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Adopting and Adjusting to the Development of the Investor-State Dispute Settlement Mechanism in China's Recent Bilateral Investment Treaty Negotiations with the European Union

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ABSTRACT

The Investor-State Dispute Settlement (ISDS) mechanism has been widely used in international treaty-making and invoked many times in cross-border dispute resolution. ISDS is a system where a foreign investor can bring claims against a host state for its discriminatory acts upon the investor. As China pursues a new level of outbound investment in the last decade, the ISDS mechanism will apply particularly in the context of investment disputes involving Chinese investors and foreign countries. This note will examine the evolution of ISDS clauses in China's Bilateral Investment Treaties (BITs), especially with the European Union (EU), as well as these clauses' implications for Chinese investors seeking remedies under the ISDS clauses. It will start by exploring the context in which the discussion of ISDS arises and some of the main criticisms raised against ISDS clauses in recent years. It will then assess ISDS clauses in China's BITs and some challenges when consolidating different versions of ISDS provision, followed by a case study of arbitration between Chinese investors and Belgium. When seeking to challenge a state's action that violates an investor's rights and interests, ISDS provides limited remedial protection to investors and presents disadvantages to Chinese investors that the Chinese government should be aware of while drafting BITs with

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the EU. In its ongoing and future treaty negotiations, China should provide a clear-lined arbitral scope, limit uncertainties in its treaty language, and install mechanisms to remedy the lack of transparency in the ISDS system, all while taking into account the importance of its state interests.

I. Introduction of ISDS

A. Background

Historically, a foreign investor has two ways to seek a remedy when the host state interferes with an investment: either through a local court or administrative body in the host state or through espousal of a claim of diplomatic protection from the investor's home country. Neither channel is perfect, and in many occasions both have been ineffective in redressing investors' problems.[1] By contrast, ISDS provides a fair opportunity for foreign investors to challenge state actions.

ISDS is widely used in many international treaties and investment agreements. It is a mechanism for settlement between investors and host states for disputes arising from state actions that affords both parties fair hearings before a neutral, impartial tribunal.[2] ISDS serves as a more flexible settlement device and affords readily enforceable remedies to private parties in international investment disputes.[3] Both parties have control, to some extent, over the dispute resolution process. For arbitrations administered by the International Center for Settlement of Investment Disputes (ICSID), parties have the freedom to choose among arbitrators provided by ICSID.[4]

Because of an emerging need for a neutral forum for investor-state cases, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States established ICSID in 1966.[5] ICSID is

1. The United Nations Conference on Trade and Development UNCTAD), *Investor-State Dispute Settlement UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2014), 23.
2. *Id.* at 13.
3. *Id*.
4. *See The ICSID Caseload Statistics (Issue 2017-2)*, ICSID Website, https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (last visited Jan. 27, 2018) (more than 70% of arbitrators were selected by the parties).
5. *About ICSID*, ICSID Website, https://icsid.worldbank.org/en/Pages/about/default.aspx (last visited Jan. 27, 2018).

considered to be an independent and depoliticized institution for international investment dispute settlement.[6] Some other popular forums designated by International Investment Agreements (IIAs) and BITs other than domestic courts or administrative bodies and domestic arbitration committees include the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC), and the Stockholm Chamber of Commerce (SCC).

More than half of ICSID cases involve BITs that give rise to ICSID jurisdiction.[7] Some standard provisions that are central to the ISDS clauses include consent to arbitration, available arbitration forums, and the types of investor-state claims covered by ICSID.[8] Most respondents in ISDS cases consist of developing countries, while there is also an increasing trend of cases being brought against developed countries.[9]

In essence, ISDS provisions in BITs provide a tool that states can use to guarantee remedies for investors if any dispute arises. There are two major approaches in constructing the ISDS clause in treaties. The traditional approach essentially allows the tribunal to review a broad range of ISDS claims.[10] The other approach exhibits a recent development which limits the scope of ISDS claims with the goal of affording a more predictable and effective process for parties involved.[11] As explored further below, this difference has fueled problems of inconsistent interpretations of ISDS provisions.

B. Criticisms of ISDS

1. Difficult in conforming to the volatility in state policy

During the past few decades, ISDS has been widely criticized for its institutional deficiencies. Since many investors have brought claims against states' public policies, a factor that is often unpredictable before the investments take place, ISDS cannot conform to the changing nature of public policy in host states.[12] Relatedly, volatility in the economic and political environment, such as the financial crisis of 2008 create additional problems. For example, in *Ping An v. Belgium* (more detailed discussion in

6. *Id.*
7. *Supra* note 4.
8. *Id.* at 30.
9. *Id.* at 1920.
10. *Supra* note 1, at 16.
11. *Id.*
12. *Supra* note 1, at 13.

Section III below), due to the financial crisis, the Belgian government executed a state rescue plan tantamount to an expropriation that cost Ping An Insurance a large portion of its investment in Belgium.[13] The unpredictability of the market, among so other factors, may drastically change a state's standing on a certain policy, and is often hard to foresee by foreign investors.

2. Lack of predictability and coherence in decisions

Unlike judicial decisions, arbitral awards are usually confidential. Sometimes international arbitral awards are decided only on jurisdictional grounds and not on the merits of the case.[14] The awards are occasionally found to be inconsistent with the judgments in previous awards due to different or even contradicting interpretations of treaty provisions, which ultimately lead to difficulty in predicting ongoing and future cases.[15] Different tribunals interpret the same treaty language or similar facts differently.[16] There is also an increasing trend of structuring investments under multiple investment treaties and forum shopping, which creates more likelihood for inconsistent decisions.[17]

This lack of consistency unavoidably impacts the credibility of the arbitral tribunals, and lead parties to question the effectiveness and fairness of the ISDS mechanism. However, investors can challenge the award according to the ICSID Convention through the annulment process.[18] [19] But non-ICSID awards, such as those under the New York Convention, do

13. Ping An Life Insurance Company of China Ltd. and Ping An Insurance (Group) Company of China Ltd. v. Kingdom of Belgium, ICSID Case No. ARB/12/29, Award (2015).

14. *See* ICSID Convention art. 41(2): "Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

15. *Supra* note 1, at 27.

16. S. Franck, *Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1545–46 (2005).

17. *Id*. at 1546.

18. *Id*. at 1547.

