

## Current Landscape and Puzzling Issues

This chapter aims to (i) offer a literature review of Chinese investment treaties, mainly bilateral investment treaties (BITs), free trade agreements (FTAs) and other investment agreements that China has signed with other countries or regional organizations; (ii) outline the key themes of this book by listing four interconnected puzzling but underinvestigated issues that this book tries to answer; and (iii) roll out the structure of this book by introducing the key content of each chapter.

### 1.1 CHINESE BIT LAW SCHOLARSHIP: IN A NUTSHELL

China is the largest emerging market perceived by foreign investors as the sought-after place with great potentialities and attractiveness. In spite of China's economic slowdown in recent years, China has recorded a consistent surge in foreign direct investment inflows (FDII).<sup>1</sup> Some scholars attribute this surge in FDII to the international mode which China chooses to follow in the field of international investment.<sup>2</sup> China's BIT regime is observed with a considerable degree of curiosity, and even suspicion. There has been a large amount of literature touching on China's BIT regime.

This section is devoted to a brief literature review, focusing on research topics explored and methodologies adopted in the field. While international investment law (IIL) has emerged as a complex terrain, a pluralistic set of research themes and methodological tools have been used to study its ongoing development. These tools include comparative study, case law approach (relating to a single body of case law involving investment arbitration cases), historical study,<sup>3</sup> doctrinal study, economic analysis (not only of IIL but also of compensation or evaluation in arbitration cases)<sup>4</sup> and empirical study.

<sup>1</sup> Ajay Sharma, "A Comparative Analysis of the Chinese and Indian FDI Regimes" (2015) 15(1) *Chicago-Kent Journal of International and Comparative Law* 1–31.

<sup>2</sup> Marcia Don Harpaz, "China's Coherence in International Economic Governance" (2016) 21 *Journal of Chinese Political Science* 123–147.

<sup>3</sup> See generally Stephan W. Schill, Christian J. Tams and Rainer Hofmann, *International Investment Law and History* (Edward Elgar 2018).

<sup>4</sup> See generally Marion Jansen, Joost Pauwelyn and Theresa Carpenter, *The Use of Economics in International Trade and Investment Disputes* (Cambridge University Press 2017).

The comparative approach is often undertaken by investment arbitration tribunals<sup>5</sup> to achieve the purpose of “judicial borrowing.”<sup>6</sup> Comparative study is a common approach to investigating the uniqueness of the Chinese FDI regime and BIT law. Comparison is made using BITs made by other countries. Usually, two dimensions are approached. One is vertical comparison – comparing new and old BITs made by China to see the evolutionary pattern or trend. The other is horizontal comparison – comparing Chinese BITs with other countries’. For instance, the China–Canada BIT 2012 is selected for comparison to provide a contemporary context for the assessment of the nature, the stages of development and the general state of the China–Africa BIT 1997 regime.<sup>7</sup>

Comparative study can also contextualize BITs in a law and development paradigm. IIL relating to BITs is a legal institution promoting not only economic growth but also the host state’s rule of law. While China is compared with other emerging economies such as India, China’s consistent surge in FDI is often attributed to its national investment policy-making, though China’s marked legal reforms and lack of rule of law are often spotted as being the key deficiencies.<sup>8</sup> Comparative study also shows a sharp contrast between China and Brazil in their BIT strategies even though these two are the emerging markets most sought-after by foreign investors in Asia and South America.<sup>9</sup>

China is also compared with the USA, although on first glance they look like the two extremes of the spectrum: China is the largest host and home country among the emerging states while the USA is the largest host and home developed state. The comparative study indicates the similarity they share in policy-making. As both try to maintain regulatory space, to pursue their own legitimate public policy objectives as a host state and to offer better protections to their outbound investors, there can be a convergence between the two in terms of the objectives of their BITs. The BIT the two countries are negotiating, if reached, could be a template for future investment agreements.<sup>10</sup>

Comparative study serves various purposes. One objective of comparative study is to understand China’s BIT-making. For instance, it is appreciated that the BIT between the USA and China is destined to be the most difficult one in history. But Canada managed to enter into a BIT with China, and this BIT may serve, at least in part, as a model for a US BIT with China, for example, to have a pre-establishment national treatment clause.<sup>11</sup>

China is making its own, albeit modest, modifications to the model BITs of the USA and Canada, in which some critical provisions regarding dispute settlement, particularly the

<sup>5</sup> Farouk El-Hosseny, *Civil Society in Investment Treaty Arbitration: Status and Prospects* (Brill Nijhoff 2019) 22.

<sup>6</sup> Vid Prislán, “Non-investment Obligations in Investment Treaty Arbitration: Towards a Greater Role for States?” in Freya Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2016) 450–451.

<sup>7</sup> Won Kidane, “China’s Bilateral Investment Treaties with African States in Comparative Context” (2016) 49(1) *Cornell International Law Journal* 141, 142.

<sup>8</sup> Ajay Sharma, *supra* note 1.

<sup>9</sup> Dan Wei, “Bilateral Investment Treaties: An Empirical Analysis of the Practices of Brazil and China” (2010) 33(3) *European Journal of Law and Economics* 663–690.

<sup>10</sup> Karl P. Sauvant and Huiping Chen, “A China-US Bilateral Investment Treaty: A Template for a Multilateral Framework for Investment?” (2013) 5(1) *Transnational Corporations Review* 1–3.

<sup>11</sup> David A. Gantz, “Challenges for the United States in Negotiating a BIT with China: Reconciling Reciprocal Investment Protection with Policy Concerns” (2014) 31(2) *Arizona Journal of International & Comparative Law* 204–250. However, surprisingly, the China–Canada BIT almost imposes no pre-establishment obligations on either party. That means that the China–Canada BIT applies only post-establishment obligations to either party. Matthew Kronby, “Canada-China Investment Treaty: Evidence Doesn’t Support Doomsayers” *The Globe and Mail*, October 26, 2012, [www.theglobeandmail.com/opinion/canada-china-investment-treaty-evidence-doesnt-support-doomsayers/article4665002/](http://www.theglobeandmail.com/opinion/canada-china-investment-treaty-evidence-doesnt-support-doomsayers/article4665002/) (accessed September 9, 2020).

abandonment of rights to “consent case by case,” to “exhaust local remedies,” and to “apply the host country’s laws,” and the right to invoke the “exception for State essential security,” not only deviate from the authorization granted to host states by the relevant international conventions but also harm China’s national interests.<sup>12</sup> Therefore, some scholars support the idea that China should insist on protecting its rights as authorized by the international conventions<sup>13</sup> and embracing disciplines commonly found elsewhere<sup>14</sup> throughout the process of negotiating and drafting BITs amid US or Canadian practices that are not widely accepted.<sup>15</sup> Some Chinese scholars claim that protecting the host state’s interests could serve as a model for the new international economic order.<sup>16</sup>

In its BIT-making, China is not applying (or copying) Western models mechanically.<sup>17</sup> China is adapting these models in light of different treaty partners. During the negotiation, it is necessary to promote mutual understanding.<sup>18</sup> For example, when Japan joins in negotiating these agreements, it will want to secure nondiscriminatory investment liberation including prohibiting various performance requirements. However, China holds a cautious (or conservative) attitude toward investment liberalization such as national treatment (NT) “as it may crimp industrial policy.”<sup>19</sup> More specifically, when negotiating BITs with developed countries, such as the USA, China will take into account the following issues: special and differentiated (S&D) treatment, conduct of investors, and sustainable development.<sup>20</sup> Negotiating a BIT with China presents distinct challenges due to the radical differences that exist between these countries’ and China’s legal frameworks, their differing values, levels of development, and economy structures.<sup>21</sup>

BIT negotiation situations will be much different between China and developing countries. More details can be analyzed, “taking into account various aspects ranging from environmental concerns to human rights aspects, labor issues, and economic development.”<sup>22</sup> What’s more, some scholars hold that it is necessary to take into consideration “shifts in Chinese Communist Party (CCP) leadership and the party’s perception of what is required to guarantee its stability and continued dominance.”<sup>23</sup>

<sup>12</sup> An Chen, “Should the Four ‘Great Safeguards’ in Sino-foreign BITs Be Hastily Dismantled? Comments on Critical Provisions Concerning Dispute Settlement in Model US and Canadian BITs” (2006) 7(6) *Journal of World Investment & Trade* 899, 907.

<sup>13</sup> Ibid.

<sup>14</sup> Tyler Cohen and David Schneiderman, “The Political Economy of Chinese Bilateral Investment Treaty Policy” (2017) 5(1) *Chinese Journal of Comparative Law* 110–128.

<sup>15</sup> Tingliang Wang, “Western Misperceptions and China’s Approach to International Investment Law” (2019) 17(1) *Santa Clara Journal of International Law* 1.

