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Abstract

Western commentators have many misperceptions on China's approach to international investment law. They divided China's bilateral investment treaties ("BITs") into two generations — conservative and liberal; but this article argues that China has three generations of BITs: the first generation is conservative, the second is liberal, and the third has reached a more balanced approach. They criticized China for not including pre-establishment national treatment in its BITs, not allowing most-favored-nation clause to extend to procedural issues and not accepting the "Hull Formula" in calculating compensation amount for expropriation. These criticisms are untenable, as what they proposed is not well-established and widely-accepted practice in the international community. They also criticized China for not actively participating in investor-State dispute settlement, as they failed to notice China's increasing participation in recent years and China's political considerations, especially when it is related to the ambitious Belt and Road Initiative.

Table of Contents

Introduction

International investment law is primarily shaped by a variety of treaties, and bilateral investment treaties ("BITs") are the most important source of contemporary international investment law.[1] As a result, if one wants to study a particular State's approach to international investment law, it would be wise to start with that State's BITs.[2]

It is relatively easy to understand the Western approach to international investment law, which tends to provide foreign investors a wide range of protections including "an expansive definition of 'investment' and 'investor'; national treatment; most favored nation treatment; a minimum standard of treatment (including fair and equitable treatment); restrictions on performance requirements; free transfer and convertibility of profits and proceeds from sales of assets; flexibility with regard to nationality of management; and protection against both direct and indirect expropriation, among others", as well as "a process, including detailed procedural requirements, for mandatory resolution of investor-[S]tate disputes through third-party international arbitration".[3]

China's approach to international investment law, on the contrary, is quite complicated. Commentators have recognized a transformation of China's approach – from a very conservative one that "includes several regulations limiting the substantive and procedural protection of foreign investments and thereby preserves the sovereign right of host [S]tates to maintain national laws and regulations on the entry and operation of foreign investors in accordance with national development strategies" to a Westernized one that includes almost all standard provisions found in mainstream BITs.[4]

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1 *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 13, 28 (2d ed. 2012).

2 Technically, the investment chapters in Free Trade Agreements ("FTAs") are not BITs. However, for convenience, when we refer to BITs below, the investment chapters in FTAs are also included, unless otherwise indicated.

3 David A. Gantz, *Challenges for the United States in Negotiating a BIT with China: Reconciling Reciprocal Investment Protection with Policy Concerns*, 31 ARIZ. J. INT'L & COMP. L. 203, 211 (2014) (citations omitted).

4 *See* Axel Berger, *The Politics of China's Investment Treaty-Making Program* (Oct. 31, 2010), at 4, 9-20, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1838651 [hereinafter Berger, *Politics*]; Congyan Cai, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J. INT'L ECON. L. 457, 459 (2009) (referring to this

Despite the dramatic change, many Western lawyers still hold certain stereotype and bias against China and severely criticize China's approach to international investment law. Many of these criticisms, in the author's view, are either due to the Western lawyers' misperception on China's approach, or because they have failed to understand the reasons behind China's approach. Therefore, this article aims to identify those Western stereotypes, biases, misperceptions and criticisms; clarify China's real approach to international investment law; defend some of China's practices which, in the author's view, should not be criticized; praise those underappreciated by the Western commentators; and explore the historical, legal and economic reasons behind China's approach.

This article is divided into six parts, including the introduction and a brief conclusion in Parts I and VI, respectively. Part II reviews the relatively common approach to describing China's two generations of BITs, and it explains how this narrative provides an incomplete picture of China's approach to international investment law. Part III explores the substantive protections that Chinese BITs provide to foreign investors, including most-favored-nation ("MFN") treatment and national treatment. Part IV describes expropriation and compensation, with particular emphasis on how China's practice has evolved over time, putting that evolution in its historical context and in light of current practice. Part V focuses on evidence in the BITs and State practice that suggest China's changing attitude towards investor-State dispute settlement ("ISDS"), with a particular interest in how China will handle investment disputes related to the Belt and Road Initiative.

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transition as China's bilateral investment treaties having been "Americanized") [hereinafter Cai, *China-US BIT*].

I. Generations of Chinese Bilateral Investment Treaties

In 1982, China entered into its first BIT (with Sweden), and so far it has signed 145 BITs, as well as 23 treaties with investment provisions.[5] Around half —68 treaties—were entered into in the 1990s, while others were signed in the 1980s (24 treaties) and the 21st century.[6] Notably, 32 BITs have been upgraded in the 21st century, either by concluding a new treaty or by issuing an amendment protocol or joint interpretation.[7]

Comparing the texts of China's first BIT—the 1982 China-Sweden BIT and one of the most recent—the 2012 China-Canada BIT, one would be amazed at the dramatic changes occurred in China's BIT practice. One might ask: how exactly have China's BITs changed and when did the changes occur?

Many Western lawyers believe that China's approach to BIT changed only once, when China liberalized its BIT practice around the turn of the century, and they claimed that the 2001 China-Netherlands BIT "heralded a new era of China's BIT practice".[8]As a result, they have found two generations of Chinese BITs —the old restrictive generation and the new liberal one.[9] The question arises how one can tell the new generation from the old one. Schill, one of those who believe in the "two generations" theory, has summarized two major innovations in the new generation —the inclusion of national treatment and the acceptance of comprehensive ISDS.[10]

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5 *International Investment Agreements Navigator—China*, U.N. CONFERENCE ON TRADE & DEV.: INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/42#iiaInnerMenu (last visited Oct. 12, 2018).

6 *See* NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE 31 (2009).

7 *See* Jie Huang, *Procedural Models to Upgrade BITs: China's Experience*, 31 LEIDEN J. INT'L L. 93, 94 (2018).

8 *See, e.g.*, Lin Jacobsen, *International Investment Law with Chinese Characteristics: Zooming in on China's BIT Practice*, 26 AM. REV. INT'L ARB. 19, 21 (2015).

9 *See* Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of The People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 77 (2007); Aaron M. Chandler, *BITs, MFN Treatment and the PRC: The Impact of China's Ever-Evolving Bilateral Investment Treaty Practice*, 43 THE INT'L. LAW. 1301, 1302 (2009); Gordon Smith, *Chinese Bilateral Investment Treaties: Restrictions on International Arbitration*, 76 ARB. 58, 58-59 (2010); Monika C. E. Heymann, *International Law and the Settlement of Investment Disputes Relating to China*, 11 J. INT'L ECON. L. 507, 524 (2008); Berger, *Politics, supra* note 5, at 10.

10 *See* Schill, *supra* note 10, at 77.

In the author's view, however, the "two generations" theory seems to have oversimplified the changing landscape of China's BITs. More accurately, China's approach has shifted twice, with the first change happening in 1998, and the second one happening between 2005 and 2007; and while the first shift could be described as "liberalization", the effects of the second one was liberalizing some aspects but *de*-liberalizing others to reach a more balanced approach.[11] As a result, China's BIT practice has undergone three, rather than two, phases.[12]

A. First Generation: Conservative

Chinese BITs before 1998 were notoriously conservative.[13] BITs signed in this phase did not provide investors with any type of national treatment, or stipulated that national treatment should be "subject to its law"; moreover, some BITs failed to provide any ISDS mechanism at all, and while others provided some types of ISDS, only disputes over compensation amount arising from expropriation could be submitted to international arbitration without case-by-case consent from the host State.[14]

Some Western lawyers are too ready to criticize this conservative approach, because they failed to see the historical, cultural, legal and economic reasons behind it.[15] As argued by Cai, four reasons can justify the approach, or at least explain why China was perfectly legitimate to adopt such a conservative approach at that time.[16] Firstly, under the economic system in transformation from planned economy to market economy, Chinese companies, mostly state-owned-enterprises ("SOEs"), had to undertake more social and economic obligations than those foreign investors did, which arguably made national treatment legally inequitable.[17] Secondly,

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11 *See* Cai, *China-US BIT*, *supra* note 5, at 461-62; Axel Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China Following the Global Trend Towards Comprehensive Agreements?* 6-12 (2013) (discussion paper) (on file with the German Development Institute) [hereinafter Berger, *Rules*].

