tax authorities' alleged acts of expropriation.[41] In issue was the tribunal adopting a fair and equitable treatment standard in assessing whether the measures applied by the tax authority exceeded its jurisdiction under the treaty.[42] The Annulment Committee also considered whether the tribunal had manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention.

After a lengthy analysis of Peru's contentions, the Annulment Committee determined that the tribunal had acted reasonably and had not manifestly exceeded its powers.[43] In reaching this decision, the Committee *did* question the ISA tribunal's expansive interpretation of the provisions of the China-Peru BIT in determining whether it had exceeded its jurisdiction. However, in dismissing Peru's assertions, on both procedural and substantive grounds, it endorsed the tribunal's interpretation of these BIT provisions, including in determining the limits of its own jurisdiction.

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[36] *Tza Yap Shum, supra* note 27, at ¶ 218

[37] *Id.* ¶ 88

[38] Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6 (Feb. 12, 2007) (Decision on Jurisdiction and Competence); Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/ (July 7, 2011) (Final Award on the Merits), summary *available at* http://www.italaw.com/documents/TzaYapShumAwardIACLSummary.pdf

[39] *Id.* ¶ 144

[40] *See* Renta 4 S.V.S.A. v. The Russian Federation, SCC Arb No. 024/2007 (Mar. 20, 2009), ¶101 (on the general applicability of an MFN clause); RosInvestCo UK Ltd v. The Russian Federation, SCC.Arb No. 079/2005 (Oct., 2007), at ¶130.

[41] Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6 (Feb. 12, 2015) (Annulment Proceeding)

[42] *Id.* ¶144

[43] *Id.* ¶ 205

The lingering question following this ruling is to determine the point at which a tribunal has manifestly exceeded its powers through its interpretation of the applicable treaty. Specifically, when will an ISA tribunal exceed its jurisdiction in deciding that state party to a "first generation" BIT had engaged in an expropriation, an issue which China had purported to exclude from consideration in such early BITs. That remains an open question, not least of all because ISA jurisdiction under China's "first generation" BITs had seldom been examined in ISA proceedings.

What can be assumed, at this stage, is not only that the Annulment Committee reaffirmed the ISA tribunal's interpretation of the dispute settlement clause in the Peru-China BIT. The tribunal did so in the first public ISA proceedings brought by an outbound Chinese (Hong Kong) investor against a foreign government, Peru. Importantly, even though the treaty provided for a narrow interpretation of the dispute resolution clause, the ISA tribunal adopted an expansive interpretation, which the Annulment Committee approved. While ISA awards do not constitute legal precedents, a well-reasoned ISA award supported by an Annulment Committee's findings is likely to render that ISA award more authoritative.

Interpreting More Recent BITs

An important issue arising in ISA is the retrospective application of jurisdiction in a BIT which is not replicated or otherwise provided for in a subsequent BIT. In issue is whether the jurisdiction provided for in the earlier BIT prevails and if so, on what basis. This issue arose in the case of *Ping An v. Belgium.*[44] There, China's second largest insurer Ping An filed an ICSID claim against Belgium. Ping An had 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 drastically diminished Ping An's interest in the European financial services of the bank. Ping An sought to recover its losses from the Belgium Government. Importantly, the China and the Belgium-Luxembourg 1986 BIT was replaced in 2009 by another treaty between the parties. Both BITs provided for investor protections, such as requiring host states to accord fair and equitable treatment to inbound investors. Both treaties also required host states to accord such investors full protection and security, namely, to abstain from physically damaging those **investments**, and protecting inbound i**nvestment** from economic harm, such as caused by private actors. However, the treaties differed in their provisions on dispute settlement. The 1986 BIT provided, in principle respects, for domestic jurisdiction. It also provided for international arbitration, without qualifying its attributes or operation, other than through its protocol which provided for disputes to be settled by a three-person arbitral tribunal, with the chair appointed by

[44]**Ping** An **Life** Insurance Company of China, Limited and **Ping** An Insurance (Group) Company of China, Limited **v.** Kingdom of Belgium (*Ping An v. Belgium)*, ICSID Case No. ARB/12/29 (Apr. 30, 2015) (Award)

the Stockholm Chamber of Commerce. In contrast, the 2009 BIT provided for both domestic jurisdiction and for ICSID arbitration. The arbitration clauses in the BITs are also significantly different in their scope. The 1986 BIT covered "disputes relating to the amount of compensation payable in case of expropriation, nationalization, or any other measure similarly affecting investments." Article 8 of the 2009 BIT extended the scope of arbitration beyond the 1986 BIT, including through an "expansive Investor-State Dispute-resolution clause." Ping An's claim was based primarily on the temporal jurisdiction of the ISA tribunal to decide the claim based on the dispute resolution provisions in the 2009 BIT.[45]

The ISA tribunal dismissed the Claim. In applying the 1986 BIT, it decided in favor of Belgium primarily on jurisdiction grounds, holding that its dispute settlement provisions were far more restrictive than under the 2009 BIT and that "all disputes" under the 1986 BIT were subject to exclusive domestic jurisdiction.[46]

The tribunal prioritized these jurisdictional defenses over the claimant's substantive allegations that Belgium had failed to provide a stable and secure business environment for their investments, and did not implement proper measures to prevent, mitigate, or resolve Fortis Bank's "liquidity crisis."[47] Given that Fortis Bank faced "extraordinary" economic loses, it sought to contain them in its shareholders "best interests."[48]

The award in *Ping An v. Belgium* not only limits the resolution of an ISA claim on jurisdictional grounds; it also constrains consideration of the merits of ISA claims and state responses. The impediment is the limited focus that ISA tribunals accord to the interpretation and application of state powers and investor protections, which are usually core underpinnings of negotiated treaties. They are also fundamentally rooted in China's Model BITs and in their adaptation in BITs between China and its partner states.[49]

ISDS and Outbound Chinese SOEs

It is arguable that Chinese SOEs should not be entitled to make ISA claims, as such enterprises are either owned or controlled by the Chinese state. They are therefore distinguishable from other Chinese foreign investors that lodge claims against a host state with which China has concluded a BIT. The seemingly logical inference following from the above, is that an SOE should not be the subject of a state-to-

[45]Ren Q (2016) Ping An v. Belgium: temporal jurisdiction of successive BITs. ICSID Rev – For Invest Law J 31:129. https://doi.org/10.1093/icsidreview/siv046

[46]*Id.*

[47]*Id*. §67

[48]*Id*. §99 (citing Resp. Mem. Jur., ¶134 on the financial advice it received from Morgan Stanley)

[49]Sebastian. Green Martínez; *Case Comment: Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium – A Jurisdictional Black Hole Between Two BITs?* TDM 1 (2017), www.transnational-dispute-management.com/article.asp?key=2407

state BIT that provides for investor-state disputes, unless that treaty explicitly provides to the contrary. A collateral consideration is whether Chinese SOEs should be prohibited from making claims against host states in general, or whether they should be so prohibited only if they are discharging governmental functions. In effect, should SOEs be entitled to make ISA claims if they act primarily as private parties and disentitled to do so if they act primarily as agents of the Chinese government?

A partial response to this question is that Chinese SOEs that invest abroad often assume both functions. They engage as private entities seeking to profit from foreign investments, while also acting as state entities discharging functions on behalf of the Chinese government.

