

Chapter 4.2

China's Belt and Road Initiative – Opportunities and Challenges for International Investment Law

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A. INTRODUCTION

In late 2013, Chinese President Xi announced the Belt and Road Initiative (BRI), which is officially named the *Silk Road Economic Belt and 21st Century Maritime Road Development Strategy*.¹ The Economic Belt is aimed at promoting infrastructure and development connectivity with countries on the original Silk Road through Central Asia, West Asia, the Middle East, and Europe. The Maritime Road seeks to foster regional and international collaboration on the maritime expedition routes. There are four principal routes: the China-Southeast Asia Route, the China-South Asia Route, the Middle East- East Africa Route, and the Europe Route.²

As of **July 2021**, China has signed more than 200 Memorandums of Understanding (MoUs) with 140 countries and 32 international organizations, covering projects in various sectors (such as energy, education, transport, urban development, and tourism) and involving a myriad of basic infrastructure projects (including railways, ports, roads, gas station networks, hydropower stations, etc.).³ Overall reception has been positive, and the United Nations (UN) has recognized the value

¹ See *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with the authorization from State Council (March 2015), http://www.china.org.cn/chinese/2015-09/15/content_36591064.htm?f=pad&a=true.

² *Id.*

³ See *List of Countries That Have Signed Cooperation Agreements with China under the Belt and Road Initiative*, <https://www.yidaiyilu.gov.cn/xwzx/roll/77298.htm>. The official website (Belt and Road Portal, <https://eng.yidaiyilu.gov.cn/>) operated by the Chinese government is accessible to obtain newly-released information and updated statistics on projects launched under the BRI. See also the Green Belt and Road Initiative Center (<https://green-bri.org/>) of the International Institute of Green Finance of the Central University of Finance and Economics in Beijing, China.

and called for efforts to put the BRI into effect.⁴ Around 20 UN agencies have concluded cooperative agreements with China on the BRI.⁵

In the meantime, implementing the BRI, along with its opportunities and challenges, have become popular topics debated from the perspectives of economics, politics (or geopolitics), international relations, sociology, and law.⁶ As a hugely ambitious economic strategy to develop and enhance trade and investment relationships regionally and worldwide, the BRI has also met with criticism. In addition to countries outside the geographic areas benefitting from the BRI, some have complained that the BRI has become a tool of the Chinese government to exert substantial political influence on countries across several continents.⁷ In the first three years following its launch, the BRI has already affected one-third of global trade⁸ and more than half of the global population.⁹ According to estimates, the BRI infrastructure projects will add over USD 1 trillion in investment by 2027.¹⁰ The BRI also has the potential to ‘grow into a legal framework [...] like FTAs [Free Trade Agreements] [...] or a new type of FTA’,¹¹ although ‘[t]he BRI neither has a constituting treaty with all BRI states (a BRI-wide treaty) nor formal membership protocols.’¹²

⁴ According to various studies, there is a massive infrastructure investment deficit, in particular in developing countries. A World Bank study in 2015 found an annual deficit of US\$ 452 billion. If unaddressed, this will make it ever more difficult for developing nations to close the gap with developed countries or even to provide basic economic opportunities for their growing populations. See Fernanda Ruiz-Nuñez & Zichao Wei, *Infrastructure Investment Demands in Emerging Markets and Developing Economies*, World Bank Policy Research Working Paper WPS7414, 2015. The UN recognizes the BRI as an important contribution in addressing this problem. See UN General Assembly, A/RES/71/9, 6 December 2016, <https://undocs.org/A/RES/71/9>, at 53; UN Security Council, S/RES/2274 (2016), 15 March 2016, http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2274.pdf, at 22.

⁵ *United Nations in China*, Remarks at the Plenary Session of the BRI International Green Development Coalition (BRIGC) by Mr. Nicholas Rosellini, UN Resident Coordinator, 25 April 2019, <http://www.un.org.cn/info/7/966.html>.

⁶ See generally, Giuseppe Martinico & Xueyan Wu (eds.), *A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road?*, Palgrave Macmillan 2020; Maria A Carrai, Jean-Christophe Defraigne & Jan Wouters (eds.), *The Belt and Road Initiative and Global Governance*, Leuven Global Governance Series, Edward Elgar 2020; Yun Zhao (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative*, Cambridge Univ. Press, 2018; Julien Chaisse & Jędrzej Górski (eds.), *The Belt and Road Initiative: Law, Economics, and Politics*, Brill Nijhoff, 2018.

⁷ Ka Zeng, *The Political Economy of Chinese Outward Foreign Direct Investment*, in ‘One-Belt, One-Road (OBOR)’ Countries, in Julien Chaisse (ed.), *China’s International Investment Strategy: Bilateral, Regional, and Global Law and Policy*, Oxford Univ. Press, 2019, at 360.

⁸ Julien Chaisse & Jamieson Kirkwood, *Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty*, *Journal of Int’l Economic Law* 2020, Vol. 23, No. 1, pp. 245–269, at 246.

⁹ OECD, *China’s Belt and Road Initiative in the Global Trade, Investment and Finance Landscape*, in *OECD Business and Finance Outlook 2018*, OECD Publishing, 2018, at 9.

¹⁰ *Id.*, at 3.

¹¹ Julien Chaisse & Mitsuo Matsushita, *China’s ‘Belt and Road’ Initiative: Mapping the World’s Normative and Strategic Implications*, *Journal of World Trade* 2020, Vol. 52, No. 1, pp. 163-185, at 184-185.

