

The Belt and Road Initiative

Law, Economics, and Politics

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Paving the Silk Road BIT by BIT: an Analysis of Investment Protection for Chinese Infrastructure/Projects under the Belt & Road Initiative

LAI Huaxia and Gabriel M. Lentner

1 Introduction

Launched in 2013, the Belt and Road Initiative (B&R) has become the centrepiece of China's foreign policy under the Xi Jinping Administration.¹ The B&R Initiative ambitiously envisages expanding links among Eurasian countries by investing hundreds of billions of dollars in infrastructure development. While the B&R Initiative has prompted massive commentary on its politics and economics, legal analysis is sparse.² Particularly important for investors interested in the B&R Initiative is the level of protection for such investments. Despite the enormous financial resources China has pledged, it is not yet clear how much investment protection is available for Chinese B&R investors.

We take up the question of investment protection and explain to what extent is the new Silk Road paved by existing international investment agreements (IIAs) between China and the B&R countries. The starting point for any discussion of investment protection for China's expansive investments in Eurasia is a comprehensive analysis of existing IIAs between China and the B&R countries. This article goes beyond the conventional account of three

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1 The Belt & Road is formally known as 'the Silk Road Economic Belt and the Maritime Silk Road' Initiative. See State Council of the People's Republic of China, 'Full Text: Action Plan on the Belt and Road Initiative' <http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm> accessed 22 June 2017.

2 For the few exceptions, see Lingliang Zeng, 'Conceptual Analysis of China's Belt and Road Initiative: A Road towards a Regional Community of Common Destiny' [2016] *Chinese Journal of International Law*, 517; Vivienne Bath, "One Belt One Road" and Chinese Investment' [2016] Sydney Law School Legal Studies Research Paper, available at SSRN <<https://ssrn.com/abstract=2866169>> accessed 3 August 2017. See also Julien Chaisse and Mitsuo Matsushita, 'China's "Belt and Road" Initiative: Mapping the World Trade Normative and Strategic Implications' (2018) 52(1) *Journal of World Trade* 163–186.

generations in China's investment treaty evolution and unearths the highly variable nature of investor protection under these IIAs. Doing so, we collect data of China's investment agreements with the B&R countries and develop an analytical framework tailored to the B&R Initiative's signature characteristic of infrastructure investments. In particular, we analyse the issues that are most likely to arise in investment arbitral proceedings that involve infrastructure investments. Highlighted issues include whether Chinese state-owned enterprises are investors for the purpose of an investment treaty, how to interpret the restrictive scope of Investor-State dispute settlement provisions, whether a violation of contractual obligations amounts to expropriation and violation of the fair and equitable treatment standard.

The article proceeds as follows. Section 2 lays out the strategic background of the B&R Initiative, describes how a typical infrastructure investment is structured under the B&R Initiative, and identifies the major risks that investment treaties can help mitigate. Section 3 scrutinizes in detail the level of protection available to Chinese investors along the Belt and Road by looking at the scope, substantive standards and dispute resolution provisions in all the treaties. Section 4 addresses the issue of invoking subsequent treaty practice for better investment protection.

2 Infrastructure Investments under the Belt & Road Initiative

2.1 *Strategic Background*

The B&R Initiative is China's grand strategy to reshape the global trade landscape. Taking the inspiration from the ancient Silk Road, China proposes to connect countries across Eurasia and Africa through infrastructure development that will improve international logistics and facilitate trade along the Belt and Road.³ The geographical scope of China's B&R Initiative goes beyond the historical Silk Road, stretching from China's Pacific coastal cities to the Baltic and the North Sea.⁴ Strategically, China's B&R Initiative has been described as a response to the Obama Administration's 'Pivot to Asia' policy that aims for rebalancing China's regional influence.⁵ It emerged in parallel with the

3 State Council of the People's Republic of China, 'Full Text: Action Plan on the Belt and Road Initiative' (n 1).

4 Werner Fasslabend, 'The Silk Road: A political marketing concept for world dominance' (2015) 14(2) *European View* 293, 294.

5 European Parliamentary Research Service, 'One Belt, One Road (OBOR): China's Regional Integration Initiative' (2016), 2. For an analysis of the "Pivot to Asia" policy, see M.E. Manyin, S. Daggett, B. Dolven, S.V. Lawrence, M.F. Martin, R. O'Rourke, B. Vaughn, 'Pivot to the Pacific?'

Trans-Pacific Partnership (TPP) as the United States tried to consolidate its Asia-Pacific trade blocs. Fearing that the World Trade Organization (WTO) has largely failed to tame China's statist economic structure,⁶ the US tried to contain China's ascendancy by excluding China from the TPP negotiation that promises 'WTO Plus' trade privileges for its twelve members.⁷

The B&R Initiative is 'amorphous'⁸ in scope, as the Action Plan stated that 'everyone is welcome.'⁹ So far, 68 countries have announced their decision of participation¹⁰ while the list keeps expanding. In contrast to the rule-based TPP led by US, China's B&R does not seek to develop a binding legal framework. The Action Plan does not commit the participating countries to any legally binding obligations or indicate any intention of doing so. The B&R's 'thin' institutionalization is no different from what East Asia international relation literature theorizes as the 'Asian Way'¹¹ of multilateral cooperation: 'a high degree of discreetness, informality... non-confrontational bargaining styles which are often contrasted with the adversarial posturing and legalistic decision-making procedures in Western multilateral negotiations.'¹²

Upon closer inspection, the B&R is distinguished from China's previous multilateral collaboration undertakings by its unequivocal and strong emphasis on infrastructure. Investment in infrastructure arguably leads to substantial economic growth.¹³ China believes that significant investment in infrastructure

The Obama Administration's "Rebalancing" Toward Asia' Congressional Research Service, 7-5700, 28 March 2012.

- 6 See Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57(2) *Harvard International Law Journal* 261.
- 7 Daniel CK Chow, 'How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade' (2016) 17(2) *Chicago Journal of International Law* 370, 372.
- 8 Economist, 'Our Bulldozers, Our Rules' (2 June 2016) <<http://www.economist.com/news/china/21701505-chinas-foreign-policy-could-reshape-good-part-world-economy-our-bulldozers-our-rules>> accessed 22 June 2017.
- 9 State Council of the People's Republic of China (n 1).
- 10 For the official list of participating countries, see the Chinese government website for the B&R Initiative at <https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10076&cur_page=1> accessed 22 June 2017.
- 11 The 'Asian Way' is also termed as the 'ASEAN Way'. For a comprehensive review of the 'Asian Way' of multilateral cooperation, see Alastair Iain Johnston, 'What (if anything) does East Asia tell us about international relations theory?' (2012) 15 *Annual Review of Political Science* 53.
- 12 Amitav Acharya, 'Ideas, identity, and institution-building: from the "ASEAN way" to the "Asia-Pacific way"?' (1997) 10(3) *Pacific Review* 319, 329.
- 13 For a cross-country analysis, see Hadi Esfahani and Maria Ramirez, 'Institutions, infrastructure, and economic growth' (2003) 70(2) *Journal of Development Economics* 443. For empirical analysis at national level, see Dave Donaldson and Richard Hornbeck, 'Railroads and American Economic Growth: A "Market Access" Approach' (2016) 131(2) *QJEcon* 799,

was critical in fuelling China's rapid growth,¹⁴ and sees an improved infrastructure network as the prerequisite for the 'unimpeded trade' envisioned in the Action Plan.¹⁵ To further this goal, China offers institutionalized funding for the B&R through the Asia Infrastructure Investment Bank (AIIB) and the Silk Road Fund.

Three years after its announcement in 2013, the B&R Initiative is steadily living up to its vision. Between 2014 to 2016, Chinese companies have invested over 50 billion USD in the B&R countries,¹⁶ and have been awarded contracts from the B&R countries with a total value of over 300 billion USD.¹⁷ In 2016, over half of China's newly-contracted foreign projects went to the B&R countries, the majority of which were large-scale infrastructure projects like highways, railways, power plants, ports.¹⁸ Behind the massive outward investment are giant Chinese state-owned enterprises (SOEs) such as China State Construction Engineering, China Communications Construction, Power China, which made it to the top 100 international contractors worldwide within a short period.¹⁹ Of course, China is by no means the only player in the field despite the B&R Initiative's high publicity. Japan, for example, has been sponsoring international infrastructure projects through the Japan International Cooperation Agency and the Asian Development Bank for decades.²⁰ In 2016, Japan promised to invest 200 billion USD in Asian and African infrastructure under the initiative of 'Expanded Partnership for Quality Infrastructure,'²¹ an open challenge to the B&R initiative led by China.

discussing how the expansion of railroad network in the late 19th century United States substantially enhanced market access and increased agricultural land values.

- 14 Yiping Huang, 'Understanding China's Belt & Road Initiative: Motivation, framework and assessment' *China Economic Review* (2016) 314.
- 15 State Council of the People's Republic of China, 'Full Text: Action Plan on the Belt and Road Initiative' (n 1).
- 16 The State Council Information Office of the People's Republic of China, 'The B&R Initiative Has Made Five Major Achievements in Facilitating Trade' (translated from Chinese, 10 May 2017) <<http://www.scio.gov.cn/xwfbh/xwfbh/wqfbh/35861/36637/zy36641/Document/1551290/1551290.htm>> accessed 28 June 2017.
- 17 *ibid.*
- 18 China International Contractors Association, 'A List of China's International Contracts in 2016' (translated from Chinese) (15 February 2017) <http://www.chinca.org/cms/html/main/col141/2017-02/15/20170215103236971798478_1.html> accessed 29 June 2017.
- 19 Engineering News Record, 'The 2016 Top 250 International Contractors 1–100' <<http://www.enr.com/toplists/2016-Top-250-International-Contractors1>> accessed 28 June 2017.
- 20 Wade Shepard, 'Japan Ups Its Game Against China's Belt and Road' (*Forbes*, 1 Dec 2016) <<https://www.forbes.com/sites/wadeshepard/2016/12/01/japan-ups-its-infrastructure-game-against-chinas-belt-and-road/#2f996d483223>> accessed 28 June 2017.
- 21 Ministry of Economy, Trade and Industry of Japan, 'The "Expanded Partnership for Quality Infrastructure" initiative directed toward the G7 Ise-Shima Summit Meeting announced'

2.2 *Project Structure and Finance*

Public-Private Partnerships (PPP) are the most popular approach for delivering infrastructure worldwide, and the preferred project form of B&R infrastructure investment to the Chinese government.²² Government facing financial difficulties in providing for mounting demand of capital-intensive infrastructure turn to the private sector to develop and finance infrastructure projects. The key feature of PPP is the partnership between the public sector and the private sector in sharing risks, responsibilities and rewards.²³ A typical PPP arrangement takes the form of a concession or a Build-Operate-Transfer (BOT). In a concession partnership, the government and the private companies form a consortium that takes shared responsibility for financing, design, construction, operation, and maintenance of the infrastructure facility. The consortium charges the users directly for investment returns. A concession usually lasts for a period of 20 to 30 years, at the end of which the private company transfers the asset back to the government. In a BOT partnership, the government grants a private company the right to develop and operate a facility. The private company is solely responsible for financing and constructing the infrastructure until it is transferred to the government, and obtains its revenues by charging the utility/government rather than the users.²⁴

PPP projects are governed by a complex web of contracts among multiple stakeholders. By definition, a PPP project involves a host government that grants a private project sponsor the right to develop the infrastructure. The host government or a public-sector entity acting on behalf of the host government contracts with the private project sponsor under a concession agreement. In energy and power PPP projects, the government and the project sponsor also enter into an implementation agreement that provides certain guarantees to the project sponsor. The private project sponsor is the primary developer of the project and sets up the project company that is usually structured as a 'special purpose vehicle' (SPV) under the laws of the host country.

