

## DECLARATORIA SULLA TESI DI DOTTORATO

il sottoscritto

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Matricola di iscrizione al Dottorato | 1136068 |

Titolo della tesi:

| China's policy rationale and treaty-making on the protection of foreign investment: |

| a comparative perspective, from the model BITs to the latest stipulations. |

Dottorato di ricerca in | Diritto Internazionale dell'Economia |

Ciclo | XXV |

Tutor del dottorando | Prof. Giorgio Sacerdoti |

Anno di discussione | 2014 |

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments:  
a comparative perspective, from the model BITs to the latest stipulations"  
di VACCARO INCISA GIUSEPPE MATTEO

discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014

La tesi è tutelata dalla normativa sul diritto d'autore (Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).

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**CHINA'S POLICY RATIONALE AND TREATY MAKING  
ON THE PROTECTION OF FOREIGN INVESTMENT:  
A COMPARATIVE PERSPECTIVE,  
FROM THE MODEL BITs TO THE LATEST STIPULATIONS**

Giuseppe Matteo Vaccaro Incisa

Thesis in co-tutelle submitted for the Degree of Doctor in Philosophy

University of Geneva

Bocconi University

Co-tutelle Agreement of Oct. 8<sup>th</sup>, 2010

July 2014

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments:  
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This research is produced as part of the project '*Dispute Settlement in Trade: Training in Law and Economics*' (DISSETTLE), a Marie Curie Initial Training Networks (ITN) funded under the EU's Seventh Framework Programme, Grant Agreement No. FP7-PEOPLE-2010-ITN\_264633.

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## Résumé

Dans le domaine des relations internationales et sur un plan historique, le pouvoir de la Chine a évolué au travers du commerce et de l'influence exercée, plutôt que par la possession de territoires outre-mer. Cette approche a connu une brève parenthèse, entre la première guerre de l'opium en 1839 et l'adoption de la politique de 'Porte Ouverte' en 1978. Depuis lors la Chine est devenue l'un des principaux acteurs du développement du droit international des investissements, en ayant façonné ses propres modèles d'accords, conclu 119 traités bilatéraux d'investissement, et en ayant récemment inclus un chapitre sur les investissements dans six accords de libre-échange.

L'étude contient tout d'abord une analyse juridique de l'évolution des modèles chinois d'accords sur les investissements au travers de la modification de la structure générale de ses accords ainsi que des clauses sur la portée, la définition et la condition de légalité de l'investissement. Si cette analyse démontre la constante recherche de la Chine en matière de clarté et prévisibilité, néanmoins elle démontre également le passage d'une approche inspirée des modèles européens à un rapprochement d'une vision plus libérale nord-américaine dans la modélisation de ses accords sur les investissements. Cette évolution s'explique, en termes politiques et économiques, par l'évolution qu'a connue la Chine. Pays principalement importateur de capital, il est également devenu un des principaux pays exportateur de capital. La traduction juridique de cette évolution de la conception de la protection des investissements est analysée au travers des traités bilatéraux (Pakistan, Nouvelle-Zélande, Association des nations d'Asie du Sud-est, Canada et Chili) qui ont rythmé ce changement de l'approche chinoise et ont abouti à la conception d'un modèle plus libéral dans le contexte des accords de libre-échange. Les premiers signes prudents de changements se sont manifestés en 2006, par la conclusion d'un chapitre sur les investissements dans l'accord de libre-échange Chine-Pakistan. Puis, entre 2008 et 2009, la Chine a posé la pierre angulaire de cette nouvelle approche en redoublant l'intensité de ses négociations dans le Pacifique Ouest avec deux accords majeurs modernisant substantiellement sa conception de la protection des investissements. Après la conclusion en 2009 de brèves négociations avec le Pérou, dans le contexte d'une relation d'investissements dominée par la Chine en tant que pays exportateur de capital, celle-ci s'est concentrée sur un dernier ensemble d'accords qui a façonné la nouvelle approche du modèle chinois, avec la conclusion de traités bilatéraux en 2012 avec le

Canada ainsi qu'avec le Chili. Ces accords ont la particularité de partager la matrice, structurelle et partiellement substantielle, du modèle canadien, aux dépens du modèle européen qui formait jusqu'alors le fondement exclusif du modèle chinois.

C'est au travers de ce début de rapprochement du modèle chinois avec le modèle nord-américain qu'ont pu s'amorcer des négociations qui pourraient permettre la conclusion d'accords d'investissements entre la Chine et les Etats-Unis et entre la Chine et l'Union européenne.

## Acknowledgments

This Ph.D. research follows on from the studies for the advanced LL.M. in International Dispute Settlement obtained jointly from the Graduate Institute of International and Development Studies and the University of Geneva, on Sept. 24<sup>th</sup>, 2009.

I wish to express my heartfelt thanks first to Prof. Laurence Boisson de Chazournes, for entrusting me with the significant task of making a research contribution in the field of international law, at a world-renowned institution such as the University of Geneva. Thanks, also, for the subtle yet consistent effort to make me understand the difference between well-structured reasoning and convoluted speculation.

The second -yet equally heartfelt- thanks are devoted to Prof. Giorgio Sacerdoti, for having consented to co-supervise this research, and install a co-tutelle with Bocconi University. I greatly (and repeatedly) benefited from his insights and acute critique of my work, through which he stimulated me to strengthen the foundations of my findings. Thanks, also, for having consented to part of this research being carried out abroad.

Indeed, the completion of this work could have not been achieved without the research period spent at the School of Law of Melbourne University, under the invaluable mentorship and guidance of Prof. Jurgen Kurtz. I am grateful to him for his patient and kind availability.

I would like to thank, also, the ‘Dispute Settlement in Trade: Training in Law and Economics’ (DISSETTLE) and the Marie-Curie Initial Training Network research programs, for the funding that made this research possible.

In this respect, I wish to sincerely thank Prof. Claudio Dordi, for his guidance and support in the application process, and his kind availability throughout my stay at Bocconi University.

Thanks, also, to the DISSETTLE research fellows at Bocconi University, especially Dr. Emily Lydgate, for making the last stages of this long process enjoyable.

I also thank the administrative and academic staff of each Institution in which I have researched. In particular, Dr. Theresa Carpenter and Ms. Angelica Zanninelli, of the Geneva Center for Trade and Economic Integration; Ms. Béatrice Ledermann, of the University of

Geneva; Ms. Cristina Villanova and Mr. Gualtiero Valsecchi, of Bocconi University; and Mr. Domingo Ramon Cordoba, of Melbourne University School of Law.

