TOWARDS A BALANCED AND LIBERAL CHINESE BILATERAL INVESTMENT TREATY REGIME IN THE CONTEXT OF ONE BELT ONE ROAD

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ABSTRACT

Chinese bilateral investment treaties (BITs) have adopted different levels of investment protection over different generations of BITs. This article elaborates on the evolution of Chinese bilateral investment treaties, considering both substantive and procedural requirements. While first-generation BITs contain general compensation clauses and conservative investor-state dispute resolution clauses, later generations of BITs contain specific compensation clauses and liberal investor-state dispute resolution clauses.[1] The innovations made in later-generation BITs reflect the development of China's external investment relations including the initiation of One Belt One Road. The changing role of China in international investment plays an important part in shaping a more balanced and liberal investment treaty regime. This article highlights the significance of a balanced and liberal approach to perfecting treaty standards and notes the potential legal risks for Chinese investors in Belt and Road Initiative countries under the current bilateral investment treaty regime. The article further provides viable solutions for Chinese investors to gain favorable investment protection under the BITs concluded between China and Belt and Road Initiative countries.

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1. *See* NORAH GALLAGHAR & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE 54–77 (2009).

I. INTRODUCTION

Before the late 1970s, China had few international investment engagements with other countries.[2] The lack of foreign investment, due in part to China's acquiescence to the Communist ideology denouncing the notion of private property,[3] did not afford China with prosperity.[4] By the late 1970s, the substantial social instability and economic distress that ensued had brought the Chinese national economy to the brink of collapse.[5] Against this background, China adopted the Open Door Policy in 1978 and restrictions on foreign investment relaxed.[6] For purposes of encouraging FDI flows, China implemented a two-tiered approach: promulgating local rules and regulations on the one hand, and increasing BITs on the other.[7] Pursuing economic recovery by means of attracting foreign investment characterized the Chinese investment treaty making regime.[8] Over the last 35 years, China has concluded 145 bilateral investment treaties,[9] which can be classified

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2. WAYNE M. MORRISON, CONG. RESEARCH SERV., RL33434, CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES 4 (2018) (noting that China opened up trade and investment with the West starting in 1978).

3. Thomas N. Thompson, *China's Nationalization of Foreign Firms: The Politics of Hostage Capitalism, 1949-57*, 1979 OCCASIONAL PAPERS/REPRINTS SERIES CONTEMP. ASIAN STUD. 4; *see also* Axel Berger, *China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making* 4–8 (Nov. 14, 2008) (unpublished paper) (on file with author).

4. GALLAGHAR & SHAN, *supra* note 1, at 5.

5. *See id.* (noting the major relevant events such as the "Great Leap Forward" in 1958 and the ten-year "Cultural Revolution" between 1966 and 1976).

6. Guocang Huan, *China's Open Door Policy, 1978-1984*, 2 J. INT'L. AFF. 1, 1–5 (1986) (stating that the decision was made during the Third Plenary Session of the 11th Central Committee of the Communist Party of China in 1978).

7. GALLAGHAR & SHAN, *supra* note 1, at 6.

8. U.N. CONF. ON TRADE & DEV. [UNCTAD], *E-Brief-China: An Emerging FDI Outward Investor* 2–5 (Dec. 4, 2003), http://unctad.org/sections/dite_fdistat/docs/china_ebrief_en.pdf.

9. *See generally International Investment Agreements Navigator: China*, UNCTAD: INV. POL'Y HUB, http://investmentpolicyhub.unctad.org/IIA/CountryBits/42 (last visited Mar. 23, 2017) (showing an entire list of BITs concluded by China).

into 3 generations.[10]

The first generation of Chinese BITs, which started to appear in 1982, adopted a restrictive approach with respect to both substantive and procedural investment protections.[11] The second generation of Chinese BITs materialized in 1998 and were characterized by more liberal and refined provisions on investment protection compared to the first generation.[12] The third generation of Chinese BITs, emerging in 2008, contained more state-friendly provisions[13] such as, in some instances, essential security exceptions and general exceptions modeled after Article XX of the General Agreement on Tariffs and Trade (GATT).[14]

Throughout the evolution of Chinese BITs, changes to compensation and dispute settlement clauses have been prominent.[15] Admittedly, the evolution of substantive clauses other than expropriation provisions, such as those addressing fair and equitable treatment (FET) and national treatment (NT), is also worth noting. Yet, expropriation clauses remain the most frequently invoked

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10. *See, e.g.*, Lars Markert, *Arbitration Under China's Investment Treaties — Does It Really Work?*, 5 CONTEMP. ASIA ARB. 211 (Nov. 30, 2012), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192035&rec=1&srcabs=2192038&alg=1&pos=1; GALLAGHAR & SHAN, *supra* note 1, at 35–43; *see also* Elodie Dulac, *Investment Treaties and Investment Arbitration in Asia: Coming of Age*, 5 TRANSNAT'L DISP. MGMT. 1, 3 (2011). According to Lars Markert, "[d]ifferent authors classify China's investment treaties into different generations. *Gallagher & Shan* consider investment treaties before China's accession to the ICSID Convention as the 'first generation' (1982-1989), the investment treaties with narrow disputes settlement clauses after China's accession to the ICSID Convention as the 'second generation' (1990-1997), and the beginning of the use of broad dispute settlement clauses in investment treaties (from 1998 onwards) as the 'third generation' of investment treaties; *Dulac* distinguishes between a 'first generation' of investment treaties with narrow disputes settlement clauses (1982-1997), a 'second generation' of investment treaties with broad dispute settlement clauses (1998-2008) and an emerging 'third generation' of investment treaties keeping broad dispute resolution clauses but introducing restrictive language in a number of respects ranging from the definition of 'investment' to substantive protections. Other authors propose the same distinction between 'first' and 'second generation' as Dulac[.]" Markert, *supra* note 10, at 211 n.25 (citations omitted).

11. *See International Investment Agreements Navigator: China*, *supra* note 9 (noting that in 1982 China concluded its first bilateral investment treaty with Sweden).

12. Berger, *supra* note 3, at 10.

13. Dulac, *supra* note 10, at 3.

14. *Id.*

15. *See, e.g.*, Markert, *supra* note 10, at 208–15.

provisions by investors under Chinese BITs.[16] In particular, as one of the host countries that has the largest amount of capital inflow and outflow,[17] China has always paid great attention to the issue of expropriation and has been exploring more liberal approaches to settle investor-state disputes.[18] Furthermore, since China has launched the One Belt One Road (OBOR) project in the hope of building a network of roads, railways, and other infrastructure projects to connect China to the world,[19] the main concern for Chinese investors wishing to invest in these projects relates to the level of investment protection afforded with regard to compensation and the promptness of settling investment disputes.[20]

In this regard, this analysis of the evolution of expropriation provisions and investor-state dispute settlement (ISDS) clauses not only stands to benefit future investment treaty negotiations in the context of OBOR, but also assists Chinese investors in identifying viable solutions for obtaining maximum treaty protection under the active BITs concluded between China and Belt and Road Initiative (BRI) countries.

II. COMPENSATION AND EXPROPRIATION

A. *First Generation: Generic Expropriation Clauses*

The first generation of Chinese BITs lack a clear definition of indirect expropriation.[21] First-generation BITs refer to

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16. *See generally ICSID Cases Database*, ICSID, https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx (last visited Mar. 26, 2017) (showing that as of November 10, 2017, four international arbitration cases—all of which involved expropriation claims—had been adjudicated under Chinese BITs).

17. GALLAGHAR & SHAN, *supra* note 1, at 4.

18. Guiguo Wang, *China's Practice in International Investment Law: From Participation to Leadership in the World Economy*, 34 YALE J. INT'L L. 575, 575–87 (2009); *see also* Shen Wei, *Expropriation in Transition: Evolving Chinese Investment Treaty Practices in Local and Global Contexts*, 28 LEIDEN J. INT'L L. 579, 579–604 (2015).

19. Nat'l Dev. & Reform Comm'n [NDRC] et al., News Release, Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road (Mar. 28, 2015), http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html.

20. *See* Donovan Ferguson et al., *A Practical Guide to Chinese Investor Protections Along the Belt and Road*, LEXOLOGY (Apr. 12, 2018), https://www.lexology.com/library/detail.aspx?g=f546ab1f-66e8-47ca-969a-a76fc0962ee1.

21. *See generally ICSID Cases Database*, ICSID, https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx (last visited Mar. 26, 2017) (listing treaties that do not provide a definition of indirect expropriation).

expropriation as measures that have the effect of expropriation or nationalization.[22] The terms "tantamount to . . . expropriation"[23] and "other measures having similar effects to expropriation"[24] in the first-generation BITs provide arbitration tribunals with little guidance for identifying the scope of indirect expropriation.

