

# CHAPTER 4

## CHINA AND THE EMERGING STANDARD OF TRANSPARENCY IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

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### *I INTRODUCTION*

In recent years, investor-state dispute settlement (ISDS), a mechanism based on international treaties under which private foreign investors, such as transnational corporations (TNCs), can bring compensation claims against host states to international arbitral tribunals, has become a highly controversial topic in public opinion. The debate has intensified in connection with the current international negotiations on large trade and investment arrangements, such as the Transatlantic Trade and Investment Partnership (TTIP)<sup>1</sup> between the EU and the United States and the US-led negotiations on the Trans Pacific Partnership (TPP), which includes 12 countries throughout the Asia-Pacific region (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and

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1 Markus Krajewski *Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in TTIP from a Trade Union Perspective* (Friedrich-Ebert-Stiftung - EU Office Brussels 2015); Mark Weaver "The Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation, and Future Trade Implications" (2014) 29(1) *Emory International Law Review* 225-275; Christian Tietje and Freya Baetens *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership - Study prepared for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands* (24 June 2014).

Vietnam), but excludes China (at least for the time being).<sup>2</sup> China, however, is engaged in the negotiations that started in 2012 on the Regional Comprehensive Economic Partnership (RCEP).<sup>3</sup> This is a proposed broad free trade and investment agreement between the ten member states of ASEAN and Australia, China, India, Japan, South Korea and New Zealand, each of which already have free trade agreements (FTAs) with ASEAN.

One of the central issues in the controversy on ISDS is the alleged lack of "transparency" of the arbitral proceedings. As other competent speakers have already explained in their contributions,<sup>4</sup> the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which came into effect on 1 April 2014,<sup>5</sup> constitute one important recent instrument to offer a broader solution to this issue.

This paper is focusing on the position and practice of China concerning ISDS and transparency of ISDS arbitration proceedings. It first provides a short discussion of the general background of ISDS and of the concept of "transparency" in this connection (II). The analysis then briefly examines the development of China's practice regarding BITs and other international investment agreements (IIAs) and the ISDS cases involving China in one way or another (III). It next discusses changes in the official position taken by China on the issue of transparency in investor-state proceedings in the past few years (IV). It proceeds to discuss the approach to transparency in China's Model Bilateral Investment Treaty and China's relevant treaty practice (V). Finally, the paper looks at the possible role of ISDS transparency

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- 2 M. Du "The Case against China's joining the Trans-Pacific Partnership (TPP)" (2015) 12(1) *Transnational Dispute Management* <[www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)>; CL Lim, Deborah K. Elms and Patrick Low (eds) *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (Cambridge University Press, Cambridge, 2012); Leon E Trakman "Instituting Investment Claims under the Trans-Pacific Partnership Agreement" in Wenhua Shan and Jinyuan Su (eds) *China and International Investment Law - Twenty Years of ICSID Membership* (Brill Nijhoff, Leiden; Boston, 2014) Ch. 12.
  - 3 See Regional Comprehensive Economic Partnership (RCEP) Joint Statement at The First Meeting of Trade Negotiating Committee, 10 May 2013 at: <[www.asean.org/news/asean-statement-communicues/item/regional-comprehensive-economic-partnership-rcep-joint-statement-the-first-meeting-of-trade-negotiating-committee](http://www.asean.org/news/asean-statement-communicues/item/regional-comprehensive-economic-partnership-rcep-joint-statement-the-first-meeting-of-trade-negotiating-committee)> (visited 28 May 2015).
  - 4 See the Session 3 papers by Corinne Montineri (UNCITRAL), James D Fry and Odysseas G Repousis, and Michael Douglas.
  - 5 Text available at: <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html)> (visited 28 May 2015). See Qingjiang Kong and Yilin Wang "Transparency Standards in International Investment Agreement Negotiations: A Chinese Lawyer's Perspective on the UNCITRAL Rules" (2015) 1(1) *China and WTO Review* 7-34; Dimitrij Euler et al. (eds) *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge University Press, Cambridge, 2015).

in the current BIT negotiations of China with the United States and the EU (VI), followed by some conclusions (VII).

## **II SOME BACKGROUND ON ISDS AND THE CONCEPT OF TRANSPARENCY**

ISDS is a central feature of the present international investment law regime governing foreign investment.<sup>6</sup> The focus is primarily on foreign direct investment (FDI) which concerns transnational investments made by multinational corporations (or other foreign investors) to acquire a lasting or long-term interest in enterprises operating in other countries, based on gaining a measure of active management control (thus excluding passive so-called "portfolio investment").<sup>7</sup> FDI activities, especially those of TNCs, are the main driving force of economic globalization since the end of the Cold War. The total stock of global FDI was more than US\$25 trillion in 2013, with the largest cumulative share on a country basis still resting with the United States (\$4.9 trillion).<sup>8</sup> After a slump in 2012, global FDI flows grew again in 2013 to US\$1.45 trillion, and UNCTAD's World Investment Report 2014 projected that FDI flows might rise to \$1.6 trillion in 2014, \$1.7 trillion in 2015 and \$1.8 trillion in 2016.<sup>9</sup> In the last decade, there has been an important shift in the distribution of FDI flows among countries. Developing countries and emerging economies have become more important, both as destinations of FDI and as sources of capital exports. The 2014 UNCTAD report notes:<sup>10</sup>

FDI flows to developed countries increased by 9 per cent to \$566 billion, leaving them at 39 per cent of global flows, while those to developing economies reached a new

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6 M. Sornarajah *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015); Jean E. Kalicki and Anna Joubin-Bret (eds) *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Martinus Nijhoff Publishers, Netherlands, 2015); Rudolf Dolzer and Christoph Schreuer *Principles of International Investment Law* (2nd ed, Oxford University Press, Oxford, 2012); Marc Bungenberg and others (eds) *International Investment Law: A Handbook* (Hart Publishing, Oxford, 2015); Jeswald W. Salacuse *The Three Laws of International Investment - National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press, Oxford, 2013).

7 IMF Balance of Payment Manual. Fifth Edition (Washington, D.C., 1993).

8 Martin A. Weiss, Shayerah Ilias Akhtar, Brandon J. Murrill and Daniel T. Shedd, *International Investment Agreements (IIAs): Frequently Asked Questions* US Congress Congressional Research Service CRS Report 7-5700 R44015 of 30 April 2015, available at <[www.crs.gov](http://www.crs.gov)> (visited 29 May 2015), at 1.

9 UNCTAD World Investment Report 2014, at ix, available at <<http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=937>> (visited 28 May 2014).

10 *Ibid.*

high of \$778 billion, or 54 per cent of the total. The balance of \$108 billion went to transition economies. Developing and transition economies now constitute half of the top 20 ranked by FDI inflows.

A similar picture emerges with regard to FDI outflows: "Developing and transition economies together invested \$553 billion, or 39 per cent of global FDI outflows, compared with only 12 per cent at the beginning of the 2000s."<sup>11</sup> The above mentioned mega regional groups under negotiation (TTIP, TPP and RCEP) each covers a quarter or more of global FDI flows<sup>12</sup> which underlines their huge potential significance for the global economy and the international trading and investment system. Preliminary estimates for 2014 note that the United States has dropped to the third rank as an investment destination (\$86 billion), surpassed by China (\$128 billion) and Hong Kong (\$111 billion).<sup>13</sup>

While global FDI flows have been increasing, the international legal investment regime has remained fragmented. There is still no single global multilateral legal framework that would comprehensively deal with all aspects of FDI comparable to the system established in 1995 by the World Trade Organization (WTO) for international trade in goods, services and intellectual property rights. The proposal for an international legal investment regime envisaged in the 1948 Havana Charter did not materialise due to opposition from the US Congress. A number of later initiatives also failed, including the ill-fated attempt towards the end of the 1990s to pass a Multilateral Agreement on Investment (MAI) within the OECD framework.<sup>14</sup> Subsequent negotiations in the WTO Doha Round were finally discarded in 2003.

Although the WTO agreements also cover some aspects of investment in a rudimentary manner, especially in the field of trade in services ("foreign commercial presence" in the General Agreement on Trade in Services- GATS as the third mode of delivery of services refers to an investment), trade-related investment measures (TRIMS), and trade-related aspects of intellectual property rights, current international investment law primarily rests upon a large number of bilateral investment treaties (BITs) and other international investment agreements (IIAs), such as free trade arrangements (FTAs), the recent models of which often include specific chapters on investment. At the end of 2014, the total number of such

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11 Ibid.

12 Ibid.

13 Weiss et al., above n 8, at 2.

14 See Peter Malanczuk "State-State and Investor-State Dispute Settlement in the OECD Draft Multilateral Investment Agreement" (2000) 3(3) *Journal of International Economic Law* 417-439.

agreements reached 3,266, consisting of 2,923 BITs and 345 "other IIAs".<sup>15</sup> These "other IIAs", however, may include quite different types of provisions on investment. Some may be considered equivalent in substance to BITs including ISDS, others have more limited provisions on investment, and a third type may be simply stating a few general provisions on investment promotion and cooperation and/or a future mandate to negotiate further on investment.<sup>16</sup>

The main purpose of BITs is to offer protection to foreign investment and thus to promote FDI flows. Whether BITs actually contribute to more FDI is a matter of dispute and the numerous economic studies on this question continue to differ.<sup>17</sup> BITs normally provide for certain substantive standards of treatment to be accorded to foreign investors, such as non-discriminatory treatment, national treatment, fair and equitable treatment (FET), full security and protection, and compensation for the expropriation of foreign property. In addition, modern BITs usually include provisions on different forms of ISDS permitting a foreign investor to call upon an international arbitral tribunal to determine the validity of claims against the host state based upon the alleged breach of such standards. The main institution used for ISDS cases is the International Centre for the Settlement of Investment Disputes (ICSID), established in 1965 under the auspices of the World Bank in Washington, D.C.<sup>18</sup> The ICSID Convention has been signed by 159 states and ratified by 150 states (as of 31 December 2014).<sup>19</sup> However, some Latin American states have withdrawn from ICSID: Bolivia (2007), Ecuador (2009), and Venezuela (2012). Argentina,

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15 UNCTAD "Recent Trends in IIAs and ISDS" IIA Issues Note, No. 1, February 2015, at 2.

16 For examples see UNCTAD *ibid.*, pp. 2-3.

17 See UNCTAD "The Impact of International Investment Agreements on Foreign Direct Investment Flows: An Overview of Empirical Studies 1998-2014" IIA Issues Note – Working Draft September 2014, available at: <<http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep%2016.pdf>> (visited 28 May 2015).

18 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, text available at: <<https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm>> (visited 28 May 2015). See Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair *The ICSID Convention: A Commentary* 2nd ed. (Cambridge University Press, Cambridge, 2009); Antonio R. Parra *The History of ICSID* (Oxford University Press, Oxford, 2012); Meg Kinnear "ICSID and International Investment Treaty Arbitration: Progress and Prospects" in Wenhua Shan and Jinyuan Su (eds), above n 2, Ch. 1.

19 ICSID Fact Sheet – World Bank: Background Information on the International Centre for Settlement of Investment Disputes (ICSID).

against which the largest number of ICSID cases has been brought as respondent (56 cases as of the end of 2014), is reported to be considering its withdrawal.<sup>20</sup>

Following the first modern BIT concluded between Germany and Pakistan in 1959,<sup>21</sup> originally BITs were primarily used by capital-exporting Western states to protect their investments in developing countries, in order to avoid having to rely on the weak local legal systems, both in terms of the substantive law as well as procedure under rule of law aspects. Quite a number of capital-exporting countries developed their own model BITs as blue-prints for negotiations with developing countries.<sup>22</sup> While there are many similarities as to the standards of treatment in such model BITs and in the actual BITs concluded, there are also some basic differences. Western European countries and developing countries preferred the "admission model", providing protection to foreign investment only after the investment had been admitted to their territory in accordance with domestic laws and regulations.<sup>23</sup> The United States, Canada and Japan, on the other hand, advocate a more liberal approach based on the "pre-establishment model" which offers protection to the foreign investment even before its admission in that foreign investors can also claim national treatment and most-favoured nation (MFN) treatment with regard to the establishment of the investment itself. Thus, investors of one party will be accorded treatment not less favourable with regard to investing in the territory of the other party than domestic investors and investors of any other third country.

At the end of 2014, the total number of known ISDS cases was 608, involving 99 states as respondents to one or more claims.<sup>24</sup> According to UNCTAD, the overall number of completed cases by the end of 2014 was 356. It is interesting to note the following results:<sup>25</sup>

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20 ICSID and Latin America: Criticisms, withdrawals and regional alternatives posted 25-June-2013, <[www.bilaterals.org/?icsid-and-latin-america-criticisms](http://www.bilaterals.org/?icsid-and-latin-america-criticisms)> (visited 30 May 2015).

