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PROTECTION OF POLISH INVESTORS UNDER THE CHINA-POLAND BILATERAL INVESTMENT TREATY

Abstract:

This article explores investment protection under Chinese international investment agreements (IIAs), particularly under the China-Poland bilateral investment treaty (BIT). As a state that both imports and exports foreign direct investment, China currently promotes balanced and safeguarded BITs that protect its increasing overseas investments and preserves the necessary space to regulate in the public interest. The Chinese government remains reluctant to be directly involved in investment arbitration as a respondent, while Chinese investors are active in taking advantage of the IIAs' regime. When compared to China's recent treaty practice and new developments in global investment governance, the China-Poland BIT is relatively outdated in terms of investment protection, promotion, social clauses, and dispute settlement. In terms of the investment protection effects of BITs, China is seemingly in a more urgent position to update the China-Poland BIT. However, if we evaluate the overall effects of a modernized BIT on investment promotion, regulation, and dispute settlement, an updated China-Poland BIT will fit the interests of both the Polish and Chinese governments. Notwithstanding the on-going negotiation between the EU and China, this article aims, along with presenting the Chinese practice regarding BITs, to describe de lege lata the state of protection offered to Chinese and Polish investors under the China-Poland BIT.

Keywords: China-Poland BIT, investment protection, investment arbitration

INTRODUCTION

In view of the great Chinese project of the new Silk Road, which for Poland can be a chance not only for investments in infrastructure (e.g. railways and harbours)¹ but

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¹ National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce of China, 推动共建丝绸之路经济带和21世纪海上丝绸之路的愿景与行动 [Vision and Ac-

may also galvanize Chinese investments in various Polish sectors,² the question may be raised as to what level of protection is granted under international law, especially international investment law, for Chinese investors in Poland, and correspondingly for Polish investors in China.³

Notwithstanding the on-going negotiations between the EU and China regarding a new investment treaty, the results of those negotiations are still far from being concluded. Even though this process attracts a lot of attention,⁴ there is no certainty that the treaty will be negotiated and signed in the near future. Therefore the aim of this article is to present what protection is granted to investors under the China-Poland Bilateral Investment Treaty (BIT) *de lege lata*, and then to briefly present three possible paths of future development.

The Chinese policy towards the protection of investments changed radically during the 20th century, as it moved away from a more restricted and sovereignty-oriented model.⁵ Commencing with Deng Xiaoping's "Open Door" policy in 1978, China has made considerable efforts to regulate its trade and investment relations and become more open. This promotes inward foreign direct investments from external sources⁶ and also encourages more Chinese investments in foreign states under the governmental strategy of "Going Abroad" since 1998.⁷ A similar pattern can be observed also in the Chinese policy concerning the ratification of investment treaties since 1982.⁸ Today China has concluded more than 140 investment treaties, most of them BITs, which amounts

tions on Jointly Building the Silk Road Economic Belt and 21st-Century Maritime Silk Road] (BRI Vision and Actions), May 2015, available at: <https://eng.yidaiyilu.gov.cn/qwyw/qwfb/1084.htm>. This is widely viewed as the first official masterplan for the BRI. Leading Group on the Construction of the Belt and Road of China, 共建“一带一路”：理念、实践与中国的贡献 [Building the Belt and Road: Concept, Practice and China's Contribution] (the Building Practice) (10 May 2017) available at: <https://eng.yidaiyilu.gov.cn/wcm.files/upload/CMSydylyw/201705/201705110537027.pdf> (both accessed 30 May 2019).

² Poland is very active toward attracting Chinese investments, e.g. by creating the Special Economic Zone Koszalin City, the so-called "first Chinese industrial park in Europe" (see I. Alon, M. Fetscherin, P. Gugler (eds.), *Chinese International Investments*, Palgrave Macmillan, New York: 2012, p. 167).

³ See M. Du Point, *Foreign Direct Investment in Transitional Economies: A Case Study of China and Poland*, Macmillan Press, London: 2000.

⁴ See the information about negotiations at the European Commission website, available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/> (accessed 30 May 2019).

⁵ See N. Gallagher, *Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy*, 31(1) ICSID Review – Foreign Investment Law Journal 88 (2016); W. Kidane, W. Zhu, *China-African Investment Treaties: Old Rules, New Challenges*, 37 Fordham International Law Journal 1035 (2014); W. Kidane, *China's and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa*, 49 Loyola of Chicago Law Journal 406 (2018); W. Kidane, *The Culture of International Arbitration*, Oxford University Press, Oxford: 2017.

⁶ K. Davies, *Inward FDI in China and Its Policy in Context*, 10(1) China International Journal 62 (2012), pp. 62-74.

⁷ N. Gallagher, W. Shan, *Chinese Investment Treaties: Policies and Practices*, Oxford University Press, Oxford: 2009, pp. 12-13.

⁸ Y. Bian, *A Revisit to China's Foreign Investment Law: With Special Reference to Foreign Investment Protection*, 8 Journal of East Asia and International Law 447 (2015), p. 448.

to an extensive network of investment agreements that is second only to Germany.⁹ Of course, the content of those treaties has evolved over time, varying from the first generation of concise and concentrated European-style BITs concluded in the 1980s to the recent complex and detailed Americanized BITs.¹⁰

Traditionally, since the beginning of their existence BITs have been used as a tool by investment-exporting countries to protect their outbound investments,¹¹ primarily in developing countries.¹² For investment exporting countries, the protection function of BITs is decisive, specifying standards of treatment in favour of investors and equipping the investors with direct access to a depoliticized investor-state dispute settlement (ISDS) mechanism. For host countries however, the picture is more mixed. On one hand, their main interest is to attract FDI from developed states by committing themselves to onerous international obligations (the Grand Bargain theory).¹³ On the other hand, host states emphasize the defence function of BITs, as they are inclined to narrow the scope and extent of investment protection obligations in order to leave as much power as possible to the discretion of a state (e.g. regarding the application of regulatory measures), and thereby avoid the interventions of international arbitrators.¹⁴ The implicit understanding is that the protection of investors/investments granted by BITs should be theoretically reciprocal. However, such factors as the unequal relationship between the rich and influential developed states and the developing states – which existed during the period of creation of the first BITs – and also the actual practice, whereby very few or no investors from developing countries have invested in the developed country, may result, as observed by scholars,¹⁵ in an imbalance that favours investors of the developed world in the developing world.

⁹ According to UNCTAD, 129 BITs were concluded (110 in force) and 20 TIPs (18 in force). All of the investment treaties, especially bilateral investment treaties invoked in this article can be found in this database: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu> (accessed 30 May 2019).

¹⁰ Note that most authors understand these notions, as they are commonly used in the literature. Thus “European style BIT” should be understood as a conservative treaty, with rather plain and concise text, which commonly incorporates only basic substantive protection provisions including, *inter alia*, the duty to compensate the investor in case of an expropriation, compensation for damages and losses, fair and equitable treatment, and most-favoured nation treatment standards. This is opposed to “American style BIT”, which should be understood as a treaty with much more complex and detailed text, usually containing more rights for investors, such as, e.g., including full ISDS mechanisms in BITs. See Gallagher, Shan, *supra* note 7, pp. 35-41.

¹¹ W. Shan, *Toward a Multilateral or Plurilateral Framework on Investment*, E15 Initiative Think Piece, 2015, p. 5.

¹² See e.g. the practice of the United States, a party to forty-seven BITs with states, almost all of which can be classified as developing, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/223#iiaInnerMenu> (accessed 30 May 2019).

¹³ J.W. Salacuse, *The Law of Investment Treaties*, Oxford University Press, New York: 2010, p. 111.

¹⁴ See M. Żenkiewicz, *Compensable vs. Non-compensable States' Measures. Blurred Picture and Changing Borderlines Under Investment Law* (November 19, 2018), Society of International Economic Law (SIEL), Sixth Biennial Global Conference, available at: <https://ssrn.com/abstract=3287271> (accessed 30 May 2019).