19. ICSID Convention art. 52(1): upon receipt of party's request, an *ad hoc* committee of three persons may fully or partially annul an award on the basis of one of more of the following grounds: a) the Tribunal was not properly constituted; (b) the Tribunal manifestly exceeded its powers; (c) there was corruption on the part of a Tribunal member; (d) there was a serious departure from a fundamental rule of procedure; or (e) the award failed to state the reasons on which it is based.

not allow an annulment procedure, and an investor may be left to seek a court order to set aside or vacate the award.[20]

Furthermore, there is no immediate remedy to cure an ill-decided award or an inefficient appellate mechanism.[21] Even though claimants sometimes can ask a court to convert the arbitral award into a formal judgment, many courts, especially in the U.S., are often deferential to the arbitral tribunal. Therefore, some have argued for an institutional reform of the arbitration system that incorporates either an internal review and guidance system, or an appellate system.[22] However, both proposals cast doubts on the difficulty of designing and implementing such systems, and whether they would accommodate the variances and complexities from different treaties.

3. Lack of transparency in judgment-making and selecting tribunal members

So far, 64 percent of the ICSID cases were decided by arbitral tribunals, while the remaining cases were settled or discontinued.[23] Many arbitrations are performed on an ad hoc basis, and arbitrators are sometimes questioned for the sufficiency of their knowledge and experience. Some criticize tribunals for their expansion of its arbitration jurisdiction when interpreting treaty clauses.[24] When facing erroneous decisions or an annulment, many cases are not subject to appellate review. The only remedy left for investors then is to bring another action.

In addition, not all awards are made public, and many proceedings are confidential unless parties agree to waive confidentiality.[25] Because many investor-State disputes involve public welfare and public interest, private arbitral proceedings has raised concerns over lack of transparency, and has been one of the main criticisms against the ISDS system.[26] Therefore, publication of awards might be one way to facilitate a more transparent

20. *Id*. at 1549-50.

21. G. Kaufmann-Kohler & M. Potestà, *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction for a permanent investment tribunal or an appeal mechanism?* CIDS – Geneva Center for International Dispute Settlement, ¶ 22 (June 3, 2016), http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf.

22. *Supra* note 15, at 1601.

23. *Supra* note 1.

24. U. Grušic, *The Evolving Jurisdiction of the International Centre for Settlement of Investment Disputes,* J. WORLD INVE. & TRADE, vol. 10, no. 1, 100 (Feb. 2009).

25. *Supra* note 1, at 13–14.

26. *Supra* note 19.

arbitral processing system and provide a legal framework which the public perceives as more reliable and consistent.

Another issue involving arbitral tribunals lies in their appointment procedure. The appointment of arbitrators is questioned largely for its lack of impartiality in the appointing process.[27] ICSID arbitrators are subject to ethical rules; nevertheless, there has been an increasing amount of challenges to their impartiality and ability.[28] Critics note a rising concern over conflicts of interest, as some arbitrators are repeatedly appointed as tribunal members, and at the same time hired as counsels for related parties in other proceedings.[29]

4. Relative difficulties faced by small enterprises and individual investors

Small- and medium-sized companies and individuals accounted for half of the class brought under international arbitrations.[30] Some scholars who researched ISDS cases, however, found that the average cost of each case is more than USD 8 million per party, and can exceed USD 30 million.[31] This figure is an enormous barrier to bringing claims for small- and medium-sized companies and individuals. For host states, it is also a huge expense that must somehow come from government budgets and therefore burdens small, developing countries. Some cases are not only expensive but take a long time before the arbitral tribunals render an award.

Meanwhile, foreign investors from outside certain economic regions might face even greater challenges to bringing actions against states. For example, an investor from the U.S. might have fewer advantages than an investor from Germany if suing France. In fact, according to a report by United Nations Conference on Trade and Development (UNCTAD), EU countries who have been sued recently in investor-State claims more often than in the past.[32] In 2013 and 2014, forty-two percent and twenty-five

27. *Id*.

28. *Supra* note 1, at 27–28.

29. S. Schacherer, *Independence and Impartiality of Arbitrators: A Rule of Law Analysis*, Jan. 2018, https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/Schacherer.pdf.

30. Office of the United States Trade Representative, *Fact Sheet: Investor-State Dispute Settlement (ISDS)* (Mar. 2015), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds.

31. D. Gaukrodger & K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, 2012/03 (OECD Publishing 2012), http://dx.doi.org/10.1787/5k46b1r85j6f-en.

32. European Commission, *Investor-to-State Dispute Settlement (ISDS) Some Facts and*

percent of the total new disputes were brought against EU countries, respectively, while fifty-six percent of the total new disputes were brought by European investors.[33]

Despite these criticisms, ISDS predominates most of China's modern BITs. China's increasing appearances in investor-State arbitration are one of the results of implementing ISDS provision in its BIT.[34] The next section will examine the development of China's BITs and its adoptions of ISDS provisions of both the European model as well as American model.

II. ISDS Provisions in BITS that China has Concluded

A. Evolution of Chinese BITs

Among the BITs and Treaties with Investment Provisions (TIPs) that China concluded, 129 BITs and 19 TIPs are currently in force.[35] The first generation of Chinese IIAs and BITs were very restrictive and signed mostly with developed European countries. The ISDS provisions in these early treaties only covered disputes regarding the amount of compensation in the event of expropriation.[36] During most of the 1990s, China continued this practice and entered into more agreements with developing countries.

In 1998, China concluded an investment treaty with Barbados, which included a broader ISDS clause allowing investors to submit "any dispute" with host states to international arbitration.[37] Thereafter, China started to include more liberal ISDS provisions that give more weight to international arbitration and some now-common ISDS standards such as national treatments.[38,39] With its expanding outbound and inbound investment

Figures, 6-7, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf.

33. *Id*.

34. D. Pathirana, *A Look into China's Slowly Increasing Appearance in ISDS Cases*. Investment Treaty News (Sept. 26, 2017), https://www.iisd.org/itn/2017/09/26/a-look-into-chinas-slowly-increasing-appearance-in-isds-cases-dilini-pathirana/#_edn4.

35. *See* International Investment Agreements Navigator, http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#footnote (last visited Feb. 19, 2018).

36. A. Berger, *China's Recent Approach to International Investment Rule-Making*, 16 J. World INVE. & TRADE 843, 845-48 (2015).

37. *Id*.

38. *Id*. at 849.