21 Germany-Pakistan BIT (1959), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/160/treaty/1732>>. This BIT has been replaced by the Germany-Pakistan BIT (2009), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/160/treaty/1733>> (both visited on 28 May 2015).

22 Chester Brown "The Development by States of Model Bilateral Investment Treaties" in Wenhua Shan and Jinyuan Su (eds), above n 2, Ch. 4; Chester Brown (ed) *Commentaries on Selected Model Investment Treaties* (Oxford University Press, Oxford, 2013).

23 See Axel Berger *China and the Global Governance of Foreign Direct Investment* (Deutsches Institut für Entwicklungspolitik, Bonn, 2008).

24 UNCTAD "Investor-State Dispute Settlement: Review of Developments in 2014" IIA Issues Note No. 2, May 2015, at 2.

25 At 5.

Out of these, approximately 37 per cent (132 cases) were decided in favour of the State (all claims dismissed either on jurisdictional grounds or on the merits), and 25 per cent (87 cases) ended in favour of the investor (monetary compensation awarded). Approximately 28 per cent of cases (101) were settled and eight per cent of claims (29) were discontinued for reasons other than settlement (or for unknown reasons). In the remaining two per cent (seven cases) a treaty breach was found but no monetary compensation was awarded to the investor...

These statistics indicate that states are not really losers in most of the cases, although the results of the cases that have been settled are not always known.

It may further be noted that since 2010 the number of cases brought against Asian states are rising, bringing the total number to 87 disputes.<sup>26</sup> This is already a significant figure which is likely to continue to rise with the ongoing shift of global economic power to the Asia-Pacific.

Critics of ISDS invoke a variety of arguments. These arguments, among others, include the allegation that ISDS and huge compensation claims have a "chilling effect" on the right of states to regulate and adopt measures to implement public policy objectives (environment, health, labour standards); that many cases would be frivolous and brought by greedy transnational corporations; that ISDS would serve the interests of a small and elite group of arbitrators who often simultaneously act as counsel to parties on the same issues in other cases; that ISDS decisions are frequently inconsistent and lacking the possibility of appellate review; and that the cases should be decided by domestic courts instead of by private and "secretive" international arbitral tribunals. Such criticism is rejected by firm supporters of international investment arbitration.<sup>27</sup>

However, a number of technical points raised, for example, by UNCTAD concerning the need to reform ISDS have apparently met with governmental sympathy at least in some corners:<sup>28</sup>

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26 Julien Chaisse "Assessing the Exposure of Asian States to Investment Claims" (2013) 6(2) *Contemporary Asia Arbitration Journal* 187-227.

27 European Federation for Investment Law and Arbitration (EFILA) *A Response to the Criticism against ISDS* (Brussels 17 May 2015), available at: <[http://efila.org/wp-content/uploads/2015/05/EFILA\\_in\\_response\\_to\\_the-criticism\\_of\\_ISDS\\_final\\_draft.pdf](http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf)> (visited on 18 May 2015).

28 UNCTAD "Reform of Investor-State Dispute Settlement: In Search of a Roadmap" IIA Issues Note No. 2, June 2013, at 1.

Concerns with the current ISDS system relate, among others things, to a perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures.

This paper is limited to discussing one major perceived problem of ISDS, namely the alleged lack of sufficient "transparency" of arbitral proceedings and the position of China in this regard. At the outset, some conceptual remarks are appropriate.

The general concept of "transparency" has been attracting considerable interest recently, both on the domestic level as well as on the international plane. Although transparency is often seen as linked to the broader concepts of good governance and the rule of law,<sup>29</sup> there is some difficulty on agreeing on what "transparency" means exactly. The definition may vary considerably because it depends on the specific context in which it is used.

In the domain of international law,<sup>30</sup> some recent assessments in the literature argue that "transparency" would be an emerging "general principle of law",<sup>31</sup> listed as one of the sources of international law in Art. 38 of the Statute of the International Court of Justice.<sup>32</sup> Others suggest that it is at least "becoming a global norm in international investment law",<sup>33</sup> a special branch of international law under the broader heading of international economic law.

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29 See, for example, Michael Johnston "Good Governance: Rule of Law, Transparency, and Accountability", available at: <<http://chothrillerit.com/post/good-governance-rule-of-law-transparency-and-accountability>> (visited 29 May 2015); Juanita Olaya "Good Governance and International Investment Law: The Challenges of Lack of Transparency and Corruption" Second Biennial Global Conference July 8-10, 2010, Barcelona, Society of International Economic Law, Online Proceedings Working Paper No. 2010/43, text available at <[www.ssrn.com/link/SIEL-2010-Barcelona-Conference.html](http://www.ssrn.com/link/SIEL-2010-Barcelona-Conference.html)> (visited 29 May 2015).

30 Andrea Bianchi and Anne Peters (eds) *Transparency in International Law* (Cambridge University Press, Cambridge, 2013). See also Thore Neumann and Bruno Simma "Transparency in International Adjudication" in Andrea Bianchi and Anne Peters (eds) *ibid.* 436-476.

31 See the references given by Andrea Bianchi "On Power and Illusion: The Concept of Transparency in International Law" in Andrea Bianchi and Anne Peters (eds), *ibid.* n 30, at 1 et seq.

32 For a discussion see Anne Peters "Towards transparency as a global norm" in Andrea Bianchi and Anne Peters (eds), *ibid.* n 30, 534-607.

33 Stephan W. Schill "Transparency as a Global Norm in International Investment Law" Kluwer Arbitration Blog 15 September 2014, <<http://kluwerarbitrationblog.com/blog/2014/09/15/transparency-as-a-global-norm-in-international-investment-law/>> (visited 25 May 2014).

There are also different applications of the concept in the closely related fields of international trade and investment law.<sup>34</sup> In fact, even in the narrower area of international investment law, "transparency" may have several dimensions.<sup>35</sup> First, it may refer to treaty obligations of the host state to provide adequate information to the foreign investor on its relevant law regulation and administrative decision-making processes, as far as it may affect foreign investment. This is the traditional meaning and it is often called "regulatory transparency" and it is, of course, also a central principle in international trade law, for example, as stated in GATT Article X on the "Publication and Administration of Trade Regulations".<sup>36</sup> Such transparency obligations require states to promptly publish, or otherwise make publicly available their relevant laws, regulations, procedures and judicial decisions of general application in order to provide legal certainty and sufficient clarity in terms of the rule of law. Indeed, some investment arbitration tribunals have even considered regulatory transparency to form part of the substantive standard of "fair and equitable treatment".<sup>37</sup>

Second, more recently in international investment law, transparency may also refer to obligations of the foreign investor to provide information on the investment or its impact in the domestic system.

Third, the latest development includes investment arbitration (ISDS transparency), establishing openness and publicity requirements to secure public access to arbitral proceedings between a foreign investor and a state. As distinct from private international commercial arbitration which is traditionally based upon the principle of confidentiality<sup>38</sup> (although there are jurisdictions not accepting it as the

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34 Junji Nakagawa (ed) *Transparency in International Trade and Investment Dispute Settlement* (Routledge, London, 2013).

35 UNCTAD *Transparency* (United Nations, New York and Geneva, 2012).

36 For the text see <[www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)> (visited 29 May 2015).

37 Martins Paporinskas *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, Oxford, 2013)

38 Alberto Malatesta and Rinaldo Sali *The Rise of Transparency in International Arbitration: The Case for the Anonymous Publication of Arbitral Awards* (JurisNet LLC, Huntington, NY, 2013) ; Florentino P. Feliciano "The 'Ordre Public' Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration" in Junji Nakagawa (ed) above n 34 15-29; Gary B. Born and Ethan G. Shenkman "Confidentiality and Transparency in Commercial and Investor-state International Arbitration" in Catherine A. Rogers and Roger P. Alford (eds) *The Future of Investment Arbitration* (Oxford University Press, New York, NY, 2009) 5-42.

default mode, thus requiring parties to specifically incorporate confidentiality in their agreement to arbitrate),<sup>39</sup> ISDS clearly affects the public interest, for example, if natural resources or environmental issues are at stake. As the host state is normally the respondent, regulatory powers, public policy objectives, and tax payers' money may be involved in ISDS cases. While it has been said that "'transparency' in the context of investor-state dispute settlement is a generally used and undefined term",<sup>40</sup> for the purpose of this paper the following six different elements can be distinguished in implementing ISDS transparency:<sup>41</sup>

- (1) the publication of information at the beginning of the arbitral proceedings;
- (2) the publication of documents submitted during the proceedings, including the final award;
- (3) written submissions by third parties to the tribunal on matters within the scope of the dispute (*amicus curiae* briefs);
- (4) submissions by a non-disputing party to the treaty on issues of treaty interpretation (the other state party);
- (5) public access to hearings; and
- (6) exceptions to transparency to protect confidential or protected information, including information relevant to national security.

The degree to which such elements of openness are made legally binding, or left to the discretion of the parties, will vary under different instruments.

As discussed by the present author elsewhere,<sup>42</sup> international rules on ISDS transparency which laid down such specific procedural elements have developed over time. Starting with the 2001 Notes of Interpretation of the NAFTA Free Trade Commission,<sup>43</sup> the greatest advance was initially made in the NAFTA context. The public, for example, was given access "to all documents submitted to, or issued by,

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39 See Filip De Ly, Mark Friedman and Luca Radicati Di Brozolo (eds) *International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in International Commercial Arbitration'* (International Law Association (ILA), London, 2012), available at: <<http://arbitration.oxfordjournals.org/content/28/3/355>> (visited 25 May 2015).

40 Jansen N. Calamita "Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy" (2014) 15(3-4) *The Journal of World Investment & Trade* 645-678 at 649.

41 These elements are all also reflected in the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, above n 5.

42 Peter Malanczuk "Confidentiality and Third-Party Participation in Arbitration Proceedings under Bilateral Investment Treaties" (2008) 1(2) *Contemporary Asia Arbitration Journal* 183-211.

43 North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, July 31, 2001, text available at <[www.sice.oas.org/tpd/nafta/Commission/CH11understanding\\_e.asp](http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp)> (visited 26 May 2015).

a [investor-state dispute settlement] tribunal, subject to redaction of" protected information relating to, for example trade secrets or national security.<sup>44</sup> NAFTA rules do not mention third party *amicus curiae* submissions, but allow NAFTA parties, even if they are not involved in the particular dispute, to "make submissions to a Tribunal on a question of interpretation of this Agreement".<sup>45</sup>

Further steps were taken in US-led FTAs, such as the Dominican Republic – Central America – Free Trade Agreement (CAFTA-DR).<sup>46</sup> Another stage in the development of ISDS transparency, although with less strict elements (leaving more discretion to the parties) than in NAFTA, was reached with the 2006 reform of the ICSID Rules and Regulations, which concerned Rule 32 on the opening of hearings to the public, Rule 37 on the option of submissions by "non-disputing parties" (for example, *amicus curiae*), and Rule 48 on the publication of awards.<sup>47</sup> ICSID transparency provisions are weaker than those negotiated by the United States in its IIAs. The full text of ICSID awards can only be made public if both parties agree. However, ICSID is now obliged to provide "excerpts of the legal reasoning of the Tribunal"<sup>48</sup> to the public. But the pleadings submitted by the parties as well as expert and witness testimony are almost always kept confidential.<sup>49</sup> In fact, however, most ICSID awards are actually published.

On the other hand, the 2006 ICSID reform did expressly permit the submission of *amicus* briefs. ICSID Arbitration Rule 37 has been interpreted by tribunals to mean that a third-party (for example an interested NGO) must ask the tribunal for leave to provide written statements for the tribunal to consider. The tribunal decides after consulting the parties and has the power to admit third-party submissions even

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44 Ibid.

45 NAFTA Article 1128: Participation by a Party, available at: <[www.sice.oas.org/trade/nafta/chap-112.asp](http://www.sice.oas.org/trade/nafta/chap-112.asp)> (visited 29 May 2015).

46 Final text available at: <<https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>> (visited 26 May 2015). See CAFTA Art. 10.21.

47 See Jason W. Yackee and Jarrod Wong "The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns" in Karl P. Sauvant (ed.) *The Yearbook on International Investment Law & Policy* (Oxford University Press, Oxford, 2010) Ch. 6; University of Wisconsin Legal Studies Research Paper No. 1151. Available at SSRN: <<http://ssrn.com/abstract=1739174>> (visited 29 May 2015).