¹⁵ J.W. Salacuse, *The Emerging Global Regime for Investment*, 51(2) Harvard International Law Journal 427 (2010), p. 464.

When initiating its BIT programs in the 1980s, China was an investment importing country, and understandably took a defensive and conservative position in BITs. Times have changed. China and other emerging economies¹⁶ have become, to various degrees, dual-role states as both major importers and exporters of capital. Like other major economies, China can seek protection for its investments abroad under BITs, while at the same time finding itself confronted by claims of foreign investors in China. Therefore, it is foreseeable that within its BITs and the possible updates, China will need to find the proper balance between the protection of incoming and outgoing foreign investment.¹⁷

This article mainly presents the protections offered under the China-Poland BIT, i.e. the protection *de lege lata*. This situation may change drastically if the on-going negotiations between the EU and China regarding an investment treaty would be concluded. If so, the China-Poland BIT would be substituted by the EU-China BIT. However, the negotiations have proven to be difficult and there is no guarantee that they will be concluded any time soon. After 19 rounds of negotiations there are still issues regarding, for example, Fair and Equitable Treatment (FET) or National Treatment (NT), which are in the initial stage of discussion.¹⁸

This article is structured as follows: In Part 1 it briefly summarizes the evolution of Chinese BITs, exploring how the content of such treaties has changed since the first BIT was concluded in 1982. Part 2 presents the arbitral awards involving China and draws some general conclusions about Chinese arbitral practice. Part 3 proceeds to evaluate the China-Poland BIT in a new context. Part 4 presents some concluding remarks regarding the protections under the BIT and comments on possible future developments.

1. THE EVOLUTION OF CHINESE BITS

It is not an easy task to make a concise periodisation of Chinese BITs. However, from the general trend it seems discernible that Chinese BITs have experienced a shift from a conservative model to one of managed liberalization.¹⁹ Since 1982, when China

¹⁶ C. Cai, A. Roberts, *Introduction to the Symposium on the BRICS Approach to the Investment Treaty System*, 112 AJIL Unbound 187 (2018); C. Cai, *Balanced Investment Treaties and the BRICS*, 112 AJIL Unbound 217 (2018).

¹⁷ W. Kidane, *China's Bilateral Investment Treaties with African States in Comparative Context*, 49 Cornell International Law Journal 141 (2016), at 175. In contrast, Cai has rightly pointed out that some BRICS countries, e.g. India, South Africa, and to some extent Brazil, have shifted from an imbalanced BIT in favour of investors to one in favour of host states (Cai, *supra* note 16).

¹⁸ See European Commission, Report of the 19th round of negotiations for the EU-China Investment Agreement, Brussels, 13 November 2018, available at: http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157495...pdf (accessed 30 May 2019).

¹⁹ Managed liberalisation is used to describe the delicate balance between liberalisation and regulation in international investment policymaking, namely the simultaneous moves to liberalise and promote

signed its first BIT with Sweden, the Chinese attitudes toward FDI and BITs have been informed by a change in posturing towards a policy away from protectionism towards a more liberal model.²⁰ That change of attitude is reflected in the gradual embrace of national treatment and full ISDS mechanisms in BITs.

In terms of ISDS mechanisms, Chinese BITs can be divided into two categories, namely: the first generation of BITs before 1997 with a limited ISDS mechanisms, covering disputes concerning the amount of compensation for expropriation; and the second generation of BITs after 1997 with a full ISDS mechanism, covering all investment disputes.²¹ Taking into account that China signed the ICSID Convention in 1990,²² the first generation of Chinese BITs can be further divided into two sub-categories – those referring to ICSID arbitration and those referring only to *ad hoc* arbitration.

The Chinese BIT programme was initiated at the request of investors from developed countries in the early 1980s. When China commenced its Open Door policy in the late 1970s, foreign investors in China were rather under-protected under Chinese laws and regulations, because of the absence of a modern legal system based on a market economy. In order to assure foreign investors, China initiated new measures at both the national and international levels. China passed the Law of the People's Republic of China on Chinese-foreign Equity Joint Ventures in 1979. BIT negotiations were initiated very quickly with Germany, the US, and Japan in 1980, and then with the UK, France, Sweden and Switzerland.²³ As most of the investors in the early 1980s were from European countries, it is not a surprise that China's early BIT practices were strongly influenced by European BITs.

The first generation of Chinese BITs were rather conservative. They incorporated basic substantive protection provisions, *inter alia*, the duty to compensate the investor in case of expropriation, compensation for damages and losses, FET and most favoured nation (MFN) standards. However, all of those rights and substantive protections are

investment (still the mainstream) and to regulate and restrict it (on the rise). See J. Zhan, *G20 Guiding Principles for Global Investment Policymaking: A Facilitator's Perspective, E15 Initiative Think Piece*, Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, December 2016, pp. 1-2.

²⁰ L. Markert, *Arbitration under China's Investment Treaties – Does It Really Work?*, 5 Contemporary Asia Arbitration Journal 205 (2012), p. 208.

²¹ Such a classification seems to be prevalent, see S. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15(1) *Cardozo Journal of International and Comparative Law* 73 (2007), pp. 89-94; M. Huth, J. Zeng, *China and ICSID Arbitration. Can the ICSID arbitration regime serve as a suitable tool for dispute resolution in investment contracts with Chinese governmental authorities?* 18 *Zeitschrift für Chinesisches Recht* 186 (2011), pp. 189-190; L. Markert, *supra* note 20, p. 211.

²² Convention on the settlement of investment disputes between States and nationals of other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, signed by the People's Republic of China on 9 February 1990, entered into force on 6 February 1993.

²³ X. Liu (ed.), *对外开放起始录 [The Beginning of China's Opening Up]*, Economy & Management Publishing House, Beijing: 2008, p. 160.

meaningless if there is no effective investor-state arbitration clause in BITs. Basically, the following stipulations regarding the dispute settlement mechanism can be found in the first generation of Chinese BITs: (a) the BIT does not include arbitration clauses that would allow investors to bring a claim against the host state (e.g., China – Sweden BIT 1982; China – Denmark BIT 1985; China – Norway BIT 1987); (b) the BIT includes arbitration clauses, but limited only to disputes regarding the interpretation or application of the investment treaty; and/or (c) the BIT includes arbitration clauses limited only to disputes over the amount of compensation to be paid in cases of expropriation measures (e.g. China – Singapore BIT 1985).

It is interesting to note that China has conducted a very active policy regarding BITs with both developed and developing countries. It is believed that Chinese BITs concluded with Eastern European states (as well as with developing states) were primarily aimed at forming or strengthening diplomatic alliances,²⁴ because the “Chinese economy was not strong enough to invest abroad.”²⁵ Some scholars argue that Chinese BITs in the early 1990s were also driven by securing international partners in a difficult domestic and international context.²⁶

The next two key events in the development of Chinese BITs were the announcement of building a Market Economy with Chinese Characteristics in 1994, and the Going Out Policy in 1998.²⁷ During this period China ratified the ICSID Convention and gradually embraced full ISDS mechanisms for all investment disputes. Meanwhile, China explored different modes for granting national treatment subject to various conditions (grandfather clauses, national law and regulations, etc.) to foreign investors on post-establishment matters. This change in the Chinese attitude can be connected with, *inter alia*, the rapid increase of FDI (both inward and outward), and the need to protect its own investors and investments in African countries.²⁸ Generally, it is accepted that Chinese BITs around this period of time provide a higher level of investment protection, which is no longer different than the protection offered by Western European states’ BITs. It is enough to mention that these treaties include a broad definition of “investment”, which ensures that all essential rights and interests necessary for engaging in economic activities, including indirect investments, are covered by the treaty (e.g. China – Germany BIT 2003). Furthermore, these BITs allow for arbitration of all investor-state disputes under the treaty, without any restrictions as to the subject matter of the dispute and the choice between, *inter alia*, ISCID or UNCITRAL arbitration

²⁴ G.M. Vaccaro-Incisa, *The Evolution of China’s Policy and Treaty Practice in International Investment Law: An Outline*, 4 Bocconi Legal Papers 89 (2014), p. 105.