39. *See e.g.*, Sino-UK BIT art. 3(3): "either Contracting Party shall to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investments of national or companies of the other Contracting Party the same as that accorded to its own nationals or companies."

policies in recent years, China started to develop more comprehensive ISDS provisions in BIT negotiations. In its negotiations with the U.S. and the EU, China continues to adopt this broader and more balanced investment treaty provision.[40]

Since 2007, when the first arbitration claim was brought by a Chinese investor against a host state,[41] there have been six cases filed before the ICSID, two of which have concluded.[42] Only one case is against an EU country.[43] Chinese investors started to employ the ISDS provisions as an alternative to litigation in the last decade. With the increasing amount of investments between China and EU countries, Chinese investors are more likely to continue using ISDS provisions to protect their interests.

B. Comparison of China's Current Treaties

1. BITs Based on the European Model

China has concluded BITs with 26 EU member states.[44] China and the EU launched their negotiation rounds for BIT (EU-China BIT) in 2013, and started their thirteenth round of negotiation in 2017.[45] The new EU-China BIT, when concluded, will replace all the current BITs between China and EU countries. The ISDS provision in the EU-China BIT will likely adopt some part of the ISDS provisions from current BITs between China and EU member states.

The Ministry of Commerce of China drafted a model BIT in 2010 and drew heavily from the traditional European model.[46] For example, Article 15 of the 2010 model BIT stipulates that this agreement applies to "all investment made before and after this agreement comes into force," but does not apply to "disputes arising before this agreement comes into force."[47] This is similar to Article 10.2 in China's BIT with Belgium in

40. *Id*.

41. *See generally*, Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6.

42. *See id.*, and Ping An v. Belgium*, supra* note 13.

43. *See* Ping An v. Belgium, *supra* note 13.

44. *How to Understand the China-EU Bilateral Investment Treaty Negotiation*, Institute of European Studies of Chinese Academy of Social Sciences, August 21, 2017.

45. *China, EU starts 13th Round of BIT Negotiations*, Xinhua Net, http://www.xinhuanet.com/english/2017-05/16/c_136288358.htm (last visited Feb. 19, 2018).

46. J. Xiao, *How can a prospective China-EU BIT contribute to sustainable investment: in light of the UNCTAD Investment Policy Framework for Sustainable Development*, J. WORLD ENERGY L. & BUS. (2015) 8 (6) 521.

47. This Model BIT was not officially published, but discussed by X. Wen in *Discussion on "China Model Bilateral Investment Treaty (draft)" (Part Three)*. 19(2) Guo

2009, which stated that the Agreement applies to "all investment made… before or after the entry into force of this Agreement," but not to disputes or claims "concerning an investment which was already under judicial or arbitral process before its entry into force."[48]

The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada is one of the most recent trade agreements that the EU concluded after the Lisbon Treaty entered into force in December 2009. CETA's investment section contains some of the most commonly-used clauses of the European model, including national treatment, fair and equitable treatment, full protection and security, expropriation, and free transfers. The most reformative aspect of CETA is the EU and Canada's joint advocacy of a multilateral investment court to replace the ad hoc arbitral tribunals.[49] CETA also initiated some innovative ISDS features in an effort to increase transparency of the ISDS system, and to strengthen trust in arbitrators' credentials and experiences.[50]

The China-Canada BIT concluded in 2012 and is considered to be the most comprehensive BIT China has signed.[51] It has set out new procedures and rules for ISDS.[52] CETA and China-Canada BIT share many commonalities which the EU-China BIT may include, such as the requirement of expertise in public international law for arbitrators and a waiver clause to prevent parallel proceedings.[53]

2. BITs Based on the U.S. Model

Other than the popular European model, China has also been consistently adopting provisions from the U.S. model in an effort to restrict arbitration. This rather strict feature can be traced back to those early BITs

Ji Jing Ji Fa Xue Kan (2011), http://www.chinesejiel.com/upFj/中国投资保护协定范本（三）.doc (last visited Feb. 19, 2018).

48. *Agreement between the Government of the People's Republic of China and the Belgium-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments*, P.R.C-B.L.E.U, art. 10.2, June 6, 2005 (came into force on Jan. 12, 2009).

49. A. Roberts, *The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds*, EJIL: Talk June 15, 2017, https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds (last visited March 20, 2018).

50. R. García-Gallardo & X. Jin, *The E.U.-China Bilateral Investment Treaty. China Law Insight,* http://cn.swisscham.org/sites/default/files/The%20E.U.%20-%20China%20Bilateral%20Investment%20Treaty.pdf (last visited March 20, 2018).

51. *Supra* note 41.

52. *Id*.

53. *Id*.

that China concluded, and was due largely to China's role as an Foreign Direct Investment (FDI) importing country, positioning itself as a state that avoids cross-border investment disputes.[54] The U.S. has adopted a more defined and restricted ISDS model in its agreements with other countries.[55] The China-Colombia BIT was adopted after the U.S. model and implemented many mechanisms to restrain a tribunal's jurisdiction in some areas, such as essential security.[56] It excluded arbitral tribunal jurisdiction on disputes arising from the most favored nation treatment.[57] It also required investors, who claim expropriation arising from taxes, to first exhaust their remedies with the host state's tax department and let the state government decide whether the taxation amounts to expropriation.[58]

Indeed, China's investment treaties in the last decade have largely adopted the American model. In addition to the China-Colombia BIT, the China-New Zealand Free Trade Agreement (FTA) completely adopted the fair and equitable treatment from the U.S. BIT Model of 2004, and the China-Mexico BIT completely borrowed the fair and equitable treatment from the U.S. BIT Model of 2004.[59] For example, both China and the U.S. require four conditions—due process, non-discrimination, public interest, and effective compensation—to render expropriation. [60]

In conclusion, the ISDS provisions in CETA, the China-Canada BIT, and China's model BIT of 2010 will likely be used as blueprints for the EU-China BIT that is currently undergoing negotiation. The recent BITs with large influence from the American models also indicate that China is moving toward the American model regarding investment protection and dispute settlement.[61] China has shown willingness to adopt parts of the

54. Axel Berger, *China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment* (Nov. 2008), 910, https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf.

55. Office of the United States Trade Representative, *Fact Sheet: Investor-State Dispute Settlement (ISDS)* (Mar. 2015), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds.

56. A. Irwin, *Crossing the Ocean by Feeling for the BITs: Investor-State Arbitration in China's Bilateral Investment Treaty,* GEGI Working Paper (May 2014), 24, https://www.bu.edu/pardeeschool/files/2014/11/China's-Bilateral-Investment-Treaties-Working-Paper.pdf.