48 ICSID Arbitration Rule 48(4).

49 See Julie A. Maupin "Transparency in International Investment Law" in Andrea Bianchi and Anne Peters (eds), above n 30, text available at: <<http://scholarship.law.duke.edu/do/search/?q=Maupin%20Transparency&start=0&context=1022222>> (visited 29 May 2015).

if a party to the dispute objects. But according to Rule 32(2), the permission to file *amicus* briefs does not imply that the third-party is entitled to attend closed hearings or obtain access to documents that are not in the public domain.<sup>50</sup>

While ICSID takes care of about two-thirds of all known ISDS cases, the remaining one-third is arbitrated outside ICSID, mostly (as far as this is in the public domain) under the UNCITRAL Arbitration Rules. But the 1976 and 2010 versions of the UNCITRAL Arbitration Rules did not provide any transparency requirements for arbitral proceedings. They were designed with confidential *ad hoc* commercial arbitration in mind,<sup>51</sup> although they are also used in a modified version also by the Iran-United States Claims Tribunal in The Hague, which make the awards of the Tribunal public.<sup>52</sup>

This situation provided UNCITRAL with the opportunity to update its own rules with respect to the particular transparency needs of investor-state proceedings. In 2008, supported by a strong Canadian initiative, UNCITRAL Working Group II received the mandate to work on transparency in ISDS. Work actually commenced two years later (in 2010) and finally led to adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration, which, as noted above, came into effect on 1 April 2014.<sup>53</sup> These Rules, which have been described as "the most wide-ranging set of transparency commitments seen thus far in international practice",<sup>54</sup> deal with all of the six aforementioned elements of ISDS procedural transparency and they are available to be applied also in non-UNCITRAL proceedings. Regarding third-party submissions, the UNCITRAL Transparency Rules are close to the ICSID rules.<sup>55</sup> Tribunals have the clear authority to accept written submissions from third parties and non-disputing states that are parties to the

50 See *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, para. 46 (2 February 2007)

51 There are no specific rules on confidentiality in the 2010 version of the UNCITRAL Rules, but hearings are to be held *in camera*, unless the parties agree otherwise (Art.28(3)), and to make awards public requires the consent of both parties (Art. 34(5)).

52 Peter Malanczuk "The Iran-United States Claims Tribunal in The Hague - Some Reflections on a Unique Institution of International Dispute Settlement Moving towards the End of its Work" in Volkmar Götze, Peter Selmer and Rüdiger Wolfrum (eds) *Liber amicorum Günther Jaenicke - Zum 85. Geburtstag* (Springer-Verlag, Berlin, Heidelberg, New York, 1998) 221-238; Peter Malanczuk "Mixing Legal Cultures in International Arbitration: The Iran-United States Claims Tribunal" in Vijay K. Bhatia, Christopher N. Candlin and Jan Engberg (eds) *Legal Discourse across Cultures and Systems* (Hong Kong University Press, Hong Kong, 2008) 35-51.

53 Text available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html)> (visited 26 May 2015).

54 Calamita, above n 40, at 667.

55 See Weiss et al., above n 8, at 21-22.

treaty at issue. A third party needs to apply to the tribunal to make a submission. The parties are consulted and the tribunal renders its decision taking into consideration whether the submission would assist the tribunal in deciding the case (Article 4). Article 3, however, differs from the ICSID rules in that it requires third-party submissions to be made public.<sup>56</sup>

As the Transparency Rules are intrinsically linked to the UNCITRAL Arbitration Rules incorporated the Transparency Rules in a new Article 1(4) of the revised version of the Rules that also came into effect on 1 April 2014.<sup>57</sup>

However, the Transparency Rules exhibited some serious limitations. They are designed for new treaties and can be applied to BITs concluded before 1 April 2014 only if the disputing parties or contracting states agree to such retroactive application. While the United States, Canada and a few other delegations were in favour of adopting strong transparency obligations like in NAFTA for all future ISDS cases to be conducted under the UNITRAL Arbitration Rules, they were unable to persuade other delegations which insisted that a mandatory application of the new transparency standards could only be acceptable on a protective basis and not for treaties that had already been concluded without such provisions.<sup>58</sup>

In order to supply a multilateral mechanism by which states could more easily overcome this obstacle and secure a broader application of the Transparency Rules to the existing patchwork of some 3,000 BITs, UNCITRAL drafted a UN Convention on Transparency in Treaty-based Investor-State Arbitration, which was completed in July 2014 and approved by the UN General Assembly on 10 December 2014.<sup>59</sup> The Convention, also known as the "Mauritius Convention on Transparency", was opened for signature on 17 March 2015 and has, as of May 2015, been signed by 10 states.<sup>60</sup> If both parties have signed the Mauritius Convention, they will be deemed to have agreed to apply the 2014 UNCITRAL Rules on Transparency to IIAs entered into by both parties before 1 April 2014.

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56 At 22.

57 Text available at: <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html)> (visited 26 May 2015).

58 See Maupin, above n 49, at 10.

59 United Nations Convention on Transparency in Treaty-based Investor-States Arbitration, UNGA Doc. A/RES/69/116 of 18 December 2014.

60 Text available at: <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html)> (visited 26 May 2015).

### III CHINA'S INTERNATIONAL INVESTMENT AGREEMENTS (IIAS) AND ISDS CASES

#### A China BITs and IIAs with Investment Chapters

Following the introduction of Deng Xiaoping's "Open Door" policy after 1978, China became a major destination for global foreign direct investment flows and the prime host country among developing countries.

Moreover, since the adoption of its new "Going Global" policy at the end of the 1990s, China has emerged as a major global outward investor as well.<sup>61</sup> While in 2003 China's outgoing FDI amounted only to \$2.8 billion, in 2013 China invested a total of US\$101 billion abroad and had become the third most important country exporting capital after the United States and Japan.<sup>62</sup> Chinese outward investment will soon surpass the amount of inward investment flows into China.

China is also a leader in concluding bilateral investment treaties (BITs), supplemented by other international investment agreements (IIAs), such as regional trade agreements (RTAs) with special provisions on investment.<sup>63</sup> As of mid-May 2015, China was already party to 134 BITs (of which 131 were in force) and had signed 17 other IIAs (16 in force).<sup>64</sup> China ranked second only after Germany which had 134 BITs (131 in force) and 64 other IIAs (53 in force).

Although China had already made great efforts to attract foreign direct investment since the end of the 1970s, for historical reasons it was only in 1982 that China agreed to sign its first BIT. It was concluded with Sweden,<sup>65</sup> followed by similar treaties with other major European states and developing countries. This first

61 David Shambaugh *China Goes Global - Understanding China's Global Impact* (Oxford University Press, New York, 2013).

62 UNCTAD World Investment Report 2014, at xv.

63 Wenhua Shan and Jinyuan Su (eds), above n 2; Martin Endicott "China and International Investment Law: An Evolving Relationship" in Wenhua Shan and Jinyuan Su (eds) *ibid.* Ch. 8; Leon E Trakman *China and Foreign Direct Investment: Looking Ahead* (UNSW Law Research Paper No. 2013-24), available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2244634](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244634)> (visited on 12 May 2015); Kate Hadley "Do China's BITs Matter? Assessing the Effect of China's Investment Agreements on Foreign Direct Investment Flows, Investors' Rights, and the Rule of Law" (2013) 45(1) *Georgetown Journal of International Law* 255-321; Guiguo Wang *International Investment Law: A Chinese Perspective* (Routledge, London, 2015).

64 UNCTAD database on Investment Agreements by Economy at <<http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>> (visited 17/05/2015).

65 China-Sweden BIT (1982), text available at <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/976>> (visited 28 May 2015).

generation of Chinese BITs<sup>66</sup> provided for the usual standards of most-favoured nation treatment, fair and equitable treatment, compensation for expropriation and others, but there was no substantive national treatment standard. Dispute settlement provisions were also limited to state-state arbitration on disputes concerning the interpretation of the treaty and investor-state arbitration on the amount of compensation for expropriation.<sup>67</sup> While China accepted the MFN-clause in its BITs, the reluctance to agree to the national treatment standard was caused by the wish to protect China's infant industries from foreign competition. Even when in the late 1980s and early 1990s, China signed some BITs with developed countries incorporating national treatment, important qualifications were added to ensure that China retained discretion not to grant national treatment to foreign companies for reasons of public order, national security or the sound development of the national economy.<sup>68</sup>

After 1998, in view of its emerging interests as an outward investor, China abandoned this conservative approach to BITs. A more liberal BIT policy accepted a substantive national treatment commitment (however, still limited to the phase after admission of the investment in accordance with Chinese law) and opened access to ICSID for all investor-state disputes.<sup>69</sup> It is notable in this connection that about 80 per cent of the new BITs that China concluded after 1998, were with developing countries mostly in Africa and Latin America which were important destinations of Chinese overseas investment. The shift towards a more liberal BIT model in China reflected a stronger interest in actively protecting the FDI engagement of Chinese companies abroad.<sup>70</sup>

The changes in BIT policy are reflected in the development of China's Model BITs. As noted above, countries adopt their own Model BITs to serve as national blueprints for negotiations on the international level with other countries. The current

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66 Axel Berger *Investment Rules in Chinese Preferential Trade and Investment Agreements - Is China Following the Global Trend Towards Comprehensive Agreements?* (Deutsches Institut für Entwicklungspolitik, Bonn, 2013) at 6 distinguishes three generations of Chinese BITs.

67 Wenhua Shan and Norah Gallagher *Chinese Investment Treaties: Policy and Practice* (Oxford University Press, Oxford, 2009).

68 Article 3(1) of the China-UK BIT; Art. 3(3) of the China-Japan BIT.

69 Wenhua Shan and Norah Gallagher, above n 67, at paras. 1.77-1.82.

70 Axel Berger, above n 23.

Chinese Model BIT (Version III) was launched in the late 1990s and superseded the earlier Version I (adopted in the 1980s) and Version II (adopted in the early 1990s).<sup>71</sup>

In addition to the BITs that China has concluded with more than 130 countries, China has become party to a number of Free Trade Agreements (FTAs) which may include a special regime on investment. As of February 2015, China has concluded 14 FTAs with some 23 states<sup>72</sup> and it is openly competing with the EU and the US in the recent wave of regionalization of the international trading system.

Many of these FTAs contain special Chapters on investment. Leaving aside the 2010 cross-straits Economic Cooperation Framework Agreement (ECFA) with Taiwan<sup>73</sup> and the special "Closer Economic Partnership Arrangements (CEPA)" which China has concluded with its Special Administrative Regions Hong Kong<sup>74</sup> and Macao<sup>75</sup> in 2003, the list includes the 2006 China-Pakistan FTA (Chapter IX),<sup>76</sup> the 2008 China-Singapore FTA (Chapter 10);<sup>77</sup> the 2008 China-New Zealand FTA (Chapter 11);<sup>78</sup> the 2010 China-Costa Rica FTA (Chapter 9);<sup>79</sup> the 2010 China-Peru

71 Norah Gallagher and Wenhua Shan "China" in Chester Brown (ed), above n 22, 131-181 at 143.

72 Bomin Ko "Uneasy Days of Push-and-Pull between China and the WTO: Recent Issues of China in the WTO" (2015) 1(1) *China and WTO Review* at 113. See further Guiguo Wang "China's FTAs: Legal Characteristics and Implications" (2011) 105(3) *American Journal of International Law* 493-518.

73 An English translation of the text is available at: <[www.ecfa.org.tw/EcfaAttachment/ECFADoc/ECFA.pdf](http://www.ecfa.org.tw/EcfaAttachment/ECFADoc/ECFA.pdf)> (visited 28 May 2015). See Tiffany Ting Sun "Investor-State Dispute Settlement Provision in the Cross-Strait BIT: Possible Enhancement in its Operation" (2014) 7(1) *Contemporary Asia Arbitration Journal* 193-2.

74 For the main text and six annexes of the 2003 Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) see <[www.tid.gov.hk/english/cepa/legaltext/fulltext.html](http://www.tid.gov.hk/english/cepa/legaltext/fulltext.html)> (visited 28 May 2015). See further Gonzalo Villalta Puig "A Quasi-adjudicative Dispute Settlement Mechanism for CEPA: The Rule of Law in Trade Relations between Mainland China and Hong Kong" (2013) 12(2) *Chinese Journal of International Law* 281-320.

75 For an English translation of the legal text of the Mainland and Macao Closer Economic Partnership Arrangement (CEPA) see <[http://www.cepa.gov.mo/cepaweb/front/eng/itemI\\_2.htm](http://www.cepa.gov.mo/cepaweb/front/eng/itemI_2.htm)> (visited 28 May 2015).