Due to the lack of guidance for applying treaty standards with respect to first-generation BITs, the application of customary international law by tribunals serves to clarify the scope of indirect expropriation.[25] Tribunals have asserted the doctrine of police powers to discern the difference between indirect expropriation and the state's legitimate regulatory measures.[26]

In *Saluka Investments B.V. v. Czech Republic*, the tribunal viewed the police powers doctrine as part of customary international law and held that regulatory measures do not constitute expropriation when they are within a state's police powers.[27] The tribunal in *Suez v. Argentina* also endorsed the doctrine of police powers because in expropriation cases it is pertinent to strike a balance between investors' private property rights and the legitimate rights of a state to regulate.[28]

Although the application of international law by tribunals offsets, to an extent, deficiencies in treaty standards, the silence of first-generation BITs' with respect to indirect expropriation

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22. *See, e.g.*, Agreement Between the Government of the People's Republic of China and the Government of the Hellenic Republic for the Encouragement and Reciprocal Protection of Investments, art. 4(1), June 25, 1992.

23. *Id.*

24. Agreement Between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, art. 4(1), June 9, 1994.

25. *See, e.g.*, Saluka Investments B.V. v. The Czech Republic, Partial Award, para. 266 (Perm. Ct. Arb. Mar. 17, 2006); *see also* Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, para. 147 (July 30, 2010).

26. *Id.*

27. Saluka Investments B.V. v. The Czech Republic, Partial Award, para. 262 (Perm. Ct. Arb. Mar. 17, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf.

28. Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, para. 147 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf.

creates uncertainty and potential legal risks for investors and host states alike.[29]

With regard to compensation, certain first-generation BITs provide a common standard for lawful and wrongful expropriations.[30] Expropriation clauses of certain first-generation BITs resemble the general principle of full reparation that was developed in the *Chorzów Factory* case. These first-generation BITs, which are currently in force, provide that "the compensation . . . shall be such as to place the nationals and companies in the same financial position . . . be similar to expropriation or nationalization, had not been taken."[31] In *Chorzów Factory*, the Permanent Court of International Justice (PCIJ) determined that full reparation in a case involving wrongful expropriation requires the reestablishment of a situation as if the wrongful act not been committed.[32]

The similar wordings of these first-generation BITs and the principle of full reparation together suggest that compensation standards under early BITs are interchangeable with lawful expropriation (internationally lawful acts) and wrongful expropriation (internationally wrongful acts).[33] A common compensation standard, however, has been criticized for bringing about contradiction within the customary international law of state responsibility because customary rules distinguish between reparation for wrongful acts and compensation for lawful ones.[34] In addition, this lack of distinction poses an ethical problem where a lawful expropriation conducted by a state in full compliance with the state's international obligations gives rise to the same amount of compensation as would an unlawful expropriation conducted by a state that commits a

29. *See* Wei, *supra* note 18, at 582.

30. *See, e.g.*, Agreement on the Mutual Protection of Investments, Swed.-China, art. 3(1), Mar. 29, 1982.

31. *Id.*; *see also* Agreement Between the Government of the People's Republic of China and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments, art. 4(2), Nov. 5, 1992.

32. Factory of Chorzów (Germ. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No.17, at 47 (Sept. 13, 1928).

33. Suzy H. Nikièma, *Compensation for Expropriation*, IISD BEST PRAC.'S SERIES 6–8 (Mar. 2013), http://www.iisd.org/pdf/2013/best_practice_compensation_expropriation_EN.pdf.

34. *Id.* at 6.

wrongful act.[35]

By contrast, other first-generation[36] and later-generation BITs[37] apply different compensation standards to lawful expropriation and wrongful expropriation. The compensation standard for lawful expropriation under these BITs differs from the full reparation principle via the incorporation of the "fair and equitable"[38] or "just"[39] compensation standard for expropriation. Variations include: "real value,"[40] "reasonable, effective and non-discriminatory compensation,"[41] "equivalent to the value,"[42] and "fair and reasonable compensation."[43] As a result of the New International Economic Order (NIEO)

35. *Id.*

36. *See* Agreement on the Promotion and Protection of Investments (with Exchanges of Letters), China-Sing., art. 6, Nov. 21, 1985; Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China Concerning the Promotion and Reciprocal Protection of Investments with Exchange Notes, art. 5, May 15, 1986 [hereinafter China-UK BIT]; Agreement Between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, art. 4, June 9, 1994 [hereinafter China-Peru BIT].

37. *See* Agreement Between the Government of the People's Republic of China and the Government of the Republic of Cyprus for the Reciprocal Promotion and Protection of Investments, art. 4, Jan. 15, 2001 [hereinafter China-Cyprus BIT]; Agreement Between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, art. 4, Jan. 12, 2003; Agreement Between the Government of the Russian Federation and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, art. 4, Nov. 9, 2006 [hereinafter China-Russ. BIT].

38. *See* Agreement Between the Government of the Republic of India and the Government of the People's Republic of China for the Promotion and Protection of Investments, art. 5(1), Nov. 21, 2006.

39. *See* Agreement Between the Government of the Republic of Mauritius and the Government of the People's Republic of China for the Reciprocal Promotion and Protection of Investments, art. 6, May 4, 1996.

40. *See* China-UK BIT, *supra* note 36, art. 5.

41. *E.g.*, Agreement Between the Government of the United Arab Emirates and the Government of the People's Republic of China for the Promotion and Protection of Investments, art. 6(1), July 1, 1993.

42. *E.g.*, China-Peru BIT, *supra* note 36, art. 4.

43. *See* Agreement Between the Government of the People's Republic of China and the Government of the State of Kuwait for the Promotion and Protection of Investments, art. 5(1), Nov. 23, 1985; Agreement Between the Government of the People's Republic of China and the Government of Malaysia Concerning the Reciprocal Encouragement and Protection of Investments, art. 5(1), Nov. 21, 1988; Agreement Between the Government of the People's Republic of China and the Government of the Republic of the Philippines Concerning Encouragement and Reciprocal Protection of Investments, art. 4(1)(c), July 20, 1992.

movement initiated by developing countries pushing back against developed countries, the just compensation standard represents something less than the "adequate, effective and prompt" standard.[44] "Prompt" refers to the notion that compensation must be paid without undue delay; "adequate" is defined as the fair market value of the taken property immediately before the taking; and "effective" conveys the point that compensation must be made in a freely transferable currency.[45] In the 1990s, however, just or appropriate compensation and "adequate, effective and prompt" compensation began to share the same meanings.[46] Article IV(2) of World Bank Guidelines on the Treatment of Foreign Direct Investment (the "Guidelines") settles the debates by providing that the compensation standard "will . . . be deemed 'appropriate' if it is adequate, effective and prompt."[47] Article IV(3) of the Guidelines further provides that adequate compensation is based on the fair market value of the asset.[48] In conformity with the Guidelines, the later-generation BITs include language that has the practical effect of applying the "prompt, adequate and effective" standard.[49] For instance, "appropriate" or "just compensation" is often associated with the

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44. Wenhua Shan, *Toward a Multilateral or Plurilateral Framework on Investment* 5 (E15Initiative, Geneva: Int'l Ctr. for Trade and Sustainable Dev. and World Econ. F., 2015).

45. BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE 92 (2011).

46. Shan, *supra* note 44, at 6.

47. World Bank, *Guidelines on the Treatment of Foreign Direct Investment*, *in* LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT, VOLUME II: GUIDELINES 41 (1992).

48. *Id.*

49. *See, e.g.,* Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, art. 10, Sept. 9, 2012 [hereinafter China-Can. BIT]; Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investments, art. 4(2), Sept. 7, 2007 [hereinafter China-Kor. BIT]; 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, art. 7(2), July 11, 2008 [hereinafter China-Mex. BIT]; Agreement Between the Government of the People's Republic of China and the Government of Malta on the Promotion and Protection of Investments, art. 4(2), Feb. 22, 2009; Agreement Between the People's Republic of China and the Portuguese Republic on the Encouragement and Reciprocal Protection of Investments, art. 4(2), Dec. 9, 2005.

term "market value."[50] Hence, just or appropriate compensation may now be deemed as the de facto "adequate, effective and prompt" standard,[51] and such standard is different from the full reparation standard.