<sup>16</sup> An Chen, *supra* note 12.

<sup>17</sup> This idea is also demonstrated in Xiuli Han, “The China–South Africa Bilateral Investment Treaty: National Rule of Law versus International Rule of Law” (2017) 24(3) *South African Journal of International Affairs* 269–290, where the author holds that China’s treaty partner should also take differential policies toward China, considering the future of China.

<sup>18</sup> Wei Yin, “Challenges, Issues in China-EU Investment Agreement and the Implication on China’s Domestic Reform” (2018) 26(2) *Asia Pacific Law Review* 170–202.

<sup>19</sup> Shintaro Hamanaka, “China-Japan-Korea Trilateral Investment Treaty: Implications for Future Investment Negotiations in Asia” in Julien Chaisse, Tomoko Ishikawa and Sufian Jusoh (eds.), *Asia’s Changing International Investment Regime: Sustainability, Regionalization, and Arbitration* (Springer 2017) 121–139.

<sup>20</sup> Congyan Cai, “China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications” (2009) 12(2) *Journal of International Economic Law* 457–506.

<sup>21</sup> David Hallinan, “The EU-China Bilateral Investment Treaty: A Challenging First Test of the EU’s Evolving BIT Model” (2016) 5(1–2) *China-EU Law Journal* 31–53.

<sup>22</sup> Catherine Elkemann and Oliver C. Ruppel, “Chinese Foreign Direct Investment into Africa in the Context of BRICS and Sino-African Bilateral Investment Treaties” (2015) 13(4) *Richmond Journal of Global Law & Business* 593–622.

<sup>23</sup> Cohen and Schneiderman, *supra* note 14.

The comparative study shows China's dichotomic BIT-making strategy, which makes its BIT laws and practices seem confusing and inconsistent to outsiders. The solution is to make concerted efforts to incorporate higher standards into its BITs and domestic laws.<sup>24</sup>

Country or region study is another branch of study. A focus has been placed on Africa, which is the primary destination of China's outbound investment. In the China–Africa context, apart from FDI, the underlying concerns in relation to BITs include environmental protection, human rights, labor issues and social development. Some other research confirms China's willingness to secure a more favorable environment for Chinese investment by including in its ChAFTA (China–Australia Free Trade Agreement; a memorandum of understanding on an investment facilitation arrangement) related mobility provisions for Chinese workers and an easier threshold (quadrupled from AUD 0.248 billion to AUD 1.078 billion) for non-state-owned-enterprise (non-SOE) investment in Australia.<sup>25</sup> But other research affirms China's loose intention to uphold environmental standards. Its recent FTAs such as the China–Korea FTA 2015 and the China–Korea–Japan Trilateral Investment Treaty (CKJ TIT) 2012 include language imposing obligation on the parties “not [to] waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion of investments in its territory.” Although such language can be interpreted as improving on its previous practice, the improvement is more limited and weaker than the US model BIT.<sup>26</sup> Other purposes such as welfare, development, prosperity<sup>27</sup> or environmental protection<sup>28</sup> are identified in newer BITs (either in treaty preambles or in instrumental terms). In a broader context, the approach with respect to BITs or FTAs relating to environmental protection is part of efforts to promote sustainable development.<sup>29</sup> The right to development, insisted on by a large number of developing countries, covers and relates to the concept of sustainable development in the global economy.<sup>30</sup> In addition, scientific and technological innovation is used as an important explanatory variable in China's investment law and policy. The China–Israel investment relationship is an example of investment diplomacy shaped and dominated by innovation on the bilateral track.<sup>31</sup> China and Israel have a Financial Protocol serving the long-term credit needs of local government-supported projects in China with advanced innovation offered by Israeli manufacturers.<sup>32</sup>

<sup>24</sup> Manjiao Chi, “The ‘Greenization’ of Chinese BITs: An Empirical Study of the Environmental Provisions in Chinese Bits and Its Implications for China's Future BIT-Making” (2015) 18(3) *Journal of International Economic Law* 511–542.

<sup>25</sup> Heng Wang, “Paradigm Shift in Investment Rules of China's Free Trade Agreements? The Present and Future” August 14, 2018, <https://iki.lk/blog/paradigm-shift-in-investment-rules-of-chinas-free-trade-agreements-the-present-and-future/>.

<sup>26</sup> Jeffrey J. Schott, Euijin Jung and Cathleen Cimino-Isaacs, “An Assessment of the Korea-China Free Trade Agreement” Peterson Institute for International Economics Policy Brief Number PB15-24, December 2015, 12.

<sup>27</sup> Andrew D. Mitchell, David Heaton and Caroline Henckels, *Non-discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar 2016) 12.

<sup>28</sup> China–Germany BIT 2012, Preambles; China–Panama FTA, Preambles. China and Panama started a joint feasibility study to explore the possibility of negotiating a free trade agreement on January 16, 2018 and have conducted five rounds of negotiations for it since June 12, 2018. [www.sice.oas.org/TPD/PAN\\_CHN/PAN\\_CHN\\_e.ASP](http://www.sice.oas.org/TPD/PAN_CHN/PAN_CHN_e.ASP) (accessed April 6, 2021).

<sup>29</sup> China–Panama FTA, Article 1.03.

<sup>30</sup> See generally Isabella D. Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Hart 2012).

<sup>31</sup> Hadas Peled and Marcia Don Harpaz, “Innovation as a Catalyst in the China-Israel Investment Relationship: The China-Israel BIT (2009) and the Prospective FTA” in Julie Chaisse, *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (Oxford University Press 2019) 142–143.

<sup>32</sup> *Ibid.*, 153.

A textual comparative study is a useful primary approach when comparing Chinese BITs with other countries'. For instance, a comparison indicates that the primary provisions in the China–South Africa BIT 1997 differ in many ways from the BITs that South Africa has signed with Western countries. While this shows the necessity of integrating new elements into BITs so as to make them compliant with the development of IIL,<sup>33</sup> it also suggests China's dominant role in negotiating a BIT with an emerging state, a quite different approach from that it takes when dealing with a developed state as a BIT counterparty.

A textual approach is often taken by scholars to analyze Chinese BIT terms and provisions. The seminal and pioneer book on the subject – *Chinese Investment Treaties: Policies and Practices* – applies textual analysis to provide a detailed account of China's approach to foreign investment.<sup>34</sup> For instance, some scholars try to characterize Chinese BITs and group them into three types in investor–state arbitration (ISA) terms – narrow, broad and special – each providing different admissibility requirements on disputes for ISA.<sup>35</sup> A narrow ISA clause appeared in earlier Chinese BITs, allowing only disputes involving the amount of compensation for expropriation to be submitted to ISA. More recent Chinese BITs adopt broad and special ISA clauses allowing a wider range of disputes for ISA. The shift from narrow to broad and special ISA clauses indicates, as scholars claim, China's BIT policy change from cautious to proactive.

Dispute settlement is the core of BITs, and ISA remains a useful tool for settling investment disputes. China has broadly adopted the investor–state dispute settlement (ISDS) clause in its BITs with trade partners, especially with the One Belt One Road Initiative (OBOR or BRI) countries and regions.<sup>36</sup> It is suggested that China should converge its ISDS clauses. "A more predictable and consistent rule-setting for ISA practice, would contribute to, and be a part of, the development of China's inbound and outbound investment activities under the 'Belt and Road' Initiative."<sup>37</sup>

Scholars have not reached consensus on the application of ISA clauses. The notion of territory is not clearly defined in China's international investment agreement (IIAs), causing doubts with respect to the application of ISA clauses. This problem remains unsolved up to now.<sup>38</sup> Besides, the application of ISA in China may also be hindered by "one country, two systems" because it is argued that BITs could not be directly applied to Hong Kong or Macau. Even though the tribunal in *Tza Yap Shum v. Republic of Peru* held that it has jurisdiction on this case, some scholars criticize that this case was wrongly judged and, thus, the decision is "incorrect, unreasonable, and unacceptable."<sup>39</sup> Another unsettled puzzle regarding ISA is whether ISA has jurisdiction on cases relating to SOEs, as ISA is "designed to protect private

<sup>33</sup> Xiuli Han, *supra* note 17.

<sup>34</sup> Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford University Press 2009).

<sup>35</sup> Manjiao Chi and Xi Wang, "The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications: The Admissibility of Disputes for Investor-State Arbitration" (2015) 16(5–6) *Journal of World Investment & Trade* 869–898.

<sup>36</sup> Shu Zhang, "Developing China's Investor-State Arbitration Clause Discussions in the Context of the 'Belt and Road' Initiative" in Wenhua Shan, Kimmo Nuotio and Kangle Zhang (eds.), *Normative Readings of the Belt and Road Initiative* (Springer 2018) 147–181. China's "proactive" attitude toward ISAs is illustrated in detail in Manjiao Chi and Xi Wang, *supra* note 35.

