BETWEEN OLD AND NEW: RETHINKING MODERNIZATION OF CHINA'S IIA REGIME

Keer Huang*

ABSTRACT

With the rapid growth in Foreign Direct Investment (FDI) inflows and outflows, China has been active in modernizing its International Investment Agreement (hereinafter "IIA") stocks since the beginning of the 21st Century. This article begins by analyzing the necessity of China's IIA modernization. The modernization of currently effective Chinese IIAs is essential to address problems resulting from the large stock of earlier IIAs, and such modernization is ultimately consistent with China's growing power in international investment governance. By adopting several reform options in IIA modernization, more balanced, modernized, and elaborated provisions can be found in recent Chinese IIAs. Nevertheless, efforts on Chinese IIA modernization may be ruined owing to multiple overlaps of existing Chinese IIAs, uncertainty about the application of Chinese IIAs to the Special Administrative Regions (hereinafter "SARs"), and insufficient coordination between Chinese IIAs and domestic law. Accordingly, tentative approaches to advance China's IIA modernization are proposed in this article, including addressing treaty relationships among Chinese IIAs, clarifying the application of Chinese IIAs to the SARs,

* PhD candidate, Wuhan University Institute of International Law, Wuhan, China. An earlier draft of this article was presented at the 7th Asian International Economic Law Network conference. The author is grateful to the anonymous reviewers and editors of the Journal for their insightful comments and suggestions on the earlier drafts of this article. The author also appreciates helpful feedback from Prof. Qi Tong, Prof. Xiao Jun, Prof. Zhang Hui, Prof. Cui Xiaojing in the course "Frontiers in International Economic Law". Any omissions or errors remain solely the author's own. The author can be reached at: keerhuang1997@gmail.com.

臺灣大學學術期刊資料庫

and enhancing coordination between Chinese IIAs and domestic law.

KEYWORDS: *bilateral investment treaty, China, foreign investment law, free trade agreement, IIA modernization, international investment law, ISDS, investment dispute settlement, Special Administrative Region, treaty overlaps*

臺灣大學學術期刊資料庫

Table of Content

I. Introduction 184
II. Necessity of China's IIA Modernization 187
A. Problems Resulting from the Large Stock of Earlier Chinese IIAs 187
B. The Growing Power of China in International Investment Governance 192
III. Current Efforts of China in Relation to IIA Modernization 194
A. Options Adopted to Modernize Chinese IIAs 194
B. Observations on the Recent Modernization of China's IIA Regime 197
IV. Challenges in China's IIA Modernization 198
A. Multiple Overlaps of Chinese IIAs 199
B. Uncertainty About the Application of Chinese IIAs to Hong Kong and Macau 203
C. Insufficient Coordination Between Chinese IIAs and Domestic Law 206
V. Tentative Approaches to Advance China's IIA Modernization 209
A. Addressing Treaty Relationships Among Chinese IIAs 209
B. Clarifying the Application of Chinese IIAs to the SARs 211
C. Enhancing Coordination Between Chinese IIAs and Domestic Law 213
VI. Conclusion 215
ANNEX 1—Chinese IIAs A-1
ANNEX 2—ISDS Cases Based on Chinese IIAs A-14

臺灣大學學術期刊資料庫

I. INTRODUCTION

China's investment treaty practice can be traced back to the 1980s—the first International Investment Agreement (hereinafter "IIA") was signed by China with Sweden in 1982[1]—at the beginning of the process of China's Reform and Opening-up.[2] As of 31 January 2023, there have been 145 bilateral investment treaties (hereinafter "BITs") (106 in force) and 19 Treaties with Investment Provisions (hereinafter "TIPs") (18 in force) in the IIA regime of China (see Annex 1).[3] As shown in Table 1,[4] of the 145 BITs, around two thirds (93 BITs) were concluded prior to the 21st Century; while the others were concluded respectively in the 2000s (45 BITs) and the 2010s (7 BITs). Of the 19 TIPs, nearly all (18 TIPs) were concluded in the latest two decades, except for the China–EC Trade and Cooperation Agreement of 1985.[5]

[1] Agreement on Mutual Protection of Investments Between the Government of the Kingdom of Sweden and the Government of the Peoples Republic of China, China-Swed., Mar. 29, 1982, https://edit.wti.org/app.php/document/show/a6d6d6eb-5198-4dab-a881-fbd8c8c4c69b [hereinafter China–Sweden BIT].

[2] The attraction of foreign investments constitutes one of the components of China's open-door policy initiated in 1978. In 1979, China's first foreign investment legislation, *the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures*, entered into force, which marked the beginning of the establishment of the legal framework for foreign investments in China. *See* Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa (中华人民共和国中外合资经营企业法) [Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, effective July 8, repealed Oct. 1, 2016) CLI.1.279350 (China). *See also* Gregory C. Chow, *China's Economic Transformation*, *in* CHINA'S 40 YEARS OF REFORM AND DEVELOPMENT: 1978–2018 93, 104 (Ross Garnaut et al. eds., 2018).

[3] In this article, "IIAs of China," including bilateral investment treaties [hereinafter BITs] and treaties with investment provisions [hereinafter TIPs], refer to international investment treaties concluded by the central government of China, excluding International Investment Agreements [hereinafter IIAs] concluded by the Hong Kong Special Administrative Region [hereinafter SAR], the Macau SAR or Taiwan, China.

[4] Statistics on numbers of BITs and TIPs in China's International Investment Agreement IIA regime in this article were obtained by combining information from the following websites: (i) *International Investment Agreements Navigator: China*, UNITED NATIONS CONF. ON TRADE & DEV. [hereinafter UNCTAD], https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china (last visited Jan. 31, 2023); (ii) *Chinese FTAs*, MINISTRY OF COM. CHINA, http://fta.mofcom.gov.cn/english/index.shtml (last visited Jan. 31, 2023); (iii) *Investment Treaties*, ELEC. DATABASE OF INV. TREATIES, https://edit.wti.org/document/investment-treaty/search (last visited Jan. 31, 2023). In the tally process, investment treaties concluded by the same contracting parties in different years were considered as separate treaties, even if the earlier treaties had been replaced by the latter ones.

[5] Agreement on Trade and Economic Cooperation Between the European Economic Community and the People's Republic of China, China-EC, May 21, 1985, 1985 O.J. (L 250) 2 (entered into force Sept. 22, 1985).

臺灣大學學術期刊資料庫

TABLE 1: IIAs Concluded by China (as of 31 January 2023)

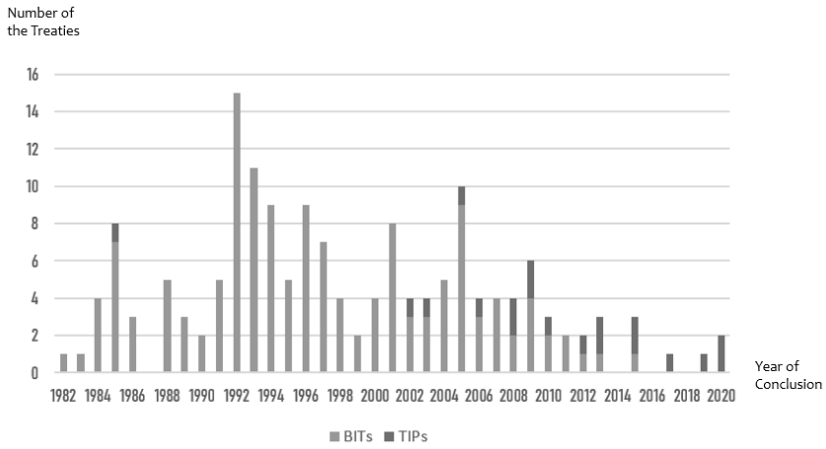
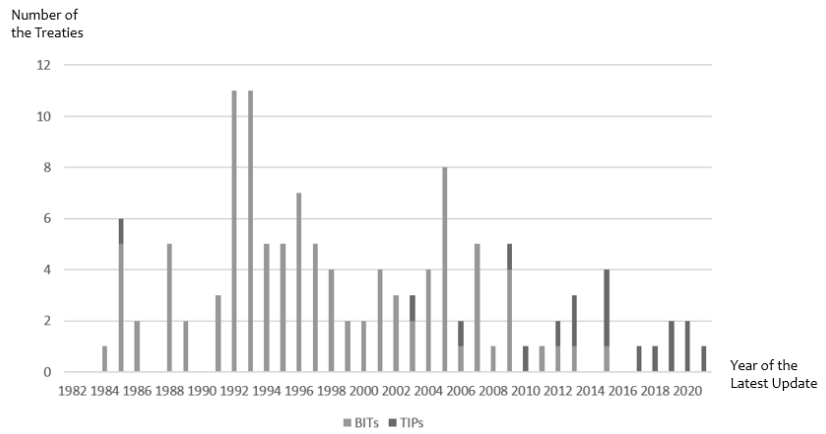


TABLE 2: Effective IIAs in China's IIA Regime (as of 31 January 2023)



However, simply observing when Chinese IIAs were concluded is not sufficient to provide a complete picture of China's current IIA regime. This is because a number of IIAs concluded in the 20th century, mainly the BITs, have already been modernized in different ways. Additionally, several IIAs remain ineffective for years. By excluding the ineffective treaties and clarifying the year of the latest update of the 124 effective Chinese IIAs (see Annex 1), a clearer picture of China's current IIA regime is provided in Table 2. The majority (68 BITs) of the 106 effective BITs were concluded before 2000 and have not yet been modernized; while the others (38 BITs) have

臺灣大學學術期刊資料庫

been concluded or modernized in the 21st Century. Nearly four fifths (14 TIPs) of the 18 effective TIPs were concluded or updated in the 2010s.

By comparing Table 1 and Table 2, it can be inferred that Chinese BITs concluded in the last century have been modernized gradually, and new IIA generations have emerged with an increasing number of TIPs, most of which are bilateral free trade agreements (hereinafter "FTAs"). Also, there has been a noticeable trend towards regionalism in China's IIA rulemaking.

China's recent adoption of modernized clauses in its IIAs has been widely acknowledged.[6] The existing literature highlights potential effects of China's IIA modernization,[7] the political economy behind it,[8] and the emerging new generation of Chinese IIAs.[9] Also, some scholars casted doubts on China's investment treaty practice,[10] expressing concerns about risks involved in investment dispute settlement resulting from Chinese IIAs.[11] The selection of specific reform options for China's IIA modernization has received little attention, and the interaction between Chinese IIAs and domestic law has not been clarified since the entry into force of China's new Foreign Investment Law.

The modernization of China's IIA regime is a comprehensive and systemic process that involves not only the negotiations of new IIAs but also the update of earlier IIAs, and the interaction between Chinese IIAs and domestic law. Instead of focusing on the modernization of a specific IIA or certain provisions, this article takes stock of the entire modernization process of China's IIA regime from the start of the 21st Century until now. With China's emergence as a key actor in international investment governance,

---

[6] *See* G. MATTEO VACCARO-INCISA, CHINA'S TREATY POLICY AND PRACTICE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 38-42 (2021); Heng Wang & Lu Wang, *China's Bilateral Investment Treaties*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1, 10-15 (Julien Chaisse et al. eds., 2020); Vivienne Bath, *China's Role in the Development of International Investment Law—From Bystander to Participant*, 15(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 359, 359 (2020).

[7] *See* Wenhua Shan & Lu Wang, *The China–EU BIT and the Emerging 'Global BIT 2.0'*, 30(1) ICSID REV. 260, 265-67 (2015); Axel Berger, *China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making*, GERMAN DEV. INST., 1 (2008), https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf.

[8] *See generally* Tyler Cohen & David Schneiderman, *The Political Economy of Chinese Bilateral Investment Treaty Policy,* 5(1) CHINESE J. COMPAR. L. 110 (2017).

[9] *See generally* Wenhua Shan & Hongrui Chen, *China–US BIT Negotiation and the Emerging Chinese BIT 4.0*, *in* ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT: ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH 223 (C. L. Lim ed., 2016); Thomas Lehmann, *How Do Chinese Investment Treaties Protect the State's Police Powers from Investors' Expropriation Claims? A Fourth Generation of Chinese International Investment Treaties*, QUEEN MARY UNIV. LONDON: EUPLANT (Dec. 15, 2020), https://www.qmul.ac.uk/euplant/blog/items/how-do-chinese-investment-treaties-protect-the-states-police-powers-from-investors-expropriation-claims-a-fourth-generation-of-chinese-international-investment-treaties.html.

[10] *See generally* Julien Chaisse & Kehinde Folake Olaoye, *The Tired Dragon: Casting Doubts on China's Investment Treaty Practice*, 17(1) BERKELEY BUS. L.J. 134 (2020).

[11] *See* Yuwen Li & Cheng Bian, *China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options*, 67 NETH. INT'L L. REV. 503, 524 (2020).

臺灣大學學術期刊資料庫

China's IIA modernization deserve further investigation. Combining qualitative and quantitative analysis, this article examines challenges and tentative approaches in relation to the modernization of China's IIA regime.

The remainder of this article proceeds as follows. Part II accentuates the necessity of modernizing Chinese IIAs, highlighting problems resulting from the huge stock of earlier Chinese IIAs and China's growing influence in international investment governance. Part III then introduces current efforts in relation to China's IIA modernization, providing a brief review of options adopted to modernize Chinese IIAs and observations on the recent modernization. Part IV reflects on challenges resulting from the modernization of China's IIA regime, including multiple investment treaty overlaps, uncertainty about the application of Chinese IIAs to Hong Kong and Macau, and insufficient coordination between Chinese IIAs and the domestic law. Part V sheds light on approaches to advance China's IIA modernization. Part VI finally concludes the article.

II. NECESSITY OF CHINA'S IIA MODERNIZATION

The necessity for China's modernizing IIAs can be attributed to two factors. One is the large stock of earlier Chinese IIAs, which will result in problems including regulatory deficiencies and application difficulties. The other is the growing power of China in international investment governance, which therefore requires a better IIA regime for both the inflow and outflow foreign direct investment (hereinafter "FDI") stocks of China.

A. Problems Resulting from the Large Stock of Earlier Chinese IIAs

To figure out what constitutes "earlier IIAs", Chinese IIAs can be divided into several generations. The generations of Chinese investment treaties have been discussed extensively. Although the existing literature provides different views on how to divide Chinese IIAs,[12] it is commonly

[12] Prior research divides Chinese IIAs by different ways according to characteristics of the treaty texts. Generally, research before 2010 tends to divide Chinese IIAs (most are BITs) into three generations. For instance, according to Norah Gallagher and Wenhua Shan, the division is—the first generation (1982-1989), the second generation (1990-1997), and the third generation (1998-). *See* NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE 35-41 (2009). In comparison, research after 2010 often divides Chinese IIAs into either three or four generations. For instance, according to Heng Wang and Lu Wang, the division is—the first generation (early 1980s-late 1990s), the second generation (late 1990s-late 2000s), and the third generation (late 2000s-present). Also, according to Yuwen Li and Cheng Bian, the division is—the first generation (1984-1999), the second generation (1997-2011), the third generation (2007-2013), and the fourth generation represented by the China–EU Comprehensive Agreement on Investment [hereinafter CAI] and the China–US BIT. *See* Wang & Wang, *supra* note 6, at 5-10; Li & Bian, *supra* note 11, at 505. For scholarship on the division of Chinese IIAs, see also Berger, *supra* note 7; Qianwen Zhang, *The Next Generation of Chinese Investment Treaties: A Balanced Paradigm in an Era of Change*, COLUM. CTR. ON SUSTAINABLE INV. (Apr. 22, 2019), https://academiccommons.columbia.edu/doi/10.7916/d

臺灣大學學術期刊論文

recognized that there are several milestones in the forty-year history of Chinese IIAs, including: (i) the conclusion of the China–Sweden BIT in 1982, when China began its IIA-making process;[13] (ii) the conclusion of the China-Barbados BIT in 1998, when China provided foreign investors unrestricted access to international arbitration at the first time after China's accession to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereinafter "ICSID Convention") in 1993;[14] (iii) the conclusion of the China–India BIT in 2006, when detailed rules on the determination of indirect expropriation was inserted in Chinese IIA at the first time;[15] (iv) the negotiations of the China–US BIT in 2014, when China committed to pursue the negotiations with the United States based on pre-establishment national treatment and a negative list that only identifies sectors not open to foreign investments;[16] (v) the conclusion of the Regional Comprehensive Economic Partnership (hereinafter "RCEP") in 2020, when China made commitments on investment through a negative list at the first time;[17] and (vii) the issue of draft sections of the EU–China Comprehensive Agreement on Investment (hereinafter "Draft CAI") in 2021, when China and the EU was expected to write a new chapter in the China–EU investment relationships with the CAI covering diverse areas.[18]

8-225k-m584.pdf.

[13] China–Sweden BIT, *supra* note 1.

[14] Agreement Between the Government of the People's Republic of China and the Government of Barbados Concerning the Encouragement and Reciprocal Protection of Investments, Barb.-China, art. 9, July 20, 1998, https://edit.wti.org/app.php/document/show/b50a7553-21c3-4990-a80f-4f231ee69135 (entered into force Oct. 1, 1999).

[15] Protocol to the Agreement Between the Government of the Republic of India and the Government of the People's Republic of China for the Promotion and Protection of Investments, China-India, art. 5, Nov. 21, 2006, https://edit.wti.org/app.php/document/show/c7b6501c-78a5-42fa-8e12-15dbe0c7b18d (entered into force Aug. 1, 2007).

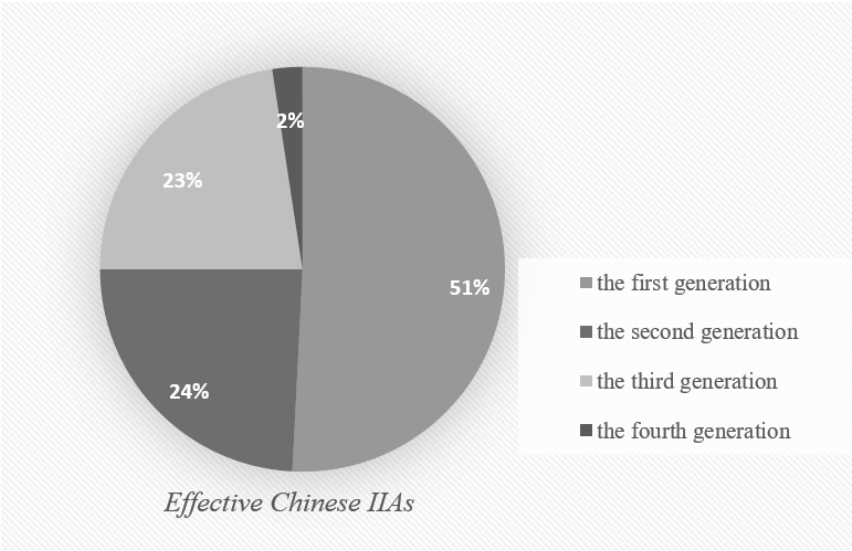
[16] *See U.S.-China Joint Fact Sheet Sixth Meeting of the Strategic and Economic Dialogue*, U.S. DEP'T TREASURY (July 11, 2014), https://home.treasury.gov/news/press-releases/jl2561. *See also* Sheng Zhang, *The China-United States BIT Negotiations: A Chinese Perspective*, VALE COLUM. CTR. ON SUSTAINABLE INT'L INV. (Jan. 6, 2014), https://ccsi.columbia.edu/sites/default/files/content/docs/publications/FDI_No112.pdf.

