

# China and Investor-State Dispute Settlement

## Experiences and Prospects

MANJIAO CHI

### I Introduction

China's accession to the World Trade Organization (WTO) in 2001 is a milestone in its history.<sup>1</sup> Thanks to its WTO membership, China has grown into the world's second-largest economy,<sup>2</sup> a major global trading power,<sup>3</sup> and a leading investment-importing and investment-exporting state.<sup>4</sup> Chinese enterprises have also grown into major international business players.<sup>5</sup>

China and its investors also face a growing risk of investment disputes. China has concluded a large number of international investment agreements (IIAs), including around 140 bilateral investment treaties (BITs) and around 24 bilateral and regional free trade agreements (FTAs) with an investment chapter or section.<sup>6</sup> The majority of these IIAs allow

Thanks are due to Zhiyuan Yin for her valuable research assistance. The views and errors of this paper are solely the author's. Email: [chimanjiao@uibe.edu.cn](mailto:chimanjiao@uibe.edu.cn).

Unless otherwise indicated, all websites are last accessed on 1 September 2022.

<sup>1</sup> The term "China" in the context of the WTO cover four different members, namely the People's Republic of China (Mainland China), the separate customs territories of Hong Kong, Macau and Taiwan Penghu, Kinmen and Macao. For the purpose of this paper, the term "China" in this paper only refers to Mainland China.

<sup>2</sup> GDP data for all countries and economies is available at <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?view=chart>.

<sup>3</sup> See WTO, *The Eighth Trade Policy Review Report of China* (WT/TPR/S/415), available at [www.wto.org/english/tratop\\_e/tpr\\_e/s415\\_sum\\_e.pdf](http://www.wto.org/english/tratop_e/tpr_e/s415_sum_e.pdf).

<sup>4</sup> See UNCTAD, *World Investment Report 2021*, available at [https://unctad.org/system/files/official-document/wir2021\\_en.pdf](https://unctad.org/system/files/official-document/wir2021_en.pdf).

<sup>5</sup> See Huiyao Wang and Lu Miao, *The Globalization of Chinese Enterprises: Trends and Characteristics* (Singapore: Springer, 2020).

<sup>6</sup> A list of China's IIAs is available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china>.

investor-state dispute settlement (ISDS), investor-state arbitration (ISA) in particular, though their ISDS clauses may be different.<sup>7</sup> Also, with the implementation of the Belt and Road Initiative (BRI), Chinese overseas investment has experienced a sharp expansion in recent years,<sup>8</sup> which exposes Chinese investors to more disputes with the host states. It would not be surprising that more ISDS cases will be initiated based on Chinese IIAs in the future.

In the meantime, since 2016, an unprecedented ISDS reform has been initiated under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).<sup>9</sup> China is a major stakeholder in international investment governance and submitted a position paper on ISDS reform to UNCITRAL on 19 July 2019.<sup>10</sup> China's position on the ongoing ISDS reform could have a profound impact on both investors and the future ISDS landscape.

Against such a background, this chapter explores two interrelated issues: what could be learned from China's ISDS experience (Part II), and what China expects from the ongoing ISDS reform (Part III). Part IV is a brief conclusion.

## II Looking into the Past: China's ISDS Experiences and Systematic Issues

According to the United Nations Conference for Trade and Development (UNCTAD),<sup>11</sup> China and its investors have encountered over a dozen ISDS cases relying on Chinese BITs in the past decade. All these cases arose in the new Millennium. As some legal issues relating to China's ISDS experiences have been broadly discussed, the focus will be put on a few systematic and unique issues.

<sup>7</sup> See Yuwen Li and Cheng Bian (2020). "China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options", *Netherlands International Law Review* 67, at 503–51.

<sup>8</sup> See MOFCOM, "2020 Statistical Bulletin of China's Outward Foreign Direct Investment", available at <http://images.mofcom.gov.cn/www/202109/20210929084957284.pdf> (original in Chinese).

<sup>9</sup> See UNCITRAL, "Working Group III: Investor-State Dispute Settlement Reform", available at [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

<sup>10</sup> UNCITRAL, "Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China" (A/CN.9/WG.III/WP.177).

<sup>11</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china>.

(i) *A Skeletal Review of ISDS Cases Relying on Chinese IIAs*

During the past decade, China has been involved in the following six ISDS cases as the respondent state:

- a. *AsiaPhos Limited v. People's Republic of China* (2020)(*ad hoc* arbitration under UNCITRAL Arbitration Rules), relying on the China-Singapore BIT (1985) (*AsiaPhos v. China*)<sup>12</sup>;
- b. *Goh Chin Soon v. People's Republic of China* (2020)(ICSID Case No. ARB/20/34), relying on the China-Singapore BIT (1985)(*Goh v. China*)<sup>13</sup>;
- c. *Macro Trading Co., Ltd. v. People's Republic of China* (2020)(ICSID Case No. ARB/20/22), relying on the China-Japan BIT (1988)(*Macro v. China*)<sup>14</sup>;
- d. *Hela Schwarz GmbH v. People's Republic of China* (2017)(ICSID Case No. ARB/17/19), relying on the China-Germany BIT (2003)(*Hela Schwarz v. China*)<sup>15</sup>;
- e. *Ansung Housing Co., Ltd. v. People's Republic of China* (2014)(ICSID Case No. ARB/14/25), relying on the China-Korea BIT (2007)(*Ansung v. China*)<sup>16</sup>;
- f. *Ekran Berhad v. People's Republic of China* (2011)(ICSID Case No. ARB/11/15), relying on the China-Malaysia BIT (1988)(*Ekran v. China*).<sup>17</sup>

The recent decade has also witnessed around a dozen ISDS cases initiated by Chinese investors against foreign states, including:

- a. *Qiong Ye and Jianping Yang v. Kingdom of Cambodia* (2021)(ICSID Case No. ARB/21/42), relying on the ASEAN-China Investment Agreement (2009)(*Ye and Yang v. Cambodia*)<sup>18</sup>;

<sup>12</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1106/asiaphos-v-china>.

<sup>13</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1090/goh-v-china>.

<sup>14</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1035/macro-trading-v-china>.

<sup>15</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/805/hela-schwarz-v-china>.

<sup>16</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/602/ansung-housing-v-china>.

<sup>17</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/427/ekran-v-china>.

<sup>18</sup> Available at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/42>.