76 China-Pakistan FTA (2006), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/3389>> (visited 28 May 2015).

77 China-Singapore FTA (2008), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/3241>> (visited 28 May 2015).

78 China-New Zealand FTA (2008), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/3243>> (visited 28 May 2015).

79 China-Costa Rica FTA (2010), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/3284>> (visited 28 May 2015).

FTA (Chapter 10);<sup>80</sup> the 2014 China-Iceland FTA (Chapter 8);<sup>81</sup> the 2014 China-Switzerland FTA (Chapter 9);<sup>82</sup> and the 2014 China–Australia Free Trade Agreement (ChAFTA).<sup>83</sup> While the ASEAN-China FTA was signed in 2002,<sup>84</sup> without including an investment chapter, and was followed by subsequent agreements on trade in goods and in services,<sup>85</sup> a separate ASEAN-China Investment Agreement was added in 2009.<sup>86</sup> Currently, upgrade negotiations on the ASEAN-China FTA are taking place.

The only FTA without any investment provisions is the 2005 Chile-China FTA.<sup>87</sup> It merely has a provision supporting the promotion of investment and envisages negotiations on a future agreement. While China and Chile signed a supplementary agreement on services in 2008, their negotiations on investment are currently still on the way.<sup>88</sup>

Furthermore, China is currently negotiating FTAs with a number of other countries such as the Gulf Cooperation Council, Norway, Japan and Korea, Sri Lanka, and the Southern Africa Customs Union (SACU). In the case of Korea and Japan, it should be noted there is already a China-Japan-Korea Trilateral Investment

80 China-Peru FTA (2010), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/3266>> (visited 28 May 2015).

81 China-Iceland FTA (2014), text available at: <<http://fta.mofcom.gov.cn/topic/eniceland.shtml>> (visited 28 May 2015).

82 China-Switzerland FTA (2014), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/3404>> (visited 28 May 2015).

83 At the time of writing, the final text has not yet been made public. The investment chapter is reported to provide for ISDS which is controversial in Australia.

84 ASEAN-China Framework Agreement (2002), text available at: <<http://fta.mofcom.gov.cn/topic/chinaasean.shtml>> (visited 28 May 2015).

85 The Agreement on Trade in Goods of the ASEAN-China FTA entered into force in July 2005. The ASEAN-China Agreement on Trade in Services entered into effect in 2007. The texts are available at: <<http://fta.mofcom.gov.cn/topic/chinaasean.shtml>> (visited 28 May 2015).

86 ASEAN-China Investment Agreement (2009), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/3272>> (visited 26 May 2015). See Xiao Jun "The ASEAN-China Investment Agreement: A Regionalization of Chinese New BITs" (Society of International Economic Law (SIEL), Second Biennial Global Conference, University of Barcelona, July 8-10, 2010. Available at: <<http://ssrn.com/abstract=1629202>> or <<http://dx.doi.org/10.2139/ssrn.1629202>> (visited 26 May 2015).

87 Chile-China FTA (2005), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/3369>> (visited 26 May 2015).

88 <<http://fta.mofcom.gov.cn/topic/enchile.shtml>> (visited 26 May 2015).

Agreement that was completed in 2012.<sup>89</sup> It should further be mentioned that in 2009 China has also concluded the special APTA Investment Agreement, which involves Bangladesh, India, Laos, South Korea and Sri Lanka as partners.<sup>90</sup> Moreover, the Regional Comprehensive Economic Partnership (RCEP) has already been mentioned at the beginning.

In addition, joint feasibility studies on possible FTAs are on the way with India, Columbia, Georgia, Moldova, and Maldives.<sup>91</sup> In response to the US-led Transpacific Partnership ('TPP') project, China has taken the leadership in promoting the plan for a Free Trade Area of the Asia-Pacific (FTAAP) among the 21 member states of APEC.<sup>92</sup> The present BIT negotiations with the United States and the European Union will be discussed separately below.

Not all of the aforementioned FTAs really include investment provisions that can be qualified as being comprehensive and substantial. The weakness of (or lack of) provisions on investment may be explained by the existence of a separate BIT, as in China's relations with Switzerland, or by ongoing separate negotiations on investment as in the relations between China and Chile. Positive examples for strong investment regimes are the FTAs with Pakistan and Peru and the 2009 Investment Agreement with ASEAN. It appears that there are different motivations that may play a role depending primarily on China's negotiating partner. One recent analyst argues:<sup>93</sup>

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89 China-Japan-Korea Trilateral Investment Agreement (2012), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/3302>> (visited 26 May 2015). See Jaemin Lee "An Important First Stride, but Beware of the Pitfalls: A Critical Analysis of the ISDS Mechanism of the 2012 Korea-China-Japan Trilateral Investment Treaty" (2013) 12(3) Chinese Journal of International Law 509-541.

90 Framework Agreement on the Promotion, Protection and Liberalization of Investment between Asia-Pacific Trade Agreement (APTA) Participating States, text available at <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/3269>> (visited 26 May 2015).

91 "Regional Comprehensive Economic Partnership News Release", <<http://fta.mofcom.gov.cn/list/rcepen/enrcepenews/1/encateinfo.html>> (visited 26 May 2015).

92 APEC member states endorsed the Beijing Roadmap for APEC's Contribution to the Realization of the Free Trade Area of Asia-Pacific (FTAAP) in November 2014. See <[http://www.apec.org/Meeting-Papers/Leaders-Declarations/2014/2014\\_aelm/2014\\_aelm\\_annexa.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/2014/2014_aelm/2014_aelm_annexa.aspx)> (visited 26 May 2015).

93 Axel Berger, above n 66, at 14; See further Chunbao Liu "China's Evolving International Investment Treaty Policy towards Liberalism" in Junji Nakagawa (ed) *Multilateralism and Regionalism in Global Economic Governance: Trade, Investment and Finance* (Google eBook) (Routledge, 2013) Ch. 11; Chenyuan Fu "China's Prospective Strategy in Employing Investor-State Dispute Resolution Mechanism for the Best Interest of its Outward Oil Investment" (2014) 2(1) PKU Transnational Law Review 266-320.

that China does not follow a coherent strategy with regard to the inclusion – or absence – of investment rules in PTIAs [preferential trade and investment agreements, P.M.]. In fact, some observers doubt that China has a clearly defined PTIA strategy. Overall, China adopts a narrow PTIA strategy that focuses first of all on trade in goods and includes additional disciplines only in a later stage ... the inclusion of investment provisions in Chinese PTIAs is, to a large extent, a result of the interests of the partner country to include comprehensive and BIT-plus rules on investment and China's flexibility in complying with these demands.

### ***B ISDS in Chinese Treaties***

While China initially resisted international arbitration as a means to settle foreign investment disputes and the first two versions of China's Model BIT merely accepted to refer "disputes involving the amount of compensation for expropriation" to an *ad hoc* three member arbitral tribunal, as noted above, a significant change of China's attitude towards ISDS occurred at the end of the 1990s.<sup>94</sup> Version III of China's Model BIT deals with dispute settlement in Chapter H, in which Article 8 addresses the settlement of disputes between Contracting Parties on the interpretation or application of the BIT, on the one hand, and Article 9 lays down rules for the settlement of disputes between an investor and a host state, on the other hand. For the purpose of this paper, it will suffice to focus on the provision dealing with ISDS.

According to Article 9(1), any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party should be first addressed through negotiations.

If such negotiations fail, after six months Article 9(2) gives the investor two options. The first option is to submit the dispute "to the competent court of the Contracting Party that is a party to the dispute" (Article 9(2)(a)). The second option, normally more attractive to the foreign investor who may not be comfortable with litigating before the national courts of the opponent host state, is to submit the dispute to ICSID, "provided that the Contracting Party involved in the dispute may require the investor concerned to go through the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before the submission

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94 Elodie Dulac "Chinese Investment Treaties: What Protection for Foreign Investment in China?" in Michael J. Moser and Yu Fu (eds) *Doing Business In China* (Juris Publishing, 2014). See further Guiguo Wang "Investor-State Dispute Settlement in China" (2011) 8(5) *Transnational Dispute Management*, available at: <[www.transnational-dispute-management.com/article.asp?key=1764](http://www.transnational-dispute-management.com/article.asp?key=1764)> (visited 29 May 2015).

to the ICSID" (Article 9(2)(b). Furthermore, Article 9(2)(b) ends with a "fork-in-the-road" provision stipulating "[o]nce the investor has submitted the dispute to the competent court of the Contracting Party concerned or to the ICSID, the choice of one of the two procedures shall be final."

Article 9(3) deals with the applicable law: "The arbitration award shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the universally accepted principles of international law."

Finally, Article 9(4) provides: "The arbitration award shall be final and binding upon both parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award."

The first two versions of China's model BIT did not refer disputes to ICSID, simply because China became a party to the ICSID Convention only in 1993. They limited themselves therefore to giving ICSID a certain role in appointing the members of the *ad hoc* tribunal if it had not been constituted within four months of the application.<sup>95</sup> When China finally joined ICSID in 1993, it entered a notification under Article 25(4) of the ICSID Convention<sup>96</sup> stating that China would only consider submitting to the jurisdiction of ICSID "disputes over compensation resulting from expropriation and nationalization".<sup>97</sup> It is not quite clear what the legal impact of this notification was, but probably any past legal significance has meanwhile become obsolete through China's new BIT practice. As Wenhua Shan and Norah Gallagher convincingly argue:<sup>98</sup>

This notification does not amount to consent (or lack thereof) for the purposes of ICSID jurisdiction, and nor does it prevent a State from consenting to ICSID arbitration subsequent to the notification. China did so for the first time when it

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95 Gallagher and Shan "China", above n 71, at 175.

96 Article 25(4) ICSID Convention states: "Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)."

97 Notification of China, 7 January 1993, available at <<https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/MembershipStateDetails.aspx?state=ST30>> (visited 28 May 2015). The notification states: "[P]ursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes over compensation resulting from expropriation and nationalization."

98 Gallagher and Shan "China", above n 71, at 175-176.

consented to arbitrate all disputes in its BIT with Barbados in 1998.<sup>99</sup> The significance now of the notification made by China appears to have limited if any impact....

At most, if the consent of a State to ICSID arbitration is unclear in a given case, then such a notification might lead to a presumption that the State intended to stay within the limits of that notification.

Another general question of China's ICSID membership is whether in its domestic legal system it has provided an appropriate framework for the enforcement of ICSID awards, which may not necessarily be directed against China but could involve the attachment of assets belonging to foreign parties.<sup>100</sup>

Moreover, China's current Model BIT does not preclude that China may accept other international venues or arbitral rules in addition to ICSID in the BITs China actually decides to conclude in practice. China and India have agreed in their BIT on the ICSID Additional Facility, as India is not a party to the ICSID Convention. China's BITs may also include references to the UNCITRAL Arbitration Rules.<sup>101</sup>

At any rate, China's recent practice has clearly moved towards including broad and comprehensive ISDS clauses in its modern BITs, although the requirement to go through domestic administrative review procedures first for a certain period before allowing resort to international arbitration is maintained. This reflects the increasing role of outward investment in China's economic development and the corresponding interest in effective investor protection rules and procedures for Chinese investments abroad.

Finally, it is interesting to note that of the original four BRICs countries, only China is a member state of ICSID. Brazil and India are not signatories to the ICSID

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99 Article 9 of the Barbados-China BIT (1998), text available at: <[www.investbarbados.org/bits.php](http://www.investbarbados.org/bits.php)> (visited 29 May 2015).

100 See Julian Ku "The Enforcement of ICSID Awards in The People's Republic of China" (2013) 6(1) Contemporary Asia Arbitration Journal 31-48. Another issue relates to the doctrine of absolute immunity still applied by the PRC. See *Democratic Republic of the Congo v FG Hemisphere Associates* [2011] HKCFA 41 ("FG Hemisphere"), in which the Hong Kong Court of Final Appeal (CFA) confirmed that the Mainland's absolute sovereign immunity doctrine also applies in Hong Kong. The Standing Committee of the National People's Congress (SCNPC) of the PRC to which these matters were referred, confirmed the CFA's decision in the *Congo* case in August 2011.

101 See the examples given by Gallagher and Shan "China", above n 71, at 176.

Convention; Russia has signed (in 1992), but not ratified the Convention.<sup>102</sup> Even if reference is made to the later extension of the BRICS acronym, China remains the only ICSID member of the group, as South Africa is not a signatory.

### *C ISDS Cases Involving China*

As far as known, China has been involved so far in only six ISDS cases, five of which are or were before ICSID and one is arbitrated under the auspices of the Permanent Court of Arbitration (PCA) in The Hague. Two cases were brought against China as respondent as China was the host state of the investment concerned. In the other four cases, claims were brought under Chinese BITs against other host states.