Whether an SOE can lodge a valid ISA claim against a host state was evaluated in *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*.[50] A comparatively recent ISA case, where Chinese SOE Beijing Urban Construction Group invoked the 2002 China-Yemen BIT to allege that Yemen had unlawfully deprived Beijing Urban Construction Group of its investment in the construction of a new terminal in Sana`a International Airport. The tribunal rejected Yemen's objection that Beijing Urban Construction Group was a state agent, finding that in the specific context, Beijing Urban Construction Group acted as a private commercial contractor, rather than by discharging governmental functions. Yemen also objected to the tribunal's subject matter jurisdiction based on a narrow interpretation of the dispute settlement clause in the 2002 BIT. However, the tribunal dismissed the objection, considering that the words "relating to the amount of compensation for expropriation" in the dispute settlement clause must be construed to "include disputes relating to whether or not an expropriation has occurred," as it promotes the BIT's overall purpose and objective.[51] The parties then settled the dispute, filing a request for the discontinuance of the proceeding. On June 7, 2018, the tribunal issued a procedural order granting the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1).[52]

Given that the case was settled before ISA proceedings had commenced, it is difficult to determine how the tribunal might have resolved the conflict over whether Beijing Urban Construction Group was a commercial contractor or an SOE discharging government functions.

The fact that China is increasingly transforming SOEs into non-SOEs affirms that they are neither owned nor controlled by the Chinese Government. If their formal legal status is not explicitly determined by the applicable BIT, the functional question is whether those entities enjoy a sufficiently arm's-length relationship with the Chinese state to benefit from the BIT protection accorded to outbound

[50]Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen ICSID Case No. ARB/14/30 (May 31, 2017)

[51]*Id*. *See further* Pathirana D (Sept 26, 2017) A look into China's slowly increasing appearance in ISDS cases. Investment Treaty News. https://www.iisd.org/itn/2017/09/26/a-look-into-chinas-slowly-increasing-appearance-in-isds-cases-dilini-pathirana/

[52]ICSID, Case Details – Beijing Urban Construction Group Co. Ltd. V Republic of Yemen (June 7, 2018), https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/30

investors generally. The formal and functional dilemma is that, in "privatizing" SOEs, China has not generally divested itself of all ownership and/or control of these entitles. Rather, it has retained some level of authority over them, including a direct financial interest in them. Maintaining that the outbound investors of states, whose governments continue to partially own companies engaged in FDI, are disentitled to invoke ISA is to undermine the investor protection embodied in BITs to which state parties expressly consent. Viewing these reasons in combination, it is arguable that Chinese SOEs will decline in both strategic economic and legal significance, although disputes between SOEs and China's partner states are likely to continue, but not at the accelerated pace that is anticipated for outbound Chinese investors generally. However, despite privatization trends, China relies on its SOEs for geopolitical and geoeconomic maneuvering, both regionally and internationally.[53]

Summary

The monetary significance of the cases brought by Chinese outbound investors against foreign governments under Chinese BITs is quite limited compared generally to ISA disputes. None are seminal to the development of ISA in general. However, it is likely that the nature and extent of claims brought by outbound Chinese investors will continue to increase geometrically in the future. The few cases to date may well constitute a prelude to the growth of ISA in which Chinese outbound investor claims represent the fastest growing cadre of large-scale outbound investors globally.[54] This development is not without parallel. It is demonstrated in the geometric expansion of global ICSID cases from one case in 1975 to fifty-six in 2017.[55] What is also probable, or perhaps inevitable, is the prospects of China's international entities bringing multimillion dollar claims against host states to protect equivalent outbound investors from economically devastating economic losses, arising from direct and indirect expropriation, or other appropriating regulatory measures adopted by the host state. The probability of such eventualities is likely to be offset by negotiated settlements between outbound Chinese investors and foreign governments, such as occurred in *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*. *Ping An v. Belgium* and *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*

[53]See, e.g., Guluzade A (07 May 2019) Explained, the role of China's state-owned companies. World Economic Forum. https://www.weforum.org/agenda/2019/05/why-chinas-state-owned-companies-still-have-a-key-role-to-play/

[54]*See* Harpaz MD (2015) China and international tribunals. In: Toohey L, Picker C, Greenacre J (eds) China in the new international economic order. p 43.

[55]ICSID, *supra* note 12

also represent an, as yet, small shift in large-scale Chinese entities lodging ISA claims against host states with whom China has BITs of various generations and vintages.

ISA Claims Against China

There are only three registered ISA cases to date against China. While none involve large financial claims, they provide some inkling of issues of significance to inbound investors in China. What none of the cases establish is any pattern of responses by China to claims brought against it in light of its different generations of model BITs and investment treaties. These issues, and limitations, are discussed below.

A Settlement Preceding ISA Hearings: Likely Implications?

The first ISA claim against China case, being *Ekran Berhad v. China*, arose under one of China's "first generation" BITs with Malaysia,[56] entered into before China acceded to the ICSID Convention.[57] That claim was brought by Ekran Berhad, a Malaysian construction company through its subsidiary, Sino-Malaysia Culture & Art Co. Ltd. (SMCAC). In 1993, SMCAC had entered into a 70-year land lease agreement for construction of 90,000 hectares of land in the Chinese Province of Hainan. The lease agreement, priced at $6 million, commenced in 1993 and was to expire in 2063. However, in 2004, the local authorities revoked the land lease on grounds that the investor had failed to develop the land as stipulated under local legislation. In issue was the right of the local government to revoke the lease.[58] The claim was withdrawn before an ISA tribunal was appointed, for reasons that were not publicly disclosed.[59] The terms of that settlement were also not disclosed.

Had the case proceeded to an award, it would have required a tribunal to interpret provisions in the China-Malaysia "first generation" BIT, including: the requirement that host states adhere to "domestic legal procedure" in resolving ISA disputes;[60] determining the nature of compensation;[61] and foreign investor protections based, inter alia, on "national" and "most favored nation" treatment. Some of these issues arose in *Ansung Housing v. China,* the second claim by a foreign investor against China.

[56]Agreement between the government of the People's Republic of China and the government of Malaysia concerning the reciprocal encouragement and protection of investments, Nov. 21, 1988

[57]Ekrhan Berhad v. People's Republic of China ICSID Case No. ARB/11/15

[58]*Id.* (proceedings suspended pursuant to the Parties' agreement on July 22, 2011)

[59]*Id*.

[60]The provision for an ISA tribunal to adhere to "domestic legal procedure" is contained in Article 4 (ii) of China's Model BIT.

[61]See Article 7(4), modeled on Article 4(iv) of China's Model BIT providing for compensation.

Interpreting an MFN Clause Restrictively

In the second case, *Ansung Housing v. China*, [62] China argued that Ansung's claims were time-barred as Ansung instituted the investor-initiated arbitration more than three years after acquiring knowledge of the loss or damage suffered as a result of China's acts.[63] Ansung therefore invoked the MFN clause in Article 3 of the China-Korea BIT,[64] pointing to other Chinese BITs that do not provide for a 3-year limitation period.[65] China responded in favor of the 3-year limitation period. Ansung argued that MFN clauses operate to allow investors to import substantive rights from other treaties. Even if the 3-year limitation period is treated as procedural, under ISA cases interpreting the ICSID, tribunals are more likely to import and apply MFN clauses in favor of foreign investors. China responded more generally that Ansung's claims were "manifestly without legal merit" under ICSID Arbitration Rule 41(5) and that its contentions of fact were "incredible, frivolous, vexatious, or inaccurate or made in bad faith." China argued further that Article 3 of the China-Korea BIT limited MFN treatment to the host state's territory and encompasses only "investment and business activities" covering "the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments." China maintained further that MFN clauses do not include dispute settlement.