<sup>37</sup> Shu Zhang, *supra* note 36. The idea of "unification" in different BITs is also supported in Wenlong Zhu, "The National Treatment Clause in Chinese Bilateral Investment Treaties" (2014) 4 *WTO & China* 72, where the author believes that unification will "definitely affects the harmonization and stabilization of domestic legislation."

<sup>38</sup> Odysseas G. Repousis, "On Territoriality and International Investment Law: Applying China's Investment Treaties to Hong Kong and Macao" (2015) 37(1) *Michigan Journal of International Law* 113–190.

<sup>39</sup> An Chen, "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?" (2009) 10 *Journal of World Investment and Trade* 829–864.

investment only.” Although there are already two cases involving SOEs, further study on this question is required.<sup>40</sup> Except for ISA, the Multilateral Investment Court (MIC) is put forward by the European Union (EU) as one option for reforming the existing ISDS mechanism and ensuring fair trade and efficient adjudication. In China’s view, the MIC should be more reflective of the interests of both developing countries and investors.<sup>41</sup>

Treaty shopping is an effective alternative “by which an investor acquires a convenient nationality in order to enjoy preferable investment protection.”<sup>42</sup> The 2012 Cross-Strait Bilateral Investment Protection and Promotion Agreement fails to adopt ISA clauses. Its most-favored-nation (MFN) clause explicitly excludes reference to dispute settlement provisions.<sup>43</sup> Case law demonstrates that the success of treaty shopping depends largely on the standards determining the nationality of an investor, control or ownership by a third person over the investor or investment resulting in denial of benefits, and the time of dispute that has transpired. For example, Taiwanese investors, in order to enjoy the substantive and procedural protections offered by Chinese BITs, may rely on treaty shopping tactics. The proper home state they may shop for depends on a large number of factors including the signatory to the new-generation Chinese BITs as well as Taiwanese IIAs, the economic status of the candidate state, the IIA’s standard defining corporate investors, its denial of benefits (DOB) clause, the ISDS clause and the scope of consent to arbitration.<sup>44</sup>

Apart from China’s treaty behavior in forming BITs, there are several other issues in the field of Chinese BITs.

Intellectual property rights (IPR) protection is one of the most heatedly debated topics of the past several years given the ongoing US–China trade confrontation. It is undisputed and inevitable that China ought to protect free trade-related IPR, considering that China is endeavoring to transform its economy from a labor-intensive one to an innovation-driven one and to follow the global trend of incorporating higher standards of intellectual property enforcement.<sup>45</sup>

The textual approach is also applied to the study of specific clauses such as IPR provisions in China’s FTAs with the purpose of exploring China’s position on IPR standards. Despite China’s firm stance against the TRIPS-plus standards for IP enforcement, the IP clauses in Chinese FTAs are quite flexible.<sup>46</sup> This flexibility matches China’s stage of economic development, innovation capacity and level of IP enforcement. A more flexible stance embracing higher IP standards and stronger IP enforcement serves China’s strategy of transforming its economy to an innovation-based one. This flexibility can also be explained as reflecting China’s effective approach to engaging in norm-setting activities, its nonreciprocity of BIT terms<sup>47</sup> and its strategic partnership for IP in the region.<sup>48</sup>

<sup>40</sup> Anran Zhang, “Letter to the Journal: The Standing of Chinese State-Owned Enterprises in Investor-State Arbitration: The First Two Cases” (2018) 17 *Chinese Journal of International Law* 1147–1153.

<sup>41</sup> Ning Hongling and Qi Tong, “A Chinese Perspective on the Investment Court System in the Context of Negotiating EU-China BIT” (2018) 11 *Tsinghua China Law Review* 91–127.

<sup>42</sup> Chi-Chung Kao, “Alternative Access to Investor-State Arbitration for Taiwanese Corporate Investors against China via Treaty Shopping” (2015) 23(2) *Asia Pacific Law Review* 121–152.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Guangliang Zhang, “China’s Stance on Free Trade-Related Intellectual Property: A View in the Context of the China-Japan-Korea FTA Negotiations” (2016) 24(1) *Asia Pacific Law Review* 36–59.

<sup>46</sup> Ibid.

<sup>47</sup> Gus Van Harten, “The Canada-China FIPPA: Its Uniqueness and Non-reciprocity” (2014) 51 *Canadian Yearbook of International Law* 3055.

<sup>48</sup> Peter K. Yu, “The Incremental Development of the ASEAN-China Strategic Partnership for Intellectual Property” in Christoph Antons and Michael Blakeney (eds.), *Intellectual Property in Southeast Asia* (Edward Elgar 2020).



Human rights present another narrative in which China's outbound FDI is scrutinized. The potential clash between the IIL regime and the human rights regime, a stability vs. flexibility dilemma or an elephant in the room,<sup>49</sup> is inherently in existence in international law.<sup>50</sup> There is a compelling linkage between international human rights law and IIL<sup>51</sup> as states are obliged to adopt regulations aimed at improving social standards and conditions of living for people while being confronted with investment disputes in which investors seek to challenge regulatory interferences through such regulations. The general consensus is that China-led FDI undermines human rights in host states amid a counterargument advocating a mutually affirming relationship between FDI and human rights, meaning that FDI improves the diffusion of human rights norms and correlates with the improved rule of law in host states. Due to the lack of legal and nonlegal measures, there is a chance, as argued, that we will witness a pragmatic approach to insulating human rights from violations that may be associated with Chinese FDIs in some African countries such as Kenya.<sup>52</sup>

Labor protection is another issue well worth considering. Chinese FTAs are criticized for lack of labor protection terms.<sup>53</sup> Currently, the Asia-Pacific region is one of the largest markets in the world, and China has "assumed the mantle of world leader on globalism and global trade, particularly in Asia." It is critical to examine the provisions of Chinese FTAs in the context of Asia-Pacific relating to labor rights.<sup>54</sup> China has just issued a new Social Security Insurance Law. As to the deficiencies in its application and enforcement, the Law adopts broad language, leaving space on specific regulations for local government detail and allowing differences at regional and local levels. Therefore, even though many BITs and FTAs have assumed the role of promoting labor protection standards at the international level, the implementation of these standards largely relies on local laws.<sup>55</sup>

Environment protection should not be ignored given the clash between the host state government's duty to protect the environment and public health and well-being, and its commitment to foreign investments. It is a sideline area with great importance for striking a fine balance between the host state's right to regulate and foreign investor protection.<sup>56</sup> The key to "greenizing" Chinese BITs "depends on how they are applied and how the two seemingly conflicting purposes of BITs, i.e. investment protection and environmental protection, are reconciled in international investment arbitration."<sup>57</sup>

A textual approach is applied to characterize the evolution of Chinese BITs, which are divided into several generations. Western scholars usually prefer to divide Chinese BITs into two generations – conservative and liberal – while Chinese scholars may divide them into three – a first, conservation generation; a second, liberal one; and the third adopting a more

<sup>49</sup> Anna de Luca and Angelica Bonfanti, "Investment and Human Rights: Is There an Elephant in the Room?" Columbia FDI Perspectives No. 282, July 23, 2020, <http://ccsi.columbia.edu/files/2018/10/No-282-de-Luca-and-Bonfanti-FINAL.pdf> (accessed September 18, 2020).

<sup>50</sup> See generally Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate* (Routledge 2016).

<sup>51</sup> Farouk El-Hosseny, *Civil Society in Investment Treaty Arbitration: Status and Prospects* (Brill Nijhoff 2019) 21.

<sup>52</sup> Rosemary Mwanza, "Chinese Foreign Direct Investment and Human Rights in Kenya: A Mutually Affirming Relationship" (2016) 2 *Strathmore Law Journal* 133.

<sup>53</sup> Ronald C. Brown, "A New Leader in Asian Free Trade Agreements: Chinese Style Global Trade: New Rules, No Labor Protections" (2017) 35(1) *UCLA Pacific Basin Law Journal* 1–32.

<sup>54</sup> *Ibid.*

<sup>55</sup> Ronald C. Brown, "China-U.S. Implementation of ILO Standards by BITs and Pieces (FTAs)" in Ulla Liukkunen and Yifeng Chen (eds.), *Fundamental Labour Rights in China – Legal Implementation and Cultural Logic* (Springer 2016) 169–201.

<sup>56</sup> See generally Flavia Marisi, *Environmental Interests in Investment Arbitration: Challenges and Directions* (Wolters Kluwer 2020).

