GEOPOLITICS, CHINA, AND INVESTOR-STALE ARBITRATION

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1. INTRODUCTION

Until recently, China was not particularly interested in investor–state arbitration. It viewed institutions such as the International Center for the Settlement of Investment Disputes (ICSID) with deep distrust due to its emphasis on state sovereignty and ideological considerations. Furthermore, China lacked experience in international litigation. However, in recent years, its attitude has changed dramatically, and it is clear that China has invested immense resources to prepare itself and its investors for future arbitration. This is evident, for example, in China's growing interest in the functioning of the ICSID and its inclusion of arbitration in its growing practice of negotiating investment treaties that regulate investor–state disputes. This practice is also evident in China's three Model Bilateral Investment Treaties (Model BITs), on which its various regional and bilateral trade and investment agreements are significantly based.

China is the largest recipient of foreign direct investment (FDI) and fifth in outward investment, recently overtaking the United States as the world's largest trading nation.[1] It is a net importer of, among other products, oil, gas, and coal, and it is investing significantly in Africa, Asia, and South America to meet its energy supply needs.[2] A Special Report of the Asia Society indicates that FDI from China

[1] See, e.g., Bloomberg News, "China Eclipses U.S. as Biggest Trading Nation," http://www.bloomberg.com/news/2013-02-09/china-passes-u-s-to-become-the-world-s-biggest-trading-nation.html. See also United Nations Conference on Trade and Development, *World Investment Report 2010*, 2010; Spencer Swartz and Shai Oster, "China Tops US in Energy Use," *Wall Street Journal*, 18 July 2010; Bernard Simon and Leslie Hook, "PetroChina in $5.4 BN Canada Gas Buy," *Financial Times*, 10 February 2011.

[2] See Jing Gu, John Humphrey, and Dirk Messner, "Global Governance and Developing Countries: The Implications of the Rise of China," (2008) 36(2) *World Development*, p. 274.

to the United States is doubling annually, and China's total projected investments are expected to reach close to US$2 trillion by 2020.[3]

China's ongoing integration has made it the second most prolific negotiator of BITs. It has signed over 130 BITs to date, second only to Germany.[4] This statistic is all the more striking considering that China concluded its first BIT only in 1982 with Sweden and its second BIT with Germany in 1985. It ratified the ICSID Convention in 1993.[5] Equally striking is the comparatively recent development of China's three Model BITs. The first was initiated in the early 1980s, the second developed in 1992, and the third in 1998.[6] These documents are analyzed in the subsequent sections below.

However, despite prolific inbound and outbound investment, China has had limited experience with investor–state arbitration to date. No claim by an inbound investor in China has been the subject of an arbitration award, and few Chinese outbound investors have brought claims against China's BIT partners. Nonetheless, China is clearly anticipating the possibility, and a number of distinctive provisions in its BIT may be the subject of a future claim.

This chapter identifies how China has developed its bilateral investment treaty regime through a succession of three Model BITs. It then scrutinizes China's approach to resolving investment disputes in light of China's geometric growth in FDI inflows and outflows, but limited experience with arbitration. Section 2 evaluates China's current Model BIT, including its legal and economic significance, and speculates on its future BIT program. Section 3 analyzes the virtual absence of arbitration claims by inbound investors against China, including the political and economic reasons for that absence. Section 4 considers claims by outbound Chinese investors against China's BIT partners and the legal and economic nature of those claims. Section 5 considers the global significance of China adopting a new Model BIT. Section 6 evaluates China's likely influence on a uniform BIT movement in light of its global economic and political stature.

[3] Daniel H. Rosen and Thilo Hanemann, "An American Open Door? Maximizing the Benefits of Chinese Foreign Direct Investment," *Center on U.S.-China Relations and Kissinger Institute on China and the United States Special Report*, May 2011, pp. 35–52, 68–75, http://www.ogilvypr.com/files/anamericanopendoor_china_fdi_study.pdf.

[4] International Centre for Settlement of Investment Disputes, "ICSID Caseload–Statistics (Issue 2012-2)," http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics. See also United Nations Conference on Trade and Development, "Total Number of Bilateral Investment Agreements Concluded," http://www.unctad.org/sections/dite_pcbb/docs/bits_china.pdf. See generally Leon E. Trakman, "The Proliferation of Free Trade Agreements: Bane or Beauty?," (2008) 42(2) *Journal of World Trade*, p. 367.

[5] See, e.g., ICSID, "List of Contracting States and Other Signatories of the Convention (as of April 18, 2012)," http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English.

[6] On the development of China's model investment agreements, see Wenhua Shan and Norah Gallagher, "China," in Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013), chapter 4.

Furthermore, this chapter considers whether China's growing geopolitical influence over international investment practice will cause a paradigm shift in a priori principles of law, notably in relation to investor protections and state defenses. It evaluates the extent to which China is likely to accommodate Western liberal values to protect its growing outbound investors, while affirming its stature as a planned economy striving to protect its national interests, including state-owned enterprises, from inbound foreign investors.

Finally, the chapter examines whether China has developed its own unique paradigm in regulating international investment, including investor–state disputes, the extent of divergence between that paradigm and those propagated by Western liberal states, and whether that variance is growing or receding. It explores the potential recalibration of free market investor protections in light of the domestic policies of planned economies that replicate, in whole or in part, China's success in inbound and outbound investment. It concludes by considering whether, given China's growing global economic and political influence, its evolving paradigm as an investment nation is likely to lead to corresponding paradigm shifts in global investment jurisprudence.

2. THE VARIABLE MODELING OF CHINA'S MODEL BIT

China has developed a multitrack BIT policy. On the one hand, it has adapted its BITs to accommodate the practices of its developed partner states. This is illustrated in its recent treaty with Canada, which includes liberalized standards of treatment accorded to home state investors and sophisticated state defenses to investor claims based on national security, public health, safety, and the protection of the environment, among others. On the other hand, China has tailored its BITs concluded with developing states, such as in Africa, to extend investment protections to meet the needs of its outbound investors.

These tensions are evident in China's third and current Model BIT, developed in 1998.[7] That Model BIT provides for the "national treatment," although China does not invariably incorporate that standard into its BITs.[8] Consistent with China's multitrack BIT negotiating practices, its investment treaties also include country-specific variations, such as in the Trilateral Investment Agreement with Japan and South Korea.[9] In addition, due to the somewhat outdated nature of

[7] On the China-Canada Free Trade Agreement, see Foreign Affairs, Trade and Development Canada, "Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments," http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx.

[8] See below, Section 3a: Article 3(1)(a), China Model Bilateral Investment Treaty 1998.

[9] On this Trilateral Agreement, see Ministry of Foreign Affairs of Japan, "Signing of the Japan-China-Korea Trilateral Investment Agreement," http://www.mofa.go.jp/announce/announce/2012/5/0513_01.html.

China's current Model BIT, its recent BITs include public health, safety, and environmental measures, such as the Trilateral Investment Agreement, China's BIT with Canada, and its ongoing negotiations with the United States.[10]

Notwithstanding these variations in its negotiated BITS, China's Model BITs mirror generational changes consistent with China's evolving FDI aspirations. Consistent with its historical ideological resistance to investment liberalization, China's early generation BITs, commencing in 1982, defined an "investment" restrictively. Its early BITs also did not provide for investor–state arbitration; they did not accord "national treatment" to foreign investors; they defined MFN treatment restrictively; and they permitted state regulation of FDI as long as it complied with "domestic legal procedures."[11]

Much has changed in China's BIT program since the early 1980s, representing the early stages of a paradigm shift in China's policy to the regulation of FDI. This is evident in China's recent BIT with Canada and its Trilateral Investment Treaty with Korea and Japan. China's Trilateral Treaty not only provides for such investor protections as fair and equitable treatment, most favored nation treatment, and protection against expropriation. It also stipulates for enhanced government transparency and express protection for intellectual property rights, and it includes exceptions that allow host state parties to take prudential measures to ensure the stability of their financial systems. The Trilateral Treaty also affirms arbitration as the key mechanism for investor–state dispute resolution.[12]

China's BIT program has also moved perceptibly away from investment protectionism to investment liberalization. It is in China's economic interest not only to protect itself from invasive inbound investors, but also to protect outbound investors from the economic protectionism of its host state partners.[13]

These changes in China's ideological and economic interests raise complex questions about how it will adapt its BIT program to address ongoing tensions between investor protections and state defenses, including in its anticipated fourth Model BIT. That Model BIT is likely to demonstrate the extent of China's paradigm shift in FDI policy, as well as the influence of that policy on other states.