The ICSID tribunal dismissed the case for lack of temporal jurisdiction, inter alia, on grounds that the claimant had not brought the claim within the limitation period specified in the contract. It also upheld China's objection that Ansung's claim "[was] manifestly without legal merit." The tribunal ordered Ansung Housing to reimburse China for the costs of the proceeding plus 75% of China's legal fees and expenses.

The case is significant for at least two reasons. First, a claimant ought to have sound grounds for bringing an ISA action against China, given the resources that China is willing and able to apply in resolutely defending such claims and the likelihood that costs will be ordered. Second, the ICSID tribunal's decision to reject a claim on jurisdictional grounds, in accordance with a limitation clause in the China-Korean BIT, should provide a ready indication that an ISA tribunal is likely to reject the claim on similar grounds, despite most of China's BITs not including limitation clauses. The fact that the ICSID tribunal upheld China's objection on grounds that Ansung's claim was manifestly without legal merit, coupled with orders

[62] Ansung Housing Co., Ltd. v. People's Republic of China (*Ansung Housing v. China),* ICSID Case No. ARB/14/25 (Mar. 9 2017)

[63] *Id.* ¶ 56

[64] Agreement between the Government of the Republic of Korea and the Government of the People's Republic of China on the promotion and protection of investments, entered into force on Dec. 1, 2007 ("China-Korea BIT").

[65] China-Korea BIT, art.9(7) provided, "An investor may not make a claim pursuant to paragraph 3 of this article if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, the knowledge that the investor had incurred losses or damage."

that the claimant pay all costs, is a clear indication that the reputational and economic cost of losing is offset by countervailing benefits to China.

Too Soon to Tell

Most recently, in June 2017, a German investor initiated a claim against China under the China-Germany BIT in the ICSID case of *Hela Schwarz GmbH v. People's Republic of China*.[66] To date, the tribunal has issued two procedural orders, with no further published order since then and no decision on the merits.[67] At this stage, the case stands for the apparent acceleration of ISA claims against China, with two comparatively recent claims in 2017 and 2019, in the first of which *Ansung Housing v. China*, where the ICSID tribunal upheld China's response. China's likely success, albeit in unclear circumstances, is further reflected in an earlier case where the claimant withdrawing and settling its claim against China in 2011 in *Ekran Berhad v. China*, under China's "first generation" BITs with Malaysia. [68]

Summary

Drawing any salutary conclusion from the two concluded ISA cases brought against China would be suspect, except to lend credence to the assumption that China is likely to be a tenacious adversary. The first inference is that, in addition to other requirements, only well-financed foreign investors may 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, the specific claim and China's response to it. In issue would also be tension arising between China's defense of its domestic markets from foreign competition and its countervailing interest in mollifying skittish foreign investors hesitant to invest in China in order to avoid adverse regulatory action.

Challenges to ISA?

Given historical resistance to ISA, and more recent challenges to it in the EU (and perhaps momentarily in the United States), is China likely to withdraw from ISA in the intermediate future? Withdrawals from ISA have a long history, such as Ecuador

[66]ICSID Case No. ARB/17/19 (Jun. 21, 2017).

[67]Hela Schwarz GmbH v. People's Republic of China ICSID Case No. ARB/17/19 (Mar. 9, 2018) (Procedural Order No. 1); Hela Schwarz GmbH v. People's Republic of China ICSID Case No. ARB/17/19 (Aug. 10, 2018) (Procedural Order No. 2)

[68]ICSID Case No. ARB/11/15 (proceedings suspended pursuant to the Parties' agreement on July 22, 2011)

in 2009 and Venezuela and Bolivia in 2012.[69] Each country withdrew from the ICSID Convention.[70] The alleged affront, starting with Ecuador, is that the ICSID is a creature of the World Bank,[71] and the United States in particular.[72] The subtext was historical disquiet toward multinationals, a fear of neocolonial sublimation, but more specifically, a reaction to adverse ISA determinations against developing states.[73] Variants of these concerns have extended to eastern European countries and to South Africa, resulting in further withdrawals from ISA.[74] However, a key impetus for most developing countries that have withdrawn from ISA and the ICSID is the loss of an ISA case and the perception that international investment law, along with ISA proceedings and findings, is biased against developing states.[75] There seem to be perceptions among some developed states that the courts of developing partner states will not accord the rule of law to outbound investors.[76] However, even developed states like Germany, and Canada to a lesser extent, have challenged ISA, largely in response to losing ISA cases to foreign investors. Australia also considered

[69] *See, e.g.*, ICSID, Venezuela Submits a Notice under Article 71 of the ICSID Convention, (Jan 26, 2012), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100; *See* Garcia LB (Jan 24, 2012) We have to get out of the ICSID. Venezuela Analysis. http://venezuelanalysis.com/analysis/6766. *See generally,* Appleton S (Mar 31, 2010) Latin American arbitration: the story behind the headlines. International Bar Association. http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78296258-3B37-4608-A5EE-3C92D5D0B979

[70] *See* Appleton S (Mar 31, 2010) Latin American arbitration: the story behind the headlines. International Bar Association. http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78296258-3B37-4608-A5EE-3C92D5D0B979 (for commentary on these events, as well as investment arbitration in Latin America).

[71] *Compare* ICSID, *List of Contracting States and Other Signatories to the Convention*, http://icsid.worldbank.org/ICSID/ *with* World Bank, *Member Countries*, http://web.worldbank.org/

[72] *See* ICSID in crisis: Straight-Jacket or Investment Protection?, Bretton Woods Project (July 10, 2009), http://www.brettonwoodsproject.org/art-564878

[73] *See* Trakman L (2012) The ICSID and investor state arbitration. In: Trakman L, Ranieri N (eds) Regionalism in international investment law. p 253 (discussing the consequences of these comments for international investment law, ICSID, and the World Bank). *See* Krever T (2011) The legal turn in late development theory: the rule of law and the World Bank's development model. Harv Int Law J 52:287; UNCTAD (Dec 2010) Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims, IIA Issues Note No 2. http://archive.unctad.org/Templates/Page.asp?intItemID=5519&lang=1

[74] *See* Peterson LE (2012) 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

[75] *See generally* Tzanakopoulos A (2011) Denunciation of the ICSID convention under the general international law of treaties. In: Hofmann R, Tams CJ (eds) International investment law and general international law: from clinical isolation to systemic integration?; Vincentelli IA (2010) The uncertain future of ICSID in Latin America. Law Bus Rev Am 16:409.

[76] *See*, e.g., Grewal DS (2018) Investor protection, national sovereignty, and the rule of law ("Making it a permanent feature of a new world economic order would suggest that the "rule of law" can only be achieved by agencies outside – above or without – the state.") Am Aff 2(1).

withdrawing, albeit without having lost an ISA case and prior its successful defense on jurisdictional grounds against a claim from Philip Morris.[77]

A further concern, shared by both developed and developing states, is the perceived lack of transparency in ISA including through institutionalized rules and procedures. This criticism has led international institutions to revise their ISA rules and to promote greater transparency in ISA proceedings and awards. Whether such changes are perceived to be adequate or not depends somewhat on the eyes of the beholder.[78]

China is likely to have considered these global developments intensively. It is also likely to have juxtaposed its global economic and legal standing against other countries that are less developed or developed but declining in economic stature relative to China's economic and investment growth. China is also likely to be very conscious of a world economic order that is increasingly beset by investor-state conflicts and by the declining status of state sovereignty in the face of foreign investor challenges to state action. China knows that the countervailing rationale that domestic courts *should* decide ISA investor-state claims is both economically and legally suspect.[79] Outbound investor states, as well as their outbound investors, often fear violations of the rule of law, arising due to a perception of their radically different ideological and economic-legal traditions. While China is likely to factor in the assumption that inbound investors from developed states almost always prevail over developing states' respondents,[80] recent statistics simply do not fully support this assumption. The latest 2018 ICSID statistics demonstrate that, of cases decided by an ISA tribunal, states have won ICSID disputes approximately half the time.