The difference between the full reparation principle and the "adequate, effective and prompt" compensation standard lies in whether investors are entitled to loss of profits.[52] In an expropriation case in which the "adequate, effective and prompt" compensation standard is adopted, the adversely affected investor is entitled only to *damnum emergens*, or the actual losses.[53] Whereas according to the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, the full reparation principle shall cover loss of profits as well.[54] The *Chorzów Factory* decision also established that full reparation includes the recovery of both actual losses and loss of profits,[55] and this finding has been followed in some subsequent awards.[56] Thus, in the case of an expropriation in which the full reparation principle is adopted, indemnification includes not only losses, but also *lucrum cessans*, or loss of profits.[57]

It should be noted, however, that not all wrongful expropriation cases have awarded loss of profits even though such profits were recoverable. In *Siemens v. Argentina*, lost profits were not included in the calculation of wrongful expropriation as they were "very unlikely to have ever

50. *E.g.*, LEON TRAKMAN & NICOLA RANIERI, REGIONALISM IN INTERNATIONAL INVESTMENT LAW 239 (2013).

51. Wei, *supra* note 18, at 593–95.

52. Nikièma, *supra* note 33, at 3.

53. *Id.*

54. *Report of the International Law Commission on the Work of Its Fifty-Third Session, in* YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 2001: VOLUME II (PART TWO) 99 (2001).

55. W. Michael M. Reisman & Robert D. Sloan, *Indirect Expropriation and Its Valuation in the BIT Generation*, 1002 YALE L. SCH. FAC. SCHOLARSHIP SERIES 115, 136–49 (2004).

56. *See* Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. C.T.R. (1988) (concurring in judgment, Judge Brower found that full reparation and compensation included both the recovery of actual losses and lost amount of profit margin).

57. Nikièma, *supra* note 33, at 3.

materialized."[58] In *Tza Yap Shum v. Peru*, an arbitration adjudicated under the 1994 China-Peru BIT,[59] the profitability or nonprofitability of the expropriated investment weighed in the determination of awarding loss of profits.[60] Even though the tribunal found that the subject measure constituted wrongful expropriation and adopted the full reparation principle for compensation,[61] the tribunal determined that because the Peruvian company in which Tza Yap Shum held majority shares had been in operation for only two years, during which its cash flow was negative, proper compensation should be based on the company's adjusted book value.[62] Accordingly, lost profits were not awarded.

Given the current BIT jurisprudence on this topic, the determination of whether lost profits should be awarded to investors will likely involve the consideration of certain factors such as the profitability and measurability of subject investments.[63]

B. Later Generations: Specific Expropriation Clauses

The lack of a uniform treaty standard for indirect expropriation in first-generation BITs has made parties to BITs realize that treaties should provide more specific guidance.[64] Thus, later-generation BITs aim to clarify the scope and definition of indirect expropriation, as well as provide more specific guidance for evaluating methods of compensation.

For instance, the 2012 China-Canada BIT provides a clear definition of indirect expropriation. The 2012 China-Canada BIT

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58. Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, para. 379 (Feb. 6, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf.

59. Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, Award, para. 252 (July 7, 2011), https:www.italaw.com/sites/default/files/case-documents/ita0882.pdf

60. *Id.*

61. *Id.*

62. *Id.* paras. 252–292.

63. *Id.* paras. 260–293.

64. *See* UNCTAD, *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* 112–13 (2012), http://investmentpolicyhub.unctad.org/Publications/Details/54.

refers to indirect expropriation as "a measure . . . that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[65] The 2012 China-Canada BIT further sets out three criteria for determining what constitutes indirect expropriation: (i) the economic impact of the measure[66]; (ii) the legitimate expectations of investors[67]; and (iii) the nature of the measure or series of measures."[68]

These factor for identifying indirect expropriation under the China-Canada BIT are a positive step toward forming a treaty standard for identifying measures that constitute indirect expropriation.

In addition, the China-Canada BIT stipulates carve-outs to indirect expropriation so as to distinguish indirect expropriation from legitimate state regulatory measures. For example, Paragraph 3 of Annex B to the China-Canada BIT reads as follows: "[E]xcept in rare circumstances . . . a non-discriminatory measure . . . designed . . . to protect the legitimate public objectives . . . does not constitute indirect expropriation."[69]

By applying the above carve-out clause, tribunals no longer need to exercise their discretion in utilizing the doctrine of police powers under customary international law to aid in the interpretation of indirect expropriation.[70] The above carve-out clause—distinguishing between indirect expropriation and legitimate regulatory measures—provides BIT jurisprudence with more predictability and tribunals with more specific guidance.[71]

While certain first-generation BITs provide a compensation standard for expropriation, they are silent on the method of calculating such compensation.[72] Later-generation BITs stipulate practical methods of calculation, the most commonly

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65. China-Can. BIT, supra note 49, Annex B.10(1).

66. *Id.* Annex B.10(2)(a).

67. *Id.* Annex B.10(2)(b).

68. *Id.* Annex B.10(2)(c).

69. *Id.* Annex B.10(3).

70. UNCTAD, *supra* note 64, at 81–90, 129.

71. *See id.* at 129–30 (setting out more specific guidance for tribunals in distinguishing indirect expropriation and non-compensable regulation).

72. Nikièma, *supra* note 33, at 12–13.

used of which is the fair market value (FMV) method.[73] The Guidelines adopt the FMV method as a standard to quantify adequate compensation[74] and refer to "an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment."[75] China has therefore taken into account the expropriation and compensation standards set forth in the Guidelines.

Table 1 below compares the expropriation clauses under the 1994 China-Peru BIT and the 2012 China-Canada BIT, so as to demonstrate that expropriation clauses in Chinese BITs have become more specific.

Table 1: *Expropriation Clauses Under the China-Peru BIT and the China-Canada BIT*

	1994 China-Peru BIT	**2012 China-Canada BIT**
Definition of Indirect Expropriation	Not mentioned	• A measure that has an effect equivalent to direct expropriation • Without formal transfer of title or outright seizure
Scope of Indirect Expropriation	Not mentioned	• Deciding Factors o Economic impact of the measure o Legitimate expectations of the investors o Character of the measure • Carve-out o Apply in good faith o Non-discriminatory o Protect legitimate public interests, i.e., health, safety, and environment

73. *See* China-Kor. BIT, *supra* note 49, art. 4(2); China-Mex. BIT, *supra* note 49, art. 7(2); China-Can. BIT, *supra* note 49, art. 10.

74. World Bank, *supra* note 47, at 26.

75. *Id.* at 41–42.

Evaluation Method for Lawful Expropriation	Not mentioned	• Fair market value • Interest at a normal commercial rate • Effectively realizable, freely transferable • Without delay

III. INVESTOR-STATE DISPUTE SETTLEMENT

A. *First Generation: Conservative Dispute Settlement Clauses*

The first-generation BITs contain no or very restrictive dispute settlement mechanisms.[76] Means of investor-state dispute settlement in first-generation BITs involve recourse to local courts and ad hoc arbitration.[77] The scope of claims for international ad hoc arbitration, however, is limited to the amount of compensation for expropriation and only after recourse or exhaustion of local remedies is exercised.[78] All other disputes are to be dealt with by local courts.[79]

In arbitration practice, international tribunals have adopted conflicting approaches to interpreting the restrictive dispute settlement clauses of the first-generation BITs. In *Tza Yap Shum v. Peru*, the tribunal found that the ISDS clause of the China-Peru BIT should be interpreted broadly so as to include both disputes concerning compensation and expropriation.[80] To justify its expansive interpretation, the tribunal interpreted the phrase "involving the amount of compensation for expropriation" as including "other issues normally inherent to an expropriation."[81]

This expansive reading was followed by a similar interpretation in *Sanum v. Lao,* which involved the China-Lao

76. Markert, *supra* note 10, at 211.

77. GALLAGHAR & SHAN, *supra* note 1, at 313.

78. *Id.* at 315–50; *see also* Berger, *supra* note 3, at 9 (establishing that the ability to appeal was restricted by certain safeguards, such as being required to exhaust local remedies before pursuing transnational arbitration).

79. Markert, *supra* note 10, at 213.

80. Tza Yap Shum v. Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, para. 188 (June 19, 2009), http://www.italaw.com/sites/default/files/case-documents/its0880.pdf.

81. *Id.* para. 189.