2a. *China's Model BIT Program*

China's three Model BITs, adopted in the early 1980s, 1992, and 1998, each highlight the generational changes that preceded it. China's 1980 Model BIT did

[10] See above notes 4, 8, and 9.

[11] On the analysis of such "procedures" in *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, June 19, 2009; see below Section 4a.

[12] See above, note 9.

[13] An example of China's endorsement of Arbitration under the ICSID and UNCITRAL is contained in Articles 5 and 9 of the Germany-China BIT, which came into force on 11 December 2005. Article 10(2) includes an umbrella clause providing that each state party shall respect its treaty obligations relating to investors from the other state party.

not provide for investor–state arbitration to which China was ideologically opposed. China's 1992 Model BITs allowed for such arbitration in principle, but China incorporated it selectively into its negotiated BITs, depending on its BIT partners. Comparatively, China's 1998 Model and negotiated BITs provide for investor–state arbitration in general, reflecting its growing readiness to endorse institutional mechanisms that liberalize global trade and investment.[14]

China's early generation Model BITs remain important as numerous current BITs evolved out of these templates. These early BITs demonstrate China's aversion to arbitral tribunals considering whether an expropriation has occurred and basing investor compensation on market value. China regarded an arbitration determination on expropriation as an infraction on its sovereignty and thought that market-based compensation conflicted with its economic and social needs as a developing state. China's most recent BITs entertain claims based on both the nature of an expropriation and the extent of compensation, not least of all as China seeks to protect its outbound investors from the regulatory action of BIT partner states. These developments are discussed immediately below, in light of China's 1998 Model BIT, and elaborated on in Sections 4 and 5.

2b. *Preamble*

The preamble to China's 1998 Model BIT includes three principles: (i) to facilitate and attract investment, (ii) to contribute to the prosperity of both Contracting States, and (iii) to cooperate on the basis of equality and for mutual benefit.[15] Other Model BITs adopted by North American and European countries articulate their national interests in different language; however, the prosperity of the host state is ordinarily identified as a primary national interest of a BIT state party.[16] Whether the language in the Preamble to China's 1998 Model BIT represents a fundamentally different paradigm at work than Model BITs and BIT practices of the United States, Canada, and different European Union (EU) Model BITs is debatable. An arbitral tribunal that interprets the purpose of China's current Model BIT restrictively could construe the Preamble as an aspiration only, to promote economic cooperation between partner states. Alternatively, it could hold that a BIT state party had engaged in "unequal" regulation among BIT partner states and their investors, contrary to subsection (iii) of the Preamble. Neither interpretation of the Preamble suggests that China's current Model BIT represents a unique paradigm that diverges

[14] See Wenhua Shan, "China and International Investment Law," in Leon E. Trakman and Nicola W Ranieri (eds.), *Regionalism in International Investment Law* (Oxford University Press, 2013).

[15] See Preambles in the three versions of the Chinese Model BITs.

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

fundamentally from Western liberal conceptions of attracting investments, promoting prosperity among BIT partner states, and fostering cooperation based on equality and mutual benefit. However, it is arguable that China's 1998 Model BIT no longer represents China's BIT practice and that China is engaged in a paradigm shift toward a new model of regulating FDI, which is discussed in Section 5 below.

2c. *The Nature of "Investment"*

Article 1(1) of the current Model BIT used by China adopts an asset-based definition of investment. It states: "1. The term 'investment' means *every kind of asset invested* by investors of one Contracting Party *in accordance with the laws and regulations of the other Contracting Party* in the territory of the latter, and particularly, though not exclusively..."[17], followed by the enumeration of different classes of an asset investment.

One can question the nonexhaustive character of such list on grounds that it is potentially overbroad in scope of application. However, open-ended language in defining or circumscribing the scope of an investment, including through a list of asset classes, is not uncommon in BITs, notwithstanding the paucity of arbitration disputes that interpret a Chinese BIT in particular. In addition, arbitral tribunals have a long history of interpreting such provisions restrictively, in effect, limiting the scope of an investment.[18]

More pertinent is the stipulation that the investment must be made "in accordance with the laws and regulations" of the host state. If this phrase is interpreted literally, an arbitral tribunal may conclude that the nature of an investment is wholly within the discretion of the host state making those "laws and regulations," regardless of their negative impact on foreign investors.[19] If the phrase is interpreted contextually, it may lead to the opposite conclusion, that such "laws and regulations" undermine the right of foreign investors to "national treatment" in order to protect domestic markets.[20]

Further complicating the definition of an investment is the absence of an objective measure of an "investment" in China's Model BIT. However, the BIT does provide illustrations of investments, such as by distinguishing between movable and immovable property, interests in companies, contractual rights, intellectual property rights, and business concessions. Arbitral tribunals presumably can also evaluate an investment comparatively by reference to other BITs, such as by

[17] Emphasis added.

[18] See, e.g., Tony Cole and Anuj Kumar Vaksha, "Power-Conferring Treaties: The Meaning of 'Investment' in the ICSID Convention," (2011) 24 *Leiden Journal of International Law*, p. 305.

[19] Such an interpretation could conceivably produce an absurdity, contrary to the Vienna Convention on the Interpretation of Treaties. See United Nations, "Vienna Convention on the Law of Treaties," http://www.refworld.org/docid/3ae6b3a10.html.

[20] See Huan Qi, "The Definition of Investment and Its Development: For the Reference of the Future BIT between China and Canada," (2011) 45 *Revue Juridique Themis*, p. 541.

reviewing arbitration interpretations of the U.S. Model BIT 2012, which also includes an illustrative measure of an "investment."[21]

2d. *Standards of Treatment Accorded to Foreign Investors and State Defenses*

Article 2 of the China's current Model BIT delineates fundamental standards for promoting and protecting FDI, principles governing the admission of an investment, rules governing the constant protection and security of an investment, and obligations of nondiscrimination.[22] As with the interpretation of any BIT, arbitral tribunals are likely to diverge over the boundaries of "constant protection and security measures" in Article 3(1) and "national treatment" of foreign investors in Article 3(2). They are also likely to diverge over the permissible means by which China and its BIT partner states determine how to protect their national interests including on domestic socioeconomic grounds.[23]

While China is unlikely to forsake its quasi-absolute standard of sovereign immunity from claims against it in its fourth model BIT,[24] it is likely to continue to have sound economic and social reasons to preserve the boundaries it sets around its sovereign immunity, not least of all to preserve its internal governance.

Finally, Article 3(3) of China's current Model BIT stipulates for "most-favored-nation" treatment. That article is unremarkable and is incorporated into Chinese BITs generally. However, an arbitral tribunal may construe it restrictively, as occurred in the *Tza Yap Shum v. Peru* case arising from a first generation Model BIT, which is discussed in Section 3b below.[25]

2e. *Expropriation*

A controversial issue arising historically and under BITs based on China's second, 1992 Model BIT is that arbitral tribunals can determine the amount of

[21] See United States Model Bilateral Investment Treaty (2012), http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf. On the illustrative measure of "investment" in the U.S. Model BIT, see K. Scott Gudgeon, "United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards," (2012) 4 *Berkeley Journal of International Law*, p. 105.