<sup>57</sup> Manjiao Chi, *supra* note 24.

balanced approach.<sup>58</sup> This not only draws a larger picture for readers but also indicates the development status of China's BIT law.

An empirical approach to the study of Chinese BITs is rarely used regardless of statistical or quantitative research. Although it is widely claimed that China's success in attracting FDI is partially due to China's efforts to enter into BITs and other international investment instruments,<sup>59</sup> there is no empirical study to support this orthodox proposition. In some research, an empirical approach is applied to the environmental protection clauses incorporated in all 104 Chinese BITs in force. The conclusion is that only a limited number of Chinese BITs contain environmental protection clauses and the generational and regional distribution of such clauses is imbalanced. This suggests a need to "greenize" Chinese BITs.<sup>60</sup>

China is not satisfied with only negotiating and reaching BITs. Through an empirical study of China's BITs and FTAs (i.e., those with investment chapters), China has adopted a "from BIT to FTA" approach, which is a sensible strategy for China given that it wants to enhance its engagement with global trade governance. The pace of FTA-making has been faster in recent years.<sup>61</sup> In general, those BITs and FTAs are helping to promote property rights protection and rule of law in China<sup>62</sup> and improve China's global trade governance.<sup>63</sup> Nor is China content to be just a rule-follower. In the long term, China is likely to become a rule-maker "evol[ing] from selective adaption to selective innovation."<sup>64</sup>

Policy analysis occupies quite a lot of scholarly effort, attempting to place the current role of investment treaties in China's foreign economic policy.<sup>65</sup> Most academic attention has been paid to China's adoption of a new model of BIT in the past decade, and, more importantly, this new model embraces widely adopted principles and aligns with Western standards, paving the way toward a universal model. From the policy perspective, this movement not only enhances neoliberal norms in IIL but also transforms Chinese domestic policy. A third way of interpreting China's changing BIT policy is to view it as a new product of complex and interacting influences reflected in China's internal debates.<sup>66</sup> The evolution of China's BIT policy is diagnosed as being closely interconnected with policy shifts in the CCP, with a view to maximizing its political benefits. As a result, the pace of BIT negotiations and the scope of the neoliberal norms China has taken in these negotiations largely depend on the CCP's perceptions of what grounds its role in China's political and economic life. This is a typical perspective of the New Haven School of international law.<sup>67</sup> A New Haven reading, as with a political science view, of China's BIT law and practice by and large links the underlying logics to China's political system, geopolitical objectives and ruling party's priority.

<sup>58</sup> Tingliang Wang, *supra* note 15.

<sup>59</sup> See generally Gallagher and Shan, *supra* note 34.

<sup>60</sup> Manjiao Chi, *supra* note 24.

<sup>61</sup> Manjiao Chi, "The China-EU BIT as a Stepping Stone towards a China-EU FTA: A Policy Analysis" in Marc Bungenburg et al. (eds.), *European Yearbook of International Economic Law* (Springer 2017) 475.

<sup>62</sup> 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" (2013) 45(1) *Georgetown Journal of International Law* 255–321.

<sup>63</sup> Chi, *supra* note 61.

<sup>64</sup> Heng Wang, "The RCEP and Its Investment Rules: Learning from Past Chinese FTAs" (2017) 3(2) *Chinese Journal of Global Governance* 160–181.

<sup>65</sup> See generally Gallagher and Weihua Shan, *supra* note 34.

<sup>66</sup> Cohen and Schneiderman, *supra* note 14.

<sup>67</sup> Guiguo Wang, "International Investment Law: An Appraisal from the Perspective of the New Haven School of International Law" (2016) 18(1) *Asia Pacific Law Review* 19–44.



Policy study shows the inadequacy of China's BIT regime which, however, is proportionate to the increased pace and volume of Chinese outbound investment.<sup>68</sup> It has been argued, through comparing China's profile vis-à-vis three dimensions of global economic order – trade, investment and development aid – that China has neither sought nor brought about significant changes to IIL. China's engagement with global economic governance is an interactive relationship with the liberal international economic order, a long process of external socialization. This may also explain why Chinese BITs tend to give priority to investor protection.<sup>69</sup>

Since the start of the new millennium, due to the “go globally” strategy and the Belt and Road Initiative (BRI), China has strongly encouraged outbound investment.<sup>70</sup> However, a mere increase in numbers does not mean that other countries also hold a friendly attitude toward China. Rather, “barriers to and protectionism against Chinese investment have been strengthened.”<sup>71</sup> Other scholars contend that future Chinese BITs will turn in the opposite direction and be likely to restrict the rights of investors.

Policy study also has a global dimension – looking at China's role in global investment governance. Inherent flaws in the global architecture are hindering China's role and function. China's interest in engaging with global governance is multi-pronged. An effective and China-friendly IIL system would not only help improve China's regulatory regime so as to attract inbound investment but also ensure better protection of its outbound investment. More fundamentally, China prefers to secure international recognition of its unique identity in terms of institutional characteristics and development strategy, which greatly concerns the USA and other Western countries. A mixture of bilateral, regional and multilateral approaches would be a better strategy to achieve China's geopolitical agenda at bilateral, regional and multilateral levels.<sup>72</sup>

North–South is a valid paradigm for contextualizing and theorizing China's BIT law and practice. It is a useful context within which to appreciate the South–South BITs and the much-touched-on new geography of investment. However, other than the discernible differences among the model BITs used by Western countries and the similarity of recalibrating policy space available to states in BITs,<sup>73</sup> the South–South BITs have not indicated or formed emerging norms<sup>74</sup> or patterns. However, the South–South BITs may show some pragmatic value in executing projects in the context of the BRI and the China–Pakistan Economic Corridor (CPEC), and the relevance of IIL in such emerging scenarios.<sup>75</sup> So does the North–South narrative, which also shows some demographical value and suggests that Canada's IPR

<sup>68</sup> Huiping Chen, “China's ‘One Belt, One Road’ Initiative and Its implications for Sino-African Investment Relations” (2016) 8(3) *Journal of Transnational Corporations Review* 178–182.

<sup>69</sup> Sauvart and Chen, *supra* note 10.

<sup>70</sup> Huiping Chen, *supra* note 68.

<sup>71</sup> Fan He and Bijun Wang, “Chinese Interests in the Global Investment Regime” (2014) 7(1) *China Economic Journal* 4–20.

<sup>72</sup> *Ibid.*

<sup>73</sup> Andeas Buser, “Recalibrating Policy Space in Bilateral Investment Treaties: Is There a Common B(R)ICS Approach?” in Congyan Cai and Huiping Chen (eds.), *The BRICS in the New International Legal Order on Investment* (Brill 2020) 163–203.

<sup>74</sup> Uche Ewelukwa Ofodile, “Africa-China Bilateral Investment Treaties: A Critique” (2013) 35 *Michigan Journal of International Law* 131.

<sup>75</sup> Hongdao Qian, Sonia Azam and Hamid Mukhtar, “China Pakistan Economic Corridor: Legal Injunctions and Protection of Chinese Investment in Pakistan under OBOR Initiative” (2018) 6(2) *European Journal Research in Social Sciences* 29–37.

protection standards could be a concern to Chinese investors.<sup>76</sup> Although there have been convergences and mutual influences between the West and the East as well as the North and the South, their interests and approaches stand quite differently, requiring a certain degree of desirable coordination between different systems at bilateral, regional and multilateral levels.<sup>77</sup>

Political science is a useful tool or paradigm for comprehending China's BIT law and practice. China is likely to be challenged by others while it is on the rise as a global superpower. There is a struggle going on between China and other incumbent powers, which are taking protectionist measures aimed at Chinese investments that are also on the rise. China's institutional build-up, including the BRI and the Asian Infrastructure Investment Bank, though addressing the legitimacy crisis in global investment governance, has increased backlash and suspicion.<sup>78</sup>

Case study and cultural perspectives are brought into the analysis of Chinese BITs as differences in political, economic and legal systems and cultures are no longer obstacles to FDI; indeed, the economic growth of all countries is closely linked with its inflow.<sup>79</sup>

Above all, traditional global investment strategy no longer fits in the current world, meaning that older BITs lack breadth, efficiency and dynamics. A clear China-specific investment governance strategy has yet to take shape. China can focus on bilateral, regional and multilateral levels, adapting relatively quickly when facing different treaty partners, and thus contributing to the new architecture governing global investment.<sup>80</sup>

## 1.2 CONCEPTUALIZING CHINESE BIT LAW AND PRACTICE: PUZZLING ISSUES AND THEORETICAL FRAMEWORK

This section lists four pressing questions that this book tries to figure out in relation to Chinese BITs. The answers to these questions may form a foundation on or framework within which to conceptualize, systemize and theorize China's BIT regime. As the book title suggests, the ideal is to decode the genetic elements and characters of China's BIT law and practice. For this reason, the focus of this book is not purely technical, that is, it does not simply look at the application or systemic analysis of particular substantive or procedural standards in BITs, or at Chinese BIT law through case study or jurisprudential analysis. Rather, this book attempts to reveal whatever patterns exist in Chinese BIT law.