The first instance involving China before ICSID (*Tza Yap Shum v Peru*) was a peculiar case brought to ICSID against Peru in 2007 by a Hong Kong investor with Chinese nationality based on the alleged breach of the 1994 China-Peru BIT.<sup>103</sup> Hong Kong's autonomy in economic affairs includes the competence to conclude BITs internationally,<sup>104</sup> but in this case there was no Hong Kong BIT with Peru upon which the claimant could have sought to rely.<sup>105</sup> Mr Shum's claim alleged that a number of measures taken by the tax authority of Peru constituted indirect expropriation of his investment (Mr Shum's business was that of a fish flour manufacturer and exporter in Peru). There were important specific legal issues regarding the jurisdiction of the ICSID tribunal arbitrating the case,<sup>106</sup> but they are of secondary interest in the present context. However, the tribunal affirmed its jurisdiction and ultimately proceeded to render a decision on jurisdiction in 2009 and a final award on the merits in 2011.<sup>107</sup> Mr Shum was awarded only a fraction in

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102 World Bank "Database of ICSUID Member States", <<https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx?tab=PtoT&rdo=BOTH>> (visited 27 May 2015).

103 *Tza Yap Shum v Republic of Peru* (ICSID Case No ARB/07/6).

104 See Peter Malanczuk "Hong Kong" in Rüdiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2012), Vol. IV 958-980.

105 As of May 2015, Hong Kong had 17 BITs, all of which were in force, see UNCTAD "International Investment Agreements Navigator", <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/93>> (visited 24 May 2015).

106 Gallagher and Shan, "China", above n 71, at 173-175. For a critic of the decision see Guiguo Wang "Consent in Investor-State Arbitration" (2014) 13(2) *Chinese Journal of International Law* 335-361 at 349-352 as "perhaps the most notorious case of an arbitral tribunal's distortion of interpretation of consent to arbitration" (at 349).

107 ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009; Award on Merits, 7 July 2011.

damages and interest of the amount claimed (US\$25 million), but it was not the end of the matter. ICSID has an annulment procedure<sup>108</sup> for the review of (limited) fatal defects of an award which is increasingly being used to the detriment of the system by losing parties at the - often costly - advice of their attorneys. In the *Shum* case, as in most other annulment proceedings, Peru's annulment request was dismissed on 12 February 2015.<sup>109</sup>

The first ICSID case ever brought against China was the *Ekran* case filed in May 2011.<sup>110</sup> Ekran, a Malaysian construction and development company based in Sarawak, claimed that China was in breach of the 1988 China-Malaysia BIT because a 70 year lease of 900 hectares of land in China's Hainan province granted to Erkan's Chinese subsidiary had been revoked by the Hainan local authority for failure to develop it. Ekran argued that this act would amount to expropriation in breach of the BIT. However, soon after registration the case was suspended and on 16 May 2013 the Secretary-General of ICSID issued a procedural order which took note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1).<sup>111</sup> Outcome of the case and terms of a possible settlement are not known.

The second ICSID case against China was brought on 4 November 2014 by Ansung Housing Co., a South Korean property developer.<sup>112</sup> Ansung had invested in the development of a golf and country club and condominiums in Sheyang Xian, in China's eastern coastal province of Jiangsu. The claimant alleges that the provincial government frustrated its investment plan and illegally deprived Ansung

108 See R. Doak Bishop and Silvia M. Marchili *Annulment Under the ICSID Convention* (Oxford University Press, Oxford, 2012).

109 <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/07/6>> (visited 25 May 2015). See Kyriaki Karadelis "Peru Fails to Annul Chinese Treaty Award" *Global Arbitration Review* (GAR) 4 March 2015, <<http://globalarbitrationreview.com/news/article/33600/peru-fails-annul-chinese-treaty-award/>> (visited 25 May 2015).

110 *Ekran Berhad v. People's Republic of China* (ICSID Case No. ARB/11/15). See Tong Qi "How Exactly Does China Consent to Investor-State Arbitration: On the First ICSID Case against China" (2012) 5(2) *Contemporary Asia Arbitration Journal* 265-291, available at <<http://ssrn.com/abstract=2181451>> (visited 25 May 2015).

111 ICSID "Case Details" *Ekran Berhad v. People's Republic of China* (ICSID Case No. ARB/11/15) <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/11/15>> (visited 25 May 2015).

112 *Ansung Housing Co, Ltd v People's Republic of China* (ICSID Case No. ARB/14/25). See Lacey Yong and Alison Ross "China Faces Second ICSID Claim" *Global Arbitration Review* (GAR), 7 November 2014, <<http://globalarbitrationreview.com/news/article/33143/%20china-faces-second-icsid-claim/>> (visited 25 May 2015).

of its investment. Losses are alleged to amount to more than CNY100 million. The claimant is invoking the 2007 BIT between China and South Korea.<sup>113</sup> At the time of writing, the case is pending while the tribunal is being formed.<sup>114</sup>

Another case, involving claims brought by Chinese entities against Mongolia under the 1991 China-Mongolia BIT,<sup>115</sup> is an arbitration in which the Permanent Court of Justice (PCA) in The Hague is providing administrative support: *1. China Heilongjiang International Economic & Technical Cooperative Corp*, *2. Beijing Shougang Mining Investment Company Ltd*, and *3. Qinhuangdaoshi Qinlong International Industrial Co Ltd v Mongolia*.<sup>116</sup> Investment was made in a freight railway system operating between China and Mongolia, which - it is alleged - was expropriated by Mongolia's decision to proceed with a competing freight railway service to Russia. This case arises under an older generation BIT that limits international arbitration to a decision on quantum - the amount of compensation to be paid in case of an expropriation, while the prior determination of whether there actually has been an expropriation is not within the jurisdiction of the arbitral tribunal. At the time of writing, the case is pending.

The most interesting case so far in economic terms as well as possible long-term political implications for China's ISDS policy regarding outward investment concerns a substantial Chinese investment in Europe. In 2012, Ping An, the second largest Chinese insurer, filed the first ICSID case brought by a Chinese investor.<sup>117</sup> When the global financial crisis emerged in 2008, Ping An was the largest shareholder in the Belgian-Dutch bank Fortis. Ping An had a stake of almost five per cent. Fortis collapsed in 2008-2009 and was bailed out by the government of Belgium which nationalised Fortis and sold it to BNP Paribas, ignoring the

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113 China-Korea, Republic of BIT (2007), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/111/treaty/924>> (visited 29 May 2015).

114 ICSID "Case Details" *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25) <<http://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/14/25>> (visited 25 May 2015).

115 China-Mongolia BIT (1991), text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/139/treaty/940>> (visited 29 May 2015).

116 Permanent Court of Arbitration "*1. China Heilongjiang International Economic & Technical Cooperative Corp.*, *2. Beijing Shougang Mining Investment Company Ltd.*, and *3. Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia* <[www.pca-cpa.org/showpage.asp?pag\\_id=1378](http://www.pca-cpa.org/showpage.asp?pag_id=1378)> (visited 25 May 2015).

117 See *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom Belgium*, ICSID Case No. ARB/12/29. For the background see Financial Times of 24 September 2012 ("Ping An in arbitration claim over Fortis") available at <[www.ft.com/intl/cms/s/0/87437290-0620-11e2-bd29-00144feabdc0.html#axzz3bPhlPP5e](http://www.ft.com/intl/cms/s/0/87437290-0620-11e2-bd29-00144feabdc0.html#axzz3bPhlPP5e)> (visited 25 May 2015).

objections raised by Ping An against the sale. In 2012, Ping An filed a case against Belgium with ICSID for compensation amounting to EUR 700 million – EUR 1 billion. While in its argument with Belgium Ping An had originally relied on investor protection provisions of the 1984 BIT between Belgium and China,<sup>118</sup> in the case before ICSID Ping An invoked the later 2005 BIT between Belgium and China<sup>119</sup> which substituted and replaced the older 1984 treaty. Whereas the 1984 BIT limited the option of arbitration to disputes concerning the amount of compensation due in the case of an expropriation and did not refer to ICSID, the 2005 BIT provided for access to ICSID without restricting the subject-matter to disputes on quantum. As it was uncontroversial between the parties that the substantive provisions of the 2005 BIT did not apply retroactively, the key issue in the case was therefore whether a dispute that had arisen under the substantive provisions of the 1984 BIT before the 2005 BIT entered into force would be covered by the dispute settlement provisions of the new 2005 BIT.<sup>120</sup> In the award issued on 30 April 2015, the tribunal held this was not the case and dismissed the claim for lack of jurisdiction.

Another ICSID case, recently brought by a Chinese entity in *Beijing Urban Construction Group Co Ltd v Yemen*, was filed on 3 December 2014.<sup>121</sup> It concerns a US\$114 million international airport project in Sana'a and is relying on the 1998 China-Yemen BIT.<sup>122</sup> At the time of writing, the tribunal was still being formed.<sup>123</sup>

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118 BLEU (Belgium-Luxembourg Economic Union) - China BIT (1984), which entered into force in 1986, text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/19/treaty/471>> (visited 29 May 2015).

119 BLEU (Belgium-Luxembourg Economic Union) - China BIT (2005), which entered into effect in 2009, text available at: <<http://investmentpolicyhub.unctad.org/IIA/country/19/treaty/472>> (visited 29 May 2015).

120 Alan Ross "Belgium Prevails Against Chinese Investor" Global Arbitration Review (GAR) 5 May 2015, available at <<http://globalarbitrationreview.com/news/article/33774/belgium-prevails-against-chinese-investor/>> (visited 25 May 2015).

121 *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30).

122 "Chinese Investor Takes on Yemen at ICSID", Global Arbitration Review (GAR), 9 December 2014, <<http://globalarbitrationreview.com/news/article/33242/chinese-investor-takes-yemen-icsid/>> (visited 25 May 2015).

123 ICSID "Case Details" *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30) <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/14/30>> (visited 25 May 2015).

There are some other cases, brought against Australia (the notorious *Philip Morris* tobacco company case) and Laos involving Hong Kong<sup>124</sup> and Macao<sup>125</sup> BITs, but they are not of interest here and may be neglected.

As one can see, China's actual experience with ISDS cases so far is limited to less than a handful of cases. Transparency issues beyond the usual implications that arise when arbitrating under the auspices of ICSID since the reform in 2006, have not played any prominent role. As far as it is known, none of the cases so far involved a request of a third party to participate and have access to documents and/or hearings.

The low number of ISDS cases so far contrasts with the higher number of cases that have involved China in one way or another in the WTO dispute settlement system since China's WTO accession in 2001. From 2002 to 2014, China appeared in 12 WTO cases as a complainant and in 23 cases as a respondent<sup>126</sup> which yields a total of 35 cases in the relatively short period of twelve years. In addition, China took part as a third party in a number of other WTO proceedings. As the present writer has discussed elsewhere, WTO dispute settlement proceedings before Panels and the Appellate Body include certain transparency requirements, some of which, such as the role of *amicus curiae*, have remained controversial, at least from the viewpoint of developing countries.<sup>127</sup> It may be safely assumed that China's WTO delegations are fully aware of the related transparency issues in international trade dispute settlement cases before the WTO, although China's effective participation in the WTO dispute settlement mechanism seems to suffer from a significant lack of financial and human resources.<sup>128</sup>

One major reason for the low case numbers in China-related ISDS proceedings, at least as far as inward investment flows are concerned, is China's usual practice as a host state to try to settle disputes with foreign investors amicably through negotiations in order to keep the desired capital investment flowing into China. Another reason for the reluctance of foreign investors to insist on bringing international claims against China as the host State, on the other hand, is the concern

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124 *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia*, registered with the Permanent Court of Arbitration (PCA) in The Hague and conducted under the 2010 UNCITRAL Arbitration Rules, <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1494](http://www.pca-cpa.org/showpage.asp?pag_id=1494)> (visited on 25 May 2015)

125 *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13.

126 Bomin Ko, above n 72, at 112.

127 See Malanczuk, above n 42, at 194 et seq.

128 See Delei Peng and Rongfang Wang "China's Participation in the WTO Disputes Settlement Mechanism for Ten Years" (2013) 8(2) *Frontiers of Law in China* 377-394, at 386-388.

that this may lead to repercussions and serious disadvantages for continuing to do business in China and even cut off access to China's huge domestic market. A foreign firm may be reluctant to lose an individual investment in China through a wrongful act, but from a global business perspective it may be better to tolerate the loss than to lose market access in China, especially when its competitors are present.