[17] China has scheduled investment commitments by negative lists, which stipulate the sectors and commitments which China has excluded from certain obligations, including National Treatment, Most-Favored-Nation [hereinafter MFN] Treatment, Prohibition of Performance Requirements, and Senior Management and Board of Directors. Moreover, such lists only apply to non-service investments by foreign investors. *See* Regional Comprehensive Economic Partnership Agreement [hereinafter RCEP], art. 10.8, annex III, Nov. 15, 2020, https://rcepsec.org/legal-text/ (entered into force Jan. 1, 2022).

[18] *EU–China Agreement in Principle* on Investment [hereinafter Draft CAI], EUR. COMM'N (Jan. 22, 2021), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237.

臺灣大學學術期刊資料庫

TABLE 3: Generations of Effective Chinese IIAs



In this article, the Chinese IIAs are categorized into four generations in terms of differences in substantive treatment and procedural access to investment dispute settlement. Specifically speaking, certain characteristics can be observed in each generation, and such characteristics are related to the socio-political and economic context in which IIAs were negotiated: [19](i) the first generation of IIAs (concluded or modernized in the period from 1982 to 1997), represented by the China–Denmark BIT,[20] accounting for 50.8% of the effective Chinese IIAs (62 BITs and 1 TIP), does not stipulate national treatment, and includes narrowly constructed Investor-State Dispute Settlement (hereinafter "ISDS") clauses that limit the scope of arbitration to "a dispute involving the amount of compensation resulting from expropriation"; (ii) the second generation of IIAs (concluded or modernized in the period from 1998 to 2005), represented by the China–Netherlands BIT,[21] accounting for 24.2% of the effective Chinese IIAs (29 BITs and 1

[19] *See* Ji Ye (季烨), Zhongguo Shuangbian Touzi Tiaoyue Zhengce yu Dingwei de Shizheng Fenxi (中国双边投资条约政策与定位的实证分析) [China's BIT Policy and Position: An Empirical Analysis], 16(3) Guoji Jingji Fa Xuekan (国际经济法学刊) [CHINESE J. INT'L ECON. L.] 172, 196 (2009) (arguing that countries' negotiations on investment treaties are not only a result of economic analysis, but more importantly, a comprehensive decision involving socio-political and economic factors).

[20] Agreement Concerning the Encouragement and Reciprocal Protection of Investments Between China and Denmark, China-Den., Apr. 29, 1985, 1443 U.N.T.S. 69.

[21] Agreement on encouragement and reciprocal protection of investments Between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands, China-Neth., Nov. 26, 2001, 2369 U.N.T.S. 219 (entered into force Aug. 1, 2004).

臺灣大學學術期刊資料庫

TIP), provides investors with post-establishment national treatment and broader ISDS scopes; (iii) the third generation of IIAs (concluded or modernized in the period from 2006 to 2019), represented by the China–Japan–Korea Trilateral Investment Agreement (hereinafter "TIA"), [22] accounting for 22.6% of the effective Chinese IIAs (15 BITs and 13 TIPs), clarifies the definition of investment, refines substantive protection rules, sets up exception clauses, and improves the investment dispute settlement mechanism; and (iv) the fourth generation of IIAs (concluded or modernized in the period from 2020 to present), represented by the RCEP,[23] accounting for 2.4% of the effective Chinese IIAs (3 TIPs), moves towards a regional and modernized legal framework for foreign investment promotion, protection, and regulation. The term "earlier IIAs" in this article refers to IIAs belonging to the first generation. As shown in Table 3, earlier IIAs account for over half of the currently effective Chinese IIAs and have not been modernized so far. Research shows that earlier IIAs between China and developed countries were aimed at attracting inward FDI. In comparison, earlier IIAs between China and developing countries were explained as efforts at deepening ties with certain developing allies for geopolitical purposes.[24]

Several problems exist within these earlier Chinese IIAs. First, there are regulatory deficiencies in the earlier IIAs. One of the most serious regulatory deficiencies in such IIAs is the scope of ISDS. As mentioned above, most of the first generation of Chinese IIAs limit the scope of arbitration to "a dispute involving the amount of compensation resulting from expropriation."[25] Such limitations, however, are not conducive to the protection of the outward FDI. China's identity in international investment governance has altered from a recipient country to both a capital-importing and capital-exporting country since 2014. The impetus of China's Belt and Road Initiative (hereinafter "BRI") launched in 2013 led to a dramatic increase in China's outward FDI stocks. Outward FDI from China remained high at $145 billion in 2021, even

[22] Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment [hereinafter China–Japan–Korea TIA], May 13, 2012, https://investmentpolicy.unctad.org/international-investment-agreements/treatyfiles/2633/download (entered into force May 17, 2014).
[23] RCEP, *supra* note 17.
[24] *See* Cohen & Schneiderman, *supra* note 8, at 117; Li Ling (李玲), Zhongguo Shuangbian Touzi Baohu Xiedin Diyue Shijian he Mianlin de Tiaozhan (中国双边投资保护协定缔约实践和面临的挑战) [China's Conclusion of BITs: Practice and Challenges], 17(4) Guoji Jingji Fa Xuekan (国际经济法学刊) [CHINESE J. INT'L ECON. L.] 114, 115 (2010).
[25] *See, e.g.*, Agreement Between the Government of the People's Republic of China and the Government of the Mongolian People's Republic Concerning the Encouragement and Reciprocal Protection of Investments, China-Mong., art. 8.3, Aug. 25, 1991, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/760/download (entered into force Nov. 1, 1993).

臺灣大學學術期刊論文

with the effect of the COVID-19 pandemic.[26] Against this background, there is a growing need for China to modernize the earlier IIAs.

Second, earlier Chinese IIAs are confronted with application difficulties. The past two decades have witnessed a sharp increase in the number of ISDS cases involving China and Chinese investors (see Annex 2). As of 31 January 2023, nearly three fifths of the disclosed ISDS cases based on Chinese IIAs were initiated under the first IIA generation.[27] In the past international arbitration practice, international arbitral tribunals have reached different interpretations of similar provisions in earlier Chinese IIAs. For instance, when interpreting the term "disputes involving the amount of compensation for expropriation," some tribunals supported a broad interpretation on the ground of *effet utile*,[28] while others interpreted the term as "a dispute as to whether the sum to be paid by the State as a compensation is equivalent to the value of the expropriated investments at the time when expropriated is proclaimed."[29] The vagueness of the treaty language has left a lot of room for the discretion of individual arbitral tribunals. Moreover, the inherent flaws of the international investment arbitration regime further exacerbate the uncertainty in ISDS cases concerning the earlier Chinese IIAs.[30]

Last but not least, earlier Chinese IIAs have spillover effects with Most Favored Nation (hereinafter "MFN") clauses, typical treaties' bridging clauses, in the new IIAs. Certain provisions in earlier Chinese IIAs may constitute "more favourable treatment" for investors who bring claims under the new IIAs. Accordingly, investors may attempt to import such "more favourable treatment" provided by earlier IIAs[31] and allege the non-

[26] *See* U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2022 at 21 (2022), https://unctad.org/system/files/official-document/wir2022_en.pdf [hereinafter WORLD INVESTMENT REPORT].

[27] Investor-state dispute settlement [hereinafter ISDS] cases based on the first generation of Chinese IIAs include: six cases against China—*Ekran Berhad v. China*, *Jason Yu Song v. China*, *Macro Trading Co., Ltd. v. China*, *Goh Chin Soon v. China (I)*, *AsiaPhos Limited v. China*, *Goh Chin Soon v. China (II)*; and nine cases initiated by Chinese investors—*Tza Yap Shum v. Peru*, *Beijing Shougang Mining Investment Company Ltd et al v. Mongolia*, *Ping An et al v. Belgium*, *Sanum Investments Ltd. v. Laos (I)*, *Sanum Investments Ltd. v. Laos (II)*, *Jetion Solar Co. Ltd and Wuxi T-Hertz Co. Ltd. v. Hellenic Republic*, *Wang Jing, Li Fengju*, *Ren Jinglin and others v. Ukraine*, *Huawei Technologies v. Sweden, PCCW Cascade Ltd. v. Saudi Arabia*. For detailed information of these cases, see Annex 2.

[28] It was believed that a narrow reading of the provision would deprive it of any practical meaning. *See* Señor Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶¶ 187-88 (June 19, 2009) [hereinafter Señor Tza Yap Shum v. Republic of Peru].

[29] *See* China Heilongjiang Int'l Eco. & Tech. Coop. Corp. v. Mong., PCA Case No. 2010-20, Award, ¶ 442 (June 30, 2017).

[30] Regarding inherent flaws of the international investment arbitration regime, see generally U.N. Comm'n on Int'l Trade L. Working Grp. III, *Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of China*, at 2, 3, U.N. Doc. A/CN.9/WG.III/WP.177 (July 19, 2019) [hereinafter China's Proposal].

[31] Recent scholarship has considered the role of Most Favored Nation clauses [hereinafter MFN clause] in the analysis of Chinese IIAs. *See generally* Julien Chaisse & Jamieson Kirkwood, *Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty*, 23 J. INT'L ECON. L. 245, 253

臺灣大學學術期刊資訊庫

application of clauses like the exception clauses that allow States to escape liability for what would otherwise constitute a breach of the IIA in certain circumstances.[32] In spite of the complexity of structural interconnections among the existing IIAs, it should also be admitted that there is a limit on such spillover effects. Although Chinese IIAs seldom explicitly exclude ISDS from the scope of application of MFN clauses,[33] in past arbitral practice under similar IIA provisions, a great number of tribunals refused to import ISDS provisions through MFN clauses.[34] Even at the substantive level, the uncertainty remains when comparing different IIAs on the level of investment treatment to find a more favourable one. More critically, the conventional view supporting the importation of substantive IIA provisions through the MFN clause is under increasing question.[35]

B. The Growing Power of China in International Investment Governance

The efforts on the Chinese IIA modernization are consistent with China's growing power in international investment governance, which is closely related to the development of China's FDI structure. According to the *World Investment Report 2022*, China is the fourth-largest source of outward FDI whilst remaining the second-largest recipient of inward FDI in the world.[36] Notably, according to the Organisation for Economic Co-operation and Development (OECD), inward FDI stocks of China in 2020 ($

(2020) (highlighting that "a Chinese investor could attempt to import more favourable provisions contained in any of the Sino-BRI jurisdictions' other IIAs. Indeed, the majority of tribunals have proceeded in this way, regardless of whether this is a proper use of MFN clauses in IIAs").

[32] *See* Wolfgang Alschner & Kun Hui, *Missing in Action: General Public Policy Exceptions in Investment Treaties*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2018 363, 366 (Lisa E. Sachs et al. eds., 2020).

[33] Few IIAs specifically excludes ISDS from the scope of application of MFN clauses. For instance, Article 4.3 of the China–Uzbekistan BIT provides, "dispute settlement mechanisms stipulated in other treaties shall not be referred to investment disputes in the framework of this Agreement." *See* Agreement Between the Government of The People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, China-Uzb., Apr. 19, 2011, https://edit.wti.org/app.php/document/show/31ad85dc-1a84-442c-835b-ac91f6
b50d82 (entered into force Sept. 1, 2011).

[34] For instance, in the case of *Telenor Mobile Communications A.S. v. Hungary*, although Article 4 of the Hungary–Norway BIT does not specifically exclude ISDS from the scope of application of the MFN clause, the Tribunal held that the ordinary meaning of the MFN clause is that "the investor's substantive rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing procedural rights as well." *See* Telenor Mobile Comm'n A.S. v. Republic of Hung., ICSID Case No. ARB/04/15, Award, ¶ 92 (Sept. 13, 2006).

[35] *See* Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111(4) AM. J. INT'L L. 873, 897 (2017) (highlighting "some discomfort with the use of MFN to rearrange the framework of substantive protection in investment treaties").

[36] *See* WORLD INVESTMENT REPORT, *supra* note 26, at 9, 21.

臺灣大學學術期刊資料庫

3,231 billion) is twice that in 2010, and the outward FDI stocks of China in 2020 ($ 2,581 billion) is seven times more than that in 2010.[37] Mirroring the rapid growth in China's inward and outward FDI stocks, China has been one of the world's most impactful geopolitical player today in international investment governance.

At the international level, from the initiation of the BRI in 2013 to 2020, China has invested around $770 billion in the 138 countries that had signed MoUs with China to work together under the BRI, promoting infrastructure development projects spread across Asia and Africa.[38] Under China's G20 presidency in 2016, the Trade and Investment Working Group was established, and the *G20 Guiding Principles for Global Investment Policymaking* that proposes non-binding principles to provide general guidance for investment policymaking was adopted.[39] Also, China has been taking the lead in the area of investment facilitation in recent years. For instance, China introduced its vision on investment facilitation, laying the groundwork for the Joint Ministerial Statement at the 11th Ministerial Conference in Buenos Aires, which points out a prospective WTO framework on investment facilitation.[40] Meanwhile, China has been active in participating international discussions on ISDS reform, and submitted the proposal to the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") Working Group III.[41] In addition, China signed the United Nations Convention on International Settlement Agreements Resulting from Mediation in 2019,[42] preparing for the use of mediation in ISDS cases.

At the regional level, China has accelerated the regional IIA rulemaking in recent years. In November 2020, China signed the RCEP with fourteen other countries, which is the largest preferential economic agreement by economic output in the world, with the potential to increase investment and

---

[37] See *FDI Stocks (indicator)*, OECD, https://data.oecd.org/fdi/fdi-stocks.htm#indicator-chart (last visited Jan. 31, 2023).

[38] *See generally* CHRISTOPH NEDOPIL WANG, CHINA BELT AND ROAD INITIATIVE (BRI) INVESTMENT REPORT H1 2021 (July 2021), https://greenfdc.org/wp-content/uploads/2021/07/21_07_22_BRI-Investment-Report-H1-2021.pdf; Dilini Pathirana, *Rising China and Global Investment Governance: An Overview of Prospects and Challenges*, 4 CHINESE J. GLOB. GOVERNANCE 122, 149 (2018).

[39] *See G20 Agrees Guiding Principles for Global Investment Policymaking*, OECD (July 11, 2016), https://www.oecd.org/investment/g20-agrees-principles-for-global-investment-policymaking.htm.

[40] *See* Communication from China, *Possible Elements of Investment Facilitation*, at 1, WTO Doc. JOB/GC/123 (Apr. 26, 2017); WTO, Joint Ministerial Statement on Investment Facilitation for Development, WTO Doc. WT/MIN(17)/59 (Dec. 13, 2017).

[41] In China's proposal on ISDS reform, several reform options were highlighted: establishing a permanent appellate mechanism, adopting alternative dispute resolution measures, stipulating pre-arbitration consultation procedures, enhancing transparency discipline for third-party funding, etc. *See* China's Proposal, *supra* note 30, at 4, 5.

[42] *United Nations Convention on International Settlement Agreements Resulting from Mediation*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en (last visited Jan. 31, 2023).

臺灣大學學術期刊資料庫

integration among the economies of East Asia.[43] In the same year, China and the EU announced an Agreement in Principle for the EU–China Comprehensive Agreement on Investment after thirty-five rounds of negotiations. The CAI represents a significant step towards regionalism in international investment law.[44] Additionally, China formally applied to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership in September 2021.[45] In general, China's participation in mega-regional IIAs and its growing power in international investment governance complement and reinforce each other.

III. CURRENT EFFORTS OF CHINA IN RELATION TO IIA MODERNIZATION

There is necessity of China's IIA modernization. However, China's IIA modernization will not be effortless given the great amount of treaties. This Part introduces options adopted by China to modernize its IIA stocks and provides observations on China's recent IIA modernization.

A. Options Adopted to Modernize Chinese IIAs

Since 2010, a number of economies, like the EU,[46] Brazil,[47] Australia,[48]

[43] RCEP, *supra* note 17.

[44] Draft CAI, *supra* note 18. *See also* Qian Xu, *Scoping the Impact of the Comprehensive Agreement on Investment: Liberalization, Protection, and Dispute Resolution in the Next Era of EU–China Relations*, 30(1) ASIA PAC. L. REV. 93, 93 (2022).

[45] *China Officially Applies to Join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (Sept. 18, 2021, 9:30 AM), MINISTRY OF COM. CHINA, http://english.mofcom.gov.cn/article/newsrelease/significantnews/202109/20210903201113.shtml.

[46] The EU has replaced BITs between the EU Member States and Canada, Vietnam and Singapore by IIAs between the EU and those countries in the post-Lisbon era. *See* Investment Protection Agreement Between the European Union and its Member States and the Socialist Republic of Viet Nam, EU-Viet., art. 4.20, annex 6, June 30, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3616/eu---viet-naminvestment-protection-agreement-2019-; Investment Protection Agreement Between the European Union and Its Member States and the Republic of Singapore, EU-Sing., art. 4.12, annex 5, Oct. 15, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-withinvestment-provisions/3545/eu---singapore-investment-protection-agreement-2018-; Comprehensive Economic and Trade Agreement: Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part, Can.-EU, art. 30.8, annex 30-A, Oct. 30, 2016, 2017 O.J. (L 11) 23.

[47] Fourteen traditional BITs containing both State-State Dispute Settlement (SSDS) and ISDS clauses were concluded between Brazil and other countries from 1994 to 1999, whereas the National Congress of Brazil never approved them. There was a transformation of Brazil's international investment policy in around 2013. Since then, Brazil has been working on an innovative model of investment dispute resolution under its Cooperation and Facilitation Investment Agreement. *See International Investment Agreements Navigator*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil (last visited Jan. 31, 2023). *See also* Geraldo Vidigal & Beatriz Stevens, *Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?*, 19(3) J. WORLD INV. & TRADE 475 (2018).

[48] Australia has replaced BITs respectively between it and Mexico, Vietnam by the Comprehensive

臺灣大學學術期刊

Indonesia[49] and so on, have reviewed or been reviewing their IIA stocks. According to the United Nations Conference on Trade and Development (hereinafter "UNCTAD"), there are at least ten options available for countries that wish to change existing IIAs to bring them into conformity with new policy objectives. Potential options for IIA modernization, not mutually exclusive and can be used in a complementary manner, include: jointly interpreting treaty provisions, amending treaty provisions, replacing outdated treaties, consolidating the IIA network, managing relationships between coexisting treaties, referencing global standards, engaging multilaterally, abandoning unratified old treaties, terminating existing old treaties, and withdrawing from multilateral treaties.[50] Besides, some countries have developed new IIA models in the modernization process.[51]

As for the modernization of China's IIA regime, several options were adopted from 2001 to now: (i) amending earlier IIAs by protocols;[52] (ii) replacing earlier BITs by new BITs[53] or investment chapters in FTAs;[54] (iii)

---

and Progressive Agreement for Trans-Pacific Partnership, and has been reviewing the remaining fifteen BITs since July 2020. *See Discussion Paper: Review of Australia's Bilateral Investment Treaties*, AUSTL. DEP'T OF FOREIGN AFF. & TRADE, https://www.dfat.gov.au/trade-and-investment/discussion-paper-review-australias-bilateral-investment-treaties (last visited Jan. 31, 2023).