57. *Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the People's Republic of China,* art. 3(3).

58. *Id*. art. 14(5).

59. C. Cai, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, J. INT'L ECON. LAW, Volume 12, Issue 2 (June 2009), 468–69.

60. *Id*. at 475.

61. *Id*. at 485-86.

American Model BIT of 2012, including intellectual property rights, and labor and environment protection.[62] Since China is negotiating BITs with the EU and the U.S. at the same time, this may be the time for China to consolidate conflicting provisions between the American model and the European model from the past. The experiences of Chinese investors with ISDS to date can help guide this consolidation process as well as other issues that will be explored below.

III. Main ISDS cases brought by Chinese investors

One of the most complicated cases brought by Chinese investors is *Ping An v. Belgium*. The case was decided in 2015, but the dispute started during the 2008 financial crisis. Ping An Life Insurance Company of China Ltd. and Ping An Insurance (Group) Company of China Ltd. (collectively "Ping An") acquired approximately 4.81 percent of the Fortis Group from 2007 to 2008, which was worth more than two billion Euros, and was given the right to appoint a director on the Board.[63] The crisis in the international banking system gave rise to a liquidity problem for Fortis.[64] Eventually, Belgium, the Netherlands, and Luxembourg, acquired 100 percent, 100 percent, and 51 percent of Fortis and its subsidiaries in each country, respectively.[65] As a result, Ping An's share of Fortis was expropriated without any compensation.[66]

In 2005, China and the Belgium-Luxembourg Economic Union concluded a new BIT,[67] effective in 2009 and replacing the BIT of 1986.[68] The 1986 BIT provided that "[a]ll disputes relating to investment" should be notified to the host state by the investor, and the investor has the option to either submit to domestic court in the host state or to international arbitration when there are "disputes relating to the amount of compensation payable in case of expropriation, nationalization or any other measures

62. L. Yong & D. Yan, *中美双边投资协定谈判：制度因素、核心条款与应对策略 (China-US BIT Negotiations: Institutional Factors, Core Clauses and Coping Strategies),* CASS-IWEP Working Paper No. 201314, Institute of World Economy and Politics, Chinese Academy of Social Sciences.

63. *Supra* note 13.

64. *Id.* ¶¶ 58-59.

65. *Id.* ¶¶ 60-64.

66. *Id.* ¶ 62.

67. *Agreement between the Government of the People's Republic of China and the Belgium-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments*, P.R.C-B.L.E.U, art. 10.2, June 6, 2005 (came into force on Jan. 12, 2009).

68. *Id*. art. 10.

similarly affecting investments."[69] The 1986 BIT will remain in force for ten years from its expiration date with respect to investments made before the expiration date.[70]

Under the 2009 BIT, investors can submit to the ICSID for any "legal dispute" arising between an investor and the host state.[71] The 2009 BIT applies to all investments made before and after the 2009 BIT's entry into force, but the 1986 BIT does not govern any dispute or claim concerning "an investment which was already under judicial or arbitral process before the 2009 BIT's entry into force.[72]

The *Ping An* dispute arose from the interpretation of the 2009 BIT—that is, whether it can be interpreted in an expansive way such that it covers disputes which breached the 1986 BIT.[73] Ping An based its claim on the 1986 BIT, but based its jurisdictional argument on the 2009 BIT.[74] In its objections to jurisdiction, Belgium argued, *inter alia*, that the tribunal lacked jurisdiction ratione temporis because the dispute arose before the 2009 BIT entered into force on December 1, 2009. But, according to the Article 8 of the 2009 BIT, the jurisdiction of the tribunal is limited to disputes after December 1, 2009.[75]

In accepting this argument, the arbitral tribunal reasoned that the plain meaning of the 2009 BIT only refers to disputes arising after the 2009 BIT comes into force.[76] The tribunal further pointed out that since Ping An had already notified the Belgian government that Ping An would take action based on the 1986 BIT, the dispute arose before the 2009 BIT came into force, and was therefore not covered by the 2009 BIT.[77] This resembles the narrow approach of the dispute settlement clause of the BIT between China and Mongolia in a 2017 ICSID case, where the tribunal found restrictive jurisdiction to any "dispute involving the amount of compensation resulting from an expropriation."[78] There, the tribunal concluded that even though the 2009 BIT made clear its intention to replace the 1986 BIT, it does not

69. *Id*.
70. *Id.* art. 14.
71. *Id*. art. 8.
72. *Id.* art. 10.
73. *See supra* note 13, ¶ 206.
74. *Id.* ¶¶ 38, 130.
75. *Id.* ¶ 113.
76. *Id.* ¶ 224.
77. *Id*. ¶ 229.
78. B. Horrigan, T. Furlong & J. Eschment, *China-Related Investment Arbitrations: Three Recent Developments*, Herbert Smith Freehills, Arbitration Notes (July 17, 2017), http://hsfnotes.com/arbitration/2017/07/17/china-related-investment-arbitrations-three-recent-developments.

render the tribunal with jurisdiction over disputes that had been notified but not taken into judicial or arbitral proceedings under the 1986 BIT.[79] The tribunal refused to take an expansive approach partly due to the concern of over-broadening the range of disputes of a similar nature.[80]

Both tribunals in the *Ping An* case and the Mongolia case mentioned above took a more restrictive approach, which is far from the approach taken in the *Tza Yap Shum* case.[81] In *Tza Yap Shum*, the first ISDS case brought by a Chinese investor, the claimant challenged the government of Peru for its action that allegedly amounted to expropriation.[82] The tribunal interpreted the wording of "expropriation" to include inherent expropriation, because to conclude otherwise would undermine the arbitration clause.[83] The tribunal sided with the tribunals in previous cases that took broad interpretations of "expropriation," despite the fact that the tribunal in *Tza Yap Shum* took into consideration China's favoritism toward a narrow interpretation of the clause during its negotiations with Peru.[84] This approach is followed by another ISDS case brought by a Chinese investor against the government of Laos, in which the tribunal broadly interpreted the dispute settlement clause.[85]

In summary, an examination of ICSID cases with Chinese complaints demonstrates the impact of inconsistent interpretations of ISDS provisions in China's BITs. The next section further explores other restrictions and insufficiencies of current ISDS provisions in affording Chinese investors meaningful remedies against foreign state actions.