(23 May 2016) <http://www.meti.go.jp/english/press/2016/0523_01.html> accessed 28 June 2017.

22 The National Development and Reform Commission of the People's Republic of China, 'NDRC Work with 13 Agencies to Promote PPP Mechanism for Infrastructure Investment under the B&R Initiative' (translated from Chinese, 6 January 2017) <http://www.ndrc.gov.cn/gzdt/201701/t20170106_834564.html> accessed 04 Aug 2017.

23 Young Hoon Kwak, YingYi Chih and C William Ibbs, 'Towards A Comprehensive Understanding of Public Private Partnerships for Infrastructure Development' (2009) *California Management Review* 51, 52, 53.

24 World Bank Group, 'Concessions, Build-Operate-Transfer (BOT) and Design-Build-Operate (DBO) Projects' <<https://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos>> accessed 29 June 2017.

The project company owns the project asset, and enters into engineering-procurement-construction (EPC) contracts with the contractor. Depending on the project structure, the project sponsor may enter into operation and maintenance contracts with a separate company, or put the EPC contractor in charge of the operation and maintenance. Lenders/financiers usually come from a variety of sources including international agencies, commercial banks, development banks and bilateral agencies. The most common financing arrangement for PPP infrastructure projects is project finance. Between the lenders and the project company, they will enter into the credit agreement that delineates the rights and remedies of the lender, and credit enhancement agreement such as retention.²⁵

The Chinese government has pledged strong financial support for infrastructure projects under the B&R Initiative. The Chinese led AIIB and Silk Road Fund are teaming up with veteran players in international development like the World Bank²⁶ and the Asian Development Bank²⁷ in sponsoring infrastructure development. Around three quarters of the projects approved by the AIIB between January 2016 and June 2017 were co-financed with other development lenders including the World Bank, Asian Development Bank, and the European Bank for Reconstruction and Development.²⁸ Host government of the B&R infrastructure projects can propose application to the Exim Bank of China for government concessional loans with interest rates below those offered by commercial banks.²⁹ Chinese investors in the B&R

25 For a general review of how a PPP project is structured, see *ibid.* See also Wendy Kennedy Venoit, 'International Construction Law: A Guide for Cross-Border Transactions and Legal Disputes' (2009) *American Bar Association*, 71–80.

26 World Bank, 'World Bank and AIIB Sign Cooperation Framework' (*World Bank*, 23 April 2017) <<http://www.worldbank.org/en/news/press-release/2017/04/23/world-bank-and-aiib-sign-cooperation-framework>> accessed 23 June 2017. Memorandum of Understanding between International Bank for Reconstruction and Development-International Development Association-International Finance Corporation-Multilateral Investment Guarantee Agency and The Asian Infrastructure Bank (23 April 2017) <https://www.aiib.org/en/news-events/news/2017/_download/world-bank-aiib-sign-cooperation-framework.pdf> accessed 23 June 2017.

27 Memorandum of Understanding for Strengthening Co-operation between Asian Development Bank and Asian Infrastructure Investment Bank (2 May 2016) <<https://www.adb.org/sites/default/files/institutional-document/185034/adb-aiib-mou.pdf>> accessed 23 June 2017.

28 Bloomberg News, 'China's Answer to the World Bank Pledges to Do More by Itself' (*Bloomberg News*, 18 June 2017) <<https://www.bloomberg.com/news/articles/2017-06-18/aiib-pledges-to-do-more-by-itself-as-regional-influence-expands>> accessed 23 June 2017.

29 China Exim Bank, 'Preferential Facilities' <http://english.eximbank.gov.cn/tm/en-TCN/index_640.html> accessed 23 June 2017. It has been commented that the real powerhouse

infrastructure projects can apply for loans, seller's credit and buyer's credit to the Exim Bank and China Development Bank. China's commercial banks, mainly the big four state-owned banks, are also engaged by providing credit.³⁰

The Karot Hydropower Station Project in Pakistan exemplifies a typical PPP project under the B&R Initiative. The main sponsor of the Karot Hydropower Station is China Three Gorges South Asia Investment Limited, an investment arm of the mighty SOE China Three Gorges Corporation. The sponsor formed the SPV project company, the Karot Power Company Limited, to develop the hydropower station along the Jhelum River in northeast Pakistan. The Power Purchase Agreement was signed between the project company and the Central Power Purchasing Agency, the utility company wholly owned by the Government of Pakistan. The project was scheduled as 5 years of construction and 30 years of concession. The project is funded by the Industrial and Commercial Bank of China (a state-owned commercial bank), China Development Bank, the World Bank, and the Silk Road Fund. The contractors responsible for constructing the station are two Chinese SOEs, the China Three Gorges Corporation and China Machinery Engineering Corporation.³¹

2.3 *Project Risks*

Foreign investment in the infrastructure sector is usually exposed to heightened risks. Smooth implementation of infrastructure PPP is rare. A high percentage³² of PPP contracts undergoes repeated renegotiation that may lead to substantial changes in the project.³³ The high incidence of PPP renegotiation is due to the PPP projects' inherent characteristics, such as its highly complicated nature of the contract arrangement, the long duration of the project during which time significant political and economic changes can happen. Large scale infrastructure projects are politically sensitive. Historically provided by the government, infrastructure projects sponsored by foreign investors can

of China's economic diplomacy resides in its policy banks, rather than the China-led multilateral financial institutions which are much smaller in size. See Tom Miller, *China's Asian Dream: Empire Building along the New Silk Road* (Zed Books 2017) 42.

30 Joshua Yau, 'Chinese Outbound Funding' (PwC Strategy&, Greater China) <http://www.un.org/esa/ffd/wp-content/uploads/sites/2/2015/10/PPP-Overseas-Fiscal_vSend-for-UN-Portion.pdf> accessed 23 June 2017.

31 Karot Power Company (PVT) LTD, '720MW Karot Hydropower Project' (*Karot Power*) <<https://www.karotpower.com/cms/lib/downloadfiles/1461214629COMPANY%20BROCHURE.pdf>> accessed 23 June 2017.

32 José Luis Guasch & Daniel Benitez & Irene Portabales & Lincoln Flor, 'The Renegotiation of PPP Contracts: An Overview of its Recent Evolution in Latin America' [2014] OECD International Transport Forum Discussion Papers, 7.

33 *ibid* 9.

trigger political protests, leading host governments to yield to public pressure and suspend or cancel the already contracted project.³⁴ They can also become easy targets when a new administration comes to power and uses foreign sponsored projects to denounce the political rival that authorized the project.³⁵ Political risks are particularly acute in developing countries that make up most of the B&R members. Macroeconomic slowdown can trigger a host government's emergency action that reneges on commitments to maintain minimum prices for infrastructure use. The devaluation of the host country's currency can significantly undermine the bankability of the project.³⁶

Relatively new to international infrastructure development, Chinese investors are at times short of legal sophistication in overseas investing. For example, it is a widely used practice among Chinese contractors to win a tender by offering a low bidding price and then raise the price through contract renegotiation as the construction proceeds in domestic projects. However, the markup strategy is strictly scrutinized or even prohibited in many countries, as illustrated in the failed A2 highway project contracted between the Polish government and the Chinese contractor Covec.³⁷ Covec won the open tender by proposing a bidding price significantly lower than that of the competitors. It was reported that Covec did not even examine the details of its contract and was not aware of the prohibition on price markup under the Polish Public Procurement Law before bidding.³⁸

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- 34 Anti-Chinese sentiment has led the transitional government in Myanmar to suspend the construction of the \$3.6 billion Chinese-financed Myitsone Dam. For details, see Mike Ives, 'A Chinese-Backed Dam Project Leaves Myanmar in a Bind' (*New York Times*, 2 April 2017) 6 <https://www.nytimes.com/2017/03/31/world/asia/myanmar-china-myitsone-dam-project.html?_r=1> accessed 28 June 2017. See also Miller (n 29) 125–136.
- 35 The controversy over Chinese investment in the Sri Lanka's Colombo Port City illustrates the political risks faced by international infrastructure contracts. Under the Rajapaks administration, China was granted to a number of infrastructure projects among which the 1.4 billion USD Colombo Port City was the biggest one. After Siresena defeated Rajapaks in the 2014 Presidential election, he suspended the Port City project on allegations of corruption during the bidding process. See Jeff Smith, 'China's Investment in Sri Lanka: Why Beijing's Bonds Come at a Price' (*Foreign Affairs*, 23 May 2016) <<https://www.foreignaffairs.com/articles/china/2016-05-23/chinas-investments-sri-lanka>> accessed 28 June 2017.
- 36 Thomas Walde, 'Treaties and regulatory risk in infrastructure investment' (2000) 34(2) *J World Trade*, 1, 5.
- 37 Jan Cienski, 'Poland to China: You're Fired' (*Financial Times*, 14 June 2011) <<http://blogs.ft.com/beyond-brics/2011/06/14/poland-to-china-youre-fired/>> accessed 28 June 2017.
- 38 Weifeng Ni, 'How to Ruin Overseas Projects: China Railway's Frustrated Investment in Poland' (translated from Chinese) (*Caixin*, 23 July 2011) <<http://finance.sina.com.cn/chanjing/sdbd/20110725/121810202007.shtml>> accessed 3 August 2017.

A realistic assessment of projects risks is essential. The discontinued case *Beijing Urban Construction Group v. Yemen*³⁹ serves as a telling example. The claimant, a Chinese contractor, was awarded a 115 million USD contract to build a new terminal at Sanaa Airport by the Yemeni government in 2006. The construction was substantially delayed due to disagreements over designing standards between the Chinese contractor and the Dutch consulting firm hired by the Yemeni government. The Yemeni government refused to pay the claimant under the contract's payment schedule. The claimant, believing that the Yemeni government would not default under Chinese government's pressure, chose to proceed with its construction anyway. After the claimant finished the main part of the construction and shipped decorative materials from China to Yemen, the Yemeni government still refused to pay and forfeited the \$30 million performance bond.⁴⁰

However, such complications are not inevitable. Investors have a few tools to mitigate the political risks, including political risk insurance through the Multilateral Investment Guarantee Agency, allocating risks to the government under the project documents, and bilateral investment treaties (BITs). The next section turns to examine the level of protection the BITs between China and the B&R countries provide to Chinese investors in overseas infrastructure development. The other two approaches are beyond the scope of the paper, but are equally important for managing political risks arising from adverse government actions.