²⁵ Ch. Brown, *Commentaries on Selected Model Investment Treaties*, Oxford University Press, Oxford: 2013, p. 132.

²⁶ T. Cohen, D. Schneiderman, *The Political Economy of Chinese Bilateral Investment Treaty Policy*, 5(1) *The Chinese Journal of Comparative Law* 110 (2018).

²⁷ Gallagher, Shan, *supra* note 7, pp. 7-8.

²⁸ Regarding Chinese investments in Africa, see the official website of the Forum on China-Africa Cooperation (FOCAC), available at: <http://www.focac.org/eng/> (accessed 30 May 2019); see also Kidane, *supra* note 17.

(e.g. China – Barbados BIT 1998; China – Netherlands BIT 2001; China – Finland BIT 2004).

After 1998, Chinese BITs no longer significantly differed from the practice of its European counter parties. The European-styled BITs were streamlined in Chinese practices²⁹ until 2012, when China negotiated and signed investment treaties with Canada, Japan and South Korea. The China – Canada BIT and the China – Japan – Korea investment agreement are exceptionally detailed and comprehensive compared to earlier Chinese BIT practices. Chinese moves towards the Americanized BITs were further enhanced with the negotiations of the China – US BIT. In particular, China accepted the policy of pre-establishment of national treatment with a negative list, which served as a basis for Chinese negotiations with both the US and the EU. Some innovations are also included in recent Chinese BITs and in negotiations to address the manifested legitimacy concerns, both substantively and procedurally. Therefore, some scholars argue that a Chinese BIT 4.0 is taking shape.³⁰

In conclusion, Chinese BITs have been subject to an evolution of inclusive and managed liberalization. Firstly, Chinese BITs are adaptive and responsive to better suit the the needs of various treaty partners.³¹ Although there is a model BIT³² for treaty negotiations in a given period, there can be, and indeed are, BITs of different generations coexisting in a given period. Secondly, Chinese BITs are closely managed and correlated with the domestic dynamics of reform and legislation. On one hand, in Chinese treaty practice investment protection remains the primary goal of BITs, while investment promotion and admission were largely regulated by national legislation until 2013, when China began to address investment admission in BITs. On the other hand, China gradually liberalized its BITs in correlation with the Chinese domestic reform and tended to make institutional try-outs for major breakthroughs in BIT arrangements. China tries to strike a balanced BIT for protecting its increasing oversea investments while safeguarding the necessary space for regulating in the public interest.

2. THE ARBITRAL PRACTICES UNDER CHINESE BITS

Compared to the number of treaties concluded and to the amount of inward and outward Chinese FDI, the State is surprisingly rarely challenged before international

²⁹ Gallagher, Shan, *supra* note 7, pp. 35-41.

³⁰ W. Shan and H. Chen, *China-US BIT Negotiation and the Emerging Chinese BIT 4.0*, in: C.L. Lim (ed.), *Alternative Visions of the International Law on Foreign Investment*, Cambridge University Press, Cambridge: 2016.

³¹ S. Li, *Bilateral Investment Promotion and Protection Agreements: Practice of the People's Republic of China*, in: P. Waart, P. Peters, E. Denters (eds.), *International Law and Development*, Martinus Nijhoff Publisher, Dordrecht: 1988, pp. 179-180.

³² The main differences in generations of Chinese Model BITs are reflected in the national treatment and dispute settlement provisions. For more, *see* the text of several Chinese Model BITs on the UNCTAD Investment Policy Hub (available at: <https://investmentpolicyhub.unctad.org/IIA>), and Gallagher, Shan, *supra* note 7, pp. 423-440.

investment tribunals. There have been only six arbitral cases (concluded, settled, or pending) in which Chinese investors took actions against the host state, and only three cases when foreign investors turned to international arbitration in disputes with China. In the first part of this section, these cases will be briefly mentioned, without their description and analysis. The second part will discuss the most important problems raised in those cases where China was a respondent.

2.1. The Chinese experience of investment arbitration

As mentioned, the Chinese experience in investment arbitration is limited to only nine cases so far. China acted as a Host State only in three proceedings. The first ISDS case against China, namely *Ekran v China* (2011),³³ arose out of the revocation of the claimant's subsidiary's rights to leasehold land by the Chinese provincial governments of Hainan due to an alleged failure to develop the land as stipulated under the local legislation. This case was settled and the ICSID proceeding was thus discontinued.³⁴ The second ISDS arbitration case against China, *Ansung Housing v. China* (2014), related to the provincial government's alleged actions in relation to Ansung's investment in the Jiangsu province,³⁵ was decided in favour of China.³⁶ The third case, *Hela Schwarz GmbH v. China* (2017)³⁷ relates to a housing expropriation decision by the Jinan Municipal Government, which was challenged by the investor.³⁸ The case is pending and no additional information on the arguments of both parties is currently available.

Chinese investors are more active in ISDS. So far there have been six arbitral cases involving China as a home state. The first ISDS cases – *Tza Yap Shum v Peru* (2007)³⁹ – arose out of the seizure of the bank account of the claimant's enterprise due to tax debt and other alleged actions undertaken by the Peruvian tax authorities, which resulted in a substantial deprivation of the claimant's investment. The case touched upon issues such as the application of Chinese BITs to a Hong Kong resident, and also the limitation of the Tribunal's jurisdiction to disputes involving the amount of compensation.⁴⁰ The issue on the applicability of China's BITs to the Hong Kong and Ma-

³³ *Ekran Berhad v. People's Republic of China*, ICSID Case No. ARB/11/15.

³⁴ Order taking note of the discontinuance of the proceeding issued by the Secretary-General dated 16 May 2013, pursuant to ICSID Arbitration Rule 43(1).

³⁵ J. Fei, B. Horrigan, T. Furlong, *China sued by South Korean property developer at ICSID* (Herbert Smith Freehills Dispute Resolution, 10 November 2014), available at: <http://hsfnotes.com/arbitration/2014/11/10/china-sued-by-south-korean-property-developer-at-icsid/> (accessed: 30 May 2019).

³⁶ *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017.

³⁷ *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19.

³⁸ *Ibidem*, Procedural Order No. 2, 10 August 2018, para. 39.

³⁹ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 12 February 2007.

⁴⁰ *Ibidem*, para. 151. See also Award of July 7, 2011, and the Decision on Annulment of 15 February 2015.

cao Special Administrative Regions was also encountered in *Sanum Investments v. Laos* (2013).⁴¹

In *China Heilongjiang v. Mongolia* (2010),⁴² Chinese investors lodged an arbitration against Mongolia under the China – Mongolia BIT (1991) over the cancellation of licenses held by the claimants in the Tumurtei iron ore mine in 2012. Similarly, in *Beijing Urban Construction v. Yemen* (2014),⁴³ the claims under the China – Yemen BIT (1998) arose out of the alleged forced deprivation of the claimant's assets and a contract.

The claims in *Ping An v. Belgium* (2012)⁴⁴ arose out of Belgian Government's bailout in the context of the 2008 financial crisis, and subsequent nationalization and sale to a third party of the Belgian-Dutch financial institution Fortis, in which the claimants had invested. The core issue was the temporal application of jurisdictional provisions, particularly whether the BIT between China and Belgium which entered into force on 1 December 2009 covered disputes which arose before that date, but were not then under a judicial or arbitral process.⁴⁵ The Tribunal confirmed that the 2009 BIT does not cover disputes notified before the 2009 BIT.⁴⁶

The claims in *Philip Morris v. Australia* (2012)⁴⁷ arose out of the enactment and enforcement by the Australian Government of the Tobacco Plain Packaging Act 2011 and its alleged effect on investments in Australia owned or controlled by the claimant. The Tribunal issued a jurisdictional decision in favour of Australia and held that the dispute was both foreseeable and actually foreseen when Philip Morris acquired its investment in Australia in February 2011, and therefore the corporate restructuring constitutes an abuse of a right or abuse of process.⁴⁸

2.2. Features of investment arbitration involving China

From the brief review above, it is clear that as a matter of fact Chinese investors are active in taking advantage of the IIA regime, while the Chinese government remains reluctant to be directly involved in ISDS as a respondent. As a matter of law, several issues

⁴¹ *Sanum Investments Limited v. Lao Peoples Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013; The High Court of the Republic of Singapore, *Judgment in the matter of Order 69A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) between Government of the Lao People's Democratic Republic and Sanum Investment Ltd.*, [2015] SGHC 15; *Sanum Investment Ltd. v. Government of the Lao People's Democratic Republic* [2016] SGCA 57, paras. 104, 113.