BIT containing a similarly restrictive dispute settlement clause.[82] The tribunal in *Ping An v. Belgium*, however, narrowly interpreted a restrictive clause and declined jurisdiction.[83] The tribunal insisted that *only* disputes directly relating to the amount of compensation for expropriation could be settled by international arbitration under the 1986 China-BLEU BIT.[84] It claimed that an expansive interpretation would be nothing short of importing the much wider dispute resolution provision of the 2009 BIT, which was impermissible because the case had been brought under the 1986 BIT.[85] Accordingly, the tribunal ruled against Ping An, the Chinese investor.[86]

The result of *Ping An v. Belgium* raises concerns about the negative impact of restrictive ISDS clauses on the protection of Chinese investors abroad. The original intention of adopting restrictive dispute settlement clauses to safeguard sovereignty is now at odds with the equally urgent need to protect Chinese investors abroad.[87] In light of this, the restrictive ISDS clause commonly seen in the first generation of Chinese BITs has rarely been incorporated in BITs of subsequent generations.[88]

B. Later Generations: Liberal Dispute Settlement Clauses

Later generations of Chinese BITs generally grant access to ICSID arbitration for "any dispute," and thus are not limited to disputes regarding compensation for expropriation.[89] Yet, a considerable number of BITs of the second generation contain

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82. Sanum v. Lao, PCA Case No. 2013-13, Award on Jurisdiction, para. 327 (Dec. 13, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf.

83. Ping An v. Belgium, ICSID Case No. ARB/12/29, para. 229 (Apr. 30, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4285.pdf.

84. *Id.* para. 42.

85. *Id.* paras. 229–233.

86. *See id.* para. 240 (dismissing Ping An's claims for lack of jurisdiction).

87. *See* Berger, *supra* note 3, at 9–10, 14–15 (finding that the Chinese government abandoned its traditional restrictive approach and adopted a new liberal policy that provides strong protection for domestic investors).

88. GALLAGHAR & SHAN , *supra* note 1, at 350–70.

89. Matthew Levine, *ICSID Tribunal Affirms Jurisdiction over Dispute Between Chinese Construction Firm and Yemen*, IISD: INV. TREATY NEWS (Dec. 21, 2017), https://www.iisd.org/itn/2017/12/21/icsid-tribunal-affirms-jurisdiction-over-dispute-between-chinese-construction-firm-yemen-beijing-urban-construction-group-republic-yemen-icsid-case-arb-14-30-matthew-levine/.

the requirement of resorting to local administrative remedies before an international arbitration can be filed.[90] Two approaches of local administrative remedy requirements exist in the later generations of Chinese BITs. The first approach requires investors to *exhaust* local administrative remedies in the host state, while the second approach either requires investors to *pursue* local administrative remedies for a certain period of time or otherwise imposes temporal requirements on the exhaustion of local remedies.[91] Furthermore, the local administrative remedies requirement is often followed by a "fork-in-the-road" clause, which provides that if the investor chooses to settle the dispute in domestic courts, the option of international arbitration is no longer available and vice versa.[92]

For instance, the 2002 China-Cyprus BIT adopts the first approach by granting the host state the right to require exhaustion of local administrative review.[93] As for the fork-in-the-road clause in the China-Cyprus BIT, the word "shall"[94] mandates the investor to choose between local courts and international arbitration. The 2007 China-Korea BIT adopts the second approach and imposes a four-month requirement for pursuing domestic administrative review.[95] Since the fork-in-the-road clause in the China-Korea BIT uses the word "may," the choice of investors to submit disputes either to local courts or international arbitration is optional rather than mandatory.[96]

The third-generation Chinese BITs are more liberal than ever, containing neither local remedies requirements nor fork-in-the-road clauses and instead granting investors the right to

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90. GALLAGHAR & SHAN, *supra* note 1, at 367.

91. Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law*, IISD BEST PRAC.'S SERIES 1, 5, 9 (Jan. 2017), http://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf.

92. *See* Agreement Between the Government of Barbados and the Government of the People's Republic of China for the Promotion and Protection of Investments, arts. 9(2)(a)–9(3), July 20, 1998 [hereinafter China-Barb. BIT]; China-Cyprus BIT, *supra* note 37, art. 9(3); China-Russ. BIT, *supra* note 37, art. 9(3); China-Kor. BIT, *supra* note 49, art. 9(4).

93. China-Cyprus BIT, *supra* note 37, art. 9(3).

94. *Id.* arts. 9(2)–(3).

95. China-Kor. BIT, *supra* note 49, art. 9(3)(b).

96. *Id.*

go straight to international arbitration.[97] The 2008 China-Mexico BIT and the 2012 China-Canada BIT provide that a disputing "investor may submit a claim to arbitration"[98] without the preconditions of local remedies requirements and fork-in-the-road clauses.

From little to almost full involvement, Chinese BITs have progressively moved toward a liberal approach to ISDS.[99] The transition from restrictive to liberal ISDS clauses is in conformity with China's changing global role in international investment.[100] The general background against which Chinese ISDS clauses have evolved involves China's shift from a country with significant FDI inflows to its being an important recipient as well as source of FDI.[101] As a result, China has not only stayed focused on protecting its sovereignty, but also has paid more attention to protecting its investors abroad by adopting measures in support of investment liberalization.[102]

Table 2 summarizes different ISDS mechanisms in Chinese BITs.

Table 2: *ISDS Clauses in Chinese BITs*

BIT Clauses	**Means of ISDS**	**Arbitrable Claims**	**Tribunals**
Singapore (1985) Article 13	Fork-in-the-road ("shall") o Local court o International arbitration	Amount of compensation	Ad hoc arbitration
UK (1986) Article 7	Straight to international arbitration ("shall")	Amount of compensation	Ad hoc arbitration

97. *See, e.g.*, China-Mex. BIT, *supra* note 49, art. 13(1) (providing that an investor may submit an arbitration claim).

98. *See id.* art. 13(3); China-Can. BIT, *supra* note 49, art. 20(1).

99. *See generally* Wenhua Shan, *Towards a Balanced Liberal Investment Regime: General Report on the Protection of Foreign Investment*, ICSID REV.: FOREIGN INV. L.J. 464–68 (discussing China's dispute settlement history).

100. GALLAGHAR & SHAN, *supra* note 1, at 4–8.

101. *See* UNCTAD, FACT SHEET #9: FOREIGN DIRECT INVESTMENT: UNCTAD HANDBOOK OF STATISTICS 2017 – ECONOMIC TRENDS (2017), http://unctad.org/en/PublicationChapters/tdstat42_FS09_en.pdf.

102. Shan, *supra* note 44, at 430.

Japan (1988) Article 11	• For disputes regarding amount of compensation, straight to ICSID arbitration/ conciliation ("shall") • For other disputes, fork-in the-road ("shall") o Local judicial or administrative remedies o ICSID arbitration or conciliation	Investment disputes between a foreign investor and the host state	ICSID arbitration/ conciliation
Bulgaria (1986) Article 9	Straight to international arbitration ("may")	Amount of compensation	Ad hoc arbitration
Mongolia (1991) Article 8	Fork-in the-road ("shall") o Local court o International arbitration	Amount of compensation	Ad hoc arbitration

South Africa (1997) Article 9	Fork-in-the-road ("shall") o Local court o Pursue local administrative review ("may") + international arbitration	Investment disputes between a foreign investor and the host state	Any international arbitration
Cyprus (2002) Article 9	Fork-in-the-road ("shall") o Local court o Exhaust local administrative review ("may") + international arbitration	Investment disputes between a foreign investor and the host state	ICSID arbitration/ ad hoc arbitration under UNCITRAL rules
Germany (2003) Article 9	• Straight to international arbitration ("shall") • Award by an ad hoc tribunal shall be final and binding	Investment disputes between a foreign investor and the host state	ICSID arbitration/ ad hoc arbitration

Russia (2006) Article 9	Fork-in-the-road ("shall") o Local court o ICSID o Ad hoc	Investment disputes between a foreign investor and the host state	ICSID arbitration/ ad hoc arbitration
Korea (2007) Article 9	Fork-in-the-road ("may") o Local court o Local administrative review ("may") + four-month consultation + international arbitration	Investment disputes between a foreign investor and the host state	ICSID arbitration/ ad hoc arbitration
Mexico (2008) Article 13	Straight to international arbitration ("may")	Investment disputes between a foreign investor and the host state arising from an alleged breach of a substantive obligation	Any international arbitration

BLEU (2009) Article 8	Fork-in the-road ("shall") o Local court o ICSID arbitration	Investment disputes between a foreign investor and the host state	ICSID arbitration
Canada (2012) Article 20	• Straight to international arbitration ("may") • If states invoke Article 33(3) exception, then investor-state arbitration will be pending until: o Within sixty days, financial services authorities of both states reach a joint decision on whether Article 33(3) is a valid defense, or o If no decision is reached, the issue shall be referred to a state-state tribunal within thirty days. The decision of the state-state tribunal shall be binding on the investor-state tribunal.	Investment disputes between a foreign investor and the host state arising from an alleged breach of a substantive obligation	Any international arbitration