[22] See, e.g., Wenhua Shan, Norah Gallagher, and Sheng Zhang, "National Treatment for Foreign Investment in China: A Changing Landscape," (2012) 27 *ICSID Review*, p. 120 at 229. But see the U.S.-China BIT, which subjects the admission of FDI to both MFN and national treatment clauses. See Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijuhoff Publishers, 1995), p. 49.

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

[24] See, e.g., Dahai Qi, "State Immunity, China and Its Shifting Position," (2008) 7(2) *Chinese Journal of International Law*, pp. 307–37.

[25] *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, 19 June 2009.

compensation only on the request of an investor and in the absence of an explicit provision for prompt, adequate, and effective compensation for an expropriation.[26] All other matters beyond compensation can be submitted to arbitration only with the consent of both parties. For example, a state can decline to consent to an arbitral tribunal considering the issue of expropriation on grounds of the host state's relatively absolute sovereign authority. The result is that China can significantly limit the economic risk of an investor making an arbitration claim against it under a Chinese BIT based on its 1992 Model BIT. It can, presumably, also deny its consent to "full" market-based measures of compensation. It can argue further that the quantum of compensation should reflect its level of economic development.

It would seem, albeit not with certainty, that the current 1998 Model BIT resolves the issue of whether an expropriation has occurred by referring it to investor–state arbitral tribunal. However, it is less clear whether the measure of compensation adopted should be based on a just, fair, and effective standard. As a result, it is not beyond the realm of possibility that an arbitral tribunal considering a BIT based on this model could adopt a restrictive interpretation of compensation. In particular, it could accept China's status as a developing state, notwithstanding its growing economic capacity, in declining to apply a market-based standard.

Article 4 sets out four conditions that must be satisfied in order to legitimate an expropriation. The expropriation must (i) be in the public interest, (ii) be in accordance with domestic legal procedure, (iii) be on a nondiscriminatory basis, and (iv) allow for compensation to be paid. An arbitral tribunal may restrict the scope of an expropriation, for example, by maintaining that the state's action is in the public interest under Article 4(ii), or may interpret an expropriation expansively by holding that the state has discriminated against the foreign investor contrary to Article 4(iii) and at variance with the "national standard" treatment of inbound investors.

What is also uncertain is the extent to which the requirement that an expropriation be in accordance with "domestic legal procedure" replicates a due process standard as understood by a common law lawyer. Even if a "domestic legal procedure" falls short of such due process, that deficiency arguably would be offset by the requirement that an expropriation should not be discriminatory under Article 2 and that compensation should be paid under Article 4(iv) of the Chinese Model BIT.[27]

[26] OECD, "Expropriation Laws and Review Processes," in *Policy Framework for Investors: User's Toolkit* (2011), http://www.oecd.org/investment/toolkit/policyareas/investmentpolicy.htm; M. Somarajah, "Power and Justice in Foreign Investment Arbitration," (1997) 14 *Journal of International Arbitration*, p. 3.

[27] On limitations associated with compensation in arbitration proceedings and in international investment law generally, see M. Somarajah, "The Norman Paterson School of International Affairs Simon Reisman Lecture in International Trade Policy: The Clash of Globalizations and the International Law on Foreign Investment," (2002) 10 *Canadian Foreign Policy*, p. 1.

However, China is not obliged to follow its own Model BIT in determining the scope of an expropriation and may decide to vary from it in specific investment treaties. Arbitral tribunals may also construe an indirect expropriation expansively even if the applicable BIT does not provide for it, as occurred in *Tza Shum Yap v. Peru*.[28] An arbitral tribunal could also determine the quantum of investor compensation based in part on the perceived egregiousness of the expropriation.

2f. *Dispute Resolution*

Articles 8 and 9 of China's Model BIT address dispute resolution, regulating settlement of investment disputes between contracting parties and between host states and foreign investors, respectively. Article 8 provides that home and host state parties to BITs must first attempt to settle investment dispute through consultations. Should such consultations fail, the state parties can resort to ad hoc arbitration. Finally, if arbitration is unsuccessful, the state parties may resort to the International Court of Justice. Whether this incremental approach is effective is likely to depend in part on the economic and legal capacity of the consulting states and their applicable investors, the perceived intractability of the dispute, the quantum of the loss or harm in issue, and the diplomatic channels available to the disputants. It must be noted that the scope of consultations between home and host states is limited. In particular, home states are likely to intervene on behalf of politically and economically influential outbound investors, denying the benefit of such consultations to outbound investors that lack sufficient economic or political incapacity.

Article 9(2) requires investor–state parties to engage in negotiations to resolve disputes. Should negotiations fail, an investor can apply to a competent court of the contracting party or to the ICSID.[29] Whether negotiations are economically efficient and fair is difficult to assess in the absence of a public record of such proceedings and limited public data on negotiation outcomes.[30] Chinese outbound investors may opt for domestic courts following failed negotiations, depending on the reputation and track record of the court in deciding past investor–state disputes and the time, cost, and convenience of litigating domestically, among other factors. Foreign investors in China may do the same in regard to Chinese courts.[31]

2g. *Placing China's Model BIT into Perspective*

Not all the articles in China's Model BIT are incorporated into every BIT that China negotiates. For example, the "national treatment" standard accorded to

[28] See Section 3b below.
[29] Article 13 provides for the settlement of disputes between investors and a contracting party.
[30] See J. Romesh Weeramantry, "Investor–State Dispute Settlement Provisions in China's Investment Treaties," (2012) 27 *ICSID Review*, p. 192.
[31] See Section 3 below.

foreign investors in China's current Model BIT is not invariably included in China's negotiated BITs.[32] One explanation is that China historically has resisted a "national treatment" standard. Another is that it prefers to include that standard selectively in BITs based on its discrete economic and political relationship with each BIT partner. A somewhat different explanation is that China may accord more than "national treatment" to foreign investors from BIT partner states with which it wishes to build reciprocal economic and political relations. An ideological explanation is that China may regard "national treatment" and "fair and equitable treatment" as minimalist standards of treatment devised by imperialistic states in their own image and in conflict with contemporary international law.[33]

A further observation is that China's recent BITs, reframing both state defenses and investor protections beyond its 1998 Model BIT, represent an early stage paradigm shift in China's international investment policy. For example, China's recent BITs with Mexico and Canada and its Trilateral Investment Agreement with Japan and South Korea include elaborate state defenses grounded in public health and environmental safety. These protections extend beyond China's 1998 Model BIT and are mirrored in its growing concerns about environmental polluting by domestic industries that are supported by foreign investment.[34]

It is arguable, as part of this paradigm shift, that China's BITs, including its 1998 Model BIT, provides foreign investors with as much protection as the 2012 U.S. Model BIT.[35] For example, the 2012 U.S. Model BIT reduces the scope of investor protections in its earlier 2004 U.S. Model BIT by linking a regulatory expropriation to a minimum standard of "fair and equitable" treatment.[36] The 2012 U.S. Model BIT also adopts subjective national security provisions and expansive measures by which host states can protect their public health and safety and related public interests from FDI.[37] These measures are embodied, too, in recent U.S. BITs such as in chapter 11 of the U.S.–Peru Free Trade Agreement.[38] They

