

DECODING CHINESE BILATERAL INVESTMENT TREATIES

by Shen Wei
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Professor Shen Wei's new book-Decoding Chinese Bilateral Investment Treaties-has vividly depicted a vibrant China in bilateral investment treaties (BITs) and BIT arbitrations. The observations, analyses and findings in his book are supported with abundant empirical evidence and critical theoretical explorations. The ground-breaking contribution made by this book lies in demystifying the patterns inherent in China's BIT law and practice and adopting versatile methodology to address the literature gap identified by the author. This book not only explores the symbiotic relationship between China's domestic governance and global BIT networks, but also coherently addresses four inter-connected puzzles relating to Chinese BITs. Professor Shen's study shows that China and its investors will be proactive rule-makers and active rule-users in the arena of international investment law and investor-state arbitration. This new book will surely be an invaluable inspiration for practitioners, scholars and other persons who have interest in this field.

Keywords: Chinese BIT, Foreign Investment, ISDS, Investor-State Arbitration, ICSID

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1. Introduction

A large amount of literature touches upon international investment law, bilateral investment treaties (BITs) and international investment (or BIT) arbitration. China is no exception to this trend and has attracted a great deal of interest from both academic and practical circles. However, a book on China's BITs and BIT arbitration is still a rare species in this field. Against this background, Professor Shen Wei's monograph, *DECODING CHINESE BILATERAL INVESTMENT TREATIES*, is worth reading.¹

This comprehensive and in-depth analysis on Chinese BITs and BIT arbitration cases has unveiled the image of a vibrant China in the field of international investment law and practice. Chinese BITs, including free trade agreements (FTAs), are investigated by the author through a systematic approach to decode the Chinese government's role in treaty-making, domestic legal reform, and the use of investor-state dispute settlement (ISDS). Contrary to the mixed idea that China is a tired dragon or crouching tiger in international investment governance,² in this book, the author contends that many assumptions similar to these were just "the best guess or observation without empirical evidence."³ What's more, the author identified a noticeable gap in the literature of Chinese investment treaties and addressed "four interconnected puzzling but under-investigated issues."⁴ One would be struck by how well the author addressed the four interconnected puzzles in a coherent way, and how informational and useful this work will be for a person who has little knowledge about the BIT and ISDS arena, as well as for those who have academic or practical interest in China-related BIT and ISDS issues.

2. The Aim, Scope and Methodology

This book is surely a ground-breaking work with its focus on discussing Chinese BIT terms and provisions. What distinguishes it from other books, however, are the various methodologies the author has adopted.⁵ The image of China in the field of international investment governance has often been misinterpreted or distorted by Westerners. The author demystifies "whatever patterns exist in Chinese BIT law" through this book.⁶ In addition to conventional jurisprudential analysis and case study of substantive or procedural standards in Chinese BIT laws, it aims to

examine four unresolved (or untested) puzzles, theoretical assumptions and some loopholes in Chinese BITs in order to demystify China's policy stance and treaty-making behaviour. The conventional methods of textual analysis, case study and comparative approach were selectively and critically used in the book to decode the genetic elements and characters of China's BIT law and practice. The author also notes that "an empirical approach to the study of Chinese BITs is rarely used regardless of statistical or quantitative research."⁷ Therefore, this book adopts empirical study, mainly through statistics and a factual investigation of China's BIT-making in Chapter 10. It adduces empirical evidence not only to re-examine orthodox propositions, but also to support the author's observations and findings.

3. China's BITs and Chinese Domestic Law

Chinese BITs as well as its domestic law are inextricably intertwined, as they have an interactive and symbiotic relationship with each other. On the one hand, as argued by the author, upgrading and modernising Chinese BITs as "liberalising devices" can help to selectively incorporate advanced international standards into China's domestic law.⁸ On the other, the reform agenda of the Chinese domestic legal system and China's transition from a pure capital-importing state to a major capital-exporting state pose new challenges for China's ongoing BIT negotiations and BIT-making strategy. Thus, it is imperative to conduct new jurisprudential analysis of China's BIT law and its relationship with Chinese domestic law.