For China's increasing role as outward investor, on the other hand, the situation is different because the issue is about protecting Chinese investor interests abroad. In such cases China is not acting as the host state, but as the home state of the Chinese outward investor, which in most large cases is likely to a state-controlled entity.<sup>129</sup>

#### **IV CHINA'S OFFICIAL POSITION ON ISDS TRANSPARENCY**

The following examines the development of China's official position on ISDS transparency, as displayed in the respective debates of UNCITRAL Working Group II.

##### **A *China's Position in 2010***

As a starting point, it is necessary to clarify that in the UNCITRAL Working Group states expressed quite different views, at least at the beginning, on the need for transparency in ISDS. The primary supporters of transparency were Australia, Chile, Norway, and especially Canada, seconded by the United States. Opposition to binding rules on transparency was voiced not only by Russia, Turkey, and China, but also by Germany and France.<sup>130</sup> China's official position was clearly to reject ISDS transparency as superfluous - at least initially.

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129 Generally speaking, state-owned transnational companies are increasingly important players in global FDI flows, but they still represent only a minor fraction of the total. The UNCTAD World Investment Report 2014 notes (at. p. ix): "UNCTAD estimates there are at least 550 State-owned TNCs – from both developed and developing countries – with more than 15,000 foreign affiliates and foreign assets of over \$2 trillion. FDI by these TNCs was more than \$160 billion in 2013. At that level, although their number constitutes less than 1 per cent of the universe of TNCs, they account for over 11 per cent of global FDI flows." See further Skovgaard Poulsen, Lauge N. "Investment Treaties and the Globalisation of State Capitalism: Opportunities and Constraints for Host States" in R. Ehandi and P. Sauvé (eds) *Prospects in International Investment Law and Policy* (Cambridge University Press, Cambridge, 2012), 73-90 available at <<http://ssrn.com/abstract=2050919>> (visited 25 May 2015).

130 M. Kantor "The Transparency Agenda for UNCITRAL Investment Arbitrations - Looking in all the Wrong Places" (New York University Investment Law Forum, 7 February 2011) at 1 and 6, available at: <[www.iilj.org/research/NYUInvestmentForum2010-11.asp](http://www.iilj.org/research/NYUInvestmentForum2010-11.asp)> (visited 25 May 2015).

In August 2010, the UNCITRAL Secretariat circulated a questionnaire to states on their current practices with respect to treaty-based investor-state arbitration. China was quite definite in its brief and consistently negative answers.

As to the first question asking for examples of publicity or transparency of arbitral proceedings and examples of access to documents or hearings, China noted that it was a party to the ICSID Convention, but "so far there has been no treaty-based arbitration of investment disputes, and therefore no such cases in evidence to publicity or transparency in respect of treaty-based investor-State arbitration proceedings."<sup>131</sup> This statement was quite accurate at the time as the first relevant ICSID case, the *Shum* case discussed above, only came up in 2011.

Second, as regards *amicus curiae* briefs or other interventions, China stated that there has been "no case of treaty-based investor-State arbitration in China, where third parties have presented their statements or become involved in the proceedings."<sup>132</sup>

Third, China clarified that it had not entered into any bilateral or multilateral treaty containing any provision on "transparency or publicity regarding treaty-based investment arbitration".<sup>133</sup> As we shall see in the next section, this statement needs to be qualified in view of two treaties concluded by China in 2008.

Fourth, China confirmed that it also had not signed any bilateral or multilateral agreement with a "provision on third-party involvement in treaty-based investment arbitration."<sup>134</sup> As of 2010, this reply is quite accurate for 2010, but as will be shown in the following section it became no longer true in 2012.

In a final comment, China then went on and unequivocally objected to the idea of introducing transparency to investor-state dispute resolution: "There is currently no such practice of treaty-based investor-State arbitration in China. Given the confidentiality of arbitration, we do not consider it appropriate to impose provisions of publicity and transparency on treaty-based settlement of investor-State investment disputes."<sup>135</sup>

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131 *Settlement of commercial disputes: Transparency in treaty-based investor-State arbitration - Compilation of comments by Governments* UNGA Doc. UNGA Doc. A/CN.9/WG.II/WP.159/Add.1, 4 August 2010, at 11 (Question 1).

132 At Question 2.

133 At Question 3.

134 At Question 4.

135 At Question 5 asking for "[a]ny other comment".

China did not give any further details on the reasons why it thought ISDS transparency was inappropriate.

### ***B China's New Position in 2013***

However, at some point in the two or three years following 2010, for reasons that are not entirely transparent, China somehow changed its mind. When the UN General Assembly discussed the work of UNCITRAL and its Rules on Transparency in October 2013, the Chinese representative, Mr Shang Zhen, stated the following:<sup>136</sup>

The Chinese Delegation believes that the implementation of the Rules on Transparency will be conducive to enhancing the transparency of international investment arbitration procedures. In so doing, it will help dispel people's apprehension that international arbitration tribunals tend to protect investors at the expense of the public interest, and will reinforce social monitoring of the implementation of host countries' legislations related to foreign investment management, thus building the overall trust of the international community in investment arbitration mechanisms. The Chinese Delegation appreciates and supports the formulation and adoption of the Rules on Transparency.

To what extent is this view reflected in China's actual treaty practice?

## ***V ISDS TRANSPARENCY IN CHINA'S MODEL BIT AND TREATY PRACTICE***

### ***A China's Model BIT***

In discussing China's treaty practice and transparency in investor-state arbitration, it is interesting to first have a look at China's model BIT. As noted above, many countries have adopted their own model BITs for use as a blueprint in international treaty negotiations with other states.<sup>137</sup> The most advanced national versions of such model BITs in respect of provisions securing transparency in investor-state arbitration are the 2004 model of Canada's Foreign Investment Promotion and Protection Agreement (FIPA)<sup>138</sup> and the 2012 United States Model BIT<sup>139</sup> (which

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136 Statement by Mr Shang Zhen, Chinese Delegate At the 68th Session of the UN General Assembly On Agenda Item 79 Report of UNCITRAL on the Work of Its 46th Session, available at: <[www.china-un.org/eng/](http://www.china-un.org/eng/)> (visited 25 May 2015).

137 Above n 22.

138 Text available at: <[www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf](http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf)> (visited 29 May 2015).

139 Text available at: <[www.state.gov/e/eb/ifa/bit/](http://www.state.gov/e/eb/ifa/bit/)> (visited 29 May 2015).

incorporated the transparency elements the US had already adopted in the earlier 2004 version). Both North American documents have detailed norms, for example, on participation of non-disputing parties and third parties, as well as on access to documents and open hearings. But there are no corresponding provisions in any existing or draft China model BIT. Like in the model BITs in many other countries outside North America, there is no mention of transparency in investor-state arbitration in the 1997 China Model BIT.<sup>140</sup>

However, it should be noted that Article 9(2)(b) of the Chinese Model BIT does refer to ICSID. This reference implies that the relatively soft transparency elements that were introduced for ICSID proceedings by the reform in 2006 will equally apply to any ICSID proceedings involving China.

Moreover, China is at liberty to agree on ISDS transparency provisions in any BIT or other IIA, even though the issue is not specifically addressed in its current Model BIT. As we shall see, there is not very much to be found so far in China's actual treaty practice in this respect. But it should be noted that an examination of the treaty practice of most EU member states does not yield any better result. While the current official EU position has clearly moved towards embracing ISDS transparency, it has been observed that this "is a virtually unprecedented departure from the treaty-making practice of the member states".<sup>141</sup> As noted by NJ Calamita: "when one looks at the existing portfolio of more than 1,200 bilateral investment treaties (BITs) entered into by EU member states almost none of them contain any provisions providing for transparency in investor-state arbitration".<sup>142</sup> China would therefore seem to be in good company in this regard, taking into consideration in addition that none of the 26 BITs concluded by individual EU member states with China contains any ISDS transparency obligations.

### ***B The China-Mexico BIT (2008)***

The first example for any acceptance of ISDS transparency by China in a BIT seems to be the 2008 China-Mexico BIT.<sup>143</sup> According to Article 20, the awards is

140 The exact status of some other later drafts (2003) and (2010) is unclear. These documents have not been officially released or endorsed. The draft texts that have been made available privately are silent on this issue.

141 Calamita, above n 40, at 646.

142 Ibid. The EU "Concept Paper", above n 168 gives a figure of 1,400 EU member states BITs out of 3,000 (at 1).

143 Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, signed 11 July 2008 (entry into force 6 June 2009), available at: <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/938>> (visited 26 May 2015). See Calamita, above n 40, at 663-664.

to be "publicly accessible, unless the disputing parties agree otherwise." But this is it. No other element of transparency is included; thus the endorsement of ISDS transparency in this treaty is rather limited.

### ***C The China-New Zealand FTA (2008)***

The investment chapter of the 2008 China-New Zealand FTA<sup>144</sup> has a number of articles on ISDS. Among those is the following provision:

Article 157 Publication of Information and Documents Relating to Arbitral Proceedings

1. Subject to paragraph 2, the state party may, as it considers appropriate, ensure public availability of all tribunal documents.
2. Any information that is submitted to the tribunal and that is specifically designated as confidential information shall be protected from disclosure.

The language leaves it to the discretion of the host state whether or not to publicise the documents, including the final award. While there is an extensive chapter on regulatory and administrative transparency,<sup>145</sup> Article 157 is the only provision in the treaty that deals with transparency of ISDS proceedings. Rights of third parties or *amicus* briefs are not mentioned at all in the treaty.

### ***D The Canada-China FIPA (2012)***

A more recent treaty constitutes a landmark in the history of the development of China's BIT practice on ISDS transparency. This refers to the 2012 Canada-China Foreign Investment Promotion and Protection Agreement (FIPA).<sup>146</sup> This agreement, which entered into force on 1 October 2014, is a major breakthrough in a number of different aspects.

As far as transparency in investment arbitration is concerned,<sup>147</sup> important provisions are laid down in Article 27 (The Non-Disputing Contracting Party:

144 China-New Zealand FTA (2008), text available at: <[www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/](http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/)> (visited 26 May 2015).

145 At Chapter 13.

146 Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, signed 9 September 2012, available at <<http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/778>> (visited 28 May 2015).

147 See also Calamita, above n 40, at 664.

Documents and Participation), Article 28 (Public Access to Hearings and Documents), and Article 29 (Submissions by a Non-Disputing Party), supplemented by Annex C.29 (Submissions by Non-Disputing Parties). These are the most progressive provisions China has so far accepted in a treaty in the area of transparency in investor-state arbitration.

The text of the aforementioned provisions often correspond to the wording of pertinent provisions in the 2004 Canadian Model FIPA (Article 38: Public Access to Hearings and Documents; Article 35: Participation by the Non-Disputing Party; Article 39: Submissions by a Non-Disputing Party, supplemented by Annex C.39 Submissions by Non-Disputing Parties).<sup>148</sup> But there are also differences in the language used in the treaty as compared to the wording of the Canadian Model FIPA (for example, hearings are not open as a matter of principle). This seems to indicate that Canada was unable to convince China to accept its model provisions on ISDS transparency without modification.

Be that as it may, it is clear that under the treaty the parties are obliged to publish arbitral awards and that the tribunal enjoys the authority to accept submissions from third parties (*amicus curiae*). But other issues are placed under the discretion of the disputing state, including the publication of documents and pleadings submitted in arbitral proceedings and the openness of hearings. Thus, China (and Canada, of course, equally, although it is not likely to do so) would be able to opt out of these elements of ISDS transparency on a case-by-case basis. Under Article 27, however, the non-disputing party is entitled to make submissions "on a question of interpretation" and a non-disputing party also has the right to attend hearings.

Overall, it can be said that the Canada-China agreement has confirmed the direction taken by the international community in the new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, at least with respect to certain elements.

### ***E Other Recent BITs and IIAs***

It seems that other BITs and IIAs concluded by China in 2009 and later do not contain any ISDS transparency provisions at all. This is true, for example, for the important investment agreement China concluded with ASEAN in 2009.<sup>149</sup> Article

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148 Céline Lévesque and Andrew Newcombe "Canada" in Chester Brown (ed) above n 22, 53-130 at 116-121.