[32] Wenhua Shan, Penelope Simons, and Dalvinder Singh (eds.), *Redefining Sovereignty in International Economic Law* (Hart, 2009), pp. 233–4.
[33] Meizhen Yao, *International Investment Law* (Wuhan: Wuhan University Press, 1985), pp. 334–8, cited in Shan et al., *Redefining Sovereignty in International Economic Law*, at 232. See also Shan et al., "National Treatment for Foreign Investment in China: A Changing Landscape," at 120.
[34] See above text accompanying Ministry of Foreign Affairs of Japan, above note 9.
[35] See United States Model Bilateral Investment Treaty (2012), http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.
[36] On the application of minimal standards of treatment to the "fair and equitable" standard, see Patrick Dumberry, "The Quest to Define 'Fair and Equitable Treatment' for Investors under International Law: The Case of the NAFTA Chapter 11 Pope and Talbot Awards," (2002) 3 *Journal of World Investment*, p. 657 at 663.
[37] Ibid.
[38] See *Peru Trade Promotion Agreement*, U.S.-Peru, 12 April 12 2006 (entered into force 1 February 2009), Art 10.21; *Free Trade Agreement*, U.S.-Colombia, 22 November 2006 (anticipated entry into force, 2013), Art. 10.21; *Free Trade Agreement*, Korea-U.S., 30 June 2007 (approved by Congress, 12 October 2011), Art. 11.21.

demonstrate the growing interest of the United States in exercising greater regulatory control over inbound investment to protect vulnerable sectors of its economy.[39]

China's current model BIT, arguably, has less invasive national security, public order, and financial exigency exemptions than the 2012 U.S. Model BIT.[40] It is also arguable that the definition of an "investment" in China's Model BIT is no more restrictive in its application to asset classes than the 2012 U.S. Model BIT.[41]

However, not all investor protections in China's current Model BIT are incorporated into all of its BITs, most notably in relation to "national treatment."[42] Some of its recently negotiated BITs such as with Canada include more elaborate state defenses grounded in sustainable development and public health than its 1998 Model BIT.[43] China's BITs also provide selectively for the interpretation of investment treaties through interpretative committees set up by the parties and that bind arbitral tribunals deciding investor–state disputes. If past practice is any indication, those committees are more likely to narrow than widen the scope of protection accorded to foreign investors.[44]

3. INVESTMENT CLAIMS BROUGHT AGAINST CHINA

Despite its evolving BIT program, there is no decided investor–state arbitration decision in which China was the respondent. There are also no publicized investor claims pending.

3a. *Ekran Berhad v. China*

The only recorded arbitration case against China to date is the *Ekran Berhad v. China*, brought under the rules of the ICSID Convention.[45] That claim was brought by a Malaysian construction company, disputing a revocation by a local government

[39] See generally Mark Kantor, "The New Draft Model U.S. BIT: Noteworthy Developments," (2004) 21 *Journal of International Arbitration*, p. 383.

[40] See, e.g., Jurgen Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis," (2010) 59 *International and Comparative Law Quarterly*, p. 325.

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

[42] Shan et al., *Redefining Sovereignty in International Economic Law*, chapter 9.

[43] See Shan and Gallagher, "China."

[44] For an empirical study of trends and biases in the behavior of investment arbitrators, see Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration," Osgoode CLPE Research Paper No. 41/2012, April 2012.

[45] ICSID Case No. ARB/11/15, 24 May 2011.

in the Hainan Province of China of the claimant's license to construct on 90,000 hectares of leasehold land. The case was suspended by mutual agreement of the parties two months after the claim was filed; and the dispute was settled privately two years later.[46] Had the claim proceeded to an award, it would have required an arbitral tribunal to consider the meaning of a provision in the China-Malaysia BIT under which an arbitral tribunal is required to follow "domestic legal procedure" in engaging in a direct or indirect expropriation.[47] Had the arbitration claim proceeded, the tribunal's interpretation of Article 7(4) of the China-Malaysia BIT would have been significant in determining whether it had jurisdiction to decide that the compensation claim arose from an expropriation or nationalization.[48]

It is difficult to draw a definitive conclusion from this case, given the absence of a public statement as to the reasons for the withdrawal of the claim. However, one clear inference is that inbound investors may perceive that China would be a tenacious adversary, that China could protract and raise the costs of investor claims, and that it could invoke its regulatory authority to terminate a claimant's investment in China. This is evidently the view of the EU in noting how formidable an adversary China is likely to be for inbound investors, as is discussed in the following section.

3b. *Explaining the Absence of Arbitration Claims against China*

An often-touted view is that China is adverse to litigating private claims on grounds of its sovereign immunity.[49] Beyond this general assertion, there are several explanations for the paucity of investor claims against China. First, foreign investors may not want to jeopardize their future dealings in China, as happened somewhat more drastically and differently in the Stern Hu case.[50] As a European Union Report of 7 March 2012 reflects, initiating arbitration against China is likely to be a "last resort, due to fear of retaliation."[51] Foreign investors may perceive that China is

[46] ICSID Case No. ARB/11/15, 24 May 2011, proceedings suspended pursuant to the Parties' agreement on 22 July 2011. See ICSID, "ICSID – International Centre for Settlement of Investment Disputes," http://icsid.worldbank.org.

[47] See Article 4(ii) of China's Model BIT, above Section 2.

[48] This BIT article is modeled on Article 4(iv) of China's current Model BIT providing for compensation. See below part 2(a).

[49] See Shan et al., "National Treatment for Foreign Investment in China: A Changing Landscape," at 229–35.

[50] Stern Hu, an Australian businessman of Chinese origins, was found guilty in 2010 by a Chinese court of stealing commercial secrets and accepting bribes. See Vivienne Bath, "The Chinese Legal System and the Stern Hu Case," *East Asia Forum*, 28 March 2010, http://www.eastasiaforum.org/2010/03/28/the-chinese-legal-system-and-the-stern-hu-case/.

[51] See Leopoldo Rubinacci, "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 European Commission, "Public Consultation on the Future Relationship between the EU and China," http://trade.ec.europa.eu/consultations/?consul_id=153.

well resourced to engage in costly, dilatory, and fractious arbitration proceedings. In addition, under earlier generation Chinese BITs, foreign investors could claim compensation, but could not ordinarily challenge China on the grounds that an expropriation has occurred.[52] As a result, any arbitration claim against China or a BIT partner state could fail should an arbitral tribunal decline to find that an expropriation had occurred. Alternatively, it could find a causal connection between China's regulatory process and an investor claim in determining the nature and extent of compensation, whether or not it reached a determination on expropriation.[53]

In addition, inbound investors may avoid investor–state arbitration on the grounds that China often accords foreign investors better than "national treatment."[54] This argument offsets the concern that China may grant inbound investors less than "fair and equitable" treatment or may engage in indirect expropriations that are not provided for in its BITs.[55]

Finally, China has a political image to protect, that it is both "friendly" and "fair" to foreign investors.

It is difficult to determine empirically which of these explanations account for China's limited exposure to investor–state arbitration. The general proposition that inbound foreign investors engage in dispute prevention and avoidance measures with China is difficult to verify due to their confidentiality. However, such confidentiality is even more pronounced in relation to negotiations that precede international commercial arbitration, such as before the China International Economic and Trade Arbitration Commission (CIETAC), or if disputing parties so decide, before international arbitration associations in the United States and Europe.[56] In addition, claims brought by foreign investors before Chinese courts may be treated as domestic disputes and may also go unreported. Alternatively, such cases may be tersely reported, not unlike the reports of many civil law cases. Chinese courts may also decline to hear investor claims against China or against Chinese state-owned

[52] See, e.g., *European Media Ventures v. Czech Republic*, UNCITRAL Award on Jurisdiction, 15 May 2007 (not public), paras. 43–4. But see *Renta 4 S.V.S.A et al. v. Russian Federation*, Award on Preliminary Objections, 20 March 2009, SCC No. 24/2007, para. 28. See further Gordon Smith, "Chinese Bilateral Investment Treaties Restrictions on International Arbitration," (2010) 76 *Arbitration*, p. 58.

[53] See, e.g., *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, below section II (a).