[49] As of April 2022, Indonesia has terminated twenty-five BITs since it revealed the intention to terminate all BITs in 2014. *See* Lucas Jun Hao Wong, *Indonesia's Termination of Bilateral Investment Treaties*, 1 SMU ASEAN PERSP. 1, 1 (2022).

[50] *See* UNCTAD *Reform of the International Investment Agreement Regime: Phase 2*, at 3, U.N. Doc. TD/B/C.II/MEM.4/14 (July 31, 2017).

[51] *See, e.g.*, *2021 Model FIPA*, GOV'T OF CANADA (2021), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_mod%20e.le_apie.aspx?lang=eng; NETHERLANDS MODEL INVESTMENT AGREEMENT, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download; COOPERATION AND FACILITATION INVESTMENT AGREEMENT OF BRAZIL AND, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download [hereinafter BRAZIL MODEL CFIA (2015)].

[52] As of 31 January 2023, eight IIAs have been amended by protocols, including: China–Romania BIT (concluded 1994, modernized 2007), China–Slovakia BIT (concluded 1991, modernized 2005), China–Bulgaria BIT (concluded 1989, modernized 2007), China–Sweden BIT (concluded 1982, modernized 2004), China–Singapore FTA (concluded 2008, modernized 2018), China–New Zealand FTA (concluded 2008, modernized 2021), China–Chile FTA (concluded 2005, modernized 2019), China–ASEAN Framework Agreement (concluded 2002, modernized 2015). For detailed information of the IIAs, see Annex 1.

[53] As of 31 January 2023, thirteen BITs were replaced by new BITs, including: China–Turkey BIT (concluded 1990, modernized 2015), China–Uzbekistan BIT (concluded 1992, modernized 2011), China–Switzerland BIT (concluded 1986, modernized 2009), China–France BIT (concluded 1984, modernized 2007), China–Korea BIT (concluded 1992, modernized 2007), China–Portugal BIT (concluded 1992, modernized 2005), China–Czech BIT (concluded 1992, modernized 2005), China-Spain BIT (concluded 1992, modernized 2005), China–BLEU (Belgium-Luxembourg Economic Union) BIT (concluded 1984, modernized 2005), China–Finland BIT (concluded 1984, modernized 2004), China–Germany BIT (concluded 1983, modernized 2003), China–Netherlands BIT (concluded 1985, modernized 2001), China–Nigeria BIT (concluded 1997, modernized 2001). For detailed information of the IIAs, see Annex 1.

[54] As of 31 January 2023, three BITs were replaced by FTAs, including: China–Mauritius BIT (concluded 1996, modernized 2019), China–Chile BIT (concluded 1994, modernized 2005), China–

臺灣大學學術期刊資料庫

consolidating the IIA network by regional IIAs, especially the China–ASEAN IIA network[55] and the China–EU IIA network;[56] (iv) developing an IIA model;[57] (v) jointly interpreting an IIA;[58] and (vi) terminating old treaties.[59] Notably, investment regimes between China and some countries have been modernized for more than once, like the China–Singapore investment regime,[60] the China-Chile investment regime,[61] etc.

The modernization process of China's IIA regime can be divided into two phases. The first phase lasts from 2001 to 2010, when some earlier IIAs, mostly BITs concluded between China and the European countries, were amended by protocols or replaced by new IIAs. The second one lasts from 2011 to the present, when the focus of China's IIA-making moves from BITs to FTAs and China accelerated the regional IIA rulemaking. In addition, according to the information published on the website of the Ministry of Commerce of China, China will continue on pursuing IIA regionalism and concluding new FTAs in the future.[62]

Singapore BIT (concluded 1985, modernized 2008). For detailed information of the IIAs, see Annex 1.

[55] *See* Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations [hereinafter China–ASEAN Framework Agreement], Nov. 4, 2002, http://fta.mofcom.gov.cn/dongmeng/annex/touzixieyi_en.pdf (entered into force July 1, 2003); RCEP, *supra* note 17.

[56] On 30 December 2020, after rounds of negotiations which were officially launched in November 2013, the EU and China announced an Agreement in Principle for the EU–China Comprehensive Agreement on Investment. CAI is an ambitious bilateral investment agreement covering diverse areas, including market access, level playing field, sustainable development and dispute settlement. *See* Draft CAI, *supra* note 18.

[57] So far, China has issued three versions of the Chinese Model IIA respectively in 1984, 1989, and 1997. For these three Model IIAs, see *supra* note 12, at 423-39 (2009). In addition, the Ministry of Commerce of China drafted the fourth Model IIA in 2010, which was not published officially. For the analysis of the fourth Model IIA, see generally Wen Xiantao, *Comments on the Draft of China's Model BIT (I)*, 18(4) Guoji Jingji Fa Xuekan (国际经济法学刊) [CHINESE J. INT'L ECON. L.] 169 (2011); Wen Xiantao, *Comments on the Draft of China's Model BIT (II)*, 19(1) Guoji Jingji Fa Xuekan (国际经济法学刊) [CHINESE J. INT'L ECON. L.] 132 (2012); Wen Xiantao, *Comments on the Draft of China's Model BIT (III)*, 19(2) Guoji Jingji Fa Xuekan (国际经济法学刊) [CHINESE J. INT'L ECON. L.] 57 (2012).

[58] *See* Sanum Inv. Ltd. v. Gov't of the Lao People's Democratic Republic, PCA Case No. 2013-13 Judgment, ¶¶ 109-11 (Sept. 29, 2016) [hereinafter Sanum Investments Limited v. Laos]. In the case of Sanum Investments Limited v. Laos People's Democratic Republic, Laos and China made joint interpretation on whether the China-Laos BIT extends to protect a Macanese investor. Both Laos and China are of the view that the BIT is not applicable to Macau SAR due to regulations of the *Basic Law of Macau* and lack of separate arrangements.

[59] As of 31 January 2023, four Chinese IIAs were terminated without any replacement, including: China–India BIT, China–Indonesia BIT, China–Ecuador BIT, China–Union of Soviet Socialist Republics BIT. For detailed information of the IIAs, see Annex 1.

[60] The China–Singapore BIT concluded in 1985 coexisted with the China–Singapore FTA concluded in 2008 for around ten years, and was replaced by the updated China–Singapore FTA in 2019.

[61] The China–Chile BIT concluded in 1994 was replaced by the China–Chile FTA in 2005, and the China–Chile FTA was updated successively by the Supplementary Agreement on Investments in 2012 and the protocol in 2019.

[62] Currently, China is in the negotiation processes of new FTAs or the updated version of FTAs with

臺灣大學學術期刊資料庫

B. Observations on the Recent Modernization of China's IIA Regime

Several points on recent Chinese IIA modernization can be observed from the third and fourth generations of Chinese IIAs.[63] In addition to IIAs that have entered into effect, the Draft CAI is also taken into account in this Section. Although the ratification process of the CAI has been suspended owing to geopolitical tensions, the CAI is the latest regional IIA negotiated by China and also a landmark agreement in China's IIA history.[64]

First, the focus of Chinese IIAs is moving from a single one, i.e., investment protection, to a comprehensive one in the process of China's IIA modernization. The comprehensive focus covers investment facilitation, investment protection, and investment liberalization. For instance, concrete market access commitments are made in the RCEP based on a combination of pre-establishment national treatment clauses and a negative list of reserved industries.[65] Moreover, the China–Cambodia FTA requires the contracting parties to establish a Committee on investment cooperation with the purpose of investment promotion and facilitation.[66]

Second, reform-oriented provisions aimed at striking a balance between investment protection and the right of States to regulate have been frequently inserted in the modernized IIAs. Relevant provisions cover both substantive and procedural provisions. At the substantive level, investment treatments are clearer and more balanced through the refined definition of investment,[67] national treatment and MFN treatment pre- and post-establishment with "in like circumstances" comparator,[68] qualified fair and equitable treatment (hereinafter "FET"),[69] exceptions to indirect expropriation,[70] transfer-of-

Ecuador, Nicaragua, Peru, Palestine, Korea, Panama, Moldova, Norway, Israel, Sri Lanka, Japan and Korea, and the Gulf Cooperation Council. Also, China is considering to conclude FTAs with Columbia, Fiji, Nepal, Papua New Guinea, Canada, Bengal, Mongolia, and Switzerland. *See* MINISTRY COM. CHINA, *supra* note 4.

[63] In addition to IIAs that have entered into effect, the Draft CAI is also taken into account in this Section. Although the CAI negotiations were "frozen" in March 2021 due to political tensions between China and the EU, as the latest BIT negotiated by China, the Draft CAI has provided significant information on China's IIA modernization.

[64] *See, e.g.*, Henry Gao, *The EU-China Comprehensive Agreement on Investment: Strategic Opportunity Meets Strategic Autonomy*, *in* ASIAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 2022 47 (M. Chi et al. eds., 2022).

[65] RCEP, *supra* note 17, annex III.

[66] Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Kingdom of Cambodia, Cambodia-China, art. 8.5, Oct. 12, 2020, http://fta.mofcom.gov.cn/cambodia/xieyi/xieyizw_en.pdf (entered into force Jan. 1, 2022).

[67] *See, e.g.*, Agreement Between the Government of the Republic of Turkey and the Government of the People's Republic of China Concerning the Reciprocal Promotion and Protection of Investments, China-Turk., art. 1, July 29, 2015, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6085/download (entered into force Nov. 11, 2020).

[68] *See, e.g.*, RCEP, *supra* note 17, art. 10.3-.4.

[69] *See, e.g.*, RCEP, *supra* note 17, art. 10.5.

[70] *See, e.g.*, China–Japan–Korea TIA, *supra* note 22, Protocol.

臺灣大學學術期刊資料庫

funds exceptions,[71] general exceptions,[72] etc. At the procedural level, the investment dispute settlement mechanism is refined by detailed investment arbitration clauses,[73] investment dispute prevention clauses,[74] the expert-driven oversight for commitments on sustainable investment,[75] and so on.

Third, clauses on non-investment issues—subsidy, labor, environment protection, and other social concerns—have been incorporated in the latest negotiations of Chinese IIAs. For instance, the regulations on transparency of subsidies are included in the Draft CAI.[76] In the Draft CAI, the coverage of rules on subsidies has expanded from goods to investment,[77] which is consistent with the EU's new move on foreign subsidies.[78] Moreover, the disclosure of information on subsidizing activities is further clarified,[79] which may help address concerns to the underperformance of the transparency mechanism of the WTO legal framework.

IV. CHALLENGES IN CHINA'S IIA MODERNIZATION

As mentioned above, China has replaced pre-existing IIAs with new IIAs on several occasions since 2000. Despite its rich experiences in replacing earlier IIAs, China has not always been consistent in this approach. Instead, the treaty parallelism can be extensively observed in the current IIA regime of China. In addition to overlapping treaties, uncertainty remains on the application of Chinese IIAs to two Special Administrative Regions (hereinafter "SAR") of China. Also, there is insufficient coordination

[71] *See, e.g.*, Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments, China-Tanz., art. 8, Mar. 24, 2013, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5488/download (entered into force Apr. 17, 2014).

[72] *See, e.g.*, Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments [hereinafter China–Canada BIT], Can.-China, art. 33, Sept. 9, 2012, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3476/download (entered into force Oct. 1, 2014).

[73] *See, e.g.*, Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China [hereinafter China–Australia FTA], Austl.-China, sec. B, ch. 9, June 17, 2015, http://fta.mofcom.gov.cn/Australia/annex/xdzw_en.pdf (entered into force Dec. 20, 2015).

[74] *See, e.g.*, RCEP, *supra* note 17, art. 10.17.2.

[75] *See, e.g.*, Draft CAI, *supra* note 18, subsec. 4, sec. IV.

[76] Draft CAI, *supra* note 18, art. 8, subsec. 2, sec. III.

[77] Draft CAI, *supra* note 18, art. 8.1, subsec. 2, sec. III.

[78] *See* European Commission Press Release IP/21/1982, *Commission Proposes New Regulation to Address Distortions Caused by Foreign Subsidies in the Single Market*, EUR. COMM'N (May 5, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1982. *See also* Csongor István Nagy, *Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field Be Levelled?*, 2(1) CENT. EUR. J. COMPAR. L. 147, 147 (2021).

[79] Draft CAI, *supra* note 18, art. 8.5, subsec. 2, sec. III: "[E]ach Party shall promptly, and no later than on 31 December of the calendar year subsequent to the one in which the subsidy was granted, publish on a publicly accessible website the objective, legal basis, form, amount or amount budgeted for, and recipient of any subsidy."

臺灣大學學術期刊資料庫

between China's domestic law and existing IIAs, especially the first IIA generation.

A. Multiple Overlaps of Chinese IIAs

Treaty overlaps are commonly seen in the changing IIA landscape with the prolific number of preferential trade agreements.[80] Treaty overlaps in China's IIA regime, however, are more complicated in comparison to those in other countries. Currently no other country—not even the ASEAN countries or Australia—faces as many overlapping IIAs as China does. In some circumstances, a bilateral investment treaty, a free trade agreement with an investment chapter, and a regional investment treaty even exist together in the same investment regime between China and another economy. Moreover, most overlapping treaties in China's IIA regime provide investors with effective remedies, which aggravates the "Achilles Heel".[81]

Concretely speaking, there are two types of overlaps in the status quo of China's IIA regime. One results from the treaty parallelism between earlier IIAs and the latter ones. First, an overlap exists between an earlier BIT and a latter FTA, both of which were concluded by the same contracting parties, and investment protection clauses are included in the FTA. Such overlaps now exist in the China–Australia investment regime, the China–Korea investment regime, the China–New Zealand investment regime, the China–Peru investment regime, the China–Georgia investment regime, and the China–Pakistan investment regime.[82] Second, there is an implicit treaty overlap existing between an earlier BIT and a latter BIT in the case that the sunset clause (also known as "survival clause")[83] in the earlier BIT was not terminated immediately when the earlier BIT was terminated. For instance,

[80] *See* Wolfgang Alschner, *Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction*, 17(2) J. INT'L ECON. L. 271, 271 (2014).

[81] *See* Aayushi Singh, *Deconstructing Treaty Parallelism and Overlap: The Infamous "Achilles Heel"*, CAMBRIDGE INT'L L.J. (May 3, 2021), http://cilj.co.uk/2021/05/03/deconstructing-treaty-parallelism-and-overlap-the-infamous-achilles-heel/

[82] Except for Australia, Korea, New Zealand, Peru, Georgia, and Pakistan, countries including Cambodia, Switzerland, Iceland, and Costa Rica also have both effective BITs and FTAs with China, respectively. However, neither the China–Cambodia FTA nor the other three FTAs have stipulated investment protection. Instead, those FTAs only provide clauses for investment cooperation or simply refer to the earlier BITs, and thus cannot constitute any overlap between FTAs and earlier BITs. For detailed information of FTAs, see Table 5, Annex 1.

[83] Sunset clauses generally extend the protection of investments made prior to the date of termination of the treaty for a further period of time.

臺灣大學學術期刊資料庫

in the cases of *Goh Ghin Soon v. China*[84] and *AsiaPhos Limited v. China*,[85] the Singaporean investor initiated the case based on China–Singapore BIT, which was terminated in 2008. However, according to the effective sunset clause in the BIT, relevant provisions remain in force for fifteen years from the date of the BIT's termination.[86]

The other is known as the "vertical overlap" of IIAs, existing when an investor from country A in country B is protected by not only a bilateral IIA between country A and country B but a regional IIA, of which country A and country B are one of the contracting parties.[87] So far, China's accelerated regional IIA rulemaking has created vertical overlaps in several international investment regimes. The first one is the China–ASEAN investment regime. Currently, most ASEAN members have BITs and/or FTAs with China respectively, [88] which coexist with the China–ASEAN Framework Agreement.[89] The RCEP, of which China and the ASEAN countries are contracting countries, entered into effect in January 2022 and added another layer to the China–ASEAN investment regime.[90] Second, vertical overlaps also exist in the China–Korea and China–Japan investment regime. There are four IIAs now governing the two countries' investment relationship, including the RCEP,[91] the China–Korea BIT,[92] the China–Korea FTA,[93] and the China–Japan–Korea TIA.[94] Additionally, the China–Japan–Korea FTA that is now under negotiations may exacerbate the treaty overlaps in the China–Korea investment regime.[95] Similar situation exists in the China–

[84] *Goh v. China*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1090/goh-v-china (last visited Mar. 11, 2023); *Mr. Goh Chin Soon (Singapore) v. People Republic of China*, PERMANENT COURT OF ARB., https://pca-cpa.org/en/cases/269/ (last visited Mar. 11, 2023).

[85] AsiaPhos Ltd. v. People's Republic of China, ICSID Case No. ADM/21/1, Award, (Feb. 16, 2023).

[86] Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments, China-Sing., art. 16.3, Nov. 21, 1985, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5377/download (entered into force Feb. 7, 1986).

[87] *See* Wolfgang Alschner, *supra* note 80, at 272.

[88] ASEAN countries having an effective BIT with China include: Cambodia, Laos, Myanmar, Philippines, Thailand, Brunei, Malaysia, and Vietnam. In addition, Singapore has an effective FTA with China. For detailed information of the IIAs, see Annex 1.

[89] China–ASEAN Framework Agreement, *supra* note 55.

[90] RCEP, *supra* note 17.

[91] *Id.*

[92] Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investments, China-S. Kor., Sept. 7, 2007, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3338/download (entered into force Dec. 1, 2007).

[93] Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea, China-S. Kor., June 1, 2015, https://investmentpolicy.unctad.org/international-investment-agreements/treatyfiles/3461/download (entered into force Dec. 20, 2015).

[94] China–Japan–Korea TIA, *supra* note 22.

[95] *See* MINISTRY COM. CHINA, *supra* note 4.

臺灣大學學術期刊資料庫

Japan investment regime.[96] Third and more importantly, there is a potential vertical overlap in the China–EU investment regime. There are twenty-five fragmented BITs in force concluded by twenty-six Member States of the European Union (except for Ireland) and China individually.[97] Before the release of the Draft CAI, it is generally accepted that once the CAI enters into force, respective BITs between China and the EU Member States will be terminated.[98] However, according to the Article 15.1, Sub-section 2, Section VI of the Draft CAI, earlier BITs between the EU Member States and China will not be superseded or terminated by the CAI.[99] Although clauses on investment protection and investment dispute settlement have not been included in the Draft CAI, China and the EU have committed to complete the negotiations within two years of the signature of the CAI.[100] In the case that Article 15.1 remains effective when the negotiations on clauses on investment protection and investment dispute settlement were concluded, a vertical overlap of IIAs will emerge in the China–EU investment regime.