I wish, lastly, to express my gratitude to Prof. Makane Moïse Mbengue and Dr. Vasilka Suncin, for their kindest friendship and professional support in the course of this first academic effort of mine.

Where I ended up in this academic journey, of course, is my own responsibility.

## TABLE OF CONTENTS

List of Abbreviations .....	11
List of Tables and Figures .....	15
<b>INTRODUCTION</b> .....	<b>19</b>
<b>I. THE RISE OF A TRADE AND INVESTMENT BEHEMOTH: THE PEOPLE’S REPUBLIC OF CHINA</b> .....	<b>29</b>
<b>A. Investment agreements’ history, policy and the current shift towards Southeast Asia: an outline ....</b>	<b>29</b>
1. <i>The European root of BITs</i> .....	29
2. <i>The changing shift</i> .....	34
3. <i>The Chinese experience with investment treaty-making</i> .....	39
<b>B. China’s policy evolution towards FDI and BITs (1949-2013): outline and remarks .....</b>	<b>41</b>
1. <i>China and FDI: main periods</i> .....	41
2. <i>From exclusion to resumption</i> .....	42
3. <i>The shift: from rejection to shaping global standards of investment law</i> .....	50
4. <i>Chinese FTAs and modern agreements on investments</i> .....	57
5. <i>The absence of known investor-State disputes with China</i> .....	64
<b>II. BUILDING THE CHINESE MODEL BIT</b> .....	<b>69</b>
<b>A. General characteristics of the Chinese Model BIT</b> .....	<b>69</b>
1. <i>Adopting a Model BIT: policy rationale</i> .....	69
2. <i>China’s evolution throughout the Model texts</i> .....	71
<b>a. Structure</b> .....	71
<b>b. Contents: outline and key notions</b> .....	74
ii. <i>Notion of investment and investor (Art. 1)</i> .....	78
iii. <i>Standards of treatment (Arts. 2-3)</i> .....	79
iv. <i>Expropriation and standard of compensation (Art. 4)</i> .....	80
v. <i>Transfers (Art. 6)</i> .....	81
vi. <i>Investor-State dispute settlement (Art. 8)</i> .....	81
<b>B. The tight relation with the major European Models: focus on the provision of scope and the notion of investment</b> .....	<b>90</b>
1. <i>The provision of scope: to what the BIT applies</i> .....	90
2. <i>The notion of investment</i> .....	93
<b>a. The opening statement</b> .....	98
i. <i>‘In accordance with the laws’: the <i>ratione legis</i> requirement</i> .....	99
ii. <i>Direct and indirect investments</i> .....	104

iii. <i>The objective criteria</i> .....	108
b. <b>The asset-based list</b> .....	110
c. <b>Returns</b> .....	115
3. <i>China's BIT program: a clear and uniform strive for predictability</i> .....	117
<b>III. THE -CAUTIOUS- BEGINNING OF A NEW ERA: THE 2006 CHINA-</b>	
<b>PAKISTAN FTA AND THE FIRST INVESTMENT CHAPTER IN A CHINESE FTA.....</b>	<b>119</b>
<b>A. The Islamic Republic of Pakistan.....</b>	<b>119</b>
1. <i>Pakistan macroeconomics: overview</i> .....	119
2. <i>The Sino-Pakistani relationship</i> .....	121
<b>B. The China-Pakistan FTA .....</b>	<b>125</b>
1. <i>Negotiations and policy rationale</i> .....	125
2. <i>Trade and investment rationale</i> .....	127
a. <b>Trade</b> .....	127
b. <b>Investment</b> .....	130
3. <i>Investment protection regime</i> .....	132
<b>IV. THE 2008-2009 WESTERN PACIFIC 'FRENZY': CHINA-NZ FTA, ACIA,</b>	
<b>AANZFTA AND CAIA .....</b>	<b>135</b>
<b>A. The relevant counterparts: New Zealand and ASEAN.....</b>	<b>136</b>
1. <i>New Zealand</i> .....	136
a. <b>Political factor and negotiations for the China-NZ FTA</b> .....	136
b. <b>New Zealand's stance on investment protection</b> .....	138
c. <b>FTA's economic rationale and data</b> .....	140
2. <i>The Association of Southeast Asian Nations</i> .....	141
a. <b>Brief history of the Association</b> .....	141
b. <b>Economic data and perspective</b> .....	143
c. <b>ASEAN Free Trade Area</b> .....	144
d. <b>ASEAN Investment regime</b> .....	145
e. <b>China-ASEAN FTA</b> .....	147
i. <i>Political factor and negotiations</i> .....	147
ii. <i>Trade and investment rationale</i> .....	152
<b>B. Genesis and correlation amongst the Agreements .....</b>	<b>155</b>
1. <i>Main characteristics of the Agreements</i> .....	157
a. <b>Structure</b> .....	157
b. <b>Development of the list of definitions</b> .....	158
2. <i>The intertwine between the notions of investment, covered investment, and scope and application:</i> <i>ratione loci, ratione temporis and ratione legis of the Agreements</i> .....	161
3. <i>The notion of investment: characteristics</i> .....	163
a. <b>The chapeau</b> .....	163

<b>b. The asset-based list</b> .....	165
i. <i>China-NZ FTA</i> .....	165
ii. <i>ACIA and AANZFTA</i> .....	167
iii. <i>CAIA</i> .....	168
<b>c. Change of form of investment and returns</b> .....	170
<b>C. Focus: investment protection in the China-NZ FTA</b> .....	<b>175</b>
1. <i>Chapter 11: main features</i> .....	175
2. <i>Investment protection standards</i> .....	176
3. <i>Dispute settlement</i> .....	182
<b>D. Focus: investment protection in the CAIA</b> .....	<b>186</b>
1. <i>Negotiations and main characteristics</i> .....	186
2. <i>Substantive protection of investments</i> .....	191
3. <i>Investor-State dispute settlement mechanism</i> .....	208
<b>E. China's first detachment from the European tradition</b> .....	<b>219</b>
<b>V. THE 'TRANSITION AGREEMENT' OF 2009 WITH PERU: THE CPEFTA</b> .....	<b>221</b>
<b>A. The Republic of Peru</b> .....	<b>221</b>
1. <i>Peru macroeconomics: overview</i> .....	221
2. <i>Peru stance towards international trade and investment agreements</i> .....	222
<b>B. The China-Peru FTA</b> .....	<b>224</b>
1. <i>Political factor and negotiations</i> .....	224
2. <i>Trade and investment rationale</i> .....	227
<b>C. Foreign investment protection regime</b> .....	<b>231</b>
1. <i>The terms of reference, and the 1994 China-Peru BIT</i> .....	231
2. <i>Chapter 10 CPEFTA: main characteristics</i> .....	232
3. <i>CPEFTA investment protection: a transition regime</i> .....	240
<b>VI. THE LATEST BILATERAL STIPULATIONS OF 2012: THE CHINA-CANADA BIT AND THE CHINA-CHILE SAI</b> .....	<b>243</b>
<b>A. The counterparts: Canada and Chile</b> .....	<b>244</b>
1. <i>The Commonwealth of Canada</i> .....	244
<b>a. Political factor and negotiations for a China-Canada BIT</b> .....	245
<b>b. Economic rationale of the China-Canada BIT</b> .....	246
<b>c. Canada stance on foreign investment protection</b> .....	249
i. <i>Canada 2004 Model BIT and the draft Model of 2006: changes in the definition of investment</i> ..	251
2. <i>The Republic of Chile</i> .....	253
<b>a. Relations with China</b> .....	255
i. <i>Negotiations for the China-Chile FTA and SAI</i> .....	256