[54] See Shan et al., "National Treatment for Foreign Investment in China: A Changing Landscape," at 120; Leon E. Trakman, "Enter the Dragon IV: China's Proliferating Investment Treaty Program," UNSW Centre for Law, Markets and Regulation, 2011, http://www.clmr.unsw.edu.au/article/deterrence/public-v-private-enforcement/enter-dragon-iv-chinas-proliferating-investment-treaty-program.

[55] See Luke Nottage and Romesh Weeramantry, "Investment Arbitration in Asia: Five Perspectives on Law and Practice," in Vivienne Bath and Luke Nottage (eds.), *Foreign Investment and Dispute Resolution Law and Practice in Asia* 25 (Routledge, 2011).

[56] See Michal J. Moser, "CIETAC Arbitration: A Success Story?," (1998) 1 *Journal of International Arbitration*, p. 30.

enterprises on jurisdictional grounds, in particular that China has sovereign immunity from such claims.[57]

Each of these inferences about how arbitration may evolve out of Chinese BITs is nevertheless contestable. Even the suggestion that arbitral tribunals lack jurisdiction to hear an investor complaint under a "first-generation" BIT that provides for compensation, but not for a determination on expropriation, is subject to dispute. Reflecting this is the case of *Tza Yap Shum v. The Republic of Peru*, involving an early generation China-Peru Free Trade Agreement. In that case, the tribunal found that Peru had engaged in an expropriation, despite Peru's defense that the China-Peru BIT excluded such a determination from arbitration.[58]

Similarly, some investor–state arbitral tribunals construe most-favored-nation (MFN) protections in BITs unrelated to China expansively, requiring a host state to accord the same protection to an investor from a BIT partner state as the most favored protection accorded to investors from any other BIT partner states.[59] However, in the *Tza Yap Shum* case, the arbitral tribunal construed such an MFN clause restrictively, including by requiring that a foreign investor exhaust some local remedies.[60]

Another arbitral tribunal could construe a comparable MFN clause expansively, permitting a claimant to bring an arbitration claim without first having to exhaust local remedies. If China considers such expansive arbitration interpretation likely, it might have an economic incentive to frame investor protections such as MFN clauses in future BITs narrowly and to expand state defenses.[61] However, China cannot know in advance whether it will be the defendant in a future BIT claim or whether its outbound investors will be claimants under that BIT against China's treaty partners.

[57] See, e.g., *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* (FACV Nos. 5, 6, and 7 of 2010), in which the Hong Kong Court of Final Appeal, in a judgment regarding the ability of states to claim sovereign immunity before Hong Kong courts, decided by majority that foreign states enjoy absolute immunity from jurisdiction. See generally Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press, 2012).

[58] See *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, 19 June 2009. See also *Renta 4 S.V.S.A. v. The Russian Federation*, award on jurisdiction, Arbitration Institute of the Stockholm Chamber of Commerce, 20 March 2009; *Czech Republic v. European Media Ventures SA* [2007] EWHC 2851.

[59] On such an expansive interpretation of a MFN clause, see, e.g., *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/07, Award, 25 May 2004; *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000. On limits placed on the scope of an MFN clause in a BIT, see *Siemens v. Republic of Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

[60] See below subsection (a).

[61] On the history and development of MFN clauses, including in relation to China, see Seong Deong Yi, "Commemorative Edition in Honour of Professor Paik, Choong-Hyun on His Retirement: Articles; Most-Favoured Nation Treatment: Its Historical Developments and Concept," (2004) 11(1) *Seoul International Law Journal*.

4. ARBITRATION CLAIMS BROUGHT BY OUTBOUND CHINESE INVESTORS

One would expect that, with the significant increase in outbound investments by Chinese investors, there might be a comparable increase in claims brought by Chinese investors against China's partner BIT states. Why such a symmetrical increase has not occurred is analyzed in this section.[62]

An initial caution is to recognize the limited global number of specialized investor–state arbitration cases generally compared with international commercial arbitration. For example, the global arbitration caseload under the ICSID has grown from a single case in 1972 to approximately ten cases in 1990, reaching thirty-eight new cases filed between January and July 2012.[63] However, the number of ICSID cases filed annually is still limited compared with international commercial arbitration cases. For example, 1,435 claims were filed with CIETAC, 994 cases filed with the International Center for Dispute Resolution of the American Arbitration Association, and 795 cases with the International Chamber of Commerce.[64]

Nevertheless, claims by Chinese outbound investors brought against China's BIT partner states have grown. While a pattern of claims by outbound Chinese investors is not yet discernible, such claims may have a material impact on the investment practices of states and investors, depending on the issues involved and the quantum of compensation in issue. Should arbitration be initiated by China's state-owned enterprises against China's BIT partners, it is likely to compound existing legal, economic, and political issues.

Section 4a that follows considers the potential shift in arbitration claims initiated by Chinese outbound investors against China's BIT partner states and the extent to which this shift depicts an instrumental change in China's international investment policy.

4a. *Tza Yap Shum v. Peru*

In the 2011 ICSID case of ***Tza Yap Shum v. Peru***, a Hong Kong resident brought a claim against the Peruvian government.[65] According to the claim, the investor,

[62] For background discussion of these issues, see Michael Moser, *Managing Business Disputes in Today's China: Duelling with Dragons* (Kluwer Law International, 2007).

[63] See ICSID, "The ICSID Caseload – Statistics (2012)," http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics.

[64] Ibid.; see also Andrea M. Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012).

[65] ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, Award on Merits, 7 July 2011. See also Nils Eliasson, "China's Investment Treaties: A Procedural Perspective," in Bath and Nottage, *Foreign Investment and Dispute Resolution Law and Practice in Asia*.

in purporting to expand a fish factory in Peru, alleged that the Peruvian taxation authority had breached the expropriation provision in the first generation China-Peru BIT of 1994[66] by investigating his business and levying liens on his firm's bank accounts that "ended up destroying [his] business operations and economic viability of [his] venture."[67] Tza Yap Shum claimed that these actions constituted an "indirect expropriation."[68] The case raised jurisdictional issues, namely, whether a Hong Kong national was qualified to rely on investor protections under the Peru-China BIT,[69] whether a prescribed waiting period of six months for amicable settlement had taken place,[70] and whether the claimant was required to exhaust local remedies before proceeding to investor–state arbitration.[71] The tribunal also considered the significance of an MFN clause in Article 3(2) of the China-Peru BIT.[72]

Peru lost the case. The tribunal decided that the claimant, as a resident of Hong Kong, was a national of the People's Republic of China for the purpose of bringing an ICSID claim.[73] It noted further that interim measures imposed by the tax authority of Peru were arbitrary in failing to comply with Peru's own internal procedures under the China-Peru BIT. However, in determining that Peru had violated its "internal procedures," the tribunal did not delineate the scope of such a "domestic legal procedure" as a denial of due process of law as a common lawyer would conceive of it.[74]

The tribunal adopted an activist stance in ruling that the provision in Article 8(3) of the Peru-China BIT "involving the amount of compensation for expropriation" included a determination whether the property was actually expropriated.[75] In so deciding, the tribunal construed the China-Peru BIT expansively. This ruling is all that more significant in light of China's efforts in its early BITs to inhibit arbitration tribunals from considering whether an expropriation had occurred.[76]

In contrast, the tribunal construed the specific wording of Article 8(3) governing MFN treatment restrictively. The treatment that Peru had accorded to Tza Yap Shum fell below the MFN treatment accorded to investors from any other BIT partner state that ought to have served as a further basis for not requiring the investor to exhaust local remedies.[77]

[66] See Peru-China BIT, above note 38, Art. 1(2)(a).
[67] *Tza Yap Shum*, above n. 65, §31.
[68] Ibid., §31.
[69] Ibid., §32.
[70] Peru-China BIT, above n. 47, chapter 10, Art. 126.
[71] ICSID Convention, Regulations and Rules, Art. 26.
[72] Peru-China BIT, above n. 38, Art. 3(5). See also Eliasson, "China's Investment Treaties: A Procedural Perspective."
[73] See *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 12 February 2007.
[74] *Tza Yap Shum*, above n. 65, §218.
[75] Ibid. § 88.
[76] See above, Sections 2a and 2b.
[77] On the general applicability of an MFN clause, see *Renta 4 S.V.S.A. v. The Russian Federation*, SCC Case No. ARB V024/2007, at §101; *RosInvestCo UK Ltd v. The Russian Federation*, SCC Case No. ARB V079/2005, at §130.