Regarding IIA overlaps, some believe that "the superposition of instruments of protection does not bring about chaos, but rather better protection to foreign investors."[101] Meanwhile, concerns or oppositions have been expressed. Wolfgang Alschner highlights that "[u]nconsolidated overlap can create a number of serious legal problems ranging from functional duplication or contradiction to parallel proceedings and normative conflicts."[102] Likewise, the dangers of overlapping IIAs and suggested termination of the earlier treaties was highlighted in the Submission on Review of Australia's Bilateral Investment Treaties.[103] As for multiple

[96] China–Japan–Korea TIA, *supra* note 22; Agreement Between Japan and the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investment, China-Japan, Aug. 27, 1988, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/747/download (entered into force May 14, 1989).

[97] Belgium and Luxembourg have jointly negotiated a BIT with China.

[98] EU Regulation No. 1219/2012 made clear that BITs concluded by the EU Member States "will be progressively replaced by agreements of the Union relating to the same subject matter." *See* Regulation 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. (L 351) 40. *See also* Andrew Cannon et al., *Updates on Potential EU-China Comprehensive Agreement on Investment (With a Focus on Investment Protection and ISDS)– New Wine in New Bottles?*, HERBERT SMITH FREEHILLS (Jan 29, 2021), https://hsfnotes.com/publicinternationallaw/2021/01/29/updates-on-potential-eu-china-comprehensive-agreement-on-investment-with-a-focus-on-investment-protection-and-isds-new-wine-in-new-bottles/.

[99] Draft CAI, *supra* note 18, art. 15.1, subsec. 2, sec. VI.

[100] Draft CAI, *supra* note 18, art. 3, subsec. 2, sec. VI.

[101] *See* Sanum Investments Limited v. Laos, *supra* note 58, Award on Jurisdiction, ¶ 292 (Dec. 13, 2013).

[102] *See* Wolfgang Alschner, *supra* note 80, at 298.

[103] *See* Tania Voon, *Submission: Review of Australia's Bilateral Investment Treaties*, AUSTL. GOV. DEP'T OF FOREIGN AFF. & TRADE (Sept. 30, 2020), https://www.dfat.gov.au/sites/default/files/bit-review-submission-professor-tania-voon_.pdf.

臺灣大學學術期刊資料庫

overlaps in China's IIA regime, this article holds that such overlaps cause more harm than good.

To be specific, IIA overlaps may raise problems in both the investment treatment and arbitral practice. On the one hand, gaps between substantive clauses of earlier IIAs and those of the new ones may bring uncertainty or inconsistency in standards of investment treatment in an international investment regime. Specifically, earlier Chinese IIAs include rather broad, general, and undefined substantive provisions, while the modern treaty practice of China favours, *inter alia*: (i) clarifying the definition of qualified investors and investments;[104] (ii) stipulating that substantive provisions in other IIAs concluded by a Party with a third country do not in themselves constitute MFN treatment;[105] (iii) circumscribing the application of the FET clause, like limiting the treatment to what is required under the customary international law minimum standard of treatment of aliens;[106] (iv) containing general exceptions for domestic policy space,[107] etc. Moreover, a number of recent IIAs have set exceptions for ISDS,[108] while the majority of earlier IIAs allow ISDS with respect to disputes concerning an investment in the territory of the host country. The differences in the regulatory landscape of different IIAs have created an unpredictable treaty scenario and provided incentives for investors to conduct treaty shopping. In individual cases, investors may invoke substantive clauses under the earlier IIAs and remain unconstrained from more modernized and balanced IIAs.

On the other hand, treaty overlaps may also result in disorders in arbitral practice. First, jurisdictional issues may arise once investors are provided with remedies under different IIAs on the same legal issue involving the same respondent State. For instance, in the case of *Pingan v. Belgium*, investors were confronted with two IIAs in the China–Belgium investment regime. One is the 1986 BIT terminated in 2009, while the sunset clause in the 1986 BIT provides for the continued ten-year effect for the 1986 BIT from its expiry in respect of investments made before 2009.[109] The other IIA is the 2009 BIT that replaced the 1986 BIT. In that case, Claimants brought the claim notified under the 1986 BIT to arbitration in 2012, pursuant to the 1986 BIT as regards to the substantive obligations and pursuant to the 2009

[104] *See, e.g.*, RCEP, *supra* note 17, art. 10.1.
[105] *See, e.g.*, Draft CAI, *supra* note 18, art. 5.2, sec. II.
[106] *See, e.g.*, RCEP, *supra* note 17, art. 10.5.2.
[107] *See, e.g.*, China–Australia FTA, *supra* note 73, art. 9.8.
[108] For instance, according to the China–Canada BIT, a decision with respect to whether or not to (a) initially approve an investment that is subject to review or (b) permit an investment that is subject to national security review shall not be subject to investment dispute settlement provisions. *See* China–Canada BIT, *supra* note 72, annex D.34.
[109] 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, Belg.-China-Lux., art. 14.4, June 4, 1984, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/340/download (entered into force Oct. 5, 1986, repealed Dec. 1, 2009).

臺灣大學學術期刊論文檢測

BIT as regards the procedural remedy. Conversely, Respondents raised objection to jurisdiction *ratione temporis*, arguing that the 2009 BIT could not apply to the dispute that arose prior to 2009.[110] The Tribunal supported the Respondents, holding that the 2009 BIT did not expressly deal with the fate of disputes arising before the entry in force of the 2009 BIT, and nothing in the wording of the 2009 BIT could be interpreted as that "more extensive remedies under the 2009 BIT would be available to pre-existing disputes that had been notified under the 1986 BIT but not yet subject to arbitral or judicial process".[111] Although the Tribunal's conclusion on jurisdiction *ratione temporis* remains controversial,[112] the case of *Pingan v. Belgium* provides an example of the complexity of the jurisdictional issues with respect to overlapping IIAs, especially when the transition clause in the latter IIA remains vague on the treaty's application to disputes arisen prior to the entry in force of the treaty.[113] Second, in the case that investors seek double relief in arbitral tribunals constituted under different IIAs, parallel proceedings may then result in problems (including conflicting decisions, double recovery, duplication of costs, etc.) and even bring difficulty in enforcement.

To conclude, in the context of multiple treaty overlaps in China's IIA regime, the modern clarifications in recent IIAs may fail to prevent the application or interpretation of the unmodernized IIAs, which may prevent the development of a more balanced, stable, and predictable IIA regime.

B. Uncertainty About the Application of Chinese IIAs to Hong Kong and Macau

The "one country, two systems" policy of China[114] has created a unique scenario for the application of international treaties. On the one hand, the SARs are allowed to conclude agreements with foreign countries on their

[110] Ping An Life Ins. Co. of China, Ltd. & Ping An Ins. (Grp.) Co. of China, Ltd. v. Kingdom of Belg., ICSID Case No. ARB/12/29, Award, ¶ 138 (Apr. 30, 2015).
[111] *Id.* ¶ 231.
[112] *See generally* Qing Ren, *Ping An v Belgium: Temporal Jurisdiction of Successive BITs*, 31(1) ICSID REV. 129 (2016) (arguing that the Tribunal's interpretation on the transition clause of the 2009 BIT amounts to rewriting the provision, and "the 2009 BIT appears to cover the disputes which arose before its entry into force but were not then under judicial or arbitral process yet").
[113] Agreement Between the Belgium-Luxembourg Economic Union and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments, Belg.-China-Lux., art. 10.2, June 6, 2005, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/338/download (entered into force Dec. 1, 2009).
[114] "One country, two systems" is a constitutional principle of China describing the governance of Hong Kong and Macau after they became China SARs in 1997 and 1999, respectively. The principle rendered it possible for Hong Kong and Macau to become part of China, yet remaining their own systems and way of life. *See* Brian C. H. Fong, *One Country, Two Nationalisms: Center-Periphery Relations Between Mainland China and Hong Kong, 1997–2016*, 43(5) MOD. CHINA 523, 523 (2017); ALBERT H.Y. CHEN, THE CHANGING LEGAL ORDERS IN HONG KONG AND MAINLAND CHINA: ESSAYS ON "ONE COUNTRY, TWO SYSTEMS" 4-31 (2021).

臺灣大學學術期刊資料庫

own in certain fields, including economy, finance, trade, investment, etc., in accordance with the Basic Laws or under the specific authorization of the Chinese central government.[115] On the other hand, the Chinese central government can decide whether an international treaty to which China is a party applies to the SARs based on circumstances and needs after seeking views from SAR governments.[116]

It was emphasized by the Chinese government in 2016 that "as a principle, the investment agreement between the central government and foreign countries do not apply to the SARs, unless otherwise decided by the central government after seeking the views of the SAR governments and consulting with the other contracting parties of the agreement".[117] Nonetheless, whether IIAs concluded by China can be applied to investors from Hong Kong and Macau SARs is not only a domestic legal issue but an international law issue as demonstrated in cases of *Tza Yap Shum v. Peru* and *Sanum Investments Ltd. v. Laos*, in which investors from SARs invoke Chinese IIAs to seek relief.[118]

In the case of *Tza Yap Shum v. Peru*, the Tribunal rejected the Respondent's objection on jurisdiction *ratione personae* on the ground that the Claimant had proved its Chinese nationality, while holding that it is not necessary for the Tribunal to determine the applicability of the China–Peru BIT to Hong Kong.[119] In contrast, the Tribunal in the case of *Sanum Investments Ltd. v. Laos* did not avoid the question on the scope of the application of the treaty, finding that the China–Laos BIT must be applied to Macau by virtue of Article 15 of the *1978 Convention on the Succession of States in Respect of Treaties* (the "moving treaty frontiers" rule) and Article 29 of the *1969 Vienna Convention on the Law of Treaties*,[120] both of which

---

[115] *See* Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jiben Fa [The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] arts. 151, 136 (China).

[116] *See Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference*, MINISTRY OF FOREIGN AFF. CHINA (Oct. 21, 2016), https://www.mfa.gov.cn/ce/cegv//eng/fyrth/t1407743.htm.

[117] *Id.*

[118] Señor Tza Yap Shum v. Republic of Peru, *supra* note 28, ¶¶ 49-51; Sanum Investments Limited v. Laos, *supra* note 58, Award on Jurisdiction, ¶¶ 115-18 (Dec. 13, 2013). There are also pending ISDS cases initiated by Hong Kong investors on the basis of Chinese IIAs, see Alpene Ltd. v. Republic of Malta, ICSID Case No. ARB/21/36; PCCW Cascade (Middle East) Ltd. v. Kingdom of Saudi Arabia, ICSID Case No. ARB/22/20.

[119] Señor Tza Yap Shum v. The Republic of Peru, *supra* note 28, ¶¶ 52-77.

[120] Article 29 of the *1969 Vienna Convention on the Law of Treaties* provides that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." Article 15 of the *1978 Vienna Convention on the Succession of States in Respect of Treaties* provides that:

> When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State: . . . (b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from

臺灣大學學術期刊論文網

are considered as rules of customary international law.[121] According to the Tribunal, China's resuming its exercise of sovereignty over SARs comports with the definition of "state succession". In the case that the China–Laos BIT keeps silent on its extension to the SARs, the extension of the BIT to Macau will not be incompatible with the object and purpose of the BIT or radically change the conditions for the operation of the BIT.[122] In response, Laos and China made statements successively, emphasizing that the China–Laos BIT should not be applicable to Macau SAR in view of regulations of the Basic Law of Macau and the absence of separate arrangements.[123]

So far, there are only few Chinese IIAs excluding the application of the treaties to the SARs. One IIA explicitly prohibits the application of the treaty to the SARs unless otherwise agreed;[124] others implicitly exclude the application by limiting the scope of the territorial application of the treaty to "the (entire) customs territory of China" except as otherwise specified.[125] After *Tza Yap Shum v. Peru* and *Sanum Investments Ltd. v. Laos*, the problem of the application of Chinese IIAs to Hong Kong and Macau remains unsolved. In addition, this challenge is closely connected with the issue of overlapping IIAs discussed in Section A. In the case that the Chinese IIAs are allowed to extend to the SARs, treaty overlaps will occur when both the Chinese central government and the SAR government have IIAs with other countries.

> the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

See Vienna Convention on the Law of Treaties art. 29, May 23, 1969, 1155 U.N.T.S. 331; Vienna Convention on the Succession of States in Respect of Treaties art. 15, Aug. 23, 1978, 1946 U.N.T.S. 3.

[121] *See* Sanum Investments Limited v. Laos, *supra* note 58, Awards on Jurisdiction, ¶¶ 220-24 (Dec. 13, 2013).

[122] *Id.* ¶¶ 237-300.

[123] *See* Sanum Investments Limited v. Laos, *supra* note 58.

[124] The Protocol of the China–Russia BIT provides that "[u]nless otherwise agreed by both Contracting Parties, the Agreement does not apply to the Hong Kong Special Administrative Region of the People's Republic of China and the Macau Special Administrative Region of People's Republic of China." *See* Agreement Between the Government of the Russian Federation and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, China-Russ., Protocol, Nov. 9, 2006, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/774/download (entered into force May 1, 2009).

[125] For example, Article 1.2 of the China–Switzerland FTA provides that "[e]xcept as otherwise specified, this Agreement shall apply to: (a) with respect to China, the entire customs territory of the People's Republic of China . . . ." *See* Free Trade Agreement Between the People's Republic of China and the Swiss Confederation, China-Switz., art. 1.2, July 6, 2013, https://edit.wti.org/app.php/document/show/3308b346-b03b-4c86-b5cb 41bce342fd29 (entered into force July 1, 2014).

臺灣大學學術期刊論文專用

C. Insufficient Coordination Between Chinese IIAs and Domestic Law

China has updated its domestic laws and regulations to improve the investment environment and facilitate foreign investment in recent years. The new Foreign Investment Law of China[126] and the Regulation for Implementation of the Foreign Investment Law[127] entered into force on 1 January 2020, which marks a milestone in China's reform of its foreign investment legal regime. In the new era of the management of FDI in China, a series of documents were issued, including the Special Administrative Measures for Foreign Investment (hereinafter "FDI Negative List"),[128] the Special Administrative Measures for Foreign Investment Access in Pilot Free Trade Zones,[129] the Catalogue of Encouraged Industries for Foreign Investment,[130] etc. In addition, a complaint mechanism for foreign-invested enterprises and foreign investors has been established, and some local governments in China have begun exploration in the establishment of the

[126] Zhonghua Renmin Gongheguo Waishang Touzi Fa (中华人民共和国外商投资法) [Foreign Investment Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2019, effective Jan. 1, 2020), CLI.1.330426 (China).

[127] Zhonghua Renmin Gongheguo Waishang Touzi Fa Shishi Tiaoli (中华人民共和国外商投资法实施条例) [Regulation for Implementing the Foreign Investment Law of the People's Republic of China] (promulgated by the St. Council, Dec. 26, 2019, effective Jan. 1, 2020), CLI.2.338347 (China).

[128] China has released the Special Administrative Measures for Foreign Investment [hereinafter FDI Negative List] annually since 2017. The current effective one is the 2021 FDI Negative List. From 2017 to 2021, the number of items restricted or prohibited to foreign investors was cut down from 93 to 31. *See* Waishang Touzi Zhunru Tebie Guanli Cuoshi (Fumian Qingdan) (2021 Nianban) (外商投资准入特别管理措施（负面清单）（2021 年版）) [Special Administrative Measures for the Access of Foreign Investment (FDI Negative List) (2021 version)] (promulgated by the Nat'l Dev. & Reform Comm'n and the Ministry Com., Sept. 18, 2021, effective Jan. 1, 2022), CLI.4.5112869 (China).

[129] China released the first version of the Special Administrative Measures for Foreign Investment Access in Pilot Free Trade Zones [hereinafter FTZ FDI Negative List] in 2015, and renewed the FTZ FDI Negative List respectively in 2017, 2018, 2019, 2020 and 2021. The current effective version is the 2021 FTZ FDI Negative List, in which the number of items restricted or prohibited to foreign investors was reduced to twenty-seven. *See* Ziyou Maoyi Shiyanqu Waishang Touzi Zhunru Tebie Guanli Cuoshi (Fumian Qingdan) (2021 Nianban) (自由贸易试验区外商投资准入特别管理措施（负面清单）（2021 年版）) [Special Administrative Measures for the Access of Foreign Investment in Pilot Free Trade Zones (FTZ FDI Negative List) (2021 version)] (promulgated by the Nat'l Dev. & Reform Comm'n and the Ministry Com., Sept. 18, 2021, effective Jan. 1, 2022), CLI.4.5112872 (China).

[130] The 2019 Catalogue of Encouraged Industries for Foreign Investment [hereinafter FDI Encouraged Catalogue] replaced the 2017 editions of the "encouraged category" of the Catalogue of Industries for Foreign Investment and the Catalogue of Encouraged Industries in the Central and Western Region. Moreover, China renewed the FDI Encouraged Catalogue in 2020. *See* Guli Waishang Touzi Chanye Mulu (2020 Nianban) (鼓励外商投资产业目录（2020年版）) [Catalogue of Industries for Encouraging Foreign Investment (2020 version)] (promulgated by the Nat'l Dev. & Reform Comm'n and the Ministry Com., Nov. 5, 2020, effective Jan. 27, 2021), CLI.4.349460 (China).

臺灣大學學術期刊資料庫

cross-administrative regional investment dispute prevention mechanism.[131] With domestic laws and regulations regarding foreign investment being constantly introduced to improve the investment environment, the coordination between China's domestic law and effective IIAs merits further discussion. This Section analyses interactions between China's IIAs and domestic law, including inconsistencies and potential conflicts.

Inconsistencies can be found between Chinese IIAs and domestic law, *inter alia*, in the following aspects. First, regarding the scope of application of the national treatment, China's new Foreign Investment Law includes the pre-establishment national treatment provision,[132] while most Chinese IIAs in the investment regime only provide for post-establishment national treatment. Meanwhile, few Chinese IIAs have inserted pre-establishment national treatment,[133] which may be imported into other IIAs by MFN clauses. As China has committed itself to pre-establishment national treatment obligations in both domestic law and recent IIAs like the RCEP, it seems redundant to maintain the old-styled national treatment clauses in the future process of China's IIA modernization. Second, regarding the compliance with commitments to foreign investments, local governments should comply with (i) policy commitments made in accordance with the law and (ii) contracts entered into in accordance with the law in accordance with Article 25 of China's new Foreign Investment Law.[134] In comparison, some

---

[131] In 2020, Chongqing Municipal Government and Sichuan Provincial Government established a cross-administrative regional complaint mechanism dealing with complaints from foreign-invested enterprises and foreign investors. *See Sichuan and Chongqing to Build Coordination Mechanism for Enterprise Complaint Handling*, THE PEOPLE'S GOV'T OF SICHUAN PROVINCE (June 2, 2020), https://www.sc.gov.cn/10462/10758/10760/10765/2020/6/2/4348b84b13eb48d9b231ceb860610d23.shtml.