⁴² *Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017.

⁴³ *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30.

⁴⁴ *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015.

⁴⁵ See also Q. Ren, *Ping An v Belgium: Temporal Jurisdiction of Successive BITs*, 31(1) ICSID Review 129 (2016).

⁴⁶ *Ping An v. Belgium*, paras. 223–31.

⁴⁷ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA, Case No. 2012-12, Decision on Jurisdiction and Admissibility (17 December 2015).

⁴⁸ *Ibidem*, pp. 585-587.

revealed in China's participation in ISDS regime deserve further in-depth analysis. Some issues are unique ones which are deeply embedded in China's policy, while some are common ones which foreign investors would encounter under almost each and every IIA. These three issues are: (1) the Special Administrative Region (SAR) issue, relating to territorial and personal jurisdiction under China's IIAs;⁴⁹ (2) the expropriation issue, relating to the interpretation of the jurisdictional scope of ISDS for disputes involving the amount of compensation for expropriation; and (3) the enforcement of ISDS awards in China.

2.2.1. The Special Administrative Region issue

The most special feature in China-related ISDS practices is the applicability of China's BITs in the SAR, namely whether investors in the SAR can invoke IIAs signed by the Chinese central government. On the surface, the SAR issue relates to the commonly-discussed nationality of investors. However, its deeper nature intertwines the issue of the intra-national distribution of regulatory power in the investment law context, namely the Central-Local Government relations in China, and especially the *One Country Two Systems Principle*.⁵⁰

Normally, the *ratione personae* jurisdiction of ISDS tribunals is based on a twofold nationality requirement: a positive one, i.e. that the investor(s) must have the nationality of a contracting state; and a negative one, that the investors must not be nationals of the host state.⁵¹ However, according to Art. 42 of the ICSID Convention, the law governing disputes does not govern determination of the nationality of individuals,⁵² and therefore the ICSID Convention does not *per se* provide a precise criterion for the determination of a qualified, and therefore protected, investor.⁵³

Regarding a natural person, most Chinese BITs stipulate that a natural person qualifies as a Chinese investor as long as the person has the nationality of the PRC according to its laws.⁵⁴ Pursuant to the Nationality Law of the People's Republic of China (1980), any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.⁵⁵ According to Art. 18 of

⁴⁹ SAR are a type of provincial-level administrative divisions of China which enjoy the highest degree of autonomy. There are two existing SARs in China: Hong Kong and Macau. The main issue regarding the Hong Kong SAR and investment law is whether a foreign investor in the Hong Kong SAR is entitled to invoke the BIT signed by the Chinese Central Government when there is a BIT signed by Hong Kong SAR as the home state of the investor.

⁵⁰ See O.G. Repousis, *On Territoriality and International Investment Law: Applying China's Investment Treaties to Hong Kong and Macao*, 37(1) Michigan Journal of International Law 113 (2015); J. Husa, *Accurately, Completely, and Solemnly: One Country, Two Systems and an Uneven Constitutional Equilibrium*, 5(2) The Chinese Journal of Comparative Law 231 (2017).

⁵¹ ICSID Convention, Art. 25(1).

⁵² *Ibidem*, Art. 42.

⁵³ Ren, *supra* note 45, p. 136.

⁵⁴ UK – China BIT, Art.1(c)(ii), Peru – China BIT, Art.1(2)(a), Netherland – China BIT, Art.1(2)(a),

⁵⁵ Standing Committee of the National People's Congress, 中华人民共和国国籍法 [Nationality Law of China], Art. 4, enacted on 10 September 1980, available at: http://www.npc.gov.cn/wxzl/gongbao/2000-12/11/content_5004393.htm (in Chinese) (accessed 30 May 2019).

Hong Kong Basic Law and Annex III⁵⁶ to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Nationality Law of the People's Republic of China shall be applied in the Hong Kong Special Administrative Region from 1 July 1997.⁵⁷ In particular, where a Hong Kong resident is of Chinese descent and was born in the Chinese territories (including Hong Kong), or where a person satisfies the criteria laid down in the Nationality Law of the People's Republic of China for having Chinese nationality, he or she is a Chinese national. Therefore it is safe to conclude that a Hong Kong resident holding a Chinese passport or equivalent identification qualifies as a protected investor under Chinese IIAs. In other words, natural persons of Hong Kong are entitled to initiate ISDS proceedings as claimants under China's IIAs. There is a possibility that a natural person of Hong Kong may have dual remedies as an investor under both China's and Hong Kong's IIAs. In such a hypothetical scenario, the tribunal may refuse the jurisdiction of ISDS under China's IIAs on the basis of Effective Interpretation Principle.

Regarding juridical persons such as corporate investors, the picture is a bit more complex. According to Art. 18 of the Basic Law of the Hong Kong SAR of the People's Republic of China, National Laws, such as corporate laws or company laws of the PRC, are not applicable in the Hong Kong SAR.⁵⁸ The relevant legislation of Hong Kong is the exclusive governing law on determination of the nationality of corporate investors of Hong Kong. The most common requirement of nationality for corporate investor in China's IIAs is the so-called Incorporation Standard, which means that only an economic entity constituted or incorporated in accordance with China's Law is a protected corporate investor under China's IIAs.

In this context, could terms such as "China's Law" or "Chinese Law" be interpreted broadly to cover the laws of the Hong Kong or Macao SARs? In the broad sense it may be arguable if the China's IIAs do not include a special application provision to exclude its territorial coverage over an SAR. But in a strict sense this is not logically sound, especially when China's government and the SAR government both entered into IIAs with the same country in which the SAR investors have challenged measures before ISDS tribunals.⁵⁹

⁵⁶ Annex III : National Laws to be Applied in the Hong Kong Special Administrative Region, available at: http://www.basiclaw.gov.hk/en/basiclawtext/annex_3.html (accessed 30 May 2019).

⁵⁷ Standing Committee of the National People's Congress, 全国人民代表大会常务委员会关于《中华人民共和国国籍法》在香港特别行政区实施的几个问题的解释 [Explanations of Some Questions by the Standing Committee of the National People's Congress Concerning the Implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region], adopted at the Nineteenth Session of the Standing Committee of the Eighth National People's Congress on 15 May 1996, http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf (in English); http://www.npc.gov.cn/wxzl/wxzl/2001-02/06/content_4661.htm (in Chinese) (both accessed 30 May 2019).

⁵⁸ Except for those listed in Annex III, which still need to be confined to those laws relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the SAR. See the Hong Kong Basic Law, Art. 18.

⁵⁹ In a sample case, in *Sanum v. Laos* the Chinese government expressed its position in a diplomatic note to Laos that "in principle the bilateral investment agreements concluded by the Central People's Government are not applicable to [Macao], unless the opinion of the Special Administrative Region Govern-

The tribunal is very likely to adopt the effective interpretation principle to make both IIAs effective and deny the applicability of China's IIAs to juridical persons incorporated in SARs in cases of a parallel existence of an SAR IIA. Therefore it can be concluded that corporate investors in an SAR may invoke China's IIAs if there is no evidence indicating otherwise. Precluding evidence includes, but is not limited to, the existence of parallel SAR IIAs.