149 2009 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 signed on 15 August 2009 in Bangkok, Thailand by Economic Ministers, text available at <<http://cil.nus.edu.sg/2009/2009-agreement-on-investment-of-the-framework-agreement-on->

14 on investor-State dispute settlement, which may make use of ICSID, the ICSID Additional Facility, the UNCITRAL Arbitration Rules, or any other rules the parties may agree upon, is completely silent on ISDS transparency. Equally uninformative on ISDS transparency are the treaties China concluded with Malta (2009),<sup>150</sup> Mali (2009),<sup>151</sup> Uzbekistan (2011),<sup>152</sup> South Korea (2015),<sup>153</sup> Japan and South Korea (2012),<sup>154</sup> or Tanzania (2013).<sup>155</sup>

A comparative look into the more limited BIT and IIA practices of Hong Kong (17 BITs, plus some other IIAs) and Macau (2 BITs) is not (yet) likely to yield a more positive indication of a trend towards ISDS transparency in these two Special Administrative Areas of China.

## **VI CHINA'S CURRENT BIT NEGOTIATIONS WITH THE US AND EU**

China is currently separately negotiating BITs with both the United States and the EU. In view of the size of the three economies involved, a positive outcome promises to be of great significance for the world economy and the international trade and investment order. The following section will consider the possible role of ISDS transparency in these negotiations. However, it will be difficult to draw any firm conclusions at the moment because the negotiations are confidential.

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comprehensive-economic-cooperation-between-the-people%E2%80%99s-republic-of-china-and-the-association-of-southeast-asian-nations-signed-on-15/> (visited 26 May 2015).

150 China-Malta BIT (2009), text available at: <<http://tfs.mofcom.gov.cn/article/h/au/201002/20100206785136.shtml>> (visited 29 May 2015).

151 China-Mali BIT (2009), text available at: <<http://images.mofcom.gov.cn/tfs/accessory/201003/1267685092854.pdf>> (visited 29 May 2015).

152 China-Uzbekistan BIT (2011), text available at: <<http://tfs.mofcom.gov.cn/article/h/au/201111/20111107819511.shtml>> (visited 29 May 2015).

153 China and South Korea formally signed the bilateral free trade agreement (FTA) on 1 June 2015 in Seoul.

154 Above n 89.

155 China-Tanzania BIT (2013), text available at: <<http://images.mofcom.gov.cn/tfs/201409/20140928170911164.doc>> (visited 29 May 2015).

## A *China-US BIT Negotiations*

China and the United States started to talk about a BIT in 2008.<sup>156</sup> After 2009, the talks were suspended for a while because the United States wanted to first finalise the text of its new 2012 Model BIT in revising the 2004 version.

The United States is a strong supporter of ISDS transparency<sup>157</sup> and the IIAs it has concluded (mostly with developing countries and emerging economies) exhibit the highest standard of ISDS transparency currently available on the global level. The US has currently BITs in force with 40 countries, plus 14 FTAs in force with 20 countries, many of which include investment chapters.<sup>158</sup> The U.S. has also signed the Mauritius Convention. China, however, has not yet done so.

For the TTIP negotiations with the EU, the United States has declared that it would seek "full transparency" in ISDS cases, requiring governments to "make all pleadings, briefs, transcripts, decisions, and awards in ISDS cases publicly available, as well as open ISDS hearings to the public".<sup>159</sup> The stated purpose of such provisions is to "allow governments that are party to the agreement, as well as the public at large, to carefully monitor pending proceedings and more effectively make decisions about whether to intervene."

In negotiating a BIT with China, the US will probably rely on its own 2012 Model BIT, including the provisions on ISDS transparency.<sup>160</sup> This text has been the product of a number of years of broad consultations with different interest groups in the United States and it is therefore not likely to be easily discarded from the US perspective.

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156 QingJiang Kong "U.S.-China Bilateral Investment Treaty Negotiations: Context, Focus, and Implications" (2012) 7(1) *Asian J. WTO & Int'l Health L. & Pol'y* 181-194; Peterson Institute for International Economics (ed) *Toward A US-China Investment Treaty* (PIIE Briefing 15-1, February 2015), Conference materials available at: <[www.iie.com/events/event\\_detail.cfm?EventID=372](http://www.iie.com/events/event_detail.cfm?EventID=372)> (visited 28 May 2015). See also Karl Sauvart and Huiping Chen "A China – US Bilateral Investment Treaty: A Template for a Multilateral Framework for Investment?" *Columbia FDI Perspectives*, No. 85, December 17, 2012 available at <[www.vcc.columbia.edu](http://www.vcc.columbia.edu)> (visited 26 May 2015).

157 See Weiss et al, above n 8, at 20.

158 Weiss et al, above n 8, at 8.

159 USTR "Investor-State Dispute Settlement (ISDS)" Fact Sheet, March 2015, available at <<https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isd>> (visited 29 May 2015).

160 K. Andelic "A U.S.-China BIT - Resolution of Investment Disputes in Context of Transparency Issues" (2015) 12(1) *Transnational Dispute Management*, only abstract available at the time of writing at: <[www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)> (visited 26 May 2015).

There are important benchmarks for the pursuit by the US of ISDS transparency in Articles 28 and 29 of the 2012 Model BIT.<sup>161</sup>

Article 28 (Conduct of the Arbitration) addresses the rights of both non-disputing parties and third parties. Article 28(2) states: "The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty." Furthermore, Article 28(3) reads as follows: "The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party."

Article 29 deals with the remaining elements of ISDS transparency in a comprehensive and detailed manner, including confidential information:

Article 29: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:
  - (a) the notice of intent;
  - (b) the notice of arbitration;
  - (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [Amicus Submissions] and Article 33 [Consolidation];
  - (d) minutes or transcripts of hearings of the tribunal, where available; and
  - (e) orders, awards, and decisions of the tribunal.
2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

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<sup>161</sup> Lee M. Caplan and Jeremy K. Sharpe "United States" in Chester Brown (ed) *Commentaries on Selected Model Investment Treaties* (Oxford University Press, Oxford, 2013) 753-851 at 831-838.

The following paragraphs of Art. 29 address in considerable detail how to deal with confidential ("protected") information and information affecting essential security interests:

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article].
4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:
  - (a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
  - (b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;
  - (c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and
  - (d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.
5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

It should be noted that Articles 28 and 29 apply *mutatis mutandis* to state-state dispute settlement proceedings, mentioned in Article 37.<sup>162</sup>

It is conceivable that China may attempt to limit its acceptance of ISDS transparency elements in a China-US BIT to those reflected in the 2012 Canada-China FIPA as discussed above. The lower level of ISDS transparency in that treaty may serve China as a precedent. But the United States obviously has more economic and political leverage in negotiating with China than Canada. However, the focus is likely to be on other substantial issues (coverage of pre-establishment phase, negative lists of investment and respective definitions) rather than on procedural issues of ISDS transparency.

### ***B China-EU BIT Negotiations***

China and the EU started negotiating on a BIT in January 2014.<sup>163</sup> When the Lisbon Treaty entered into force in December 2009, under Article 207 the EU gained exclusive competence in the field of foreign direct investment.<sup>164</sup> This has raised complicated legal issues concerning the status of BITs that may conflict with EU investment policy, including the impact of the reform on so-called "intra-EU BITs".

The exact scope of the competence of the EU is also controversial between the EU Commission and EU member states.<sup>165</sup> The Commission claims that the EU was given the power to negotiate and conclude (within its exclusive competence) international treaties concerning FDI, including both BITs and other IIAS, such as FTAs with investment chapters. A number of EU member states disagree and say the powers of the EU are limited to the admission of investments and to the narrow

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162 See Art. 37(4). On the relationship between the two types of procedures see generally Chang-Fa Lo "Relations and Possible Interactions between State-State Dispute Settlement and Investor-State Arbitration under BITs" (2013) 6(1) Contemporary Asia Arbitration Journal 1-30.

163 Axel Berger "EU-China Bilateral Investment Agreement Negotiations" EurBiz 30 May 2014, available at: <[www.eurobiz.com.cn/eu-china-bilateral-investment-agreement-negotiations/#\\_ftn4](http://www.eurobiz.com.cn/eu-china-bilateral-investment-agreement-negotiations/#_ftn4)> (visited 28 May 2015). See further Marc Bungenberg and Catherine Titi "The Evolution of EU Investment Law and Future of EU-China Investment Relations" in Wenhua Shan and Jinyuan Su (eds) above n 2, Ch. 11.

164 Marc Bungenberg, August Reinisch and Christian Tietje *EU and Investment Agreements: Open Questions and Remaining Challenges* (Nomos; Hart, Oxford, 2013).

165 See Matthew Weiniger and Vanessa Naish "European Commission requests European Court of Justice Opinion on competence to enter into EU-Singapore FTA", Herbert Smith Freehills PIL Notes 6 November 2014, available at: <<http://hsfnotes.com/publicinternationallaw/2014/11/06/european-commission-requests-european-court-of-justice-opinion-on-competence-to-enter-into-eu-singapore-fta/>> (visited 30 May 2015).

category of "FDI", which would not cover portfolio investments and "investment protection" addressed in IIAs (including ISDS). It is argued that where IIAs deal with such issues, there is no EU exclusive competence, but only a shared competence, requiring approval from both the EU and individual member states. In connection with the finalization of the EU-Singapore Free Trade Agreement, on 30 October 2014 the European Commission announced that it would seek an opinion from the European Court of Justice as to the interpretation of the Lisbon Treaty as regards the exact powers of the EU in this area.

The new China-EU BIT under negotiation is intended to substitute the current network of 26 BITs that China has concluded with EU member states since the 1980s. It is also a platform for considering a comprehensive China-EU FTA in the future.

The EU has not published a Model BIT that could serve as a reference in negotiations with China.<sup>166</sup> But the EU has developed some firm ideas about the direction it wants to take. As noted above, the EU has faced serious opposition from civil society against including ISDS procedures in its current negotiations with the United States on the Transatlantic Trade and Investment Partnership (TTIP) which commenced in June 2013. The EU conducted an extensive online consultation of the public in 2104 on the TTIP, investment protection policy, and ISDS in which it was, *inter alia*, confirmed that transparency in ISDS proceedings and access to hearings "is a widely shared objective". The EU report further noted:<sup>167</sup>

However, concerns go in two directions. One group of concerns, mostly expressed by NGOs and trade unions, is that some of the exceptions to the transparency provisions to protect business confidential information could be too widely interpreted and could risk undermining the effectiveness of transparency. There is also concern that the tribunal could have too wide a discretion in deciding under what circumstances public hearings could be closed to the public. Another group of concerns stemming from business organisations and companies is that the provisions in the proposed approach on transparency go further than most national legal systems and that this could entail

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<sup>166</sup> Indeed, Calamita, above n 40, at 671 states that the EU Commission "has steadfastly refused to make public a model investment treaty since first receiving competence for foreign direct investment under the Treaty of Lisbon." Reference is made to N. Jansen Calamita "The Making of Europe's International Investment Policy: Uncertain First Steps" (2012) 39 *Legal Issues of Economic Integration* 301-330, 316-322.

<sup>167</sup> EU Commission Staff Working Document, "Report - Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)", SWD (2015) 3 final, Brussels, 13.1.2015, at 19. See also: European Commission Report on the online consultation on investment protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership Agreement, MEMO/14/560, 13 January 2014.

a risk that genuine confidential information and trade secrets could be disclosed. There is also concern that the access by the public to the hearings could politicise cases brought by companies, with the risk that this could affect the fairness of the proceedings.

The EU has laid out its position in the "concept paper" published in May 2015.<sup>168</sup> Reference is made to some improvements that have been already introduced in the 2014 Canada-EU Comprehensive Economic and Trade Agreement (CETA)<sup>169</sup> and the 2014 EU-Singapore FTA.<sup>170</sup> The proposals in the "concept paper" focus on (i) securing the right of states to regulate and take measures in the interest of legitimate public policy interests as they deem appropriate; (ii) enhancing the quality and legitimacy of arbitral tribunals, including a right of third parties to intervene if they have a direct and existing interest in the outcome of a case; (iii) establishing an appellate body mechanism with the aim of creating a permanent investment dispute settlement court; and (iv) clarifying the relationship between ISDS and national courts. It is very likely that these directions will also be EU benchmarks for the BIT negotiations with China.

Some have expressed high expectations that the China-EU BIT will definitely prescribe extensive transparency obligations for ISDS. Ramón García-Gallardo and Xiao Jin from King & Wood Mallesons, for example, are convinced that the innovative elements of ISDS in the China-EU BIT will include the following:<sup>171</sup>

First of all, ISDS will be bound by conditions for full transparency: all documents submitted by the parties as well as those produced by the arbitral tribunals will be

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168 Andrew Cannon and Hannah Ambrose "EU Commission Issues 'Concept Paper' on ISDS in the TTIP and Beyond: Proposals for 'Profound Reform'" Lexology 20 May 2015, available at: <[www.lexology.com/library/detail.aspx?g=edd497ae-5152-42d4-b043-12a4807c6d03&utm\\_source=Lexology+Daily+Newsfeed&utm\\_medium=HTML+email+-+Body+-+General+section&utm\\_campaign=Lexology+subscriber+daily+feed&utm\\_content=Lexology+Daily+Newsfeed+2015-05-21&utm\\_term](http://www.lexology.com/library/detail.aspx?g=edd497ae-5152-42d4-b043-12a4807c6d03&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2015-05-21&utm_term)> (visited on 26 May 2015).