China is a unique player in the global investment governance regime. In the BIT circle, there has been a so-called "China disequilibrium." While China is the second largest country in terms of the BITs it has signed, right next to Germany,<sup>81</sup> the investment arbitration cases involving China, as either a respondent state or a claimant investor, are rare. This is a great puzzle given the weak rights protection that China extends to foreign investors and Chinese

<sup>76</sup> Timothy S. McNamara, "The China-Canada BIT, Its Shortcomings, and the Risks for Chinese Investors" (2019) 10 *Beijing Law Review* 287.

<sup>77</sup> Chang-fa Lo, Nigel Li and Tsai-Yu Lin (eds.), *Legal Thoughts between the East and the West in the Multilevel Legal Order – A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma* (Springer 2016).

<sup>78</sup> Dilini Pathirana, "Rising China and Global Investment Governance: An Overview of Prospects and Challenges" (2018) 4(2) *Chinese Journal of Global Governance* 122–153.

<sup>79</sup> Guiguo Wang, *International Investment Law: A Chinese Perspective* (Routledge 2014).

<sup>80</sup> Ibid.

<sup>81</sup> Leon E. Trakman, "China's Regulation of Foreign Direct Investment" in Julien Chaisse, Tomoko Ishikawa and Sufian Jusoh (eds.), *Asia's Changing International Investment Regime: Sustainability, Regionalization and Arbitration* (Springer 2017).

investors' complaints against their host states, most of which are natural-resource-rich but legal-infrastructure-weak countries.

This small number of cases may be a result of the host state's political position and legal culture.<sup>82</sup> Others argue that the small number of ISA cases between Chinese investors and China's trade partners is related to the widespread doubts that exist at the policy-making level. The argument has also been made to justify the rare involvement of China as a respondent in investment arbitration cases by reference to China's unwillingness to take on more responsibilities in world affairs or to participate in the world's judicial institutions.<sup>83</sup>

From developing states' perspective, the ISDS system sits uncomfortably with capital-receiving states as it requires a great deal of concession from the developing states, granting substantive rights to investors and allowing decision-making by arbitral tribunals outside of their territory. Given the quasi-colonial treatment of extraterritoriality that it has experienced, China has systemically guarded itself from the jurisdictional intrusion embedded in the ISDS.<sup>84</sup>

We need to offer a logical answer to solve this puzzle. Some cultural perspectives have been offered to understand the Chinese cultural values in international arbitration. Both legal and cultural factors are influential in shaping the evolution of international arbitration standards.<sup>85</sup>

The second puzzle is the so-called "return of the state" paradigm. Presently, one of the major concerns among states is the balance between the rights protection offered by BITs to foreign investors and the right to regulate that host states need to preserve while hosting and protecting foreign investment. In the past several decades, in negotiating and signing BITs, more states have been willing to sacrifice their sovereignty by offering better rights protection to foreign investors. Similarly, the ISDS system has also indicated a strong tendency to place more emphasis on rights protection toward foreign investors. This sacrifice of sovereignty by host states has contributed to the emergence of the existing IIL regime and ISDS system. Consequently, host states' right to regulate has been compromised while foreign investment and foreign investors are better protected. This can be described as the "leaving of the state" movement.

In more recent years, there has been a clear shift toward the return of the state, meaning that the states care more about their rights to regulate, or police power, and try to strike a new balance with foreign investment protection. For instance, some of the recently signed BITs allow the host state to possess more police power in regulating FDI activities.

India's latest model BIT underpins preservation of regulatory autonomy, with five methods employed to strengthen it. An investment tribunal is required to give due regard to regulatory autonomy in the preamble. The jurisdiction of arbitral tribunals is narrowed by the definition of investment, investor and the scope of the model BIT so that the possibility of review of regulatory actions is reduced. The scope of treatment of standards is also reduced. Fair and equitable treatment (FET), MFN treatment and the umbrella clause have been removed and the scope of the customary standard full protection and security, indirect expropriation

<sup>82</sup> Shu Zhang, *supra* note 36.

<sup>83</sup> Guiguo Wang, "Chinese Mechanisms for Resolving Investor-State Disputes" (2011) 1(1) *Jindal Journal of International Affairs* 204–233.

<sup>84</sup> Won Kidane, "China and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa" (2017) 49 *Loyola University Chicago Law Journal* 405–477.

<sup>85</sup> Joshua Karton, "Beyond the 'Harmonious Confucian': International Commercial Arbitration and the Impact of Chinese Cultural Values" in Chang-fa Lo et al. (eds.), *Legal Thoughts between the East and the West in the Multilevel Legal Order: Liber Amicorum in Honour of Professor Herbert Han-pao Ma* (Springer 2016) 519–542.

and NT has been reduced. Access to arbitration is limited through the need to first exhaust local remedies. Exceptions applying to general and specific circumstances are introduced.<sup>86</sup>

More recent regulatory movements such as the Committee on Foreign Investment in the United States (CFIUS) reform initiated in the USA and the foreign investment screening mechanism established in the EU can also be viewed as part of this new balancing. Along with this paradigm shift is the uncertainty of the future landscape as host states are retreating from the global international investment arena. China's position in this leaving-and-return-of-the-state paradigm has been neither studied nor clearly understood by insiders or outsiders.

The third issue is how China is making use of its BIT regime to improve its domestic rule of law, which is based on several indicators that measure the extent to which foreign investors have confidence in and abide by the rules of Chinese society. The other way to rephrase the question is how are domestic institutions shaping the success of FDI activities or how are BITs impacting on China's local law reform?

Some research is dedicated to examining China's legal framework for foreign investment and relevant international treaties,<sup>87</sup> but probably not vice versa. There is growing recognition that each state owes certain fundamental obligations to its own and foreign citizens as well as to the wider international society. These responsibilities include an obligation to provide a minimum level of legal and rights protection to foreign investors, which is one of the fundamental purposes of the BIT regime. Yet the effort to make these rule of law norms (such as the effectiveness and predictability of the judiciary and the enforceability of contracts) operational and enforceable remains a Herculean challenge.

The general consensus is that China has not improved its rule of law as much as the rest of the world has expected, especially since China joined the World Trade Organization (WTO), which could have been a great opportunity not only for China but also for the world to witness a rising China in terms of its quality in legal infrastructure and internal governance system. As the US administration has indicated in the ongoing trade war against China, China's accession to the WTO has not changed China's way of internal governance in a substantial manner. Consequently, as the USA has claimed, China has failed to comply with its WTO commitments. The puzzle here is how to assess the interaction between China's BIT regime and its internal rule of law.<sup>88</sup> Do Chinese BITs play only a decorative function in sending signals to the international investment community? In other words, we try to understand the interactive relationship between Chinese BITs and domestic rule of law in China.

Needless to say, BIT negotiations are helping to lift China's investor protection standards, through both outside pressures and internal incentives, and giving China's BIT regime the modernity it may want to have in the new era. However, realization of the objectives that higher-level BITs want to achieve largely depends on China's domestic regulatory regime in the field of foreign investment.<sup>89</sup> China's domestic law, for example, is said to make China's compliance with the International Centre for Settlement of Investment Disputes (ICSID) Convention's recognition and enforcement obligations uncertain. This leads to the need for

<sup>86</sup> Aniruddha Rajput, "Safeguarding India's Regulatory Autonomy: Analysis of the New Model Bilateral Investment Treaty" (2017) 14(3) *Manchester Journal of International Economic Law* 279–300.

<sup>87</sup> Andrew D. Mitchell and Tania Voon, "Series Editor's Preface" in Julien Chaisse (ed.), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (Oxford University Press 2019).

<sup>88</sup> Cohen and Schneiderman, *supra* note 14 (indicating some academic doubt over any correlation between China's BIT law and practice and the liberalizing movement of China's internal law, in particular economic law).

<sup>89</sup> Wei Yin, *supra* note 18.

judicial interpretation by China's Supreme People's Court guaranteeing enforcement of an ICSID award within China's legal system.<sup>90</sup>

A related question is – what is the real driving force shaping China's BIT regime? The general consensus is that China's shifting role from a pure capital-importing state to a capital-importing and exporting state<sup>91</sup> is the key force pushing for the liberalization of the Chinese BIT regime.