- b. Fengzhen Min v. Republic of Korea (2020)(ICSID Case No. ARB/20/26), relying on the China-Korea BIT (2007)(Min v. Korea)<sup>19</sup>;
- c. Wang Jing, Li Fengju, Ren Jinglin and others v. Republic of Ukraine (2020) (procedural details unknown), relying on the China-Ukraine BIT (1992)(Wang, Ren and others v. Ukraine)<sup>20</sup>;
- d. Jetion Solar Co. Ltd and Wuxi T-Hertz Co. Ltd. v. Hellenic Republic (2019)(*ad hoc* arbitration under UNCITRAL Arbitration Rules), relying on the China-Greece BIT (1992)(Jetion Solar et al. v. China)<sup>21</sup>;
- e. Sanum Investments Limited v. Lao People's Democratic Republic (II) (2017)(ICSID Case No. ADHOC/17/1), relying on the China-Laos BIT (1993) (Sanum v. Laos II)<sup>22</sup>;
- f. Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen (2014) (ICSID Case No. ARB/14/30), relying on the China-Yemen BIT (1998)(BUCC v. Yemen)<sup>23</sup>;
- g. Sanum Investments Limited v. Lao People's Democratic Republic (2013)(PCA Case No. 2013-13), relying on the China-Laos BIT (1993) (Sanum v. Laos)<sup>24</sup>;
- h. Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium (2012)(ICSID Case No. ARB/12/29), relying on the China-BLEU BIT (1984) and the China-BLEU BIT (2007)(Ping An v. China)<sup>25</sup>;
- i. Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia (2010)(PCA Case No. 2010-20), relying on the China-Mongolia BIT (1991)(Beijing Shougang et al. v. Mongolia)<sup>26</sup>;

<sup>19</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1098/min-v-korea>.

<sup>20</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1105/wang-and-others-v-ukraine>.

<sup>21</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/975/jetion-and-t-hertz-v-greece>.

<sup>22</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/797/sanum-investments-v-laos-ii->.

<sup>23</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/573/beijing-urban-construction-v-yemen>.

<sup>24</sup> Available at [www.italaw.com/cases/2050](http://www.italaw.com/cases/2050).

<sup>25</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/480/ping-an-v-belgium>.

<sup>26</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/367/beijing-shougang-and-others-v-mongolia>.

- j. *Tza Yap Shum v. Republic of Peru* (2007)(ICSID Case No. ARB/07/6), relying on the China-Peru BIT (1994)(*Tza v. Peru*).<sup>27</sup>

The above list should not be deemed exhaustive. It is possible that a few ISDS cases are not included, due to lack of sufficient transparency of ISDS cases.

Without going into the details of these cases, a few general observations could be drawn. First, though the current number of cases remains small, there is a clear trend that China's ISDS cases are on the rise. In 2020 alone, five ISDS cases were registered. As mentioned earlier, it is likely that more ISDS cases will be initiated. Second, somehow surprisingly, the majority of China's ISDS cases are initiated by Chinese investors against foreign states, including a few developed states, such as Belgium. There is no clear reason to explain this phenomenon, but it has been observed that Chinese investors, SOEs in particular, have become growingly affirmative of and accustomed to resorting to international adjudication to "defend" their overseas interests.<sup>28</sup> Third, most of these cases have been submitted to the ICSID. This is not surprising, since the majority of Chinese IIAs allow investors to select ICSID arbitration, in addition to or in lieu of *ad hoc* arbitration under UNCITRAL Arbitration Rules.<sup>29</sup>

An interesting observation is that China seems not frustrated by the ISDS cases against it. For instance, China's Ministry of Commerce (MOFCOM), the principal government agency responsible for handling China's ISDS and WTO cases for China, has never publicly commented on the ISDS cases; whereas MOFCOM spokesperson has frequently commented on China's WTO cases.<sup>30</sup>

China's silence in commenting ISDS cases could be attributed to several factors. First, China has not been "defeated" in any major ISDS cases in the legal sense up to date. Among the six cases against China, three are pending

<sup>27</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/255/tza-yap-shum-v-peru>.

<sup>28</sup> See Manjiao Chi and Qing Ren. (2020). "China International Investment Arbitration Annual Watch (2020)", *Beijing Arbitration*, 02, at 1–47 (original in Chinese).

<sup>29</sup> See Manjiao Chi and Xi Wang. (2015). "The evolution of ISA clauses in Chinese IIAs and its practical implications: the admissibility of disputes for investor-state arbitration", *The Journal of World Investment and Trade*, 16 (5–6), at 869–98.

<sup>30</sup> See, e.g., MOFCOM, "MOFCOM Spokesperson Speaks on Initiation a WTO Dispute against the U.S. on US 301 Tariff on Chinese Products", available at [www.mofcom.gov.cn/article/ae/ag/202009/20200903001422.shtml](http://www.mofcom.gov.cn/article/ae/ag/202009/20200903001422.shtml) (original in Chinese); "MOFCOM Department of Treaty and Law Person-in-Charge Speaks on China's Dropping the WTO Dispute against the EU relating to External Benchmark in Anti-dumping Investigation", available at [www.mofcom.gov.cn/article/ae/sjld/202007/20200702982154.shtml](http://www.mofcom.gov.cn/article/ae/sjld/202007/20200702982154.shtml) (original in Chinese).

(AsiaPhos v. China, Goh v. China, and Hela Schwarz v. China), two have been discontinued by a settlement agreement (Ekran v. China) or by the choice of the investor (Macro v. China), only one case has been decided (Ansung v. China) in the jurisdictional stage, in which the arbitral tribunal was in favor of China. Thus, from a practical perspective, these ISDS cases have not inflicted “real pain” on China in the sense of monetary compensation and legal defeat. There is no clear reason to explain China’s “success” in handling ISDS cases. A possible explanation is the helpfulness of negotiation between investors and the state. Different from many states, China is a centralized state. There is no clear constitutional division of administrative authority between China’s central and local governments. This essentially implies that the central government may deal with and even decide on investment issues that involve local governments. Thus, if necessary, China’s central government may negotiate with foreign investors to solve the investment disputes. Such negotiation could be quite effective and efficient given the authority and resources of the central government.

Second, all ISDS cases against China involve disputes between foreign investors and China’s local governments, most of these disputes relate to land-use rights issues. As a matter of fact, land disputes between private parties, both Chinese and foreign, and local governments have once been rampant in China in the past few decades, as a result of China’s aggressive and underregulated urbanization measures.<sup>31</sup> Subsequent to China’s revision of the relevant laws and regulations in around 2010, land disputes have decreased dramatically, and are less likely to be a major concern of investors.<sup>32</sup>

Third, China holds different perceptions of ISDS cases and WTO cases. To China, ISDS cases in general appear less sensitive than WTO cases. In WTO cases, what is challenged are China’s laws, regulations, or measures or even measures of the Chinese Communist Party. Some cases involve sensitive issues, such as media censorship,<sup>33</sup> and the export

<sup>31</sup> See, e.g., Eva Pils. (2005–2006). “Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan”, *Columbia Journal of Asian Law* 19, at 235–85; Xiaowen Lin et al. (2008). “Conflicts of Land Expropriation in China during 2006–2016: An Overview and its Spatiotemporal Characteristic”, *Land Use Policy* 76, at 246–51.