[132] Article 4 of China's new Foreign Investment Law provides that:

> The State shall implement the management systems of pre-establishment national treatment and negative list for foreign investment.
>
> For the purpose of the preceding paragraph, pre-establishment national treatment refers to the treatment given to foreign investors and their investments during the investment access stage, which is not lower than that given to their domestic counterparts; negative list refers to special administrative measures for the access of foreign investment in specific fields as stipulated by the State. The State shall give national treatment to foreign investment beyond the negative list.
>
> . . . .

In addition, provisions regarding post-establishment national treatment can also be seen in China's new Foreign Investment Law, e.g., Article 15 (foreign investors' equal participation in setting standards), Article 22 (prohibition on forced transfer), Article 30 (same review conditions and procedures for foreign and domestic investments). *See* Foreign Investment Law of the People's Republic of China, *supra* note 126, arts. 4, 15, 22, 30.

[133] *See, e.g.*, RCEP, *supra* note 17, annex III.

[134] Article 25 of China's new Foreign Investment Law provides that:

> Local people's governments at all levels and their relevant departments shall strictly keep their policy commitments made to foreign investors and foreign-funded

臺灣大學學術期刊資料庫

Chinese IIAs limit the application of the umbrella clause to contractual obligations,[135] and few IIAs extend to "any specific commitments".[136] In general, the inconsistency between domestic law and recent IIAs, like the RCEP, can be divided into two kinds. One refers to when IIAs provide more favourable treatment than domestic law, while the other is on the contrary. In the context that domestic law provides more favourable treatment than Chinese IIAs, Chinese oversea investors cannot be necessarily provided with certain treatments, such as the pre-establishment national treatment, as foreign investors in China do.

Compared to the inconsistency, conflicts between Chinese IIAs and domestic law normally bring more problems. For instance, Article 35 of China's new Foreign Investment Law provides that "security review decisions made in accordance with laws should be final."[137] In other words, foreign investors cannot resort to domestic administrative review or judicial review if they are dissatisfied with the security review decision, which may constitute a denial of justice and consequently violate FET obligations under Chinese IIAs. Moreover, as mentioned in Section B, Part III, pre-establishment national treatment has been introduced in China's recent IIA practice,[138] which may be simultaneously imported into other Chinese IIAs by MFN clauses. As such, the application of Article 35 of China's new Foreign Investment Law may also be inconsistent with national treatment obligations. Meanwhile, there is a lack of clauses excluding national security review decisions from ISDS[139] or security exceptions[140] in most Chinese

---

> enterprises and perform all contracts entered into in accordance with the law.
>
> If any policy commitment or contract needs to be changed due to national interests or public interests, the statutory authority and procedures shall be strictly followed, and the foreign investor or foreign-funded enterprise concerned shall be compensated for losses incurred thereby in accordance with the law.

See Foreign Investment Law of the People's Republic of China, *supra* note 126, art. 25.

[135] *See, e.g.*, Agreement Between the Republic of Austria and the People's Republic of China on the Promotion and Reciprocal Protection of Investments, Austria-China, art. 8.2, Sept. 12, 1985, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6364/download (entered into force Oct. 11, 1986).

[136] *See, e.g.*, Agreement Between the Government of the People's Republic of China and the Government of the Republic of Finland on the Encouragement and Reciprocal Protection of Investments, China-Fin., art. 11.2, Nov. 15, 2004, http://www.asianlii.org/cn/legis/cen/laws/abtgotprocatgotrofotearpoi1508/ (entered into force Nov. 12, 2006).

[137] Foreign Investment Law of the People's Republic of China, *supra* note 126, art. 35: "The State shall establish a safety review system for foreign investment, under which the safety review shall be conducted for any foreign investment affecting or having the possibility to affect national security. The decision made upon the safety review in accordance with the law shall be final."

[138] *See, e.g.*, RCEP, *supra* note 18, annex III.

[139] According to the China–Canada BIT, national security decisions shall not be subject to investment dispute settlement provisions. *See* China–Canada BIT, *supra* note 72, annex D.34.

[140] So far, a small portion of Chinese IIAs have included security exceptions; most are FTAs, such as China–Peru FTA, China–Japan–Korea TIA, etc. *See* China–Japan–Korea TIA, *supra* note 22, art. 18; Free Trade Agreement Between the Government of the People's Republic of China and the

臺灣大學學術期刊資料庫

IIAs. Even if a security exception clause is inserted in the IIA, such a clause may not necessarily exempt States from liability.[141] For instance, arbitral tribunals may examine whether the preconditions to invoke the national security clause have been met, unless the IIA contains specific wording granting full discretion to the State to determine what it considers necessary for the protection of its security interests.[142]

In the process of China's IIA modernization, more attention should be paid to enhancing coordination between Chinese IIAs and domestic law, as the actual effect of IIA modernization will be greatly affected by domestic law. Furthermore, certain modernized provisions of IIAs need to be internalized into the domestic legal regime to establish a harmonious legal framework for foreign investment.

V. TENTATIVE APPROACHES TO ADVANCE CHINA'S IIA MODERNIZATION

Taking the above challenges into consideration, tentative approaches are proposed to advance the modernization of China's IIA regime in this Part. First, treaty relationships among Chinese IIAs should be addressed to tackle problems resulting from treaty overlaps. Second, with the increasing number of ISDS cases based on Chinese IIAs, it is of necessity to clarify the application of Chinese IIAs to Hong Kong and Macau SARs. Third, coordination between Chinese IIAs and domestic law should be enhanced.

A. Addressing Treaty Relationships Among Chinese IIAs

Before dealing with treaty overlaps in China's IIA regime, a review of currently effective Chinese IIAs should be conducted to figure out the degree of treaty overlaps. In some investment regimes, treaty overlaps are relatively acceptable, like those between China and ASEAN countries (except Indonesia).[143] Given the temporary lack of ISDS provisions in the RCEP, BITs/FTAs between China and ASEAN countries provide a remedy for investors. Nevertheless, treaty overlaps with more than one remedy are trickier.

Government of the Republic of Peru, China-Peru, art. 194, Apr. 28, 2009, http://www.sice.oas.org/tpd/per_chn/texts_28042009_e/FullText_20090422_e.pdf (entered into force Mar. 1, 2010).

[141] *See* Tania Voon & Dean Merriman, *Incoming: How International Investment Law Constrains Foreign Investment Screening*, J. WORLD INV. & TRADE 1, 36-37 (2022) (forthcoming 2022) (highlighting that the outcome of the application of security exceptions will be "treaty-specific, fact-specific, and perhaps tribunal specific").

[142] *See* CC/Devas (Mauritius) Ltd. v. India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, ¶¶ 218-20 (July 25, 2016).

[143] *See supra* text accompanying note 88.

臺灣大學學術期刊資料庫

In order to avoid disorders in investment treatment and arbitral practice, IIA consolidation is suggested in the future process of IIA modernization.[144] It is believed that consolidation, i.e., abrogating several pre-existing treaties and replacing them with a single modern and sustainable development-oriented treaty, is an appealing option that has the dual positive effect of modernizing treaty content and reducing the IIA fragmentation.[145] In the case of IIA consolidation, survival clauses in the earlier IIAs should be terminated simultaneously.[146] In addition, transition clauses in the new IIAs should be contained to avoid the same issue in the case of *Pingan v. Belgium*. Taking China–Germany BIT as an example, the latter IIA is suggested to clarify its scope of application by clauses like "the present Agreement shall apply to all investments made by investors . . . whether made before or after the entry into force of this Agreement, but shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before its entry into force."[147]

Meanwhile, since each IIA negotiation involves two or more than two parties, plus the large number of existing Chinese IIAs, treaty overlaps in China's IIA regime may not be eliminated completely. In the case of treaty parallelism, clauses dealing with treaty relationships should be inserted in the latter IIA. Such clauses can be divided into two types. One is to provide mandatory consultations between the parties. For instance, Article 20.2.2 of the RCEP provides that:

> [i]f a Party considers that a provision of this Agreement is inconsistent with a provision of another agreement to which that Party and at least one other Party are party, upon request, the relevant Parties which are party to the other agreement shall consult with a view to reaching a mutually satisfactory solution (emphasis added).[148]

This kind of clause may benefit the unification of standards for investment treatments, while the right to initiate such consultations is retained by the contracting countries.

---

[144] *See* Jie (Jeanne) Huang, *Procedural Models to Upgrade BITs: China's Experience*, 31(1) LEIDEN J. INT'L L. 93, 98 (2018) (highlighting "[g]ood practice would be to terminate an old BIT when signing a new FTA with a comprehensive investment protection regime").

[145] *See Reform of the International Investment Agreement Regime: Phase 2*, *supra* note 50.

[146] For an analysis of the termination of sunset clauses in the IIA reform, see Keer Huang & Tong Qi, *Avoid Opening up the Pandora's Box: Treaty Parallelism, Termination and Survival in the Reform of the China-EU Investment Regime*, 30(2) ASIA PAC. L. REV. 367, 377-79 (2022).

[147] *See* Agreement Between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, China-Ger., art. 16(2), Dec. 1, 2003, https://www.italaw.com/sites/default/files/laws/italaw9028.pdf (entered into force Nov. 11, 2005).

[148] RCEP, *supra* note 17, art. 20.2.2.

臺灣大學學術期刊資料庫

The other type is the clause subjecting itself to or affirming that it is not incompatible with the provisions of an earlier treaty, and the provisions of the earlier treaty will prevail if they provide a treatment more favourable. For instance, Article 55 of the China–Pakistan FTA highlights that:

> [i]f the legislation of either Party or international obligations existing at present or established hereafter between the Parties result in a position entitling investments by investors of the other Party to a treatment more favorable than is provided for by the Agreement, such position shall not be affected by this Agreement.[149]

Such clauses indicate that the contracting parties' intentions of leaving the earlier BIT as a self-standing instrument, and preclude the application of norm conflict resolution techniques like the *lex specialis* rule in arbitral practice. In other words, investors are entitled to invoke earlier IIAs that provide more favourable treatment, while the countries play a passive role in the interplay of overlapping treaties.

B. Clarifying the Application of Chinese IIAs to the SARs

Notably, Hong Kong and Macau, the two SARs of China, take different routes on IIA making. As a leading center of global FDI inflows,[150] Hong Kong has been an active participant in IIA negotiations with foreign countries. So far, twenty effective BITs and five effective TIPs to which Hong Kong is a contracting party have entered into force,[151] and negotiations between Hong Kong and other countries are underway.[152] In its 2022-23 budget speech, the Hong Kong government committed that it would continue

[149] Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan, China-Pak., art. 55.1, Nov. 24, 2006, http://fta.mofcom.gov.cn/pakistan/xieyi/xieyizw_en.pdf (entered into force July 1, 2007, reversed Apr. 28, 2019).

[150] According to the World Investment Report 2022, Hong Kong SAR has become the seventh source of outward FDI and the third-largest recipient of inward FDI in the world. *See* WORLD INVESTMENT REPORT 2022, *supra* note 26, at 9, 21.

[151] As of 31 January 2023, Hong Kong SAR has effective BITs with Mexico, Kuwait, United Arab Emirates, Chile, Canada, Finland, Thailand, the United Kingdom, Korea, Japan, Austria, Belgium-Luxembourg Economic Union, Germany, France, Italy, New Zealand, Switzerland, Sweden, Denmark, Netherland, respectively. Also, Hong Kong SAR has effective TIPs with Austria, ASEAN, Chile, European Free Trade Association, New Zealand, respectively. *See International Investment Agreements Navigator—Hong Kong, China SAR*, UNCTAD INV'T POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/countries/93/hong-kong-china-sar (last visited Jan. 31, 2023); *Hong Kong's Investment Promotion and Protection Agreements*, TRADE & INDUS. DEP'T THE GOV'T OF THE HONG KONG SPECIAL ADMIN. REGION, http://www.tid.gov.hk/english/ita/ippa/index.html (last visited Jan. 31, 2023).

[152] As of 31 January 2023, Hong Kong SAR has finished IIA negotiations with Bahrain, Maldives, Myanmar, respectively, and been negotiating with Saudi Arabia, Russia, and Turkey. *See id.*

臺灣大學學術期刊資料庫

to seek to enter into IIAs with other economies apart from Hong Kong's major trading partners.[153] In comparison, as a regional center for incentive travel, conventions, and tourism, Macau attracts foreign investments mainly by investment incentives provided on a national treatment basis, including fiscal incentives, financial incentives, and export diversification incentives. [154] Currently, Macau only has two effective BITs with Netherlands and Portugal respectively, and an effective TIP with the European Union.[155] The differences between Hong Kong and Macau on FDI stocks, FDI policy and the number of IIAs should not be ignored in the discussions of whether Chinese IIAs should extend to the SARs. Against the backdrop of such differences, this article is not on the side of either the entire exclusion or inclusion of the SARs in the scope of application of Chinese IIAs, while suggesting a case-by-case approach to address this issue.

Indeed, the application of Chinese IIAs to the SARs may differ in different investment regimes, which is closely related to the attitude of the Chinese central government, the SAR government, as well as the other contracting party(ies) to the particular IIA. Even if the parties reach an agreement to apply Chinese IIAs to the SARs, the following aspects need consideration. First, treaty overlaps should be avoided in the investment regime of both SARs for reasons illustrated in Section A, Part IV. Accordingly, it is not suggested to extend a Chinese IIA between the central government and the other country to a SAR that already has concluded an IIA with such country. Second, an explicit provision clarifying whether or not the IIA applies to the SARs should be included in new Chinese IIA negotiations in order to avoid misinterpretation by arbitral tribunals. Third, in the modernization of Chinese IIAs, options like amendment and joint interpretation can be adopted to clarify the stance of parties on this issue. Finally, in some circumstances, the SARs may also join certain IIAs as a contracting party, such as Hong Kong's application to join the RCEP,[156] thus eliminating the problem from the beginning.

From a long-term perspective, the unification of IIAs in mainland China and SARs may contribute to the development of Guangdong-Hong Kong-Macao Greater Bay Area.[157] However, an entire exclusion or inclusion is not

---

[153] *See Budget Speech*, HONG KONG GOV'T: THE 2022-23 BUDGET, https://www.budget.gov.hk/2022/eng/budget44.html (last visited Jan. 31, 2023).

[154] *See 2021 Investment Climate Statements: Macau*, U.S. DEP'T OF STATE, https://www.state.gov/reports/2021-investment-climate-statements/macau (last visited Jan. 31, 2023).

[155] *See Macau, China SAR*, UNCTAD INV'T POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/countries/123/macao-china-sar (last visited Jan. 31, 2022).

[156] *See Hong Kong Applies to Join RCEP Trade Agreement*, BILATERALS.ORG (Feb. 23, 2022), https://www.bilaterals.org/?hong-kong-applies-to-join-rcep&lang=en.

[157] The Guangdong-Hong Kong-Macao Greater Bay Area comprises the two Special Administrative Regions of Hong Kong and Macao, and the nine municipalities of Guangzhou, Shenzhen, Zhuhai, Foshan, Huizhou, Dongguan, Zhongshan, Jiangmen and Zhaoqing in Guangdong Province. The objectives of the Greater Bay Area are to further deepen cooperation amongst Guangdong, Hong

臺灣大學學術期刊論文授權

realistic at the current stage. To make either Hong Kong or Macau a more attractive investment environment, certain Chinese IIAs may extend to Macau to provide Macau investors with recourse to investment arbitration in China's IIA modernization. Meanwhile, whether such Chinese IIAs extend to Hong Kong depends on more factors, and the emerging Hong Kong IIA drafting trends merit further observation.[158]

C. Enhancing Coordination Between Chinese IIAs and Domestic Law

In the process of China's IIA modernization, a new Chinese IIA model can be proposed, which will not only set a basis for IIA negotiations involving China, but provide standards that may impact the IIA-making processes of other economies.[159] Modernized provisions at both substantive and procedure levels should be contained in the new model and reflected in the future IIA-making process.

Regarding substantive provisions, first, the pre-establishment national treatment is suggested to be incorporated into the new IIAs to enhance the consistency between Chinese IIAs and domestic law. Second, it is necessary to clarify, or even delete the umbrella clauses in new IIAs. Umbrella clauses with vague terms in earlier IIAs[160] may be contrary to the aim of balancing investors' interests and the State's regulatory power. In the case that the umbrella clauses are retained, "commitment" in such clauses can be limited to policy commitment and contractual commitment in written form as stipulated by the Foreign Investment Law of China.[161] Third, security exceptions or right-to-regulate provisions should be carefully stipulated in future IIA-making process. On the one hand, substantive provisions in IIAs

Kong and Macao, fully leverage the composite advantages of the three places, facilitate in-depth integration within the region, and promote coordinated regional economic development, with a view to developing an international first-class bay area ideal for living, working and travelling. *See* Framework Agreement on Deepening Guangdong-Hong Kong-Macao Cooperation in the Development of the Greater Bay Area, H.K.-Mac.-Nat'l Dev. & Reform Comm'n-People's Gov't of Guangdong Province, July 1, 2017, https://www.bayarea.gov.hk/filemanager/en/share/pdf/Framework_Agreement.pdf.

[158] *See* Julien Chaisse & Kehinde Olaoye, *Hong Kong, SAR China's New Approach to Investment Treaty Arbitration*, KLUWER ARB. BLOG (July 10, 2021), http://arbitrationblog.kluwerarbitration.com/2021/07/10/hong-kong-sar-chinas-new-approach-to-investment-treaty-arbitration/.

[159] *See* Eric De Brabandere, *The 2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform*, 36(2) ICSID REV. 319, 337 (2021).

[160] *See, e.g.*, Article 10 of the China–Iceland BIT provides that "[e]ach Contracting Party shall observe any commitment in accordance with its law additional to those specified in this Agreement entered into by the Contracting Party with investors of the other Contracting Party as regards their investments." Agreement Between the Government of the People's Republic of China and the Government of the Republic of Iceland Concerning the Encouragement and Reciprocal Protection of Investments, China-Ice., art. 10, Mar. 31, 1994, https://edit.wti.org/app.php/document/show/f8311e6e-54ff-44a9-96b6-7b4c71464b88 (entered into force Mar. 1, 1997).

[161] *See* Foreign Investment Law of the People's Republic of China, *supra* note 126, art. 25; Regulation for the Implementation of the Foreign Investment Law, *supra* note 127, arts. 27, 28.

臺灣大學學術期刊論文資料庫

shall not be constructed to prevent a country from making non-discriminatory investment screening decisions with security concerns. On the other hand, states should not be exempted from their liability in case of the breach of IIA obligations when making national security decisions under the nationality-specific scope of the filtering mechanism, including both pre-establishment screening and retrospective screening.

