

Reforming International Investment Law in a Transitional China: The Post-FPS of the 18th Party Central Committee*

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This paper examines the new trends of interaction between the legal transformations in China and the international investment treaties, focusing on the legal reforms after the Fourth Plenary Session of the Eighteenth Party Central Committee Fourth Plenary Session of the 18th Party Central Committee of the PRC of 2014 (2014 FPS). It envisages that the 2014 FPS will impose significant influence on the current legal system in China, on the forthcoming Foreign Investment Law of China, and eventually on the negotiation and application of the international investment treaties concluded by China because the CPC Central Committee Decision on Certain significant Issues regarding the Comprehensive Promotion of Law (PCC Decision) has demonstrated the directions of legal constructions and reforms explicitly and comprehensively from the administrative, judicial, social, and jurist perspectives, which constitutes the most inclusive PCC Decision regarding Chinese law and justice.

Keywords: IIAs, Legal reforms in China, FPS, Party Central Committee Decision, BITs

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I. INTRODUCTION

Since 1982 when the first Chinese BIT was concluded, nearly 150 BITs have been reached between China and other contracting States. Although it is difficult to conclude to what extent the BITs are promoting FDI flows,¹ undeniable is that the BITs provide comprehensive protection of investment and improve the economic determinants of FDI flow.² Meanwhile, the number of investment disputes under the Chinese BITs has been increasing since 2008. It is mainly due to the expanding cross-border investment activities and the merging third generation of Chinese International Investment Agreements (“IIAs”), although the results of most disputes remain to be seen.³

For a long time, Chinese BITs were mainly modeled after the US and Canadian BITs. The reforms of Chinese domestic laws, however, have not been involved in treaty negotiation.⁴ When, the China-Canada BIT and China-Japan-Korea Trilateral Investment Treaty reached in 2012, they demonstrated that the interests of the host countries are being taken into account in IIAs more.⁵ The Premier of State Council in China maintained that ‘mutual balance’ should be reflected in the ongoing negotiation of the China-US BIT,⁶ indicating the desire to consider Chinese interests in the new treaty.

As a result, Chinese laws, in particular the will-be-reformed laws after the 2014 Fourth Plenary Session (“FPS”)⁷ are likely to influence the negotiation and application of the future Chinese BITs. Here, a question may arise as to what extent the post-2014 FPS legal reforms will affect Chinese IIAs and the ongoing China-US and China-EU investment instruments.

The primary purpose of this research is to fill the literature gap regarding the interplay of IIAs and Chinese domestic laws in transition. This paper is composed of five parts including a short Introduction and Conclusion. Part two will examine the recent developments of Chinese BITs. This part revisits the treaty practice in China and proposes 2012 rather than 2008, as the watershed of a new generation of Chinese BITs seeking the balance between investors and the host countries. Part three will evaluate the PCC Decision reached from the 2014 FPS as well as the possible development of the legal system in China arising from the PCC Decision. Part four will explore the impacts of post-2014 FPS legal reforms on Chinese IIAs negotiation and application. Part five will reach the conclusion.