[77] *See* **Philip Morris** Asia Limited **v**. The Commonwealth of **Australia**, UNCITRAL, PCA Case No. 2012–12; Voon T, Mitchell AD. Philip Morris vs. tobacco control: two wins for public health, but uncertainty remains. Columbia FDI Perspectives on Topical Foreign Direct Investment Issues No. 182, September 12, 2016. http://ccsi.columbia.edu/files/2013/10/No-182-Voon-and-Mitchell-FINAL.pdf; Trakman L (2012) Rejecting investor-state arbitration in favor of domestic courts: the Australian example. J World Trade 46(1).

[78] *See* Kantor M (2011) The transparency agenda for UNCITRAL investment arbitrations: looking in all the wrong places. Inst Int Law Justice 10. http://www.iilj.org/research/documents/IF2010-11 (demonstrating 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* Franck S (2007) Empirically evaluating claims about investment treaty arbitration. N C Law Rev 86:1; World Bank, Worldwide Governance Indicators (2012) http://info.worldbank.org/governance/wgi/index.asp (the World Bank's World-wide Governance Indicators demonstrated further that 68% of those States were in the bottom 60% of its Index for the "rule of law").

[79] *See*, e.g., Trakman L (2018) Domestic Courts declining to recognize and enforce foreign arbitral awards: a comparative reflection. Chin J Comp Law 6:174–227. https://doi.org/10.1093/cjcl/cxy009.

[80] *See, e.g.*, Jishnu L (Jan 31, 2012) Secretive tribunals. Hidden Damages (Interview). http://www.downtoearth.org.in/content/secretive-tribunals-hidden-damages (where 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,* Trakman LE (2012) The ICSID under siege. Cornell Int Law J 45.

ICSID tribunals have dismissed 52% of the cases, albeit primarily on jurisdictional grounds. They have upheld 48% of investor claims in whole or part.[81] However, these statistics do not stress that foreign investors have brought far more claims against developing states than developed states. Nor do they highlight the extent to which ISA tribunals base their substantive awards on commercial, or alternatively, public policy considerations.[82] They do highlight, however, the diminishing historical assertion that wealthy investors from developed states inevitably prevail over developing states. Importantly, though, such analysis does not take account of China's distinctive position. While traditionally conceived as a developing state, China's status is increasingly sui generis, given its dominance as an inbound and outbound investor state, the limited number of claims brought against it, as well as by its outbound investor against China's partner states. What is also not readily known is the extent to which investor-state disputes between China and inbound investors, and Chinese outbound investors and foreign states, are settled, and particularly, the reasons for such settlements. That issue is considered immediately below.

China's Choices

Undoubtedly, China could assert its sovereign right to require that parties exhaust local remedies before resorting to ISA, as it has done, along with many other treaty making states.[83] More drastically, China could replace ISA with an international investment court which the European Union has promoted, but which has not progressed beyond tentative BITs with Canada and Vietnam.[84] However, China is unlikely to follow these alternative pathways.

[81]ICSID (2018) The ICSID caseload – statistics. World Bank, Issue 1. https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf

[82]*See generally*, Schill SW (ed) (2010) International investment law and comparative public law (discussing the concerns that ISA arbitrators will pay less attention to the public policy consequences of awards for developing states than to the plain words of treaties). *See, too,* Harten GV (2007) Investment treaty arbitration and public law. pp 122–151; Reinisch A (2011) How narrow are narrow dispute settlement clauses in investment treaties? J Int Dispute Settlement 2:115 (discussing the restrictive construction of investment agreements).

[83]*See*, e.g., Shan W et al (eds) (2008) Redefining sovereignty in international economic law, part four (commenting on the complexity of sovereignty in international investment law); Stumberg R (1998) Sovereignty by subtraction: the multilateral agreement on investment. Cornell Int Law J 31:491, 503–504, 523–525 (discussing sovereignty). *See also* Jackson RH (1990) Quasi-states: sovereignty, international relations and the third world; Sir Robert Jennings, Sir Arthur Watts (eds) (1992) Oppenheim's international law. p 927.

[84]*See*, e.g., Titi C (2017) The European Union's proposal for an international investment court: significance, innovations and challenges ahead. TDM 1. Available at www.transnational-dispute-management.com; Howard DM (2017) Creating consistency through a world investment court. Fordham Int Law J 41:1. *But cf.* Uzelac A (2019) Why Europe should reconsider its anti-arbitration policy in investment disputes. Access Justice East Eur 1:7.

China has reason to support a dispute resolution system that does not rely on domestic courts as the primary means of dispute resolution. It has strong reason to protect its geometrically increasing outbound investors from the courts of BIT partner states. It also is motivated to build its strategic relationship with international institutions that service ISA, such as to a lesser extent, the ICSID and the Permanent Court administering the UNCITRAL. China can also rationalize its concern not to expose its outbound investors to commercial biases favoring investors from market-based economies, at the expense of its domestic economy.[85] A significant new Arbitration Rule, adopted by the premier arbitration institution in China, China International Economic and Trade Arbitration Commission (CIETAC), authorizes the conduct of mediation prior to commercial and investment arbitration. Another CIETAC Rule provides for the exhaustion of local remedies and a waiting period before parties can invoke ISA. A further strategic new CIETAC Rule provides public access to hearings and documents submitted in the arbitration, unless the parties otherwise agree.[86] This last Rule mirrors, to some degree, recent developments in the Rules of international ISA institutions, such as the ICSID Rules, in which public access to ISA hearings is encouraged, along with the publication of ISA awards.[87] In scrutiny, however, is whether Western liberal states have entrenched a level of confidentiality in ISA proceedings, notwithstanding changing ICSID and other Rules that provide for greater transparency,[88] in part due to the perpetuation of state sovereignty over investor protectionism on both ideological and libertarian grounds.

A further development in China that is politically and economically sustainable is expanding their two-tier BIT strategy, such as in differentiating its BITs with African countries with which it has distinctive economic relations, from BITs with developed countries. The significant consequence of this development is that China will further bifurcate, pluralize and enrich its treaties based on the distinctive state partnership

[85] *See* Shihata IFI (2009) Towards a greater depoliticization of investment disputes: the roles of ICSID and MIGA. In: Lu KW et al (eds) Investing with confidence: understanding political risk management in the 21st century. pp 2–35 (discussing old world views); Franck SD (2007) Foreign direct investment, investment treaty arbitration, and the rule of law. Pac Mcgeorge Global Bus Dev Law J 19:337 (analyzing different views of the rule of law).

[86] CIETAC Investment Rules, art. 32, 55

[87] *See* Fry J, Repousis O. Towards a new world for investor-state arbitration through transparency. N Y Univ J Int Law Polit 48:795 (on the liberalization of the ICSID Rules, notably in public access to ISA proceedings and awards).