ii. <i>The agreement's trade and investment rationale</i> .....	257
b. <b>Chile's stance on international trade and investment agreements</b> .....	261
<b>B. Structure and main features of the Agreements: overview</b> .....	<b>262</b>
1. <i>The China-Canada BIT</i> .....	268
2. <i>The China-Chile SAI</i> .....	278
<b>C. Focus: the notion of investment</b> .....	<b>288</b>
1. <i>The China-Canada BIT</i> .....	288
a. <b>The notion of covered investment</b> .....	288
b. <b>The asset-based exhaustive list</b> .....	291
2. <i>The China-Chile SAI</i> .....	298
a. <b>The chapeau</b> .....	299
b. <b>The asset-based list</b> .....	300
<b>D. China-Canada BIT and China-Chile SAI: significant steps towards the North American models of investment protection</b> .....	<b>306</b>
 <b>CONCLUSION</b> .....	 <b>309</b>
 <b>ANNEXES AND TABLES</b> .....	 <b>321</b>
1. <b>Chinese Model BITs</b> .....	323
2. <b>Structure of major model BITs</b> .....	330
3. <b>Structure of latest Chinese BITs and North American models</b> .....	331
4. <b>List of definitions – Chinese Investment Agreements 2008-2012</b> .....	336
5. <b>Text of treaty provisions</b> .....	338
6. <b>Others Tables</b> .....	376
 <b>BIBLIOGRAPHY</b> .....	 <b>381</b>
➤ <b>List of Treaties and other International Legal Instruments</b> .....	381
1. <i>Investment Treaties</i> .....	381
2. <i>Free Trade Agreements</i> .....	383
3. <i>Other Treaties</i> .....	384
4. <i>UN Documents</i> .....	385
➤ <b>List of Cases</b> .....	385
➤ <b>Books &amp; Treatises</b> .....	388
➤ <b>Articles</b> .....	391
➤ <b>Papers and Presentations</b> .....	400
➤ <b>Official Reports and Statistics</b> .....	401
➤ <b>Web-based Sources</b> .....	404
1. <i>Online Databases</i> .....	404
2. <i>Media Sources</i> .....	406
➤ <b>Miscellaneous</b> .....	408

## List of Abbreviations

- Ad.	Addendum
- Art(s).	Article(s)
- APEC	Asia-Pacific Economic Cooperation
- ASA	Association of Southeast Asia
- ASEAN	Association of South East Asian Nations
- BBC	British Broadcasting Corporation
- BIT	Bilateral Investment Treaty
- BRICS	Brazil, Russia, India, China and South Africa
- CCSAI	China-Chile Supplementary Agreement on Investment
- Cf.	Compare
- Ch.	Chapter
- CP(s).	Contracting Party/State (or Parties/States)
- DE	Germany
- Ed(s).	Edited by
- EEA	European Economic Area
- EFTA	European Free Trade Association
- e.g.	<i>exempli gratia</i>
- ES	Spain
- EU	European Union
- FCN	Treaty of Friendship, Commerce and Navigation
- FDI	Foreign Direct Investment
- FET	Fair and Equitable Treatment
- FIPA	Foreign Investment Promotion and Protection Agreement
- fn.	footnote
- FPS	Full Protection and Security
- FR	France
- FTA	Free Trade Agreement
- G7	Canada, Germany, France, Italy, Japan, UK, US
- G8	Canada, Germany, France, Italy, Japan, Russia, UK, US

- G20	Argentina, Australia, Brazil, Canada, China, EU, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, UK, US
- GDP	Gross Domestic Product
- <i>ibid.</i>	<i>ibidem</i>
- ICC	Court of Arbitration of the International Chamber of Commerce
- ICSID Center	International Center for Settlement of Investment Disputes
- ICSID Convention	International Convention for Settlement of Investment Disputes
- <i>id.</i>	<i>idem</i>
- <i>i.e.</i>	<i>id est</i>
- inv. rep.	investment report
- IPPA	Investment Protection and Promotion Agreement
- IT	Italy
- km	kilometer
- LCIA	London Court of International Arbitration
- let.	letter
- MERCOSUR	Mercado Comùn del Sur America
- MFN	Most Favored Nation
- MIGA Convention	Multilateral Investment Guarantee Agreement
- MOFCOM	Ministry of Commerce of the People's Republic of China
- NAFTA	North American Free Trade Agreement
- NT	National Treatment
- NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- NZ	New Zealand
- OECD	Organization for Economic Co-operation and Development
- p./pp.	page/page(s)
- para(s).	paragraph(s)
- PNG	Papua New Guinea
- PRC	People's Republic of China
- SADC	Southern African Development Community
- SAI	Supplementary Agreement on Investment

- SC	Seychelles
- SCC	Arbitration Institute of the Stockholm Chamber of Commerce
- Sect(s).	Section(s)
- SICE	Organization of American State's Foreign Trade Information System
- TNC-WGI	Trade Negotiating Committee – Working Group on Investment
- UNCITRAL	United Nations Commission on International Trade Law
- UNCTAD	United Nations Conference on Trade and Development
- UK	United Kingdom
- US	United States
- USD	United States Dollar
- USSR	Union of Soviet Socialist Republics
- v.	<i>versus</i>
- vol.	volume
- WTO	World Trade Organization
- WWII	World War II

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## List of Tables and Figures