IV. Limitations of ISDS Provisions in Practice

A. Vagueness and Inconsistency among different BITs and IIAs

In many earlier BITs and IIAs that China concluded, the provisions largely varied because their designs were driven by the preferences of the other signee.[86] From the Chinese investors' perspective, they are equipped with vague and sometimes overbroad ISDS provisions to challenge host

79. *See supra* note 13, ¶228.
80. *Supra* note 13, ¶230.
81. *Supra* note 33.
82. *See* Tza Yap Shum v. The Republic of Peru, *supra* note 36, and Ping An v. Belgium, *supra* note 13.
83. *Supra* note 75.
84. *See* Tza Yap Shum v. The Republic of Peru, *supra* note 36.
85. *Supra* note 75.
86. *Supra* note 32, at 868.

countries in the international arbitration forums. Even though there have been only six cases filed with ICSID, and only two of them concluded, there will likely be an increasing trend of ICSID cases filed by Chinese investors in the near future.[87] For example, the China Railway Construction Corporation Limited (CRCC) announced in December of 2017 that it is planning to bring the government of Mexico to arbitration for cancelling CRCC's successful tender in USD $4 billion worth of high-speed railway project in Mexico.

While the early BITs took a restrictive approach to ISDS provisions, in a few cases brought by Chinese investors the arbitral tribunals adopted a rather broad interpretation when deciding the jurisdiction issue.[88] The Mexico-China BIT provided that expropriation, either direct or indirect, may be compensated.[89] Under its arbitration provision, an investor may submit a claim to arbitration that is due to breach of obligation set forth in Chapter II of the BIT and as a result causes damages to the investor.[90]

The "fair and equitable treatment" standard is adopted commonly in ISDS provisions, but also controversial because of its elastic and constantly shifting meaning.[91] It has been invoked in almost all of the ISDS cases.[92] Since 2008, China has been cautiously reforming the "fair and equitable treatment" standard. As a result, this standard has been written very differently among different treaties that China has concluded, which may be the result of different treatments between countries that are partnered closely with China and those that are not.[93]

87. *See* Tza Yap Shum v. The Republic of Peru (concluded), *supra* note 36; Ping An v. Belgium (concluded), *supra* note 13; Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Electric Supply Company Limited, ICSID Case No. ARB/10/20 (pending); Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen (pending), ICSID Case No. ARB/14/30; Standard Chartered Bank (Hong Kong) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/15/41 (pending); Sanum Investments Ltd. v. Lao People's Democratic Republic, ICSID Case No. ADHOC/17/1 (pending).

88. *See* Tza Yap Shum v. The Republic of Peru, *supra* note 36; Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, *id.*; Sanum Investments Ltd. v. Lao People's Democratic Republic, *id*.

89. Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, art. 7, July 11, 2008 (came into force June 6, 2009).

90. *Id*. art. 13.

91. K. Yannaca-Small, *Fair and Equitable Treatment Standard: Recent Developments*, Standards of Investment Protection (Oxford Univ. Press 2008) 111.

92. *See Special Update on Investor-State Dispute Settlement: Facts and Figures*, p.1, Nov. 2017, https://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf.

93. *Supra* note 32 at 858–59.

Similarly, the "indirect expropriation" standard is used frequently when investors challenge a broad range of state measures that require the arbitral tribunal to interpret expropriation more expansively.[94] Chinese investors have invoked this standard in a few ISDS cases.[95] The most recent development of this standard in China's treaties was adopted after the North American Free Trade Agreement (NAFTA), which gave more consideration to legitimate public purposes, such as public health and safety and environment protection.[96] However, variance of the "indirect expropriation" language still exists among different treaties and agreements China has signed with European and countries from the Association of Southeast Asian Nations (ASEAN).[97]

The 2010 model BIT drafted by the Ministry of Commerce of China (MOFCOM) provided that the fair and equitable treatment standard issues arises when investors are "willfully rejected to fair judicial proceedings or be treated with obvious discriminatory or arbitrary measures."[98] As suggested above, the EU-China BIT will also be influenced heavily by treaties signed between the EU and other countries, especially CETA. CETA provided an exhaustive list of state acts that would trigger invoking the fair and equitable treatment: (i) denial of justice in criminal, civil or administrative proceedings; (ii) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (iii) manifest arbitrariness; (iv) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (v) abusive treatment of investors, such as coercion, duress and harassment; or (vi) a breach of any further elements of the fair and equitable treatment adopted by the parties' regular review.[99]

CETA and the Canada-China BIT adopted similar measures for the indirect expropriation standard by stating that non-discriminatory measures protecting legitimate public interests do not constitute indirect

94. *Id*. at 859.

95. *See* Tza Yap Shum v. The Republic of Peru, *supra* note 36, and Ping An v. Belgium, *supra* note 13.

96. *Supra* note 32.

97. *Id*. at 859–60.

98. J. Xiao, *How can a prospective China-EU BIT contribute to sustainable investment: in light of the UNCTAD Investment Policy Framework for Sustainable Development*, 8 J. WORLD ENERGY L. & BUS. 521, 533 (2005).

99. GOVERNMENT OF CANADA, Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and Its Member States, http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng (last visited Feb. 2, 2018).

expropriation, as well as providing an illustrative list for such inquiry.[100] In CETA, the list includes the following: (i) the economic impact of the measure—it has to be clarified that the sole fact of the measure having an adverse effect on the economic value of an investment in itself does not give rise to a finding of indirect expropriation; (ii) the duration of the measure; (iii) the extent to which the measure interferes with distinct, reasonable, investment-backed expectations; and (iii) the character of the measure, notably its object, context and intent.[101] The Canada-China BIT provides a similar criteria.[102]

A precisely-tailored ISDS provision with specific and confined criteria, as demonstrated in CETA, will provide a clear guide not only to investors, but also to arbitration tribunals when interpreting the text. This would also help eliminate the capricious and arbitrary interpretations of the arbitrators, and further reduce the volatility in investors' expectations and preventable suits against host states.