¹² Heng Wang, *China’s Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, *Journal*

In addition to trade, the BRI has inextricable connections with investment law and other rules that govern investment activities. According to the *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road* jointly issued by the National Development and Reform Commission, the Ministry of Foreign Affairs, and the Ministry of Commerce of the People's Republic of China (PRC), the Chinese government is devoted to 'speed up investment facilitation, eliminate investment barriers, and push forward negotiations on bilateral investment protection agreements and double taxation avoidance agreements to protect the lawful rights and interests of investors' through the BRI.¹³ To build the Silk Road Economic Belt and the Maritime Silk Road, Chinese enterprises are encouraged to engage in infrastructure construction and make other investments in BRI target countries. Meanwhile, China itself is also open to foreign investors from all countries.¹⁴ According to the World Bank research report, China's FDI in the BRI countries, as well as intra-BRI FDI, are indeed growing.¹⁵

Nonetheless, the primary BRI agreements – the large volume of bilateral MoUs – are mostly of soft law nature and have weak or no binding force at all.¹⁶ That is to say, by their very nature, the MoUs can hardly help govern investment activities or offer effective protection to investors. Since the BRI is not conceived as an enforceable multilateral investment protection agreement, questions as to whether and how BRI investors are protected have arisen. This chapter seeks to address these concerns by presenting the main content and distinctive features of the international investment legal framework in the BRI. In particular, it introduces the international investment agreements (IIAs)-network between China and the BRI countries, elaborates on the available dispute resolution mechanisms to address investment conflicts arising out of the BRI projects, and investigates the sustainable development challenges along the BRI.

B. CHINESE INVESTMENT TREATIES AND THE BRI

Ever since the conclusion of the bilateral investment treaty (BIT) between Germany and Pakistan in 1959, China has played an important role in the proliferation of BITs. The database of the IIA Navigator operated by the United Nations Conference on Trade and Development (UNCTAD) shows that China has so far concluded 145 bilateral investment treaties (BITs). Of these, 19 have

of Int'l Economic Law 2019, Vol. 22, No. 1, pp. 29–55, at 43.

¹³ Vision and Actions, *supra* note 1.

¹⁴ *Id.*

¹⁵ Maggie Xiaoyang Chen & Chuanhao Lin, *Foreign Investment Across the Belt and Road: Patterns, Determinants, and Effects*, World Bank Policy Research Working Paper No. WPS 8607, Washington DC, 2018, at 11–13. It is worth mentioning that China has become the second largest FDI recipient in the world after the United States (U.S.) since 2017 and that China now makes the largest FDI outflows worldwide. See *UNCTAD World Investment Report 2021: Investing in Sustainable Recovery*, 2021, at 7; *UNCTAD World Investment Report 2018: Investment and New Industrial Policies*, 2018, at 4; and *UNCTAD World Investment Report 2020: International Production Beyond the Pandemic*, 2020, at 12.

¹⁶ Heng Wang, *The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges*, World Trade Review 2021, Vol. 20, No. 3, pp. 282–305, at 288–289.

been terminated, 19 remain signed but not in force, and 107 have entered into force.¹⁷ In addition, China is a signatory to many FTAs and other forms of treaties with investment protection provisions or chapters.¹⁸

Most of these IIAs were concluded before the BRI was promulgated. However, China has recently engaged in a great number of investment negotiations in an attempt to 'reassess its current BIT network and transition towards something new'.¹⁹ For instance, China concluded a new BIT with Turkey in 2015 and signed several FTAs, respectively with Mauritius in 2009, Georgia in 2017, and Australia and Korea in 2015. More importantly, in November 2020, China, as one of the negotiating parties, signed the Regional Comprehensive Economic Partnership (RCEP),²⁰ which is supposed to 'improve access to Chinese Belt and Road Initiative funds'²¹ and 'affect China's investment regime significantly'.²² Later, in December 2020, China and the European Union (EU) reached agreement in principle on a Comprehensive Agreement on Investment (CAI),²³ which has the potential,²⁴ though not necessarily,²⁵ to replace the existing 25 Chinese BITs with EU Member States. Very recently, China submitted a formal request to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).²⁶ China also seeks to advance negotiations for a BIT with the United States (U.S.).²⁷

¹⁷ See *Mapping of IIA Content, International Investment Agreements Navigator*, UNCTAD Investment Policy Hub, <https://investmentpolicy.unctad.org/international-investment-agreements/ii-a-mapping>.

¹⁸ The UNCTAD IIA Navigator has listed 24 treaties with investment provisions (TIPs) signed by China: 19 are in force and 5 remain signed but not currently in force. See *Id.*

¹⁹ Chaisse & Kirkwood, *Anatomy of the (Invisible) Belt and Road Investment Treaty*, *supra* note 8, at 247.

²⁰ The RCEP was concluded by the ten member states of the Association of Southeast Asian Nations (ASEAN), Australia, China, Japan, Korea, and New Zealand, at the 4th RCEP Summit. See *Joint Leaders' Statement on the Regional Comprehensive Economic Partnership (RCEP)*, <https://rcepsec.org/wp-content/uploads/2020/11/RCEP-Summit-4-Joint-Leaders-Statement-Min-Dec-on-India-2.pdf>.

²¹ Peter A Petri & Michael Plummer, *RCEP: A New Trade Agreement That Will Shape Global Economics and Politics*, Brookings, 16 November 2020, <https://www.brookings.edu/blog/order-from-chaos/2020/11/16/rcep-a-new-trade-agreement-that-will-shape-global-economics-and-politics/>.

²² Heng Wang, *The RCEP Investment Rules and China: Learning from the Malleability of Chinese FTAs*, in Julien Chaisse (ed.), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy*, Oxford Univ. Press 2019, at 243.

²³ European Commission, *EU and China Reach Agreement in Principle on Investment*, 30 December 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541.

²⁴ The European Commission (EC) has noted that one of the EU's objectives is to 'modernise and replace the existing Member States' Bilateral Investment Treaties with China'. See *Id.*

²⁵ Lili Yan Ing & Junianto James Losari, *The EU—China Comprehensive Agreement on Investment: Lessons Learnt for Indonesia*, *China Economic Journal* 2021, Vol. 14, No. 2, pp. 200–221, at 200.

²⁶ See *China Applies to Join Pacific Trade Pact to Boost Economic Clout*, Reuters, 17 September 2021, online: <https://www.reuters.com/world/china/china-officially-applies-join-cptpp-trade-pact-2021-09-16/>.