<sup>32</sup> See Manjiao Chi and Zongyao Li. (2021). “Administrative Review Provisions in Chinese Investment Treaties: Gilding the Lily?”, *Journal of International Dispute Settlement*, 12(1), at 138.

<sup>33</sup> See, e.g., *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (DS363), available at [www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds363\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm).

of strategic natural resources.<sup>34</sup> To China, these cases are not just trading disputes, but concern “national interests”, which could have a “systematic impact” on China’s economic and social governance.<sup>35</sup> Somehow, in contrast, China’s ISDS cases were mainly caused by administrative conducts of local governments. Even if China loses cases, it will only need to pay monetary compensation to foreign investors.<sup>36</sup> Thus, ISDS cases are not deemed as a threat to China’s national security and are less likely to have a systematic impact on China. This partly explains why, unlike some states that have been “hit” by ISDS cases, such as Australia, Germany, India, and Latin American states, China has not publicly commented on its ISDS cases.

On the other hand, China seems to hold a *laissez-faire* attitude towards ISDS cases initiated by its investors against foreign states. In practice, Chinese investors, similar to foreign investors, have discretion in initiating and handling investment disputes with the host states. In such cases, however, it is possible that the Chinese government be approached by investors or the foreign state for assistance. For instance, in *Ping An v. Belgium*, it is reported that Ping An has sought help from the Chinese Government to seek compensation from Belgium.<sup>37</sup> In *Sanum v. Laos*, as recorded in the judgment of the Court of Appeal of Singapore, the Laotian Ministry of Foreign Affairs sent a note to the Chinese embassy seeking China’s views on a major legal issue, and the Chinese embassy replied to the note.<sup>38</sup> While these cases do not necessarily prove that China has formed a fixed pattern of practice, they give rise to an interesting question: whether and how China could be involved in investment disputes between Chinese investors and foreign

<sup>34</sup> See, e.g., *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (DS431), available at [www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds431\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm).

<sup>35</sup> See, e.g., Manjiao Chi. (2013). “Trade-Plus Effects of WTO Dispute Settlement on China: An Ideal or Illusion?” *Journal of World Trade*, 47(6) at 1349–84; Joost Pauwelyn. (2010). “The Dog that Barked but Didn’t Bite: 15 Years of Intellectual Property Disputes at the WTO”, *Journal of International Dispute Settlement*, 1(2), at 389–429.

<sup>36</sup> See, e.g., Johnson L. Sachs, “Investment Treaties, Investor-State Dispute Settlement, and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities”. In José Antonio Ocampo (ed.), *International Policy Rules and Inequality* (New York: Columbia University Press, 2019), at 112–42.

<sup>37</sup> See New York Time, “Ping An seeks Beijing’s Help over Nationalization of Fortis”, available at [www.nytimes.com/2008/11/28/business/worldbusiness/28iht-insure.1.18227245.html](http://www.nytimes.com/2008/11/28/business/worldbusiness/28iht-insure.1.18227245.html).

<sup>38</sup> See *Sanum Investments Ltd. v Government of the Lao People’s Democratic Republic*, Judgement of the Court of Appeal of Singapore ([2016] SGCA 57), available at [www.italaw.com/sites/default/files/case-documents/italaw7600.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7600.pdf), at 4.

states. It is too early to answer this question with meaningful accuracy, but it surely deserves further observation.

(ii) *Systematic Issues Raised in ISDS Cases Relying on Chinese IIAs*

Many of the decided ISDS cases relying on Chinese BITs have been broadly discussed. This chapter does not present a comprehensive study of all these cases, but only focuses on a few systematic issues.

The first systematic issue is the applicability of Chinese BITs in Hong Kong and Macao. While this issue has been discussed, almost all existing literatures take the perspective of treaty law, especially treaty interpretation and state succession in respective treaties.<sup>39</sup> They fail to explain why China has been reluctant in clarifying its position on this issue over the years, especially through BIT-making. This issue will be discussed *infra*.

Hong Kong and Macao were handed over to China by the United Kingdom (U.K.) and Portugal in 1997 and 1999 respectively. Following the “One Country Two Systems” (OCTS) policy, China established special administrative regions (SARs) in Hong Kong and Macao after their handover. An important legal issue relating to the handover is the application of treaties in the SARs. Take Hong Kong for example, before the handover, a number of treaties to which the U.K. is a party were also applied to Hong Kong through extension. While such an application should be terminated once Hong Kong becomes a Chinese territory, the termination does not lead to the automatic application of Chinese treaties to Hong Kong. To deal with this issue, the *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (HKBL) provides that the applicability of Chinese treaties to Hong Kong after the handover should be “decided by the Central People’s Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region”.<sup>40</sup>

Notwithstanding the arrangement in the HKBL, China’s Central Government has never decided to apply its IIAs to Hong Kong. Besides, almost all Chinese IIAs are silent on their applicability to the SARs, with

<sup>39</sup> See, e.g., Patrick Dumberry. (2018). “State Succession to BITs in the Context of the Transfer of Territory of Macao to China: Lessons Learned from the Sanum Saga”, *Journal of International Arbitration*, 35(3), at 329–56, <https://kluwerlawonline.com/journalissue/Journal+of+International+Arbitration/35.3/17374>.

<sup>40</sup> Article 153, paragraph 2, HKBL.



the China-Russia BIT (2006) as the only exception, which expressly excludes the SARs from its scope of application.<sup>41</sup> As can be seen, the applicability issue is not only systematic as it pertains to almost all Chinese IIAs, but it is also unique and sensitive as it is linked with the OCTS policy.

The applicability issue has been discussed in two ISDS cases. In *Tza v. Peru*, the issue at dispute is, among others, whether the investors, Mr. Tza, a Hong Kong resident, could invoke the China-Peru BIT for protection. The tribunal essentially held that though Mr. Tza is a Hong Kong passport holder, he should be protected by the BIT as far as he has proven to be a Chinese national since the BIT protects “a national of a contracting state” as an investor.<sup>42</sup> In *Sanum v. Laos*, the issue at dispute is whether the investor, Sanum, a company registered in Macao, could rely on the China-Laos BIT for protection. The arbitral tribunal recognized that China has not extended the BIT to Macao.<sup>43</sup> Then, relying mainly on the international law principle of “moving treaty frontier” in the VCLT,<sup>44</sup> the arbitral tribunal ruled that since Macao has been incorporated as a territory of China after the handover, it falls in the application scope of Chinese BITs, unless the BITs exclude Macao from its application scope, which is not the case of the China-Laos BIT.<sup>45</sup> As can be seen, the arbitral tribunals in both cases recognized that Chinese BITs can be applied to the SARs, if the SARs are not excluded from their application scope.