Table no.	Topic	p. no.
1	BITs concluded by G7 States (plus Switzerland and Sweden)	33
2	Cases registered under the ICSID Convention and Additional Facility Rules (up to Jun. 30 <sup>th</sup> , 2013)	36
3	Top 20 investor economies, 2012	37
4	FDI inflows and outflows (2006-2012)	38
5	Most promising investor economies for FDI in 2013-2015	38
6	Annual Growth of Chinese BITs 1982-2007	47
7	First Chinese BITs	48
8	Changes in national investment policies – <i>trend</i> (2000-2012)	55
9	Changes in national investment policies – <i>number of measures</i> (2000- 2012)	55
10	Chinese outward FDI - annual flow: 1990-2012	64
11	European and Chinese model BITs – Sequence of provisions	73
12	Chinese model BITs – Investment	84
13	Chinese model BITs – Return	84
14	Chinese model BITs – Investor	85
15	Chinese model BITs – Promotion, protection and treatment of investment	86
16	Chinese model BITs – Expropriation	88
17	Chinese model BITs – Investor-State dispute settlement	89
18	European and Chinese model BITs – Application	93
19	European and Chinese model BITs – Investment	96
20	European and Chinese model BITs – Promotion of Investments	98
21	Indirect Investment – Express Coverage	107
22	European and Chinese model BITs – Returns	116
23	Pakistan GDP Annual Growth Rate (1990-2010)	119
24	Chinese flow and stock of investment in Pakistan	131
25	ASEAN: FDI flows (1995-2011)	144
26	China's outward FDI flows into ASEAN States (2005-2010)	154

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments: a comparative perspective, from the model BITs to the latest stipulations"

di VACCARO INCISA GIUSEPPE MATTEO

discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014

La tesi è tutelata dalla normativa sul diritto d'autore (Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).

Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

27	China's outward FDI stock into ASEAN States (2005-2010)	154
28	Negotiations for FTAs and investment agreements in the Southwest Pacific (2003-2009)	155
29	List of definitions – US model, PRC-NZ FTA, ACIA, AANZFTA, CAIA, PRC-CA BIT, CCSAI	159
30	Investment (and return) – US model, PRC-NZ FTA, ACIA, AANZFTA, CAIA	171
31	Scope of application and Art. 3, para. 2, CAIA: the mishap	195
32	CAIA application and investor-State arbitration provisions: a registry blur.	211
33	Peru GDP Annual Growth Rate (2008-2012)	222
34	Peru principal exports to China (2012)	229
35	FET and FPS standards – China-NZ FTA, CPEFTA, CAIA, US-Peru FTA	238
36	Expropriation (chapeau) – US-Peru FTA, PRC model '97, CPEFTA	240
37	Canada GDP Annual Growth Rate (2008-2012)	245
38	Canadian Outward Foreign Direct Investment (1980-2012)	249
39	Canadian Inward Foreign Direct Investment (1980-2012)	249
40	Canada China two-way investment (1991-2013)	249
41	Chile GDP Annual Growth Rate (2008-2012)	254
42	Chile-China Trade (2000-2010)	259
43	Structure of the Agreements – US model, CA model '04, CA model '06, PRC-CA, CCSAI	264
44	Investment – US model, Canada model '04, Canada model '06, PRC-CA, CCSAI	294
45	Investment – PRC model '97, US model, CCSAI	304

- List of highlights and styles (applying to all comparative tables relating to stipulations concluded by China).

	Text already acquired under / deriving from the 1984/1989 Chinese Model BITs;
	Text acquired under / deriving from the 1997 Chinese Model BIT;
	Text acquired / deriving from the UK Model BIT, <i>or</i>
	Text acquired / deriving from the Canadian Model BIT (Chapter VI);
	Text acquired / deriving from the German Model BIT;
	Text acquired / deriving from the German Model BIT non featured in Chinese Models yet present in the 2003 China-Germany BIT;
	Text acquired / deriving from the 2008 German Model BIT;
	Text acquired / deriving from the US Model BIT;
	Common / identical / equivalent wording amongst compared agreements;
	Text common amongst China-NZ FTA, ACIA, CAIA, and AANZFTA.
[...]	Minor, unrelated or irrelevant wording;
<b>bold</b>	Relevant modifications, additions or deletions of wording between one version and another (with reference to contiguous Chinese Models only);
<u>underscore</u>	Relevant variations between models not appearing in later texts.

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## INTRODUCTION

In the course of its long imperial history, China's inclination was to regard international relations and power as regulated primarily through the lens of trade and influence, rather than the material possession of overseas territories<sup>1</sup>. The Opium Wars (1839-1842 and 1856-1860) and the 'unequal treaties' that ensued with Western Powers, the collapse of the Empire (1911) and the advent of the People's Republic (1949), temporarily yet greatly changed China's attitude towards foreign trade and investments, which were then effectively discouraged. Such hostility ended in 1978, when the Communist ruling party acknowledged that Zedong's 'Great Leap Forward' campaign effectively contributed to China's 'Great Famine' (1958-1961), and thus shifted for Xiaping's 'Open Doors' policy.

By gradually restoring trade and investment channels with the rest of the world, the 'Open Doors' policy ultimately resulted in China's unparalleled growth over the past 30 years, fuelled by foreign investments. Nevertheless, beside the remarkable economic achievements, it is today still often overlooked that China has become also one of the most active -and influential- actors in international investment law. Notwithstanding a relatively late start, China has weaved, since 1982, a web of 119 Bilateral Investment Treaties (BITs)<sup>2</sup>, plus six free trade agreements (FTAs) featuring a foreign investment protection discipline. Only a handful of States in the world compare (Germany, the UK, France, Switzerland), and the model BIT of two of those (Germany and the UK) represented for long time the principal reference term for China's own model treaty. Indeed, the People's Republic has availed itself of a model BIT since 1984, well before most major economies and capital exporters. Its BIT

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<sup>1</sup> Cf., W. Bernstein, *A splendid exchange – how trade shaped the world*, Grove Press - New York, 2008, pp. 152-198.

<sup>2</sup> Ninety-four of which in force.

program has long constituted a model of uniformity, as the actual stipulations feature very limited variations -if any- among themselves, or between them and the up-to-date Chinese model.