²⁷ For discussions centered on the ongoing negotiation of the China-US BIT and its implications, see e.g. Jie Huang, *Challenges and Solutions for the China–US BIT Negotiations: Insights from the Recent Development*

At present, there is no multilateral investment treaty concluded by all BRI jurisdictions. So far, it has been practically impossible to reconcile the interests of all BRI countries, given their great differences in terms of legal frameworks, geopolitical concerns, cultural and social values, and economic systems.²⁸ This becomes even more difficult as the number of BRI jurisdictions increases.²⁹ Still, China arguably needs a BRI-wide mega-regional investment treaty so as to ‘counter the impact of the US-led TPP and TTIP, ..., to encourage other nations to rewrite the investment rules, ..., and [to] offer better protection for China’s outbound investment.’³⁰ Such a treaty would further assist China in ‘solidif[ing] its leading role in the BRI region and reshap[ing] its legalistic image on the global stage’.³¹ Of course, since Trump terminated U.S. participation in the negotiations for the TPP and TTIP, there is no US-led or even U.S.-supported effort in this direction, leaving the field wide open, at least potentially, for China to take on a more substantial leadership role.

104 out of the 140 BRI countries³² have signed investment treaties with the Chinese government; of these countries, 33 are in Africa, 32 in Asia, 26 in Europe, 3 in Oceania, 5 in South America, and 5 in Central- and North America. 89 of them have BITs, FTAs, or other types of treaties with investment provisions (TIPs) with China in force;³³ another 15 countries have signed investment treaties with China but they are not (yet) in force (see also the chart below).³⁴ Thus, nearly 75% of the BRI

of FTZs in China (2015) 18:2 *Journal of International Economic Law* 307–339; *Policy Considerations for Negotiating a U.S.-China Bilateral Investment Treaty*, by Lauren Gloudeman & Nargiza Salidjanova, Zotero (U.S.-China Economic and Security Review Commission, 2016); Congyan Cai, *China–US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications* (2009) 12:2 *Journal of International Economic Law* 457–506.

²⁸ Chaisse & Kirkwood, *Anatomy of the (Invisible) Belt and Road Investment Treaty*, *supra* note 8 at 248–249.

²⁹ *Id.*

³⁰ Wei Shen, *The Belt and Road Initiative, Expropriation and Investor Protection under BITs*, in Yun Zhao (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative*, Cambridge University Press 2018, pp. 132 et seq., at 136.

³¹ *Id.*, at 161.

³² In this chapter, BRI countries are those who have signed the respective MoU(s) with the Chinese government.

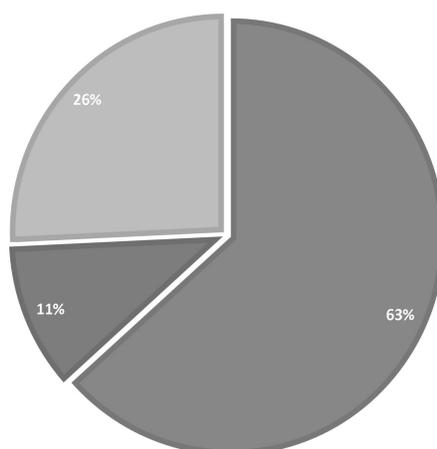
³³ Among the 89 countries, 84 promote investment cooperation with China mainly through BITs and 5 through TIPs. These five countries are Cyprus, Chile, Brunei, Indonesia, and Singapore. Cyprus, as a Member State of the EU, connects with China through the recently signed CAI. Chile has an effective FTA with China, the Chile-China FTA (2005), so does Singapore, the China-Singapore FTA (2008). Brunei and China signed a BIT in 2000 but this treaty is not yet in force. Indonesia and Singapore have signed BITs with China – the China-Singapore BIT (1985), and the China-Indonesia BIT (1994). However, these two BITs have been terminated. Brunei, Indonesia, and Singapore, as member states of ASEAN (the Association of Southeast Asian Nations), now reshape their investment relations with China through the ASEAN-China Investment Agreement (2009) and the ASEAN-China Framework Agreement (2002), both of which are now in force. It is worth noting that all ASEAN member states (Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, and Thailand) are now BRI partners and have close economic relations with China through investment treaties and through BRI MoUs.

³⁴ 14 out of 15 are African countries. The Democratic Republic of Congo (DRC) has signed more than one BIT with China: The China-DRC BIT (1997) and the China-DRC BIT (2011); however, neither of these two DRC

countries have an investment treaty with China and some 63% have treaties in force. This suggests that China has built up a wide web of (mostly bilateral) investment agreements within the BRI context. This is a solid base for promotion and facilitation of capital flows between China and BRI jurisdictions.

CHART 1: BITS AND TIPS BETWEEN CHINA AND BRI COUNTRIES

■ BIT/TIP in force ■ BIT/TIP signed but not in force ■ No BIT or TIP



However, a large number of the Chinese BITs were concluded in the 1990s or even earlier and the investment protection offered therein is largely obsolete. Chinese IIAs have usually been divided by academic scholars into several generations, considering China's overall investment policy, the level of substantive protection included, and the scope of China's consent to investor-state dispute settlement.³⁵ While commentators have set up different timelines and boundaries for their categorizations, many empirical studies have revealed that the first and second generations of Chinese IIAs – generally signed before the late 1990s – do not contain ISDS provisions,³⁶ or incorporate only

BITs have entered into force.