2.2.2. Disputes involving the amount of compensation for expropriation

A considerable portion of China's early BITs are still in force. The limited ISDS provision for disputes involving the amount of compensation for expropriation will continue to be contested and interpreted in more cases. Despite the general reference to, and reliance on, the rules of treaty interpretation in the Vienna Convention on Law of Treaties (VCLT),⁶⁰ the tribunals have been divided in their interpretation on the issue.

For instance, in *China Heilongjiang v. Mongolia*, the Tribunal rejected the claimant's broad interpretation (extending it to include the existence and lawfulness of the expropriation),⁶¹ and held that its narrower reading would neither deprive the words of any practical meaning (*effet utile*), which would leave investors without a meaningful opportunity to use arbitration before an *ad hoc* tribunal,⁶² nor contravene the object and purpose of the Treaty.⁶³ Singapore's High Court in the *Sanum* case took a similar position, and held that only a dispute relating to the amount of compensation for expropriation can be submitted.⁶⁴

However, tribunals in other cases have tended to evaluate the overall effects of the dispute settlement provision to determine whether a broad or narrow interpretation should be given. The Tribunal in *Tza Yap Shum v. Peru* held that the provision should be interpreted as disputes *including rather than exclusively limited to* the amount of compensation,⁶⁵ because to "rule otherwise would eviscerate the provision relating to ICSID arbitration since, in accordance with the final sentence of Article 8(3), to have recourse to the host State's tribunals would definitely preclude the possibility to accede to arbitration under the ICSID Convention."⁶⁶

ment has been sought, and separate arrangements have been made after consultation with the contracting party". See *Government of the Lao People's Democratic Republic v. Sanum Investment Ltd*, para. 40. After the Judgment of the Singapore Court of Appeal in the *Sanum* case, the Ministry of Foreign Affairs of China repeated this position in a press release. Ministry of Foreign Affairs of China, 2016年10月21日外交部发言人华春莹主持例行记者会 [Press Release by Spokesperson of Ministry of the Foreign Affairs of 21 October 2016], available at: http://www.fmprc.gov.cn/web/fyrbt_673021/jzhsl_673025/t1407728.shtml (accessed 30 May 2019).

⁶⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁶¹ *China Heilongjiang v. Mongolia*, para. 262.

⁶² *Ibidem*, para. 450.

⁶³ *Ibidem*, para. 452.

⁶⁴ *Government of the Lao People's Democratic Republic v. Sanum Investment Ltd*, para. 128.

⁶⁵ *Tza Yap Shum v. Peru*, para. 151.

⁶⁶ *Ibidem*, para. 188; *Sanum v. Laos*, para. 341.

In *Sanum Investments v. Laos*, the Tribunal could find no decisive guideline in the literal wording, nor in the object and purpose of the treaty.⁶⁷ Therefore it focused more on the context of the provision, namely the existence or absence of fork-in-the-road clauses in the underlying BIT, which might help determine whether investors would be left unprotected and whether the relevant provision would be futile in a practical sense if the investor had to first have recourse to local courts to determine whether an expropriation had actually occurred.⁶⁸

The tribunal in *Beijing Urban Construction v. Yemen* took a similar position, holding that the narrow interpretation (excluding the lawfulness and existence of an expropriation) would trap rather than protect foreign investors, stating that:⁶⁹ “the Contracting Parties intended to confer a real choice, not an illusory choice” and that the words “must, in context, be read to include disputes relating to whether or not an expropriation has occurred.”⁷⁰

Therefore, in brief it can be concluded that the situation is far from being clear, and no consistent jurisprudence has been developed regarding this issue.

2.2.3 Enforcement of ISDS awards in China

The enforceability of ISDS awards in China also remains unsettled.⁷¹ When signing the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958),⁷² China lodged a commercial reservation,⁷³ i.e. that China would apply the Convention only to “legal relationships, whether contractual or not, which are considered commercial” under the national law of China. Pursuant to interpretations of China’s Supreme People’s Court, a commercial legal relationship means: “the economic rights and obligations arising from contracts, torts or relevant legal provisions, such as purchase and sale of goods ..., except disputes between foreign investors and the host government.”⁷⁴

In other words, the enforcement of an award rendered by the arbitral tribunal, even if both States are parties to the New York Convention (1958), will still be subject to China’s domestic laws. According to China’s Civil Procedural Law, the courts shall

⁶⁷ *Sanum v. Laos*, paras. 326-338.

⁶⁸ *Ibidem*, para. 340.

⁶⁹ *Beijing Urban Construction v. Yemen*, para. 92.

⁷⁰ *Ibidem*, para. 87.

⁷¹ J. Ku, *The Enforcement of ICSID Awards in the People’s Republic of China*, 6(1) Contemporary Asia Arbitration Journal 31 (2013).

⁷² Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.

⁷³ China’s reservations to New York Arbitration Convention, available at: <https://bit.ly/2LxJQ22> (accessed 30 May 2019).

⁷⁴ Supreme People’s Court of China, 最高人民法院关于执行我国加入的《承认及执行外国仲裁裁决公约》的通知 [Notice of the Supreme People’s Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China], No. 5 [1987] of the Supreme People’s Court (4 October 1987), available at: <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/9/9-1-7-1.html> (accessed 30 May 2019).

refuse to enforce an arbitral award on the basis of non-arbitrability.⁷⁵ Pursuant to China's Arbitration Law, administrative disputes falling within the jurisdiction of the relevant administrative organs are not allowed to be arbitrated.⁷⁶

ISDS arbitration under the ICSID Convention might be different as the ICSID Convention is a self-contained system and the awards rendered thereunder shall be considered as a "final judgment of a court".⁷⁷ However, when signing the ICSID Convention China made a notification on jurisdiction of the Centre that the PRC "would only consider submitting to the jurisdiction of ICSID disputes over compensation resulting from expropriation and nationalization."⁷⁸ Such a notification, which cannot be considered as a reservation to the treaty, is normally interpreted in case law for informative purposes only and cannot be considered as a legal obligation to narrow or broaden an otherwise accepted consent to jurisdiction.⁷⁹

To conclude, there is at least some uncertainty as to which law would govern the enforcement of ISDS awards,⁸⁰ and there is some possibility that awards enforceable under the New York Convention (1958) or under the ICSID Convention might face problems with enforceability in China.⁸¹

⁷⁵ Standing Committee of the National People's Congress, 中华人民共和国民事诉讼法 [Civil Procedural Law of China], Arts. 237, 274, amended on 27 June 2017, available at: http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024892.htm (in Chinese) (accessed 30 May 2019).

⁷⁶ Standing Committee of the National People's Congress, 中华人民共和国仲裁法 [Arbitration Law of China], Article 3, amended on 1 September 2017, available at: http://www.npc.gov.cn/npc/xinwen/2017-09/12/content_2028692.htm (in Chinese) (accessed 30 May 2019).

⁷⁷ ICSID Convention, Art. 54.1.

⁷⁸ Notifications Concerning a Class or Classes of Disputes Which the Contracting State Would or Would Not Consider Submitting to the Jurisdiction of the Centre (Article 25(4)), 7 January 1993, available at: <https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST30> (accessed 30 May 2019).

⁷⁹ C. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge: 2001, pp. 342-347: "[...] notifications under Art. 25(4) are for purposes of information only and are designed to avoid misunderstanding" (p. 344); see *Tza Yap Shum v. Peru*, paras. 163-165; *Sanum v. Laos*, para. 328.

⁸⁰ Vaccaro-Incisa, *supra* note 24, p. 113.

⁸¹ For the sake of comparison, the recognition and enforcement of a foreign arbitration award in Poland is based on the Polish Civil Procedure Code and the New York Convention (1958). Poland signed the New York Convention (1958) with the following reservation: "[w]ith reservation as mentioned in article I, para. 3." The existing regime of enforcement of arbitral awards in Poland is rather clear (although there is no automatic recognition of awards as is provided by the ICSID Convention because Poland is not party to that Convention) and does not raise serious doubts or concern in practice L. Błaszczak, J. Kolber, *Annulment and Enforcement of Arbitral Awards in Poland*, 30(3) ASA Bulletin 564 (2012); A. Remin, *Uznawanie i wykonywanie zagranicznych orzeczeń arbitrażowych w aspekcie porównawczym między Niemcami, Austrią, Polską i Szwajcarią* [Recognition and enforcement of arbitral awards from the comparative perspective of Germany, Austria, Poland and Switzerland] 2(6) ADR 17 (2009); R. Morek, W. Sadowski, *Recognition and Enforcement of Arbitral Awards in Poland*, in: P. Pietkiewicz et al. (eds.), *Arbitration in Poland*, Court of Arbitration at the Polish Chamber of Commerce, Warszawa: 2011, pp. 125-140.