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In its decision on the merits on 7 July 2011, the tribunal awarded the claimant more than $700,000 in damages and $200,000 in interest.[78] Peru filed to have the award annulled, which is under consideration as of 15 November 2014.[79] The monetary award for damages in this case is not significant. However, the decision demonstrates the extent to which arbitral tribunals may adopt both literal and contextual methods of interpreting an early generation BIT. While the tribunal interpreted that BIT expansively to include the nature of the expropriation, it construed the MFN clause restrictively.

4b. *Heilongjiang v. Mongolia*

In *Heilongjiang v. Mongolia*,[80] a Chinese investor in a freight railway system operating between Mongolia and China brought a claim against Mongolia under the China-Mongolia BIT. It alleged that Mongolia's plan to construct a competing freight railway service to Russia constituted an expropriation. Mongolia's decision to build the announced railway to Russia reflects its interest in reducing economic dependence on China and its efforts to promote its economic relations with Russia, a country with which Mongolia had a longstanding legal, economic, and political relationship during the Soviet era.

This case was filed under an early generation Chinese BIT that does not provide for an arbitral tribunal to determine expropriation, but to provide for compensation only. The case is pending before the Permanent Court of Arbitration at the time of writing.[81] What is conjectured at this time is that an investor–state arbitral tribunal appointed under the UNCITRAL rules would need to decide whether Mongolia had engaged in an indirect expropriation of the claimant's property under the applicable BIT, or whether Mongolia's national interest defenses ought to prevail notwithstanding that claim.

The case highlights the extent to which Mongolia's concern to reduce its economic dependence on China in the national interest reinforces Mongolia's public policy defense that it has denied a requisite standard of treatment to an inbound Chinese investor. The issue also raises a double-edged legal issue, whether Mongolia's defense constitutes a legitimate exercise of state sovereignty and, by converse reasoning, whether China's invoking of state sovereignty as a defense would lead to a comparable determination.

[78] *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Final Award on the Merits, 7 July 2011, summary available at Kenneth Juan Figueroa, "*Tza Yap Shum v. The Republic of Peru* (ICSID Case No. ARB/07/6) Award," http://www.italaw.com/documents/TzaYapShumAwardIACI.Summary.pdf.

[79] On the ICSID proceedings to date on this case, see ICSID, "Procedural Details: *Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6)," https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C96&actionVal=viewCase.

[80] *China Heilongjiang International Economic and Technical Cooperative Corp. et al. v. Mongolia*, PCA Case (China-Mongolia BIT 1991), http://www.pca-cpa.org/showpage.asp?pag_id=1378.

[81] Ibid. See Article 8 of the China-Mongolia BIT. See also Article 4(iv) of China's Model BIT.

4c. *Ping An v. Belgium*

The most recent arbitration case was brought in 2012 by Chinese insurer Ping An against Belgium. It is potentially the leading arbitration case involving a Chinese outbound investor to date.

Ping An, China's second largest insurer, lost approximately $3 billion when failed Belgo-Dutch bank Fortis was nationalized and sold during the 2008 financial crisis. The collapse of Fortis Bank and its subsequent sale significantly diminished Ping An's interest in the European financial services of the bank. Ping An brought the claim under the early generation China-Belgian/Luxembourg Investment Agreement, signed in 1984.[82]

While comprehensive details of the case are not yet publicized, beyond the names of the appointed arbitrators, this case is significant. In particular, it is the first mainland Chinese company filing a claim under the ICSID Convention. It is the first claim by a Chinese national against the government of a developed country. It is also a substantial claim.[83]

The case is likely to raise important issues regarding the nature and legal significance of the Belgian nationalization of Fortes bank, the applicable standards of protection accorded to Ping An under the applicable first generation BIT, and the economic exigencies invoked by Belgium as a defense to that claim.

4d. *Implications of Arbitration Claims by Chinese Investors Abroad*

No case involving a Chinese outbound investor, other than the pending Ping An claim against Belgium, has a substantial claim for compensation. However, the Ping An case may represent a turning point in the readiness of large Chinese companies to bring substantial claims against China's BIT's partners. This poses a problem for China unless it continues to craft a paradigm shift from protectionism toward inbound investors to liberalization of international investment significantly in favor of outbound investors. While China has a particular economic incentive to promote claims by its outbound state entities against its BIT partner states, it has a countervailing economic interest in not promoting corresponding claims by inbound investors into China. In addition, China has an economic interest in promoting claims by its outbound state-owned enterprises against its BIT partner states, while resisting such claims from inbound state-owned enterprises. Should

[82] See Agreement between the Government of the People's Republic of China and the Belgian-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, Brussels, 4 June 1984, entered into force 5 October 1986, 1938 U.N.T.S.305.

[83] David A. R. Williams (New Zealand) was appointed as arbitrator by the Claimant. Philippe Sands (British/French) was appointed as arbitrator by the Respondent. See *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29.

arbitral tribunals deny the claims by Chinese state enterprises against foreign states, significantly on grounds that such enterprises represent the Chinese state, China would have an incentive to "privatize" those state enterprises that are most vulnerable to inbound arbitration claims. However, doing so may conflict with China's domestic economic and political incentive to preserve state ownership of such enterprises. An additional complicating issue is the prospect of tribunals maintaining that, while Chinese state enterprises are distinctive to China and its satellite states, many Western-style governments have state entities that engage in FDI on behalf of their home states. [84]

5. SCOPE FOR A NEW CHINESE MODEL BIT

It is conjectural to what extent a fourth Chinese model BIT will lead to a paradigm change in China's Model BIT program. Much has changed on the global FDI landscape since China devised its current Model BIT fifteen years ago that supports such a paradigm shift. Newer BIT models, in the United States and also in Asia, provide more elaborate state defenses to investor claims. This is typified in the NAFTA case of *Methanex v. United States of America*,[85] in the U.S. Model Treaties,[86] and in the India-Singapore Economic Cooperation Agreement.[87] Each treaty also includes defenses to investor claims on such extensive grounds as public health, public morality, social welfare, and sustainable development.[88] In addition, some ICSID tribunals have accommodated these state defenses,[89] holding that they

[84] See, e.g., Thomas Cottier and Petros C. Mavroidis (eds.), *State Trading in the Twenty-First Century* (University of Michigan Press, 1998), available at http://muse.jhu.edu/books/9780472026456.

[85] See *Methanex Co. v. United States*, Final Award, 7 August 2005, http://www.state.gov/documents/organization/51052.pdf. See also Courtney Kirkman, "Fair and Equitable Treatment: *Methanex v. United States* and the Narrowing Scope of NAFTA Article 1105," (2002) 34 *Law and Policy in International Business*, p. 343.

[86] See U.S. Trade Representative, "2012 U.S. Model Bilateral Investment Agreement," http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf. This replaces the Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, "American 2004 Model Bilateral Investment Treaty," http://www.state.gov/documents/organization/117601.pdf.

[87] See Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore, http://commerce.nic.in/ceca/toc.htm.

[88] See Andrew Newcombe, "General Exceptions in International Investment Agreements," BIICL Eighth Annual WTO Conference Draft Discussion Paper, May 2008, p. 4.

[89] A series of cases illustrate these variable conceptions of "fair and equitable" treatment. See *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award on the Merits, para 64 (Nov. 132000), http://italaw.com/documents/Maffezini-Award-English.pdf; *MTD Equity Sdn Bhd & MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, para. 178 (25 May 2004), http://italaw.com/documents/MTD-Award.pdf; 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," 1(4) (October 2004) *Transnational Dispute Management*.