3 Investment Protection under the BITs between China and the Belt & Road Countries

China has been actively negotiating BITs since it signed its first BIT with Sweden in 1982.⁴¹ Up to now, China is party to 110 BITs that are in force (second

39 *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction (31 May 2017) (*BUCG v Yemen*).

40 Baoqing Han, 'Dispute Settlement of Overseas Contracted Projects by ICSID Arbitration: A Feasibility Analysis Based on Beijing Urban Construction Group's Case against Republic of Yemen' (2015) *Journal of International Trade* (Chinese) 168.

41 Nils Eliasson, 'The Chinese Investment Treaty Programme, Jurisdictional Challenges and Investment Planning: The Example of Chinese Outbound Investments in the Natural Resources Sector' in Wenhua Shan and Su Jinyuan (eds), *China and international investment law: Twenty years of ICSID membership* (Nijhoff 2015) 235; Martin Endicott, 'China and International Investment Law: An Evolving Relationship' in Wenhua Shan and Su Jinyuan (eds), *China and international investment law: Twenty years of ICSID membership*

only to Germany which has concluded 131 BITs), and 18 treaties with investment provisions.⁴² China has concluded investment agreements with the majority of the B&R countries, except for Afghanistan, Brunei, Bangladesh, Bhutan, Iraq, Jordan,⁴³ Maldives, Nepal, Montenegro, Palestine, Timor-Lest. Negotiations between China and the EU⁴⁴ to conclude a BIT are under way.⁴⁵

China's BITs have gone through significant changes.⁴⁶ Depending on the Model BIT and the course of negotiations at the time, these treaties may be grouped into different generations of BITs.⁴⁷ The first generation of Chinese BITs, concluded roughly between 1982–89, provides for either no Investor-State dispute settlement (ISDS) or ISDS only for disputes relating to the amount

(Nijhoff 2015) 215–216; Norah Gallagher, 'Role of China in Investment: BITS, SOEs, Private Enterprises, and Evolution of Policy' (2016) 31(1) *ICSID Review* 88, 93.

42 UNCTAD, 'International Investment Agreements Navigator' (Investment Policy Hub) <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu>> accessed 26 June 2017.

43 The BIT between China and Jordan was signed in 2001 but has not entered in force.

44 With the entry into force of the Lisbon Treaty in 2009, the EU now enjoys an exclusive competence over 'foreign direct investment' and will be negotiating on behalf of all EU member states. On the scope of this competence see the European Court of Justice's opinion, ECJ, Opinion 2/15 (16 May 2017). See also Siegfried Fina and Gabriel M Lentner, 'The Scope of the EU's Investment Competence after Lisbon' (2016) 14 *Santa Clara Journal of International Law* 419. Existing BITs between EU member states and China will continue to apply in accordance with the 'Grandfathering-Regulation', Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries OJ L 351/2012, 40.

45 The negotiations started in 2013 and on 15 January 2016 the EU Commission reported that the EU and China agreed on the scope of the future IIA, see European Commission, 'EU and China agree on scope of the future investment deal' (15 January 2016, Press Release) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1435>> accessed 21 June 2017. See also Jeremy Clegg and Heinrich Voss, 'The new two-way street of Chinese direct investment in the European Union' (2016) 5(1–2) *China-EU Law J* 79.

46 Wei Shen, 'Expropriation in Transition: Evolving Chinese Investment Treaty Practices in Local and Global Contexts' [2015] *Leiden Journal of International Law* 579, 601; Congyan Cai, 'Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice' (2006) 7 *Journal of World Investment & Trade* 621, 636; M. C E Heymann, 'International Law and the Settlement of Investment Disputes Relating To China' (2008) 11(3) *Journal of International Economic Law* 507, 524.

47 Norah Gallagher, 'China's BIT's and Arbitration Practice: Progress and Problems' in Wenhua Shan and Su Jinyuan (eds), *China and international investment law: Twenty years of ICSID membership* (Nijhoff 2015) 184; J. R Weeramantry, 'Investor-State Dispute Settlement Provisions in China's Investment Treaties' (2012) 27(1) *ICSID Review* 192, 193. See generally Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (OUP 2009) 35–43.

of compensation for expropriation.⁴⁸ The second generation from 1990–97 adopts a more liberalized, unconditional reference to ISDS in some BITS, but it is difficult to establish a general pattern in the treaty practice during that time.⁴⁹ The third generation, from 1998–2009, provides for comprehensive ISDS, particularly through the International Centre for Settlement of Investment Disputes (ICSID).⁵⁰ Finally, the most recently concluded Chinese BITS adopt a modern approach that seeks to balance investor protection with host states' interests. This categorization has been followed by many studies on China's investment treaties to identify patterns of evolution, but it underestimates many nuanced differences among BITS. BITS have to be viewed in their own different political, economic and temporal context.⁵¹ Interpretation of BITS is made on a treaty by treaty basis. This analysis seeks to make no general assumptions about the BITS but to examine each BIT on its own. However, due to the large number of treaties and the limited space available, the following

48 The following first generation BITS with B&R countries are in force: China-Singapore BIT (1985); China-Thailand BIT (1985); China-Kuwait BIT (1985); China-Sri Lanka BIT (1986); China-Malaysia BIT (1988); China-Poland BIT (1988); China-Bulgaria BIT (1989). See also Julien Chaisse and Christian Bellak, 'Navigating the Expanding Universe of Investment Treaties – Creation and Use of Critical Index' (2015) 18(1) *Journal of International Economic Law* 79–115; Julien Chaisse, 'The Shifting Tectonics of International Investment Law – Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region' (2015) 47(3) *George Washington International Law Review* 563–638.

49 The following second generation BITS with B&R countries are in force: China-Turkey BIT (1990); China-Mongolia BIT (1991); China-Czech Republic BIT (1991); China-Hungary BIT (1991); China-Philippines BIT (1992); China-Vietnam BIT (1992); China-Kazakhstan BIT (1992); China-Kyrgyzstan BIT (1992); China-Turkmenistan BIT (1992); China-Armenia BIT (1992); China-Greece BIT (1992); China-Moldova BIT (1992); China-Ukraine BIT (1992); China-Laos BIT (1993); China-Tajikistan BIT (1993); China-United Arab Emirates BIT (1993); China-Albania BIT (1993); China-Belarus BIT (1993); China-Croatia BIT (1993); China-Estonia BIT (1993); China-Georgia BIT (1993); China-Lithuania BIT (1993); China-Slovenia BIT (1993); China-Indonesia BIT (1994); China-Egypt BIT (1994); China-Azerbaijan BIT (1994); China-Romania BIT (1994); China-Israel BIT (1995); China-Oman BIT (1995); China-Serbia BIT (1995); China-Cambodia BIT (1996); China-Lebanon BIT (1996); China-Saudi Arabia BIT (1996); China-Syria BIT (1996); China-Macedonia BIT (1997).

50 The following third generation BITS with the B&R countries are in force: China-Yemen BIT (1998); China-Bahrain BIT (1999); China-Iran BIT (2000); China-Myanmar BIT (2001); China-Bosnia and Herzegovina BIT (2002); China-Slovakia BIT (2005); China-India BIT (2006); China-Russia BIT (2006); China-Pakistan FTA Chapter 9 (2006). The China-Qatar BIT (1999) does not provide dispute settlement at the ICSID.

51 JR Weeramantry, 'Investor-State Dispute Settlement Provisions in China's Investment Treaties' (2012) 27(1) *ICSID Review* 192, 193.

section adopts the nomenclature of the three generation to provide an accessible analysis of all the BITs between China and the B&R countries.⁵²

This section does not attempt to analyse every constituent element of the BITs between China and the B&R countries. It addresses investment law issues that are most likely to arise in arbitral proceedings. The analysis of each legal issue will start with a survey of the BITs, followed by a brief review of the case law, and then addresses its application to infrastructure investment disputes.

3.1 *Definition of Investment*

Both the first generation and the second generation of Chinese BITs with the B&R countries define 'investment' as 'every kind of asset' with a non-exhaustive list of examples.⁵³ The third generation of BITs makes a few changes, such as adding 'similar rights' to the list of examples of property rights, introducing 'debentures' in parallel to 'shares', adding 'stock' as an example of corporate participation,⁵⁴ and adding the qualifier 'associated with an investment' to 'claims to money and other performance having an economic value'.⁵⁵ The third generation of BITs also expands the coverage of business concessions from only 'those conferred by law' to 'under contract permitted by law'.⁵⁶

All the BITs between China and the B&R countries include the qualification of 'in accordance with its laws and regulations' to the definition of investment.⁵⁷ This requirement is important in that investments made not in accordance with the host state's laws and regulations do not enjoy the

52 Yongjie Li, 'Factors to be Considered for China's Future Investment Treaties' in Wenhua Shan and Su Jinyuan (eds), *China and international investment law: Twenty years of IC-SID membership* (Nijhoff 2015) 174; Wenhua Shan and Norah Gallagher, 'China' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (1st edn. Oxford University Press 2013) adopt the three generations categorization. For a two generation categorization, see Eliasson (n 41) 238–239.

53 Shan and Gallagher (n 52) 147. See further Gallagher and Shan, *Chinese Investment Treaties* (n 47) 59–67.

54 For example, the China-Iran BIT (2000) reads in Art 1(1)(b) 'shares, debentures, stocks and any other kind of participation in companies'. See also China-Myanmar BIT (2001); China-Bosnia and Herzegovina BIT (2002); China-Czech Republic BIT (2005); China-India BIT (2006); China-Pakistan FTA (2006); China-Russia BIT (2006) for almost exact same wording. The China-Uzbekistan BIT (2011) omits 'debentures' and only refers to 'shares, stock and any other kind of participation in companies'.

55 Shan and Gallagher (n 52) 147. See e.g., China-Iran BIT (2000); China-Myanmar BIT (2001); China-Bosnia and Herzegovina BIT (2002); China-Czech BIT (2005); China-China-Pakistan FTA (2006); China-Russia BIT (2006); China-Uzbekistan BIT (2011). The China-Slovakia BIT (1991) and the China-India BIT (2006) omits this qualification.