Nonetheless, since the renegotiation of the BIT with Germany, in 2003, China's foreign investment protection program has been undergoing gradual yet major changes, only some of which have caught the attention of the doctrine already. This research thus aims at filling such gap, by reviewing the changes introduced with the arrangements China has become party to between 2005 and 2012, in terms of structure and wording, and their underlying policy rationale. Indeed, the investment protection disciplines stipulated with Pakistan (2006), New Zealand (2008), ASEAN (2009), Peru (2009), Canada (2012), and Chile (2012), all represent steps of an overall coherent policy, by which China displays an increasing concern with the protection of its investors abroad, aside the traditional framework offered to foreign investment in the People's Republic. With the conclusion of those agreements, China has begun entering into FTAs featuring a foreign investment protection regime (in the form either of a chapter within the FTA, or a separate agreement part of a multi-stage FTA project established through a framework agreement). In doing so, China gradually accepted a number of modifications to its otherwise uniform practice. It resulted an increased reliance on the North American models of protection of foreign investments – thus the choice for a more articulated discipline, meant not only to 'offer protection' to international investors on the Mainland's soil, but also aimed at better protect Chinese investments abroad.

To date, only one publication partly covers the analysis presented in this research. It is *Chinese Investment Treaties – Policies and Practice*, a joint effort of Prof. Norah Gallagher

and Prof. Wenhua Shan, published in 2009<sup>3</sup>. Such authoritative text, nevertheless, does not provide for an analytical comparison of the Chinese BIT models and stipulations with those of the other major players in the international investment legal field. Moreover, it refers only to China's practice up to 2008, thus not including the most recent stipulations and developments.

The present research hence focuses on such new stipulations, adopting some thoroughly analytical and comparative approach with regard to the structure and wording each time chosen in the final texts. The work aims at addressing an at least partial response to two authoritative observations made in this respect. Firstly, that differences in BITs have been often overlooked, as well as their impact on the evolution of international investment law over time<sup>4</sup>. Secondly -and with specific regard to China-, that existing research on Chinese BIT is '...either outdated or incomprehensive, confined to a limited number of BITs with States from a particular, albeit important, part of the world'<sup>5</sup>.

The research relies, as a constant term of reference, on the model texts of the world's principal capital exporters, as those texts are evidence of the 'minimum expression of consent' a particular State is prepared to offer vis-à-vis any counterpart. Over forty comparative tables are attached in the relevant parts of the research and in the annex at its end, in order to (literally) highlight the changes brought over the time by China (as well as its major counterparts), in their model texts or actual stipulations. China's new agreements are thus contrasted with the model treaties that have been used as templates (or as reference in

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<sup>3</sup> N. Gallagher & W. Shan, *Chinese investment treaties – policies and practice*, Oxford University Press, 2009.

<sup>4</sup> In this sense, see M. S. Manger, *A quantitative perspective on trends in IIA rules*, in A. De Mestral & C. Lévesque (ed.), *Improving international investment agreements*, Routledge, 2013, pp.76-92, at p. 91.

<sup>5</sup> N. Gallagher & W. Shan, *Chinese investment treaties – policies and practice*, Oxford University Press, 2009, p. 3.

more limited respects) during the negotiations. It results a surprising intertwine of cross-influences, in an overall trend that sees the influence of the Pacific area on the rise, with the old European framework being recalibrated to fit different cultural exigencies, and adjusted to support -or prevent- the development of certain emerging interpretive trends in international investment law.

The present research is thus believed to present the topic in a new perspective. The analysis focuses on the rationale behind the wording upon which consent has been expressed (*i.e.*, the intention of the -Chinese- Party), and looks systematically at the changes introduced in each text, by comparing it with models, earlier and concurrent stipulations. Such task has been carried out first and foremost with reference to *i)* the structure of the agreements each time under analysis, *ii)* the application provision, and *iii)* the notion of investment. The analysis of the other main provisions is performed with regard to those pivotal agreements where ‘evolutionary milestones’ have been marked (*e.g.*, the China-New Zealand FTA, or the China-Chile FTA). Hence, the research does not extend the thorough analytical approach to all provisions of all agreements. Scope of this work is to explore trend and extent of China’s change of stance towards international investment law, from instrument aimed at luring investments from capital-exporting States to tool equally meant to protect Chinese investment abroad. In particular, the research stresses those elements which, in the text of the subsequent treaties, are not subject to change, thus highlighting China’s core interests.

In order to understand the rationale of some choices, however, the legal text may not always suffice. For this reason, the legal analysis of the most significant stipulations is nestled in the wider geopolitical, trade and investment web of relations that China enjoys with the

relevant counterparts. Comparative references are also made to the G7, G8, G20 and BRICS groups, the OECD States' macroeconomics, as well as those States with the widest and most influential investment treaty programs.

As mentioned, to date a comparative analysis of Chinese investment texts is lacking. Consequently, the more analytical strands of this research do not depend on external sources, such as doctrine or case law. Indeed, it would be uneasy to rely upon on the latter, as China holds the rather enviable record of not having been brought before an investment tribunal so far<sup>6</sup>. Chinese investors, to the contrary, have begun taking advantage of China's investment treaty network for the protection of their investments abroad<sup>7</sup>.

China is, nonetheless, proving not deaf to the critical interpretive developments in the international investment case-law, nor to the doctrinal debate ensuing from it. Where innovations in the wording of a treaty are adopted in relation (or as a reaction) to any such trends (*e.g.*, notion of investment, applicability of the MFN clause), such changes and their rationale are duly pointed out and illustrated.

A brief summary of the content of the thesis, which comprises six Chapters, is provided below.

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<sup>6</sup> At least, not in a publicly known case; the achievement is particularly remarkable if one considers, by comparison, that States with much less significant demographics, territorial extension and foreign investment inflow, are in a quite different situation. For instance, Slovenia has signed its first BIT in 1993 (with China, more than a decade after the latter begun its BIT program), yet it has been involved in three ICSID cases already (two of which, currently pending).

<sup>7</sup> Cf., *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6.

Chapter I opens the research by offering a brief review of the recent history of BITs, from their European origin to the current ‘Pacific lead’<sup>8</sup>, by comparatively analyzing the treaty-making activity in the field of traditional capital exporters as well as of emerging economies (Section A). The Chapter then explores the history of FDI and BITs in China: from exclusion to the beginning of the BIT program, its great expansion and, lastly, the recent launch of the FTA program (Section B).

Chapter II focuses, firstly, on the three Chinese Model BITs (1984, 1989 and 1997), outlining structure and key notions, and highlighting the changes China introduced over the time (Section A). Subsequently, a thorough comparative analysis over the provision of scope and the notion of investment, between the current Chinese Model BIT and the principal model texts, reveals the tight relation between the former and the European models (Section B). The peculiar Chinese model-making technique – which borrows elements from different models within a single provision, in the attempt to forge a clear text to serve as basis for a uniform BIT program – is examined in detail.