It is clear that China's BIT negotiations with other trading partners are shaped by competitive externalities, that is, developments in the negotiation of FTAs or BITs between third parties. Competitive pressures may threaten China with the prospect of disadvantages vis-à-vis key competitors in the others' market for investment.<sup>92</sup> China's domestic reforms are also helping to resolve the issue of reciprocity, which the USA tried to solve through unilateral measures while the EU may take a bilateral approach.

One task of the book is to investigate the correlation between China's liberalization of its BIT regime and all the variables in relation to the evolution of BIT norms, especially among counterparties that have been in BIT negotiations with China. Some empirical studies will be conducted in the book to see how the landscape of China's BIT regime has been shaped in the past four decades. This question is also associated with China's treaty behavior when it comes to negotiating and signing BITs. The conventional consensus is that China has not been an inexperienced rule-maker, particularly in the international law arena. In terms of BITs, China has appeared to follow in the footprints of the EU, the USA and other major trading partners. The other perspective that the book is trying to offer is an investigation of China's treaty behavior and the varying terms in Chinese BITs. There has been evidence indicating China's adherence to its own policy when signing BITs rather than following the uniform approach.<sup>93</sup>

To characterize China's BIT program and to predict its evolution are two interconnected tasks that current scholarship is working on. It is said that the Chinese approach to its BITs used to be an Americanized one but that, for the sake of its own and the world's interests, China should adopt a more balanced, responsive and accountable approach, taking into account multiple elements not limited to the investment regime.<sup>94</sup>

The final issue concerns China's stance in the ongoing, systematic and sustainable development-oriented reform of the global IIA regime,<sup>95</sup> including the ISDS mechanism, and its role in the transformation of global investment governance. The ISDS reform has been heatedly debated with the emergence of a number of reform proposals<sup>96</sup> touching on various dimensions and various investment disputes needing to address social, political and economic concerns.<sup>97</sup> The trade-offs of these reforms are hard to measure or quantify, but improvement of the rule of law, the normative contents of which include justice, fairness,

<sup>90</sup> Julian Ku, "The Enforcement of ICSID Awards in the People's Republic of China" (2013) 6 *Contemporary Asia Arbitration Journal* 31–48.

<sup>91</sup> Shen Wei, "Expropriation in Transition: Evolving Chinese Investment Treaty Practices in Local and Global Contexts" (2015) 28 *Leiden Journal of International Law* 579 (clarifying China's switching stance of being a pure capital importing state to a capital importing and exporting state).

<sup>92</sup> Hallinan, *supra* note 21.

<sup>93</sup> Marcia Don Harpaz, *supra* note 2 (arguing that, at least in the sphere of international investment, BITs do not bring any significant changes to China); An Chen, *supra* note 12 (arguing against the idea of China going to copy other countries' model BITs).

<sup>94</sup> Congyan Cai, *supra* note 20.

<sup>95</sup> UNCTAD, UNCTAD's Reform Package: For the International Investment Regime, 2018, <https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition> (accessed March 6, 2021).

<sup>96</sup> *Ibid.*, 80–96.

<sup>97</sup> Wenhua Shan and Peng Wang, "A Matrix Analytical Framework for Investment Disputes and Their Settlement" (2018) *Foreign Investment Law – ICSID Review* 1–24.

transparency, efficiency and peace, should be used as a benchmark when making institutional choices in light of the different contexts that the states are facing.<sup>98</sup>

The expanding economic clout of the emerging powers is increasing their political influence well beyond their borders. Moreover, power is shifting from established powers to rising countries and nonstate actors (such as foreign investors in IIL), both of which have become more important in IIL and the ISDS system. While the United States remains at the apex of the international system, the global distribution of power – political, economic, demographic, technological and to some degree military – is shifting toward the developing world, driven by the rise of China, India, Brazil and other nations (and the relative decline of Europe).

A shift in power to the global “South” is a driving force reshaping the global investment governance system. When problems are global, solutions require global collective action including engagement across national borders and levels of decision-making. Suspicions over global governance add to the difficulties of effectively mastering the growing number of challenges. The major economies including the EU, the USA, South Africa and Brazil are all making various proposals to reform the existing defective, if not illegitimate, ISDS mechanism. Some of them have materialized their ideals by codifying some of the ideas and proposals into recently signed BITs or FTAs. The EU has been active in making various proposals to improve the existing ISDS system. The ISDS arrangements provided in Chapter 14 of the United States–Mexico–Canada Agreement (USMCA) represent a new but radical shift from those that have been in force for over a quarter of a century under Chapter 11 of the North American Free Trade Agreement (NAFTA). Canada opted out of ISDS under USMCA with the exception of legacy claims and pending NAFTA claims.<sup>99</sup> The USA and Mexico only consented to highly restricted claims being brought to ISDS.<sup>100</sup>

China’s position has yet to become crystal clear,<sup>101</sup> even though it has indicated some interest in an appeal process.<sup>102</sup> Its acceptance or rejection of this new model requires in-depth analysis of the coherences and divergences between the EU and China as well as the effect of core features of the investment court system (ICS) model.<sup>103</sup> Some proposals have been made. For instance, mediation, given its advantages in reducing tension and hostility and creating an amicable atmosphere,<sup>104</sup> may offer solutions to ensure continued operation of the involved investment project and an ongoing cooperative relationship between the foreign

<sup>98</sup> Sergio Puig and Gregory Shaffer, “Imperfect Alternatives: Institutional Choice and the Reform of Investment Law” (2018) 112(3) *American Journal of International Law* 361–409.

<sup>99</sup> USMCA Annex 14-C.

<sup>100</sup> USMCA Annex 14-D. But a wide range of claims can be brought with respect to government contracts according to Annex 14-E.

<sup>101</sup> In its statements on the ISDS reform for UNCITRAL, China said: “We are still making in-depth study on those options and our point of departure is that the Investor-State arbitration regime shall be an effective and efficient one striking the proper balance between investor protection and government’s right to regulate. This is one of the guiding principles G20 adopted for global investment policy-making this July, and China welcomes and also keeps an open mind on any option that is conducive to the above-mentioned goal.” UNCITRAL, 50th Session, “Settlement of Commercial Disputes, Investor-State Dispute Settlement Framework Compilation of Comments: Addendum” July 3–21, 2017, A/CN.0/918/Add.1, 3.

<sup>102</sup> Anthea Roberts, “Incremental, Systemic and Paradigmatic Reform of Investor-State Arbitration” (2018) 113(2) *American Journal of International Law* 410–432; “G20 Guiding Principles for Global Investment Policymaking?” Hongzhou Summit, July 2016, Part III.

<sup>103</sup> Hongling Ning and Tong Qi, *supra* note 41, 93.

<sup>104</sup> Guiguo Wang and He Xiaoli, “Mediation and International Investment: A Chinese Perspective” (2012) 65(1) *Maine Law Review* 216, 235.



investor and the host state. Therefore, mediation can be used as a step in ISDS.<sup>105</sup> Some mandatory conciliation clauses have appeared in BITs. For instance, the Hong Kong–UAE BIT 2019 makes mandatory conciliation the prerequisite to arbitration, which has been viewed as a breakthrough in BIT law and practice. Accordingly, foreign investors may initiate arbitration only if the host state does not make a request for conciliation in the first place. However, this mandatory conciliation is not an entitlement of foreign investors.<sup>106</sup>

The ultimate decision should rest on China's own interests. Nevertheless, China is still silent and has not indicated its position in ISDS reform, while global investment governance – the collective management of common problems at the international level – is at a critical juncture. On the other hand, China is aggressively executing its BRI and many Chinese companies have been actively investing overseas along the Belt and Road. As such, the stance of Chinese BITs on ISDS reform is important not only to the Chinese BIT scheme but also to China's ongoing BIT negotiations with the EU and the USA, which are likely to be the cornerstone of the new international investment governance regime. The growing number of legitimacy-crisis issues on the IIL agenda, and their complexity and uncertainty, are outpacing the ability of the ICSID and BIT networks to cope. A multipolar world is absolutely complicating the prospects for effective global governance over the next several decades. Mounting global challenges and defects need China to deal not only with its internal problems but also with the global governance deficit issues.

In a broader sense, China, as a global investor, is gaining importance in steering global investment governance, manifested by its forming the G20 Guiding Principles for Global Investment Policymaking and its establishment of the Asian Infrastructure Investment Bank. China's rise as a global superpower in general and a global investor in particular is not only influencing global investment governance but also causing increased backlash against it.<sup>107</sup> Theoretically, China's deeper participation may make the existing global investment governance more complicated.

The issue is to define China's role in international investment governance. Is China a rule-follower, a rule-shaker, a rule-maker or a rule-violator? Some scholars give high praise to China, characterizing it as a rule-shaker in the short and medium term and a rule-maker in the long run through so-called selective adaption and selective innovation.<sup>108</sup> Others may even have positioned China in a leader role in the world economy.<sup>109</sup> This is the best guess or observation without empirical evidence.