56 *ibid.*

57 Shan and Gallagher (n 52) 148.

protections of the treaty,⁵⁸ as *Inceysa Vallisoletana v El Salvador*⁵⁹ and *Fraport v Philippines*⁶⁰ illustrate. This issue also came up in *BUCG v Yemen*, where the Respondent contested the Tribunal's jurisdiction by claiming that the disputed investment was not made 'in accordance with Yemeni laws and regulations, which required registration to gain protection under the BIT.'⁶¹ The Tribunal rejected the Respondent's claim, reasoning that 'there is no express provision of the China-Yemen BIT that imposes a requirement to obtain registration for an investment to be protected by the BIT.'⁶²

Another requirement relates to the objective qualifications of the definition of 'investment'. Most Chinese BITs do not include express objective qualifications,⁶³ as compared to the 2012 US Model BIT.⁶⁴ However, the most recent B&R BITs include a similar reference. The China-Uzbekistan BIT (2011) provides such qualification in its definition of investment, stating that '[t]he term "investment" means every kind of assets that has the characteristics of an investment', and further adding that '[t]he characteristics of an investment mean the commitment of capital or other resources, the expectation of gain of profit, and the assumption of risk.'⁶⁵

As most B&R projects will be financed through loans, the question arises whether the loans are 'investments' for the purpose of the applicable BITs. The illustrative list of examples of particular assets covered by the BITs include five categories of investments, i.e., moveable and immovable property, interests in companies, contractual rights, intellectual property rights,⁶⁶ and business

58 *ibid.*

59 *Inceysa Vallisoletana SL v El Salvador*, Award, ICSID Case No ARB/03/26 (2 August 2006).

60 *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, Award, ICSID Case No ARB/03/25 (16 August 2007).

61 *BUCG v Yemen*, para 122.

62 *BUCG v Yemen*, para 45. The Tribunal reasoned that "The registration requirement under the Yemen Investment Law is the gateway to the privileges and protections set out in that law. But it does not serve as the gateway to the privileges and protections maintained by the China-Yemen BIT." *ibid* para 46.

63 Gallagher and Shan, *Chinese Investment Treaties* (n 47) 59.

64 The US Model BIT adds to the definition of 'investment' that it covers every asset 'that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.'

65 China-Uzbekistan BIT (2011), art 1.

66 On the issue of the protection of IP through investment agreements see e.g., Henning Grosse Ruse-Khan, 'The Protection of Intellectual Property and International Investment Law' (2016) 19(1) *Journal of International Economic Law* 87; Siegfried Fina and Siegfried Fina and Gabriel M Lentner, 'The European Union's New Generation of International Investment Agreements and Its Implications for the Protection of Intellectual Property Rights' (2017) 18(2) *The Journal of World Investment & Trade* 271.

concession.⁶⁷ Moveable and immovable property has a broad coverage, including 'legal interests in property that are less than full ownership, such as mortgages and pledges. Liens, usufruct, and other similar rights sometimes are also included,'⁶⁸ and 'interests in companies', which not only covers shares and stocks but also other rights and interests such as debentures, loans, and bonds, and no controlling stake is required.⁶⁹ On this specific issue, the *Fedax* Tribunal confirmed that loans and other credit facilities fell within the competence of the ICSID Convention and the BIT.⁷⁰ The Tribunal reasoned that the basic features of an investment involved 'a certain duration, assumption of risk, a substantial commitment and a significance for the host state's development.'⁷¹ It held that the transaction at issue, i.e. promissory notes, meets these basic features.⁷² It follows that the loans financing B&R projects are investment for the purpose of the applicable BITs under both treaty law and case law.

In the ASEAN-China Investment Agreement, the definition of 'investment' includes a reference in the footnote that 'business concessions' included in the non-exhaustive list cover 'contractual rights such as those under turnkey, construction or management contracts, production or revenue sharing contracts, concessions, or other similar contracts and *can include* investment funds for projects such as Build-Operate and Transfer (BOT) and Build-Operate and Own (BOO) schemes.'⁷³ The qualification 'can include' points to a case-by-case approach to BOT and BOO schemes and arguably means that BOT and BOO schemes do not automatically fall under the protection of the ASEAN-China Investment Agreement.

67 Shan and Gallagher (n 52) 150.

68 Gallagher and Shan, *Chinese Investment Treaties* (n 47) 60.

69 *ibid.*

70 *Fedax NV v The Republic of Venezuela*, Decision on Jurisdiction (11 July 1997) ICSID Case No ARB/96/3 para 43. The applicable BIT was the Netherlands-Venezuela BIT (1991). Investment is defined in Article 1, similar as those used in China's BITs as 'the term 'investments' shall comprise every kind of asset and more particularly though not exclusively: i. movable and immovable property, as well as any other rights in rem in respect of every kind of asset; ii. rights derived from shares, bonds, and other kinds of interests in companies and joint-ventures; iii. title to money, to other assets or to any performance having an economic value; iv. rights in the field of intellectual property, technical processes, goodwill and know-how; v. rights granted under public law, including rights to prospect, explore, extract, and win natural resources'. Similarly, *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999) para 76ff.

71 *Fedax* (n 70) para 43.

72 *ibid.*

73 Article 1(1)(iv) fn 2.

In conclusion, Chinese BITs generally adopt a broad asset-based definition of ‘investment’, which is subject to the requirements that they are being made in accordance with the laws and regulations of the host state.⁷⁴ Infrastructure investments and their financing are generally covered as investment for the purpose of the applicable BITs.

3.2 *Definition of Investor*

An important question for the definition of ‘investor’ in China’s BITs relates to state-owned enterprise investors.⁷⁵ No Chinese BIT to date expressly excludes state-owned or controlled entities or sovereign wealth funds, and in principle those would be covered by the existing definition.⁷⁶ This is particularly important for infrastructure projects under the B&R Initiative, since those investments are mostly made by Chinese SOEs.⁷⁷ Whether or not a specific Chinese SOE investor falls outside this definition will have to be assessed on a case-by-case basis, as suggested by the case law.⁷⁸ More recently, treaties include specific references to ‘public institution’⁷⁹ or ‘governmentally owned or controlled’⁸⁰ investors as being protected under the BIT at issue.⁸¹

This issue was raised in *BUCG v Yemen*.⁸² The investor in this case, BUCG, is a wholly state-owned company in China. The Tribunal sitting on this case

74 Shan and Gallagher (n 52) 150–151.

75 *ibid* 151.

76 Gallagher, ‘Role of China in Investment’ (n 42) 99.

77 Chinese investment abroad is generally made through such entities, see e.g., Shan and Gallagher (n 52) 155; Karl P Sauvants and Michael D Nolan, ‘China’s Outward Foreign Direct Investment and International Investment Law’ [2015] *J Int Economic Law* 893–934, 895. See also Julien Chaisse, Debashis Chakraborty, and Jaydeep Mukherjee ‘Sovereign Wealth Funds as Corporations in the Making – Assessing the Economic Feasibility and Regulatory Strategies’ (2011) 45(4) *Journal of World Trade* 837–875.

78 The landmark case on this issue grants protection to SOEs under the condition that they do not ‘perform State functions’, *CSOB v Slovak Republic*, ICSID Case No ARB/97/4, Decision on Jurisdiction (24 May 1999) para 23–27. See also Gallagher, ‘Role of China in Investment’ (n 42) 100; Mark Feldman, ‘The Standing of State-Owned Entities under Investment Treaties’ in Karl P Sauvants (ed), *Yearbook on International Investment Law & Policy* (OUP 2012) 615; Mark Feldman, ‘State-Owned Enterprises as Claimants in International Investment Arbitration’ (2016) 31(1) *ICSID Review* 24; Sauvants and Nolan (n 78) 917–918. See for an extensive analysis, Claudia Annacker, ‘Protection and Admission of Sovereign Investment under Investment Treaties’ (2011) 10(3) *Chinese Journal of International Law* 531.B.

79 See e.g., China–Korea BIT (2007), art 1(2)(b).

80 China–ASEAN FTA (2009), art 1(f); China–Japan–Republic of Korea TIT (2012), art. 1(4).

81 Sauvants and Nolan (n 78) 916. See also China–UAE BIT (1993), art 1(2)(b)(2).

82 *BUCG v Yemen* (n 39) para 29ff.

adopted the ‘Broches test’,⁸³ which requires that a SOE should not be disqualified as a ‘national of another Contracting State’ unless it is ‘acting as an agent for the government or is discharging an essentially governmental function.’⁸⁴ For the Tribunal, the key question is not the corporate framework of the SOE, but whether it functions as an agent of the State, which is to be assessed on a case-by-case basis.⁸⁵ In this case, the tribunal found that BUCG was not fulfilling Chinese governmental functions in Yemen.⁸⁶ This ruling and other precedents⁸⁷ point to the conclusion that as long as the SOEs are not fulfilling governmental functions, they would be considered as investors for the purpose of the applicable BITs.

3.3 Fair and Equitable Treatment

All Chinese BITs with the B&R countries include provisions that provide for fair and equitable treatment (FET), except the BITs with Turkey, Romania, and Belarus.⁸⁸ The majority of China’s BITs do not define the content and the scope of the FET standard, except a few recent ones that include substantive elements in referring to the FET standard such as ‘fairly judicial proceedings’,⁸⁹ and prohibition against ‘any discriminatory measures that might hinder management and disposal activities in connection with investments.’⁹⁰ A large number of

83 This test was adopted and applied in other cases, such as in *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic*, ICSID Case No ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999) para 17; *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Objections to Jurisdiction (25 January 2000) para 80; *Runeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) para 212.

84 Cited in *BUCG v Yemen* (n 39) para 33.

85 *BUCG v Yemen* (n 39) para 39.

86 *BUCG v Yemen* (n 39) para 44.

87 See (n 83).

88 China-Bahrain BIT (1999), China-Poland BIT (1988), China-Pakistan (1989) and China-Hungary BIT (1991) in Art 3 only refer to ‘equitable treatment’ without the word ‘fair’. However, this does not seem to suggest a different interpretation of the standard. According to the rules of interpretation codified in Articles 31 and 32 of the VCLT, a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. The word ‘equitable’ means ‘Fair and impartial’ according to the Oxford Dictionary online, which leads to the conclusion that no difference in meaning exists between both terms (<https://en.oxforddictionaries.com/definition/equitable>).

89 China-Uzbekistan BIT (2011), art 5(2).

90 China-Russia BIT (2006), art 3(1). China-Bosnia and Herzegovina BIT (2002) art 2(2) uses similar wording.

China's BITS do not subject the FET standard to any criteria.⁹¹ In a few cases, they subject the FET standard to the domestic law of the host country,⁹² and very rarely refer to the FET standard as 'in accordance of commonly accepted rules of international law'.⁹³ Most Chinese BITS with the B&R countries refer to the FET standard in a separate clause. A few include it in the Preamble, which may render a merely hortatory effect instead of imposing a legal obligation.⁹⁴

FET based claims have replaced expropriation as the most popular litigation strategy in ISDS.⁹⁵ It is the most frequently invoked standard in ISDS, the violation of which is the basis of the majority of successful claims in international arbitration.⁹⁶ The FET standard is intended to 'fill gaps which may be left by the more specific standards';⁹⁷ and may offer 'redress where the facts do not support a claim for expropriation'.⁹⁸ Increasingly, the prominence of the FET standard in ISDS has come under mounting criticism that it unduly favours investors and threatens to restrict legitimate regulatory autonomy of the host countries.⁹⁹

91 China-Albania BIT (1993), art 3(1), China-Bulgaria BIT (1989), art 3(1), China-Cambodia BIT (1996), art 3(1), China-Malaysia BIT (1988), art 2(2), China-Poland BIT (1988), art 3(1), China-Azerbaijan BIT (1994), art 3(1), China-Israel BIT (1995), art 2(2), China-Oman BIT (1995), art 2(2), China-Saudi Arabia BIT (1996), art 2(1), China-Pakistan BIT (1989), art 3(1), China-ASEAN FTA (2009), art 7(1).