3. CHINA – POLAND BIT IN THE NEW ERA: AN EVALUATION

The Agreement between the Government of the People's Republic of China and the Government of the Polish People's Republic on the Reciprocal Encouragement and Protection of Investments (China – Poland BIT) was signed in Beijing on 7 June 1988, and entered into force on 8 January 1989.⁸² This treaty consists of 11 articles and without doubt can be regarded within the group of China's first-generation BITs. Like other BITs of the first generation, the China – Poland BIT is relatively outdated in terms of investment protection, promotion, social clauses, and dispute settlement compared to China's recent treaty practices and new developments in global investment governance. In this part of the article the most relevant features of the BIT will be briefly discussed.

3.1. Investment protection

3.1.1. Definition of investor and investment

The definition of investment under Art. 1 of the China – Poland BIT can be regarded as a broad asset-based definition, even if, surprisingly and differently to other Chinese BITs, “business concessions” are not enumerated under Art. 1.⁸³ The definition of investor, who can be a “natural” or a “juridical person/organization/association” seems to be rather narrow, due to the fact that an investor was restrained only to a juridical entity “having its seat in the territory of this Contracting Party.”⁸⁴ The China – Poland BIT is silent on its application to investors and investment to and from SARs, which will, according to the analysis in part 2.2.1 of this article, likely be interpreted to be applicable.

3.1.2. Fair and Equitable Treatment

The FET provision in the China – Poland BIT is a quite common one (“equitable treatment”) configured with the Full Protection and Security (“enjoy protection”), the MFN provision, and a custom union exception.⁸⁵ However, a clarification of the FET standard seems desirable given the inconsistent interpretations of the term in arbitral practices. A good example of a more precise FET provision may be found in other Chinese BITs e.g. in the China – Tanzania BIT, where FET means that “investors of one

⁸² Note that in the literature sometimes this BIT is mistakenly quoted as China – Poland BIT 1998, probably due to the error in the English text of the treaty (1998 instead of 1988) available in. e.g., the database of UNCTAD. See A. Chen. *The Voice from China, An Chen on International Economic Law*, Springer, Berlin-Heidelberg: 2013, p. 360.

⁸³ Brown, *supra* note 25, p. 151: “[w]hilst the list serves to clarify the meaning of ‘investment’, it is important to bear in mind that the list is merely illustrative, and absence from the list of any particular asset does not necessarily mean that they are excluded from BIT protection.”

⁸⁴ While some other BITs define the term investor more broadly, using alternatively the criteria of “incorporation”, “control” and “seat”.

⁸⁵ China – Poland BIT, Art. 3.

Contracting Party shall not be denied fair judicial proceedings by the other Contracting Party or be treated with obvious discriminatory or arbitrary measures.”⁸⁶

3.1.3. National Treatment

There is no national treatment provision of any kind included in the China – Poland BIT, which is obviously inadequate for the protection of transnational investment between China and Poland. There is thus considerable room for improvement of the China – Poland BIT regarding NT, because China has accepted the full NT standard for post-establishment matters since 1998. China in its practice has adopted various provisions regarding NT, for example, as the most recent EU-style Chinese BIT, the China – Tanzania BIT (2013) provides for NT “without prejudice to its applicable laws and regulations, with respect to the operation, management, maintenance, use, enjoyment, sale or disposition of the investments in its territory”,⁸⁷ while other Chinese BITs adopt a NT standard subject to like circumstances only.⁸⁸

3.1.4. Expropriation

Art. 4 of the China – Poland BIT provides that nationalization or expropriation may be conducted for security reasons or a public purpose; shall be taken under due process of national law; and shall not be discriminatory.⁸⁹ The required compensation shall be equivalent to the value⁹⁰ of the expropriated investment assets at the time when the expropriation is proclaimed.⁹¹ In a rather unusual provision, the China – Poland BIT provides that the legality of expropriation can be challenged in and reviewed by a competent domestic court.⁹² However, with respect to a loss suffered as a result of war, a state of national emergency, insurrection, riot or other similar events, compensation is not guaranteed, but should be treated no less favourably than that accorded to investors of a third State.⁹³ Compared to Chinese recent practices, the China – Poland BIT may be improved by an annex clarifying the factors for indirect expropriation and the police power doctrine.⁹⁴

3.2. Investment promotion

The China – Poland BIT refers briefly to investment promotion, namely to “admit such investments in accordance with its laws and regulations.”⁹⁵ This provision wisely acknowledges the role that national law could play in investment promotion.

⁸⁶ China – Tanzania BIT, Art. 5(2).

⁸⁷ *Ibidem*, Art. 3(1).

⁸⁸ China – Canada BIT, Art. 6(1).

⁸⁹ China – Poland BIT, Art. 4(1).

⁹⁰ *Cf.* “fair market value” in China – Canada BIT, Art. 10(1).

⁹¹ China – Poland BIT, Art. 4(2).

⁹² *Ibidem*, Art. 4(3).

⁹³ *Ibidem*, Art. 4(4).

⁹⁴ *Ibidem*, Art. 6(2)-(4). China – Canada BIT, Annex on Expropriation.

⁹⁵ China – Poland BIT, Art. 2.

Traditionally, China has used national laws and policies to positively promote foreign investment with actual incentives, such as taxation reduction,⁹⁶ working permits, and housing conditions.⁹⁷ The national law in China remains relevant for investment promotion. For example, while pre-establishment national treatment with a negative list is right now only a proposal in the China-US BIT negotiation, it has already been put into practice in China's Pilot Free Trade Zone⁹⁸ and is now nation-wide.⁹⁹

If investment promotion is understood broadly to cover investment admission, pre-establishment national treatment may be well covered in future Chinese BITs, especially the US-style BITs. China is negotiating an investment agreement with the European Union and pre-establishment treatment is among the key issues.¹⁰⁰ Another related issue is the national security review of investment admission, which is primarily addressed by the domestic law of China.¹⁰¹ It is therefore advisable to update the China-Poland BIT in coordination with national legislations and the industrial policies of both China and Poland.

3.3. Social clauses

Social concerns are neither addressed nor covered by the China-Polish BIT. The absence of a social clause for investment regulation is understandable because in their early practices neither China nor Poland realized the potential negative effects of BITs and the associated investment arbitration. With the increasing awareness of the

⁹⁶ Standing Committee of National People's Congress, 全国人大常委会关于外商投资企业和外国企业适用增值税、消费税、营业税等税收暂行条例的决定 [Decision of the National People's Congress Standing Committee on the Application of the Interim Regulations on Value Added Tax, Consumption Tax and Business Tax for Foreign-invested Enterprises and Foreign Enterprises], 29 December 1993, available at: http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4610.htm (in Chinese) (accessed 30 May 2019).

⁹⁷ The Central People's Government of China, 中华人民共和国外国人入境出境管理条例 [Regulations on the Administration of Foreigners' Entry and Exit of China], 3 July 2013, available at: http://www.gov.cn/flfg/2013-07/22/content_2477673.htm (in Chinese) (accessed 30 May 2019).

⁹⁸ Development and Reform Commission, Ministry of Commerce, 自由贸易试验区外商投资准入特别管理措施（负面清单）（2018年版） [List for Special Administrative Measures for Admission of Foreign Investment in the Pilot Free Trade Zone (Negative List) (2018 Version)], 30 June 2018, available at: <http://images.mofcom.gov.cn/wzs/201806/20180628222647715.pdf> (in Chinese) (accessed 30 May 2019).