12 *See* Cai, *China-US BIT*, *supra* note 5, at 461-62.

13 *See id.* at 461. *See also* Congyan Cai, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice*, 7 J. WORLD. INVEST. & TRADE 621, 641-48 (2006) [hereinafter Cai, *Outward FDI*] (providing more information on this issue).

14 *See* Cai, *China-US BIT*, *supra* note 5, at 461; Cai, *Outward FDI*, *supra* note 14, at 638, 641.

15 *See*, *e.g.*, Schill, *supra* note 10, at 89-91, 94-97.

16 *See* Cai, *China-US BIT*, *supra* note 5, at 461.

17 *See id.*

Chinese companies at that time lacked competitiveness as compared to their foreign counterparts, which rendered national treatment economically unfeasible.[18] Thirdly, from a cultural perspective, China's notion of absolute sovereignty discouraged it from adopting Western style international law, with international arbitration being one of the most notable aspects of international law that it had difficulty with, thereby rendering China reluctant to give the type of ISDS to foreign investors that they desired.[19] Finally, at that time, China's outward direct investment ("ODI") is negligible as compared to the large amount of foreign direct investment ("FDI") it received, so China had little incentive to enter into BITs that would protect its own investments and investors overseas.[20]

B. Second Generation: Liberal

From 1998 to the mid-2000s, Chinese BITs became significantly more liberal.[21] For example, many provide for post-establishment national treatment without the traditional limitations such as "subject to its law".[22] In addition, all disputes arising from investment (not limited to compensation amount disputes anymore) can be submitted to international arbitral tribunals without the host State's case-by-case consent.[23]

What is the reason behind this dramatic change? Some Western commentators argue that "pro-investor and pro-rule of law developments in China's BITs have occurred as a result of other countries' policies—particularly OECD countries and developing democracies" and "developed democracies have been successful in promoting stronger property rights [for] foreign investors [in China]".[24] This argument, in the author's view, demonstrates a lack of common sense of China's fundamental policies and thus is unconvincing. The Chinese communist regime has always been ideologically hostile towards "developed democracies". It insists on legal and

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[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id. See also* Cai, *Outward FDI*, *supra* note 14, at 641-48.

[22] *See* Cai, *China-US BIT*, *supra* note 5, at 461-62.

[23] *See id.*

[24] Kate Hadley, *Do China's BITs Matter? Assessing the Effect of China's Investment Agreements on Foreign Direct Investment Flows, Investors' Rights, and the Rule of Law*, 45 GEO. J. INT'L L. 255, 310 (2013).

economic systems with "Chinese characteristics" and adamantly resists the influence of Western countries' policies. As a result, the only reason that could make China change its approach would be huge economic incentives. Promotion of ideologies like "rule of law" and "property rights" by "developed democracies" could not possibly be a factor that China would take into consideration.

In fact, China's liberalization of BITs was a result of its new economic policy encouraging Chinese companies to invest overseas, known as "going abroad" ("*zou chu qu*" in Chinese), as a result of the growth of China's economy.[25] More fundamentally, as Gallagher and Shan explain, the surge of China's ODI was due to the economic success brought about by its WTO entry, particularly with the significant trade surplus and the explosion of FDI inflow, which in turn resulted in an enormous foreign exchange reserve.[26] Hence, the main concern of China, from then on, was no longer how to attract FDI and build up a large foreign exchange reserve, but how to make good use of the existing reserve and make ODI.[27] China continues to be attractive to FDI, but at the same time, its ODI has been increasing sharply each year since the new "going abroad" policy was adopted in 1998, with ODI levels climbing to US$68.8 billion in 2010, making China as the fifth biggest investment source.[28] In this new context, Chinese investors have become particularly sensitive to political risks and investment barriers that might negatively affect their investments overseas.[29]

As an emerging large capital-exporting country, China shifted its BIT practice from the conservative to liberal, with the aim to protect its own investments and investors overseas. Notably, the first BIT which reflects China’s liberal approach was its treaty with Barbados in

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25 *See* Cai, *China-US BIT*, *supra* note 5, at 462.

26 *See* GALLAGHER & SHAN, *supra* note 7, at 12.

27 *See id*, at 14.

28 *See 2010 Statistical Bulletin of China’s Outward Foreign Direct Investment*, MINISTRY OF COMM. CHINA: STATISTICS (2010), at 4-5, http://english.mofcom.gov.cn/article/statistic/foreigninvestment/201109/20110907742320.shtml;

World Investment Report 2011: Non-Equity Modes of International Production and Development, UNCTAD, (2011), at 9, http://unctad.org/en/PublicationsLibrary/wir2011_en.pdf.

29 *See 2009 World Investment and Political Risks*, MULTILATERAL INVEST. GUAR. AGENCY (2010), at 84, https://openknowledge.worldbank.org/bitstream/handle/10986/2688/520190PUB0flag10Box345548B01PUBLIC1.pdf?sequence=1&isAllowed=y.

1998 (earlier than the 2001 China-Netherlands BIT, which, as argued by many Western commentators, "heralded a new era of China's BIT practice"[30]), which for the first time agreed that any investment dispute could be submitted to international arbitration without specific consent of the host State.[31]

C. A New Balanced Generation

Some Western commentators failed to notice that China's approach changed again in mid-2010s. This time, what China did was not comprehensively liberalizing its BIT practice, but rather liberalizing some aspects while *de*-liberalizing others.

On the one hand, China started to include references to the "minimum standard of treatment", which shows China's willingness to accept customary international law in the area of international investment law.[32] The significance of this shift should not be underappreciated, as China once viewed customary international law as a Western notion disregarding developing countries' interests.[33] Another example of liberalization would be the inclusion of the term "admission" or "establishment" in the list of investment activities covered by the MFN clause.[34]

On the other hand, bearing in mind the experience that States like the U.S. and Argentina have been dragged into a huge amount of investment arbitrations, China tried to strike a balance between the interests of foreign investors and host States in its third-generation BITs.[35] For

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30 *See, e.g.,* Jacobsen, *supra* note 9, at 21.

31 *See* Agreement between the Government of Barbados and the Government of the People's Republic of China for the Promotion and Protection of Investments art. 9, Barb.-China, July 20, 1998. (All investment treaties, including investment chapters in free trade agreements, cited throughout this article are available in UNCTAD's online database of international investment instruments, located at http://investmentpolicyhub.unctad.org/IIA.)

32 *See, e.g.,* Agreement Between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments art. 5, China-Mex., Nov. 7, 2008 [hereinafter China-Mexico BIT (2008)]; Bilateral Agreement for the Promotion and Protection of Investment Between the Government of the Republic of Colombia and the Government of the People's Republic of China art. 2, China-Colom., Nov. 22, 2008 [hereinafter China-Colombia BIT (2008)]; Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments art. 4, Can.-China, Sept. 9, 2012 [hereinafter China-Canada BIT (2012)].

33 *See* Berger, *Rules*, *supra* note 12, at 10; Cai, *China-US BIT*, *supra* note 5, at 468.

34 *See* Berger, *Rules*, *supra* note 12, at 11.

35 *See id*. at 10; Cai, *China-US BIT*, *supra* note 5, at 462.

instance, while all types of investment disputes can be arbitrated, the new generation of China's BITs would include preliminary procedures to discourage foreign investors from abusing their rights.[36] This balanced approach can also be illustrated by China's adoption of the term "in like circumstances" in clauses such as MFN treatment,[37] national treatment[38] and compensation for losses,[39] aiming at reducing the room for interpretation by international arbitral tribunals.[40] Another example would be exceptions to the free transfer of investment-related funds, which allow host States to restrict investment flows in the event of serious balance-of-payments or other macroeconomic difficulties.[41]

Notably, although this article argues that China has three generations of BITs, the fundamental problem with many Western commentators is not that they argue two generations instead of three. The number "three" or "two" itself does not make any sense unless one explains clearly how to divide those generations and specifies the characteristics of each generation. Even those commentators who superficially divide China's BITs into three generations (i.e., the 1980s , the 1990s and the 2000s) are still wrong,[42] because they have oversimplified China's BIT practice during the past thirty years as a "one-directional liberalization" process[43] and failed to notice that

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36 *See* Cai, *China-US BIT*, *supra* note 5, at 462.