Regarding procedural provisions, provisions for investment dispute prevention should be stipulated, including the Parties' assisting investors to amicably resolve complaints or grievances with government bodies, establishing mechanisms to make recommendations to relevant government bodies addressing recurrent issues affecting investors, and so on. As the complaint mechanism for foreign investors has been established under Article 26 of China's new Foreign Investment Law,[162] the inclusion of relevant clauses in new IIAs will contribute to closing a systemic gap in national and international investment policies on dispute prevention. On this front, Brazil's experience can offer valuable guidance. Brazil's investment dispute prevention mechanism has been established at both domestic and international levels under Brazilian CFIAs and Decrees. Even though the Focal Points or Ombudsmen are established at the domestic level, they are required to follow the guidance or recommendations from the interstate Joint Committees established according to IIAs.[163]

[162] Article 26 of Foreign Investment Law stipulates that:

> Where a foreign-funded enterprise or its investor deems that any administrative act of an administrative department or its staff member infringes its legitimate rights and interests, in addition to seeking coordination and resolution through the complaint mechanism for foreign-funded enterprises, it may apply for administrative review, or lodge an administrative litigation.

See Foreign Investment Law of the People's Republic of China, *supra* note 126, art. 26.

[163] *See* BRAZIL MODEL CFIA (2015), *supra* note 51.

臺灣大學學術期刊資料庫

VI. CONCLUSION

IIA modernization has become one of the primary focuses of attention in international investment law. Either the instruments implementing procedural reforms to ISDS under discussions in UNCITRAL Working Group III[164] or a proposed Framework Convention on Investment and Sustainable Development[165] reflects an aspiration to reach better agreements and set modernized IIA provisions. This article examines challenges in the modernization of China's IIA regime, suggesting to rethink IIA modernization in a comprehensive and systematic way. Except for the improvement of specific provisions in new IIAs, reform options in China's IIA modernization should also be taken into account. As highlighted by UNCTAD in its road map for the IIA reform, the determination of reform options requires a careful and facts-based cost-benefit analysis.[166]

As the world's fast-growing emerging economy, China plays an increasingly important role in global investment governance. China's IIA modernization is of necessity for not only problems resulting from the huge stock of earlier IIAs but China's emerging status in international investment governance. Meanwhile, although China has the incentive to conduct its IIA modernization, China's IIA modernization will not be effortless given the large number of existing earlier generation IIAs. The past four decades have witnessed the great development of Chinese IIAs at both substantive and procedural levels. The shift of China towards the modernized generation of IIAs is continuing to mature, which will have significant implications on both China's IIA regime and the global investment regime. Moreover, China's recent movements on IIA modernization, like the CAI negotiation, have shown its determination to further deepen regionalism.

Against the backdrop of China's accelerating IIA modernization, this article contends that China should remain prudent when updating the earlier IIAs and entering into the new IIAs. Specifically, treaty relationships between earlier treaties and new treaties, bilateral treaties and regional treaties, should be addressed to avoid potential problems in investment treatment and arbitral practice. In addition, a case-by-case approach is suggested on the issue of the application of Chinese IIAs to the SARs.

---

[164] *Working Group III: Investor-State Dispute Settlement Reform*, U.N. COMM'N ON INT'L TRADE L. [hereinafter UNCITRAL], https://uncitral.un.org/en/working_groups/3/investor-state (last visited Jan. 31, 2023).

[165] Matthew C. Porterfield et. al., *Reforming the International Investment Regime through a Framework Convention on Investment and Sustainable Development*, UNCITRAL (Oct. 6, 2020), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a_framework_convention_on_investment.pdf.

[166] *See* UNCTAD, *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, 2 IIA ISSUES NOTE 1, 7 (2017), https://unctad.org/system/files/official-document/diaepcb2017d3_en.pdf.

臺灣大學學術期刊資料庫

Finally, coordination between IIAs and domestic laws of China should be enhanced at both substantive and procedural levels.

臺灣大學學術期刊資料庫

ANNEX 1—Chinese IIAs[167]

TABLE 4: BITs Concluded by China (as of 31 January 2023)

Note: For the 145 BITs that are covered in Table 2, the following diagram legends are used: "P" = the BIT has been modernized by a protocol; "R·B" = the BIT has been replaced by the latter BIT; "R·F" = the BIT has been replaced by the FTA; "R[x]" = the BIT replaced the earlier BIT (No. x).

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
1	China–Turkey BIT	29/07/2015	11/11/2020	in force—R[120]	2015
2	China–Tanzania BIT	24/03/2013	17/04/2014	in force	2013
3	China–Canada BIT	09/09/2012	01/10/2014	in force	2012
4	China–Democratic Republic of Congo BIT	11/08/2011	/	signed	2011
5	China–Uzbekistan BIT	19/04/2011	01/09/2011	in force—R[112]	2011
6	China–Libya BIT	04/08/2010	/	signed	2010
7	Chad–China BIT	26/04/2010	/	signed	2010
8	China–Bahamas BIT	04/09/2009	/	signed	2009
9	China–Malta BIT	22/02/2009	01/04/2009	in force	2009
10	China–Mali BIT	12/02/2009	16/07/2009	in force	2009

[167] Statistics on Chinese IIAs were obtained by combining information from the following websites: (i) *International Investment Agreements Navigator: China*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china (last visited Jan. 31, 2023); (ii) *Chinese FTAs*, MINISTRY COM. CHINA, http://fta.mofcom.gov.cn/english/index.shtml (last visited Jan. 31, 2023); and (iii) *Investment Treaties*, ELEC. DATABASE INV. TREATIES, https://edit.wti.org/document/investment-treaty/search (last visited Jan. 31, 2023).

臺灣大學學術期刊資料庫

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
11	China–Switzerland BIT	27/01/2009	13/04/2010	in force—R[130]	2009
12	China–Colombia BIT	22/11/2008	02/07/2013	in force	2009
13	China–Mexico BIT	11/07/2008	06/06/2009	in force	2008
14	China–France BIT	26/11/2007	20/08/2010	in force—R[143]	2007
15	China–Costa Rica BIT	24/10/2007	20/10/2016	in force	2007
16	China–Korea BIT	07/09/2007	01/12/2007	in force—R[105]	2007
17	China–Seychelles BIT	10/02/2007	/	signed	2007
18	China–India BIT	21/11/2006	01/08/2007	terminated	2006
19	China–Russian BIT	09/11/2006	01/05/2009	in force	2006
20	China–Vanuatu BIT	07/04/2006	/	signed	2006
21	China–Portugal BIT	09/12/2005	26/07/2008	in force—R[114]	2005
22	China–Czech Republic BIT	08/12/2005	01/09/2006	in force—R[115]	2005
23	China–Madagascar BIT	21/11/2005	01/07/2007	in force	2005
24	China–Guinea BIT	18/11/2005	/	signed	2005
25	China–Namibia BIT	17/11/2005	/	signed	2005
26	China–Spain BIT	14/11/2005	01/07/2008	in force—R[113]	2005
27	China–Equatorial Guinea BIT	20/10/2005	15/11/2006	in force	2005

臺灣大學學術期刊資料庫

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
28	China–BLEU (Belgium-Luxembourg Economic Union) BIT	06/06/2005	01/12/2009	in force—R[142]	2005
29	China–North Korea	22/03/2005	01/10/2005	in force	2005
30	China–Finland BIT	15/11/2004	15/11/2006	in force—R[141]	2004
31	China–Tunisia BIT	21/06/2004	01/07/2006	in force	2004
32	China–Uganda BIT	27/05/2004	/	signed	2004
33	China–Latvia BIT	15/04/2004	01/02/2006	in force	2004
34	China–Benin BIT	18/02/2004	/	signed	2004
35	China–Germany BIT	01/12/2003	11/11/2005	in force—R[144]	2003
36	China–Djibouti BIT	18/08/2003	/	signed	2003
37	China–Guyana BIT	27/03/2003	26/10/2004	in force	2003
38	China–Côte d'Ivoire BIT	30/09/2002	/	signed	2002
39	China–Trinidad and Tobago BIT	22/07/2002	07/12/2004	in force	2002
40	China–Bosnia and Herzegovina BIT	26/06/2002	01/01/2005	in force	2002
41	China–Myanmar BIT	12/12/2001	21/05/2002	in force	2002
42	China–Netherlands BIT	26/11/2001	01/08/2004	in force—R[136]	2001
43	China–Jordan BIT	15/11/2001	/	signed	2001

臺灣大學學術期刊資料庫

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
44	China–Nigeria BIT	27/08/2001	18/02/2010	in force—R[64]	2001
45	China–Kenya BIT	16/07/2001	/	signed	2001
46	China–Mozambique BIT	10/07/2001	26/02/2002	in force	2001
47	China–Sierra Leone BIT	16/05/2001	/	signed	2001
48	China–Cyprus BIT	15/01/2001	29/04/2002	in force	2001
49	China–Brunei Darussalam BIT	17/11/2000	/	signed	2000
50	China–Botswana BIT	12/06/2000	/	signed	2000
51	China–Iran BIT	01/06/2000	01/07/2005	in force	2000
52	China–Congo BIT	20/03/2000	01/07/2015	in force	2000
53	China–Bahrain BIT	17/06/1999	27/04/2000	in force	1999
54	China–Qatar BIT	09/04/1999	01/04/2000	in force	1999
55	China–Barbados BIT	20/07/1998	01/10/1999	in force	1998
56	China–Ethiopia BIT	11/05/1998	01/05/2000	in force	1998
57	China–Cape Verde BIT	21/04/1998	01/01/2001	in force	1998
58	China–Yemen BIT	16/02/1998	10/04/2002	in force	1998
59	China–South Africa BIT	30/12/1997	01/04/1998	in force	1997
60	China–Democratic Republic of	18/12/1997	/	signed	1997

臺灣大學學術期刊資料庫

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
	the Congo BIT				
61	China–Cameroon BIT	10/09/1997	24/07/2014	in force	1997
62	China–Macedonia, The former Yugoslav Republic of BIT	09/06/1997	01/11/1997	in force	1997
63	China–Sudan BIT	30/05/1997	01/07/1998	in force	1997
64	China–Nigeria BIT	12/05/1997	/	abolished —R·B	1997
65	China–Gabon BIT	09/05/1997	16/02/2009	in force	1997
66	China–Syria BIT	09/12/1996	01/11/2001	in force	1996
67	China–Algeria BIT	17/10/1996	28/01/2003	in force	1996
68	China–Bangladesh BIT	12/09/1996	25/03/1997	in force	1996
69	China–Cambodia BIT	19/07/1996	01/02/2000	in force	1996
70	China–Zambia BIT	21/06/1996	/	signed	1996
71	China–Lebanon BIT	13/06/1996	10/07/1997	in force	1996
72	China–Zimbabwe BIT	21/05/1996	01/03/1998	in force	1996
73	China–Mauritius BIT	04/05/1996	08/06/1997	Terminated —R·F	1996
74	China–Saudi Arabia BIT	29/02/1996	01/05/1997	in force	1996
75	China–Serbia BIT	18/12/1995	12/09/1996	in force	1995

臺灣大學學術期刊資料庫

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
76	China–Cuba BIT	24/04/1995	01/08/1996	in force	1995
77	China–Israel BIT	10/04/1995	13/01/2009	in force	1995
78	China–Morocco BIT	27/03/1995	27/11/1999	in force	1995
79	China–Oman BIT	18/03/1995	01/08/1995	in force	1995
80	China–Indonesia BIT	18/11/1994	01/04/1995	terminated	1994
81	China–Jamaica BIT	26/10/1994	01/04/1996	in force	1994
82	China–Romania BIT	12/07/1994	01/09/1995	in force — P[168]	2007
83	China–Peru BIT	09/06/1994	01/02/1995	in force	1994
84	China–Egypt BIT	21/04/1994	01/04/1996	in force	1994
85	China–Iceland BIT	31/03/1994	01/03/1997	in force	1994
86	China–Chile BIT	23/03/1994	01/08/1995	terminated —R·F	1994
87	China–Ecuador BIT	21/03/1994	01/07/1997	terminated	1994
88	China–Azerbaijan BIT	08/03/1994	01/04/1995	in force	1994
89	China–Uruguay BIT	02/12/1993	01/12/1997	in force	1993
90	China–Lithuania BIT	08/11/1993	01/06/1994	in force	1993
91	China–Slovenia BIT	13/09/1993	01/01/1995	in force	1993

[168] Additional Protocol to the Agreement Between the Government of the People's Republic of China and the Government of Romania on the Mutual Promotion and Protection of Investments, China-Rom., Apr. 16, 2007, http://treaty.mfa.gov.cn/tykfiles/20180718/1531876971850.pdf (entered into force Sept. 1, 2008).

臺灣大學學術期刊資料庫

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
92	China–Estonia BIT	02/09/1993	01/06/1994	in force	1993
93	China–United Arab Emirates BIT	01/07/1993	28/09/1994	in force	1993
94	China–Croatia BIT	07/06/1993	01/07/1994	in force	1993
95	China–Georgia BIT	03/06/1993	01/03/1995	in force	1993
96	China–Tajikistan BIT	09/03/1993	20/01/1994	in force	1993
97	China–Albania BIT	13/02/1993	01/09/1995	in force	1993
98	China–Laos BIT	31/01/1993	01/06/1993	in force	1993
99	China–Belarus BIT	11/01/1993	14/01/1995	in force	1993
100	China–Viet Nam BIT	02/12/1992	01/09/1993	in force	1992
101	China–Turkmenistan BIT	21/11/1992	04/06/1994	in force	1992
102	China–Moldova BIT	06/11/1992	01/03/1995	in force	1992
103	China–Argentina BIT	05/11/1992	01/08/1994	in force	1992
104	China–Ukraine BIT	31/10/1992	29/05/1993	in force	1992
105	China–Korea BIT	30/09/1992	04/12/1992	terminated —R·B	1992
106	China–Kazakhstan BIT	10/08/1992	13/08/1994	in force	1992
107	China–Philippines BIT	20/07/1992	08/09/1995	in force	1992
108	China–Armenia BIT	04/07/1992	18/03/1995	in force	1992

臺灣大學學術期刊資料庫

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
109	China–Greece BIT	25/06/1992	21/12/1993	in force	1992
110	China–Kyrgyzstan BIT	14/05/1992	08/09/1995	in force	1992
111	China–Bolivia BIT	08/05/1992	01/09/1996	in force	1992
112	China–Uzbekistan BIT	13/03/1992	12/04/1994	terminated —R·B	1992
113	China–Spain BIT	06/02/1992	01/05/1993	terminated —R·B	1992
114	China–Portugal BIT	03/02/1992	01/12/1992	terminated —R·B	1992
115	China–Czech BIT	04/12/1991	01/12/1992	terminated —R·B	1991
116	China–Slovakia BIT	04/12/1991	01/12/1992	in force — P[169]	2005
117	China–Mongolia BIT	25/08/1991	01/11/1993	in force	1991
118	China–Hungary BIT	29/05/1991	01/04/1993	in force	1991
119	China–Papua New Guinea BIT	12/04/1991	12/02/1993	in force	1991
120	China–Turkey BIT	13/11/1990	20/08/1994	terminated —R·B	1990
121	China–Union of Soviet Socialist Republics BIT	21/07/1990	26/07/1991	terminated	1990
122	China–Ghana BIT	12/10/1989	22/11/1990	in force	1989

[169] Additional Protocol Between the Government of the Slovak Republic and the Government of the People's Republic of China to the Agreement Between the Government of the Czech and Slovak Federal Republic and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, China-Slovk., Dec. 7, 2005, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/778/download (entered into force May 25, 2007).

臺灣大學學術期刊論文

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
123	China–Bulgaria BIT	27/06/1989	21/08/1994	in force — P[170]	2007
124	China–Pakistan BIT	12/02/1989	30/09/1990	in force	1989
125	China–New Zealand BIT	22/11/1988	25/03/1989	in force	1988
126	China–Malaysia BIT	21/11/1988	31/03/1990	in force	1988
127	China–Japan BIT	27/08/1988	14/05/1989	in force	1988
128	China–Australia BIT	11/07/1988	11/07/1988	in force	1988
129	China–Poland BIT	07/06/1988	08/01/1989	in force	1988
130	China–Switzerland BIT	12/11/1986	18/03/1987	terminated —R·B	1986
131	China–United Kingdom BIT	15/05/1986	15/05/1986	in force	1986
132	China–Sri Lanka BIT	13/03/1986	25/03/1987	in force	1986
133	China–Kuwait BIT	23/11/1985	24/12/1986	in force	1985
134	China–Singapore BIT	21/11/1985	07/02/1986	terminated —R·F	1985
135	China–Austria BIT	12/09/1985	11/10/1986	in force	1985
136	China–Netherlands BIT	17/06/1985	01/02/1987	terminated —R·B	1985
137	China–Denmark BIT	29/04/1985	29/04/1985	in force	1985

[170] Additional Protocol Between the Government of the People's Republic of China and the Government of the Republic of Bulgaria to the Agreement Between the Government of the People's Republic of China and the Government of the People's Republic of Bulgaria Concerning the Reciprocal Encouragement and Protection of Investments, Bulg.-China, June 26, 2007, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3562/download (entered into force Nov. 10, 2007).

臺灣大學學術期刊資料庫

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
138	China–Thailand BIT	12/03/1985	13/12/1985	in force	1985
139	China–Italy BIT	28/01/1985	28/08/1987	in force	1985
140	China–Norway BIT	21/11/1984	10/07/1985	in force	1984
141	China–Finland BIT	04/09/1984	26/01/1986	terminated —R·B	1984
142	China–BLEU (Belgium-Luxembourg Economic Union) BIT	04/06/1984	05/10/1986	terminated —R·B	1984
143	China–France BIT	30/05/1984	19/03/1985	terminated —R·B	1984
144	China–Germany BIT	07/10/1983	18/03/1985	terminated —R·B	1983
145	China–Sweden BIT	29/03/1982	29/03/1982	in force—P[171]	2004

[171] Protocol of Amendment to the Agreement on Mutual Protection of Investments Between the Government of the People's Republic of China and the Government of the Kingdom of Sweden of March 29, 1982, China-Swed., Sept. 27, 2004, http://images.mofcom.gov.cn/tfs/202109/20210915102544434.pdf (entered into force Sept. 27, 2004).