92 For example, China-Pakistan BIT (1989), art 3(1) provides that 'Investment and activities associated with Investments of investors of either Contracting Party shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting Party.' China-Tunisia BIT (2006), art 3(1) provides that 'Investments of investors of each Contracting Party shall at all time be accorded fair and equitable treatment in the territory of the other Contracting Party.'

93 China-New Zealand FTA (1988), art 143 (1).

94 Shan and Gallagher (n 52) 127.

95 UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2016' (IIA Issues Note, May 2017) 4; M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment*, (CUP 2015) 298; UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, 10; Christopher Schreuer, 'Fair and Equitable Treatment' in Anne K Hoffmann (ed) *Protection of Foreign Investments through Modern Treaty Arbitration – Diversity and Harmonisation* (Association Suisse de l'Arbitrage 2010) 135.

96 Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, (OUP 2013) 4. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2012) 131. See also UNCTAD, *Fair and Equitable Treatment* (n 95).

97 Dolzer and Schreuer (n 96) 132.

98 *ibid.* The significance of the FET standard as a guarantee for the investors is further elevated by the recognition of regulatory expropriation and the increasing difficulty in finding of expropriation. See Sornarajah (n 95) 246.

99 See Gus Van Harten and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (2016) *Journal of International*

The FET standard is particularly important for infrastructure projects where the government is deeply involved as a contracting party. At the centre of the FET claims is the issue of the investor's legitimate expectations.¹⁰⁰ A couple of Tribunals have addressed the application of the FET standard in infrastructure disputes. In *Total v Argentina*, the Tribunal found that the failure to readjust the tariffs of gas transportation utilities according to principles of 'economic equilibrium and business viability' violated the FET standard.¹⁰¹ In *Garanti Koza v Turkmenistan*, a case that concerned the contracts to build highway bridges, the Tribunal found that the Turkmenistan government violated the FET standard by forcing the claimant to use specific progress payment invoice that would reduce the compensation.¹⁰² However, failure to respect the contract does not automatically amount to a violation of the FET standard. The Tribunal in *Waste Management Inc v United Mexican States (II)* found that the city's failure to make payments under a concession agreement due to financial difficulty did not 'amount to an outright and unjustified repudiation of the transaction'.¹⁰³

The jurisprudence on the FET standard is characterized by inconsistency. The minimalist wording of most FET clauses, of which the FET clauses in Chinese BITs exemplify, is prone to diverse interpretation.¹⁰⁴ Arbitral tribunals decide the content of the FET standard on a case by case basis, for example, by taking into account the specific circumstances of the host state at issue in

Dispute Settlement 92; Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2014) U. Pa. J. Int'l L. 1; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 168–173. Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' [2009] NYU School of Law, Public Law Research Paper No. 09–46.

100 For the evolution of the jurisprudence on legitimate expectation, see Michael Potesta, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28(1) *ICSID Review* 88. See also Julien Chaisse, 'Exploring the Confines of International Investment and Domestic Health Protections – General exceptions clause as a forced perspective' (2013) 39(2/3) *American Journal of Law & Medicine* 332–361 and Julien Chaisse, 'The Issue of Treaty Shopping in International Law of Foreign Investment – Structuring (and restructuring) of investments to gain access to investment agreements' (2015) 11(2) *Hastings Business Law Review* 225–306.

101 *Total v Argentine Republic*, Decision on Liability, ICSID Case No ARB/04/01 (27 December 2010) para 168.

102 *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Award (19 December 2016) paras 382–83.

103 *Waste Management Inc v United Mexican States (II)*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004) para 115.

104 Somarajah (n 95) 247–250, 253. UNCTAD, *Fair and Equitable Treatment* (n 95) 11.

some cases while others do not.¹⁰⁵ Although a few principles have been identified by arbitral tribunals as the key elements of the FET standard, such as protection of the investor's legitimate expectations, procedural propriety and due process, the case law is not consistent.¹⁰⁶ The uncertainty in the interpretation and application of the FET standard is further aggravated by the different formulations of the FET clause.¹⁰⁷ In the case of the BITs between China and the B&R countries, some have unqualified FET clauses while others have FET clauses qualified by national laws of the host state or principles of international law accepted by both Contract Parties. Not only do the arbitral tribunals draw a distinction between the different types of clauses in interpreting and applying the FET standard, they also develop different reasoning for the same type of FET clause under different BITs.¹⁰⁸ Overall, despite the popularity of FET claims in ISDS, it would be 'difficult to expect such consistency in a system where numerous one-off arbitral tribunals adjudicate disputes under a variety of differently formulated standards and factual situations and furthermore in the absence of an effective appellate review.'¹⁰⁹

3.4 National Treatment

National treatment (NT) is not widely used in China's BIT practice, due to its planned economy legacy.¹¹⁰ The first generation BITs did not contain a NT

105 Dolzer and Schreuer (n 96) 139. For uncertainty in the case law on the relationship between the FET standard and the circumstances of the host state, see Nick Gallus, 'The Fair and Equitable Treatment Standard' in Chester Brown and Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 223–245.

106 UNCTAD, *Fair and Equitable Treatment* (n 95) 61–88. Take the protection of investor's legitimate expectation for example, the principle was first developed in *Tecmed v Mexico*, ICSID Case No ARB (AF)/00/ 2, Award (29 May 2003). A large number of later cases affirmed this principle. See *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005); *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Award (22 May 2007); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012). In applying these principles, some arbitral tribunals add qualification to the legitimate expectations approach that expectations must be based on objectively verifiable facts. See *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award (17 March 2005); *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007).

107 UNCTAD, *Fair and Equitable Treatment* (n 95) XIV.

108 Dolzer and Schreuer (n 96) 141–142, lists three lines of reasoning. Gallagher and Shan (n 47) 107–113, comparing plain meaning approach with the international minimum standard approach. UNCTAD, *Fair and Equitable Treatment* (n 95) 7–8.

109 UNCTAD *Fair and Equitable Treatment* (n 95), 90.

110 Shan and Gallagher (n 52) 160. It is interesting to note that OECD Draft Convention of 1967 did not contain a NT provision either.

clause at all.¹¹¹ The second generation includes a ‘best endeavours’ or soft NT provision. The third generation provides a NT provision that is subject to domestic law and regulations.¹¹² Furthermore, the NT provisions in China’s BITS do not apply equally to ‘investors’ and ‘investments’ as independent obligations. The NT standard only applies to the treatment of ‘investments’ of investors and not to the treatment of the investors themselves (with the exception of the ASEAN Investment Agreement¹¹³).¹¹⁴

Several BITS signed in the 1990s contain provisions against ‘unreasonable or discriminatory measures’, such as those with Egypt, Israel, Oman, Lebanon, Saudi Arabia.¹¹⁵ These provisions subject these guarantees to the laws and regulations of the host state. This reservation is very significant in that it arguably allows the host state to maintain or introduce legislation that would otherwise be considered ‘unreasonable’ or ‘discriminatory’, only preventing any such measures by other means than laws and regulations, such as individual acts of state officials.¹¹⁶

Later BITS follow China’s Model BIT Version III and provide for NT, which ‘accord treatment in accordance with the stipulations of its laws and regulations to the investments of investors of the other Contracting Party, the same as that accorded to its own investor.’¹¹⁷ Such NT provisions provide no hard legal obligation but only a ‘best-effort’ requirement.¹¹⁸ Moreover, it is subject to the local laws and regulations, which is another significant reservation.¹¹⁹ The

111 See China-Thailand BIT (1985), China-Singapore (1985), China-Kuwait (1985), China-Sri Lanka (1986), China-Malaysia (1988), China-Poland (1988), China-Bulgaria (1989), China-Pakistan (1989), China-Cambodia (1996), China-Azerbaijan (1994), China-Romania (1994). China-Syria BIT (1996) provides national treatment only for Syria, providing in the Protocol that ‘[treatment and protection] in respect of the Syrian Arab Republic, shall not less favorable than that accorded by the Syrian Arab Republic to investments

112 Shan and Gallagher (n 52) 160.

113 Article 4 ASEAN Investment Agreement provides: ‘Each Party shall, in its territory, accord to investors of another Party and their investments treatment no less favourable than it accords, in like circumstances, to its own investors and their investments with respect to management, conduct, operation, maintenance, use, sale, liquidation, or other forms of disposal of such investments.’

114 *ibid.*

115 China-Egypt BIT (1994); China-Israel BIT (1995); China-Oman BIT (1995); China-Lebanon BIT (1996); China-Saudi Arabia BIT (1996).

116 *ibid.* 157; Gallagher and Shan, *Chinese Investment Treaties* (n 47) 167. See also Ibrahim F I Shihata, ‘Recent Trends Relating to Entry of Foreign Direct Investment’, 9 *ICSID Review* (1994) 47, 55.

117 China-Macedonia BIT (1997), art 3(3); China-Serbia BIT (1995), art 3(2).

118 *Ibid.*

119 *Ibid.*

most recent BITs, such as the one with Uzbekistan, provide for NT for both investors and their investments without the, ‘best-effort’ requirement.¹²⁰ Similar wording can also be found in BITs with the Slovak Republic, Russia, and Bosnia and Herzegovina.¹²¹

Nevertheless, the limited NT provisions in existing BITs between China and the B&R countries can be remedied through the Most-Favoured-Nation (MFN) standard. All BITs that do not contain NT provide for MFN treatment, which could be used by investors to invoke NT from third party BITs.¹²²

3.5 *Most-Favoured-Nation Treatment (MFN)*

All the BITs between China and the B&R countries include a standard MFN treatment provision. A typical MFN provision in China’s BIT reads like the following:

The treatment and protection accorded by either Contracting Party within its territory to investors of the other Contracting Party with respect to investments, returns and business activities in connection with investment shall not be less favourable than that accorded to investors of any third country.¹²³

MFN clauses vary in their exact wording, but they generally include the usual exceptions for membership in regional organizations, free trade zones and customs unions. Some are stand-alone provisions, such as in the China-Israel BIT (1995), or combined with national treatment provisions, such as in the China-Czech Republic BIT (2005).¹²⁴

A contentious issue is whether more favourable dispute resolution clauses in other BITs can be incorporated through MFN.¹²⁵ In BITs along the Belt and Road, only the China-Uzbekistan BIT and the ASEAN Investment Agreement

¹²⁰ China-Uzbekistan (2011) BIT Article 3 provides that ‘without prejudice to its applicable laws and regulations, with respect to the management, conduct, maintenance, use, enjoyment, sale or disposal of the investments in its territory, each Contracting Party shall accord to investors of the other Contracting Party and associated investments treatment not less favorable than that accorded to its own investors and associated investments in like circumstances.’