37 *See, e.g.*, 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 art. 3, China-S. Kor., Sept. 7, 2007 [hereinafter China-Korea BIT (2007)]; China-Mexico BIT (2008), *supra* note 33, arts. 3-4; China-Canada BIT (2012), *supra* note 33, arts. 5-6.

38 *See, e*.g., China-Korea BIT (2007), *supra* note 38, art. 3; China-Mexico BIT (2008), *supra* note 33, art. 3; China-Colombia BIT (2008), *supra* note 33, art. 3; Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Peru art. 129, China-Peru, Apr. 28, 2009; 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 art. 4, China-ASEAN, Aug. 15, 2009 [hereinafter China-ASEAN BIT (2009)]; 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 art. 3, May 13, 2012; China-Canada BIT (2012), *supra* note 33, art. 6.

39 *See, e.g.*, China-ASEAN BIT (2009), *supra* note 39, art. 9; China-Canada BIT (2012), *supra* note 33, art. 11.

40 *See* Berger, *Rules*, *supra* note 12, at 10-11.

41 *See id.* at 11.

42 *See* Won Kidane, *China-Africa Bilateral Investment Treaties in Comparative Context*, 49 CORNELL INT'L L.J. 141, 142-53 (2016).

43 *See* Jacobsen, *supra* note 9, at 21.

in mid-2010s China began to step backwards and pursue a more balanced approach.

III. Investment Treatment

Treatment of foreign investment is no doubt the central issue of international investment law. Although most second- and third-generation Chinese BITs contain treatment that a typical European or American BIT has, criticisms and misperceptions have not yet disappeared in the minds of Western commentators, especially when it comes to national treatment and MFN treatment.

A. National Treatment

In theory, national treatment includes pre-establishment national treatment, which guarantees foreign investors' market access, and post-establishment national treatment, which protects the existing investments' operations.[44] In practice, however, not every BIT contains both.

1. Pre-establishment National Treatment

The U.S. is the most typical State that insists on pre-establishment national treatment. Although post-establishment national treatment used to be all that the U.S. required,[45] since the mid-1980s pre-establishment national treatment has been included in almost all its investment treaties.[46] For example, the North American Free Trade Agreement ("NAFTA"), as well as the U.S. Model BITs of 1994 and 2004, require contracting parties to provided national treatment to "the *establishment*, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments".[47]

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44 *See* Cai, *China-US BIT*, *supra* note 5, at 469.

45 *See, e.g.*, Treaty Between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments art. II(2), U.S.-Morocco, July 22, 1985 [hereinafter U.S.-Morocco BIT (1985)] ("2. Each Party shall accord to these investments, once established, and associated activities, treatment no less favorable than that accorded in like situations to investments of its own nationals and companies or to investments of nationals and companies of any third country, whichever is most favorable").

46 *See* Cai, *China-US BIT*, *supra* note 5, at 469.

47 North American Free Trade Agreement art. 1102(1), Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993) (emphasis added); Treaty Between the Government of the United States of America and the Government of _______Concerning the Encouragement and Reciprocal Protection of Investment (1994 Model BIT) art. 2(1), http://investmentpolicyhub.unctad.org/Download/TreatyFile/2867; Treaty Between the Government of the United States of America and the Government of [Country] Concerning the

Western commentators have been quick to criticize China's approach to national treatment. Bath has criticized China for refusing to grant pre-establishment national treatment to foreign investors, and has categorized China's approach as the "investment control model".[48] Schill, who generally appreciates China's liberalization of BIT practice, nevertheless has criticized China's rejection of pre-establishment national treatment.[49] From his perspective, China's BITs made itself "unrestricted in subjecting foreign investors to pre-establishment approval or excluding them from specific sectors of the economy".[50] This article sees such criticism as untenable for the following four reasons.

First, even the U.S. does not grant an absolute pre-establishment national treatment; instead, it limits national treatment to particular economic sectors and activities.[51] For instance, the 2012 U.S. Model BIT excludes sectors such as financial services.[52] In addition, a few U.S. BITs say that national treatment depends on the host State's legislation.[53] According to the classification provided by United Nations Conference on Trade and Development, what the U.S. adopts is the "pre-establishment with a negative list approach" ("negative list" refers to reserved activities or excepted industries that national treatment does not apply).[54] This is what Bath and Schill fail to mention when they criticize China for its so-called "investment control model" and

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Encouragement and Reciprocal Protection of Investment (2004 Model BIT) art. 3, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2872.

48 *See* Vivienne Bath, *The Quandary of Chinese Regulators: Controlling the Flow of Investment Into and Out of China*, *in* FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA 68, 76-77 (Vivienne Bath & Luke Nottage eds., 2011).

49 *See* Schill, *supra* note 10, at 86.

50 *Id.*

51 *See* Qianwen Zhang, *Opening Pre-Establishment National Treatment in International Investment Agreements: An Emerging "New Normal" in China?*, 11 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 437, 441 (2016).

52 Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2012 U.S. Model BIT) art. 20, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2870.

53 *See, e.g.*, Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment art. 2(1), Pan-U.S., Oct. 27, 1982.

54 *See Admission and Establishment: UNCTAD Series on issues in international investment agreements*, UNCTAD (2002), at 3-4, http://unctad.org/en/Docs/iteiit10v2_en.pdf.

its denial of pre-establishment national treatment.[55]

Secondly, only treaties can require the provision of national treatment, not customary international law.[56] Looking at the relevant treaty practice of various States, one will find that acceptance of the pre-establishment model is actually very limited throughout the world. Cai correctly points out that "it is doubtful that pre-establishment [national treatment] has become an established practice among developed countries".[57] In fact, very few countries (such as the NAFTA members and Japan) adopt the pre-establishment model, while the vast majority of countries, including not only developing countries but also developed European countries, refuse to grant pre-establishment national treatment to foreign investors.[58] Bath and Schill seem to have adopted a double standard as they criticize China but do not criticize European countries for denying pre-establishment national treatment. Indeed, pre-establishment national treatment cannot even to be called a Western approach. Instead, it is more of a unique U.S. approach with a few friends of the U.S. adopting it.

Thirdly, there are indications that China may be willing to accept pre-establishment national treatment in its future BITs. In July 2013, during the fifth round of the China-U.S. Strategic and Economic Dialogue, China announced its intention to negotiate a BIT with the U.S. that "will cover all phases of investment, including market access, and sectors of the Chinese economy (except for any limited and transparent negotiated exceptions)".[59] This is essentially the "pre-establishment with a negative list approach" which the U.S. adopts. Admittedly, the China-U.S. BIT has not been concluded yet, and given the Trump administration's hostility towards China and globalization, the prospect of the treaty is bleak. Nevertheless, as far as China's part is concerned, it has indicated its willingness to embrace the pre-establishment model.

Finally, a draft of China's Foreign Investment Law ("Draft FIL") was circulated by the

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55 *See* Bath, *supra* note 49, at 76-77; Schill, *supra* note 10, at 86.

56 *See* Cai, *China-US BIT*, *supra* note 5, at 471.

57 *Id.* at 471.

58 *See id.* at 472; Berger, *Politics*, *supra* note 5, at 6.

59 *See U.S. Fact Sheet–Economic Track Fifth Meeting of the U.S.-China Strategic and Economic Dialogue*, U.S. DEP'T OF TREAS. (July 12, 2013), https://www.treasury.gov/press-center/press-releases/Pages/jl2011.aspx.