臺灣大學學術期刊資料庫

TABLE 5: TIPs Concluded by China (as of 31 January 2023)

Note: For the 19 TIPs that are covered in Table 3, the following diagram legends are used: "P" = the TIP has been modernized by a protocol; "P" = the TIP has been supplemented by a protocol while no substantive revisions were included in the protocol; "S" = the TIP has been supplemented by the subsequent treaty.*

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
1	Regional Comprehensive Economic Partnership	15/11/2020	01/01/2022	in force	2020
2	China–Cambodia FTA	12/10/2020	01/01/2022	in force	2020
3	China–Mauritius FTA	17/10/2019	01/01/2021	in force	2019
4	China–Georgia FTA	13/05/2017	01/01/2018	in force	2017
5	China–Australia FTA	17/06/2015	20/12/2015	in force	2015
6	China–Korea FTA	01/06/2015	20/12/2015	in force	2015
7	China–Switzerland FTA	06/07/2013	01/07/2014	in force	2013
8	China–Iceland FTA	15/04/2013	01/07/2014	in force	2013
9	China–Japan–Korea Trilateral Investment Agreement	13/05/2012	17/05/2014	in force	2012
10	China–Costa Rica FTA	01/04/2010	01/08/2011	in force	2010
11	APTA Investment Agreement	15/12/2009	/	signed	2009
12	China–Peru FTA	28/04/2009	01/03/2010	in force	2009

臺灣大學學術期刊資料庫

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
13	China–Singapore FTA	23/10/2008	01/01/2009	in force—P[172]	2018
14	China–New Zealand FTA	07/04/2008	01/10/2008	in force—P[173]	2021
15	China–Pakistan FTA	24/11/2006	01/07/2007	in force—P*[174]	2006
16	China–Chile FTA	18/11/2005	01/10/2006	in force—S[175]; P[176]	2019
17	China–Australia Framework Agreement	24/10/2003	24/10/2003	in force	2003
18	China–ASEAN Framework Agreement	04/11/2002	01/07/2003	in force—S [177]; P[178]	2015

[172] Protocol to Upgrade the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore, China-Sing., Nov. 12, 2018, http://fta.mofcom.gov.cn/singapore/doc/sjyds_en.pdf (entered into force Oct. 16, 2019).

[173] Protocol to Upgrade the Free Trade Agreement Between the Government of the People's Republic of China and the Government of New Zealand, China-N.Z., Jan. 26, 2021, http://fta.mofcom.gov.cn/newzealand/doc/shengji/sjyds_en.pdf (entered into force Apr. 7, 2022).

[174] The protocol to amend the China–Pakistan FTA only stipulates the future work programme. Article 7 of the protocol provides that:

> The Parties are committed to encouraging investments from the other Party and agree to strengthen the cooperation in the field of investment to provide stable, transparent and predictable investment environment for the investors of both Parties. The Parties agree to enter into negotiations to upgrade Chapters IX (Investment) of the Free Trade Agreement in due course.

See Protocol to Amend the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan, China-Pak., Apr. 28, 2019, http://fta.mofcom.gov.cn/pakistan/xieyi/xdyds_en.pdf (entered into force Dec. 1, 2019).

[175] The Supplementary Agreement on Investments of the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile, Chile-China, Sept. 9, 2012, http://fta.mofcom.gov.cn/chiletwo/xieyi/tzxd-en.pdf (entered into force Feb. 8, 2014).

[176] Protocol to Amend the Free Trade Agreement and the Supplementary Agreement on Trade in Services of the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile, Chile-China, Nov. 11, 2017, http://fta.mofcom.gov.cn/chile/xieyi/bcyds_en.pdf (entered into force Mar. 1, 2019).

[177] Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the People's Republic of China and the Association of Southeast Asian Nations, ASEAN-China, Aug. 15, 2009, https://asean.org/wp-content/uploads/images/archive/22974.pdf (entered into force Jan. 1, 2010).

[178] Protocol to Amend the Framework Agreement on Comprehensive Economic Co-operation and Certain Agreements Thereunder Between the People's Republic of China and the Association of

臺灣大學學術期刊資料庫

No	Short Title	Date Of Signature	Date of Entry into Force	Status	Year of the Latest Update
19	China–EC Trade and Cooperation Agreement	21/05/1985	22/09/1985	in force	1985

Southeast Asian Nations, ASEAN-China, Nov. 21, 2015, http://fta.mofcom.gov.cn/dongmeng_phase2/annex/yds_en.pdf (entered into force partially July 1, 2016, entered into force entirely Oct. 22, 2019)

臺灣大學學術期刊資料庫

ANNEX 2—ISDS Cases Based on Chinese IIAs[179]

TABLE 6: ISDS Cases Based on Chinese IIAs—Cases against China (as of 31 January 2023)

No	Case Name	Case Number	Time	Instrument(s) Invoked	Arbitration Rule	Administrative Institution	Subject of Dispute	Status
1	Ekran Berhad v. China	ICSID Case No. ARB/11/15	2011-2013	1. China–Israel BIT (1995) 2. Malaysia–China BIT(1988)	ICSID Convention—Arbitration Rules	ICSID	arts and culture facilities	settled
2	Ansung Housing Co., Ltd. v. China	ICSID Case No. ARB/14/25	2014-2017	China–Korea BIT (2007)	ICSID Convention—Arbitration Rules	ICSID	property development project	decided in favor of State
3	Hela Schwarz GmbH v. China	ICSID Case No. ARB/17/19	2017-present	China–Germany BIT (2003)	ICSID Convention—Arbitration Rules	ICSID	spice products company	pending

[179] Statistics on ISDS Cases based on Chinese IIAs were obtained by combining information from the following websites: (i) Cases Database: Search Cases, ICSID, https://icsid.worldbank.org/cases/case-database (last visited Aug. 7, 2022); (ii) Investment Dispute Settlement Navigator, UNCTAD, https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited Aug. 7, 2022); (iii) China: List of Cases, JUS MUNDI, https://jusmundi.com/en/d/profile/state/cn#list-of-cases (last visited Aug. 7, 2022).

臺灣大學學術期刊資料庫

No	Case Name	Case Number	Time	Instrument(s) Invoked	Arbitration Rule	Administrative Institution	Subject of Dispute	Status
4	Jason Yu Song v. China	PCA Case No. 2019-39	2019-present	China–United Kingdom BIT (1986)	unclear	PCA	unclear	pending
5	Macro Trading Co., Ltd. v. China	ICSID Case No. ARB/20/22	2020-2021	China–Japan BIT (1988)	ICSID Convention—Arbitration Rules	ICSID	real estate project	discontinued
6	Goh Chin Soon v. China (I)	ICSID Case No. ARB/20/34	2020-2021	China–Singapore BIT (1985)	ICSID Convention—Arbitration Rules	ICSID	real estate and development projects	discontinued
7	AsiaPhos Limited v. China	/	2020-present	China–Singapore BIT (1985)	ICSID Convention—Arbitration Rules	ICSID	mining projects	pending

臺灣大學學術期刊

No	Case Name	Case Number	Time	Instrument(s) Invoked	Arbitration Rule	Administrative Institution	Subject of Dispute	Status
8	Goh Chin Soon v. China (II)	/	2021-present	China–Singapore BIT (1985)	UNCITRAL and/or Ad-Hoc	/	real estate and development projects	pending
9	Eygenio Montenero v. China	/	2021-present	China–Switzerland BIT (2009)	UNCITRAL and/or Ad-Hoc	/	music service	pending

臺灣大學學術期刊資料庫

TABLE 7: ISDS Cases Based on Chinese IIAs—Cases Initiated by Chinese Investors (as of 31 January 2023)

No	Case Name	Case Number	Time	Instrument(s) Invoked	Arbitration Rule	Administrative Institution	Subject of Dispute	Status
1	Tza Yap Shum v. Peru	ICSID Case No. ARB/07/6	2007-2015	China–Peru BIT (1994)	ICSID Convention—Arbitration Rules	ICSID	fish flour production enterprise	decided in favor of investor
2	Beijing Shougang Mining Investment Company Ltd et al v. Mongolia	PCA Case No. 2010-20	2010-2017	China–Mongolia BIT (1991)	UNCITRAL and/or Ad-Hoc	PCA	mining concessions	decided in favor of State
3	Ping An et al v. Belgium	ICSID Case No. ARB/12/29	2012-2015	1. China–Belgium-Luxembourg BIT (1984) 2. China–Belgium-Luxembourg BIT (2005)	ICSID Convention—Arbitration Rules	ICSID	banking and financial services	decided in favor of State

No	Case Name	Case Number	Time	Instrument(s) Invoked	Arbitration Rule	Administrative Institution	Subject of Dispute	Status
4	Sanum Investments Ltd. v. Laos (I)	PCA Case No. 2013-13	2013	China–Laos BIT (1993)	UNCITRAL and/or Ad-Hoc	PCA	gaming industry	decided in favor of State
5	Beijing Urban Construction Group Co. Ltd. v. Yemen	ICSID Case No. ARB/14/30	2014-2018	China–Yemen BIT (1998)	ICSID Convention—Arbitration Rules	ICSID	construction of an airport terminal	settled
6	Zhongshan Fucheng Industrial Investment Co. Ltd. v. Nigeria	/	2017-2021	China–Nigeria BIT (2001)	UNCITRAL and/or Ad-Hoc	PCA	concession agreement	decided in favor of investor
7	Sanum Investments Ltd. v. Laos (II)	ICSID Case No. ADHOC/17/1	2017-present	China–Laos BIT (1993)	Ad-Hoc rule	ICSID	gaming industry	pending

臺灣大學醫學圖書館

No	Case Name	Case Number	Time	Instrument(s) Invoked	Arbitration Rule	Administrative Institution	Subject of Dispute	Status
8	Jetion Solar Co. Ltd and Wuxi T–Hertz Co. Ltd. v. Hellenic Republic	/	2019	China-Greece BIT (1992)	UNCITRAL and/or Ad-Hoc	unclear	photovoltaic project	discontinued
9	Fengzhen Min v. Korea	ICSID Case No. ARB/20/26	2020-present	China–Korea BIT (2007)	ICSID Convention—Arbitration Rules	ICSID	real estate project	pending
10	Wang Jing, Li Fengju, Ren Jinglin and others v. Ukraine	/	2020-present	China–Ukraine BIT (1992)	UNCITRAL and/or Ad-Hoc	unclear	shares of an aircraft-engine manufacturer	pending

臺灣大學學術期刊典藏庫

No	Case Name	Case Number	Time	Instrument(s) Invoked	Arbitration Rule	Administrative Institution	Subject of Dispute	Status
11	Wang Jiazhu v. Finland	/	2021-present	China–Finland BIT (2004)	UNCITRAL and/or Ad-Hoc	/	warehousing logistics	pending
12	Beijing Everyway Traffic and Lighting Tech Co Ltd v. Ghana (I)	./	2021-2023	China–Ghana BIT (1989)	UNCITRAL and/or Ad-Hoc	unclear	traffic management system contract	decided in favor of State
13	Alpene Ltd v. Malta	ICSID Case No. ARB/21/36	2021-present	China–Malta BIT (2009)	ICSID Convention—Arbitration Rules	ICSID	banking enterprise	pending

臺灣大學圖書館期刊系統

No	Case Name	Case Number	Time	Instrument(s) Invoked	Arbitration Rule	Administrative Institution	Subject of Dispute	Status
14	Qiong Ye and Jianping Yang v. Cambodia	ICSID Case No. ARB/21/42	2021-present	China–ASEAN Investment Agreement (2009)	ICSID Convention—Arbitration Rules	ICSID	telecommunication enterprise	pending
15	Huawei Technologies v. Sweden	ICSID Case No. ARB/22/2	2022-present	China–Sweden BIT (1982)	ICSID Convention—Arbitration Rules	ICSID	telecommunication license agreements	pending
16	PCCW Cascade (Middle East) Ltd. v. Saudi Arabia	ICSID Case No. ARB/22/20	2022-present	China–Saudi Arabia BIT (1996)	ICSID Convention—Arbitration Rules	ICSID	telecommunication enterprise	pending

臺灣大學學術期刊

No	Case Name	Case Number	Time	Instrument(s) Invoked	Arbitration Rule	Administrative Institution	Subject of Dispute	Status
17	PowerChina et al. v. Vietnam	ICSID Case No. ARB(AF)/22/7	2022-present	ASEAN–China Investment Agreement (2009)	ICSID Additional Facility—Arbitration Rules	ICSID	Construction project	pending

臺灣大學學術期刊資料庫

REFERENCES

Books

CHEN, ALBERT H.Y. (2021), THE CHANGING LEGAL ORDERS IN HONG KONG AND MAINLAND CHINA: ESSAYS ON "ONE COUNTRY, TWO SYSTEMS".

GALLAGHER, NORAH & WENHUA SHAN (2009), CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE.

VACCARO-INCISA (2021), GIUSEPPE-MATTEO, CHINA'S TREATY POLICY AND PRACTICE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION.

Articles

Alschner, Wolfgang & Kun Hui (2020), *Missing in Action: General Public Policy Exceptions in Investment Treaties*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2018 366 (Lisa E. Sachs et al. eds., Columbia Center on Sustainable Investment Books).

Alschner, Wolfgang (2014), *Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction*, 17(2) JOURNAL OF INTERNATIONAL ECONOMIC LAW 271.

Bath, Vivienne (2020), *China's Role in the Development of International Investment Law—From Bystander to Participant*, 15 ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW AND POLICY 359.

Batifort, Simon & J. Benton Heath (2017), *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111(4) AMERICAN JOURNAL OF INTERNATIONAL LAW 873.

Chaisse, Julien & Jamieson Kirkwood (2020), *Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty*, 23 JOURNAL OF INTERNATIONAL ECONOMIC LAW 245

Chaisse, Julien & Kehinde Folake Olaoye (2020), *The Tired Dragon: Casting Doubts on China's Investment Treaty Practice*, 17(1) BERKELEY BUSINESS LAW JOURNAL 134.

Chow, Gregory C. (2018), *China's Economic Transformation*, *in* CHINA'S 40 YEARS OF REFORM AND DEVELOPMENT: 1978–2018 93 (Ross Garnaut et al. eds.).

Cohen, Tyler & David Schneiderman (2017), *The Political Economy of Chinese Bilateral Investment Treaty Policy,* 5(1) THE CHINESE JOURNAL OF COMPARATIVE LAW 110.

De Brabandere, Eric (2021), *The 2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform*, 36(2) ICSID REVIEW 319.

臺灣大學學術期刊資料庫

Fong, Brian C. H. (2017), *One Country, Two Nationalisms: Center-Periphery Relations Between Mainland China and Hong Kong, 1997–2016*, 43(5) MODERN CHINA 523.

Gao, Henry (2022), *The EU-China Comprehensive Agreement on Investment: Strategic Opportunity Meets Strategic Autonomy*, *in* ASIAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 2022 47 (M. Chi et al. eds.).

Huang, Jie (2018), *Procedural Models to Upgrade BITs: China's Experience*, 31(1) LEIDEN JOURNAL OF INTERNATIONAL LAW 93.

Huang, Keer & Tong Qi (2022), *Avoid Opening up the Pandora's Box: Treaty Parallelism, Termination and Survival in the Reform of the China-EU Investment Regime*, 30(2) ASIA PACIFIC LAW REVIEW 367.

Li, Yuwen & Cheng Bian (2020), *China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options*, 67 NETHERLANDS INTERNATIONAL LAW REVIEW 503.

Ling, Li (2010), Zhongguo Shuangbian Touzi Baohu Xiedin Diyue Shijian he Mianlin de Tiaozhan (中国双边投资保护协定缔约实践和面临的挑战) [China's Conclusion of BITs: Practice and Challenges], 17(4) Guoji Jingji Fa Xuekan (国际经济法学刊) [CHINESE JOURNAL OF INTERNATIONAL ECONOMIC LAW] 114.

Nagy, Csongor István (2021), *Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field Be Levelled?*, 2(1) CENTRAL EUROPEAN JOURNAL OF COMPARATIVE LAW 147.

Pathirana, Dilini (2018), *Rising China and Global Investment Governance: An Overview of Prospects and Challenges*, 4 THE CHINESE JOURNAL OF GLOBAL GOVERNANCE 122.

Ren, Qing (2016), *Ping An v Belgium: Temporal Jurisdiction of Successive BITs*, 31(1) ICSID REVIEW 129.

Shan, Wenhua & Hongrui Chen (2016), *China–US BIT Negotiation and the Emerging Chinese BIT 4.0*, *in* ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT: ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH 223 (C. L. Lim ed.).

Shan, Wenhua & Lu Wang (2015), *The China-EU BIT and the Emerging 'Global BIT 2.0'*, 30(1) ICSID REVIEW 260.

Vidigal, Geraldo & Beatriz Stevens (2018), *Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?*, 19(3) JOURNAL OF WORLD INVESTMENT AND TRADE 475.

Voon, Tania & Dean Merriman (2022), *Incoming: How International Investment Law Constrains Foreign Investment Screening*, JOURNAL OF WORLD INVESTMENT AND TRADE 1.

Wang, Heng & Lu Wang (2020), *China's Bilateral Investment Treaties*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1 (Julien Chaisse et al. eds.).

Wong, Lucas Jun Hao (2022), *Indonesia's Termination of Bilateral*

臺灣大學學術期刊資料庫

Investment Treaties, 1 SMU ASEAN PERSP. 1.
Xiantao, Wen (2011), *Comments on the Draft of China's Model BIT (I)*, 18(4) Guoji Jingji Fa Xuekan (国际经济法学刊) [CHINESE JOURNAL OF INTERNATIONAL ECONOMIC LAW] 169.
Xiantao, Wen (2012), *Comments on the Draft of China's Model BIT (II)*, 19(1) Guoji Jingji Fa Xuekan (国际经济法学刊) [CHINESE JOURNAL OF INTERNATIONAL ECONOMIC LAW] 132.
Xiantao, Wen (2012), *Comments on the Draft of China's Model BIT (III)*, 19(2) Guoji Jingji Fa Xuekan (国际经济法学刊) [CHINESE JOURNAL OF INTERNATIONAL ECONOMIC LAW] 57.
Xu, Qian (2022), *Scoping the Impact of the Comprehensive Agreement on Investment: Liberalization, Protection, and Dispute Resolution in the Next Era of EU–China Relations*, 30(1) ASIA PACIFIC LAW REVIEW 93.
Ye, Ji (2009), Zhongguo Shuangbian Touzi Tiaoyue Zhengce yu Dingwei de Shizheng Fenxi (中国双边投资条约政策与定位的实证分析) [China's BIT Policy and Position: An Empirical Analysis], 16(3) Guoji Jingji Fa Xuekan (国际经济法学刊) [CHINESE JOURNAL OF INTERNATIONAL ECONOMIC LAW] 172.

Cases

Alpene Ltd v. Republic of Malta, ICSID Case No. ARB/21/36.
AsiaPhos Ltd. v. People's Republic of China, ICSID Case No. ADM/21/1, Award, (Feb. 16, 2023).
CC/Devas (Mauritius) Limited v. India, PCA Case No. 2013-09, Award on Jurisdiction and Merits (July 25, 2016).
China Heilongjiang International Economic & Technical Cooperative Corporation v. Mongolia, PCA Case No. 2010-20, Award (June 30, 2017).
Goh Chin Soon v. People's Republic of China, ICSID Case No. ARB/20/34.
Goh Chin Soon v. People's Republic of China, PCA Case No. 2021-30.
PCCW Cascade (Middle East) Limited v. Kingdom of Saudi Arabia, ICSID Case No. ARB/22/20.
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, Award (April 30, 2015).
Sanum Investments Limited v. Lao People's Democratic Republic, PCA Case No. 2013-13 Judgment (September 29, 2016).
Señor Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (June 19, 2009).
Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, Award (September 13, 2006).

臺灣大學學術期刊資料庫

Treaties

Additional Protocol Between the Government of the People's Republic of China and the Government of the Republic of Bulgaria to the Agreement Between the Government of the People's Republic of China and the Government of the People's Republic of Bulgaria Concerning the Reciprocal Encouragement and Protection of Investments, Bulgaria-China, June 26, 2007, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3562/download.