IV. WAYS TO RENDER THE CURRENT CHINESE BITS MORE EFFECTIVE FOR CHINESE INVESTORS IN THE CONTEXT OF ONE BELT ONE ROAD

As of the time this paper was written in 2018, China has concluded with BRI countries sixty-one BITs, most of which are first- and second-generation BITs.[103] Since most of the first- and second-generation Chinese BITs require Chinese investors to first settle disputes in local courts, investors cannot go straight to international arbitration when disputes arise.[104] As a result, Chinese investors were unable to offensively use ISDS mechanisms until 2007.[105] Furthermore, Chinese investors have only brought five claims to international arbitration under the current BIT regime.[106] Chinese investors" rarely resort to using ISDS mechanisms, notwithstanding China's expanded web of BITs, because ISDS clauses under the first and second generations of BITs are restrictive.[107]

In order to make the ISDS clauses under the first- and second-generation Chinese BITs more effective, Chinese investors may look to arbitration practice for guidance. Arbitral jurisprudence suggests means by which Chinese investors can go straight to international arbitration.[108]

For the purpose of bringing investment arbitration claims more efficiently under the current Chinese BITs, Chinese investors may seek to bypass the exhaustion of local remedies requirements on grounds of futility.[109] Chinese investors may also bypass *time-limited* local remedies requirements for reasons of procedural economy or through the operation of most favored nation (MFN) clauses.[110] In addition, nationality planning can

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103. *See International Investment Agreements Navigator: China*, *supra* note 9 (listing BITs China has concluded with other countries).

104. Berger, *supra* note 3, at 7–10.

105. *See generally Investment Dispute Settlement Navigator*, UNCTAD: INV. POL'Y HUB, http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry (last visited July 25, 2018) (indicating that ISDS was not used by China until 2007).

106. *Id.*

107. Berger, *supra* note 3, at 9–10; *see also* Markert, *supra* note 10, at 208 (explaining China's refined investment treaties).

108. Brauch, *supra* note 91, at 19.

109. *Id.*

110. *Id.* at 20.

be utilized by investors to obtain maximum protection.[111]

A. *Invoking Futility, Ineffectiveness, and Other Customary International Law Exceptions*

Tribunals have excused investors from compliance with local remedies clauses by holding that recourse to local remedies would be futile.[112] In *Abaclat v. Argentina*, the tribunal reasoned that under no circumstances could the available local remedies resolve the dispute in eighteen months, and that only burdensome delays would have occurred.[113] The tribunal performed a weighing and balancing test to conclude that no adverse consequence could arise from noncompliance with the local remedies requirement.[114] Accordingly, the tribunal held that Abaclat was not precluded from resorting to arbitration notwithstanding its noncompliance with the local remedies requirement.[115] In *Ambiente Ufficio v. Argentina*, the tribunal cited the futility exception threshold in the ILC Draft Articles on Diplomatic Protection in order to apply the futility exception with respect to the requirements of pursuing and exhausting local remedies.[116] The tribunal in *Giovanni Alemanni v. Argentina* endorsed and applied the holding of *Ambiente Ufficio* and the ILC futility exception threshold to exempt Giovanni Alemanni from strict compliance with the local remedies

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111. Christopher Schreuer, *Nationality Planning*, *in* THE FORDHAM PAPERS 19 (Arthur W. Rovine ed., 2012).

112. *See, e.g.*, Ambiente Ufficio S.p.A. and others v. The Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, para. 620 (Feb. 8, 2013) (holding that the exhaustion requirement under the Argentina-Italy BIT to pursue claims in domestic court for at least eighteen months did not to apply to Italian bondholders' claims over Argentina's sovereign debt default given that Argentine law did not offer "[c]laimants a reasonable possibility to obtain effective redress from the local courts and would have accordingly been futile").

113. Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction, paras. 585, 587 (Aug. 4, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf.

114. *Id.* paras. 580–582.

115. *Id.* para. 588.

116. Ambiente Ufficio S.p.A. and others v. The Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, paras. 604–611 (Feb. 8, 2013).

requirement.[117] Similarly, after finding that no decision could be reached under any existing local procedure within the established time limit, the tribunal in *Urbaser v. Argentina* also concluded that it would be useless for investors to comply with the time-limited local remedies requirement.[118]

The successful application of the futility exception is instructive for Chinese investors because most second-generation BITs contain a time-limited local administrative remedies requirement.[119] By invoking the futility exception, Chinese investors may be able to resort to international arbitration without being required to seek recourse through local administrative remedies.[120] Thus, the futility exception is an effective defense strategy for Chinese investors seeking favorable investment protection in BRI countries.

B. *Flexible Application on Grounds of Procedural Economy*

Tribunals have held that premature initiation of ICSID proceedings can be justified on grounds of procedural economy,[121] finding ICSID claims admissible despite having been prematurely brought by investors.[122] The *TSA v. Argentina* tribunal determined that it would be "highly formalistic" to reject jurisdiction merely because the claimant was three months short of satisfying the eighteen-month local remedies requirement.[123] In the view of the *TSA* tribunal, the claimant was not likely to receive a verdict within eighteen months.[124]

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117. Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, paras. 316–317 (Nov. 17, 2014), https:// www. Italaw.com/sites/default/files/case-documents/italaw4061.pdf.

118. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Decision on Jurisdiction and Admissibility, para. 202 (Dec. 19, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1324.pdf.

119. *See* Markert, *supra* note 10, at 217.

120. *See* Brauch, *supra* note 91, at 18–19 (discussing the futility exception with respect to the exhaustion of local remedies rule).

121. *Id.* at 19.

122. *Id.*

123. TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, paras. 112–113 (Dec. 19, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0874.pdf.

124. *Id.* para. 111.

Thus, the claimant would inevitably initiate a new ICSID proceeding if the tribunal rejected jurisdiction at that point, an outcome which would have been undesirable.[125] Similarly, in *Teinver v. Argentina*, while the tribunal acknowledged that the claimants should have submitted their claims after fulfilling the local litigation time period requirement, the tribunal nevertheless found it "a waste of time and resources" for the claimants to be forced to refile for arbitration after the eighteen-month requirement had been met.[126] Furthermore, due to the fact that eighteen months had passed since the arbitration claim was initially filed, the tribunal found that the claimants had complied with the requirement.[127] Likewise, the tribunal in *Philip Morris v. Uruguay* approved of the *Teinver* tribunal's ruling and sustained premature initiation of the arbitration proceedings on grounds of procedural economy.[128]

These ICSID cases successfully invoked procedural economy to justify noncompliance with the time-limited *local litigation requirement*.[129] Even though Chinese BITs rarely list local litigation as a prerequisite to the initiation of the ICSID proceedings,[130] Chinese investors that wish to initiate international arbitration proceedings without full compliance with the time-limited local *administrative* remedies requirement can argue procedural economy as an alternative to the futility exception.

C. Importation of MFN Clause

Investors can apply MFN clauses in order to import from other BITs ISDS clauses that waive local remedies requirements. In *Maffezini v. Spain*, Maffezini claimed that the

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125. *Id.* para. 113.

126. Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/01, Decision on Jurisdiction, para. 135 (Dec. 21, 2012), https://www.italaw.com/cases/documents/1649.

127. *Id.*

128. Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction and Admissibility, para. 142 (July 2, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf..

129. *See* Brauch, *supra* note 91, at 20.

130. *See International Investment Agreements Navigator: China*, *supra* note 9.

MFN clause in the Argentina-Spain BIT' allowed him to import the more liberal dispute settlement procedures of the Chile-Spain BIT,[131] which unlike the Argentina-Spain BIT did not contain a time-limited local remedies clause.[132] The tribunal found in favor of Maffezini, endorsing the application of the MFN clause to dispute settlement procedures on grounds of the *ejusdem generis* principle.[133] In the view of the *Maffezini* tribunal, dispute settlement clauses were closely related to the substantive protections afforded under the subject treaty.[134] In *Wintershall v. Argentina*, however, the tribunal held that the MFN clause did not apply to procedural clauses unless the scope of the MFN clause explicitly included them.[135] The tribunal in *Daimler v. Argentina* endorsed the holding that there is an implicit exclusion unless the treaty explicitly stipulates otherwise.[136] The *Daimler* tribunal reasoned that the contracting states had not expressly excluded dispute settlement clauses from the scope of the MFN clause because they never anticipated such a broad application, not because they tacitly allowed such application.[137] By contrast, the *Siemens* tribunal interpreted the silence as to the whether procedural rules were included within the scope of the MFN clause as an inclusion, reasoning that any exclusion should be expressly made.[138] In *RosInvest v. Russia*, the tribunal also maintained that an

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131. Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, para. 40 (Jan. 25, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf.