169 Government of Canada "Consolidated CETA Text", available at: <[www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng)> (visited on 26 May 2015).

170 European Commission "EU-Singapore Free Trade Agreement. Authentic text as of May 2015", available at: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> (visited on 26 May 2015).

171 Ramón García-Gallardo and Jin Xiao "The E.U.—China Bilateral Investment Treaty" Lexology 20 May 2015, available at: <[www.lexology.com/library/detail.aspx?g=219ebc8a-c9c0-4efd-8808-36761b4ed526&utm\\_source=Lexology+Daily+Newsfeed&utm\\_medium=HTML+email+-+Other+top+stories&utm\\_campaign=Lexology+subscriber+daily+feed&utm\\_content=Lexology+Daily+Newsfeed+2015-05-22&utm\\_term](http://www.lexology.com/library/detail.aspx?g=219ebc8a-c9c0-4efd-8808-36761b4ed526&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Other+top+stories&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2015-05-22&utm_term)> (visited 26 May 2015).

publically available on a website; all hearings will be open to the public and their transcripts published; and interested parties, such as NGOs and trade unions, will be able to make submissions.

Whether this materialises, remains to be seen and depends on the assessment by China and the EU of their priorities and respective interests in the BIT negotiations. But it should be clear that the EU massively supports the inclusion of the 2014 UNCITRAL Transparency Rules in any BIT or IIA that the EU signs. On 29 January 2014, the EU Commission issued a press release notifying the public that it "proposed to allow UN rules on transparency for Investor-to-State Dispute Settlement (ISDS) to apply also to existing investment treaties that the EU and Member States have in place."<sup>172</sup> This proposal is directed towards existing BITs of EU member states. As far as new BITs are concerned, the Commission statement clarified that its "has integrated" the UN rules on transparency "in all of the EU's completed and on-going ISDS negotiations."<sup>173</sup> Presumably, this also applies to the BIT negotiations with China.

It has been noted that the EU Commission's decided to adopt the text of the UNCITRAL transparency rules as its "negotiating baseline" internationally already in early 2014 in the talks with Canada on the Canada and European Union (EU) Comprehensive Economic and Trade Agreement (CETA).<sup>174</sup> The EU Commission, supported by the European Parliament, but in contrast to the prevailing actual BIT practice of EU member states, had been strongly advocating ISDS transparency in various documents since 2010.<sup>175</sup> Calamita makes the following interesting observation in this connection:<sup>176</sup>

The EU's adoption of the UNCITRAL position in its negotiations is a radical step not only in light of the member states' prior practice. It is also a bold decision in light of the positions taken by EU member state representatives during the UNCITRAL debates on the formulation of the new UNCITRAL transparency rules. In the formal positions submitted by EU member states to UNCITRAL in the course of the debates in 2010, not a single EU member state came out in general favour of transparency. Rather, in those submissions, the EU member states voiced considerable scepticism

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172 European Commission - Press release "European Commission pushes for full transparency for ISDS in current investment treaties", Brussels, 29 January 2015, <[http://europa.eu/rapid/press-release\\_IP-15-3881\\_en.htm](http://europa.eu/rapid/press-release_IP-15-3881_en.htm)> (visited 25 May 2015).

173 Ibid.

174 See Calamita, above 40, at 672.

175 At 672-675.

176 At 672.

about the need for transparency in investor-state arbitration or the desirability of making transparency a default norm in investor-state cases in the absence of specific consent from the disputing parties.

The Comprehensive Economic and Trade Agreement (CETA) signed by Canada and the EU on 5 August 2014<sup>177</sup> includes a comprehensive regime of investment protection with investor-state arbitration under ICSID, the ICSID Additional Facility, or the UNCITRAL Arbitration Rules. Moreover, there is wholesale incorporation of the UNCITRAL transparency rules.<sup>178</sup> The CETA provisions go even beyond the requirements of the UNCITRAL transparency rules and allow a greater volume of information to be made public.

The EU and Singapore announced on 22 May 2015 that they have also finalised the text of the Investment Protection Chapter of the FTA of the EU-Singapore Free Trade Agreement (EUSFTA).<sup>179</sup> When it enters into force sometime in 2016 (in view of the still pending request for a European Court of Justice opinion on the European Commission's competence regarding the EUSFTA), it will replace the 12 existing BITs between Singapore and individual EU member states. The final text was not available at the time of writing, but earlier drafts included an extensive Annex to the ISDS chapter with detailed provisions on full transparency.

## ***VII CONCLUSIONS***

The analysis has shown that China's practice regarding ISDS transparency is rather limited, both with respect to treaty-making, as well as with regard to actual ISDS cases. China's recent positive evaluation of the 2014 UNCITRAL transparency rules and the ISDS transparency provisions China has accepted in the 2012 Canada-China FIPA appear to signal a significant shift in China's basic position towards transparency in investor-state arbitration. This may be induced particularly by the changing role of China from a major recipient of global foreign direct investment to a rising outward investor, especially in the United States and Europe, regions where China hopes to benefit from technology transfers for its own further economic development.

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177 Above n 169.

178 Article X.33: Transparency of Proceedings.

179 Ministry of Trade and Industry (MTI) Singapore - Press release on EUSFTA IPC Initialling.pdf (22 May 2015).

However, actual practice in accepting ISDS transparency in IIAs to which China is a party remains very limited. Except for the two other examples, the 2008 China-Mexico BIT and the 2008 China-New Zealand FTA, containing quite rudimentary provisions relating to transparency, the large number of existing Chinese BITs and other IIAs remain silent on the matter. But this is not very different from the practice so far of the BIT-policy of most other states outside of the limited circle of strong advocates of ISDS transparency led by Canada and the United States based on the NAFTA experience.

China has so far not signed the Mauritius Convention, which has only 10 signatories at the moment and will enter into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession. If China does not sign and ratify the Convention, its existing network of BITs and other IIAs would not be affected. Alternatively, China might consider joining the Mauritius Convention in order to demonstrate good standing and adherence to the modern trend of enhancing ISDS transparency, but in doing so, making use of the rather broad option of entering reservations. Article 3(1) of the Mauritius Convention provides:

A Party may declare that:

- (a) It shall not apply this Convention to investor-State arbitration under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty;
- (b) Article 2(1) and (2) shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent;
- (c) Article 2(2) shall not apply in investor-State arbitration in which it is a respondent.

Moreover, Article 3(2) offers protection against future revisions of the UNITRAL transparency rules: "In the event of a revision of the UNCITRAL Rules on Transparency, a Party may, within six months of the adoption of such revision, declare that it shall not apply that revised version of the Rules."

On the other hand, Article 3 (4) clarifies that "[n]o reservations are permitted except those expressly authorised in this article". But permissible reservations can be made at any time, except for a reservation under Article 3(2).<sup>180</sup>

In the current – confidential – BIT negotiations between China and the United States, on the one hand, and China and the EU, on the other hand, it can be expected that both the United States (on the basis of its 2012 Model BIT) and the EU (on the

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180 See Art. 4.

basis of its stated ISDS transparency policy) will press the point of transparency. The EU still needs to settle the aforementioned controversy on the scope of its exclusive competences regarding FDI, including whether it really covers ISDS as well. From China's point of view, one general issue pertinent to the China-EU BIT negotiations, in the light of increasing Chinese investment in Europe in "strategic" sectors, is the question whether the EU, which currently has a fragmented system of national security review for foreign direct investment, might choose to replace this fragmented system with a centralised one comparable to the US federal government review of FDI.<sup>181</sup>

For negotiations on future treaties, it is likely that the 2012 Canada-China FIPA has already set an important *de facto* precedent, from which it may be difficult for China to deviate. China may consider to clarify in future BITs or other IIAs that the MFN clause does not apply to dispute settlement.<sup>182</sup> Advocates of "full transparency" may not be satisfied with the standards that China has accepted in the Canada-China FIPA. But China may still be able to use a reference to these standards as evidence to support its credibility, both as a leading global investor and recipient of global investment. On the other hand, this may be a double-edged sword, cutting both ways, because such treaty-based transparency obligations would also apply to cases brought by foreign investors against China concerning investments made in the Middle Kingdom. China will have to balance any competing interests in this respect in its longer-term strategy and make an assessment whether it is well equipped to handle increased ISDS transparency in practical terms, including "the management of lay opinions and media reactions to the state's legal case, decisions to settle and perceived loss of face, and the tribunal's lack of power to contain public reaction".<sup>183</sup> Moreover, it is still unclear how tribunals will apply the UNCITRAL transparency rules, especially as regards Article 1(4) dealing with the exercise of discretion of the tribunal where it should take into account (a) the "public interest in transparency in treaty-based investor-State arbitration and in the particular proceedings" and (b) "the disputing parties' interest in a fair and efficient resolution of their dispute".

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181 See Lawrence Eaker and Tao Sun "Chinese Investment in the European Union & National Security Review: Is the EU Legal Regime About to Follow the US Model?" (2014) 9(1) *Frontiers of Law in China* 42-64,

182 See Dolzer and Schreuer, above n 6, at 270-275 for a discussion of the case law.

183 Sophie Nappert "The Other Side of Transparency" *Columbia FDI Perspectives*, No. 141, February 16, 2015 available at: <[www.ccsi.columbia.edu](http://www.ccsi.columbia.edu)> (visited 30 May 2015).

For China, granting extensive rights to third parties to intervene in ISDS as *amicus curiae* may raise issues in view of unfamiliarity in dealing with activist NGOs. This may imply the need for some recognition that third-party intervention has a different nature from other aspects of information openness and public access in ISDS transparency.<sup>184</sup> Partly this may relate to the issue of increasing costs of the proceedings. Other questions may arise from China's state secrets legislation.<sup>185</sup> While all parties in any ISDS proceeding need to secure confidential or protected information, as addressed in Article 7 of the UNCITRAL transparency rules as "[e]xceptions to transparency", China might need to rely specifically on Article 7(5), which contains a self-judging clause<sup>186</sup> "essential security interests": "Nothing in these Rules requires a respondent State to make available the disclosure of which it considers to be contrary to its essential security interests."

In deciding which road to take beyond the relatively low level of transparency China has accepted in the 2012 Canada-China FIPA, China will need find a balance between its increasing interests as an outward investor and its continuing interest in attracting FDI flows to China. The challenges of competing with other states with more advanced ISDS transparency experience are different in ISDS cases where China is the respondent than in cases where China is the home state of a "national champion going global".

Some observers are optimistic as regards future trends on the global level. N. Jansen Calamita, for example, states:<sup>187</sup>

As the regionalization of investment treaty arrangements continues to grow, a shared position of transparency by Canada, the EU, and the United States could serve as a strong global force." Considering the large share of these states in global FDI flows, the author hopes that "[t]his political/economic leverage, especially in the context of large regional negotiations, may prove irresistible even to states otherwise not inclined to join the transparency agenda.

However, the global flows of investment are changing. Moreover, the states referred to in the above citation are clearly democratic states, but they do not include,

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184 See Kantor, above n 130.

185 See Mitchell A. Silk and Jillian S. Ashley "Understanding China's State Secrets Laws", available at <[www.chinabusinessreview.com/understanding-chinas-state-secrets-laws/](http://www.chinabusinessreview.com/understanding-chinas-state-secrets-laws/)> (visited 30 May 2015).

186 See Katia Yannaca-Small "Essential Security Interests under International Investment Law" in OECD *International Investment Perspectives: Freedom of Investment in a Changing World* (OECD, Paris, 2007).

187 Calamita, above n 40, at.678.

for example India or Brazil which have not joined the bandwagon of ISDS transparency. Whether a trend or norm can truly be described as "global" without including India or China with their combined population figures of 2.6 billion people, and other important actors like Russia, Brazil and South Africa, is doubtful. The direction China decides to take will certainly make a big difference.<sup>188</sup> As in many other instances of reform, most likely, China will take a gradual approach towards ISDS transparency following Deng Xiaoping's phrase "Mozhe shitou guo he" or "crossing the river by feeling for stones".

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188 For an engaged call that China should embrace ISDS transparency see Zhao Jun, Liu Yun "The Transparency Reform in International Investment Arbitration and China" 2014 44(3) Journal of Zhejiang University 150-163 (in Chinese with English abstract).