Despite these arbitral awards, China has not publicly clarified the applicability issue until its embassy in Laos replied to the Laotian government following the arbitration of *Sanum v. Laos*. In its note, it is stated that China’s concurrence with the Laotian view that the China-Laos BIT did not apply to Macao “unless both China and Laos make separate arrangements in the future”.<sup>46</sup> This position has been reiterated by China’s Ministry of Foreign Affairs. Referring to the HKBL, the Ministry confirmed that Hong Kong shall enjoy a high level of autonomy, including autonomy in concluding economic treaties with foreign

<sup>41</sup> Article 1, Protocol, China-Russian BIT.

<sup>42</sup> See *Tza v. Peru*, Decision on Jurisdiction and Competence (ICSID Case No. ARB/07/6), available at [www.italaw.com/sites/default/files/case-documents/ita0880.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0880.pdf), at 16.

<sup>43</sup> See *Sanum Investments Ltd. v Government of the Lao People’s Democratic Republic*, Award on Jurisdiction (PCA Case No. 2013-13), available at [www.italaw.com/sites/default/files/case-documents/italaw3322.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf) (last accessed 10 October 2021), at 59.

<sup>44</sup> See Article 29, VCLT.

<sup>45</sup> See *supra* note 43, at 73.

<sup>46</sup> See *supra* note 38, at 4.

states in its own name.<sup>47</sup> Thus, Chinese BITs “in principle 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 party of the BIT”.<sup>48</sup>

Though the award in *Sanum v. Laos* does not have binding force as precedence, it is likely to be relied on or referred to by SAR investors and arbitral tribunals in future ISDS cases. Yet, China’s diplomatic note seems to show a conflicting view on the applicability issue. China’s view could not only profoundly influence the adjudication of the applicability issue in future ISDS cases, it also implies that China will have less flexibility in dealing with the issue. While it remains unclear why China chose to clarify the applicability issue during the set-aside proceedings of *Sanum v. Laos*, China’s clarification does give rise to a number of interesting questions: why has China kept silent on the applicability issue for so long? Is China’s silence intentional? What could China expect to get from its silence?

In retrospect, several facts could show that China’s silence is intentional. Shortly before the handover of Hong Kong in 1997, some lawyers discussed whether Chinese treaties could be applied to Hong Kong after the handover, as the relationship between Hong Kong and China will have been changed from an “international” one to an “OCTS” one.<sup>49</sup> Such discussions imply that China and its lawyers have considered the applicability issue even before the handover. In addition, the China-Russian BIT (2006) explicitly stipulates that it shall not be applicable in the SARs unless otherwise agreed by the Parties.<sup>50</sup> Besides, the issue has been straightforwardly raised in 2008 by the initiation of *Tza v. Peru*. The above facts imply that China should have been aware of the applicability issue long before the initiation of *Sanum v. Laos*. Had China wished to clarify the issue, it could have had ample opportunities to do so. Yet, all of China’s recent IIAs remain silent on the applicability issue, such as the China-Canada BIT (2012) and the ASEAN-China Investment Agreement (2009).

<sup>47</sup> Article 151, HKBL.

<sup>48</sup> Ministry of Foreign Affairs of the People’s Republic of China, “Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on 21 October 2016”, available at [www.italaw.com/sites/default/files/case-documents/italaw7687.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7687.pdf) (last accessed 10 October 2021).

<sup>49</sup> See, e.g., Ulrich G. Schroeter. (2004). “The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods”. *Pace International Law Review*, 16(2), at 307–32.

<sup>50</sup> Article 1, *Protocol to the 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*.

As mentioned, it was not until 2018 that China clarified its position on this issue in *Sanum v. Laos* upon the request of the Laotian government. And it remains unclear why China chose to clarify this issue after so many years of silence.

Practically speaking, China's silence is not without merits. It should be understood from a broader policy perspective, and could have an impact of "killing two birds with one stone". First, China's silence could be seen as "constructive vagueness" in IIA-making, which could be helpful to SAR investors, as this allows them to rely on Chinese IIAs for protection. Such helpfulness could be especially significant considering that China has concluded a large number of IIAs, while the SARs only host a limited number of IIAs. For instance, Hong Kong has concluded 21 BITs and seven FTAs.<sup>51</sup> Second, for historical reasons, the SARs, Hong Kong in particular, have played a key role in China's economic development and opening up. Many Chinese mainland investors use Hong Kong as a gateway for business convenience and overseas investment; foreign companies also use Hong Kong as a launchpad to expand in Mainland China.<sup>52</sup> In a sense, protecting SAR investment and investors have special significance to China.

A more complicated scenario of the applicability issue is where both the SAR and China have an IIA with a state. In such a case, are SAR investors allowed to select from a Chinese BIT and an SAR BIT? Up to the present, this treaty shopping issue has not emerged in reality. Thus, it remains unclear how arbitral tribunals, SAR investors, SAR Government, and China's Central Government will address the issue. Here, it is of interest to note that treaty shopping is not prohibited under international investment law, as IIAs have a purpose of encouraging and protecting foreign investment.<sup>53</sup> But treaty shopping should not be encouraged since it could go against the principle of reciprocity, create an undue regulatory chill on countries and even give rise to legitimacy concerns over IIAs.<sup>54</sup> As a matter of fact, various types of IIA provisions have been introduced to

<sup>51</sup> A list of Hong Kong IIAs is available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/93/hong-kong-sar-china>.

<sup>52</sup> Noah Sin, "Explainer: How Important is Hong Kong to China as a Free Finance Hub?", available at [www.reuters.com/article/us-hongkong-protests-finance-explainer-idUSKBN2350VO](http://www.reuters.com/article/us-hongkong-protests-finance-explainer-idUSKBN2350VO).

<sup>53</sup> Julien Chaisse. (2015). "The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration", 11 *Hastings Business Law Journal* 225, at 228.

<sup>54</sup> See Jorun Baumgartner, *Treaty Shopping in International Investment Law* (Oxford: Oxford University Press, 2016), at 39–64.

help address the negative impacts of treaty shopping by investors, such as clauses of denial of benefits.<sup>55</sup> That said, however, if China clinches to its clarification made in *Sanum v. Laos*, it is unlikely to allow such treaty shopping practice.