[88] *See generally* Yackee JW, Wong J (2010) 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 (discussing transparency in international investment arbitration); Marian C (2010) Balancing transparency: the value of administrative law and Mathews-balancing to investment treaty arbitrations. Pepperdine Dispute Resolut Law J 10:275 (discussing transparency in international investment arbitration).

that it is establishing. It will also do so according to the discrete political and economic environment in which it, along with its foreign investors, is functioning.[89]

China's Role in Determining Future Trends

What are likely to be the intermediate horizons for China as an investment powerhouse is unavoidably subject to debate. A possible FDI prognosis is that the recognized and evolving "new" FDI International Economic Order now including China, is likely to replicate – while still diverging from – the FDI "dominance" occupied by the United States over the latter twentieth century, and before then, by Western European states. What China is likely to add is its transformation from a strictly planned economic order, to an international economic order that varies from its domestic economy. If China is to augment its growing dominance in the global order, including through BITs and ISDS, it needs to protect its outbound investors from BIT partner states as tenaciously as it has traditionally protected its domestic economy from inbound investors of foreign states.[90]

If China is to protect its outbound investors, it will need to recognize that investment liberalization that was pioneered by Western liberal states to secure access to global markets can assist China to secure access to those selfsame, but faltering, markets.[91] However, China cannot realistically revert to a wholly "unplanned" international investment market any more than Western libertarian markets can avert "planned" intrusions by government on those markets, epitomized by the May 2019 tariffs imposed by the United States on imports from China.[92] The reality is that the imbedded economic ideologies of states cannot be intransigent, given the variability of international investment markets in which foreign investors function and their increased readiness to proceed against developed states. While the

[89] *See generally* Cotula L (2011) Law and power in foreign investment in Africa: shades of grey in the shadow of the law; Agyemang AA (1988) African states and ICSID arbitration. CILSA 21:177 (discussing the African signatories, particularly their consent to jurisdiction, their position in the institution, and the appointment of African arbitrators); Johnson AR (2010) Comment, Rethinking bilateral investment treaties in Sub-Saharan Africa. Emory Law J 59:919 (discussing BITs in relation to African countries).

[90] *See*, e.g., Ruggie J (1982) International regimes, transactions, and change: embedded liberalism in the postwar economic order. Int Org 36:379–415. http://ftp.columbia.edu/itc/sipa/U6800/readings-sm/rug_ocr.pdf; Moravcsik A (2013) The new liberalism. In: Goodin RE (ed) The Oxford handbook of political science.

[91] *See* Stiglitz J (2010) Freefall: America, free markets, and the sinking of the world economy (providing an account of these recessionary forces and their global consequences). *See also* Trakman LE (2010) Foreign direct investment: hazard or opportunity? George Washington Int Law Rev 41:1, 15–16, 20.

[92] *See* Lynch DJ, Telford T, Paletta D, Shih G (May 13, 2019) U.S. prepares to slap tariffs on remaining Chinese imports, which could add levies on roughly $300 billion in additional goods. Washington Post. https://www.washingtonpost.com/business/2019/05/13/trump-warns-china-not-retaliate-tariffs-insists-they-wont-hurt-us-consumers/?noredirect=on&utm_term=.29e20706bc29.

progression of this latter development is too early to predict, there is evidence of foreign investors proceeding against powerful liberal states and having their claims enforced. Such has been the experience in the successful $2.2 billion *Vattenfall* claim against Germany and, more frequently, but less significant financially, against Canada.[93]

For China to develop a BIT policy case by case is unrealistic, as is historically evidenced by other states with the economic and political power to negotiate BITs somewhat in their own images. Nor is there a pervasive expectation that the interpretation of provisions in investment treaties, including dispute resolution clauses, will develop uniformly from one treaty to the next. Arguably, ICSID annulment proceedings are "not designed to bring about consistency in the interpretation and application of international investment law."[94] Such variability in the regulation of international investment will undoubtedly undermine international investment "law" in submitting to ad hoc interpretations of investor protections in BITs, along with the procedural grounds upon which to annul ISA awards. Undoubtedly too, inconsistent interpretation of otherwise comparable treaty protections of investors, or state protections based on public policy assertions, will make it difficult to reasonably predict how ISA tribunals will construe dispute resolution provisions in discrete cases.[95] Given these observations, it is unreasonable to expect China to transcend these endemic differences in the interpretation of dispute resolution provisions in treaties.

Dependent on the extent of China's influence over the next order of investment treaties, states will inevitably adopt provisions in their BITs in accordance with their respective economic and political negotiating powers. Even if states abandon ISA en masse in favor of a purportedly unifying institution, such as an international investment court, such a court is unlikely to become the sole global determinant of investor-state dispute because of the ever growing economic and political miscellany across both states and foreign investors. This in turn makes it likely the economic and political framework for the resolution of investor-state disputes will become ever more piecemeal and less cohesive as a regulatory framework. At its best, uniformity in dispute resolution practice will depend on discrete treaty partners, the incentive of these and other states to endorse comparable standards of investor treatment, as well

[93]*See*, e.g., Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (*Vattenfall)*, ICSID Case No. ARB/09/6 (Mar. 11, 2011). On a successful $ISDS_A$ claim by Eli Lilly against Canada, *see* Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2 (Mar. 16, 2017).

[94]S*ee* 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 & Meg Kinnear, *NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration,* 25 ICSID L. Rev. 225 (2010) (providing a systematic approach toward investment arbitration, through the prism of Chapter 11 of the NAFTA).

[95]Trakman L (2018) Aligning state sovereignty with transnational public policy. Tulane Law Rev 93:43. https://doi.org/10.2139/ssrn.3301024

as adopt model laws which they intend to lead to, albeit not guarantee, consistency in interpretation.[96] Especially challenging is for ISA tribunals to interpret divergent regulatory provisions in bifurcated or plural BIT partnerships among states whose ideological, cultural, and economic traditions differ from those to which China subscribes.[97]

In the absence of precedent in investor-state decision-making,[98] the development of a cohesive BIT dispute resolution jurisprudence is doubtful. However probable it is that China will lead that development,[99] divergence in the economic aspirations and legal traditions of states is likely to accentuate deviations in both the content and construction of BITs. Treaty provisions will be subject to interpretations that diverge, not only according to similar words used in different treaties but according to different constructions of the same words in the same treaties.[100] Applied to China and its outbound investors, interpreting the boundaries of "fair and equitable" treatment is likely to vary according to whether the Chinese foreign investor is an SOE or not.[101] Determining the "legitimate expectations" of foreign investors will depend somewhat on China's expropriation laws and practices within an economy that is predominantly centralized. This may well differ from the "legitimate expec-

[96] *See generally* Dolzer R, Schreuer C (2008) Principles of international investment law (discussing investment treaties); Dolzer R, Stevens M (1995) Bilateral investment treaties.

[97] *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 (discussing the development of such international investment norms). *See generally* Trakman LE (2006) Legal traditions and international commercial arbitration. Am Rev Int Arbitration 17:1; von Staden A (2011) Towards greater doctrinal clarity in investor-state arbitration: the CMS, Enron and Sempra annulment decisions. Czech Yearbook Int Law 2:207 (discussing how different investment policies can influence investment law).

[98] *See*, e.g., Schreuer C, Weiniger M (2008) A doctrine of precedent? In: Muchlinski P, Ortino F, Schreuer C (eds) The Oxford handbook of international investment law, p 1188 (discussing the absence of binding precedents, at least in principle, in international investment law).