³⁵ See generally, Manjiao Chi, *From Europeanization Toward Americanization: The Shift of China's Dichotomic Investment Treaty-Making Strategy* (2017) 23:2 *Canadian Foreign Policy Journal* 158–170; Axel Berger, *Hesitant Embrace: China's Recent Approach to International Investment Rule-Making* (2015) 16:5–6 *The Journal of World Investment & Trade* 843–868. Other factors have also been used by scholars to differentiate successive generations of Chinese IIAs, such as the international competitiveness of Chinese enterprises, China's advocacy and understanding of the principle of sovereignty, and China's investment policies. For instance, Professor Congyan Cai has considered three generations of Chinese IIAs: (1) Conservative Paradigm (before 1998); (2) Liberal Paradigm (from 1998 to 2005); (3) Balanced Paradigm (since 2006). See Cai, *China–US BIT Negotiations and the Future of Investment Treaty Regime*, *supra* note 27, at 461–462.

³⁶ Yuwen Li & Cheng Bian, *China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options* (2020) 67:3 *Netherlands International Law Review* 503–551 at 505.

narrow consent to ISDS,³⁷ and/or omit important principles like non-discrimination,³⁸ and national treatment.³⁹ Taking the China-Greece BIT (1992) as an example, this treaty does not include any clauses providing for national treatment and China only agrees to submit disputes concerning the amount of compensation to international investor-state arbitration.⁴⁰ By contrast, Chinese BITs concluded in the twenty-first century are often referred to as third or fourth generation agreements and generally offer more preferential and better substantive treatment for investors.

In the BRI context, a large number of BITs were concluded in the 1980s and 90s and provide only weak protections for investors. In particular, more than half of the Asian BRI countries have this type of early BITs with China. Only a few Asian BRI countries have liberalized BITs in force with China. A similar phenomenon exists in the group of Chinese BITs concluded with BRI countries in Europe. To provide broader protections to investors, China and BRI countries may need to re-negotiate and replace their existing old BITs with modernized ones.

Some BRI countries have updated their investment relations with China through multilateral investment treaties. Most notably, this is the case for the China-Association of South-East Asian Nations (ASEAN) Investment Agreement (2009). The BITs between China and some of the ASEAN member states, like Brunei, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, and Vietnam, are either terminated, not in force, or provide only limited protections to investors.⁴¹ By concluding the China-ASEAN Investment Agreement (2009), investors can now enjoy broader and extended protections, including national treatment, most-favoured-nation treatment (MFN), fair and equitable treatment (FET), full protection and security (FPS), and comprehensive consent to ISDS via international arbitration.⁴²

The EU Member States may also want to replace their existing BITs with China through new ones, such as the CAI. However, the CAI is so far not in force and does not include issues of investment protection or ISDS. Therefore, more efforts need to be done. In the meanwhile, China should also update the obsolete BITs with BRI countries from other parts of the world, including African nations and Latin American countries, especially when an updated and modernized regional agreement is not (yet) in the works.

³⁷ Manjiao Chi & Xi Wang, *The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications: The Admissibility of Disputes for Investor-State Arbitration* (2015) 16:5–6 *The Journal of World Investment & Trade* 869–898, at 873–883.

³⁸ Matthew Levine, *Towards a Fourth Generation of Chinese Treaty Practice: Substantive Changes, Balancing Mechanisms, and Selective Adaption*, in Julien Chaisse (ed.), *China's International Investment Strategy*, Oxford Univ. Press 2019, at 207–208.

³⁹ Wenhua Shan, Norah Gallagher & Sheng Zhang, *National Treatment for Foreign Investment in China: A Changing Landscape* (2012) 27:1 *ICSID Review - Foreign Investment Law Journal* 120–144 at 133.

⁴⁰ Art.10(2), China-Greece BIT (1992).

⁴¹ Myanmar is also one of the member states of the ASEAN. The BIT between Myanmar and China belongs to the modernized generation of Chinese BITs, where substantive treatment protection is provided to investors.

⁴² Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations, 2009.

Even in the absence of an effective multilateral treaty among BRI jurisdictions, some have argued that modern levels of protection are already guaranteed on account of the MFN clauses included in the more recent bilateral investment treaties concluded between China and BRI partners.⁴³ To be more specific, most Sino-BRI IIAs include an MFN clause, though the formats differ. According to these clauses, Chinese investors could import more favorable rules contained in a third-country BIT,⁴⁴ in particular higher substantive standards for investment protection.⁴⁵

C. Dispute Settlement Mechanisms for the BRI

As the giant BRI projects gets implemented, occasional disputes seem inevitable. The extensive cooperation and multi-level transactions between governments and private entities across international borders require sound, effective, and efficient legal dispute settlement mechanisms. In 2018, China established two China International Commercial Courts (CICCs) for the BRI context. However, these CICCs are designed to deal with commercial disputes⁴⁶ rather than traditional investment disputes, i.e. disputes between investors and host states. When taking into account China's limited experience in international investor-state disputes, it has become a concern how BRI investment disputes should and will be addressed.

Since 2015, the Supreme People's Court (SPC) supports the use of multiple dispute settlement mechanisms, including arbitration and mediation, to address disputes arising from the development of the BRI, especially considering the differences in terms of culture, legal systems, politics, and religions in the BRI jurisdictions.⁴⁷ In 2019, the SPC reiterated the importance of developing international arbitration and mediation and new international commercial dispute resolution mechanism to meet the stakeholders' needs for dispute resolution along the BRI.⁴⁸ The SPC 2019 Opinions are further in support of 'the improvement of international investment dispute settlement mechanisms and institutions, the respect of dispute settlement provisions in multilateral and bilateral investment treaties' so as to resolve disputes fairly and efficiently.⁴⁹ Therefore, the BRI investment disputes are most likely to be addressed by a combination of arbitration and mediation,⁵⁰

⁴³ Chaisse & Kirkwood, *Anatomy of the (Invisible) Belt and Road Investment Treaty*, *supra* note 8, at 268.

⁴⁴ *Id.*, at 253–254.

⁴⁵ *Id.*, at 256–260.

⁴⁶ For discussions of the legal framework for commercial disputes under the BRI, see e.g., Allison Goh, *Framework for the Resolution of Disputes Under the Belt and Road Initiative* (2021) 87:2 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 243–267.