### 1.3 ROADMAP OF THE BOOK: ISSUES, TOPICS AND OUTLINE

This book attempts to tackle these four interconnected China-myth issues which constitute a thematic framework within which to conceptualize and theorize Chinese BIT laws and practices.

<sup>105</sup> Chunlei Zhao, "Investor-State Mediation in a China-EU Bilateral Investment Treaty: Talking about Being in the Right Place at the Right Time" (2018) 17(1) *Chinese Journal of International Law* 111–135.

<sup>106</sup> James Claxton, Luke Nottage and Ana Ubilava, "Pioneering Mandatory Investor-State Conciliation Before Arbitration in Asia-Pacific Treaties: IA-CEPA and HK-UAE BIT" Kluwer Arbitration Blog, September 5, 2020, <http://arbitrationblog.kluwerarbitration.com/2020/09/05/pioneering-mandatory-investor-state-conciliation-before-arbitration-in-asia-pacific-treaties-ia-cepa-and-hk-uae-bit/?print=pdf> (accessed September 17, 2020).

<sup>107</sup> Dilini Pathirana, *supra* note 78.

<sup>108</sup> Heng Wang, *supra* note 64.

<sup>109</sup> Guiguo Wang, "China's Practice in International Investment Law: From Participation to Leadership in the World Economy" (2009) 34 *Yale Journal of International Law* 575–587.

Chapter 2 offers a landscape of China's foreign investment law (FIL) – its evolution in the past four decades, the key distinctive features of its FDI regime and its recent FIL developments. Chapter 2 lays the foundation for comprehending China's BIT regime, which initially was put in place to attract FDI and boost economic growth and was later to provide better investor protection to China's outbound investment. The evolution of Chinese FIL demonstrates the gradual developments in the Chinese legal system and regulatory framework, and, more importantly, the changing role and function of the government in this process. Apparently, there is a gap in the legal system and governmental function among China, Western countries and other developing or emerging economies. This gap explains the difficulty in converging BIT laws. But the evolutionary path is also clear in the sense that both the legal system and the regulatory structure are more liberal, market-oriented and investor-friendly than they were.

Chapter 3 offers an evolutionary landscape of substantive standards in Chinese BITs by reference to the China–ASEAN investment framework agreement. Both comparative study and a textual approach are adopted. The reason for referring to the China–ASEAN Investment Framework Agreement is that this is the very first regional investment agreement that China has signed in the past decade. Given the deglobalization and anti-multilateralism, regionalism is of particular significance in the current time. The second reason is to investigate the liberty level of substantive standards in Chinese BITs in the South–South context, instead of the South–North context.

The EU and China in January 2014 decided to launch negotiations on a bilateral treaty addressing the promotion and protection of investment between the two parties. Chapter 4 mainly examines the legal positions from which the parties will proceed with their negotiations in terms of the nondiscriminatory standards, that is, the NT and the MFN clauses, which are said to be the cornerstone of foreign investment protection, by focusing on the evolution of nondiscriminatory standards in China's BITs against the same standards in EU BITs, in particular the EU's recently concluded three important treaties regulating, among other things, foreign investment, namely with Canada, Singapore and Vietnam. Domestically, the reference value of BITs signed by China in the 1980s and 1990s has been significantly affected by the dynamic economic reform and market development in the past four decades. Essentially, globalization has fundamentally lifted China's foreign investment standards up to international levels. As a result, while the market anticipates the difficulties in the ongoing negotiations, the gap between EU and China, as argued in this chapter, should be noticeably slight when the EU and China come to negotiate their nondiscriminatory standards.

The doctrine and case law on expropriation in IIL are unsettled due to a variety of factors such as the diversity of interests between capital-importing and exporting states, the divergence in legal, economic and cultural concepts of property rights, and, more importantly, the regulatory role of the state in cross-border investment activities. Although China has been an active “treaty-maker” in the universe of international investment arbitration, evidenced by its nearly 130 BITs, the notion of expropriation in these BITs is in a state of flux. Chapter 5 scrutinizes the expropriation clauses in China's BITs, in particular the Peru–China BIT 1994 and the Peru–China FTA 2009, by reference to the final award of *Tza Yap Shum v. The Republic of Peru*, the first Chinese BIT arbitration case. This chapter attempts, in a comparative context, to understand the underlying rationality of China's evolving stance on expropriation in both global and domestic contexts.

Inconsistency has been said to be one of the most severe shortcomings that the existing ISDS system possesses. Inconsistency, if not cured, is likely to affect the legitimacy of ISDS. Partly in response to the claims of inconsistency and illegitimacy of ISDS, the EU has proposed having a permanent investment court to replace the current ISDS mechanism while the USA has proposed having an appellate body for current ISDS and a large camp of undecided states have no firm position on ISDS reform. China, on the other hand, has not issued an official response to the concept of a permanent investment court, partially because of its less active role in the use of the existing ISDS mechanism. More recent years have witnessed China's increasing involvement in ISDS cases. The objective of Chapter 6 is to review these China BIT-related ISDS cases, in particular the awards on jurisdiction and the tribunals' varying techniques in interpreting ISDS clauses in China's BITs with a focus on jurisprudential analysis of these cases and the tribunals' treaty interpretive techniques. Not surprisingly, the interpretative tendency has been quite uniform. In brief, the tribunals have tended to take an expansive approach when called upon to determine jurisdictional issues. Although Chapter 6 is largely jurisprudential, a sense of the tribunals' treaty interpretation techniques may help shape some foundational underpinnings of China's policy response to the proposals to reform the ISDS system made by the EU, the USA and others.

Apart from its overall jurisprudential review, Chapter 6 touches on two unique procedural rules in Chinese BITs. One is related to the legal standing of investors originated from Hong Kong and Macau. Two investment arbitration cases have investigated the legal standing of such investors. Theoretically, two opposite arguments have been made. One is a policy-based treaty interpretation technique, which tries to exclude Hong Kong or Macau-originated investors out of the jurisdiction of Chinese BITs, while the other is to allow such investors to enjoy the benefits of Chinese BITs according to textual interpretation of Chinese BIT terms (e.g., the concepts of investor and investment) even though both Hong Kong<sup>110</sup> and Macau<sup>111</sup> actually have their own BITs.

China believes that treaty interpretation relating to Hong Kong and Macau has been well settled in the context of both international and domestic law (i.e., the Constitution of China, the Basic Law of Hong Kong and the Basic Law of Macau). China's position is clear that those treaties ratified by China may apply to Hong Kong and Macau only when China has expressly so stated. However, this narrow or China-centric treaty interpretation approach has been greatly challenged by the *Tza Yap Shum v. Peru* case and the *Sanum Investments Ltd v. Laos* case in the context of BITs. There have been clear tensions between China's unilateral declaration and the operation of the "Moving Treaty Frontier" (MTF) doctrine.<sup>112</sup>

The other jurisdictional issue is related to state-owned enterprises (SOEs). Putting aside the importance of SOEs in China's economy and global cross-border investment setting, SOEs are more often involved in public international law as the government instrument

<sup>110</sup> Hong Kong has signed twenty BITs to date and nineteen of them are in force. These counterparties are Austria, Belgium-Luxembourg Economic Union, Canada, Chile, Denmark, Finland, France, Germany, Italy, Japan, Republic of Korea, Kuwait, the Netherlands, New Zealand, Sweden, Switzerland, Thailand, the United Kingdom and the United Arab Emirates. The Hong Kong–Australia BIT was terminated. UNCTAD, Investment Policy Hub, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/93/hong-kong-china-sar> (accessed March 6, 2021).

<sup>111</sup> Macao had only two BITs – with the Netherlands (2008) and Portugal (2000), respectively. UNCTAD, Investment Policy Hub, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/123/macao-sar-china> (accessed March 6, 2021).

<sup>112</sup> John Shijian Mo, "The Dilemma of Applying Bilateral Investment Treaties of China to Hong Kong and Macao: Challenge Raised by Sanum Investments to China" (2018) 33(1) *ICSID Review – Foreign Investment Law Journal* 125–155.

triggering state responsibility for breaches of international law due to the rules of state attribution.<sup>113</sup> In one investment arbitration case, the host state tried to defeat the tribunal's jurisdiction on the grounds that China's SOEs are not supposed to enjoy the rights under Chinese BITs as BITs allow only investors, but not the government's arm, to enjoy the legal standing to bring claims to international investment tribunal.

