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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 (FDI). Some scholars attribute this surge in FDII to the international mode which China chooses to follow in the field of international investment. 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, doctrinal study, economic analysis (not only of IIL but also of compensation or evaluation in arbitration cases) and empirical study.

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The comparative approach is often undertaken by investment arbitration tribunals to achieve the purpose of "judicial borrowing." 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. Comparative study also shows a stark 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.

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.

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.

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

8 Aparna Sharma, supra note 2.
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. Therefore, some scholars support the idea that China should insist on protecting its rights as authorized by the international conventions and embracing disciplines commonly found elsewhere throughout the process of negotiating and drafting BITs amid US or Canadian practices that are not widely accepted. Some Chinese scholars claim that protecting the host state’s interests could serve as a model for the new international economic order.

In its BIT-making, China is not applying (or copying) Western models mechanically. China is adapting these models in light of different treaty partners. During the negotiation, it is necessary to promote mutual understanding. For example, when Japan joins in negotiating these agreements, it will want to secure nondiscriminatory investment liberalization 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.” 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. 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.

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.” 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.”

19 Ibid.
22 An Chen, supra note 12.
23 This idea is also demonstrated in Xini 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.
29 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. 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. 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. Other purposes such as welfare, development, prosperity or environmental protection 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. 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. 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. 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.

27 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.
28 China–Germany BIT 2014, 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 (accessed April 6, 2021).
29 China–Panama FTA, Article 1.07.
32 Ibid., 153.
1.1 Chinese BIT Law Scholarship: In A Nutshell

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, 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. 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. 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. 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.”

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. 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 Sham 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.” Another unsettled puzzle regarding ISA is whether ISA has jurisdiction on cases relating to SOEs, as ISA is “designed to protect private
investment only.” Although there are already two cases involving SOEs, further study on this question is required.\(^4\) 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.\(^4\)

Treaty shopping is an effective alternative “by which an investor acquires a convenient nationality in order to enjoy preferable investment protection.”\(^4\) 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.\(^5\) 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 IIAs standard defining corporate investors, its denial of benefits (DOB) clause, the ISDS clause and the scope of consent to arbitration.\(^4\)

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.\(^5\)

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.\(^6\) 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\(^7\) and its strategic partnership for IP in the region.\(^8\)


\(^{43}\) Ibid.

\(^{44}\) Ibid.


\(^{46}\) Ibid.


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, is inherently in existence in international law. There is a compelling linkage between international human rights law and IIL 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.

Labor protection is another issue well worth considering. Chinese FTAs are criticized for lack of labor protection terms. 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. 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.

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. 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.”

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

54 Ibid.
57 Manjiao Chi, supra note 24.
balanced approach. 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, 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.

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. In general, those BITs and FTAs are helping to promote property rights protection and rule of law in China and improve China’s global trade governance. Nor is China content to be just a rule-follower. In the long term, China is likely to become a rule-maker “evolv[ing] from selective adaption to selective innovation.”

Policy analysis occupies quite a lot of scholarly effort, attempting to place the current role of investment treaties in China’s foreign economic policy. 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.

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. 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.

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58 Tingliang Wang, supra note 15.
59 See generally Gallagher and Shan, supra note 34.
60 Manjiao Chi, supra note 24.
63 Chi, supra note 61.
65 See generally Gallagher and Weihua Shan, supra note 34.
66 Cohen and Schneiderman, supra note 14.
Policy study shows the inadequacy of China’s BIT regime which, however, is proportionate to the increased pace and volume of Chinese outbound investment. 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.

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. 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.” 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.

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, the South–South BITs have not indicated or formed emerging norms 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. So does the North–South narrative, which also shows some demographical value and suggests that Canada’s IPR


69 Sauvant and Chen, supra note 10.

70 Huiping Chen, supra note 68.


72 Ibid.


protection standards could be a concern to Chinese investors. 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.

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.

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.

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.

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, 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