Ministry of Commerce in January 2015.[60] For decades, China's foreign investment legal regime was dominated by "Three Foreign Investment Laws"—the Law on Sino-foreign Equity Joint Ventures, the Law on Wholly Foreign-owned Enterprises and the Law on Sino-foreign Cooperative Joint Ventures — under which every single foreign investment transaction and the related agreements shall be approved by the government before the foreign-invested enterprises can be established.[61] But the Draft FIL, according to the Ministry of Commerce's official commentaries, "has abolished the case-by-case examination and approval system established by the Three Foreign Investment Laws and designed the foreign investment access administration system in line with the management mode of [pre-establishment] national treatment plus negative list".[62] Under the Draft FIL, the government will publish a Catalogue of Special Administrative Measures (i.e., the "negative list"), which consists of two categories —prohibited industries and restricted industries.[63] Article 25 of the Draft FIL stipulates that "[f]oreign investors shall not invest in any sector set out in the Catalogue of Prohibitions", and Article 26 provides that "[a]n application for access permission is not required if the foreign investment is not involved in any circumstance set out in the Catalogue of Restrictions".[64] As a result, a majority of foreign investment access matters (those outside the "negative list") will no longer be subject to examination and approval.[65] Sun, the spokesman for the Ministry of Commerce, made the following comments on the Draft FIL:

> Where the management mode of national treatment plus negative list *prior to admission* is adopted, the fields to which the foreign investment is prohibited or restricted will be included in a list; and the fields [other] than those included in that list

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[60] *See Foreign Investment Law of the People's Republic of China (Draft for Comment)*, MINISTRY OF COMM. OF CHINA (2015), http://images.mofcom.gov.cn/english/201510/2015102311241865.doc.

[61] *See Notes to the Foreign Investment Law of the People's Republic of China (Draft for Comment)*, MINISTRY OF COMM. OF CHINA (Jan. 19, 2015), http://images.mofcom.gov.cn/english/201510/20151023112521891.docx.

[62] *Id.*

[63] *See Foreign Investment Law of the People's Republic of China (Draft for Comment), supra* note 61, arts. 22-26.

[64] See *id.* arts. 25-26.

[65] *See Notes to the Foreign Investment Law of the People's Republic of China (Draft for Comment), supra* note 62.

will be fully open to investment, and these foreign investors or investment will receive treatment that is [not inferior to that] for Chinese investors or investment.[66]

Albeit a draft, it indicates that China will adopt pre-establishment national treatment in its domestic law in the foreseeable future. More importantly, such a domestic legislation may be regarded as China's preparation for the future China-U.S. BIT and potentially more Chinese BITs which would adopt the pre-establishment model. Furthermore, quite a few "Pilot Free Trade Zones" have been established in China's coastal regions such as Shanghai, Guangdong, Tianjin and Fujian, and they have started to experiment on the pre-establishment national treatment.[67]

2. Post-establishment National Treatment

Both Western and Chinese commentators agree that China has been willing to incorporate post-establishment national treatment into its BITs since 1998, i.e., its second- and third-generation BITs. Nevertheless, Western commentators still seem to have some concerns.

After examining the so-called "grandfather clause" in the protocol to the 2003 China-Germany BIT, which provides that national treatment does not apply to "any existing non-conforming measures maintained within its territory" and "the continuation of any such non-conforming measure", Heymann concludes:

The national treatment clause in the new Chinese BITs is thus not yet perfect and China remains extremely cautious as to what extent it will treat foreign investors as national investors. It seems that China has still not overcome its initial concerns about the national treatment clause, which were that national industries have to be protected from competition and that China is determined to maintain [SOEs'] monopolies.[68]

Moreover, Bath looks at Chinese domestic law on foreign investment and expresses her view that despite China's liberalized practice of BITs at the *international* level, Chinese *domestic* laws, regulations and policies on FDI have not changed substantially.[69] She criticizes China for

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66 Jiwen Sun, *Comments on Foreign Investment Law (Exposure Draft) Issued for Soliciting Public Opinions* (Jan. 22, 2015), http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201501/20150100875221.shtml.

67 *See* Zhang, *supra* note 52, at 452-53.

68 Heymann, *supra* note 10, at 526.

69 *See* Bath, *supra* note 49, at 69-73, 77-78.

keeping a different regime for foreign-invested enterprises under its domestic law and discriminating against foreign investors and in favor of Chinese companies, especially SOEs.[70]

This article argues that these criticisms are untenable. Indeed, the "grandfather clause" exists in some Chinese BITs. However, it is almost always accompanied by (1) the "standstill clause", which prohibits the creation of new discriminations against foreign investors or privileges for Chinese companies, and (2) the "rollback clause", which demonstrates China's willingness to continuously abandon non-conforming measures.[71] These two clauses, in effect, make sure that China will not implement new non-conforming measures and will gradually get rid of existing ones.

Moreover, few Western commentators are aware that in the Chinese legal system, international treaty provisions prevail over domestic law in case of conflict.[72] Thus, although in a different context, Wang points out that BITs have the effect of filling the gap in Chinese law and prevailing over any conflicting provisions of Chinese law.[73] In a highly globalized world, the line between domestic and international legal realms has become blurred over time, and international norms are, by way of treaties like BITs, seeping more and more into the domestic legal systems of sovereign States.[74] From Wang's perspective, filling gaps and prevailing conflicting domestic laws are precisely the use of BITs in the development of the Chinese legal system on protection of foreign investment, and thus BITs can serve as a tool to move international norms into the

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70 *See id.*

71 *See* Schill, *supra* note 10, at 98.

72 *See* Minfa Tongze (民法通则) [General Principles of Civil Law] (promulgated by the NAT'L PEOPLE'S CONG., Apr. 12, 1986, effective Jan. 1, 1987), art. 142, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm (China) (providing that, where a treaty varies from existing Chinese law, the treaty will apply unless China has entered a relevant reservation); Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the NAT'L PEOPLE'S CONG., Apr. 9, 1991, effective Apr. 9, 1991, amended Oct. 28, 2007, Aug. 31, 2012, June 27, 2017), art. 260, http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024892.htm (China) (same).

73 *See* Guiguo Wang, *China's Practice in International Investment Law*, 53 SEOUL L.J. 187, 201, 227 (2012) [hereinafter Wang, *Seoul*].

74 *See* Guiguo Wang, *China's Practice in International Investment Law: From Participation to Leadership in the World Economy*, 34 YALE J. INT'L L. 575, 585 (2009) [hereinafter Wang, *Leadership*]; Guiguo Wang, *Globalizing the Rule of Law*, 48 INDIAN J. INT'L L. 21 (2008).

Chinese domestic law.[75]

Of course, this does not mean that China need not amend its domestic law. On the contrary, to play a role in the international community commensurate to its size and economic importance, particularly in the realm of investment, China still has much to do; specifically, it needs to review and modify its domestic laws, regulations and policies to cope with the ever-changing situation.[76] This is exactly what China appears to be doing. As mentioned above, China's Ministry of Commerce published the Draft FIL in January 2015. The Draft FIL has not only touched on the issue of pre-establishment national treatment, but it has improved post-establishment national treatment as well.

Under the old foreign investment legal regime, the Three Foreign Investment Laws have formed an "independent kingdom" outside of those general business organization laws, such as the Company Law and the Partnership Law. Practitioners sometimes complain that it is difficult to resolve conflicts between the Three Foreign Investment Laws and the Company Law.[77] Although the Company Law as amended in 2013 stipulates in principle that the Company Law shall apply to all foreign-invested limited liability companies and joint stock companies, an exception was also made: where foreign investment laws have conflicting provisions, such provisions shall prevail.[78] But the Draft FIL will abolish the split and bring harmonization to the Chinese corporate law regime. According to Sun's Comments, the Draft FIL:

no longer takes the organization forms or operating activities of foreign-invested enterprises as main items to be regulated. As for the organization forms and operating activities of foreign-invested enterprises, on basis of uniform principles for domestic and foreign investment, relevant laws and regulations, such as Company Law, will apply in a

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75 *See* Wang, *Seoul*, *supra* note 74, at 201, 227.