Chapters 2-3 of this book are excellently exploring the evolutionary path of China's foreign investment law and BITs as well as their symbiotic relationship. This is especially meaningful against the backdrop of the promulgation of the PRC Foreign Investment Law (FIL) on March 15, 2019 to replace the "three old laws" for foreign investments made into China.⁹ More importantly, this symbiotic relationship between Chinese laws and China's BITs is now confronted with new challenges arising from clashes between China's domestic governance system and the global governance system dominated by Western countries.¹⁰ It calls for the Chinese government to reflect on its past BIT-drafting and negotiating strategy and make corresponding changes to address the challenges arising from ideological divergences, geopolitical tensions, chaotic diplomatic relations, and technological

competitions, among others, between China and Western countries. Today, the global community is facing many challenges such as climate change, environmental pollution, corruption and non-transparency, labour protection, corporate social responsibility, anti-globalisation and populist movements. Even though China has been developing one of the most extensive BIT networks since the 1980s, which contain different clauses on MFN treatment, NT, FET, FPS, ISDS and so on,¹¹ the Chinese government is still trying to upgrade its BITs and other IIAs to tackle old and new global challenges.

For instance, China has spent seven years in negotiating with the EU to upgrade China's existing BITs with the EU Member States.¹² In December 2020, both parties reached the China-EU Comprehensive Agreement on Investment (CAI). Despite being temporarily thwarted for its ratification by the EU due to political tensions in May 2021,¹³ the CAI is believed to be the “global BIT 2.0” and “Chinese BIT 4.0” for the future, with its specific sections and provisions on transparency and anti-corruption, sustainable development and environment, and climate change.¹⁴ The author highly appraises the CAI in his book. In addition to the ongoing China-US BIT negotiation,¹⁵ the CAI negotiation is an empirical evidence that China has become a game-changer and rule-maker, if not a rule-shaker, in global investment governance.¹⁶ The fourth generation of Chinese BITs is believed to be a typical instrument adopting the balanced paradigm that aims to strengthen the protection of investors and investments while at the same time preserving China's right to regulate and sovereignty under the “return of the state” paradigm.¹⁷

4. China's ISDS Practice and Case Trend

The book points out that China is now taking on the “dual roles” to be gradually the home state of outbound investment and a major host state for massive foreign investment.¹⁸ This is allegedly due to China's “Going Abroad” policy that encourages Chinese nationals and enterprises to make investments in foreign countries under the Belt and Road Initiative (BRI) or other natural-resource-rich countries.¹⁹ As a result, the Chinese government has a strong economic motive to protect Chinese investors and their outbound investments through various measures, one of which is ISDS, also known as investor-state arbitration.

As the author rightly indicates, firstly, significant steps have been taken or are soon to be implemented by China to fine-tune and upgrade the current ISDS regime for the purpose of better preserving and promoting Chinese investors' rights and interests in their overseas investments. These measures include, *inter alia*, making recommendations to the UNCITRAL regarding the possible reform of ISDS,²⁰ issuing practical guidance for Chinese enterprises on utilisation of ISDS,²¹ promulgating investor-state arbitration rules by Chinese arbitration institutions,²² setting up an "International Investment Joint Arbitration Center" in Shenzhen City of Guangdong Province,²³ and amending the PRC Arbitration Law 1994.²⁴ A look into all these measures shows that China is currently undergoing internal reforms carried out in an incremental and innovative manner to open China's gate towards ISDS, especially the arbitration launched by investors against the host state for treaty protection of foreign investments.