These two China-specific jurisdictional issues are of great legal significance given the large number of investors from China that channel their investment through Hong Kong or Macau, and the fact that foreign investors often do the same thing when investing into China. SOEs are important market players in China. So, too, are they in the global market. A considerable portion of China's outbound investment is made by SOEs. Their legal standing in Chinese BITs needs clarification while developed states, especially the USA and the EU, are trying to exclude SOEs from legal protections offered in BITs and to justify restrictive measures relating to SOE-related investment by applying both the domestic screening schemes<sup>114</sup> and the security exception clause to SOEs.<sup>115</sup> In the China–Canada BIT 2012, China reserves some leniency for its SOEs.<sup>116</sup> The definition of “enterprise” in the China–Australia FTA 2015 (ChAFTA) includes entities that are governmentally owned or controlled, allowing SOEs to enjoy the benefits set out in the investment chapter.<sup>117</sup> The legal battle between China and the USA over SOEs surrounds the legal treatment granted to SOEs. The USA is fighting for legal rules to ensure that SOEs act at arm's length from the state and solely for commercial purposes, while China is fighting for nondiscriminatory treatment of SOEs, especially when they are subject to CFIUS screening rules under national security considerations.<sup>118</sup>

Chapters 7 and 8 continue to focus on procedural rules in Chinese BITs. These procedural rules are vaguely drafted in the BITs, leading to confusion and ambiguity in treaty interpretation.

Classic issues of international commercial arbitration such as parallel proceedings also emerge in international investment arbitration. The parallel existence of international investment arbitration and domestic litigation deserves careful analysis for the sake of international legal certainty and security. Given the small number of international investment arbitration cases involving China and its BITs, the issue of parallel proceedings in Chinese BIT law and practice is underinvestigated. Chapter 7 tries to look into this issue by reference to the case of *Hela Schwarz GmbH v. PR China*, an ongoing BIT arbitration case

<sup>113</sup> Bernard Hanotiau, “Foreword” in Albert Badia, *Piercing the Veil of State Enterprises in International Arbitration* (Wolters Kluwer 2014) xxi–xix.

<sup>114</sup> See Chapter 9. See also European Commission, “Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Welcoming Foreign Direct Investment While Protecting Essential Interests” Brussels, 13.9.2017, COM(2017) 494 final.

<sup>115</sup> UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (UN Publication 2015) 141; Daniel C. K. Chow, “Why China Wants a Bilateral Investment Treaty with the United States” (2015) 33 *Boston University International Law Journal* 101, 120.

<sup>116</sup> Hongyu Fu and Meng Wan, “Convergences and Divergences in the China-EU and the China-US BIT Negotiations” in Yuwen Li, Tong Qi and Cheng Bian (eds.), *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (Routledge 2019) ch 3.

<sup>117</sup> Vivienne Bath, “Substantive Provisions in ChAFTA's Investment Chapter” in Colin Picker, Heng Wang and Weihuan Zhou (eds.), *The China-Australia Free Trade Agreement: A 21st-Century Model* (Hart 2018) 201.

<sup>118</sup> Kyle Dylan Dickson-Smith, “Lessons Learned from the Canada-China FIPA for the US-China BIT and Beyond – Chinese Whispers or Chinese Chequers?” in Julien Chaisse (ed.), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (Oxford University Press 2019) 138.

registered with the ICSID. Some improvements have been made to relevant jurisdictional clauses in China's more recent FTAs, filling the gap in this gray area.

There has been a shift in Chinese BITs. The transition of China's BITs from the first generation to the second generation is a landmark move for China's more market-oriented economy. However, the discrepancy between the new- and old-generation Chinese BITs, which causes confusion in interpretation and application of BIT terms, has become an obstacle for investors wanting to seek relief through international arbitration under these BITs. With these new-generation BITs that China is renegotiating and re-signing with its counterparties, investors are more likely to encounter difficulty in knowing whether to interpret and apply appropriate treaty terms under either old or new BITs.

Chapter 8, through analyzing the case of *Ping An v. Belgium*, addresses the following issues: (a) investment disputes arising prior to the new BIT, which might fall into a "black hole" or "arbitration gap" between the new and the old BITs; (b) the term "dispute" in the transitional clause and its scope of application; and (c) the presumed intention of the contracting parties as to the true meaning of a transitional clause. Chapter 8 makes an in-depth study of how ICSID tribunals interpret and apply transitional clauses (and the rules relating to the interpretation and application of BIT terms) and further examines the retroactivity of transitional clauses. To conclude, Chapter 8 investigates China's current BIT regime, particularly transitional clauses, and suggests an effective way of filling the possible arbitration gap.

China has always been an exceptional case in the IIL arena. The principal purpose of Chapter 9 is to unveil China's evolutionary pattern of BIT practice as well as its underlying logic of BIT policies through statistical and textual analysis of China's BITs. In the analytical paradigm of the return of the state, China was a capital-importing state for a long period of time. Consequently, its BIT policy reflects China's capital-importing status with the aim of attracting foreign investment. Essentially, it is fair to say that China has probably never been in favor of moving away from its position of stressing and protecting its sovereignty while participating in the global BIT network. Seen from this angle, China and most developed states may have been on divergent paths in terms of their approaches toward engaging in the IIL regime. Put differently, while developed countries are now in the trend of returning to state sovereignty by stressing their right to regulate, China has been slightly leaving its position of overly preserving its sovereignty. Being a capital exporter, China may be more conscious of stricter investment protection and less sovereign control.<sup>119</sup> Nevertheless, substantive and procedural standards in Chinese BITs are still quite conservative without granting foreign investors too-liberal rights. Chapter 9, through statistical study, may also confirm that China's economic liberalization is limited, though it claims to advocate globalization, in particular free trade and investment facilitation, by taking on a position of leadership in globalization. This leadership may be symbolic due to its limited neoliberal ideology, as exemplified by the rule of law development, investor rights protection and judicial quality, among others.

Nevertheless, caution must be given to the capital-importing/capital-exporting state dichotomy of interests, which is often used to differentiate states' treaty behaviors, as the boundaries between these two groups of states seem blurred or even delimited. There has been an increase in investment arbitration cases filed against capital-exporting states,<sup>120</sup> giving the USA and EU member states a dual role in the ISDS mechanism, thereby making this capital-

<sup>119</sup> M. Sornarajah, *The International Law on Foreign Investment* (3rd edition, Cambridge University Press 2010) 233.

<sup>120</sup> UNCTAD World Investment Report 2016: Investor Nationality: Policy Challenges (United Nations 2016) (reporting 40 percent of cases filed against developed countries).

importing/exporting state narrative less useful than before, despite their trajectory shift altering their BIT negotiation position from that of capital-exporting to capital-importing states.<sup>121</sup> This duality narrative, originally used to describe the FDI to and from the USA and now being spread to other countries,<sup>122</sup> complicates the landscape of the IIL regime. There may be some historical dimensions attached to this duality narrative. Historically, ISDS or even IIL is reminiscent of the imperial system of international law<sup>123</sup> with its colonial heritage, given the fact that the current IIL has largely been shaped by conventional developed (capital-exporting) states.<sup>124</sup> Conventional capital-exporting states, as strong drivers of the ISDS mechanism, coordinate their negotiating positions when negotiating BITs with capital-importing states, thereby influencing capital-importing states and even emerging capital-exporting states.<sup>125</sup>

Very little empirical research has been conducted in relation to China's BIT law and practice. Chapter 10 makes a novel attempt to comprehend China's BIT-making by applying an empirical approach. The existing literature has tried to justify and rationalize Chinese BITs' generational evolution by attributing to China a policy shift, transitioning from using BITs to attract foreign investment to using BITs to protect its outbound investment. Because of this policy shift, Chinese BITs are reframed, moving from the old conservative and protectionist approach with its stress on sovereignty to regulate foreign investment to a more liberal approach with more focus on foreign investors' protection. Although the Chinese government has never made it clear to the outside world why and how its BITs have changed, the general wisdom attributes this change to a self-determined government policy move. Through empirical study, Chapter 10 tries to spot the correlation between Chinese BITs and a variety of factors shaping a host state's BIT policy. The finding seems to suggest that China's BIT policy change is due to outside pressures as well as certain endogenous factors.

Chapter 11 concludes the book.

<sup>121</sup> David Gantz, "Challenges for the United States in Negotiating a BIT with China: Reconciling Reciprocal Investment Protection with Policy Concerns" (2015) Arizona Legal Studies Discussion Paper No. 14-03, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=238919](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=238919), 240.

<sup>122</sup> José Alvarez, *The Public International Law Regime Governing International Investment* (Martinus Nijhoff 2011) 144.

<sup>123</sup> John Linarelli, Margot E. Salomon and M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press 2018) 145.

<sup>124</sup> Stephan W. Schill, Christian J. Tams and Rainer Hofmann, *International Investment Law and History* (Edward Elgar 2018) 63.

<sup>125</sup> Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press 2018) 207.