B. Incapacities in providing proper remedies

Varying interpretations of treaty language causes lack of consistency and uniformity in applying the treaties. As discussed above, the tribunals in the *Ping An* case interpreted the ISDS clause narrowly, while the tribunals in *Tza Yap Shum* and *Sanum* cases provided broader interpretations. The divergent results are partly due to different parts of the arbitration clauses that were interpreted. However, having a consolidation mechanism for similar claims or claims arising from similar treaty provisions would essentially contribute to the coherence of awards, and increase the likelihood of affording just remedies.[103]

Inadequate remedy amount is yet another obstacle that foreign investors have been facing. In a case study of 462 ICSID cases from 1990 to 2014, the tribunals awarded only 30 to 40 percent of the petitioners' monetary claims on average.[104] This figure was even lower in the *Tza Yap Shum* case, where the tribunal awarded only USD$78,000 compared to the loss claimed by petitioner in the amount of USD$25 million. In only six

100. *Supra*, note 92.
101. *Supra*, note 93.
102. Canada-China BIT (2012), annex B.10(2).
103. *Supra* note 1, at 6.
104. R. Wellhausen, *Recent Trends in Investor-State Dispute Settlement*, J. INT'L DISP. SETTLEMENT, 2016, at 1, 4, 19.

out of the 462 cases mentioned earlier were there rewards larger than or equal to what the investors sought.[105]

Another challenge that foreign investors often deal with in ISDS cases is state policies in protecting public interests. For example, in the China-Australia FTA, state interests are protected when it is necessary to protect human life or health; it is necessary to comply with domestic laws and regulations; it is to protect national treasures; and it is relating to the conservation of exhaustible natural resources.[106] This type of general exception clause is found in many treaties and shields states behind public interests. In *Philip Morris v. Uruguay*, the challenged anti-smoking legislations were aimed at public health but allegedly injured Philip Morris' investment interest in Uruguay.[107] Nevertheless, the tribunal found that Uruguay adopted a reasonable regulatory measure to promote public health.[108] Foreign investors may be vulnerable to the volatility of the policies of host states, especially in countries where political regimes shift constantly or those with an unstable regulatory environment.

In addition, it is difficult sometimes to enforce the arbitration award against states. Arbitral awards based on ICSID Convention are subject to automatic recognition of contracting states, and execution of the awards are governed by the laws of the foreign states.[109] Even if an investor receives a favorable award, it still has to enforce and execute the award against the respondent state. This often creates an additional hurdle for investors. The governments of Argentina, Zimbabwe, Russia, Kyrgyzstan, Thailand, and Venezuela have repeatedly refused to satisfy awards entered against them, while the governments of Mexico and Romania have been fighting against the enforcement of arbitral awards against them.[110]

In some cases where the host states have assets overseas, investors can go to the courts in those countries and seek enforcement, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In a recent arbitration between Venezuela and Resort Mining Limited, the tribunal found Venezuela violated the Canada-Venezuela BIT in its action of expropriating Rusoro's asset in Venezuela.[111] After

105. *Id*. at 27.
106. China-Australia FTA (entered into force on Dec. 20, 2015), art. 9.8.
107. *See* Philip Morris v. Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 2, ¶¶ 10-11 (July 8, 2016).
108. *Id*. ¶ 420.
109. ICSID Convention, art. 54.
110. *The Changing Practices of International Law* (Tanja Aalberts & Thomas Gammeltoft-Hansen eds., Cambridge 2018), 96–97.
111. Rusoro Mining Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/12/5, Award, 197, ¶ 904.3 (Aug. 22, 2016).

Venezuela refused to pay the $1.3 billion award, Rusoro petitioned the U.S. District Court of Columbia to convert the award into a court judgment and to execute Venezuela's assets in the U.S., and the court confirmed the award.[112] As a result, Rusoro is now entitled by American law to discovery of Venezuela's state assets around the world, as well as to enforce the award in more than 140 countries that are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[113] Large companies with abundant resources like Rusoro can usually pursue enforcement of the award by using judicial systems in countries that are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, especially in courts like the American ones that are more deferential to arbitral awards.

C. Conflicts between the EU and its member states

Foreign investors in European countries may face another obstacle in the attempt to enforce an award, especially when the cited investment treaty conflicts with EU laws and regulations. This results in an increasing number of challenges to the compatibility of intra-EU BITs with EU laws and regulations. Since the Treaty of Lisbon entered into force, the EU possesses comprehensive exclusive competence over foreign investment.[114] The EU Regulation passed in December 2012 by the European Parliament provided that the BITs entered into by member states may still remain in force until a BIT between the EU and the same third country enters into force.[115] This would severely affect investors who want to bring suit against EU countries based on pre-establishment BIT.

According to the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU),[116] the EU is constitutionally obligated to comply with its own principles to guide external action regarding commercial policy. This is particularly relevant to events when a

112. Rusoro Mining Ltd. v. Bolivarian Republic of Venez., 300 F. Supp. 3d 137, 145, 151 (D.D.C. 2018).

113. Brief for Petitioner at 1113, Rusoro Mining Ltd. v. Bolivarian Republic of Venez., No. 16-cv-2020 (D.D.C. Oct. 10, 2016).

114. C. Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*. 26 EUR. J. INT'L L. 639, 640 (2015).

115. Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries, 2012 O.J. (L351) 40, 42, art.3.

116. Consolidated Version of the Treaty on European Union art. 21, Oct. 26, 2012, 2012 O.J. (C326) 13; Consolidated Version of the Treaty on the Functioning of the European Union art. 205, Oct. 26, 2012, 2012 O.J. (C326) 47.

member state is sued by foreign investors because the state must then take action to comply with EU's investment policy. The incompatibilities between the laws of the EU and a member state arise in several areas, such as the free transfer of investment-related funds without any exceptions, the admission and the post-establishment treatment of foreign investments, and equal treatment of all EU nations.[117]

For example, in 2013, the court in *Micula v. Romania* found that Romania had violated the fair and equitable treatment obligation under the Sweden-Romania BIT for Romania's withdrawal of economic incentives, despite Romania's claim that its revocation of the incentive program was to comply with EU law requirement on state aid.[118] In March 2015, the European Commission nevertheless rendered that those incentives are illegal state aid under EU law, and therefore enjoined Romania from complying with the award of US$250 million rendered in *Micula v. Romania*.[119] A decision by an ICSID ad hoc committee was issued in February 2016, rejecting Romania's application to annul the award.