76 *See* Wang, *Leadership*, *supra* note 75, at 585.

77 *See*, *e.g.*, Xu Ping, Mark Schaub & Jennifer Yao, *A New Era for the PRC Foreign Investment Regime—An Introduction to the Discussion Draft Foreign Investment Law of PRC*, CHINA LAW INSIGHT (Jan. 22, 2015), http://www.chinalawinsight.com/2015/01/articles/corporate/mergers-acquisitions/a-new-era-for-the-prc-foreign-investment-regime-an-introduction-to-the-discussion-draft-foreign-investment-law-of-prc/.

78 *See* Gongsi Fa (公司法) [Company Law] (promulgated by the STANDING COMM. NAT'L PEOPLE'S CONG., Dec. 29, 1993, effective Jul. 1, 1994, amended Aug. 28, 2004, Oct. 27, 2005, Dec. 28, 2013), art. 217, http://www.npc.gov.cn/wxzl/gongbao/2014-03/21/content_1867695.htm (China).

uniform manner.[79]

Therefore, this draft indicates China's willingness to review and amend its domestic law to grant foreign investors genuine national treatment. Most recently, the Ministry of Commerce announced on November 2, 2017 that the new Foreign Investment Law is progressing well, as the draft has been submitted for further discussion by the central government, and that "the ministry will collaborate with the Legislative Affairs Office of the State Council to speed up the lawmaking pace in the next stage".[80]

In addition, post-establishment national treatment is not a serious problem for foreign investors *in reality*, because China has tended to give foreign investors more favorable treatment than that given its own nationals.[81] For example, according to the Circular of the State Council on Adjustment of Imported Equipment Taxation Policies, the State Council determined that "imported equipment of domestic investment projects and foreign investment projects encouraged by the state enjoy exemption from tariff and import stage value-added tax" within a specified scope, starting from January 1, 1998.[82] The actual "more favorable treatment" given to foreign investors is recognized by not only legal commentators but also economists as well. For example, Huang, a Chinese economist, after extensive empirical study, concludes that there is "legislative and regulatory superiority" enjoyed by foreign investors in China's economy, and this "superiority" has created a business environment that is more "friendly" to foreign-invested enterprises than to domestic private firms.[83] China's SOEs, as opposed to private firms, are indeed a problem. However, some high profile Chinese officials, including Premier Li, have indicated China's willingness and resolution to reform its SOEs.[84] The effects of the proposed

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79 Sun, *supra* note 67.

80 Jing Shuiyu & Liu Yukun, *Foreign investment law enactment progresses*, STATE COUNCIL (Nov, 3, 2017, 9:04 AM), http://english.gov.cn/state_council/ministries/2017/11/03/content_281475930350075.htm.

81 *See* Wang, *Seoul*, *supra* note 74, at 217.

82 *See id.* at. 217 n. 115.

83 *See* Yasheng Huang, *One Country, Two Systems: Foreign-Invested Enterprises and Domestic Firms in China*, 14 CHINA ECON. REV. 404, 404-05 (2003).

84 *See China Unveils Targets for 2015: Li Keqiang's Speech as It Happened*, S. CHINA MORNING POST (Mar. 5, 2015, 6:05 PM), www.scmp.com/news/china/article/1729846/live-li-keqiang-unveils-chinas-annual-work-report ("Li says the government will cut red tape for businesses and will relax controls over private capital to enter the market. He emphasises the reform of state owned enterprises and says the

reform remain to be seen.

B. Most-Favored-Nation Treatment

The MFN clause has formed part of international economic treaties for centuries.[85] In recent years, this clause, along with clauses relating to other types of treatment such as fair-and-equitable treatment and national treatment, has been included in nearly all Chinese BITs.[86] Notably, even in the first-generation BITs, MFN treatment was a common provision.[87]

A remarkable step made by China concerning MFN treatment is that China has started applying pre-establishment MFN treatment. An example includes Article 3(3) of the 2004 China-Finland BIT, which provides that "[w]ith respect to the *establishment*, acquisition, operation, management, maintenance, use, enjoyment, expansion, sale or other disposal of investments", MFN treatment applies.[88] Article 5(1) of the 2009 China-ASEAN BIT is even more explicit, extending MFN treatment to the "*admission*, *establishment*, acquisition, expansion, management, conduct, operation, maintenance, use, liquidation, sale, and other forms of disposal of investments".[89]

Notably, the MFN clause in Chinese BITs can cover even more than what is covered by NAFTA. In practice, foreign investors in China receive both national treatment and MFN

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government will accelerate reforms in power, petroleum and natural gas enterprises, while also strengthening supervision of the assets of the state enterprises."); Kwong Man-ki, *China Expected to Push Forward Reforms of State-Owned Enterprises*, S. CHINA MORNING POST (Mar. 11, 2015, 9:51 PM), http://www.scmp.com/business/china-business/article/1735247/china-expected-push-forward-reforms-state-owned-enterprises ("A series of plans to reform the country's SOEs would be released this year, Mu Hong, vice chairman of the National Development and Reform Commission and deputy director of the leading group for deepening reform, told reporters last week at a meeting of the Chinese People's Political Consultative Conference (CPPCC).").

85 *See* DOLZER & SCHREUER, *supra* note 2, at 206.

86 *See* GUIGUO WANG, INTERNATIONAL INVESTMENT LAW: A CHINESE PERSPECTIVE 376 (2015) [hereinafter WANG, CHINESE PERSPECTIVE].

87 *See* Qingjiang Kong, *Bilateral Investment Treaties: The Chinese Approach and Practice*, 8 ASIAN YBK. INT'L L. 105, 123-25 (1998).

88 Agreement Between the Government of the Republic of Finland and the Government of the People's Republic of China on the Encouragement and Reciprocal Protection of Investments art. 3(3), China-Fin., Nov. 15, 2004 [hereinafter China-Finland BIT] (emphasis added).

89 China-ASEAN BIT (2009), *supra* note 39, art. 5(1) (emphasis added).

treatment without exception.[90] This is in contrast with (and more liberal than) NAFTA, inasmuch as Article 1410(1) of NAFTA provides that "[n]othing in this Part shall be construed to prevent a Party from adopting or maintaining reasonable measures for prudential reasons", even if the effect of such measures (as contrasted with their motive or intent) is discriminatory.[91]

Nonetheless, MFN treatment should not be allowed to go too far, such as applying to procedural matters. For years, controversies have not been settled on whether MFN treatment is limited to substantive rights, or can also cover procedural ones.[92] This question has been addressed in a number of cases, but the arbitral tribunals of those cases have reached diverging conclusions.[93] In some cases, such as *Maffezini*, tribunals have answered in the affirmative,[94] while others have answered in the negative, such as the *Salini* arbitration.[95]

Some Western commentators, such as Chandler, believe that interpretation of the MFN clauses in Chinese BITs should follow the *Maffezini* approach so that procedural rights are covered.[96] However, China has never intended to let MFN treatment go that far. Leading Chinese international economic law professors, such as Chen and Cai, have suggested that dispute settlement procedures should be excluded from the coverage of MFN clause.[97] This point is not purely academic, as it appears to have been adopted by the Chinese government. For example, the 2008 China-New Zealand Free Trade Agreement indicates that “for greater certainty, the obligation in this Article [139] does not encompass a requirement to extend to investors of the

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90 *See* WANG, CHINESE PERSPECTIVE, *supra* note 87, at 379.

91 *See, e.g.*, Fireman's Fund Ins. Co. v. Mexico, ICSID Case No. ARB(AF)/02/1, Award, ¶ 162 (July 17, 2006).