132. Agreement Between the Republic of Chile and the Kingdom of Spain for the Reciprocal Promotion and Protection of Investments, art. 10(2), Oct. 2, 1991.

133. Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, para. 56 (Jan. 25, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf.

134. *Id.*

135. Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, para. 167 (Dec. 8, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0907.pdf.

136. Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, para. 239 (Aug. 22, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1082.pdf.

137. *Id.* para. 238.

138. *See* Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 103 (Aug. 3, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0788.pdf.

exclusion of procedural obligations from the scope of the MFN clause should be explicitly made by the contracting states at the time of the treaty's conclusion.[139] The tribunal was not convinced that the contracting states simply "forgot" to discuss the dispute settlement clause when they were drafting the MFN clause.[140] Thus, the assumption made by the *Daimler* tribunal may not withstand close scrutiny.

Arbitration practice confirms that it is feasible to apply the MFN clause to dispute settlement clauses. Nevertheless, Chinese investors that wish to invoke MFN clauses to bypass time-limited local administrative requirement provisions should exercise caution since some tribunals may be reluctant to endorse such an application.

As for local *judicial* remedies requirements, it should be noted that although the *Maffezini* tribunal applied the MFN clause to procedural matters, it conditioned the application of the MFN clause on certain public policy considerations. For example, an MFN clause cannot override a "fork-in-the-road" clause.[141] In *Sanum v. Lao*, the tribunal classified both Article 8 of the China-Lao BIT and Article 8(3) of the China-Peru BIT as "fork-in-the-road" clauses.[142] The tribunal proceeded to distinguished these clauses from the eighteen-month local requirement clauses in *Maffezini* and other Argentine cases.[143] The tribunal then concluded that the MFN clause in Article 8 of the China-Lao BIT did not extend to fork-in-the-road clauses, affirming the public policy considerations set forth by the *Maffezini* tribunal. The tribunal in *Tza Yap Shum v. Peru* adopted the same restrictive interpretation.[144] Since most local

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139. RosInvestCo UK Ltd. v. The Russian Federation, ICSID Case No. V079/2005, Award on Jurisdiction, para. 135 (Oct. 1, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0719.pdf.

140. *Id.*

141. *See* Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, para. 63 (Jan. 25, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf.

142. *See* Sanum Investments Ltd. v. Lao People's Democratic Republic, PCA Case No. 2013–13, Award on Jurisdiction, para. 354 (Dec. 13, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf.

143. *Id.* paras. 350–351.

144. *See* Tza Yap Shum v. Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, paras. 188, 217–220 (June 19, 2009), https://www.italaw.

judicial remedies clauses in Chinese BITs are fork-in-the-road clauses, Chinese investors are unlikely to be able to bypass local judicial remedies requirements through the operation of MFN clauses.

Arbitration practice also provides guidance on whether the scope of international arbitration claims under the first-generation Chinese BITs can be extended beyond the amount of compensation for expropriation by the invocation of MFN clauses.[145] Dissenters, such as the tribunal in *Salini Costruttori v. Jordan,* are concerned that the application of the MFN clauses to procedural obligations would lead to "treaty shopping."[146] Furthermore, the *Salini* tribunal also concluded that dispute settlement clauses were precluded from the scope of these restrictive MFN clauses, which unlike the MFN clause in *Maffezini* do not contain broad phrases such as "all rights" or "all matters."[147]

While dissenters have put forth some seemingly persuasive arguments, tribunals in support of the application of the MFN clause do not find their arguments compelling. The *Siemens* tribunal approved the application of MFN clauses to procedural obligations even though the MFN clause in the case did not contain "all rights" or "all matters."[148] The tribunal found that while the MFN clause in *Siemens* was narrower than that in *Maffezini*, specific terms such as "treatment" and particular phrases such as "activities related to the investments" are broad enough to cover dispute settlement provisions.[149] This view is

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com/sites/default/files/case-documents/ita0880.pdf.

145. *See, e.g.*, Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 90 (Aug. 3, 2004) ("Parties to a treaty are not precluded from placing emphasis on certain matters . . . rather than limiting the scope of clauses of general character."); *see also* Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction, para. 73 (Oct. 24, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0405.pdf (discussing compensation on account of expropriation).

146. Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, para. 115 (Nov. 9, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0735.pdf.

147. *Id.* paras. 117–119.

148. *See* Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 103 (Aug. 3, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0788.pdf.

149. *Id.*

supported by the holding of the tribunal in *Hochtief AG v. Argentina*. In *Hochtief*, the tribunal noted that "the procedural right to enforce another substantive right is one component of the bundles of rights and duties that make up the legal concept of what property is."[150] To elaborate, the procedural rights of an investor guarantee the enforcement of the substantive rights, and thus if the substantive rights of monetary claims could not be deprived without violating the subject BIT, neither could the procedural rights.[151] Similarly, the *RosInvest* tribunal concluded that the MFN clause should be applied indiscriminately to rules of protection of the basic treaty.[152]

Tribunals have also rejected applying the MFN clause to widen the scope of claims that an investor can submit to international arbitration, from the amount of compensation to any dispute, based on the fact that contracting states had not specifically agreed thereto.[153] In *Plama Consortium v. Bulgaria*, the tribunal distinguished the case, which sought to override a temporal block (the eighteen-month local remedies prerequisite), from *Maffezini* and *Siemens*.[154] According to the *Plama* tribunal, the claimant established a new arbitral mandate that was initially absent from the treaty when the claimant proposed to extend the scope of claims to international arbitration from the amount of compensation to any dispute.[155]

By contrast, the *RosInvest* tribunal was in favor of extending jurisdiction to the expropriation clause.[156] The tribunal noted

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150. *See* Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction, para. 66 (Oct. 24, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0405.pdf.

151. *Id.* para. 67.

152. RosInvestCo UK Ltd. v. The Russian Federation, ICSID Case No. V079/2005, Award on Jurisdiction, paras. 130, 132, 135 (Oct. 1, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0719.pdf.

153. *See, e.g.*, Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, paras. 208, 218–219 (Feb. 5, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0669.pdf (noting the chaos that would result from allowing investors to pick and choose BITs).

154. *Id.* paras. 204–208.

155. *Id.* paras. 208–210.

156. *See* RosInvestCo UK Ltd. v. The Russian Federation, ICSID Case No. V079/2005, Award on Jurisdiction, paras. 130, 133, 135 (Oct. 1, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0719.pdf (noting that conflicting MFN clauses are normal and should not limit jurisdiction).

that while importing a much broader dispute resolution provision through the application of the MFN clause conflicted with the original limitations set forth in the treaty, it nevertheless was a normal result of such application.[157]

Arbitration practice demonstrates the implications of applying the MFN clause to dispute resolution clauses. Given the amount of fork-in-the-road clauses in Chinese BITs and the restrictive nature of the first-generation BITs, the operation of the MFN clause might not be the best option for investors seeking to bypass local remedies requirements.[158] Yet, MFN clauses are one of the most flexible and essential dispute resolution mechanisms because all the limitations concerning the operation of the MFN clause are not binding on claims brought under the Chinese BITs.[159] Furthermore, while some tribunals have refused to apply the MFN clause to the dispute resolution provisions,[160] other tribunals have persuasively argued in favor of such application.[161] Therefore, the operation of the MFN clause is still a suitable option for circumventing local remedies requirements.

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157. *See id.* para. 131.

158. *See* Elizabeth Whitsitt, *Application of Most-Favored Nation Clauses to the Dispute Settlement Provisions of Bilateral Investment Treaties: An Assessment of the Jurisprudence*, 27 J. ENERGY & NAT. RES.'S L. 527, 533–36 (2009).

159. *See* Patrick Dumberry, *Are BITs Representing the "New" Customary International Law in International Investment Law?*, 28 PENN ST. INT'L L. REV. 675, 682–85 (2009).

160. *See* Dana H. Freyer & David Herlihy, *Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How "Favored" is "Most-Favored"?*, 20 ICSID REV.: FOREIGN INV. L.J. 58, 60–65 (2005).

161. *See, e.g.*, Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, para. 63 (Jan. 25, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf ("[T]he most favored nation clause in the Argentine-Spain BIT gives him the option to submit the dispute to arbitration without prior referral to domestic courts."); Matthew C. Porterfield, *Exhaustion of Local Remedies In Investor-State Dispute Settlement: An Idea Whose Time Has Come?*, 41 YALE J. INT'L L. 2, 4 (2015) (discussing application of the MFN clause to dispute resolution provisions); Freyer & Herlihy, *supra* note 160, at 61 (discussing application of dispute settlement arrangements to broadly-phrased MFN clauses).