In *Slovak Republic v. Achmea BV*, the Court of Justice of the EU declared that the arbitration clause in the BIT between the Netherlands and the then government of the Czech and Slovak Federal Republic was incompatible with EU law, namely articles 267 and 344 of the TFEU.[120] There, the Court of Justice of the EU (CJEU) invalidated the applications of investor-state arbitration provisions in not just the BIT at issue, but all intra-EU BITs because the CJEU found the investor-state arbitration provision undermines the autonomy and direct binding effect of EU laws on member states.[121] This is particularly relevant to the discussion here as the EU-China BIT negotiations will face the same issue of inconsistency between EU objectives and its member states.[122]

The European Parliament announced that the EU-China BIT will be based on the best practices drawn from the experiences of its member states, while maintaining its own objectives and standards. A few cases involving EU countries raised the concern of the enforceability of arbitral

117. S. Schacherer, *Can EU Member States Still Negotiate BITs with Third Countries?*, INV. TREATY NEWS (Aug. 10, 2016), https://www.iisd.org/itn/2016/08/10/can-eu-member-states-still-negotiate-bits-with-third-countries-stefanie-schacherer.

118. Ioan Micula v. Romania, ICSID Case No. ARB/05/20, Award (Dec. 11, 2013), 367, ¶ 1329.b.

119. Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania Arbitral award Micula v Romania of 11 December 2013, 2015 O.J. (L232) 43, 69, ¶¶ 241, 255.

120. Slovak Republic v. Achmea, Case C-284/16 (Mar. 6, 2018).

121. *Id*. ¶¶ 37, 58-59.

122. *Supra* note 106, at 651.

awards involving incompatibilities between EU laws and intra-EU treaties.[123] There might be an increasing volume of caseloads as a result of the EU-China BIT and BITs between China and EU member states. From a pratical point of view, the negotations between China and the EU will have to tackle the incompatibility issue of the EU laws and the laws of EU member states.

V. Suggestions for Drafing New BITS from China's Perspective

A. Confine the Scope of Arbitral Claims

As demonstrated in *Ping An v. Belgium*, the gap between the 1986 BIT and the 2009 BIT arose out of different scope of claims. The 1986 BIT limited the arbitrable claims to disputes relating to investment, while the 2009 BIT expanded to any disputes arising between investors and host states.[124] The narrow approach in *Ping An* is however not universal. In another concluded ICSID case brought by Chinese investors, the arbitral tribunals took a rather expansive interpretation of the dispute settlement clause as discussed above.[125]

One way to protect investors in foreign investment disputes is to construct the BIT with confined scopes of arbitrability, as tribunals construe even slight variations of wording in BITs differently. Indeed, tribunals have been less reluctant in recent years to broaden their jurisdiction, even when the dispute settlement clauses are rather restrictive.[126] Some suggested adopting the CETA model, which limits arbitration to breaches of investment protection obligation.[127] In the China-Mexico BIT and China-Colombia BITs, China abridged the arbitral tribunal's space to broadly interpret the BIT by limiting the most favorable nation clause and tax dispute procedure.[128] Both the EU and China would welcome a limited scope of claims, especially with the rising numbers of ISDS cases against them in recent years. This could come from a variety of

123. *Supra* note 112.
124. 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, art.10, June 4, 1984; 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, art.8, June 6, 2005.
125. *See* Tza Yap Shum v. The Republic of Peru, *supra* note 36.
126. A. Reinisch, *How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?* 2 J. INT'L DISP. SETTLEMENT 115, 116–17 (2011).
127. *Supra* note 93, art. 17.
128. *Supra* note 55.

ways to construct ISDS clause, from restraining investors from bringing multiple claims against the host state, to prohibiting tribunals from making findings against a host state's domestic laws.[129]

B. Minimize Uncertainties and Inconsistency

Since many BITs and IIAs overlap with their earlier versions, there will be an increasing number of disputes where contrasting readings of different versions of the treaty would hinder the predictability of arbitration. In *Ping An* and *China Heilongjiang ITCC v. Mongolia,*[130] both tribunals took the restrictive approach toward the dispute settlement clauses in the BITs. For example, the *Ping An* tribunal pointed out that there was nothing in the preamble or common clause that indicated a gap-filling by arbitration tribunal.[131] As follows, the new treaty should clarify whether the status quo in the earlier version of the treaty remains or the new version will govern disputes notified under the older treaty.[132] Both China and the EU strive to provide a stable investment environment with improved legal certainties with more specified standards and procedures to follow in the event of investor-state disputes.

Another likely adoption of provisions from existing BITs, such as CETA and the Canada-China BIT, will be the consolidation of arbitral proceedings.[133] They both provided clear and concise rules to avoid inconsistent arbitral awards.[134] CETA, for example, limited the ability of investors to bring parallel proceedings while an investment claim is pending in order to limit abuse of process and duplicative proceedings.[135] Article 8.22(g) of CETA provides that an investor may only submit a claim if the investor waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim.

129. *Supra* note 45.

130. Petition to Vacate Arbitration Award Declining to Exercise Arbitral Jurisdiction & Compel Arbitration, Beijing Shougang Mining Inv. Co. Ltd. v. Mongolia, No. 17 CV 7436, ¶ 451 (S.D.N.Y. Sept. 29, 2017).

131. *Supra* note 36, ¶ 225.

132. D. Pathirana. *Making an Arbitration Claim under Chinese BITs: Some Inferences from Recent ISDS Cases*. 5 CHINA. J. COMP. L. 420, 420–31 (2017).

133. *Supra* note 92.

134. *Id*.

135. D. Gonzalez & G. Morello, *Parallel Proceeding Problems: The Case for Party Autonomy* (July 5, 2016), https://www.law360.com/articles/811867/parallel-proceeding-problems-the-case-for-party-autonomy.

C. Improve Transparency with Procedural Safeguards

Given the confidential nature of the system, the arbitrator appointment system, and the tendency to award in favor of large multinational enterprises, ISDS has remained controversial and has been attacked for its lack of transparency.[136] Therefore, it is crucial to implement procedural safeguards to minimize the risk that comes with lack of transparency. The Mauritius Convention on Transparency, for example, was designed to provide an effective mechanism to ensure procedural transparency to treaty-based investor-state dispute resolutions.[137] The Convention was ratified by Canada, Mauritius, and Switzerland, and has been signed by nineteen countries including the U.S. and several EU member states.[138] The Mauritius Convention on Transparency references the UNCITRAL Rules on Transparency, where the latter applies to all investor-State arbitrations regardless of whether the arbitration initiates under UNCITRAL Arbitration Rules.[139] The UNCITRAL Rules took into consideration both the public interest and parties' interest in resolving disputes in a fair and efficient manner.[140] In the event of conflict between the Rules on Transparency and relevant arbitration rules, the Rules on Transparency prevail.[141] The Rules on Transparency provide some other devices: publication of information of commencement of arbitration proceedings and documents such as a statement of claim and defense; expert reports and witness statements are also available upon public request; exhibits may be made available upon the arbitral tribunal's discretion; and hearings except when it concerns confidential protected information.[142] Incorporating a procedural guidance like the Mauritius Convention and the UNCITRAL Rules on Transparency will significantly improve transparency in investor-State dispute resolutions, and further the goal of using the ISDS mechanism.