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do not constitute the denial of "fair and equitable treatment" or that a signatory state has not exceeded the limits of the "margin of appreciation" in protecting its public interests over those of foreign investors in arbitration cases involving EU members.[90]

It is conceivable that China will reframe its fourth Model BIT to highlight a paradigm shift, from a reticence to liberalize its international investment regime to a willingness to reach a unique accommodation between Western liberal values and preserving China's distinctiveness as an advancing socialist state. In accommodating Western liberal values, China may continue to liberalize its international investment regime, BIT by BIT, even as Western countries have retreated from such liberalization.[91] China is also increasingly likely to frame an "investment" in its BITs generally to reflect the interests of its outbound investors. However, it is likely to define an "investment" expansively but on a selective basis, depending on its BIT partners and its inbound and outbound investment traffic.

In contrast, China may adopt a protective public policy stance in response to the economic and social impact of inbound investment on its national security, public health, safety, and the protection of the environment. This perceptible early-stage paradigm shift in China's BITs policy will ultimately test its commitment to industrial regulation within an advancing socialist society, balanced against regulatory models by which the West has liberalized FDI.[92]

Regarding dispute avoidance, China is likely to retain Article 8 in its current Model BIT, providing for state consultation, using it to intervene selectively on behalf of outbound investors. As for investor–state dispute resolution, China is likely to continue to provide investor–state parties with a choice between submitting an investor–state dispute to domestic courts or to arbitration. Those investors that opt for domestic courts are likely to pay particular regard to the political risks of submitting claims to the courts of particular BIT partner states, including in light of "domestic legal procedures" and the "rule of law."

China faces a formidable barrier in reforming its Model BIT program, in not being perceived as engaging in double standards. If it regulates domestic investors in industries that impact on public health and environmental safety standards, while according foreign investors preferential treatment, it risks being accused of applying a double standard by granting foreign investors more than national

[90] See generally Onder Bakircioglu, "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases," (2007) 8 *German Law Journal*, p. 711; Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?," (2005)16 *European Journal International Law*, p. 907.

[91] See Yilian et al., "National Treatment for Foreign Investment in China: A Changing Landscape." See also Joseph Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy* (W. W. Norton, 2010) (providing an account of these recessionary forces and their global consequences).

[92] See generally Björn A. Gustafsson, Li Shi, and Terry Sicular, *Inequality and Public Policy in China* (Cambridge University Press,2010).

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treatment. If it regulates domestic and foreign investors alike, it encourages foreign investors to withdraw from China to avoid being subject to costly regulation in China's domestic interest. A likely paradigm shift in China's domestic regulatory regime is its growing recognition of the need to accelerate its public health and environmental safety requirements if it is to advance beyond its traditional standing as a developing state. While foreign investors may envisage China's regulatory imperatives as unduly invasive, China is likely increasingly to apply these defenses to domestic and foreign investors alike, affirming its application of "national treatment" to both.

In conclusion, China's future Model BIT is likely to be contentious, but arguably no more contentious than the model BITs of the EU and the United States that have shifted perceptibly toward FDI regulation in their national interests. If China adopts a BIT-by-BIT approach, varying from its Model BIT, dissension is likely to revolve around whether it grants preferential treatment selectively to investors from particular partner states, gives greater market share to investors from wealthy states,[93] undermines human rights,[94] destabilizes local and regional investment markets, and treats foreign investors in similar cases unequally.[95] Variations among BITs are also likely to be challenged for fragmenting investment treaty jurisprudence, for rendering the legal effect of regulatory action by host states uncertain, and for undermining the security of FDI.[96]

However, it would be short-sighted to expect China to adopt higher standards of investor protections and lower thresholds of state defenses in future model and negotiated BITs, from which some Western countries have perceptibly retreated.[97]

[93] By way of contrast, see Kevin P. Gallagher and Elen Shrestha, *Investment Treaty Arbitration and Developing Countries: A Re-Appraisal* (Global Development and Environmental Institute, Working Paper No. 11-01, 2011), http://www.ase.tufts.edu/gdae/Pubs/wp/11-01TreatyArbitrationReappraisal.pdf. See also Bretton Woods Project, ICSID – International Centre for Settlement of Investment Disputes, http://www.brettonwoodsproject.org/item.shtml?x=537853 ("Reasons for the vocal and mounting critiques against ICSID peg around its governance, its biasness in favour of rich countries and its role in crisis").

[94] See Moshe Hirsch, "The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective," in Tomer Broude and Yuval Shany (eds.), *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing, 2011), pp. 211–14; Sara L. Seck, "Conceptualizing the Home State Duty to Protect Human Rights," in Karin Buhmann et al. (eds.), *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (Palgrave Macmillan, 2011), p. 34.

[95] See James O. Gump, "The West and the Third World: Trade, Colonialism, Dependence, and Development" (review), (2000) 11 *Journal World History* 396; D. K. Fieldhouse (ed.), *The Theory of Capitalist Imperialism* (Longmans, Green and Prentice Hall, 1967).

[96] See J. W. Salacuse and N. P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," (2005) 46 *Harvard International Law Journal*, p. 67.

[97] On China's shifting position in regard to investment arbitration, see Vivienne Bath, "The Quandry for Chinese Regulators: Controlling the Flow of Investors into and out of China," in Bath and Nottage, *Foreign Investment and Dispute Resolution Law and Practice in Asia*.

6. CHINA'S INFLUENCE ON THE UNIFORMITY OF INVESTMENT TREATIES

While China has become a key player in the global BIT regime, its contribution to investment governance is likely to remain elusive, despite efforts to ground international investment practice in unifying principles of law.[98] So long as arbitral tribunals do not have to agree on the literal or contextual interpretation of words in BITs, the unification of BIT jurisprudence, whether led by China or not, is unrealistic.[99] First, investment treaty jurisprudence will often be circumscribed by the words used in different treaties.[100] Second, tribunals will interpret different words in different treaties differently, and even the same words in the same treaties differently. Third, arbitral tribunals will not subscribe to arbitral precedent as lawyers commonly conceive of judicial precedent.[101]

Greater uniformity in international investment law might stem from the global community of states eventually endorsing a new multilateral investment agreement (MIA). But it is difficult to fathom how China would lead such a unification movement, given the disincentive of states, including China, to surrender their country-tailored BITs and FTAs for a multilateral treaty that would compromise some of those benefits.[102] China also has sound economic and political reasons to liberalize its BITs selectively, to protect its outbound investors from invasive regulation by particular BIT partner states, and to protect itself from inbound investors from other BIT partners.

A further impediment to the growth of uniform international investment jurisprudence is that investor–state arbitration awards that are determined ad hoc are difficult to predict, and if the case reasoning is limited, they may not be transparent.[103] The result of proliferating BITs, not limited to Chinese BITs, is an even

[98] On the development of such international investment norms, see Foreign Investment Review Board, *Current International Investment Issues*, OECD Investment Committee, http://www.firb.gov.au/content/international_investment/current_issues.asp?NavID=60.

[99] See generally Dolzer and Stevens, *Bilateral Investment Treaties*, pp. 89–91.

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

[101] See, e.g., Christoph Schreuer and Matthew Weiniger, "A Doctrine of Precedent?," in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), p. 1188 (discussing the absence of binding precedents, at least in principle, in international investment law).

[102] See generally Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (New York: Oxford University Press, 2012), p. 1; Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009), chapters 1 and 2.