¹²¹ China-Slovakia BIT (1991), art 3(2); China-Russia BIT (2006), art 3(2); China-Bosnia and Herzegovina BIT (2002), art 3(1).

¹²² *ibid* 165.

¹²³ China-Slovakia BIT (1991), art 3(1).

¹²⁴ China-Israel BIT (1995), art 3; China-Czech Republic BIT (2005), art 3.

¹²⁵ Heymann (n 46) 518–521.

explicitly excludes ISDS from the application of MFN.¹²⁶ None of the other BITS expressly refer to dispute resolution. Tribunals have been inconsistent on this issue, with some affirming the possibility of incorporating more favourable dispute resolution clauses from BITS with third States through the MFN clause,¹²⁷ whereas others rejected such approach.¹²⁸ In *ST-AD GmbH v Republic of Bulgaria* the tribunal summarized these inconsistencies stating that:

126 China-Uzbekistan BIT (2011), art 4(3) provides that 'dispute settlement mechanisms stipulated in other treaties shall not be referred to investment disputes in the framework of this Agreement.' Art 5(4) ASEAN Investment Chapter provides that 'For greater certainty, the obligation in this Article [MFN] does not encompass a requirement for a Party to extend to investors of another Party dispute resolution procedures other than those set out in this Agreement.' Also the New Zealand FTA and the Canada BIT contain such clause. See also Christoph Schreuer, 'The Development of International Law by ICSID Tribunals' (2016) 31(3) *ICSID Review* 728.

127 The first ICSID case to deal with this issue and deciding in favor of incorporation was *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000). See also *RosInvestCo UK Ltd v Russia*, SSC Case No Arbitration V 079 / 2005, Award on Jurisdiction (October 2007).

128 *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005). Arguments to the effect that an arbitration clause may be affected by the treaty's MFN provision have been accepted in *Camuzzi International SA v República Argentina*, ICSID Case No ARB/03/7, Decision on Jurisdiction (10 June 2005); *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No ARB/03/17, Decision on Jurisdiction (16 May 2006); *Telefónica SA v Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006); *National Grid plc v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006); *AWG Group v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction (3 August 2006); *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011); *Teinver SA, Transportes de Cercanías SA, and Autobuses Urbanos del Sur SA v Argentine Republic*, ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012). Such arguments have, however, been rejected by the tribunals in *Técnicas Medioambientales Tecmed SA v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003); *Salini Construttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Award (31 January 2006); *Vladimir Berschader and Moïse Berschader v The Russian Federation*, SCC Case No. 080/2004, Award (21 April 2006) (with a dissenting opinion by Mr. Todd Weiler); *Telenor Mobile Communications AS v The Republic of Hungary*, ICSID Case No ARB/04/15, Award (13 September 2006); *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008);

Renta 4 SVSA, Ahorro Corporación Emergentes FI, Ahorro Corporación Eurofondo FI, Rovime Inversiones SICAV SA, Quasar de Valores SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA v The Russian Federation, SCC No 24/2007, Award (20 July 2012) (with a separate opinion by Judge Charles N. Brower), *Señor Tza Yap Shum v The Republic of Peru*, ICSID Case No ARB/07/6, Award (7 July 2011); *Austrian Airlines v The Slovak Republic*, UNCITRAL, Award (9 October 2009) (with a dissenting opinion by Judge Charles N. Brower);

[w]hile the Tribunal has paid careful attention to these and other decisions, they clearly reveal that there is no clear arbitral consensus on this issue. Indeed, far from constituting a jurisprudence constante, they reflect a complete lack of consistency, which results from a fundamental difference of views between the various arbitrators.¹²⁹

For Chinese investors, two cases are particularly relevant. First, in *Tza Yap Shum v Peru*,¹³⁰ the Chinese investor invoked MFN in the applicable BIT to incorporate Article 12 of the Peru-Columbia BIT to extend the scope of its jurisdiction over further claims.¹³¹ The Tribunal rejected the Chinese investor's claim, reasoning that the MFN clause at hand 'cannot be interpreted so as to extend the jurisdiction of the Centre as a basis for an independent source of competence of the Tribunal.'¹³² This interpretation was based on the restrictive wording of the dispute resolution clause in Article 8(3) which stated that '[a]ny disputes concerning other matters between an investor of either Contracting Party and the other Contracting Party may be submitted to the Centre if the parties to the disputes so agree.' From this wording it followed that the MFN clause could not be used to widen the scope of consent to arbitration.¹³³ This also means, however, that in treaties that do not contain such restrictive language tribunals could use MFN to invoke more favourable dispute resolution provisions.¹³⁴

In *BUCG v Yemen*, the Tribunal also rejected the incorporation of a broader dispute resolution clause through MFN, relying on the wording 'in the territory' in the applicable MFN clause that treatment:

These words, in the Tribunal's view, tie the MFN to activities that take place "in the territory" associated geographically with the investment. This limitation is not consistent with the Parties giving their consent to the use of the MFN to expand the scope of international arbitration beyond the provisions of Article 10. As pointed out in *IRC v. Argentina*, *supra*

most recently, *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award (22 August 2012) (with a dissenting opinion by Judge Charles N. Brower).

129 *ST-AD GmbH v Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013) para 386.

130 Shen Wei, 'Bilateral Investment Treaties and Indirect Expropriation: *Tza Yap Shum v. Republic of Peru*' (2014) 108 *American Journal of International Law* 315.

131 Norah Gallagher and Wenhua Shan, *Chinese investment treaties: Policies and practice* (Oxford international arbitration series, Oxford University Press 2009) 161-162.

132 *ibid.*

133 Shan and Gallagher (n 52) 192.

134 *ibid* 162; Gallagher, 'China's BIT's and Arbitration Practice: Progress and Problems' (n 48) 208-209.

paragraph 117, international arbitration is not itself an activity “inherently linked to the territory of the [R]espondent.”¹³⁵

In conclusion, recent treaty practice has reacted to this inconsistent case law by expressly rejecting the possibility of incorporating more favourable dispute settlement clauses through MFN. However, the debate regarding the interpretation of old treaties does not seem to have reached an end.¹³⁶ For Chinese investors seeking more favourable dispute settlement in other BITs, much will depend on the composition of the respective tribunal called to decide on this issue.¹³⁷

3.6 Expropriation

Expropriation is another claim frequently invoked by aggrieved investors besides the FET obligation.¹³⁸ The expropriation clause appears in all BITs between China and the B&R countries. Although most of the BITs between China and the B&R countries do not include the term ‘indirect expropriation’, they use different formulation such as ‘having an effect equivalent to’,¹³⁹ ‘tantamount to’¹⁴⁰ to refer to indirect expropriation. The slight variation in wording usually makes little difference in interpretation.¹⁴¹ Like the majority of IIAs, China’s BITs with the B&R countries allow States to expropriate investments as long as the taking is done for the public interest, not discriminatory, takes place in accordance with domestic legal procedure, and is accompanied by compensation.¹⁴² On the issue of how compensation is calculated,¹⁴³ China’s

135 *BUCG v. Yemen* (n 39) para 120.

136 Stephan W Schill, ‘Maffezini v. Plama: Reflections on the Jurisprudential Schism in the application of Most-Favored-Nation Clauses to matters of Dispute Resolution’ [2017] Amsterdam Law School Legal Studies Research Paper 1, 18.

137 Schill (n 136), 19. See also Heymann (n 46) 521.

138 UNCTAD, ISDS (n 95) 4.

139 China-Czech Republic BIT (2005), China-Israel BIT (1995), China-Jordan BIT (2001, not in force), China-Kuwait BIT (1985), China-Mongolia BIT (1991), China-New Zealand BIT (1988), China-Oman BIT (1995), China-Singapore (1985), China-Slovakia BIT (1991), China-Sri Lanka BIT (1986).

140 China-Greece BIT (1992).

141 Jeswald W Salacuse, *The Law of Investment Treaties* (2nd edn, OUP 2015) 328. Also see UNCTAD Expropriation Sequel (UNCTAD Series on Issues in International Investment Agreements II, 2012), at 8, arguing that the notion of expropriation is broad enough to cover both direct and indirect expropriation even when the treaty text does not specifically mention indirect takings.

142 Gallagher and Shan (n 47) 271.

143 See generally on the calculation of compensation and damages, Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd edn, OUP 2017).

BITs with the B&R countries use a variety of formulas. Many of them provide that the compensation shall be equivalent to the value of the expropriated investment;¹⁴⁴ some lists explicit elements to be considered in assessing the compensation, including interest rate and generally recognized principles of valuation;¹⁴⁵ some provide that the compensation shall be at the market value of the expropriated investments;¹⁴⁶ a small number allow the damages to be calculated under the laws of the host state.¹⁴⁷

The practice and the case law of expropriation have gone through considerable changes. The early years of international investment law focused on outright taking of foreign private property by the State during nationalization and decolonization movements. Today, the predominant form of expropriation is indirect expropriation,¹⁴⁸ including measures like disproportionate tax increases, interference with contractual rights, unjustified interference with the management of the investment, revocation or denial of government permits or licenses, etc.¹⁴⁹ The focus of the jurisprudence on expropriation has accordingly shifted from the amount of compensation to what amounts to an indirect taking. States in their defence usually resort to the doctrine of non-compensable regulatory takings.¹⁵⁰

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- 144 China-Albania BIT (1993), art 4(2); China-Azerbaijan BIT (1994), art 4(2); China-Belarus BIT (1993), art 4(2); China-Bulgaria BIT (1989), art 4(2); China-Cambodia BIT (1996), art 4(2); China-Egypt BIT (1994), art 4(2); China-Estonia BIT (1993), art 4(2); China-Georgia BIT (1993), art 4(2); China-Hungary BIT (1991), art 4(2); China-India BIT (2006), art 5(1); China-Iran BIT (2000), art 4(2); China-Lao BIT (1993), art 4(2); China-Mongolia BIT (1991), art 4(2); China-Philippines BIT (1992), art 4(2); China-Poland BIT (1988), art 4(2); China-Saudi Arabia BIT (1996), art 4(2); China-Slovakia BIT (1991), art 4(1)(c); China-Syria BIT (1996), art 4(2); China-Thailand BIT (1985), art 5(1)(a); China-Vietnam BIT (1992), art 4(2).
- 145 China-Bosnia and Herzegovina BIT (2003), art 4(2); China-Czech BIT (2005), art 4(1)(c); China-Greece (1992), art 4(2); China-Kuwait (1985) art 5(1)(iii); China-Latvia BIT (2004), art 4(2); China-Lithuania (1993), art 4(2); China-Malaysia (1988), art 5(2); China-Myanmar BIT (2001), art 4(2); China-Portugal BIT (2005), art 4(2); China-Qatar (1999), art 4(2).
- 146 China-Bahrain BIT (1993), art 4(2); China-Croatia BIT (1993), art 4(2); China-Israel BIT (1995), art 5(1); China-Korea BIT (2007), art 4(2); China-Kuwait (1985), art 5(1)(iii); China-Lebanon BIT (1996), art 4(2); China-Malaysia BIT (1988), art 5(2); China-Oman BIT (1995), art 4(2); China-Romania BIT (1994), art 4(2); China-Russia BIT (2006) BIT, art 4(2); China-Serbia BIT (1995), art 4; China-Slovenia BIT (1993), art 4(2); China-UAE BIT (1993), art 6(3); China-Uzbekistan BIT (2011), art 4(4).
- 147 China-Pakistan BIT (1989), art 4(2); China-Singapore BIT (1985), art 6(1); China-Sri Lanka (1986), art 6(1).
- 148 Salacuse (n 141) 325.
- 149 Salacuse (n 141) 328–334.
- 150 Sornarajah (n 95) 244–245.