⁹⁹ Development and Reform Commission, Ministry of Commerce, 外商投资准入特别管理措施（负面清单）（2018年版） [List for Special Administrative Measures for Admission of Foreign Investment (Negative List) (2018 Version)], 28 June 2018, accessed at: <http://www.ndrc.gov.cn/zcfb/zcfb/201806/W020180628640822720353.pdf> (in Chinese) (accessed 30 May 2019).

¹⁰⁰ EU and China agree on scope of the future investment deal, Brussels, 15 January 2016, available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1435> (accessed 30 May 2019).

¹⁰¹ Standing Committee of the National People's Congress, 中华人民共和国国家安全法 [National Security Law of China], Art. 59, 1 July 2015, available at: http://www.npc.gov.cn/npc/xinwen/2015-07/07/content_1941161.htm (in Chinese) (accessed 30 May 2019). 商务部实施外国投资者并购境内企业安全审查制度的规定 [Rules of the Ministry of Commerce on the Implementation of Security Review on Merger of Domestic Enterprise by Foreign Investors], MOFCOM Decree [2011] 53, 25 August 2011, available at: http://www.gov.cn/gzdt/2011-08/26/content_1934046.htm (in Chinese) (accessed 30 May 2019).

potential negative effects of investment and investment arbitration, China has paved the way for the inclusion of social clauses in recent Chinese BITs, which could be served as a blueprint for a possible update of the China-Poland BIT.

Social clauses are generally introduced for two reasons, namely rebalancing for the host state's legitimate regulatory power and promoting inclusive and sustainable development. First, the right to regulate is increasingly and expressly recognized in Chinese BITs, for example "respecting the economic sovereignty of both states" in the preamble,¹⁰² in the police power doctrine for expropriation,¹⁰³ in a taxation exception,¹⁰⁴ and in a balance of payments difficulty exception to freedom of transfers.¹⁰⁵ Secondly, both the China – Tanzania and the China – Canada BITs specifically refer to sustainable development in the preamble. The China – Tanzania BIT further expressly encourages investors to respect corporate social responsibilities in the preamble and includes one provision on health, safety and environmental measures to prohibit the regulatory race to bottom.¹⁰⁶

3.4. Dispute settlement

Regarding the dispute settlement mechanism, the China – Poland BIT is more generous than other Chinese first-generation BITs. But still, comparing it to BITs worldwide the Chinese mechanism is obviously far from being generous overall. Under Art. 9 disputes regarding the interpretation or application of the investment treaty may be submitted to an *ad hoc* arbitral tribunal if a dispute cannot be settled within six months through diplomatic channels. This dispute settlement mechanism is available for state-to-state disputes regarding only the BIT's interpretation and application. Also, under Art. 10 the investor can submit a dispute over the amount of compensation to be paid in case of an expropriation measure to the *ad hoc* international arbitral tribunal, if the competent authority of the Contracting Party taking the expropriation measure to whom the investor filed a complaint fails to resolve the dispute within one year.

Therefore, the ISDS arbitration on an *ad hoc* basis is available in the China – Poland BIT only for disputes concerning the amount of compensation for expropriation. ICSID arbitration is not included in the BIT as China and Poland were not parties to the ICSID Convention at the time of concluding the BIT.¹⁰⁷ The cooling-off period is rather long – one year after a complaint is filed.¹⁰⁸ Recourse to the domestic court is also available for settling the dispute and there is no fork-in-the-road provision.¹⁰⁹

The limited ISDS mechanism in the China – Poland BIT is obviously not sufficient for the protection of transnational FDI between China and Poland. It is possible that

¹⁰² China – Tanzania BIT, Preamble.

¹⁰³ *Ibidem*, Art. 6(3); China – Canada BIT, Annex on Expropriation.

¹⁰⁴ China – Canada BIT, Art. 14.

¹⁰⁵ China – Tanzania BIT, Art. 8(4); China – Canada BIT, Art. 12.

¹⁰⁶ China – Tanzania BIT, Art. 10.

¹⁰⁷ Note that Poland still remains the only European state not to sign the ICSID Convention.

¹⁰⁸ *Cf.* 6 months in the China – Tanzania BIT, Art. 13(2); and in the China – Canada BIT, Art. 21(2)(2).

¹⁰⁹ China – Poland BIT, Art. 10.

an arbitral tribunal might take a restrictive interpretation in disputes concerning the amount of compensation for an expropriation, severely restraining the availability of ISDS for investors. And as there is no fork-in-the-road provision¹¹⁰ it is necessary for investors to first resort to the domestic court to settle the legality of an expropriation and then proceed to international arbitration for determination of the amount of compensation due.

3.5. Most favoured nation

Another relevant issue is the application of the MFN provision. This provision in the China – Poland BIT is drafted in a brief but broad manner.¹¹¹ Recent Chinese BITs tend to limit the application of MFN in various manners, for example, to like circumstances,¹¹² or in the territory of the host state,¹¹³ or by excluding procedural manners.¹¹⁴ It can be concluded that the MFN clause in the China – Poland BIT applies to substantive matters, but uncertainty remains as to its applicability to procedural issues.

As a general matter there is no conceptual reason why an MFN clause should be limited to substantive guarantees and rule out procedural protections.¹¹⁵ The potential application of an MFN clause to procedural protections has been accepted by investment tribunals.¹¹⁶ However, it has also been confirmed by various arbitral tribunals that the application of MFN clauses depends on the precise wording of the clause included in the treaty,¹¹⁷ has to be decided on a case-by-case basis, and that it is not possible to establish a general rule that an MFN clause applies or does not apply to jurisdictional issues.¹¹⁸

Luckily, the clear text of the China – Poland BIT should leave no doubts regarding the scope of application of the MFN clause. Art. 3(1) states that “investments 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.” The MFN clause has been articulated under para. 2, which states that: “the treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with invest-

¹¹⁰ *Ibidem*, Art. 10.

¹¹¹ *Ibidem*, Art. 3(2).

¹¹² China – Tanzania BIT, Art. 4(1).

¹¹³ China – Canada BIT, Art. 5(1).

¹¹⁴ China – Tanzania, Art. 4(1). China – Canada BIT, Art. 5(3).

¹¹⁵ *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. Abr. V 079/2005, Award on Jurisdiction, 5 October 2007, paras. 130-132; *Australian Airlines v. Slovak Republic*, UNCITRAL, Final Award, 9 October 2009, para. 124.

¹¹⁶ *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, paras. 54-56; *Siemens A. G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 32; *Gas Natural SDG, S.A v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, 17 July 2005, paras. 24-30.

¹¹⁷ *Quasar de Valores SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009, para. 119.

¹¹⁸ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011, paras. 28-29, 37-38.

ments of investors of any third State.” Thus the text of the treaty leaves no doubt that it refers only to the standard of protection awarded under Art. 3 para. 1 (FET).

This problem was addressed in the case *Tza Yap Shun v. Peru*, when the question of the MFN clause was raised. The Arbitral Tribunal under the China – Peru BIT, which contains the same stipulation as Art. 3(2) of the China – Poland BIT, stated that the MFN clause included in the treaty is applicable only to the content of Art. 3 (FET) and cannot be interpreted as applicable to the procedural issues – especially arbitration clauses. Therefore, following the standpoint of the scholars¹¹⁹ and the jurisprudence, the MFN clause of the China – Poland BIT should be interpreted restrictively, and the evolution of Chinese BITs (second generation) which contain more generous arbitration clauses cannot affect and change the scope of protection of the China – Poland BIT.

4. FINAL OBSERVATIONS

The international investment law regime is undergoing a fundamental transition, and a more nuanced generation of Chinese BITs is taking shape.¹²⁰ The China – Poland BIT, signed in the late 1980s, is insufficient and needs updating in terms of investment protection, promotion, regulation, and dispute settlement. The challenging question is how to do this.