The following Chapters focus on the investment protection discipline China agreed to in the major bilateral stipulations concluded between 2006 and 2012 – *i.e.*, since embarking in the FTA program.

Chapter III centers on the 2006 China-Pakistan FTA, the first Chinese arrangement of the kind featuring a discipline for the protection of foreign investments. After the trade, investment and political outline (Section A) follows the actual review of the agreement (Section B) – which, however, under the investment protection regime offers limited innovations, being a reproduction of China’s latest model BIT.

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<sup>8</sup> Cf., China and ASEAN activity in the region (cf., Chapter IV), as well as Chile (cf., Chapter VI), or the negotiations for the Trans-Pacific Partnership Agreement.

Chapter IV turns to what I defined the ‘Western Pacific frenzy’: between 2008 and 2009, four articulated agreements have been concluded in the Southwest Pacific area – all of which comprise, or establish, a foreign investment protection regime. These are *i)* the China-New Zealand FTA, *ii)* the ASEAN’s Comprehensive Investment Agreement, *iii)* the China-ASEAN Agreement on Investment, and *iv)* the ASEAN-Australia-New Zealand FTA. These treaties, whose parties and negotiations overlap for the most part, deeply influenced the final text of one another, and contributed in establishing a comprehensive and relatively uniform investment regime in the region. Nevertheless, beside the similarities, it is through the -at time, subtle- differences that the core interests of the relevant parties emerge. The Chapter thus first considers the political, trade and investment factors behind China’s agreements with New Zealand and ASEAN (Section A). Subsequently, the comparative analysis focuses on the structure of the four interrelated texts, and then on the notion of investment (Section B). The following two Sections are devoted to a review of the foreign investment protection regime – and the specific choices of words – established with the China-New Zealand FTA (Section C) and the China-ASEAN Investment Agreement (Section D). The last section wraps up the major changes China accepted in the new stipulations, and highlights those elements now shared with, or closer to, the discipline featured in the North American models (Section E).

Chapter V is devoted to China’s 2009 FTA with Peru. The Chapter firstly briefly summarizes the economic and political ties between the parties (Section A); secondly, it reviews the agreement’s trade and investment rationale (Section B); lastly, it offers an analysis of the foreign investment protection regime featured in the stipulation, with comparative reference being made to the agreement’s templates (Section C). Despite some additions derived from the US Model, and some original formulations, the China-Peru FTA, as mentioned, appears to be more of a ‘transition agreement’, signed in between China’s shift

from the European to the North American model of protection of foreign investment. In 2009, China proved either unprepared or unwilling to move towards an agreement such as that Peru enjoyed already with the US since 2006.

Chapter VI, at last, focuses on the most recent -and, in many respects, significant- Chinese arrangements in the field: the China-Canada BIT and the China-Chile Supplementary Agreement on Investment. Firstly, China's political and economic bonds with each of the two States are outlined (Section A); secondly, the analysis turns to the agreements' structure, from a comparative perspective between the agreements, as well as with the relevant templates (*i.e.*, Canadian, US and Chinese models) (Section B); then, a thorough investigation of the changes brought in the notion of investment in both agreements is carried out (Section C), paving the way to the concluding remarks on China's further shift for the North American model (Section D).

As mentioned, each agreement is preliminarily scrutinized under its political, trade and investment rationale. Indeed, in the last few years China acquired, next to its trade weight, also an investment capacity superior to that of most OECD States. Consequently, its stance in the matter of foreign investment protection – traditionally conservative, as a capital-importing State – had necessarily to change, in light to the growing outflow of Chinese investment. Such a change is reflected in China's apparent adoption of a more flexible approach which, while still grounded on its BIT experience, is open to innovations coming from trusted, reliable or more experienced States.

Therefore, where the conclusion of the agreement is driven principally by a *political* rationale (*e.g.*, FTA with Pakistan), the stipulation is limited to reproduce the latest Chinese model BIT within the FTA investment chapter, thus simply updating the previous regime.

Innovations in the text of the treaty will be limited also where trade and investment relationships are ‘unilateral’, with China in the position of principal trade partner and capital-exporting State (*i.e.*, FTA with Peru). On the other hand, the conclusion of the agreements with New Zealand and Chile -small yet developed OECD economies- turned out more sophisticated results: indeed, the new investment discipline featured in those stipulations constituted a preparatory round to future more complex negotiations. It is not a coincidence that, at about the same time, long protracted negotiations with Canada would finally be brought to an end, with the signature of a long-sought BIT. Lastly, considerable political, trade and investment rationales all underlie China’s Agreement on Investment with ASEAN. It is with such an increasingly relevant partner (and neighbor) that China appears to have found a shared understanding of the investment treaty regime and, consequently, struck a balance between its conservative grasp of State sovereignty and consent, on the one hand, and the protection of foreign investment (incoming as well as outgoing), on the other.

The analysis of the arrangements considered throughout this research shows that China has cautiously undertaken a process of gradual modernization of its foreign investment protection standards. Once central references, the German and British model BITs are being partially substituted with elements and content borrowed from the North American models. The transitory nature of the current *status quo* is, nonetheless, particularly evident in the latest bilateral agreements with Canada and Chile. The process is still *in fieri*, and the research devotes particular attention to those typical Chinese elements in the text of the treaties which, despite the changes, have remained unaltered – thus highlighting China’s core interests in negotiating an investment agreement.

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# **I. THE RISE OF A TRADE AND INVESTMENT BEHEMOTH: THE PEOPLE'S REPUBLIC OF CHINA**

## **A. Investment agreements' history, policy and the current shift towards Southeast Asia: an outline**

### *1. The European root of BITs*

At their origin, Bilateral Investment Treaties (hereinafter, BITs) were conceived as instruments for major European capital-exporting States to 'promote and protect' their businesses in poor capital-importing States<sup>9</sup>. Their main purpose '...was historically that of protecting investments from the industrialized party into the developing one, thereby (hopefully) attracting capital into the latter's economy'<sup>10</sup>.

The first BIT was signed between the Federal Republic of Germany and Pakistan, on Nov. 25<sup>th</sup>, 1959. Between 1959 and 1963, BITs have been a monopoly of Germany (and Switzerland<sup>11</sup>). The influence of Germany in shaping investment law and treaty models may be inferred by looking at the stipulations concluded around 'peak' moments in the course of international investment law history – with regard to the international community at large, as well as China in particular<sup>12</sup>. In 1963, the Netherlands first (in March, with Tunisia) and

<sup>9</sup> Cf., R. Dolzer, M. Stevens, *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, 1995, p. 1: 'BITs are European in origin'; such theoretical axiom has started to change very recently only: by the end of 2008, only 26% of all BITs were South-South treaties, and only 9% North-North; source: UNCTAD, *World Investment Report 2009*, p. 33; available at <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=743>.