D. Nationality Planning

Another way for Chinese investors to gain direct access to international arbitration is through nationality planning.[162] Most often, nationality planning is achieved via the incorporation of a corporate vehicle in a state that enjoys favorable treaty relations with the host state, premised on the condition that the treaty allows incorporation as a valid basis for corporate nationality.[163]

Practice confirms that it is neither unethical nor illegal for investors to arrange their investments in order to obtain favorable treaty protection.[164] In *Tokios Tokel. . .s v. Ukraine*, Tokios Tokel. . .s was a Ukrainian company lawfully incorporated in Lithuania.[165] While Ukraine argued that Tokios Tokel. . .s was an entity that had no real economic connection with Lithuania, the tribunal found the legal place of incorporation was the only relevant factor in determining the jurisdiction of the tribunal under the subject BIT.[166] Accordingly, the tribunal held that since Tokios Tokel. . .s was established in compliance with the laws of Lithuania, Tokios Tokel. . .s qualified as a Lithuanian "investor" under the BIT.[167] The tribunal further pointed out that the contracting states could have inserted a denial of benefits clause had they intended to adopt a control test for identifying the scope of the term "investor."[168] The absence of a denial of benefits clause reinforces the position that nationality planning is a feasible option for investors seeking favorable treaty protection. In *Saluka*,[169] even though the respondent admitted that Saluka was a shell company controlled by its Japanese owners, the tribunal

162. Schreuer, *supra* note 111, at 19.

163. *See id.* at 18.

164. *See id.* at 19.

165. Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, paras. 21, 37–38 (Apr. 29, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0863.pdf.

166. *Id.* paras. 29, 38.

167. *Id.* paras. 28–29.

168. *Id.* para. 30.

169. Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, para. 183 (Mar. 17, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf.

nonetheless found that the claimant was a Dutch company and that Saluka qualified as an "investor" under the Czech-Netherlands BIT.[170] Similar to the *Tokios Tokel. . .s* case, the *Saluka* tribunal endorsed the notion that tribunals lack the authority to impose additional limitations on the scope of BITs where the contracting states could have added restrictions but had chosen not to.[171]

Given that denial of benefit clauses are absent from almost all of the first and second generations of Chinese BITs,[172] it is logical to conclude that nationality planning can be used as a precaution against potentially undesirable procedural requirements under the current Chinese BIT regime.

In sum, the four strategies developed in arbitration practice serve as effective tools to render the first- and second-generation BITs more effective for Chinese BRI investors. Thus, BRI investors may obtain maximum treaty protection by gaining favorable access to international tribunals.

V. POLICY OPTIONS FOR A NEW GENERATION OF CHINESE BITS UNDER THE CONTEXT OF ONE BELT ONE ROAD

A. *Balanced Expropriation Clauses Through the Importation of Proportionality*

Despite ongoing efforts to distinguish indirect expropriation and regulatory measures, a balance has yet to be struck between the protection of foreign investors and the regulatory right of the host state.[173] While the later-generation BITs reaffirmed the regulatory right of the host state through the formulation of the police power exception, a uniform and precise boundary between indirect expropriation and the regulatory right of the host state

170. *Id.* paras. 183–186, 240.

171. *Id.* para. 241.

172. *See, e.g.*, China-Barb. BIT, *supra* note 92; Agreement Between the Government of the Republic of Chile and the Government of the People's Republic of China Concerning the Encouragement and the Reciprocal Protection of Investment, Mar. 23, 1994; China-Cyprus BIT, *supra* note 37; Agreement Between the Czech Republic and the People's Republic of China on the Promotion and Protection of Investments, Dec. 8, 2005.

173. *See* Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV.: FOREIGN INV. L.J. 1, 45 (2005).

has yet to be established.[174] Until the boundary between these terms is clearly defined, the scope of indirect expropriation can be grossly expanded or contracted, resulting in uncertainty for investors.[175] For the sake of better weighing the important and competing interests in a particular expropriation case, the new generation of Chinese BITs should adopt the principle of proportionality.[176]

The principle of proportionality balances suitability, necessity, and proportionality in the narrow sense, respectively.[177] Accordingly, whether a state action is excluded from the scope of indirect expropriation will be assessed in accordance with the three steps of proportionality. First, the state action ought to be suitable to achieving a legitimate purpose. If the state action cannot achieve the legitimate purpose pursued, there is no real conflict between the end pursued and the infringed rights.[178] Second, the state action ought to be necessary to achieve the end pursued, which means that no other state action can achieve the same legitimate objective while infringing on the affected right to a lesser degree than the challenged measure.[179] Third, the state action should be scrutinized by balancing two legal principles in terms of proportionality in the narrow sense.[180] The law of balancing aims to determine whether the fulfillment of one legal principle justifies the detriment to another competing legal principle.[181] The three stages of the proportionality test identify the boundary between indirect expropriation and legitimate regulatory measures, and more and more tribunals have adopted the test when determining whether or not an indirect

174. *See* Wei, *supra* note 18, at 600–01 (discussing various regulatory reforms implemented by the Chinese government to address property rights protection).

175. *See* Newcombe, *supra* note 173, at 23–24 (providing examples of narrow and broad forms of indirect expropriation).

176. *See id.* at 40 (discussing past implementations of the principle of proportionality in various jurisdictions).

177. Jonas Christoffersen, *Straight Human Rights Talk – Why Proportionality Does (Not) Matter*, *in* 55 HUMAN RIGHTS: THEIR LIMITATIONS AND PROLIFERATION 17–18 (Peter Wahlgren ed., 2010).

178. *Id.* at 17.

179. *Id.*

180. *Id.* at 18.

181. *Id.* at 30–31.

expropriation has occurred.[182]

In *Tecmed v. Mexico*, the Mexican authorities refused to renew an operational permit for a hazardous landfill and the claimant was forced to close down.[183] The claimant subsequently pursued its claims on grounds of expropriation.[184] According to the *Tecmed* tribunal, the determination of expropriation should consider whether the public interest pursued is proportionate to the protection of the investor.[185] The tribunal first applied the suitability test and concluded that the landfill was neither hazardous to environment nor to public health.[186] Thus, the denial of a permit failed to serve the purpose of promoting public health or environmental protection.[187] Instead, the tribunal found that the real purpose of refusing to renew the application was to excavate the landfill in order to satisfy political needs and to deal with complaints of local residents.[188] The tribunal subsequently applied the necessity text and determined that a fine would be proportionate to the infringement resulting from the operation of the landfill, as opposed to a refusal to renew the landfill's operational permit.[189] Consequently, the tribunal found that the denial of the permit constituted expropriation.[190]

Subsequent cases such as *LG&E v. Argentina*,[191] *S.D. Myers v. Canada*,[192] *Feldman v. Mexico*,[193] and *Philip Morris v.*

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182. *E.g.*, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, para. 122 (May 29, 2003), https://www.italaw.com/cases/documents/1088.

183. *See id.* paras. 41, 148 (arguing that concerns over the environment or public health were not responsible for the refusal, as they had not been noted).

184. *Id.* para. 95.

185. *Id.* para. 122.

186. *See id.* para. 145.

187. *See id.* para. 148.

188. *Id.* para. 140.

189. *See id.* paras. 171, 201 (demonstrating that after deliberation, the court solely assessed a fine and did not refuse to renew the operational permit).

190. *Id.* para. 151.

191. LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, para. 152 (Oct. 3, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.

192. S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Decision on Liability, para. 144 (Oct. 21, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0752.pdf (citing to a case that employed the principle of proportionality for the identification of expropriation).

Uruguay[194] also applied the principle of proportionality to the determination of expropriation. These tribunals did not assess suitability, necessity, and proportionality in the narrow sense in a strict order. Rather, they undertook a more flexible approach by assessing one or two of the three elements.[195] What remains, however, is that the principle of proportionality was assessed and recognized in these cases regardless of how flexibly the three elements of proportionality were applied.

In terms of formulation, the proportionality test under the new generation of Chinese BITs may mirror the wording of the policy model suggested by UNCTAD in its expropriation report, which stipulates that "non-discriminatory measures[,] . . . not disproportionate in light of their purpose, shall not constitute indirect expropriation."[196]

The importation of the principle of proportionality would promote the identification of indirect expropriation as demonstrated in arbitration practice.[197] Hence, the formulation of proportionality in a new generation of expropriation clauses would facilitate the process of striking a fair balance between foreign investor protection and the legitimate regulatory right of the host state.[198]

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193. *See* Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, para. 107 (Dec. 16, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf (citing to a case that employed the principle of proportionality for the identification of expropriation).