To sum up, if China truly wishes to uphold its position on the applicability issue as clarified in *Sanum v. Laos*, it is advisable for China to consider revising the relevant IIA provisions when making or updating IIAs in the future. Preferably, an explicit language could be included to exclude IIAs to be applied to the SARs. Such exclusion could take the form of a refined definition of certain key terms, such as “territory” or “national”, or an insertion of a statement similar to that in the China-Russia BIT. Up to the present, China has not made such revisions in its IIAs. Therefore, the real issue seems how much weight arbitral tribunals would give to China’s clarification in *Sanum v. Laos* in future ISDS cases.

The second systematic issue relates to China’s state-owned enterprises (SOEs). While SOEs are not unique to China, China hosts a large number of SOEs at central and local levels.<sup>56</sup> In recent years, China’s SOEs have dramatically expanded their overseas investment as a result of BRI implementation. Because China’s SOEs are active players in global market, it is unsurprising that they initiate ISDS cases against foreign states. Typical such cases include *BUCG v. Yeman* and *Beijing Shougang et al. v. Mongolia*.

That SOEs could be involved in ISDS cases is not a novel issue.<sup>57</sup> In such cases, arbitral tribunals have routinely adopted the “Broches test” in deciding whether the SOEs could be qualified claimants. According to this test, an SOE should not be disqualified as a “national of another Contracting State” unless it is acting as an agent for the government or is discharging an essentially governmental function.<sup>58</sup> For instance, in *BUCG v. Yemen*, Yemen argued that BUCG does not qualify as a “national of another Contracting State”, since it as “a state-owned entity, is both an agent of the Chinese Government and discharges governmental functions

<sup>55</sup> See Bianca Böhme. (2021) “Recent Efforts to Curb Investment Treaty Shopping: How Effective Are They?”, *Journal of International Arbitration* 38(4), at 511–32.

<sup>56</sup> A list of China’s top central SOEs is provided by China’s State-Owned Assets Supervision and Administration Commission of the State Council, available at [www.sasac.gov.cn/n2588035/n2641579/n2641645/index.html](http://www.sasac.gov.cn/n2588035/n2641579/n2641645/index.html).

<sup>57</sup> See, e.g., Mark Feldman. (2016). “State-Owned Enterprises as Claimants in International Investment Arbitration”, *ICSID Review* 31(1), at 24–35.

<sup>58</sup> See C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: A Commentary* (2nd edition) (Cambridge: Cambridge University Press, 2009), at 161.

even in its ostensible commercial undertakings”.<sup>59</sup> The arbitral tribunal, however, based on the facts of the case, decided that BUCG is a qualified claimant and that it has *ratione personae* over BUCG.<sup>60</sup>

BUCG is but one of the many Chinese SOEs. In recent years, China seems to have strengthened its control over its SOEs. While the effectiveness and consequence of such control could only be evaluated on a case-by-case basis, China’s growing control over its SOEs could make it easier for foreign states to prove that the SOEs are an agent of the Chinese government or play a governmental function. This could be a challenge to China’s SOEs in proving themselves as qualified a claimant in future ISDS cases.

The third systematic issue relates to inconsistent treaty interpretation. This issue is not unique to China, as an inconsistent interpretation of IIAs is deemed a major reason for inconsistent arbitral awards and the legitimacy crisis of ISDS at a more fundamental level.<sup>61</sup> Since many Chinese BITs, early ones in particular, contain similar or identical terms, diverse interpretations of these terms would not only lead to inconsistent arbitral awards but also result in uncertainty and unpredictability of China’s foreign investment protection standards in a broader sense.

In this respect, *Beijing Shougang et al. v. Mongolia*, *Tza v. Peru* and *Sanum v. Laos* are illustrative examples. All of these cases involve the interpretation of a key sentence in the ISDS clauses commonly seen in early Chinese BITs, namely “a dispute involving the amount of compensation for expropriation”. According to some Chinese scholars, this is a narrowly defined jurisdictional requirement, which reflects China’s cautious attitudes towards ISDS and grave concerns that ISDS could harm China’s “judicial sovereignty”.<sup>62</sup> With respect to this sentence, the arbitral tribunals in these cases made conflicting decisions. In *Tza v. Peru*, while resorting to the rules of treaty interpretation in the VCLT, the arbitral tribunal held the following:

<sup>59</sup> BUCG v. Yemen, Decision on Jurisdiction (31 May 2017), available at [www.italaw.com/sites/default/files/case-documents/italaw8968.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw8968.pdf), at 7.

<sup>60</sup> *Id.*, at 13.

<sup>61</sup> See e.g., UNCITRAL, “Possible Reform of Investor-State Dispute Settlement (ISDS)” (A/CN.9/WG.III/WP.142), available at <https://undocs.org/en/A/CN.9/WG.III/WP.142>, at paras.9 and 31; Stephan W Schill (2017). “Reforming Investor-State Dispute Settlement: a Comparative and International Constitutional Law Framework”, *Journal of International Economic Law* 20(3), at 649–72.

<sup>62</sup> See, e.g., An Chen (2009). “Queries to the Recent ICSID Decision on Jurisdiction Upon the Case of Tza Yap Shum v Republic of Peru: Should China-Peru BIT 1994 Be Applied to Hong Kong SAR under the ‘One Country Two Systems’ Policy”, *Journal of World Investment and Trade* 10(6), at 829–62.

To give meaning to all the elements of the article, it must be interpreted that the words ‘involving the amount of compensation for expropriation include not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT provisions and requirements, as well as the determination of the amount of compensation due if any.’<sup>63</sup>

In contrast, the arbitral tribunal in *Beijing Shougang et al. v. Mongolia* held the opposite opinion, stating that:

Arbitration before an *ad hoc* arbitral tribunal would be available in cases where an expropriation has been formally proclaimed and what is disputed is the amount to be paid by the State to the investor for its expropriated investment. In other words, arbitration will be available where the dispute is indeed limited to the amount of compensation for a proclaimed expropriation, the occurrence of which is not contested.<sup>64</sup>

The interpretation issue is unlikely to be a major challenge in ISDS cases relying on China’s recent IIAs since ISDS clauses in Chinese BITs concluded since the mid-1990s have been substantially broadened, so that “any dispute relating to an investment” may be submitted for ISA.<sup>65</sup> In retrospect, however, the interpretation of the ISDS clause in the China-Peru BIT was no less than a shock to China, especially because *Tza v. Peru* is the first case relying on a Chinese BIT. After the publication of the arbitral award, Chinese scholars have published a number of comments, and many argued that the arbitral tribunal’s interpretation is wrong and that the interpretative power of arbitral tribunals should be properly limited.<sup>66</sup> Today, while scholarly discussions on these cases have largely diminished, China remains “bothered” by the issue of inconsistent interpretation of its IIA provisions and deems “inconsistent decisions” as a major concern over the existing ISDS regime.<sup>67</sup>

<sup>63</sup> See *Tza v. Peru*, *supra* note 42, at para.188.