Secondly, the trend of investor-state arbitration case related to Chinese investors and the Chinese government indicates that the so-called "Chinese disequilibrium,"²⁵ coined by Professor Shen ten years ago, has been fading away in recent years thanks to more liberal treaty interpretation methods applied by investment tribunals and, more importantly, China's improving rule of law. Chinese BIT-based arbitration cases have mushroomed together with the modernisation of Chinese BITs, which have abandoned restrictive ISDS clauses. This is partly due to the fact that "China has broadly adopted the [ISDS] clause in its BITs with trade partners."²⁶ Nevertheless, as shown by the author in his book, the underlying reason may be China's increasingly strong motive and political will to safeguard Chinese investors and investments, especially those within the BRI countries and regions. This motive has been crystalized into China's efforts to "attain a high level of legal and institutional protection for its national investors abroad."²⁷

Among various other reasons for China's proactive approach to ISDS, China's transition from "being a pure capital-importing state to a hybrid major capital-importing and capital-exporting state" is a fundamental driving force for its policy change.²⁸ While this transition process is certainly continuing, China is expected to be a proactive rule-maker as well as an extensive user of BITs and ISDS in the foreseeable future. As far as Chinese investors and lawyers are concerned, they have already become active rule-users in international investment law and the ICSID arbitration. As of January 2022, there are 15 investment treaty arbitration

cases initiated by Chinese investors against foreign states to protect their overseas investments.²⁹ Nonetheless, no Chinese investors had ever entrusted Chinese lawyers to handle their investment disputes as counsels in the ICSID arbitration against foreign states until 2020. Only a few Chinese law firms and lawyers have been involved as counsels for the Chinese government in ICSID proceedings. However, since 2020 Chinese investors began to put trust in Chinese lawyers to represent them to invoke the Chinese BITs by submitting the claims to the ICSID.

For instance, in 2020, Chinese investor Fengzhen Min commenced the ICSID arbitration against the Republic of Korea (Korea) over the dispute relating to Korea's violation of his rights to fair and equitable treatment and expropriation of his investment in Korea.³⁰ In 2021, two Chinese investors Qiong Ye and Jianping Yang commenced the ICSID arbitration against the Kingdom of Cambodia (Cambodia) over the dispute arising from Cambodia's revocation of telecommunication licenses of local companies controlled by them.³¹ The three Chinese investors have engaged the PRC lawyers affiliated with Beijing Hui Zhong Law Firm (jointly with international law firms) as lead counsel or co-counsel for the two ICSID cases. Each of them is the very first case of investor-state arbitration initiated by Chinese investors on the basis of the Korea-China BIT 2007 and the ASEAN-China Investment Agreement 2009, respectively.³² This is based on China's increasingly liberal stance towards BIT practice and ISDS, which was precisely commended by the author as the "most important groundbreaking feature of the ASEAN Treaty."³³ Moreover, it is believed that Chinese lawyers' increasing competence and practical experiences in international investment law and ISDS will definitely help Chinese investors to cautiously and efficiently use the BITs as the legal basis to bring investment claims against foreign states.

5. Concluding Remarks

A healthy co-existence between Chinese BIT laws and domestic law, as revealed by this book, has contributed to improving China's rule of law and governance capacities and to achieving the miraculous economic growth since the reform and opening-up policy in the early 1980s. This symbiotic relationship is also conducive to restructuring a high-level open Chinese economy through its consistent and

deepening reform, which is partly ignited and fuelled by the ongoing treaty negotiations with key trading partners. These theoretical assumptions have been confirmed by the jurisprudential analysis and empirical evidence provided by the author, who decoded and investigated China's BIT law and practice. As a practitioner, the reviewer feels so thrilled and encouraged to see the rising role of China in participating in the evolution of international investment law and the ISDS reform, although the author is sober and discreet. I am also happy to see Chinese investors, lawyers, governments, scholars and many other stakeholders actively engage themselves in (re)shaping the order of international investment governance. Against this backdrop, this book appears to be more instructive and inspirational for both Chinese and foreign readers beyond pure academic discussions or practical guidance.

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