92 *See* Christopher F. Dugan et al., INVESTOR-STATE ARBITRATION 417-25 (2008).

93 *See generally* Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT’L L. 125 (2007).

94 *See* Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000).

95 *See* Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 9, 2004).

96 *See, e.g.*, Chandler, *supra* note 10, at 1308.

97 *See* Guoji Touzi Fa de Xin Fazhan yu Zhongguo Shuangbian Touzi Tiaoyue de Xin Shijian (国际投资法的新发展与中国双边投资条约的新实践) 393 (Chen An (陈安) & Cai Congyan (蔡从燕) eds., 2007); Cai, *Outward FDI*, *supra* note 14, at 651.

other party dispute resolution procedures other than those set out in this chapter [Chapter 11]."[98] Another example would be Article 10(8)(6) of the 2008 modification agreement of the China-Cuba BIT, in which the MFN clause was excluded from enforcement or annulment.[99]

IV. Expropriation and Compensation

A. Historical Events

China has had a disgraceful history of large-scale seizure and nationalization of foreign properties and enterprises from the founding of the People's Republic of China in 1949 to 1957; and no compensation was given when the expropriation took place.[100] This is well documented in the Western literature. It is probably less well known that compensation did come at a later stage, through formal or informal channels.[101] Concerning the formal ways, since the 1970s, when China officially restored diplomatic relations with the Western States, it began to settle the historical disputes concerning expropriation.[102] In 1979, for example, as part of the normalization process between the U.S. and China, the two States signed the Agreement Concerning the Settlement of Claims (the "Agreement"), which provided that China pay a lump-sum of $80.5 million in exchange for the U.S. unblocking $80.5 million in Chinese assets.[103]

Some Western commentators and government officials are of the view that the Chinese

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98 Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China art. 139(2), China-N.Z., Oct. 1, 2008.

99 *See* Modification of the Agreement on the Promotion and Mutual Protection of Investments Between the Government of the People's Republic of China and the Government of the Republic of Cuba art. 10(8)(6), Apr. 20, 2007, http://tfs.mofcom.gov.cn/article/h/bk/201003/20100306805846.shtml ("Neither contracting party shall resort to any treaty or convention, to which the contracting parties are members, to apply for enforcement or annulment of the arbitration award according to the provisions of most-favored-nation treatment of this Agreement.").

100 *See* Pat K. Chew, *Political Risk and U.S. Investments in China: Chimera of Protection and Predictability?*, 34 VIRG. J. INT'L L. 615, 627 (1993); Laurie A. Pinard, *United States Policy Regarding Nationalization of American Investments: The People's Republic of China's Nationalization Decree of 1950*, 14 CAL. WESTERN INT'L L.J. 148, 148 (1984); Thomas N. Thompson, *China's Nationalization of Foreign Firms: The Politics of Hostage Capitalism, 1949-57*, at 6 (Occasional Papers/Reprint Series in Contemporary Asian Studies No.6, 1979), http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1026&context=mscas.

101 *See* WENHUA SHAN, THE LEGAL FRAMEWORK OF EU-CHINA INVESTMENT RELATIONS: A CRITICAL APPRAISAL 9 (2005).

102 *See id.*

103 *See* Agreement Concerning the Settlement of Claims, China-U.S., May 11, 1979, 30 U.S.T. 1958.

compensation was substantially less than what was claimed by the foreign investors.[104] Specifically, Solomon, the Undersecretary of the Treasury for Monetary Affairs during the Carter administration, reported that the Chinese lump-sum payment entitled the average U.S. claimant to a mere 41 percent compensation for his property that was nationalized by China.[105] For example, the U.S. Foreign Claims Settlement Commission determined that a Delaware corporation was entitled to recover $144 million including interest, but ultimately it received only about $20 million.[106] In general, the Agreement left many U.S. claimants dissatisfied.[107] As a result, the U.S. claimants contend that they are entitled to full compensation for their nationalized property, and they even argue that the Agreement violates both international and domestic law.[108]

This article is not trying to argue that those contentions are wrong. However, it must be mentioned that, in addition to the aforementioned formal ways in which foreign investors received compensation, there were also some informal ways. For instance, since 1954, the companies that were expropriated have been employed as consultants in the interest of promoting Sino-Western trade, and this was exactly what they had hoped for in the years of expropriation.[109] All indications have shown that they have profited handsomely from this employment.[110] This is perhaps something that they did not mention while calculating their claims under the Agreement.

B. Current Practice

Fearing too much that those historical events may happen again, Chew made the following argument in the 1990s:

The threat of expropriation by the Chinese government is not merely theoretical. After the Communist regime took control of the government in 1949, it began a nationalization and expropriation process. While political circumstances are very

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104 *See* Chew, *supra* note 101, at 629.

105 *See* Anthony M. Soloman, *When 41 Cents on the Dollar is a Good Deal*, CHRISTIAN SCI. MONITOR, Mar. 28, 1979, at 23.

106 *See* Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 239-240 (1983).

107 *See* Pinard, *supra* note 101, at 149.

108 *See id.*

109 *See* Thompson, *supra* note 101, at 69.

110 *See id.*

different today, the fact that some of the current Chinese leaders were part of the early party power structure suggests that these events may be of more than mere historical interest.[111]

Even in the 2010s, the U.S. government agencies still worry about the risk of expropriation in China, as the US-China Economic and Security Review Commission, a congressional commission, stated that "[p]rotection against expropriation is an especially important guarantee in China, following the large-scale seizure and nationalization of foreign assets after the Chinese Communist Party came to power in 1949".[112]

This concern, however, seems illusional today, because developing countries around the globe compete fiercely with each other to attract FDI, and since the existing capital inflows are far from sufficient to satisfy the needs of most developing countries, large-scale direct expropriation is not a major threat to foreign investment nowadays.[113] In 2010, Multilateral Investment Guarantee Agency of the World Bank Group noted that only 6% of respondents in its survey of political risks reported losses due to expropriation.[114]

As for China in particular, all its BITs contain protection against expropriation.[115] As indirect expropriation appears to be more of a threat to foreign investment nowadays than direct expropriation,[116] all recent Chinese BITs contain rules on indirect expropriation in the form of "other legal measures having similar effect",[117] which is similar to the language of NAFTA Article 1100(1).

As a result, expropriations (including direct and indirect ones) are lawful under Chinese

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111 Chew, *supra* note 101, at 625-26.

112 *Evaluating a potential US-China bilateral investment treaty: Background, context and implications*, U.S.-CHINA ECON. & SEC. REVIEW COMM'N (2010), at 15, http://digitalcommons.ilr.cornell.edu/key_workplace/733.

113 *See* WANG, CHINESE PERSPECTIVE, *supra* note 87, at 388-89.

114 *See 2010 World Investment and Political Risks*, MULTILATERAL INV. GUAR. AGENCY (2011), at 23, https://www.miga.org/documents/wipr10ebook.pdf.

115 *See* Schill, *supra* note 10, at 106.

116 *See* Wang, *Seoul*, *supra* note 74, at 225.

117 *See* WANG, CHINESE PERSPECTIVE, *supra* note 87, at 433. *See, e.g.*, Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments art. 4(2), China-Ger., Dec. 1, 2003.

BITs only if they fulfill four conditions — public purpose, due process, non-discrimination and compensation.[118] This is similar to the U.S. approach.[119]

Many Western commentators argue that although both the U.S. and Chinese BITs require compensation for expropriation, China always insists on "reasonable compensation" and rejects "prompt, adequate and effective compensation" (the "Hull Formula"[120]), which many consider to be the dominant standard under international law.[121] This argument is not entirely correct. The 1986 China-U.K. BIT, for example, still adopts the "reasonable compensation" standard in general terms; but, immediately thereafter, the reasonable standard was further elaborated: "[s]uch compensation shall amount to the real value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall include interest at the normal rate until the date of payment, shall be made without undue delay, be effectively realizable and be freely transferable".[122] Indeed, the prevailing Chinese view on compensation for expropriation has always been "reasonable compensation", rather than the Hull Formula. However, the actual wording of some Chinese BITs, such as the 1986 China-U.K. BIT, seems to have adopted, more or less, the Hull Formula *in effect*, while reluctantly giving lip-service to "reasonable compensation" in order to quiet potential internal criticism.[123]

Admittedly, China has not yet fully embraced the Hull Formula. Nonetheless, many recent Chinese BITs have adopted "fair market value" as a methodology to calculate loss and

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118 *See* Cai, *China-US BIT*, *supra* note 5, at 475.