<sup>64</sup> Beijing Shougang et al. v. Mongolia, Award (30 June 2017), available at [www.italaw.com/sites/default/files/case-documents/italaw11026\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw11026_0.pdf) (last accessed 30 September 2021), at para.448.

<sup>65</sup> See Manjiao Chi and Xi Wang, *supra* note 28, at 884–8.

<sup>66</sup> See, e.g., Wei Shen. (2011). “The Good, the Bad or the Ugly? A Critique of the Decision on Jurisdiction and Competence in *Tza Yap Shum v. The Republic of Peru*”, *Chinese Journal of International Law* 10(1), at 55–95; Yanru Wei. (2006). “On the Impropriety of China’s Recent Complete Acceptance of ICSID Jurisdiction”, 13(1) *Chinese Journal International Economic Law*, at 109 (original in Chinese).

<sup>67</sup> See Part III, *infra*.

## 1 Looking into the Future: China's Position on ISDS Reform

Since the late 1990s, ISDS has been subject to growing criticisms on a number of grounds, such as high cost and long duration, unintended restraint on state regulatory rights, and inconsistent arbitral awards.<sup>68</sup> Such a legitimacy crisis of ISDS has been amplified by some high-profile cases, notably *Philip Morris Asia Limited v. The Commonwealth of Australia*,<sup>69</sup> and *Vattenfall AB and others v. Federal Republic of Germany*,<sup>70</sup> and has provoked unprecedented public debate during the course of the negotiations of some major FTAs, such as the *Transatlantic Trade and Investment Partnership between the U.S. and the EU* (TTIP) and the *Comprehensive Economic and Trade Agreement between Canada and the EU* (CETA).<sup>71</sup>

To respond to the legitimacy crisis of ISDS, various measures have been taken. At the national level, some Latin American countries have denounced the *Convention on Settlement of International Investment Disputes between States and the Nationals of Other States* (ICSID Convention) and terminating their BITs,<sup>72</sup> some have revised their existing BITs or IIA models with stress on domestic remedies for ISDS,<sup>73</sup> and some have proposed various ISDS alternatives, such as an investment court system.<sup>74</sup> At the international level, a global ISDS reform is in process, which features, among others, multilateral discussions and negotiations presided over by UNCITRAL Working Group III<sup>75</sup> and the fourth revision of ICSID Rules.<sup>76</sup>

Especially, the UNCITRAL ISDS reform is mandated as a government-led process that aims at identifying the inadequacies of the

<sup>68</sup> See, e.g., UNCITRAL, *supra* note 61, at para.20; Teresa Cheng. (2020). "The Search for Order within Chaos in the Evolution of ISDS." *ICSID Review*, 35(1–2), at 1–19.

<sup>69</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/421/philip-morris-v-australia> (last accessed 30 September 2021).

<sup>70</sup> Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/329/vattenfall-v-germany-i-> and <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/467/vattenfall-v-germany-ii-> (last accessed 30 September 2021).

<sup>71</sup> See, e.g., Michael Nienaber, "Tens of Thousands Protest in Europe against Atlantic Free Trade Deals", available at [www.reuters.com/article/us-eu-usa-ttip-idUSKCN11N0H6](http://www.reuters.com/article/us-eu-usa-ttip-idUSKCN11N0H6) (last accessed 30 September 2021); DW, "Thousands Protest against CETA and TTIP in Brussels", available at [www.dw.com/en/thousands-protest-against-ceta-and-ttip-in-brussels/a-19564581](http://www.dw.com/en/thousands-protest-against-ceta-and-ttip-in-brussels/a-19564581) (last accessed 30 September 2021).

<sup>72</sup> See Teresa Cheng, *supra* note 68, at 1–2.

<sup>73</sup> *Id.*, at 8.

<sup>74</sup> See, e.g., Yuwen Li and Cheng Bian, *supra* note 7, at 531–2.

<sup>75</sup> Relevant information of the UNCITRAL ISDS reform process is available at [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state) (last accessed 30 September 2021).

<sup>76</sup> Available at <https://icsid.worldbank.org/resources/rules-amendments>.

existing ISDS regime and exploring ways to improve this regime.<sup>77</sup> The reform offers a precious opportunity to observe how states evaluate the existing ISDS regime and how their preferred regime should look like. China is a major stakeholder of international investment governance and an active participant in the ISDS reform, China's position on ISDS reform thus deserves careful analysis.

## 2 China's Major Concerns and Proposals on ISDS Reform

In China, MOFCOM is responsible for negotiating China's IIAs and handling ISDS cases. It submitted a position paper on ISDS reform to UNCITRAL Working Group III on 19 July 2019, entitled "Recommendations of China Regarding Investor-State Dispute Settlement Reform" (Position Paper).<sup>78</sup> The Position Paper has three major parts, respectively explaining China's concerns over the existing ISDS regime, its proposals for reforming this regime, and its vision for the future ISDS regime.

The Position Paper at the outset explains China's major concerns over the current ISDS regime, which include the following:

- a. arbitral awards lack an appropriate error-correcting mechanism;
- b. arbitral awards lack stability and predictability;
- c. arbitrators' professionalism and independence are questioned;
- d. third-party funding affects the balance between parties' rights; and
- e. time frames are overly long and cost overly high.<sup>79</sup>

After explaining its major concerns, the Position Paper puts forward a number of proposals for ISDS reform, including,

- a. to explore the possibility of establishment of a permanent appellate mechanism;
- b. to maintain the right of the parties to appoint arbitrators;
- c. to improve the rules relating to arbitrators;
- d. to encourage the use of alternative dispute resolution measures;
- e. to include pre-arbitration consultation procedures; and
- f. to enhance transparency discipline for third-party funding.<sup>80</sup>

<sup>77</sup> UNCITRAL, *supra* note 61, at para.3.

<sup>78</sup> UNCITRAL, "Submission from the Government of China" (A/CN.9/WG.III/WP.177) ("China Position Paper"), available at [https://uncitral.un.org/sites/uncitral.un.org/files/wp\\_177\\_wgiii.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/wp_177_wgiii.pdf) (last accessed 30 September 2021).

<sup>79</sup> *Ibid.*, at 2–3.

<sup>80</sup> *Ibid.*, at 4–5.



The Position Paper also clarifies that China welcomes UNCITRAL ISDS reform, and impliedly stresses that the reform should be progressed on a multilateral basis.<sup>81</sup>

While the Position Paper is not an exhaustive elaboration of China's view on ISDS reform, it is by far the only official document formally issued by MOFCOM on this important subject. Many of China's concerns and reform proposals stated in the Position Paper are shared by other states and have been discussed widely. That said, China's proposals do have some distinct features, which will be the focus of this Part.