194. *See* Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, paras. 136, 139 (July 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf (citing to a case that employed the principle of proportionality for the identification of expropriation).

195. *See, e.g.*, LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, para. 152 (Oct. 3, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf (demonstrating the necessity test); *see also id.* para. 139 (citing the *Tecmed* case and discussing the proportionality and necessity tests).

196. UNCTAD, *supra* note 64, at 87–88, 130 (encouraging the language used in the BIT between the United Kingdom and China).

197. *See* Newcombe, *supra* note 173, at 25–36 (arguing for a better method of identifying indirect expropriation).

198. AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW 23 (2014).

B. *Liberal ISDS Clauses with Strings Attached*

Chinese BITs have taken a more liberal approach towards ISDS clauses by granting direct access to international arbitration.[199] While this trend coincides with the changing role of China in the global economic order, liberal ISDS clauses alone may not be enough to guarantee a smooth transition for China in consideration of its gradually increasing involvement in ISDS cases.[200] Instead of re-imposing restrictions on ISDS clauses and disrupting the inevitable trend of liberalization, limiting the scope of MFN clauses and clarifying the definition of investor in future BITs could best serve the purpose of increasing predictability.

The current MFN clauses of the Chinese BITs contain broad language but do not specify the categories of measures covered by such provisions.[201] Arbitration practice has interpreted the vagueness of the MFN clause as covering every aspect relating to investment.[202] Thus, some tribunals have allowed the importation of more favorable dispute settlement clauses through the operation of MFN clauses.[203] To ensure greater certainty under the new generation of Chinese BITs, MFN clauses that are more precise and specific are encouraged.[204] In particular, the exclusion of dispute settlement mechanisms from the scope of MFN could prevent the possibility of the unexpected

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199. Won Kidane, *China's Bilateral Investment Treaties with African States in Comparative Context*, 49 CORNELL INT'L L.J. 141, 151 (2016).

200. *See* Dilini Pathirana, *A Look into China's Slowly Increasing Appearance in ISDS Cases*, IISD: INV. TREATY NEWS (Sept. 26, 2017), https://www.iisd.org/itn/2017/09/26/a-look-into-chinas-slowly-increasing-appearance-in-isds-cases-dilini-pathirana (arguing that reform initiatives may be insufficient for a smooth transition as China may be more inclined to maintain the existing regime).

201. Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 100–01 (2007).

202. *See* Suzy H. Nikièma, *The Most-Favored-Nation Clause in Investment Treaties*, *in* IISD BEST PRAC.'S SERIES 10–17 (Feb. 2017), https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf (contending that numerous arguments arise from the analysis of arbitration awards).

203. *See id.* at 13–17 (arguing that the response of investment tribunals to the possibility of invoking MFN to import provisions previously not included in the basic treaty is mostly positive).

204. *See id.* at 25 (arguing that it is prudent to not engage in new negotiations when discussions are ongoing).

application of the MFN clauses to procedural rules.

The limitation of the scope of the MFN clause can be formulated as follows: "The most favorable treatment . . . does not encompass mechanisms for the settlement of investment disputes."[205] As a matter of fact, more and more BITs and free trade agreements (FTAs) have incorporated this type of exclusion.[206] Specifically excluding dispute resolution clauses engenders certainty for both states and investors, and supports ongoing efforts towards a more balanced regime.[207] Thus, the new generation of Chinese BITs would benefit from adopting this exclusionary language.

With regard to the definition of investor, a broad definition that adopts a sole criterion for determining company nationality has given investors abundant space to perform nationality planning.[208] In general, a shell company can easily be established under the laws of most host states. The disadvantage of stipulating a single criterion for defining an investor is that host states cannot deny investors the legal benefits that accrue through nationality planning, even when investors are abusing the system.[209] By contrast, formulating a stricter definition of investor would prevent the abusive use of treaty protection without infringing on the legitimate practice of nationality planning.[210] As a consequence, nationality planning would remain a viable option for investors, but would be subject to necessary and reasonable limitations.

Two methods can be used to limit the scope of the definition of investor. Under the first method, states can set stricter nationality criteria to confine the scope of the term investor.[211] As for the second method, the inclusion of a denial of benefits clause could also effectively narrow the scope of investors under the new generation of Chinese BITs.[212]

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205. *Id.* at 23.

206. *Id.* at 25.

207. *Id.*

208. *See id.* at 7 (arguing that BITs that use a single criterion for contracting states thereby allow those same states to more easily engage in treating shopping).

209. *See id.* at 8–11.

210. *Id.* at 11–12.

211. *Id.* at 11.

212. *Id.* at 12.

First, BITs can refine and narrow the scope of "investor" by having at least two combined and cumulative criteria for investor nationality.[213] Two main criteria applicable to the determination of company nationality include the place of incorporation and the head office of the company.[214] The place of incorporation refers to the country where the company is established.[215] The head office refers to the place where the actual management of the company occurs, which involves decisions made by the board of directors and managerial meetings held by managerial personnel.[216] These two nationality criteria together can narrower the definition of investor. This goal can be accomplished by including phrases in the definition of investor such as, "any legal person incorporated in accordance with . . . one of the contracting States which has its head office in the territory of that State."[217] This combination would render the establishment of shell companies under future BITs reasonably difficult.[218]

Second, including of denial of benefits clause can also restrict the scope of protected investors without undermining the liberal approach of ISDS clauses. Denial of benefits clauses can be formulated as follows: "Party denies the benefits of this treaty . . . to an investor . . . if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party . . . own or control the enterprise."[219] Relying on this clause, a state party to the investment treaty has the authority to deny treaty benefits to an investor that does not have substantial business connections to the state.[220] Establishing a shell company does not evidence authentic or substantial business ties with the state.[221]

213. *Id.* at 11–12.

214. *Id.* at 8.

215. *Id.*

216. *Id.*

217. *Id.* at 11.

218. *Id.* at 11–14.

219. *Id.* at 12.

220. Schreuer, *supra* note 111, at 19–20 (arguing that the denial of benefits clause allows a state to exclude investors supported by other states).

221. *See id.* at 21 (arguing that the establishment of shell companies should not entitle said companies to be able to invoke treaty provisions).

Consequently, the shell company will be excluded from the scope of investor so long as the treaty contains a denial of benefits clause.[222]

Incorporating these policy options in Chinese BITS will promote balance and trade liberality in Belt and Road Initiative countries. A more balanced generation of expropriation clauses requires the importation of proportionality. Meanwhile, liberal ISDS clauses granting direct access to international arbitration tribunals could strike a fairer balance with a relatively stricter scope of protected investors.

VI. CONCLUSION

The evolution of the expropriation and ISDS clauses of Chinese BITs is a process of balancing the need for investment liberalization with the regulatory space of the host state.[223] The first-generation generic expropriation clauses and restrictive ISDS clauses tilt in favor of attracting FDI inflow into China.[224] Specific expropriation clauses and liberal ISDS clauses of later-generation BITs are designed to preserve the regulatory right of host states while protecting the interests of foreign investors.[225]

Refining later-generation BITs to correspond to the latest trends in arbitral development will help achieve a more balanced and liberal Chinese BIT regime. First, expropriation clauses can strike a better balance between host state and investor rights by incorporating the principle of proportionality. This balance can also be struck by narrowing the definition of investor, which would moderate pro-investment liberal ISDS clauses. These refinements would eventually map out a new generation of Chinese BITs.

This evolution towards a balanced and liberal BIT regime conforms with the changing role of China in international

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222. Nikièma, *supra* note 202, at 12–13.

223. Shan, *supra* note 44, at 2, 6.

224. *See* Berger, *supra* note 3, at 5–13.

225. Yuting Hua, China's Legal Obligations in the Field of Foreign Investment: How Trade Agreements Influence the Formation of Investment Agreements 198 (June 15, 2017) (unpublished thesis, European University Institute Department of Law) (on file with author).

investment in the context of One Belt One Road.[226] China is transitioning from one of the countries with the largest amount of capital inflows into an important recipient and source country of FDI.[227]

Accordingly, China urgently needs to design investment instruments that reflect the interests of the two key stakeholders in a BIT: the foreign investor and the host state. A balanced and liberal BIT regime would best serve the interests of both stakeholders.[228]

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226. Schill, *supra* note 201, at 79–80.

227. *Id.*

228. Shan, *supra* note 44, at 474 (arguing that balancing the investment regime and socializing the approach to foreign investors serves to equally respect and protect the interests and rights of foreign investors and host states).