119 *See id.*

120 U.S. Secretary of State Cordell Hull was the first to articulate this notion when responding to Mexico's expropriation of U.S. property. *See generally* GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655-65 (1942).

121 *See, e.g.*, Schill, *supra* note 10, at 108.

122 Agreement between the Government of the Kingdom of Great Britain and Northern Ireland the Government of the People's Republic of China Concerning the Promotion and Reciprocal Protection of Investments art. 5(1), China-U.K., May 15, 1986.

123 *See* Wang, *Seoul*, *supra* note 74, at 226 (discussing how Chinese culture saw concessions to foreign states as being non-patriotic and against socialism, which feelings intensified in the mid 1980s but later subsided with Deng Xiaoping).

damage arising from expropriation,[124] which is commonly employed in the U.S. BITs,[125] so the difference between the Chinese and U.S. approaches concerning compensation is not as much as it appears.[126]

V. Investor-State Dispute Settlement

China has a long history of jealously guarding its sovereignty against international courts and tribunals.[127] While China is still extremely reluctant to submit to international courts and tribunals those disputes which affect its "core interests", such as sovereignty, security and territorial integrity[128]—China's non-participation of the *South China Sea Arbitration* being the best example,[129] it has become willing to participate in international dispute settlement mechanism for trade and investment disputes. For example, China is obviously very active in trade dispute settlement, as so far it has been involved in 199 cases before the WTO Dispute Settlement Body, either as complainant, respondent or third-party.[130] When it comes to investment disputes, China's approach is not that straight forward and thus deserves careful study.

A. "Reservation" under Article 25(4) of the ICSID Convention?

Has China made a "reservation" when it acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") in 1993? Some Western commentators believe so and argue that China's acceptance of the jurisdiction of the International Centre for Settlement of Investment Disputes ("ICSID") is

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124 *See, e.g.*, China-Korea BIT (2007), *supra* note 38, art. 4; China-Finland BIT (2003), *supra* note 89, art. 4.

125 *See, e.g.*, US-Morocco BIT, *supra* note 46, art. 3.

126 *See* Cai, *China-US BIT*, *supra* note 5, at 476.

127 *See generall*y Julian Ku, *China and the Future of International Adjudication*, 27 MD. J. INT'L L. 154 (2012).

128 *See* Chang-fa Lo, et al., *Special Issue on "Asia-Pacific Regional Mediation Organization" (ARMO): Perspectives from Some Asian Countries*, 13 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 159, 164 (2018).

129 *See* Note Verbale from Permanent Mission of the People's Republic China to the United Nations to the Secretary General of the United Nations, CML/17/2009 (May 7, 2009), http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf.

130 See Table of Disputes by WTO Member, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Oct. 12, 2018).

limited to investment disputes "over compensation resulting from expropriation and nationalization".[131]

Indeed, China notified the ICSID on January 7, 1993 that "pursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the [ICSID] disputes over compensation resulting from expropriation and nationalization".[132] However, the legal nature of this notification is not a "reservation".

First, China issued its notification under Article 25(4), which states "[a]ny Contracting State may, at the time of ratification, acceptance of approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre".[133] The Convention, *per se*, is silent on the legal effect of such a notification. Nevertheless, examining Article 25 as a whole, an arbitral tribunal under the ICSID Convention will have personal jurisdiction over a State only when two conditions are met: (1) the State has ratified the ICSID Convention; and (2) the State has consented to jurisdiction under the ICSID Convention Article 25(1). In other words, States do not automatically accept the ICSID's jurisdiction when they become parties to the ICSID Convention, and thus a reservation at the time of joining ICSID is unnecessary.[134]

Secondly, the ICSID Convention Article 25(4) provides that "[s]uch notification shall not constitute the consent required by [Article 25] paragraph (1)".[135] That is to say, even if a State notifies the ICSID that it accepts ICSID's jurisdiction for certain investment disputes under Article 25(4), such a notification would be without legal effects.[136] Therefore, it is logical to infer that notification refusing to accept ICSID's jurisdiction in certain types of cases also lacks legal

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131 *See, e.g.*, Mark A. Cymrot, *Investment Disputes with China*, 61 DISP. RES. J. 80, 82 (2006).

132 *Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre* (Jan. 7, 1993), https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%208-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf.

133 Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25(4), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

134 *See* Heymann, *supra* note 10, at 517-18.

135 ICSID Convention, *supra* note 134, art. 25(4).

136 *See* Heymann, *supra* note 10, at 518.

effect.[137]

Finally, the ICSID Convention's *travaux préparatoires* also confirms this view. According to the drafters, the object and purpose of Article 25(4) is to clarify that the ratification of the ICSID Convention does not constitute any form of consent to accept the jurisdiction of the ICSID and should not create any expectations to investors.[138]

Therefore, it can be concluded that China's notification under Article 25(4) is for information purposes only and has no direct legal consequences, and thus China is free at any moment to accept the jurisdiction of the ICSID for all investment disputes.[139] And this is exactly what China has done in its second- and third- generations of BITs.

B. Liberalization of Investor-State Dispute Settlement Clauses

As discussed above, first-generation BITs are very conservative, most of which provide that, without case-by-case consent from the host State, only disputes concerning compensation amount arising from expropriation can be arbitrated. China liberalized the ISDS clauses in its BITs in 1998, and second- and third-generation BITs enable all investment disputes to be sent to arbitration, although third-generation BITs have added some procedural pre-requisites that aim to discourage abuse of rights by foreign investors.

One should not take the liberalization process for granted. Wang uses arbitral awards concerning the fair and equitable treatment clause as an example to illustrate that it is not an easy decision for China to allow all investment disputes to be submitted to international arbitration:

> Recent arbitral awards involving Argentina and other countries have certainly sent a strong signal that the [fair and equitable treatment] clause may have devastating impact on the legal system and laws of the host countries. China was of course not unaware of the potential consequence of the fair and equitable [treatment] clause. Yet it still decided to have the clause stated in its BITs which shows that China is determined

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137 *See id.*

138 *See* CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY §§ 622-24 (2001).

139 *See* Heymann, *supra* note 10, at 518; *id.*, § 626 ("[N]otifcations under Article 25 are for purposes of information only and are designed to avoid misunderstandings. They do not have any direct legal consequences. . . . In particular, they do not bind the Contracting States making the notification, which may withdraw or modify its notification at any time.").

to be a responsible member of the international community and to let its laws and administrative decisions be subject to the scrutiny of international arbitration. For a country with the communist party at the helm of affairs, this is in itself an important contribution to international investment law.[140]

Indeed, it appears that China needed a considerable amount of courage to make this decision.

C. Actual Participation in Investor-State Arbitration

China has fully embraced the investor-State arbitration mechanism in its BITs, as it is not only a party to the ICSID Convention, but also one of the world's most enthusiastic signatories of BITs that grant binding mandatory jurisdiction to the ICSID.[141] Despite that, many Western commentators in around 2000 adopted the view that China's *actual* participation in investor-State arbitration, including both scenarios —Chinese investors as claimants and Chinese government as defendant, was very inactive.[142] This might have been true one or two decades ago, but not anymore. In recent years, more and more investor-State arbitrations are brought under Chinese BITs, including five cases with Chinese investors as the claimants and three cases with the Chinese government as the respondent.[143] Most recently, the China International Economic and Trade Arbitration Commission ("CIETAC"), the leading institution for international arbitration in China, published its International Investment Arbitration Rules.[144] It is for the first time a

140 Wang, *Seoul*, *supra* note 74, at 219-20.

141 *See* Julian Ku, *The Enforcement of ICSID Awards in the People's Republic of China*, 6 CONTEMP. ASIAN ARB. J. 31, 32 (2013).