### 3 China's Preference for a WTO-Style Appeal Mechanism

A major proposal of China is to establish an ISDS appeal mechanism. Such an idea is not entirely new.<sup>82</sup> Notably, it has been discussed during the third round of ICSID Rules revision between 2004 and 2006.<sup>83</sup> The major grounds for creating such an appeal mechanism include inconsistent treaty interpretation of IIA provisions and insufficiency of the existing award review mechanisms, particularly the annulment mechanisms under the ICSID Convention and the judicial review mechanism under the *Convention on Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention).<sup>84</sup>

As discussed, China complains about the lack of predictability of arbitral awards in its Position Paper and shows a strong preference for an ISDS appellate mechanism. Though China does not elaborate on the proposed mechanism, it specifically points out that the mechanism should be "permanent" and "treaty-based". It is noteworthy that China expressly refers to the WTO appellate body as a model for the proposed ISDS mechanism. A WTO-style ISDS appeal mechanism is not only different from the optional arbitral appeal mechanisms incepted in some commercial arbitration rules,<sup>85</sup> but also seems unique among existing ISDS reform proposals. It is of interest to discuss the rationale underlying China's preference.

<sup>81</sup> *Ibid.*, at 5–6.

<sup>82</sup> See, e.g., Chester Brown. (2017). "Supervision, Control, and Appellate Jurisdiction: The Experience of the International Court", *ICSID Review* 32(3), at 595–610.

<sup>83</sup> Relevant information of ICSID Rules Revision is available at <https://icsid.worldbank.org/sites/default/files/publications/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>.

<sup>84</sup> See, e.g., Albert Jan van den Berg. (2019). "Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions", *ICSID Review* 34(1), at 157–9.

<sup>85</sup> See generally China Position Paper at 4.

First, China's preferred ISDS appeal mechanism is supposed to have a high degree of institutionality. The feature of "permanent" implies that the *ad hoc* ICSID annulment mechanism is not a desirable model for ISDS award review; while the feature of "treaty-based" implies that national courts (for award review under the New York Convention) or any other optional award review mechanism based on commercial arbitration rules would also be undesirable. Essentially, this proposal implies that existing award review mechanisms would not be considered by China for ISDS appeal.

Compared with existing award review mechanisms, the AB seems more "stable" and "predictable" for a number of reasons. The AB is a permanent adjudicative body composed of a fixed number of judges, the disputants are not allowed to "appoint" the judges, and the procedure is subject to a strict and clear statutory time limit,<sup>86</sup> while both ICSID annulment mechanism and judicial review mechanism lack such a level of procedural certainty. Besides, the AB also appears "powerful", since it has the authority to review substantive issues, including errors of treaty interpretation,<sup>87</sup> while both the ICSID annulment mechanism and judicial review mechanism only allow procedural issues to be reviewed. As such, despite all the criticisms, the AB seems to be in a better position to ensure the consistency of its decisions and the efficiency of its adjudicative work.

Second, China's preference for a WTO-style ISDS appeal mechanism is based on its nearly twenty-year experience of WTO litigation. Since its WTO accession in 2001, China has been involved in 63 WTO disputes as a complainant or respondent as of 30 September 2021.<sup>88</sup> All of these disputes involve China's major trading partners, especially the U.S., EU, and Japan, and around half of the disputes have been submitted to the AB for appeal.<sup>89</sup> China has invested massively in WTO litigation capacity building to effectively participate in the multilateral trading system centering around the WTO regime.<sup>90</sup> By its tenth year of WTO membership, China has already emerged from a reluctant participant in

<sup>86</sup> See Art. 17 of WTO Dispute Settlement Understanding.

<sup>87</sup> *Ibid.*

<sup>88</sup> A list of China's WTO disputes is available at [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last accessed 20 Jan. 2019).

<sup>89</sup> The information about the percentage of panel reports appealed is in Appellate Body Annual Reports, available at [www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_an\\_rep\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_an_rep_e.htm).

<sup>90</sup> See, e.g., Pasha L. Hsieh. (2010). "China's Development of International Economic Law and WTO Legal Capacity Building", *Journal of International Economic Law* 13(4), at 997.

WTO litigation to an active and formidable player that used the system to defend its interests.<sup>91</sup> As China gets more experienced with WTO litigation, a WTO-style ISDS appeal mechanism seems to be a convenient option for China, as it could substantially save China's ISDS capacity-building efforts.

Third, China's such preference could also be understood as a potential support to its current foreign trade policy, especially in response to the unprecedented trade war with the U.S.<sup>92</sup> Since the Trump administration, the U.S. has shifted its foreign trade policy towards protectionism and unilateralism.<sup>93</sup> Notably, the U.S. has repeatedly blocked the appointment of new AB members, resulting in the dysfunction of the AB, which is deemed as a major hurt to the multilateral trade system.<sup>94</sup> While the U.S. is the chief designer of this system, China has stood out to be a supporter of this system.<sup>95</sup> Against this backdrop, China's preference for a WTO-style ISDS appeal mechanism not only conveys its view on ISDS reform but also impliedly enhances its self-portrayed image as a defender of trade multilateralism.

#### 4 China's Preference for an "ISA Plus" Model

In its Position Paper, China also proposes that, in addition to ISA, other alternatives should be explored for ISDS. Two alternatives are highlighted by China, that is mediation and compulsory pre-ISA negotiation between host states and foreign investors. China also states that "investors' right of appointing arbitrators should not be denied". China's such statements send a clear signal, that is while China wants to have additional ISDS alternatives, it is not against ISA. To put it differently, China wants to keep ISA but hopes to provide certain flexibility by allowing other alternatives. In short, China has envisaged an "ISA plus" model for future ISDS. While

<sup>91</sup> Henry Gao, "China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?", in Carolyn Deere Birkbeck (ed.), *Making Global Trade Governance Work for Development: Perspectives and Priorities from Developing Countries* (Cambridge: Cambridge University Press, 2011), at 167–72; Manjiao Chi. (2012). "China's Participation in WTO Dispute Settlement Over the Past Decade: Experiences and Impacts", *Journal of International Economic Law*, 15(1), at 22–49.

<sup>92</sup> See, e.g., Manjiao Chi and Liang Qiao. (2019). "A Skeletal Review of the China-U.S. Trade War", *Canadian Foreign Policy Journal* 23(2), at 99–107.

<sup>93</sup> See *ibid.*

<sup>94</sup> See, e.g., Hoekman Bernard and Petros C. Mavroidis. "Preventing the Bad from Getting Worse: The End of the World (Trade Organization) as We Know it?" *Robert Schuman Centre for Advanced Studies Research Paper* No. RSCAS 6 (2020).