<sup>10</sup> G. Sacerdoti, *Bilateral treaties and multilateral instruments on investment protection*, in *Recueil des cours de l'Académie de Droit International de la Haye*, vol. 251, 327-328 (1997).

<sup>11</sup> Switzerland has been the second State to begin a BIT program; it signed its first BIT in 1961, with Tunisia. By the time the Netherlands signed its first, in 1963, Switzerland was party to 7 BITs already.

<sup>12</sup> See Table 1, below; for a review of the evolution of the model investment discipline of Germany, see R. Dolzer and Y. Kim, *Germany*, in C. Brown (ed.), *Commentaries on selected model investment treaties*, Oxford University Press, 2013, pp. 289-320.

France soon afterward (in August, also with Tunisia) signed their first BIT. Italy followed in 1964, with Guinea. While the Netherlands and Italy continued over the subsequent years their BIT programs – The Netherlands with Cote d’Ivoire and Cameroon (1965), Indonesia (1968), Tanzania, Uganda, Sudan and Kenya (1970); Italy with Malta (1967), Gabon (1968), Chad and Cote d’Ivoire (1969) –, France halted its own for almost a decade<sup>13</sup>. Sweden as well figures among the early starters, as its first BIT was concluded in 1965 already (with Cote d’Ivoire<sup>14</sup>). The United Kingdom – more focused on treaties of ‘Friendship, Commerce and Navigation’ (FCN)<sup>15</sup> and on intra-Commonwealth trade and investment privileges – signed its first BITs in 1975 only (with Egypt and Singapore)<sup>16</sup>; nevertheless, it has subsequently proceeded at a fast pace (Romania and Indonesia, in 1976, Thailand in 1978, Sri Lanka, in 1980).

Some scholars, however, considers most of the early stipulations only as forerunners of current BITs. The actual first instance of a modern investment treaty would be the 1969 Italy-Chad BIT<sup>17</sup> – the first combining substantive investment protection to binding ICSID investor-State arbitration<sup>18</sup>. In the 1990s, such type of BIT will represent by far the majority

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<sup>13</sup> There will not be another French BIT until 1972 – which will be a renegotiation of that with Tunisia.

<sup>14</sup> Cote d’Ivoire appears to have represented at the time for BITs what Chile is today with regard to FTAs: by 1966 already, it enjoyed agreements with Switzerland, The Netherlands, Italy, Sweden and Germany.

<sup>15</sup> Despite primarily concerned with trade, FCNs are considered the forerunners of BITs as they features, *inter alia*, guarantees on property rights and business interests foreigners; according to *Dolzer (1995)*, p.11, however, ‘...the broad spectrum of close political, economic and cultural cooperation which was envisaged by FCNs (such as unrestricted right to entry and the unqualified right of national treatment) were thought to be incompatible with the new political realities [of the late 1950s]’, and this brought to the end of the stipulation of FNCs in 1966 (with the conclusion of the last two: US-Togo and US-Thailand).

<sup>16</sup> The first BIT the UK will sign with a Commonwealth State will be in 1980, with Sri Lanka.

<sup>17</sup> A. Newcombe, *Developments in IIA treaty-making*, in A. De Mestral & C. Lévesque (ed.), *Improving international investment agreements*, Routledge, 2013, p. 17.

<sup>18</sup> Art. 7 reads: ‘Tout différend concernant les investissements, objet du présent Accord, qui s’élèverait entre un Etat contractant (ou n’importe quelle Institution ou Organisation dépendante ou contrôlée par le même Etat) et

of those stipulated. By 1979, however, States had concluded only approximately 100 BITs, most of which between major Western European States and developing States. BITs were, thus, expanding at a slow pace (and the ICSID, a dormant system<sup>19</sup>). It was perhaps too early, for often newly independent States, to consent to the sovereign restraints a BIT implies (especially, vis-à-vis ex-colonizers)<sup>20</sup>.

As of the non-European G7 economies, Japan's traditional emphasis on trade, rather than foreign investments<sup>21</sup>, may explain why it entered into its first BIT at a later stage (*i.e.*, in 1977, with Egypt<sup>22</sup>), and still today it is party to only 20 of them<sup>23</sup>. The US, even more than the UK, attempted at keeping its long-standing policy based on bilateral FCN treaties<sup>24</sup>. It consequently signed its first BITs in 1982 (with Egypt and Panama), the same year as China. While the US developed its first model text a few years later (in 1987), its strategy first shifted towards the conclusion of over sixty 'Trade and Investment Framework

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une personne physique ou morale, ayant la nationalité de l'autre Etat, sera soumis à la juridiction du Centre International pour le règlement des différends relatifs aux investissements, conformément à la Convention Internationale de Washington du 18 mars 1965. Toute contestation ou tout différend entre les deux Etats, portant sur l'interprétation ou l'application du présent Accord, seront réglés par la voie diplomatique'.

<sup>19</sup> The first ICSID award was rendered on Aug. 29th, 1977, in the case involving the Italian investor *Adriano Gardella S.p.A. v. Côte d'Ivoire* (ICSID Case No. ARB/74/1).

<sup>20</sup> Such resistance on the part of developing States is exemplified by Resolution A/RES/S-6/3201, *Declaration for the establishment of a new international economic order*, adopted by the General Assembly of the United Nations in 1974; also of 1974, General Assembly Resolution A/RES/29/3281, *Charter of economic rights and duties of States*.

<sup>21</sup> Already noted back in 1995 by Dolzer (*cf.*, *Dolzer (1995)*, p. 3) and maintained until nowadays (*cf.*, Table 1).

<sup>22</sup> Since its first BIT with Switzerland (1973), Egypt has rapidly concluded BITs with all major capital-exporters: Germany and France in 1974, Italy in 1975, The Netherlands in 1976, Japan in 1977 and the US in 1982; notably, Egypt appears also to be the first developing State to have signed a BIT with another developing State (*i.e.*, the Egypt-Morocco BIT, of 1976).

<sup>23</sup> ICSID online database: [http://unctad.org/Sections/dite\\_pcbp/docs/bits\\_japan.pdf](http://unctad.org/Sections/dite_pcbp/docs/bits_japan.pdf).