[99] Sauvant K (2017) Reforming the international investment regime: two challenges. In: Chaisse J, Ishikawa T, Jusoh S (eds) Asia's changing international investment regime

[100] *See*, e.g., Peinhardt C, Allee T (2011) Devil in the details? The investment effects of dispute settlement variation in BITs. In: Yearbook on international investment law & policy 2010–2011; Weeramantry R (2012) Treaty interpretation in investment arbitration (on different interpretation of words used in BITs).

[101] 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, ICSID Case No ARB/97/7 (Nov. 13, 2000) (Award on Merits) [64]; MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile, ICSID Case No ARB/01/7 (May 25, 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,* Trans. Dispute Management, Oct. 2004.

tations" of foreign investors originating from market-based economies.[102] Challenges for China's outbound investors include the framing and interpretation of such doctrines as the "margin of appreciation" to different BITs that are each strategically directed at protecting the interests of the immediate BIT parties, such as China and the European Union,[103] but that differ from the strategic interests of other BIT partners.

China could demonstrate its global leadership strategically and instrumentally. It could support, or indeed spearhead, a new multilateral investment agreement (MIA), directed at facilitating a more interconnected global jurisprudence in investment.[104] The challenge in achieving this objective is accentuated by the proliferation of BITs within, between, and among states. The difficulty is for states to agree upon a multilateral agreement in the face of decades of bilateralism and investment jurisprudence that arise from different generations of BITS. This is especially evident in China's evolving generations of model BITS and their divergence application in different regions, illustrated by China's distinctive relationships with African countries.

Ultimately, if ISA is sustainable in China, its global evolution will hinge on the extent to which China can tailor and contribute its own distinctive perspectives on ISA into a currently multilayered body of international investment law.[105] China's contribution to ISA will depend somewhat on its discrete investment treaties and the model BIT on which each treaty is based. China's contribution to the structure of investor-state dispute resolution, in turn, is likely to remain contingent on how

[102]On such "legitimate expectations", *see* Saluka Investments BV (The Netherlands) v. The Czech Republic ¶ 304 (Mar. 17, 2006) (Partial Award) (Arbitration under the UNCITRAL Rules); Waste Management, Inc v. The United Mexican States ICSID Case No. ARB(AF)/00/3 ¶ 98 (Apr. 30, 2004); International Thunderbird Gaming Corporation v. The United Mexican States (*Thunderbird)* (Arbitration under the UNCITRAL Rules (NAFTA) ¶ 147 (Jan. 26, 2006); GAMI Investments Inc v. The Government of the United Mexican States (Arbitration under the UNCITRAL Rules) ¶ 100 (Nov. 15, 2004) (Final Award).

[103]On the "margin of appreciation" doctrine, see, for example, Muhammad N (2019) A comparative approach to margin of appreciation in international law. Chin J Comp Law 1(forthcoming); Bakircioglu O (2007) The application of the margin of appreciation doctrine in freedom of expression and public morality cases. German Law J 8:711; Shany Y (2005) Toward a general margin of appreciation doctrine in international law? Eur J Int Law 16:907.

[104]*See generally*, Dolzer R, Schreuer C (2008) Principles of international investment law. pp 67–86; Schill SW (2009) The multilateralization of international investment law. pp 1–64; *See also* Organisation For Economic Co-Operation and Development, The Multilateral Agreement on Investment Negotiating Text (1998), http://italaw.com/documents/MAIDraftText.pdf

[105]*See* Brown C (2013) Commentaries on selected model investment treaties (for commentaries on selected model BITs). On attempts to redress consistencies in international investment arbitration, *see* Hofmann R, Tams C (eds) (2011) International investment law and general international law: from clinical isolation to systemic integration?; Paulsson J (2007) International arbitration and the generation of legal norms: treaty arbitration and international law. In: Van Den Berg AJ (ed) Int'l Arb. 2006: back to basics? International council for commercial arbitration congress series no. 13. p 879.

investor-state tribunals and/or domestic courts construe those BITS, whether restrictively or expansively.

China and Alternatives to ISA

The scope of dispute resolution relating to international investment is, understandably, dynamic. It is likely to change according to how states conceive of their national interests in response to inbound investment compared to state investment practice and how these practices interface with regional and global investment practice. Centrally in issue is the role played by global and regional institutions in regulating investor-state disputes, notably under the developing rules of the ICSID and the UNCITRAL,[106] through limited resort to international commercial arbitration.[107] These developments will be contrasted against the historical reliance that states place upon domestic courts, contrasted further with the more embryonic conception of an international investment court.[108]

The extent to which China will follow any one or more of these global movements will be difficult to determine conclusively against the backdrop of political machinations among and across states. More significant is how China will manifest its preferences among existing dispute resolution structures and whether it will construct new dispute resolution institutions and processes according to its strategic preferences. While the ISCID continues to be favored, including by China,[109] its continuity as an organ of the World Bank, and its adaptation to neoliberalism in the Trump era, may recede in stature, including in China's BIT practice.[110] Such shifts are not exceptional, such as in the administration of BITs from the UNCITRAL as the traditional choice of developing states, to the ISCID in more recent BITs.[111] Still, a prospective shift away from established conventions such as the ICSID will be more significant than shifts in preference for the UNCITRAL to the ISCID. In contention will be the reason for China, and its allies, shifting away from the

[106]The UNCITRAL Rules are a general set of rules that can be applied flexibly to resolve any type of international dispute and are adopted widely globally, including for resolving investor-state disputes. Some of the amendments to the UNCITRAL rules were inspired by the rising use of the Rules in ISA. *See* UNCITRAL, *UNCITRAL Arbitration Rules* (2013) http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf.

[107]*See* Nottage L, Miles K. "Back to the future" for investor-state arbitrations: revising rules in Australia and Japan to meet public interests. J Int Arbitration 26:25 (on the similarities and differences between international commercial arbitration and investment arbitration).

[108]*See* Titi, *supra* note 83.

[109]*See supra* text accompanying note 6.

[110]*See* Leventhal AG (2018) The 2018 proposals for amendments of the ICSID rules: ICSID enters the era of trump, populism, and state sovereignty. Am Soc Int Law 22(15). https://asil.org/insights/volume/22/issue/15/2018-proposals-amendments-icsid-rules-icsid-enters-era-trump-populism

[111]*See* Trakman L (2017) Enhancing standing panels in investor-state arbitration: the way forward. Georgetown J Int Law 48:1145, Appendix.

ICSID, which could occur on ideological/political grounds due to the perception that the ICSID is a construct of the World Bank and therefore a creation of the West in a past era.

Evidently, China's most recent BITs provide predominantly for investor-state arbitration and notably, a preference for the ICSID.[112] In addition, China has not negotiated BITs that provide for recourse to domestic courts, in contrast to countries that have rejected ISA, or have done so temporarily, such as Australia did in April 2011.[113] However, the prospect of Chinese BITs stipulating for the exhaustion of local remedies, including resort to the court system, may grow, rather than recede, given past criticisms directed at ISA and international investment law more generally. While BITs which direct investor-state disputes to domestic courts may invite parochialism, treaty bilateralism ensures that inbound investors of both treaty partners are subject to the domestic judicial system of the host state. Moreover, the prospect of intensifying reliance on Chinese courts in investment treaty practice is not peculiar to China. It pervades international investment jurisprudence more generally.[114]

No doubt China skeptics are likely to question the institutionalization of ISA proceedings in which China is the respondent, such as whether China will decline to agree to permit third party intervention in proceedings, its possible refusal to hold public hearings, or insistence on confidential documentation and unpublished awards.[115] Further impending the development of a uniform ISA jurisprudence is China's distinctive conceptions of law, such as property law, compared to the conceptions adopted in other states.[116] However, the transparency concerns arising from such action are not peculiar to China. Other states have adopted comparable

[112]On the case for investor-state arbitration, *see, generally,* Dugan C, Wallace D Jr, Rubins N (2008) Investor-state arbitration; Muchlinski P, Ortino F, Schreuer C (eds) (2008) Oxford handbook of international investment law.