The EU has been on the frontier of reforming the ISDS system in response to all of its criticisms discussed in earlier sections. Similar to the UNCITRAL Rules on Transparency, CETA has raised a few options for

136. *Supra* note 109.

137. *Bolivia (Plurinational State of) signs the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, UNIS VIENNA (Apr. 17, 2018), http://www.unis.unvienna.org/unis/en/pressrels/2018/unisl260.html.

138. *Id*.

139. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration art. 2(1).

140. *See id.* preamble; UNCITRAL Rules on Transparency art. 1(4).

141. UNCITRAL Rules on Transparency art. 1(7).

142. UNCITRAL Rules on Transparency art. 2, 3(1)-(3), 6(1)-(2).

the China-EU BIT.[143] In order to improve transparency, all documents produced by parties and tribunals, as well as hearings will be open to the public.[144] The tribunal will consist of members selected from a pre-determined list of well-recognized arbitrators.[145] In addition, there will be an appellate system to review awards and grant reversal or annulment.[146] All of those are proper considerations for the EU-China BIT, given China's strong interest in affording a more effective system for its investors.

D. Balance the Interests Between States and Investors

In the recent decade, China's BITs and IIAs have been heavily adopting NAFTA and other significant European models of international treaties. On the one hand, with its rising economic power, China now has more leverage in negotiating a more coherent BIT with provisions that are beneficial to Chinese investors. On the other hand, the Chinese government also needs to shield itself from unjustifiable liabilities and costs associated with being sued in ISDS cases.[147] In many ICSID cases, investors had sought to expand states' liabilities in various forms. For example, in a case brought by the Deutsche Bank AG against the government of Sri Lanka, the tribunal based its award only on a hedge agreement, which does not have a physical investment in the host state.[148] Investors will continue to use ISDS to challenge state action, and in many ways may increase pressure on eroding states' regulatory schemes and public interests.

In recent years, especially after the initiation of the One Belt and One Road Project,[149] there is a rising concern about China's commitment to further its trade and investment policy while maintaining its own regulatory scheme. The ongoing BIT negotiations with the U.S. and the EU will

143. *Supra* note 119.
144. *Id*.
145. *Id*.
146. *Id*.
147. *Id.*
148. F. Fontanelli, *Does Investor-State Dispute Settlement (ISDS) threaten States' regulatory autonomy? Fact-checking a commonplace of the TTIP debate*, SIDIBLOG (Mar. 3, 2015), http://www.sidiblog.org/2015/03/03/does-investor-state-dispute-settlement-isds-threaten-states-regulatory-autonomy-fact-checking-a-commonplace-of-the-ttip-debate.
149. The One Belt and One Road Project is an initiative brought by China in 2013 and officially announced in 2015 to joinly develop infrastructure and promote investments with countries along the Silk Road Economic Belt and the 21st century Maritime Silk Road. *China Unveils Action Plan on Belt and Road Initiative*, The State Council of the The People's Republic of China, http://english.gov.cn/news/top_news/2015/03/28/content_281475079055789.htm (last updated Mar. 28, 2015).

inevitably create challenges to China's treatment of foreign investment. For example, China has long rejected the pre-establishment national treatment provision in BITs, because as a result China must liberalize its domestic capital markets so that foreign investment can flow in and out freely.[150] In response, some scholars advocated the four-safety-valve theory to protect China's state interests: (i) the right of the host state to consent to the jurisdiction of an international tribunal on a case-by-case basis, (ii) the requirement that an investor exhaust local remedies before resorting to international arbitration, (iii) application of the host state's laws by the investment tribunal, and (iv) exceptions to BITs for essential national security interests.[151]

Another factor that is important for China's state interests lies in the enormous amount of state-owned enterprises (SOEs). In an ICSID case brought by the Beijing Urban Construction Group (BUCG) against the government of Yemen, Yemen challenged the BUCG's function as an agent for the Chinese government and that it therefore did not qualify to use the ICSID Convention as a dispute settlement forum.[152] The tribunal found that the assertion that the Chinese government is the decision maker for BUCG was too remote, and therefore concluded that BUCG was not performing a government function as an agent for the Chinese government.[153] This case indicated the potential challenges for SOEs and corporations that are largely backed by the Chinese government, but also provides that the ICSID will still be available for disputes arising between Chinese SOEs and the foreign host states.[154]

VI. Conclusion

Chinese investors are relatively new to the international arbitration procedures and foreign laws. They might be unfamiliar with layers of regulatory compliance with the EU and the European host state, or find themselves to be the victims of drastic political regime shifts. The inconsistent readings by the arbitral tribunals also severely burden

150. *Supra* note 125.

151. X. Han, *On The Application Of The Principle Of Proportionality In Icsid Arbitration And Proposals To Government Of The People's Republic Of China,* [2006] JCULawRw 11; (2006) 13 JAMES COOK UNIV. L. REV. 233, http://www5.austlii.edu.au/au/journals/JCULawRw/2006/11.html#fnB36.

152. Beijing Urban Const. Grp. Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 7, ¶ 29 (May 31, 2017).

153. *Id*. ¶ 43.

154. *Supra* note 92.

investors. ISDS has been widely criticized, yet both the EU-China BIT and U.S.-China BIT are likely to keep this clause, at least in the current status of negotiation rounds. As China reforms and expands its state policy to encourage both outbound and inbound investments, we expect to see a more cohesive ISDS clause that balances the interests between investors and states.

Generally, courts, and especially arbitral tribunals, respect party autonomy when interpreting dispute settlement clauses. While keeping in mind all those potential hurdles in foreign investments, the more proactive method for China is to minimize the risks during the course of contracting. Therefore, China's focus during constructing dispute settlement clauses should focus on minimizing inconsistency and enhancing transparency, while taking into consideration maintaining a balance between the state's interest and the investor's interest. This highlights a coherent ISDS system that can respond to the development of relevant treaties, the changes in state policies, and the overarching legal and economic environment.

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