142 *See, e.g.*, Bath, *supra* note 49, at 78-79; Nils Eliasson, *Chinese Investment Treaties: A Procedural Perspective*, in FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA 90, 91-92 (Vivienne Bath & Luke Nottage eds., 2011).

143 Chinese investors have appeared as claimants in the following cases: (1) Tza Yap Shum v. Peru, ICSID Case No. ARB/07/6; (2) China Heilongjiang International Economic & Technical Cooperative Corp. et al. v. Mongolia, PCA Case No. 2010-20; (3) Ping An Life Ins. Co. v. Belgium, ICSID Case No. ARB/12/29; (4) Beijing Urban Construction Group Co. Ltd. v. Yemen, ICSID Case No. ARB/14/30; (5) Sanum Investments Ltd. v. Lao, PCA Case No. 2013-13. The Chinese government was a respondent in the following arbitrations: (1) Ekran Berhad v. China, ICSID Case No. ARB/11/15; (2) Ansung Housing Co., Ltd. v. China, ICSID Case No. ARB/14/25; (3) Hela Schwarz GmbH v. China, ICSID Case No. ARB/17/19. *See also* Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 EUR. J. INT'L L. 755, 792 (2013) (mentioning several of these cases) [hereinafter Cai, *New Great Powers*].

144 *See China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (For Trial Implementation)*, CHINA INT'L ECON & TRADE ARBITRATION COMM'N

Chinese arbitral institution adopted a set of rules specifically designed for international investment disputes,[145] and the CIETAC may in the future become a forum for the Chinese government to be sued by foreign investors and also for Chinese investors to sue foreign States. Therefore, in the foreseeable future, we can expect to see even more investor-State arbitrations involving Chinese investors or the Chinese government.

Nevertheless, the decision to seek investor-State arbitration is not a purely legal matter for many Chinese companies. Taking political factors into account, one might see a different picture of Chinese government and companies' involvement in investor-State arbitration. Since, most of the time, the Chinese government wants to maintain its historically friendly ties with developing countries, it may direct its SOEs, which make more than 60 percent of Chinese overseas investment, to refrain from suing developing countries before international arbitral tribunals.[146] This is in line with practitioners' experience. The author interviewed an attorney working at an international law firm in New York, and he told the author that the firm's clients included some large Chinese SOEs making investments overseas; in several occasions, they encountered disputes with the host States, but when the attorneys advised them to sue the host States before international arbitral tribunals, they appeared to be very reluctant.[147] They told the attorneys that that suing foreign corporations in international commercial arbitrations is one thing, and suing foreign governments in investor-State arbitrations is another thing, because they would need to seek the approval from the Ministry of Foreign Affairs and Ministry of Commerce before they could sue foreign governments; and they indicated that they did not think the two ministries would easily approve that.[148]

Thus, while investments disputes between Chinese investors and host States will be increasing, there would probably not be as many investor-State arbitrations brought by Chinese

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(adopted Sept. 12, 2017; in force Oct. 1, 2017), http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en.

145 *See CIETAC Rules for Investment Arbitration*, CLEARY GOTTLIEB STEEN & HAMILTON LLP (Nov. 14, 2017), https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/2017/publications/alert-memos/cietac-rules-for-investment-arbitration-11-14-17.pdf.

146 *See* Cai, *New Great Powers*, *supra* note 144, at 792.

147 Interview with an anonymous attorney, in N.Y.C., N.Y. (Mar. 23, 2018) (the attorney prefers not to disclose his name and the name of the law firm).

148 *Id.*

investors as some might expect.[149] Moreover, China may prefer dispute settlement mechanisms other than investor-State arbitration, especially in context of the Belt and Road Initiative.

D. Belt and Road Initiative and Dispute Settlement Mechanisms other than Investor-State Arbitration

The Belt and Road Initiative refers to the Silk Road Economic Belt and 21st Century Maritime Silk Road.[150] First proposed by President Xi in 2013, it is a significant development strategy launched by the Chinese government with the aim to promote economic cooperation among countries along the proposed Belt and Road routes.[151] According to the State Council's "Action Plan on the Belt and Road Initiative":

> The Silk Road Economic Belt focuses on bringing together China, Central Asia, Russia and Europe (the Baltic); linking China with the Persian Gulf and the Mediterranean Sea through Central Asia and West Asia; and connecting China with Southeast Asia, South Asia and the Indian Ocean. The 21st-Century Maritime Silk Road is designed to go from China's coast to Europe through the South China Sea and the Indian Ocean in one route, and from China's coast through the South China Sea to the South Pacific in the other.[152]

Apparently, countries along the Belt and Road are mainly developing countries without a strong rule of law. Thus, it is not hard to imagine that when doing business in those countries, a considerable number of disputes would arise. Nevertheless, despite China's BITs with most of the Belt and Road countries which contain investor-State arbitration provisions, China, including Chinese government and companies, may resort to other mechanisms to settle investment disputes, such as mediation

The theme of the Belt and Road Initiative is economic cooperation, so China definitely considers the countries along the Belt and Road to be its partners and friends, rather than

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[149] *See* Cai, *New Great Powers*, *supra* note 144, at 792.

[150] *See Full Text: Action plan on the Belt and Road Initiative*, STATE COUNCIL (Mar. 30, 2015, 7:31 PM), http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm.

[151] *See id.*

[152] *See id.*

competitors or hostile enemies. As discussed above, China generally wants to maintain a friendly relationship with most developing countries, even when disputes arise between its SOEs and the governments of developing countries. Thus, China is very likely to direct its SOEs to resolve investment disputes with the governments of the Belt and Road countries through mediation, which seems more "friendly" than mandatory arbitration, and it may be regarded as China’s good will to its partner countries.[153]

Various mediation institutions are ready to provide mediation service for Belt and Road related disputes. For example, the Singapore International Mediation Centre, for example, has already announced that it will collaborate with the Mediation Center of the China Council for the Promotion of International Trade / China Chamber of International Commerce to mediate disputes arising out of Belt and Road related transactions.[154] The proposed Asia-Pacific Regional Mediation Organization is also considered a good option.[155]

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153 *See* Chang-fa Lo et al., *supra* note 129, at 171.

154 *See Singapore and China Mediation Centres Work Together to Help Businesses Resolve Disputes along Belt and Road*, MINISTRY OF LAW OF SINGAPORE (Sept. 19, 2017), https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-and-china-mediation-centres-work-together-to-help-busi.html.

155 Chang-fa Lo et al., *supra* note 129, at 171.

Conclusion

Western commentators have many misperceptions on China's approach to international investment law. As is often the case, the reality of China's approach proves to be somewhat complicated, with evidence of evolution in recent years. At the early stages, China was hostile to foreign investment, as it expropriated foreign investments without providing compensation. From a broad perspective, China was hostile not only to foreign investment, but also to the Western world in general. Over time, when China started to improve its diplomatic relations with Western States, it adopted an "open-door" policy and provided some compensation to foreign investors whose investments were expropriated. Since then, China has continued to try to attract foreign investment, with BITs featuring prominently in that effort.

Chinese BITs used to be conservative. In 1998, China significantly liberalized its BITs by adopting many of the protections that one would see in the BITs of Western States. Since then, China’s approach continued to evolve, becoming more liberal in some aspects while introducing some limitations in others. Today, China's BITs tend to strike a balance between the sovereignty of host States and the protection of foreign investors. To conclude, while China's approach to international investment law can be seen as largely Westernized or Americanized, it nevertheless retains its own unique characteristics. Western commentators need to realize this if they are to fully understand China's real approach to international investment law.