[113]*See* Emerson C (Apr 2011) Trading our way to more jobs and prosperity (Government Trade Policy Statement), released by Australia's Trade Minister. http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state. *See also* Trakman LE (2013) Investor-state arbitration: the Australian case. In: Trakman LE, Ranieri N (Eds) Regionalism in international investment law. pp 344–373; Kurtz J (2012) Australia's rejection of investor-state arbitration: causation, omission and implication. ICSID Rev 1; Trakman LE (2012) Investor state arbitration or local courts: will Australia set a new trend? J World Trade 46:83.

[114]See Vandevelde K (2005) A brief history of international investment agreements. U C Davis J Int Law Policy 12:157, 172. *See also* United Nations Conference on Trade and Development, World Investment Report (2018), https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf

[115]*See* Moser MJ (1998) CIETAC arbitration: a success story? J Int Arbitration 1:30.

[116]*See*, e.g., Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4 (July 23, 2001) (Decision on Jursidction) (on the conflicting conceptions of property law). *See too* Sasson M (2010) Substantive law in investment treaty arbitration: the unsettled relationship between international and municipal law (see especially Chapter 4 on property in investment treaties); Garcia-Bolivar OE (2010) Protected investments and protected investors: the outer limits of ICSID's reach. Trade Law Dev 2:145 (on the requirements to invoke the ICSID's jurisdiction); Schreuer, *supra* note 2, at 90–91 (on jurisdictional requirements under Article 25 of the ICSID Convention).

measures in the past.[117] ISA is initiated with the consent of both direct parties to ISA disputes, administered by the ICSID or UNCITRAL. Typically, the Secretary General of the ICSID would publish reports of conciliation commissions or awards rendered by arbitral tribunals in ICSID proceedings, but only "with the consent of both disputing parties," with a limited added power discussed later.[118] 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."[119] It nevertheless declined to permit public participation under the petition. China has less incentive to challenge the publicization of the ISA process, given the scant number of investor claims brought against it and the limited quantum in issue. Also absent is any significant ISA case on the record in which China was the respondent and in which the claim proceeded beyond jurisdiction.[120]

Much has changed in investor-state dispute resolution in the last decade, commencing with greater transparency and open hearings under Chapter 11 of the NAFTA and more pervasive efforts to redress the socioeconomic cost of protectionism.[121] In 2006, the ICSID revised its rules, including Rule 37 which now provides for the admission of third parties to proceedings and the submission of amicus curiae briefs.[122] Some of these changes are qualified. For example, provision is made for

[117] *See generally* Yackee JW, Wong J (2010) The 2006 procedural and transparency-related amendments to the ICSID arbitration rules: model intentions, moderate proposals, and modest returns. In: Sauvant KP (ed) Yearbook on international investment law & policy 2009–2010 (discussing transparency in international investment arbitration); Marian C (2010) Balancing transparency: the value of administrative law and Mathews-balancing to investment treaty arbitrations. Pepperdine Dispute Resolut Law J 10:275 (discussing transparency in international investment arbitration).

[118] *See*, e.g., Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3 (Mar. 28, 2006) (Order Taking Note of Discontinuance). *See also* Vandevelde K (2007) Aguas del Tunari, S. A. v. Republic of Bolivia. Am J Int Law 101:179 (providing an overview and analysis of the case).

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

[120] *See* Harpaz *supra* note 53.

[121] *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 (on public statements by the NAFTA on open hearings).

[122] *See* Gómez KF (2012) Rethinking the role of Amicus Curiae in international investment arbitration: how to draw the line favorably for the public interest. Fordham Int Law J 35:510.

the publication of ICSID awards.[123] But that is still subject to the consent of the direct parties to the ISA dispute.[124] The ICSID Arbitration Rules do state that "the Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."[125] A review committee with limited authority, which includes no right to overturn an ICSID award on its merits, continues to be able to review ICSID decisions.[126]

Whether China will deny consent or otherwise resist public interest petitions, amicus briefs or other forms of participation by third parties in ISA proceedings are also difficult to gauge in the absence of a track record of China as respondent. Much will also be contingent on how host states, and ISA tribunals particularly, react to the responses of host states that Chinese SOEs are not legitimate foreign investor claimants.[127]

A further apprehension is that China will use conflict avoidance measures under the veil of conciliation or mediation, to force inbound investor complainants into submission, and to intimidate foreign states into succumbing to claims brought by inbound Chinese SOEs. However, reliance on conflict avoidance measures to avert ISA is neither peculiar to China nor to ISA. States often rely on conflict avoidance measures to ensure that their outbound investors are treated "fairly" based on integrating "home" state standards of treatment into "host" state standards.[128] Such

[123]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 (Feb. 2, 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 (Feb. 12, 2007). *See* International center for settlement of investment disputes, *ICSID Convention*, Regulations and Rules 95–96 (2006); Baldwin E, Kantor M, Nolan M (2006) Limits to enforcement of ICSID awards. J Int Arbitration 23:1 (discussing 'tactics' that may be employed in attempts to 'delay' or 'avoid' compliance with ICSID Awards).

[124]*See*, e.g., Antonietti A (2006) The 2006 amendments of the ICSID rules and regulations and the additional facility rules. ICSID Rev – For Invest Law J 21:427.

[125]*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 (almost identical text). *See also* Franck SD (2004–05) The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions. Fordham Law Rev 73:1521, 1616; Maupin JA (2011) MFN-based jurisdiction in investor-state arbitration: is there any hope for a consistent approach? J Int Econ Law 14:157, 162.

[126]*See*, e.g., Nathan KVSK (2000) The law of the international centre for settlement of investment disputes.

[127]*See,* Pathirana, *supra* note 51.

[128]*See*, e.g., Brower C, Steven L (2001) NAFTA chapter 11: who then should judge? Developing the international rule of law under NAFTA chapter 11. Chin J Int Law 2:193, 193–195; Coe JJ Jr (2002) Domestic court control of investment awards: necessary evil or Achilles heel within NAFTA and the proposed FTAA. J Int Arbitration 19:185; Gantz DA (2006) An appellate mechanism for review of arbitral decisions in investor-state disputes: prospects and challenges. Vanderbilt J Transnational Law 39:39. *But see,* Dodge WS (2001) Case report: Waste Management, Inc v. Mexico. Am J Int Law 95:186 (presenting the case for modeling Chapter 11 on the WTO appellate process).

reliance by states is also institutionalized internationally, not least of all in the UNCTAD Principles of Conflict Prevention and Alternatives to Arbitration.[129] Economically and politically dominant states can also be expected to engage in the state-centered take-it-or-leave-it treatment of foreign investors. This conceivably occurred in *Ekran Berhad v. People's Republic of China*,[130] in which China settled a claim with a foreign investor. It is also explicable for investment treaties, not limited to Chinese treaties modelled on a Chinese model BIT, to provide a waiting period during which the parties are expected to negotiate a settlement, directly or through mediation, failing which ISA can be pursued. As Article 12(3) of the Singapore-China BIT provides: "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."[131] However, the requirement that investor-state parties engage in negotiation before arbitration does not presuppose that they will do so on a level playing field, notwithstanding the UNCTAD's espousal of conflict avoidance measures in investor-state disputes.[132] Nor is the expectation that investor-state parties engage in "med-arb," being the requirement that mediators facilitate the resolution of investor-state negotiations and failing that, act as arbitrators, exceptional.[133] "Med-arb" is also a practice which China has espoused.[134] The limitations of "med-arb" are also unexceptional and seen globally; particularly the hazard of ISA arbitrators being eincombered by party disclosures made during negotiations inheres in "med-arb," whether institutionalized in treaties or not.[135]

China might conceivably respond to these various dispute avoidance and resolution options, and obstacles, by carving out a case-by-case treaty approach to the

[129]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

[130]ICSID Case No. ARB/11/15. Proceedings were suspended pursuant to the Parties' agreement on 22 July 2011.