[103] See generally Jason W. Yackee and Jarrod Wong, "The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns," in Karl P. Sauvant (ed.), *Yearbook on International Investment Law and*

more varied and potentially inconsistent interpretative jurisprudence[104] that will accentuate rather than allay disparate arbitration decisions.[105] Arbitral tribunals will need to balance the reasonable expectations of inbound investors into China against the "legitimate" defenses of states in respect of which arbitral tribunals may well disagree, such as over the scope of an expropriation.[106] Arbitral tribunals will also face interpretative challenges, such as in determining the claim by inbound investors that China has accorded them less than "national" or "fair and equitable" treatment compared with the treatment of state-owned enterprises.[107] Similar challenges will arise in delineating the parameters of doctrines such as the "margin of appreciation" in interpreting BITs between China and the EU.[108] Arbitral tribunals will also encounter difficulty in deriving a uniform body of customary law from divergent treaty interpretations.[109]

Further complicating the development of a uniform jurisprudence are divergent conceptions of property law that proliferate across mainstream legal systems.[110]

Policy 2009–2010 (Oxford University Press, 2010) (discussing transparency in international investment arbitration).

[104] On the varied and inconsistent interpretations of investment treaties, see Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis," p. 325 (Kurtz identifies three different methodologies of interpretation). But see William W. Burke-White and Andreas von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties," 48 (2008) *Virginia Journal International Law* 307.

[105] On inconsistent arbitration decisions in the CME/Lauder cases against the Czech Republic, see *Lauder v. Czech Republic (Final Award)*, ad hoc (UNCITRAL Arbitration Rules, 3 September 2001); *CME Czech Republic BV v. Czech Republic (Partial Award)*, ad hoc (UNCITRAL Arbitration Rules, 13 September 2001, 14 March 2003); (2003) 62 IIC.

[106] On such "legitimate expectations," see, e.g., *Saluka Investments BV (The Netherlands) v The Czech Republic (Partial Award)* (arbitration under the UNCITRAL Rules, 17 March 2006), para. 304, available at http://italaw.com/documents/Saluka-PartialawardFinal.pdf; *International Thunderbird Gaming Corporation v. The United Mexican States (Final Award)* (Arbitration under the UNCITRAL Rules, 15 November 2004), para. 100, available at http://www.state.gov/documents/organization/38789.pdf.

[107] Illustrating these variable conceptions of "fair and equitable" treatment, see *Maffezini v. Kingdom of Spain (Award on the merits)* (ICSID Arbitral Tribunal, Case No. ARB/97/7, 13 November 2000), para. 64, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC566_En&caseId=C163; *MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile* (ICSID Arbitral Tribunal, Case No ARB/01/7, 25 May 2004), para. 178; Laird, "*MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile*: Recent Developments in the Fair and Equitable Treatment Standard."

[108] On the "margin of appreciation" doctrine, see, e.g., Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?," 907.

[109] On the contest between customary and treaty law governing international investment, see, e.g., Campbell McLachlan, "Investment Treaties and General International Law," (2008) 57 *International & Comparative Law Quarterly*, p. 361; Stephen Schwebel, "The Influence of Bilateral Investment Treaties on Customary International Law," (November 2005) 1 *Transnational Dispute Management*, p. 1.

[110] See, e.g., Dolzer and Schreuer, *Principles of International Investment Law*, chapters 1 and 2 (discussing the alleged foundations of investment law in contract and property); Luzius Wildhaber and Isabelle Wildhaber, "Recent Case Law on the Protection of Property in the

Accentuating that difficulty is the need for arbitral tribunals to accommodate China's particular blend of customary law and civil law of property among already diffuse conceptions of property in international investment law.[111]

A disheartening response to these concerns is the observation that ICSID annulment proceedings are "not designed to bring about consistency in the interpretation and application of international investment law."[112] These obstacles to a uniform investment treaty law notwithstanding, Chinese BITs may cumulatively add a textured layer of arbitration jurisprudence to an already multilayered and sometimes inconsistent body of laws.[113] However, that influence will be hampered by the tendency of arbitral tribunals to construe BIT language restrictively and to engage in incremental, not transformative legal change.[114]

These challenges to a uniform investment treaty law are likely to be partially offset by efforts to unify BITs, perhaps not unlike the EU's efforts to limit the proliferation of BITs concluded by its member states.[115] However, realism suggests against placing too much faith in regional integration that conflicts with the discrete economic and political interests of member states.

7. CONCLUSION

China's influence over the development of investment treaty law is likely to grow. However, China's influence will depend on the kinds of BITs it negotiates, the

European Convention on Human Rights," in Christina Binder et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009), p. 657.

[111] On such differences, see, e.g., *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco* (Decision on Jurisdiction), ICSID Arbitral Tribunal, Case No. ARB/00/4, 23 July 2001; (2003) 42 ILM 609. See also Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law* (Kluwer, 2012) (see esp. chapter 4 for a discussion of property in investment treaty context).

[112] See *M.C.I. Power Grp. L.C. & New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6, Annulment Decision, para 24 (19 October 2009); see also *Hochtief AG v. Arg.*, ICSID Case No. ARB/07/31 (7 October 2011) (providing different interpretations of a treaty in the same case in the dissent of Christopher Thomas, Q.C.).

[113] For commentaries on selected model BITs, see Brown, *Commentaries on Selected Model Investment Treaties*. On attempts to redress consistencies in international investment arbitration, see Rainer Hofmann and Christian Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration* (Nomos, 2011).

[114] For concerns that investment arbitrators who are commercial, not public lawyers will pay less attention to the public policy concerns of developing host states, see generally Stephan W. Schill (ed.), *International Investment Law and Comparative Public Policy* (Oxford University Press, 2010); Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007), pp. 122–51; see also August Reinisch, "How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?," (2011) 2 *Journal International Dispute Settlement*, p. 115 (discussing the restrictive construction of investment agreements).

[115] On the Report to the European Parliament on Investor-State Dispute Settlement to Which the European Union Is a Party, see http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0124&language=EN#title1.

treaty language used, their distinctiveness, the extent to which other countries replicate them in whole or part, and the interpretation that tribunals accord to them in discrete cases. Much will also depend on the economic and political stature of China and its BIT state partners.

The reality is that investor protections and state defenses embodied in BITs and FTAs will inevitably reflect not only the cultural and ideological predilections of the countries negotiating them, not least of all China, but also the predilections of those interpreting them. Given this, how arbitral tribunals will construe China's future BITs in the development of international investment practice is likely to remain unclear in the immediate future. The meaning of an "investment," an "expropriation," "fair and equitable treatment," and the "protection of the environment" will depend somewhat on the meaning arbitral tribunals give to them, including how other arbitral tribunals have interpreted identical or similar wording in the past.

No matter how economically dominant China may become over global FDI, much will also depend on the extent to which arbitral tribunals develop a homogeneous body of investor–state treaty jurisprudence based on principles, standards of investor treatment, and state protections not limited to those embodied in China's Model BITs. In support of such homogeneity is the often touted positivist view that a priori principles of law ought to determine the meaning and application of treaty language relating to investor protections and state defenses and that arbitral tribunals ought not to reframe the meaning of treaty language retroactively on geopolitical grounds. However, it is contestable whether arbitral tribunals can realistically ignore the geopolitical power of dominant states such as China in interpreting BITs and FTAs ex posteriori according to their purpose and regulatory effects. It is in this regard that China's effort to accommodate Western liberal values weighed against its demands to reinvent itself as a sophisticated planned economy is likely to foster a new paradigm. That paradigm, in turn, will influence the direction of international investment law well beyond China. The likely result will be that "ownership" of the evolving paradigm directed at rebalancing the regulatory expectations of states and according free market protection to foreign investors increasingly will be shared by the global community of states. China is likely to be a significant architect of this evolving paradigm. However, norms of FDI regulation that were unique to China historically are likely to decline in their distinctiveness, as China's architecture evolves into a global norm, in contradistinction to being an exception to the liberal norms of FDI propagated by the West in decades past.

Please put these references in Italics.