⁴⁷ Several Opinions on Providing Judicial Services and Guarantee for the Building of One Belt One Road by People's Courts, No. 9 (2015), The Supreme People's Court of The People's Republic of China, <http://gongbao.court.gov.cn/Details/b10a1d30141bc4a4c7886b00d759c3.html>, at para 11.

⁴⁸ Opinions of the Supreme People's Court Regarding Further Providing Judicial Services and Guarantees by the People's Courts for the Belt and Road Initiative, No. 29 (2019), The Supreme People's Court of The People's Republic of China, <http://www.court.gov.cn/zixun-xiangqing-212931.html>, at para 3.

⁴⁹ *Id.*, at para 32.

⁵⁰ James Crawford AC, *China and the Development of an International Dispute Resolution Mechanism for the Belt and Road Construction*, in Jinyuan Su, Sheng Zhang & Wenhua Shan (eds.), *China and International*

although it is also possible that entirely novel and reformed dispute resolution mechanisms may be introduced to the BRI.

I. Arbitration

Since the establishment of ISDS, China's practice in investor-state arbitration (ISA) has been limited. Commentators have used the term 'disequilibrium'.⁵¹ So far, the Chinese government has become involved as the respondent in eight ISA cases (see below Figure 2). The underlying reason of this limited engagement in ISA lies in a narrow approach to ISDS adopted by China in its IIAs. As briefly presented in the preceding section, China has rarely consented to submit investment disputes for arbitration in early IIAs. In the first and second generations of Chinese IIAs, China did not provide any ISDS provisions or just offered a restrictive consent to arbitration that simply allows disputes on 'the amount of compensation for expropriation' to be addressed by arbitration. For example, in the China-Serbia BIT (1995), the parties agree that:⁵²

If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 [Amicable Negotiation] of this Article, it may be submitted at the request of either party to the International Centre for Settlement of Investment Disputes (ICSID) or to an ad hoc arbitral tribunal. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in the Paragraph 2 [Domestic Court Reform] of this Article.

Parties' consent only to the amount of compensation in case of expropriation may also appear in another form, taking the China-Greece BIT (1992) as an example:⁵³

If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent court of the Contracting Party, or to an international arbitration tribunal if the dispute concerns the amount of compensation referred to in Art.4 [Expropriation]. Any other dispute between an investor and a Contracting Party, may be submitted to an international arbitration tribunal, only by mutual consent.

To what extent a claim can be regarded as concerning the 'amount of compensation for expropriation' has been hotly debated. ISA tribunals have offered different interpretations of these similar provisions. On one hand, this wording has been interpreted as only encompassing disputes

Dispute Resolution in the Context of the 'Belt and Road Initiative', Cambridge University Press 2021, pp. 11 et seq., at 18.

⁵¹ See generally, Wei Shen, *The Good, the Bad or the Ugly? A Critique of the Decision on Jurisdiction and Competence in Tza Yap Shum v. The Republic of Peru* (2011) 10:1 Chinese Journal of International Law 55–95.

⁵² Art. 9, China-Serbia BIT (1995).

⁵³ Art. 10, China-Greece BIT (1992).

involving the amount of compensation for expropriation;⁵⁴ on the other hand, it is sometimes interpreted as including disputes relating to whether an expropriation has occurred in the first place or not.⁵⁵

In the third or fourth generation of Chinese IIAs, China has incorporated a broader scope of ISDS provisions which allow any dispute concerning investments to be settled through arbitration.⁵⁶ For instance, the China-Germany BIT (2003) provides that:

(1) Any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.

(2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration.

An empirical study of the ISDS provisions in Chinese IIAs reveals that the treaties that include a broader ISDS scope are not in the majority. On the contrary, around 60 BRI countries have early IIAs with China where investors have no access to ISDS at all, or have only insufficient access.⁵⁷ If we add the 36 countries along the BRI who do not even have a BIT with China,⁵⁸ there are 96 out of 140 BRI countries (nearly 70%) whose investors may not have any access or only limited access to ISDS in cases of disputes with the Chinese government. In the same vein, Chinese entities investing in these 96 countries cannot have full access to ISDS, either. Therefore, one can easily argue that ‘insufficient protection [has] be[en] granted to Chinese investors in BRI countries’, because disputes other than about the amount of compensation cannot be claimed before arbitration tribunals.⁵⁹

⁵⁴ See generally *China Heilongjiang v Mongolia*, PCA Case No 2010-20, Award of 30 June 2017, 2017 [China Heilongjiang v. Mongolia, Award (2017)].

⁵⁵ See generally *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No ARB/14/30, Decision on Jurisdiction of 31 May 2017, 2017 [BUCG v. Yemen, Decision on Jurisdiction (2017)]; *Sanum Investments Limited v Lao People’s Democratic Republic*, UNCITRAL, PCA Case No 2013-13, Award of 6 August 2019, 2019 [Sanum v. Laos (1), Award (2019)]; *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence of 19 June 2009, 2009 [Tza Yap Shum v. Peru, Decision on Jurisdiction and Competence (2009)]; *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Award of 7 July 2011, 2011 [Tza Yap Shum v. Peru, Award (2011)].

⁵⁶ Li and Bian have identified three different approaches to allow a broader scope of disputes for arbitration. First, the ‘investment requirement’ approach where the treaties provide that ‘any investment dispute’ can be settled through arbitration; second, the ‘legal requirement’ approach where states allow ‘any legal dispute’ to be brought before arbitral tribunals; third, the hybrid approach in combination of the ‘legal requirement’ and the ‘investment requirement’, stating that any legal dispute concerning an investment is admissible. Li & Bian, *China’s Stance on Investor-State Dispute Settlement*, *supra* note 36, at 514–515.

⁵⁷ *Id.*, at 524–525.

⁵⁸ See Part 2 (Chinese Investment Treaties and the BRI) *infra*. ???

⁵⁹ Li & Bian, *China’s Stance on Investor-State Dispute Settlement*, *supra* note 36, at 527.