[131]*See* Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore (*Singapore-China BIT*) (2006), http://images.mofcom.gov.cn/gjs/accessory/200804/1208158780064.pdf

[132]*See* UNCTAD, *Investor-State Dispute Settlement: Review of Developments in 2017*, https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf (on the UNCTAD's most recent report on investor state dispute settlement).

[133]Schneider M (1996) Combining arbitration with conciliation. In: Van Den Berg AJ (ed) International dispute resolution: towards an international arbitration culture, ICCA congress series no. 8. p 57.

[134]*See* Kaufmann-Kohler G, Kun F (2008) Integrating mediation into arbitration: why it works in China. J Int Arbitration 25(4):479–492; Nakamura T (2009) Brief empirical study on Arb-Med in the JCAA arbitration. JCAA News Letter 22:10–12.

[135]*See* Xing Q (Sept 2000) The different right in arbitration and mediation. In: The research on arbitration rights; Ali S (2011) The morality of conciliation: an empirical examination of arbitrator "role moralities" in East Asia and the West. Harv Negot Law Rev 16:1.

resolution of investor-state disputes. It might extend its two-tier BIT program with African states and Western liberal states, respectively, to multiple tiers that include but extend beyond both.[136] China might do so in response to preexisting relations between states, as well as supervening economic changes in investment markets, not limited to discrete states.

China might provide for the exhaustion of local remedies and for a waiting period before the parties can commence ISA proceedings. Such practices are widely adopted by states negotiating BITs. These provisions regulating ISA by BIT nevertheless do not preclude China from adopting further conflict avoidance and resolution remedies, systemically or discretely in specific contexts.

Conclusion

The sometimes loud clarion call from the West that China should further liberalize its investment regime is ahistorical at worst and disingenuous at best. Even the process of liberalization in the West, which is presented as an example of good practice, has evolved incrementally, unevenly, and often incompletely. Western countries were – and often are – protectionist and reluctant to surrender their sovereignty through treaties with other states.[137] Not only is there a history of reticence in granting foreign states MFN treatment, there is also a history of even greater reluctance to grant foreign investors national treatment.[138] The process of developing BITs in China is not entirely different from that development. 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 countries themselves initially did not do either, notwithstanding their liberal traditions.[139]

There has been a significant shift in China's status and ensuing policies from a capital importer to a capital exporter. As a capital importer, China had significant historical reasons to regulate inbound capital including through BITs, domestic laws, administrative regulation, commercial arbitration, and its court system. As a capital exporter today, China has equally significant reasons to expand on the BIT protections that it wants its BIT host partner states to accord Chinese investors.

China's growing interest in concluding FTAs and BITs that enable its investors to profit abroad is entirely consistent with the aspirations of other capital exporters. Nor should one expect otherwise. Investment protectionism is the other side of the investment liberalization coin. It is a coin that Western liberal states repeatedly flip

[136] *See,* Cotula, *supra* note 88.

[137] Trakman, *supra* note 96

[138] *See*, e.g., Kurtz, *supra* note 112. Kurtz relies on the commentary of Joseph Stiglitz to assert, at 11, 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."

[139] *See* Mukand SW (2006) Globalization and the "confidence game". J Int Econ 70:406.

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.

At the same time, it would be disingenuous to suggest that China has not continued to adopt a protectionist stance toward vulnerable sectors of its economy, notably its struggling rural sectors. The Supreme Peoples' Court of China has affirmed the virtue of such protectionism as a matter of national interest.[140] The defense of necessity is likely to arise in the interpretation of Chinese BITs in cases in which China is an ISA defendant, and the scope of such a defense is globally significant.[141] However, 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.[142]

Moreover, ascribing the lack of investor-state arbitration against China to its failure to liberalize FDI is equally tenuous. The fact that China has expanded the grounds for investor claims in its more recent BITs beyond compensation is a sign of its investment liberalization, however much it also benefits Chinese investors in foreign host states. The rarity of inbound investors bringing ISA claims against China is also not exceptional. The United States and many European countries that historically were capital exporters seldom were, or are, targets of ISA claims. Germany has had only one successful ISA claim brought against it, despite having concluded the largest number of BITs to date. This is not to deny that foreign investors that lodge ISA claims against China may face 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, in pitting the public interests of states against the private

[140] *See*, e.g., Wolff L-C (2010) Pathological foreign investment projects in China: patchwork or trendsetting by the supreme people's court? Int Lawyer 44:1001, 1003, 1110–11 (noting China's protectionism); *see also* Shen W (2010) Case note, beyond the scope of 'investor' and 'investment': who can make an arbitration claim under a Chinese BIT? – some implications from a recent ICSID case. Asian Int Arbitration J 6:164, 183–185 (discussing limits placed on complainants under bilateral investment agreements with China).

[141] 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 (Sept. 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

[142] *See* Bath V (2012) Foreign investment, the national interest and national security: foreign direct investment in Australia and China. Sydney Law Rev 34:5 (discussing governmental bureaucracies faced by foreign investors in Asia, particularly in China and Australia).

interests of foreign investors, is not distinctive to China.[143] Nor does the absence of mass ISA claims by foreign investors against China infer investor temerity. It may well infer that foreign investors are in fact receiving fair and equitable treatment in China. It may infer that they also wish to avoid disputes with China to protect their investments there and to profit from them. The surest measure of China's success is in formulating a dispute avoidance program to attract foreign investors and a dispute resolution program that retains those investors.

Cross-References

- ▶ China's Bilateral Investment Treaties
- ▶ Chinese FDI in Africa: An Empirical Investigation of Trends, Dynamics and Challenges
- ▶ Consent to Investment Arbitration Limited to the Evaluation of Compensation Due to Expropriation: China's Treaty Policy and Practice Vis-à-Vis Current Interpretive Trends
- ▶ From SEZ to FTZ: An Evolutionary Change toward FDI in China
- ▶ The Interactions of Competition Law and Investment Law: The Case of Chinese State-Owned Enterprises and EU Merger Control Regime

[143]On the tension between private and public interests in investor-state arbitration in regard to the publication of awards, see Karton JDH (2012) A conflict of interests: seeking a way forward on publication of international arbitral awards. Arbitration Int 28. On the public interest rationale for *amicus curiae* interventions, see De Brabandere E (2011) NGOs and the 'public interest': the legality and rationale of Amicus Curiae interventions in international economic and investment disputes. Chin J Int Law 12:85; Mills A (2011) The public-private dualities of international investment law and arbitration. In: Brown C, Miles K (eds) Evolution in investment treaty law and arbitration. pp 97–116