Investors face many obstacles in bringing successful expropriation claims against the host state. Although the case law has established that intangible assets, including contract rights, are protected properties subject to expropriation,¹⁵¹ not every failure by a government to perform a contract amounts to expropriation. Arbitral tribunals have distinguished between ordinary breach of contract and an expropriation of contract rights, holding that non-payment by the State under a concession agreement does not amount to an expropriation.¹⁵² State's responsibility under an expropriation provision will only arise if the State breaches its contractual obligation by using methods unavailable to an ordinary contracting party.¹⁵³ Infrastructure investment in the B&R countries are usually structured as a concession or a BOT project. The host government and its SOEs acting in government capacity¹⁵⁴ get directly involved in the partnership in multiple ways, such as entering into a Power Purchase Agreement or becoming a shareholder of the SPV. Although a few BITs between China and the B&R countries provide for protection for foreign shareholders,¹⁵⁵ Chinese investors in general face a high threshold to establish that a breach of contract amounts to indirect expropriation. Even after overcoming this threshold, the investors are faced with a body of highly fragmented case law on indirect expropriation¹⁵⁶ and tribunals increasingly receptive to

151 *Vivendi v Argentina II*, ICSID Case No ARB/97/3, Award (20 August 2007) para 7.5.4.

152 *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/98/2, Award (2 June 2000) para 174; *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction (29 January 2009) para 161. 'A mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal.'

153 See *SGS v Philippines* (n 153); *Waste Management v Mexico II* (n 103); *Consortium RFCC v Royaume du Maroc*, ICSID Case No ARB/00/6, Award (22 December 2003). The tribunal ruled that a breach of contract would constitute a breach of treaty provisions when 'the state or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign.'

154 For the question whether State can be held responsible for a contractual breach by state-owned entities, see Michael Feit, 'Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity' (2010) 28 *Berkeley J Int'l Law* 142.

155 China-Czech Republic BIT (2005), art 4(3). See also Chinese BITs with Kuwait, Lebanon, New Zealand, Oman, Poland, Qatar, Slovakia, Sri Lanka, Thailand, UAE. See Gallagher and Shan (n 47) 293–295.

156 Dolzer and Schreuer (n 96) 112. Tribunals have taken three approaches in distinguishing indirect expropriation and legitimate regulatory takings: the 'sole effects' approach, the treatment of police powers as an exception from expropriation, and a balancing approach that takes both the purpose and effect of host state measures into consideration. See Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting

a balancing approach on investor protection and State's regulatory rights.¹⁵⁷ It is estimated that investors have won only 21 percent of indirect expropriation claims in the last decade.¹⁵⁸

3.7 *Dispute Resolution*

3.7.1 State-State Dispute Settlement

Most investment treaties, including Chinese BITs with the B&R countries, provide for dual tracks of State-State dispute settlement and Investor-State dispute settlement. Despite the co-existence, the investment arbitration practice has been dominated by Investor-State dispute settlement since the 2000s. So far, only three cases have been brought under the State-State dispute settlement provision on claims of diplomatic protection, pure interpretive disputes, and requests for declaratory relief.¹⁵⁹ The limited case law favours Investor-State arbitration and restrictively interprets the scope and availability of State-State arbitration.¹⁶⁰

All Chinese BITs with the B&R countries include a State-State dispute settlement provision. The substance of this provision across treaties is similar, providing for 'amicable settlement through diplomatic channels', usually capped at six months, before the contracting parties agree to submit the dispute to an *ad hoc* arbitral tribunal.¹⁶¹

Proportionality Analysis and the Standard of Review in Investor-State Arbitration' [2012] *Journal of International Economic Law* 223, 225. Also see Steven Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 *American Journal of International Law*, 475, explaining how the different institutional settings can impact the decisions on regulatory takings and contribute to the fragmentation of investment law.

157 UNCTAD, ISDS (n 95) 28. A prominent example is *Philip Morris v Uruguay*, where the Tribunal fully dismissed Philip Morris's claims and recognized Uruguay's right to regulate and protect public health, *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016).

158 Krzysztof J Pelc, 'What Explains the Low Success Rate of Investor-State Disputes?' [2017] *International Organization* 22.

159 Anthea Roberts, 'State-To-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2013) 55 *Harvard International Law Journal* 1, 3.

160 *ibid* 10.

161 For example, China-Russia BIT (2006) art 8 provides that 'Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled with consultation through diplomatic channel. If a dispute cannot thus be settled within six months, it shall, upon the request of either Contracting Party, be submitted to an *ad hoc* arbitral tribunal.'

3.7.2 Investor-State Dispute Settlement

Among all the constituent elements of Chinese BITs, the ISDS provision has probably undergone the most substantial changes. The vast majority of BITs between China and the B&R countries only provide for restrictive Investor-State dispute settlement that only covers disputes ‘involving’ or ‘relating to’¹⁶² the amount of compensation for expropriation.¹⁶³ Only nine BITs between China and the B&R countries provide for unrestricted Investor-State dispute settlement at the ICSID.¹⁶⁴ One Chinese BIT does not include ISDS provisions at all.¹⁶⁵ The shift from initial scepticism to gradual embrace of ISDS is largely due to China’s changing role from a net capital importer to an active global investor.¹⁶⁶ Aggrieved Chinese investors can bring legal claims against the B&R

162 The Chinese characters used in the restrictive ISDS provisions are 有关 (You Guan), which are translated interchangeably from ‘involving the amount of compensation for expropriation’ (China-Mongolia BIT), to ‘involving the amount of compensation’ (China-Lebanon BIT), to ‘concerning the amount of compensation for expropriation’ (China-Bulgaria BIT), to ‘in connection with’ (China-Philippines BIT). It is suggested that the difference in wording is unlikely to make significant difference in practice. See Gallagher and Shan (n 47) 313–315. A few Chinese BITs with the B&R countries are only available in Chinese and the language of the Contracting Party. The absence of official English translation has become a source of minor contention as the Respondent disputes the translation of ‘involving’, ‘concerning’, ‘relating to’ to be broader than the Chinese characters ‘You Guan’. See *BUCG v Yemen*, para 66.

163 China-Albania BIT (1993), art 8(3); China-Azerbaijan BIT (1994), art 9(3); China-Belarus BIT (1993), art 9(1); China-Bahrain BIT (199), art 9(3); China-Bulgaria BIT (1989), art 8(3); China-Cambodia BIT (1996), art 9(3); China-Croatia BIT (1993), art 8(3); China-Egypt BIT (1994), art 9(3); China-Estonia BIT (1993), art 8(3); China-Georgia BIT (1993) art 9(3); China-Greece BIT (1992); China-Hungary BIT (1991) art 10(1); China-Kuwait BIT (1985), art 8(3); China-Lao BIT (1993) art 8(3); China-Lebanon BIT (1996) art 9(3); China-Lithuania BIT (1993) art 8(2)(b); China-Mongolia BIT (1991) art 8(3); China-Philippines BIT (1992) art 10(1); China-Poland BIT (1988) art 10(1); China-Saudi Arabia BIT (1996) art 8(2); China-Serbia BIT (1995) art 9(3); China-Singapore BIT (1985) art 13(3); China-Slovakia BIT (1991), art 9(2)(b), China-Slovenia BIT (1993) art 8(3); China-Sri Lanka BIT (1986) art 13(3); China-Syria BIT (1996) art 9(3); China-Turkey BIT (1990) art VII(b); China-UAE BIT (1993) art 9(3); China-Vietnam BIT (1992) art 8(3); China-Yemen BIT (1998), art 10(2)(b).

164 China-Bosnia and Herzegovina BIT (2002), art 8(2); China-Czech BIT (1993), art 9(2); China-India BIT (2006) art 9(3); China-Iran BIT (2000), art 12(2); China-Korea BIT (2007) art 9; China-Latvia BIT (2004) art 9(2); China-Myanmar BIT (2001), art 9(3); China-Russia BIT (2006), art 9(2); China-Uzbekistan BIT (2011), art 9(3). The number of BITs providing for dispute settlement for ‘any dispute’ will increase as more countries join the B&R Initiative.

165 China-Thailand BIT (1985) only provides for State-State dispute settlement, see art 9. See also Weeramantry (n 51) 193–194.

166 Sauvants and Nolan (n 77) 893–897. See also Weeramantry (n 51) 192; *ibid* 507–508.

host government at either the institutional ICSID or an *ad hoc* tribunal. Prior to China's ratification of the ICSID Convention in 1993, most Chinese BITS provide for *ad hoc* arbitration only 'in accordance with the Arbitration Rules of UNCITRAL'.¹⁶⁷ Some of the BITS in their Protocols also provide that the two States may reach supplementary agreement to allow disputes submitted to the ICSID after China becomes the Contracting Party to the ICSID Convention. The BITS signed after China's accession to the ICSID Convention would provide for disputes to be referred either to the institutional ICSID or an *ad hoc* tribunal.¹⁶⁸

Due to the restrictive scope of many BITS, the first and most significant hurdle that Chinese investors face in initiating ISDS proceedings against a host government is to establish that the arbitration tribunal's jurisdiction is not limited to the quantum of compensation. The restrictive ISDS provisions have been invoked to contest the tribunal's jurisdiction. For example, the Respondent in *BUCG v Yemen* contends that the ICSID Tribunal's jurisdiction is limited to 'the amount of compensation' only as provided in Article 10(2) of the China-Yemen BIT. This narrow interpretation of Article 10 infers that 'quantum is wholly divorced from liability'¹⁶⁹ and that the Tribunal does not have jurisdiction over anything other than the monetary assessment of the loss unless the respondent government concedes liability.¹⁷⁰ Following the rules of interpretation under Article 31(1) of the Vienna Convention on the Law of Treaties¹⁷¹ (VCLT), the Tribunal finds that the text itself in the China-Yemen BIT is not conclusive in supporting either a narrow construction or a broad construction.¹⁷² In examining the context of Article 10, the Tribunal concludes that the words 'relating to the amount of compensation for expropriation' must be read to include disputes over both quantum and liability.¹⁷³ The Tribunal then finds that Respondent's narrow construction would undermine the BIT's objective and purpose.¹⁷⁴ The decision in another ICSID case initiated by a Chinese investor

167 China-Lebanon BIT (1996); China-Sri Lanka BIT (1986); China-Turkey BIT (1990); China-Uruguay BIT (1993). See also Heymann (n 46) 515.