Some have argued that reliance on MFN clauses could be a way to access broader scope ISDS provisions in BITs with third countries outside the BRI. However, many tribunals have explicitly denied the use of MFN clause in the ISDS context.⁶⁰ To overcome this legal uncertainty, China could insert MFN clauses into newer BITs, explicitly allowing ISDS provisions to be covered by the MFN clauses.⁶¹

In spite of these limitations, arbitration will be the main recourse Chinese investors may resort to when encountering disputes in the BRI. In particular, the International Centre for Settlement of Investment Disputes (ICSID) is likely to become the main institution addressing disputes arising under the BRI.⁶² China, as the main capital-exporting country in the BRI, will attach greater importance on outbound investment, and its position and attitudes towards ISDS are getting more liberal. It is expected that China's engagement in ISA will increase.⁶³

II. Mediation

In addition to arbitration, mediation, as an alternative form of dispute resolution, may become one of the major dispute settlement mechanisms in the BRI. Mediation has a close relation with the Chinese culture of Confucianism, as well as the culture of other Asian countries which emphasizes 'harmonism' and 'avoiding conflicts'. Mediation is usually the first form of dispute resolution being considered, wherever possible, and is an essential component of China's policies in this regard. In cases there is no IIA or only an IIA with restrictive consent to ISDS, mediation should and will be the first choice for investors to deal with disputes.

In the Chinese IIA stock, only two BITs have an explicit and direct reference to mediation. One is the China-Colombia BIT (2008), providing that '[n]othing in this Article shall be construed as to prevent the parties of a dispute from referring their dispute, by mutual agreement, to ad hoc or institutional mediation or conciliation before or during the arbitral proceeding.'⁶⁴ The other one is a Closer Economic Partnership Arrangement (CEPA) concluded between Mainland China and Hong Kong (China Special Administrative Region, China SAR) in 2017, where investors in the Mainland and in Hong Kong are entitled to settle their disputes through mediation.⁶⁵

⁶⁰ *Salini Costruttori S.p.A and Italstrade S.p.A v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction of 31 July 2001, 42 ILM 609 (2003), 2001 [Salini v. Morocco, Decision on Jurisdiction (2001)]; *BUCG v. Yemen*, Decision on Jurisdiction (2017), *supra* note 55.

⁶¹ Chaisse and Kirkwood suggest that China expressly widen the scope of MFNs to include ISDS provisions in its future IIA-making practices, considering that China has become a capital-exporting country, especially within the BRI. See Chaisse & Kirkwood, *Anatomy of the (Invisible) Belt and Road Investment Treaty*, *supra* note 8, at 268.

⁶² Meg Kinnear, *ICSID and the Evolution of ISDS*, in Wenhua Shan, Sheng Zhang & Jinyuan Su (eds.), *China and International Dispute Resolution in the Context of the "Belt and Road Initiative"*, Cambridge Univ. Press 2021, pp. 99 et seq., at 108.

⁶³ Mark McLaughlin, *Global Reform of Investor-State Arbitration: A Tentative Roadmap of China's Emergent Equilibrium* (2018) 6:1 *The Chinese Journal of Comparative Law* 73–102, at 96–97.

⁶⁴ Art.9(3), China-Colombia BIT (2008).

⁶⁵ Arts.19-20, Mainland-Hong Kong CEPA (2017). The Mainland and Hong Kong have set up a detailed

In addition, there are 16 IIAs referring to ‘conciliation’, which is often deemed to be equivalent or at least similar to mediation.⁶⁶ Also, a wording like ‘the dispute may be settled through the use of non-binding, third-party procedures’ in the China-Turkey BIT (1990), has been recognized as an implicit reference to mediation or conciliation.⁶⁷

Given the soft law nature of the BRI agenda and the sensitive sectors dealing with investments into airport, port, and transport infrastructure, disputes arising out of such sectors may not be appropriate for mediation. But, as advocated, ‘the necessity of preserving good relations and existing systems of information exchange support the conditions for settlement in others’.⁶⁸ Thus, China and BRI jurisdictions are encouraged to sign and ratify special agreements for handling BRI disputes through mediation.

III. Development of New Forms of Dispute Settlement

In addition to arbitration and mediation, there is a possibility of introducing innovative dispute resolution mechanisms for BRI investor-state disputes. China has expressly supported the reform of ISDS and new institutional designs on many occasions. Most notably, in the 2019 submission to the UNCTRAL Working Group III, China supports the establishment of a permanent appellate mechanism.⁶⁹ There are also proposals of establishing a multilateral investment court for BRI disputes by scholars. Since China is open to these possibilities, it is not totally impossible to envisage these new forms of mechanisms for BRI disputes resolution.

D. SUSTAINABLE DEVELOPMENT CHALLENGES AND THE BRI

The implementation of the BRI has already met with great success, but also confronted tremendous challenges. The most prominent challenges at the present moment are those caused by the persisting COVID-19 pandemic. According to the UNCTAD World Investment Report 2021, the COVID-19 crisis has dramatically and fundamentally impacted global FDI flows, causing a decrease by 35 per cent in 2020 compared to the year before.⁷⁰ This decline is projected to continue by ‘a further 5 to 10 per cent in 2021 and to initiate a recovery in 2022’.⁷¹ Inevitably, investments in the BRI have also experienced a substantial decline in the first six months of 2020, compared to the

process of using mediation as dispute resolution and named a list of mediation institutions and mediators.

See ???

⁶⁶ Mark McLaughlin, *Investor–State Mediation and the Belt and Road Initiative: Examining the Conditions for Settlement* (2021) 24:3 *Journal of International Economic Law* 609–629, at 622.

⁶⁷ *Id.*

⁶⁸ *Id.*, at 625.

⁶⁹ See Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of China, UN General Assembly, A/CN.9.WG.III/WP.177, 19 July 2019, <https://undocs.org/en/A/CN.9/WG.III/WP.177>.

⁷⁰ UNCTAD WIR 2021, *supra* note 15, at 2.