4.1. Concluding remarks regarding state of investment protection de lege lata

In terms of the investment protection effects of BITs, it seems that China should be more interested in updating the China – Poland BIT than Poland. It can be observed that with some states China has – instead of amending the old first generation of BITs – signed and concluded new BITs with wider substantive protection of investment and broader dispute settlement clauses.¹²¹ This has not happened in the case of Poland. Obviously, from the standpoint of a Polish investor wishing to invest or already investing in China, a new modern BIT would be *prima facie* more desirable, because in case of any infringement of investor rights the investor would have the possibility to have recourse to international arbitration. However, as already pointed out a Polish investor, even with an arbitral award rendered in his favour, would still face hurdles under the Chinese system, e.g. regarding the enforcement of such an award. At the end of the day, an investor’s position still depends more on a positive Chinese attitude and its willingness to reach an agreement than on the international arbitral system.

¹¹⁹ See e.g. N. Eliasson, *Investor-State Arbitration and Chinese Investors, Recent Developments in Light of the Decision on Jurisdiction on the Case Mr. Tza Yap Shun v. The Republic of Peru*, 2 Contemporary Asia Arbitration Journal 347 (2009), p. 361.

¹²⁰ Shan, Chen, *supra* note 30, p. 223.

¹²¹ E.g. with the Czech Republic, France, Finland, Germany, the Netherlands, the Russian Federation, Spain, and Switzerland.

In assessing the need for a modern BIT with China, the Polish government has to take into account the reciprocity of the investment protection granted. A new modern BIT would grant broader protection not only for Polish investors in China, but more importantly for Chinese investors in Poland. Therefore, by granting such a protection the Polish government would weaken its position *vis-à-vis* Chinese investors in Poland, allowing them to sue Poland under international investment law before international arbitral tribunals. Taking into account that there is certainly more Chinese investment in Poland than Polish investments in China, and also that Chinese investors would not face the same problems with the enforceability of favourable arbitral awards as Polish investors would, it seems that a modern BIT would be more beneficial for Chinese investors than for Polish ones. It seems this would particularly be the case because China increasingly regards BITs as a tool for protecting its oversea investments, and is actively expanding and deepening its BIT networks through mega-negotiations with the EU, the US, and the Regional Comprehensive Economic Partnership.¹²²

Without a doubt, China is still among those states which would prefer not to leave the solution of a dispute in the hands of international arbitration, but would rather resolve it *via* diplomatic channels and bilaterally reached agreements. Very few of those agreements are fully disclosed. As an illustrative example, the dispute between the General Director for National Roads and Motorways in Poland and the Chinese investor COVEC may be instructive. This dispute arose in 2011 when the Chinese investor, who had previously won a contract for a motorway's construction, abandoned his investment, leaving a lot of unpaid obligations in his on-going building project. The Polish agency faced problems even recovering bank guarantees for this contract. The dispute was settled by an agreement of 19 May 2017 between the interested parties.¹²³ However, it goes without saying that such an agreement was a result of the decisions taken during the visit of the Polish Prime Minister in China in May 2017. The public was informed only about the existence of the agreement and that both States were satisfied. The precise content of the agreement was not disclosed.

Therefore, the first reasonable step for an investor whose rights are allegedly infringed would be to turn to the government for help. On the intergovernmental level China enjoys a stronger bargaining position and possible leverage over the Polish government, which puts Chinese investors in a relatively better position *vis-à-vis* their Polish counterparts. However, it cannot be taken for granted that the result of a Polish claim *via* diplomatic channels would be preordained to be ineffective, because without doubt China is concerned to project an image of being a fair and friendly host State to foreign investors.

Some scholars have raised some doubts regarding the reliability of China's judicial system, which is believed to fail to enforce contractual obligations, and about the lack

¹²² See Gallagher, *supra* note 5.

¹²³ See Official Statement of the General Director for National Roads and Motorways available at: <https://www.gddkia.gov.pl/pl/a/26149/Ugoda-pomiedzy-GDDKiA-a-firma-COVEC-zawarta> (accessed 30 May 2019).

of transparency and uniformity in the application of the regulatory regime governing investments.¹²⁴ Therefore, the initiation of an ISDS proceeding in the face of opposition on the part of the Chinese government is a risky move for foreign investors, especially Polish ones, who are protected by the first-generation BIT. In many cases the primary, and sadly sometimes the only recourse, is a negotiated settlement with the Chinese government. Viewed in this light, the renegotiation of the China – Poland BIT does not seem to be an urgent need for the Polish government because, in the light of the presented arguments, a modern China – Poland BIT would be more desirable and beneficial for Chinese than for Polish investors. However, if we evaluate the overall effects of a modernized BIT on investment promotion, regulations, and dispute settlement, an updated China – Poland BIT would fit the interests of both the Polish and Chinese Governments. As both an FDI importing and exporting state, China currently pursues balanced and safeguarded BITs aimed at protecting its increasing oversea investments and safeguarding the necessary space to regulate in the public interest. An updated BIT should be viewed as an overall structure for transnational investment governance, rather than simply a tool to protect the investments of investment-exporting countries. First, a China – Poland BIT with pre-establishment treatment would stimulate the transnational FDI flow among the two countries, perhaps more for Chinese investors investing in Poland. Second, an updated BIT would likely include a social clause which would recognize the regulatory power of the host state and promote inclusive and sustainable development. Third, both China and Poland would like to recalibrate the ISDS mechanism, to reinforce the safeguard mechanism for the participation of contracting states and therefore to better guide the arbitral tribunals. This may be particularly relevant for Poland, as it has been sued in at least 26 cases, while China has only been sued in three cases so far.¹²⁵

4.2. Where to from here? Three possible scenarios for the future

To conclude this article, some brief remarks regarding possible future developments are appropriate. Basically there are three possible scenarios for future Chinese – Polish relations in terms of investments. The first situation assumes that the negotiations over an EU – China BIT will not bear fruit in the near future. Therefore the status quo will be preserved and the investor will be only covered by the China-Poland BIT from 1989. This situation, namely the status of *the lege lata* of the regulations regarding the protection of the investors was mainly addressed throughout all parts of this article and concluded in sub-part 4.1 above. The second scenario would take place when the EU – China negotiations are finally concluded. The China – Poland BIT should be updated by the EU – China investment agreement, assuming it is successfully concluded and fits the interests of both Poland and China. On one hand, the EU has to take the concerns

¹²⁴ Vaccaro-Incisa, *supra* note 24, p. 114.

¹²⁵ More information on the cases against Poland and China can be found in the UNCTAD Investment Policy Hub Investment Dispute Settlement Navigator, <http://investmentpolicyhub.unctad.org/ISDS> (assessed 30 May 2019).

and interests of all Member States into consideration and may not fully satisfy the particular demands of Poland in its negotiations with China. On the other hand, the EU as a whole will be in a better bargaining position during such negotiations. In such a situation, obviously the protection of Polish and Chinese investors would be amended and updated, especially in comparison with the protection granted under the China – Poland BIT (1989). However, any detailed scrutiny of the possible content of an EU – China investment agreement falls outside of the scope of this article.¹²⁶

The third scenario would arise if the EU – China negotiations would be futile, and what's more that Poland would be allowed to negotiate an agreement on its own with China. BIT protection in the EU after the Lisbon Treaty lies within the exclusive competence of the EU, not in the competence of the Member States. Therefore, Poland could only renegotiate the treaty with China if it were granted permission by the EU Commission under a so-called “grandfather regulation.”¹²⁷ If these two variables were fulfilled, updating the China – Poland BIT at the national level remains a viable option. Poland is an important partner for China in the Belt and Road Initiative, and it should be possible for China and Poland to work together to promote a tailor-made Belt and Road Investment Agreement.

¹²⁶ For more on the EU-China Investment Treaty, see I. Ewert, *The EU-China Bilateral Investment Agreement: Between High Hopes and Real Challenges*, Security Policy Brief No. 68, February 2016, available at: <https://core.ac.uk/download/pdf/148912339.pdf> (accessed 30 May 2019).

¹²⁷ Regulation EU No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transnational arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351.