168 For analysis on the options of arbitration venues, see Gallagher and Shan (n 47) 302–310. See also Heymann (n 46) 515.

169 *BUCG v Yemen* (n 39) para 60.

170 *ibid* para 61.

171 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

172 *BUCG v Yemen* (n 39) para 77.

173 *ibid* para 87.

174 *ibid* para 92.

also supports a broad construction of the restrictive ISDS provision, finding that the wording does not preclude the Tribunal from determining whether an expropriation had actually taken place.¹⁷⁵ This is in line with the recent expansionist trend in jurisprudence that supports a broader construction of similar provisions in other BITS.¹⁷⁶

However, in a recent award – at the time of writing still unpublished – a Tribunal reportedly arrived at the opposite conclusion. In the case of *China Heilongjiang v Mongolia*,¹⁷⁷ the Tribunal declined jurisdiction, relying on the history of PRC's position in various BITS that point to a narrow reading of the jurisdictional clause,¹⁷⁸ as opposed to the *BUCG v Yemen* Tribunal which held this history to be irrelevant.¹⁷⁹ The Tribunal also reportedly clarified that such narrow reading does not deprive the clause of any effect, because arbitration before an *ad hoc* arbitral tribunal would be available in cases where an expropriation has been formally proclaimed and what is disputed is the amount of compensation for its expropriated investment. In other words, arbitration will be available where the dispute is indeed limited to the amount of compensation for a proclaimed expropriation.¹⁸⁰

In conclusion, the inconsistent caselaw on this issue could constitute a significant jurisdictional hurdle for aggrieved Chinese investors in States where these restrictive clauses are still in effect.

175 *Tza Yap Shum*, para 188. See Gallagher (n 41) 96; Sauvant and Nolan (n 77) 925–930.

176 *Berschader* (n 128) para 153; *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*, Judgment (2015) SGHC 15, para 123. See also *European Media Ventures SA v The Czech Republic*, Award on Jurisdiction, UNCITRAL (15 May 2007) paras 48–68; *Renta 4 SVSA, Ahorro Corporación Emergentes FI, Ahorro Corporación Eurofondo FI, Rovime Inversiones SICAV SA, Quasar de Valores SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA v The Russian Federation*, Award on Preliminary Objections, SCC No 24/2007 (20 March 2009) paras 19–67.

177 *China Heilongjiang International Economic & Technical Cooperative Corp, Beijing Shougang Mining Investment Company Ltd, and Qinhuangdaoshi Qinlong International Industrial Co Ltd v Mongolia*, Final Award, PCA Case No 2010–20 (30 June 2017).

178 Luke Eric Peterson, 'Mongolia prevails in long-running Chinese BIT arbitration, as arbitrators distinguish their reading of constricted jurisdiction clause from more generous readings in prior cases' (7 July 2017, *IAReporter*) <<https://www.iareporter.com/articles/mongolia-prevails-in-long-running-chinese-bit-arbitration-as-arbitrators-distinguish-their-reading-of-constricted-jurisdiction-clause-from-more-generous-readings-in-prior-cases/>> accessed 28 July 2017.

179 *BUCG v Yemen* (n 39) para 97.

180 Milbank, 'Milbank Secures Significant Victory for Mongolia over Chinese SOEs in Treaty-Based Arbitration' (Press Release, 5 July 2017) <<https://www.milbank.com/en/news/milbank-secures-significant-victory-for-mongolia-over-chinese-soes-in-treaty-based-arbitration.html>> accessed 7 August 2017.

4 Subsequent Treaty Practice and Interpretation

The analysis above demonstrates significant variations and limitations to investor protection under the BITs between China and the B&R countries. The mismatch between China's massive outbound investment and inadequate investment protection under existing BITs has led to proposals for upgrading and renegotiating the investment agreements.¹⁸¹ The ongoing EU-China BIT negotiations are an example of China's effort to afford more protection to its outward investment by concluding more liberal investment treaties.

The renegotiation approach, however, is cumbersome. Pragmatically, a more viable solution is through interpretation with reference to subsequent practice and agreements, based on Art 31(3)(a) and/or (b) of the VCLT regarding subsequent agreements/practice. For example, State Parties may issue interpretive statements on BITs to interpret the outdated investment protection standards in line with the latest BIT practice. With regards to the BITs that exclude concessions in their definition of investment, it can be argued that concessions should be covered because all the State Parties include concessions in their later BIT practice.¹⁸²

Interpretation with reference to subsequent practice and agreement is not settled. The Tribunal in *Plama v Bulgaria* found that '[t]reaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into.'¹⁸³ However, under the VCLT, subsequent treaty practice is only relevant where that practice relates to the application of the treaty between the parties and not such practice with third States. A close look at the wording in the VCLT makes this clear. Article 31(3) of the VCLT provides that:

3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (...)

'Any subsequent agreement between the parties' in subpara (a) may extend to 'an informal agreement recorded in the minutes of a meeting or a press release, provided it constitutes 'concordant practice' or 'the genuine shared

¹⁸¹ Shen (n 130), 603.

¹⁸² Shan and Gallagher (n 52) 150.

¹⁸³ *Plama Consortium Limited v Republic of Bulgaria* (Decision on Jurisdiction) ICSID Case No ARB/03/24 (8 February 2005) para 195.

expectations of the parties'.¹⁸⁴ With regards to 'subsequent practice in the application of the treaty' in subpara (b), the International Law Commission (ILC) states that:

Subsequent practice under article 31(3)(b) can take a variety of forms and must reflect a common understanding of the parties regarding the interpretation of a treaty. Its value as a means of interpretation depends on the extent to which it is concordant, common and consistent.¹⁸⁵

The case law on using States' subsequent BIT practices in interpretation is not settled.¹⁸⁶ On the one hand, in *Berschader* the Tribunal referred to other BITs concluded by the Soviet Union to confirm that the definition of 'investment' did not extend to indirect investments.¹⁸⁷ On the other hand, some Tribunals clarified that each provision of a treaty is 'unique and not identical to that in any of such other treaties and thus must be interpreted by itself'.¹⁸⁸ Others urged against using interpretation of essentially the same terms under different treaties.¹⁸⁹

The inconsistent case law suggests limits to interpretation with reference to subsequent practice and agreement.¹⁹⁰ While other treaties can be viewed as evidence of individual state's intention, 'subsequent agreement' and 'subsequent

184 Hazel Fox, 'Article 31(3)(a) and (b) of the Vienna Convention and the Kasikili/Sedudu Island Case' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (vol 1. Martinus Nijhoff Publishers 2010) 63.

185 Draft Conclusions 8 Provisionally Adopted by the Drafting Committee on 27 May and 28 May and on 2 and 3 June 2014, (3 June 2014) Doc UN A/CN.4/L.83. See also Georg Nolte, Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, (26 March 2014) UN Doc A/CN.4/671 (Texts and Titles of Draft Conclusions 2014).

186 e.g., *Berschader* (n 128) paras 145–146. See also paras 155–157, 179; *RosInvestCo* (n 127) para 113.

187 *Berschader* (n 128) paras 153–155.

188 *RosInvestCo* (n 127) para 122. Tribunal in another case employed a similar reasoning, stating that '[t]here is nothing in the Vienna Convention that would authorize an interpreter to bring in as interpretive aids when construing the meaning of one bilateral treaty the provisions of other treaties concluded with other partner States.' *The Rompetrol Group NV v Romania*, ICSID Case No. ARB/06/3, Decision on Jurisdiction (18 April 2008) para 108.

189 'The Tribunal is mindful of the need not to make expressions used in different contexts and treaties interchangeable in spite of their similarity.... WTO and other tribunals have been extremely careful not to interpret expressions or concepts used in specific provisions in the light of the use of those or similar expressions in other contexts.' *Merrill & Ring Forestry LP v Canada*, Award (31 March 2010) para 86.

190 See also M. Sornarajah, *The International Law on Foreign Investment* (3rd ed. Cambridge University Press 2010) 81.

practice' requires these elements to relate to mutual agreement between the parties to the investment treaty at hand.¹⁹¹ This interpretational means can be used to confirm a meaning arrived at through other means of interpretation, but cannot be used to extend the meaning of provisions under the applicable treaty.¹⁹² The better view is that subsequent BITs may be considered supplementary means of interpretation under Article 32 of the VCLT to confirm an interpretation.¹⁹³ This follows clearly from Article 32 of the VCLT, which provides that recourse may be had to supplementary means of interpretation in order to confirm the meaning resulting from the application of article 31.

5 Conclusion

Infrastructure investments under the B&R Initiative are risk-ridden. Not only are they prone to serious setbacks due to their lengthy duration and complicated structure. More importantly, infrastructure projects underwritten by foreign companies are subject to acute political risks in the host country. In this article, we find significant variations in investor protection afforded by China's BITs with the B&R countries. While the conventional approach of classifying Chinese BITs into three generations provides a first overview, this categorization is too crude to be of guidance for particular issues arising out of infrastructure projects. It is therefore vital to look into the applicable treaties, BIT by BIT, to ensure the legal clarity for the level of protection for specific projects.

Our analysis suggests that China's active role as capital exporter in the global economy is not matched by its diverse and often outdated bilateral investment treaties. What becomes clear is the need for a more comprehensive approach to investor-protection should China wish to afford adequate protection for their investors along the Belt and Road. At present, most of the investment treaties between China and the B&R countries cannot effectively mitigate the political risks inherent in those large-scale infrastructure investments. Interpretative tools to consider subsequent practice and subsequent

191 Trinh H Yen, *The Interpretation of Investment Treaties* (Brill Nijhoff 2014) 74. Similarly, Hervé Ascensio, 'Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law' (2016) 31(2) *ICSID Review* 366, 377.

192 Yen (n 191) 74, claims that '[a]bout 26 per cent of the reviewed decisions and awards (i.e., 60 out of 229) have resorted to [subsequent agreements or practice] in interpreting investment treaties.'

193 On the hierarchy between Article 31 and 32, see eg, Ulf Linderfalk, 'Is the hierarchical structure of articles 31 and 32 of the Vienna convention real or not? Interpreting the rules of interpretation' (2007) 54(1) *NLR* 133.

agreement do not suffice to consolidate existing investor protection. China is aware of this problem and has been negotiating comprehensive IIAs, of which the EU-China BIT is a good example. It will be interesting to watch the next move of investment protection and trade facilitation along the Silk Road.