⁷¹ UNCTAD WIR 2020, *supra* note 15.

pace of 2019 and that of 2018.⁷² An FDI contraction of such scale has caused unprecedented economic uncertainty in BRI jurisdictions, especially for the developing countries. For instance, the comprehensive lockdown policy in many Chinese regions is causing economic stagnation and widespread disruption of supply chains and labour resources. The economy depression resulting from the pandemic once again reminds policymakers and investors of the importance of planning investments and financing in a sustainable matter so as to promote resilience to withstand external shocks.⁷³

Over the past decades, sustainable development has become one of the most popular topics in scholarly works in relation to international investment policies.⁷⁴ Extensive discussion of the topic can also be found in research associated with ISDS reform.⁷⁵ Despite the foregoing, the content and ambit of sustainable development is 'uncertain and heavily disputed'.⁷⁶ Still, we can ascertain, based on common consensus, that sustainable development is a broad concept and the current sustainability challenges found in international investment activities touch on a large number of different aspects. Depending on the level of economic development and the values and priorities pursued, there are certain convergences as well as divergences between states as to the sustainable challenges they are facing. For instance, environmental protection has become a significant part of IIA reforms, and each state has been constantly encouraged to put greater weight on environment-friendly investment policies in the making of new and revising of older IIAs.⁷⁷

In the BRI context, the Chinese government has expressly proposed the idea of building a Green Silk Road, or in other words, an environmentally-friendly project, from the first announcement of the BRI in 2013.⁷⁸ This concept was reinforced at the first Belt and Road Forum for International

⁷² Nedopil Christoph, *Investments in the Chinese Belt and Road Initiative (BRI) in the First Half of 2020 During the Covid-19 Pandemic* (2020), Green BRI Center, International Institute of the Green Finance, <http://rgdoi.net/10.13140/RG.2.2.14360.21766>, at 4.

⁷³ See *OECD Business and Finance Outlook 2020: Sustainable and Resilient Finance*, by OECD (OECD Publishing).

⁷⁴ See generally, Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Paul Newcombe (eds.), *Sustainable Development in World Investment Law*, Kluwer Law International 2011. For concrete investment policies under sustainable development considerations, see generally *UNCTAD Investment Policy Framework for Sustainable Development*, 2015.

⁷⁵ Such as the transparency of investor-state arbitration, see Joanna Lam & Güneş Ünüvar, *Transparency and Participatory Aspects of Investor-state Dispute Settlement in the EU 'New Wave' Trade Agreements* (2019) 32:4 *Leiden Journal of International Law* 781–800; Dimitrij Euler, Markus Gehring & Maxi Scherer (eds.), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, Cambridge Univ. Press 2015.

⁷⁶ Steffen Hindelang & Markus Krajewski, *Towards a More Comprehensive Approach in International Investment Law*, in Steffen Hindelang & Markus Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, Oxford Univ. Press 2016, at 7.

⁷⁷ See e.g. *UNCTAD's Reform Package for the International Investment Regime* (2018), at 15–16.

⁷⁸ See 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road', National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce of the People's Republic of China, http://www.china.org.cn/chinese/2015-09/15/content_36591064.htm?

Cooperation (BRF) in 2017, and the second BRF in 2019, where the BRI participating countries jointly committed to promote sustainable development along with the implementation of the planned BRI projects, and to contribute to the UN 2030 Agenda for Sustainable Development.⁷⁹ However, like other parts of the world, China and its massive BRI, is facing grave sustainable development challenges which encompass a variety of aspects, including, *inter alia*, environmental protection, labour rights, anti-corruption, corporate social responsibility (CSR), etc. This is particular true if one considers the BRI as a 'multilateral investment framework' and is aware of the ongoing sustainable development-oriented reform of IIAs.

As the initiator of the BRI, China is standing in the very center of this intricate and extended hub-and-spoke network,⁸⁰ which means that the Chinese government, its legal framework, and the investment policies it promotes or intends to promote, have a substantial impact on each and every investment planned and implemented in the BRI context. In this sense, it is fair to say that the sustainability challenges China is facing in developing its investment policies are also the major sustainability challenges of the BRI. It will be imperative to find real and workable solutions for both.

First and foremost, the environmental impacts of Chinese investments have generated extensive attention. Chinese investors are focusing on destinations with rich natural resources,⁸¹ such as mineral, oil, gas resources in African countries.⁸² However, the approaches adopted by China in early years towards the environmental practices of Chinese oversea investments are arguably 'disengaged'.⁸³ A recent survey has indicated 'an overall negative African perception about Chinese investment in Africa' in terms of environmental and social issues.⁸⁴ Second, China and a large majority of its BRI partners have serious challenges with regard to corporate social responsibilities and governance. For instance, according to Transparency International and its Corruption Perceptions Index (CPI) 2020, corruption in China continues to be widespread in spite of slight improvements over the past six years.⁸⁵ The corruption situation is even more severe in a majority of BRI countries in Asia, Africa, South- and Central America.⁸⁶ Additionally, Chinese firms operating

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⁷⁹ See Ministry of Foreign Affairs of the People's Republic of China, *Joint Communique of the Leaders' Roundtable of the 2nd Belt and Road Forum for International Cooperation*, https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1658766.shtml.

⁸⁰ Wang, *China's Approach to the Belt and Road Initiative*, *supra* note 12, at 35–36.

⁸¹ Zeng, *supra* note 7, at 377.

⁸² David H Shinn, *The Environmental Impact of China's Investment in Africa* (2016) 49 *Cornell International Law Journal* 44–67, at 46–49.

⁸³ *Id.*, at 30.

⁸⁴ Sofie Geerts, Namhla Xinwa & Deon Rossouw, *Africans' Perceptions of Chinese Business in Africa: A Survey* (Pretoria: Ethics Institute of South Africa, 2014), at 57.

⁸⁵ Corruption Perceptions Index 2020, Transparency International, <https://www.transparency.org/en/cpi/2020>.