<sup>95</sup> See Manjiao Chi and Liang Qiao, *supra* note 92, at 101.

this model is not entirely novel, it could have some unique implications on China and Chinese investors.

First, as mentioned earlier, despite that China has been sued in several ISDS cases by foreign investors, it has not encountered any major “defeat” up to the present. Unlike many other states, China seldom complains about the regulatory chill effects of ISA or the amount of compensation for ISDS cases. Given its successful ISDS experience, China does not need to hold a negative attitude towards ISA as a major ISDS alternative.

Second, China’s implied support for ISA as a major ISDS option seems to reflect its growing interest as a leading investment-exporting state in the world. As early as the 1990s, China adopted the “Going Abroad Strategy” and started to encourage its enterprises, SOEs in particular, to invest abroad.<sup>96</sup> Since its initiation in 2013, the BRI has quickly become a priority on China’s development and diplomatic agenda. While the BRI is not just an investment scheme, promoting trade and investment among BRI states is a major aspect of BRI implementation.<sup>97</sup> As Chinese overseas investment keeps expanding, disputes between Chinese investors and the host states are inevitable. Especially, as a large portion of Chinese investments is made in states that are environmentally vulnerable, politically unstable, economically underdeveloped, and culturally diversified,<sup>98</sup> effective and efficient ISDS seems imperative to China and its investors.

Third, in recent years, China is experiencing a dramatic deterioration of economic and diplomatic relations with many trade partners, especially leading economies in the world. As a result, Chinese investors nowadays face growing difficulty in acceding to and operating in many states.<sup>99</sup> And it is increasingly difficult for China to solve such difficulty with these states through diplomatic talks and bilateral negotiations. To many Chinese investors, ISA seems to be a reasonable choice for ISDS. It could particularly be the case as Chinese investors have got familiar with ISA and are affirmative in protecting their overseas interests. In light of this, it is pragmatic for China to support ISA as a major ISDS option, at least in the current situation.

<sup>96</sup> See Huiyao Wang and Lu Miao, *supra* note 5, at vii.

<sup>97</sup> See People’s Republic of China National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce, “Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road”, available at [www.gov.cn/xinwen/2015-03/28/content\\_2839723.htm](http://www.gov.cn/xinwen/2015-03/28/content_2839723.htm) (original in Chinese).

<sup>98</sup> See Yuwen Li and Cheng Bian, *supra* note 7, at 525–26.

<sup>99</sup> See Huiyao Wang and Lu Miao, *supra* note 5.

Fourth, China's preference for ISA as a major ISDS option also reflects its support for the ongoing "ISDS adventure" of its leading arbitration institutions. With the growth of Chinese overseas investment, Chinese arbitration institutions also show a growing interest in the ISDS business.<sup>100</sup> While these Chinese arbitration institutions are not listed in Chinese IIAs as an optional ISA forum, it is possible for them to be selected for contract-based ISDS cases, especially by Chinese investors.<sup>101</sup> Since a decade ago, leading Chinese arbitration institutions, such as the China International Economic and Trade Arbitration Commission (CIETAC), the Beijing Arbitration Commission (BAC), and the Shenzhen Court of International Arbitration (SCIA) have embarked on an adventure of exploring opportunities in the ISDS business.<sup>102</sup> The ISDS adventure is not only prompted by commercial considerations but is also a measure of implementing China's development strategy. For instance, CIETAC has stated that its adventure is a measure of "serving China's BRI implementation".<sup>103</sup> A notable achievement of the ISDS adventure is the publication of specialized ISA rules by CIETAC in 2017,<sup>104</sup> and by BAC in 2019.<sup>105</sup>

Naturally, the historical ISDS adventure of Chinese arbitration institutions would only make sense if ISA remains to be a major ISDS option. Any ISDS reform proposal that could result in abandoning or marginalizing ISA would fundamentally go against the purpose of this adventure. In this sense, China's proposal of an "ISA plus" model renders implied support to the ISDS adventure of its arbitration institutions. Besides, as shown by the draft amendment of the Chinese Arbitration Law recently published by China's Ministry of Justice, China is considering removing some longstanding legal impediments to ISDS in its arbitration law, such

<sup>100</sup> See, e.g., Manjiao Chi. (2021). "The ISDS Adventure of Chinese Arbitration Institutions: Towards a Dead End or a Bright Future?". *Asia Pacific Law Review* 28 (2), at 278; Tong Qi, "China's Policy on ISDS Reform: Institutional Choice in a Diversified Era". In Yuwen Li et al. (eds.), *China, the EU and International Investment Law* (London: Routledge, 2019), at 112–23.

<sup>101</sup> Manjiao Chi, *ibid.*, at 286.

<sup>102</sup> For the purpose of this chapter, it is unnecessary to elaborate on the "ISDS adventure" of Chinese arbitration institutions. For detailed discussions on this topic, see Manjiao Chi, *supra* note 100, at 279–96.

<sup>103</sup> See CIETAC, "Explanation on CIETAC International Investment Arbitration Rules (Trial Implementation)", available at [www.cietac.org/index.php?m=Article&a=show&id=14469](http://www.cietac.org/index.php?m=Article&a=show&id=14469) (original in Chinese).

<sup>104</sup> Available at [www.cietac.org/index.php?m=Article&a=show&id=15199&l=en](http://www.cietac.org/index.php?m=Article&a=show&id=15199&l=en).

<sup>105</sup> Available at [www.bjac.org.cn/page/tz/guifan.html](http://www.bjac.org.cn/page/tz/guifan.html).

as the lack of capacity of foreign states as a disputing party in arbitration in China.<sup>106</sup> Such an amendment could help legitimize ISA under Chinese law, paving the way for Chinese and foreign arbitration institutions to engage in the ISDS business.<sup>107</sup>

### III Conclusion

With a growing number of ISDS cases relying on Chinese IIAs, China and its investors have emerged as major stakeholders of ISDS. China's ISDS cases have given rise to a few systematic issues, such as the applicability of Chinese IIAs in the SARs, the legal status of Chinese SOEs in ISA proceedings, and the interpretation of some typical IIA provisions. China seems not very concerned over the possible increase in ISDS cases. Rather, it shows a clear preference for ISA as a major ISDS alternative. In its Position Paper, China proposes an "ISA plus" model with a WTO-style appeal mechanism for the future ISDS regime. Such proposals are realistic and beneficial to China, as they are based on China's ISDS and WTO litigation experiences, and also conform with its development strategy. As ISDS reform remains ongoing, it remains to be seen whether China will be challenged more profoundly in future ISDS cases, and whether China will change its position on ISDS reform.

<sup>106</sup> Available at [www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730\\_432958.html](http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432958.html) (original in Chinese).

<sup>107</sup> See Manjiao Chi, *supra* note 28, at 10–11.