Additional Protocol Between the Government of the Slovak Republic and the Government of the People's Republic of China to the Agreement Between the Government of the Czech and Slovak Federal Republic and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, China-Slovakia, Dececember 7, 2005, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/778/download.

Additional Protocol to the Agreement Between the Government of the People's Republic of China and the Government of Romania on the Mutual Promotion and Protection of Investments, China-Rom., Apr. 16, 2007, http://treaty.mfa.gov.cn/tykfiles/20180718/1531876971850.pdf

Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment, May 13, 2012, https://investmentpolicy.unctad.org/international-investment-agreements/treatyfiles/2633/download.

Agreement Between Japan and the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investment, China-Japan, August 27, 1988, https://investmentpolicy.unctad.org/international-investment-agreements/treatyfiles/747/download.

Agreement Between the Belgium-Luxembourg Economic Union and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments, Belgium-China- Luxembourg, June 6, 2005, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/338/download.

Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Canada-China, September 9, 2012, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3476/download.

Agreement Between the Government of the People's Republic of China and the Government of the Republic of Iceland Concerning the Encouragement and Reciprocal Protection of Investments, China-Iceland, March 31, 1994, https://edit.wti.org/app.php/document/show/f8311e6e-

臺灣大學學術期刊資料庫

54ff-44a9-96b6-7b4c71464b88.

Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investments, China-South Korea, September 7, 2007, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3338/download.

Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments, China-Singapore, November 21, 1985, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5377/download.

Agreement Between the Government of the People's Republic of China and the Government of the Mongolian People's Republic Concerning the Encouragement and Reciprocal Protection of Investments, China-Mongolia, August 25, 1991, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/760/download.

Agreement Between the Government of The People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, China-Uzbekistan, April 19, 2011, https://edit.wti.org/app.php/document/show/31ad85dc-1a84-442c-835b-ac91f6b50d82.

Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments, China-Tanzania, Mar 24, 2013, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5488/download.

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, Belgium-China- Luxembourg, June 4, 1984, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/340/download.

Agreement Between the Government of the People's Republic of China and the Government of the Republic of Finland on the Encouragement and Reciprocal Protection of Investments, China-Finland, November 15, 2004, http://www.asianlii.org/cn/legis/cen/laws/abtgotprocatgotrofotearpoi1508/.

Agreement Between the Government of the People's Republic of China and the Government of Barbados Concerning the Encouragement and Reciprocal Protection of Investments, Barb.-China, July 20, 1998, https://edit.wti.org/app.php/document/show/b50a7553-21c3-4990-a80f-4f231ee69135.

Agreement Between the Government of the Republic of Turkey and the Government of the People's Republic of China Concerning the

臺灣大學學術期刊資料庫

Reciprocal Promotion and Protection of Investments, China-Turkey, July 29, 2015, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6085/download.

Agreement Between the Government of the Russian Federation and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, China-Russia, Protocol, November 9, 2006, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/774/download.

Agreement Between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, China- Germany, December 1, 2003, https://www.italaw.com/sites/default/files/laws/italaw9028.pdf.

Agreement Between the Republic of Austria and the People's Republic of China on the Promotion and Reciprocal Protection of Investments, Austria-China, September 12, 1985, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6364/download.

Agreement Concerning the Encouragement and Reciprocal Protection of Investments Between China and Denmark, China- Denmark, April 29, 1985, 1443 U.N.T.S. 69.

Agreement on encouragement and reciprocal protection of investments Between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands, China-the Netherlands., November 26, 2001, 2369 U.N.T.S. 219.

Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the People's Republic of China and the Association of Southeast Asian Nations, Association of Southeast Asian Nations-China, August 15, 2009, https://asean.org/wp-content/uploads/images/archive/22974.pdf.

Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations, November 4, 2002, http://fta.mofcom.gov.cn/dongmeng/annex/touzixieyi_en.pdf.

Agreement on Mutual Protection of Investments Between the Government of the Kingdom of Sweden and the Government of the Peoples Republic of China, China-Swed., March 29, 1982, https://edit.wti.org/app.php/document/show/a6d6d6eb-5198-4dab-a881-fbd8c8c4c69b.

Agreement on Trade and Economic Cooperation Between the European Economic Community and the People's Republic of China, China-European Economic Community, May 21, 1985, 1985 O.J. (L 250) 2.

Comprehensive Economic and Trade Agreement: Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part, Canada-European Union, October 30, 2016, 2017 O.J. (L 11) 23.

臺灣大學學術期刊資料庫

EU–China Agreement in Principle, EUROPEAN COMMISSION (January 22, 2021), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237.

Framework Agreement on Deepening Guangdong–Hong Kong–Macao Cooperation in the Development of the Greater Bay Area, Hong Kong-Macao- National Development and Reform Commission of the People's Republic of the Guangdong Province, July 1, 2017, https://www.bayarea.gov.hk/filemanager/en/share/pdf/Framework_Agreement.pdf.

Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, Australia-China, June 17, 2015, http://fta.mofcom.gov.cn/Australia/annex/xdzw_en.pdf.

Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea, China-South Korea, June 1, 2015, https://investmentpolicy.unctad.org/international-investment-agreements/treatyfiles/3461/download.

Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan, China-Pakistan, November 24, 2006, http://fta.mofcom.gov.cn/pakistan/xieyi/xieyizw_en.pdf.

Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Kingdom of Cambodia, Cambodia-China, October 12, 2020, http://fta.mofcom.gov.cn/cambodia/xieyi/xieyizw_en.pdf.

Free Trade Agreement Between the People's Republic of China and the Swiss Confederation, China-Switzerland, July 6, 2013, https://edit.wti.org/app.php/document/show/3308b346-b03b-4c86-b5cb41bce342fd29.

Investment Protection Agreement Between the European Union and its Member States and the Socialist Republic of Viet Nam, European Union-Viet Nam, June 30, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3616/eu---viet-naminvestment-protection-agreement-2019-.

Investment Protection Agreement Between the European Union and Its Member States and the Republic of Singapore, EU- Singapore., October 15, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-withinvestment-provisions/3545/eu---singapore-investment-protection-agreement-2018-.

Protocol of Amendment to the Agreement on Mutual Protection of Investments Between the Government of the People's Republic of China and the Government of the Kingdom of Sweden of March 29, 1982, China-Sweden., September 27, 2004, http://images.mofcom.gov.cn/tfs/202109/20210915102544434.pdf.

Protocol to Amend the Framework Agreement on Comprehensive Economic

臺灣大學學術期刊資料庫

Co-operation and Certain Agreements Thereunder Between the People's Republic of China and the Association of Southeast Asian Nations, Association of Southeast Asian Nations -China, Nov. 21, 2015, http://fta.mofcom.gov.cn/dongmeng_phase2/annex/yds_en.pdf.

Protocol to Amend the Free Trade Agreement and the Supplementary Agreement on Trade in Services of the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile, Chile-China, November 11, 2017, http://fta.mofcom.gov.cn/chile/xieyi/bcyds_en.pdf.

Protocol to Amend the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan, China- Pakistan, April 28, 2019, http://fta.mofcom.gov.cn/pakistan/xieyi/xdyds_en.pdf.

Protocol to the Agreement Between the Government of the Republic of India and the Government of the People's Republic of China for the Promotion and Protection of Investments, China-India, November 21, 2006, https://edit.wti.org/app.php/document/show/c7b6501c-78a5-42fa-8e12-15dbe0c7b18d.

Protocol to Upgrade the Free Trade Agreement Between the Government of the People's Republic of China and the Government of New Zealand, China- New Zealand, January 26, 2021, http://fta.mofcom.gov.cn/newzealand/doc/shengji/sjyds_en.pdf.

Protocol to Upgrade the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore, China- Singapore, November 12, 2018, http://fta.mofcom.gov.cn/singapore/doc/sjyds_en.pdf.

Regional Comprehensive Economic Partnership Agreement, November 15, 2020, https://rcepsec.org/legal-text/.

Supplementary Agreement on Investments of the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile, Chile-China, September 9, 2012, http://fta.mofcom.gov.cn/chiletwo/xieyi/tzxd-en.pdf.

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

Vienna Convention on the Succession of States in Respect of Treaties, August 23, 1978, 1946 U.N.T.S. 3.

WTO-related Documents

Communication from China, *Possible Elements of Investment Facilitation*, WTO Doc. JOB/GC/123 (April 26, 2017)

World Trade Organization, Joint Ministerial Statement on Investment Facilitation for Development, WTO Doc. WT/MIN(17)/59 (December 13, 2017).

臺灣大學學術期刊資料庫

U.N. -related Documents

U.N. Commission on International Trade L. Working Group. III, *Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of China*, U.N. Doc. A/CN.9/WG.III/WP.177 (July 19, 2019).

U.N. Conference on Trade and Development, *Reform of the International Investment Agreement Regime: Phase 2*, U.N. Doc. TD/B/C.II/MEM.4/14 (July 31, 2017).

Internet Sources

2021 Investment Climate Statements: Macau, U.S. DEPARTMENT OF STATE, https://www.state.gov/reports/2021-investment-climate-statements/macau.

2021 Model FIPA, GOVERNMENTT OF CANADA (2021), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng.

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

Budget Speech, HONG KONG GOV'T: THE 2022-23 BUDGET, https://www.budget.gov.hk/2022/eng/budget44.html.

Cannon, Andrew et al., *Updates on Potential EU-China Comprehensive Agreement on Investment (With a Focus on Investment Protection and ISDS)– New Wine in New Bottles?*, HERBERT SMITH FREEHILLS (January 29, 2021), https://hsfnotes.com/publicinternationallaw/2021/01/29/updates-on-potential-eu-china-comprehensive-agreement-on-investment-with-a-focus-on-investment-protection-and-isds-new-wine-in-new-bottles/.

Cases Database: Search Cases, ICSID, https://icsid.worldbank.org/cases/case-database.

Chaisse, Julien & Kehinde Olaoye, *Hong Kong, SAR China's New Approach to Investment Treaty Arbitration*, KLUWER ARB. BLOG (July 10, 2021), http://arbitrationblog.kluwerarbitration.com/2021/07/10/hong-kong-sar-chinas-new-approach-to-investment-treaty-arbitration/.

China Officially Applies to Join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (September 18, 2021, 9:30 AM), MINISTRY OF COMMERCE CHINA, http://english.mofcom.gov.cn/article/newsrelease/significantnews/202109/20210903201113.shtml.

China: List of Cases, JUS MUNDI, https://jusmundi.com/en/d/profile/state

臺灣大學學術期刊資料庫

/cn#list-of-cases.

Chinese FTAs, MINISTRY COMMERCE CHINA, http://fta.mofcom.gov.cn/english/index.shtml.

Chinese FTAs, MINISTRY OF COMMERCE PEOPLE'S REPUBLIC OF CHINA, http://fta.mofcom.gov.cn/english/index.shtml.

CHRISTOPH NEDOPIL WANG, GREEN BRI CENTRE, CHINA BELT AND ROAD INITIATIVE (BRI) INVESTMENT REPORT H1 2021 (July 2021), https://greenfdc.org/wp-content/uploads/2021/07/21_07_22_BRI-Investment-Report-H1-2021.pdf

Commission Proposes New Regulation to Address Distortions Caused by Foreign Subsidies in the Single Market, EUROPEAN COMMISSION (May 5, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1982.

COOPERATION AND FACILITATION INVESTMENT AGREEMENT OF BRAZIL AND, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download.

Discussion Paper: Review of Australia's Bilateral Investment Treaties, AUSTRALIA DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, https://www.dfat.gov.au/trade-and-investment/discussion-paper-review-australias-bilateral-investment-treaties.

FDI Stocks (indicator), ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, https://data.oecd.org/fdi/fdi-stocks.htm#indicator-chart.

G20 Agrees Guiding Principles for Global Investment Policymaking, OECD (July 11, 2016), https://www.oecd.org/investment/g20-agrees-principles-for-global-investment-policymaking.htm.

Goh v. China, INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1090/goh-v-china.

Hong Kong Applies to Join RCEP Trade Agreement, BILATERALS.ORG (February 23, 2022), https://www.bilaterals.org/?hong-kong-applies-to-join-rcep&lang=en.

Hong Kong's Investment Promotion and Protection Agreements, TRADE AND INDUSTRY DEPARTMENT THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, http://www.tid.gov.hk/english/ita/ippa/index.html.

International Investment Agreements Navigator, UNCTAD INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil.

International Investment Agreements Navigator: China, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china.

International Investment Agreements Navigator: China, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china.

臺灣大學學術期刊資料庫

International Investment Agreements Navigator—Hong Kong, China SAR, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/93/hong-kong-china-sar.

Investment Dispute Settlement Navigator, UNCTAD, https://investmentpolicy.unctad.org/investment-dispute-settlement

Investment Treaties, ELECTRONIC DATABASE OF INVESTMENT TREATIES, https://edit.wti.org/document/investment-treaty/search.

Investment Treaties, ELECTRONIC DATABASE OF INVESTMENT TREATIES, https://edit.wti.org/document/investment-treaty/search.

Lehmann, Thomas, *How do Chinese Investment Treaties Protect The State's Police Powers from Investors' Expropriation Claims? A Fourth Generation of Chinese International Investment Treaties*, QUEEN MARY UNIV. LONDON: EUPLANT (Dec. 15, 2020), https://www.qmul.ac.uk/euplant/blog/items/how-do-chinese-investment-treaties-protect-the-states-police-powers-from-investors-expropriation-claims-a-fourth-generation-of-chinese-international-investment-treaties.html.

Macau, China SAR, INVESTMENT POLICY HUB UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/123/macao-china-sar.

Mr. Goh Chin Soon (Singapore) v. People Republic of China, PERMANENT COURT OF ARBITRATION, https://pca-cpa.org/en/cases/269/.

NETHERLANDS MODEL INVESTMENT AGREEMENT, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download.

PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE U.N. OFFICIAL AT GENEVA AND OTHER INTERNATIONAL ORGANIZATION IN SWITZERLAND, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference* (October 21, 2016), https://www.mfa.gov.cn/ce/cegv//eng/fyrth/t1407743.htm.

Porterfield, Matthew C. et. al., *Reforming the International Investment Regime through a Framework Convention on Investment and Sustainable Development*, UNCITRAL (October 6, 2020), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a_framework_convention_on_investment.pdf.

Sichuan and Chongqing to Build Coordination Mechanism for Enterprise Complaint Handling, THE PEOPLE'S GOVERNMENT OF SICHUAN PROVINCE (June 2, 2020), https://www.sc.gov.cn/10462/10758/10760/10765/2020/6/2/4348b84b13eb48d9b231ceb860610d23.shtml.

Singh, Aayushi, *Deconstructing Treaty Parallelism and Overlap: The Infamous "Achilles Heel"*, CAMBRIDGE INTERNATIONAL LAW JOURNAL (May 3, 2021), http://cilj.co.uk/2021/05/03/deconstructing-treaty-parallelism-and-overlap-the-infamous-achilles-heel/.

U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT

臺灣大學學術期刊資料庫

REPORT 2022 (2022), https://unctad.org/system/files/official-document/wir2022_en.pdf.

U.S.-China Joint Fact Sheet Sixth Meeting of the Strategic and Economic Dialogue, U.S. DEPARTMENT OF THE TREASURY (July 11, 2014), https://home.treasury.gov/news/press-releases/jl2561.

UNCTAD, *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, 2 IIA ISSUES NOTE 1 (2017), https://unctad.org/system/files/official-document/diaepcb2017d3_en.pd f.

United Nations Convention on International Settlement Agreements Resulting from Mediation, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en.

Voon, Tania, *Submission: Review of Australia's Bilateral Investment Treaties*, AUSTRALIAN GOVERNMENT DEPARTMENT OF FOREIGN AFFAIRS AND TRADE (September 30, 2020), https://www.dfat.gov.au/sites/default/files/bit-review-submission-professor-tania-voon_.pdf.

Working Group III: Investor-State Dispute Settlement Reform, UNCITRAL, https://uncitral.un.org/en/working_groups/3/investor-state.

Zhang, Qianwen, *The Next Generation of Chinese Investment Treaties: A Balanced Paradigm in an Era of Change*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT (April 22, 2019), https://academiccommons.columbia.edu/doi/10.7916/d8-225k-m584.

Zhang, Sheng, *The China-United States BIT Negotiations: A Chinese Perspective*, VALE COLUM. CTR. ON SUSTAINABLE INT'L INV. (January 6, 2014), https://ccsi.columbia.edu/sites/default/files/content/docs/publications/FDI_No112.pdf.

Chinese Regulation

Guli Waishang Touzi Chanye Mulu (2020 Nianban) (鼓励外商投资产业目录（2020 年版）) [Catalogue of Industries for Encouraging Foreign Investment (2020 version)] (promulgated by the National Development and Reform Commission and the Ministry Commission, November 5, 2020, effective January 27, 2021), CLI.4.349460 (China).

Waishang Touzi Zhunru Tebie Guanli Cuoshi (Fumian Qingdan) (2021 Nianban) (外商投资准入特别管理措施（负面清单）（2021 年版）) [Special Administrative Measures for the Access of Foreign Investment (FDI Negative List) (2021 version)] (promulgated by the National Development and Reform Commission and the Ministry Commission, September 18, 2021, effective January 1, 2022), CLI.4.5112869 (China).

Zhonghua Renmin Gongheguo Waishang Touzi Fa (中华人民共和国外商投资法) [Foreign Investment Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's

臺灣大學學術期刊資訊網

Congress, March 15, 2019, effective January 1, 2020) CLI.1.330426 (China).

Zhonghua Renmin Gongheguo Waishang Touzi Fa Shishi Tiaoli (中华人民共和国外商投资法实施条例) [Regulation for Implementing the Foreign Investment Law of the People's Republic of China] (promulgated by the State Council, December 26, 2019, effective January 1, 2020), CLI.2.338347 (China).

Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jiben Fa [The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] (China).

Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa (中华人民共和国中外合资经营企业法) [Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures] (promulgated by the Standing Committee of the National People's Congress, July 1, 1979, effective July 8, 1979) CLI.1.279350 (China)

Ziyou Maoyi Shiyanqu Waishang Touzi Zhunru Tebie Guanli Cuoshi (Fumian Qingdan) (2021 Nianban) (自由贸易试验区外商投资准入特别管理措施（负面清单）（2021 年版）) [Special Administrative Measures for the Access of Foreign Investment in Pilot Free Trade Zones (FTZ FDI Negative List) (2021 version)] (promulgated by the National Development and Reform Commission and the Ministry Commission, September 18, 2021, effective January 1, 2022), CLI.4.5112872 (China).

Other Sources

European Commission Press Release IP/21/1982, Commission Proposes New Regulation to Address Distortions Caused by Foreign Subsidies in the Single Market (May 5, 2021).

Regulation 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. (L 351) 40.

臺灣大學學術期刊資料庫

臺灣大學學術期刊資料庫