⁸⁶ *Id.*

overseas have reportedly failed to respect internationally recognized standards of labor rights, posing a threat to local businesses and labour laws.⁸⁷

Third, China has long been challenged with regard to insufficient rule of law in its domestic legal system. The challenge becomes even more important when it comes to the transnational and regional dimensions. In particular, the lack of an institutional or legal framework specifically designed for the BRI has given rise to mounting criticism about shortfalls in the rule of law.⁸⁸ The absence of a comprehensive system of dispute settlement to deal with commercial and investment disputes occurring in the implementation of BRI projects exacerbates the rule of law deficit for BRI countries and investors. Furthermore, the fact that different BRI countries have different levels of rule of law brings more challenges to investment activities along the BRI.⁸⁹ A number of BRI countries do not have a robust legal system;⁹⁰ some of them do not even have an investment treaty with China but just an MoU.⁹¹

To address these challenges, China should consider renegotiating its existing BITs with the BRI participating countries and including higher sustainability standards in new treaties. At present, a large majority of current Chinese BITs were signed before the BRI was solemnly announced and most of them are overall incompatible with sustainable development objectives. While there are indeed a number of Chinese BITs where provisions addressing issues of sustainable development have been incorporated, they do not address the core issues.⁹² In some treaty preambles, China recognizes ‘the need to promote investment based on the principles of sustainable development’⁹³ and commits to ‘promote a healthy, stable and sustainable development of economy.’⁹⁴ There are several Chinese IIAs where particular aspects of sustainable development are stressed. For instance, pursuant to the China-Japan-Korea Trilateral Investment Agreement (TIA) (2012), member states recognize the importance of legal investments so as to ‘contribute to the economic, social

⁸⁷ Mimi Zou, *China and The Belt and Road Initiative: Transnational Labor Law Under State Capitalism 4.0* (2019) 113 AJIL Unbound 418–423 at 420.

⁸⁸ Malik R Dahlan, *Envisioning Foundations for the Law of the Belt and Road Initiative: Rule of Law and Dispute Resolution Challenges* (2020) 62 Harvard International Law Journal. ???

⁸⁹ Yuwen Li & Bian Cheng, *supra*, note 36, at 524.

⁹⁰ World Bank, *Belt and Road Economics: Opportunities and Risks of Transport Corridors* (Washington, DC: World Bank, 2019) at 84, 109.

⁹¹ Li & Bian, *China’s Stance on Investor-State Dispute Settlement*, *supra* note 36, at 524–525.

⁹² See generally Manjiao Chi, *The ‘Greenization’ of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and its Implications for China’s Future Bit-Making* (2015) 18:3 Journal of International Economic Law 511–542.

⁹³ See e.g. Preamble, *Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments*, 2012.

⁹⁴ See e.g. Preamble, *Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments*, 2011. See also, Preamble, *Agreement Between the Government of the People’s Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments*, 2013.

and environmental progress'.⁹⁵ In addition to mentions in preambles, sustainable development provisions are present in the main text of, or the protocols to a number of Chinese IIAs, which will be scrutinized in the following sections.

Most importantly, the China-EU CAI includes high standards of environment and labor protection.⁹⁶ The parties are required *not* to waive or derogate from their labour and environmental laws as an encouragement for investment. On the contrary, this treaty demands that the parties strive to ensure that their laws and policies provide for high levels of environmental and labor protection and that they continue to improve those laws and policies and their underlying levels of protection.⁹⁷ The CAI also mandates that each party make 'continued and sustained efforts' to ratify the International Labour Organization (ILO) Conventions No. 29 and No. 105 on the elimination of forced labor.⁹⁸ However, while Chinese BITs with some European countries can be updated by the CAI, China needs to take immediate measures to modernize its BITs with states in other regions.

In the meantime, China should also resort to national measures to mitigate sustainability challenges. For instance, the Chinese government should make efforts to increase the awareness of Chinese investors of the importance of environmental protection, labor rights protection, CSR, and other externalities. Specific requirements should be imposed on China's state-owned enterprises (SOEs) who are the major Chinese investors in the BRI implementation and have a significant impact on Chinese private entities or individuals investing abroad.

⁹⁵ Preamble, *Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment*, 2012.

⁹⁶ For a brief review of the sustainable development provisions in the CAI, see generally Lorenzo Cotula, *EU-China Comprehensive Agreement on Investment: An Appraisal of its Sustainable Development Section* (2021) 6:2 *Business and Human Rights Journal* 360–367.

⁹⁷ The China-EU CAI (2020), Section V (Investment and Sustainable Development), Sub-Section 2 (Investment and Environment), Art.2; Sub-Section 3 (Investment and Labour), Art.2.

⁹⁸ The China-EU CAI (2020), Section V, Sub-Section 3, Art.4(2).

Figure 2 China as Respondent in ISA [update!]

No.	Case Name	Home State	Legal Instrument	Arbitration Rules	Status
1	Eugenio Montenero v. China (2021)	Switzerland	China-Switzerland BIT (2009)	UNCITRAL	Pending
2	AsiaPhos v. China (2020)	Singapore	China-Singapore BIT (1985)	UNCITRAL	Pending
3	Goh Chin Soon v. China (1) (2020)	Singapore	China-Singapore BIT (1985)	ICSID	Discontinued
	Goh Chin Soon v. China (2) (2020)			UNCITRAL	Pending
4	Macro Trading v. China (2020)	Japan	China-Japan BIT (1988)	ICSID	Discontinued
5	Jason Yu Song v. China (2019)	United Kingdom	China-United Kingdom BIT	UNCITRAL	Pending
6	Hela Schwarz GmbH v. China (2017)	Germany	China-Germany BIT (2003)	ICSID	Pending
7	Ansung Housing v. China (2014)	South Korea	China-Republic of Korea BIT (2007)	ICSID	decided in favor of China
8	Ekran Berhad v. China (2011)	Malaysia	China-Malaysia BIT (1988)	ICSID	Settled