<sup>24</sup> The US entered into over 100 of such treaties (starting with the Treaty of Amity and Commerce with France in 1782).

Agreements'<sup>25</sup>. Despite officially labeled in a number of ways, these instruments serve primarily the purpose to provide for an annual bilateral forum '...to meet and discuss issues of mutual interest with the objective of improving cooperation and enhancing opportunities for trade and investment'<sup>26</sup>. Systematic BIT negotiations would be pursued only in the course of the 1990s<sup>27</sup>. As of Canada, the first BIT was signed with a dusking USSR, in 1988.

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<sup>25</sup> The US continue still today to conclude these agreements; for instance, in 2006 it signed a 'Trade and Investment Framework Arrangement' with the ASEAN (the text of the arrangement is available at: [http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset\\_upload\\_file932\\_9760.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file932_9760.pdf)).

<sup>26</sup> According to the US Trade Representative official website (<http://www.ustr.gov/trade-agreements/trade-investment-framework-agreements>).

<sup>27</sup> For a review of the early US BIT program, see K. J. Vandavelde, *The Bilateral Investment Treaties program of the United State*, in *Cornell Journal of International Law*, vol. 21, 1988; pp. 208-211. Despite the late start, since joining the trend of modern BITs the US is found to have been '...at the forefront of varying the pattern started by Germany by the way of dramatically extending its length, and also by deviating from the basic pattern by way of combining matters of trade and investment in Free Trade Agreements instead of concluding solely investment-focused agreements', see. R. Dolzer and Y. Kim, *Germany*, in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties*, Oxford University Press, 2013, p. 291.

<b>Table 1</b>						
<b>BITs concluded by G7 States (plus Switzerland and Sweden)</b>						
<i>-selected years / total number of BITs-</i>						
	1967 <sup>28</sup> /	1982 <sup>29</sup> /	1983 <sup>30</sup> /	1984 <sup>31</sup> /	1994 <sup>32</sup> /	2013 <sup>33</sup> /
	63	201	220	229	>700	>2860
Germany	33 (>50%)	55 (>25%)	58 (>25%)	59 (>25%)	>90 (>10%)	136/127 (>5%)
France	1	19	23	26 <sup>34</sup>	48	102/91
UK	0	17	21	22	>60	104/92
Italy	1	7	7	7	30	93/73
Japan	0	2	2	2	4	20/15
US	0	0	2	4	24	46/40
Canada	0	0	0	0	6	33/27
Switzerland	16	32	32	33	>60	118/111
Sweden	3	8 <sup>35</sup>	9	9	18	65/62

A notable conceptual difference between Europe and North America (especially, since 2004) is that, through BITs, the latter emphasizes the aspect of investment liberalization and free movement of capital flows, while the former seeks to secure first the ‘promotion and

<sup>28</sup> Release of the Draft Convention on the Protection of Foreign Property.

<sup>29</sup> First Chinese BIT, with Sweden.

<sup>30</sup> China-Germany BIT.

<sup>31</sup> First Chinese Model BIT.

<sup>32</sup> Figures for 1994 are extracted from *Dolzer (1995)*, pp. 267-285.

<sup>33</sup> BIT signed / BIT in force; source: UNCTAD online database (<https://icsid.worldbank.org/ICSID/FrontServlet>), figures updated to June 2013; the total number of BITs currently in force is indicated in *International investment policymaking in transition: challenges and opportunities of treaty renewal*, UNCTAD paper no. 4, June 2013, available at: [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf).

<sup>34</sup> The 26<sup>th</sup> Agreement being the 1984 China-France BIT.

<sup>35</sup> The 8<sup>th</sup> Agreement being the 1982 China-Sweden BIT.

protection' of investments. Nevertheless, still in 2006 investment liberalization was perceived as a '*per se* newly contentious global issue'<sup>36</sup> and, beside wider and deeper forms of integration among States (*e.g.*, EU, NAFTA or ASEAN), most of them – especially, developing States – oppose it<sup>37</sup>.

## 2. The changing shift

Today, BITs are in excess of 2800, plus roughly some 340 trade, partnership or framework international agreements with an investment dimension<sup>38</sup>. Over half of these are with (or between) European States. Currently, it appears that virtually almost-all relevant BITs have been signed: year 2012 has witnessed the conclusion of only 20 new agreements – marking the yearly lowest in a quarter century<sup>39</sup>. In this respect, two factors, affecting the future of investment agreements – both in terms of the States propelling their conclusion, as well as in the evolution of their provisions (and structure) – are currently challenging the Euro-centric *status quo*.

The first is of a political nature. BITs – especially, those less recent yet still in force – are being object of intense scrutiny by legislators and scholars all over the world. Following

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<sup>36</sup> C. Huiping, *China-ASEAN investment agreement negotiations: the substantive issues*, in *The journal of world investment & trade : law, economics, politics*, vol. 7, 2006, p. 144.

<sup>37</sup> *e.g.*, ASEAN Member States accepted investment liberalization in the 'Framework Agreement on ASEAN Investment Area', but strictly limited to the ASEAN area; singular ASEAN Members – such as Malaysia, Indonesia, Thailand and the Philippines – along many other States such as, *e.g.*, India and China, still oppose it; nevertheless, ASEAN insisted for liberalization within the China-ASEAN FTA framework (*cf.*, Chapter IV, Section D1).

<sup>38</sup> UNCTAD *paper no. 4/2013, supra*, fn. 33, p.1.

<sup>39</sup> UNCTAD, *World investment report 2013 – Global value chains: investment and trade for development*; 2013, p. 101; available at : [http://unctad.org/en/PublicationsLibrary/wir2013\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf).

the surge of investment arbitral cases (ICSID or non-ICSID)<sup>40</sup>, some decisions have revealed the potential costs for host States of foreign investors' claims. As a result, some developing States have terminated their BITs, or withdrawn from the ICSID Convention<sup>41</sup>. States have become concerned about (further) expansionary interpretations of what are already perceived as systemically investor-oriented arbitral panels<sup>42</sup>; governments started criticizing the BITs language, as 'intended to capture or threaten to capture a wide range of State activities', resulting in them being 'legally constrained from pursuing a range of legislative strategies that significantly impair investment interests'<sup>43</sup>; national interest groups vocally manifested their concerns over the BITs' failure to consider environmental and human rights interests<sup>44</sup>. Consequently, innovations in recent Model BITs reflect the efforts of an increasing number of States to find a new balance between two competing objectives: the promotion and protection of investments, and the right to properly regulate for public welfare purposes<sup>45</sup>.

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<sup>40</sup> See Table 2, below.

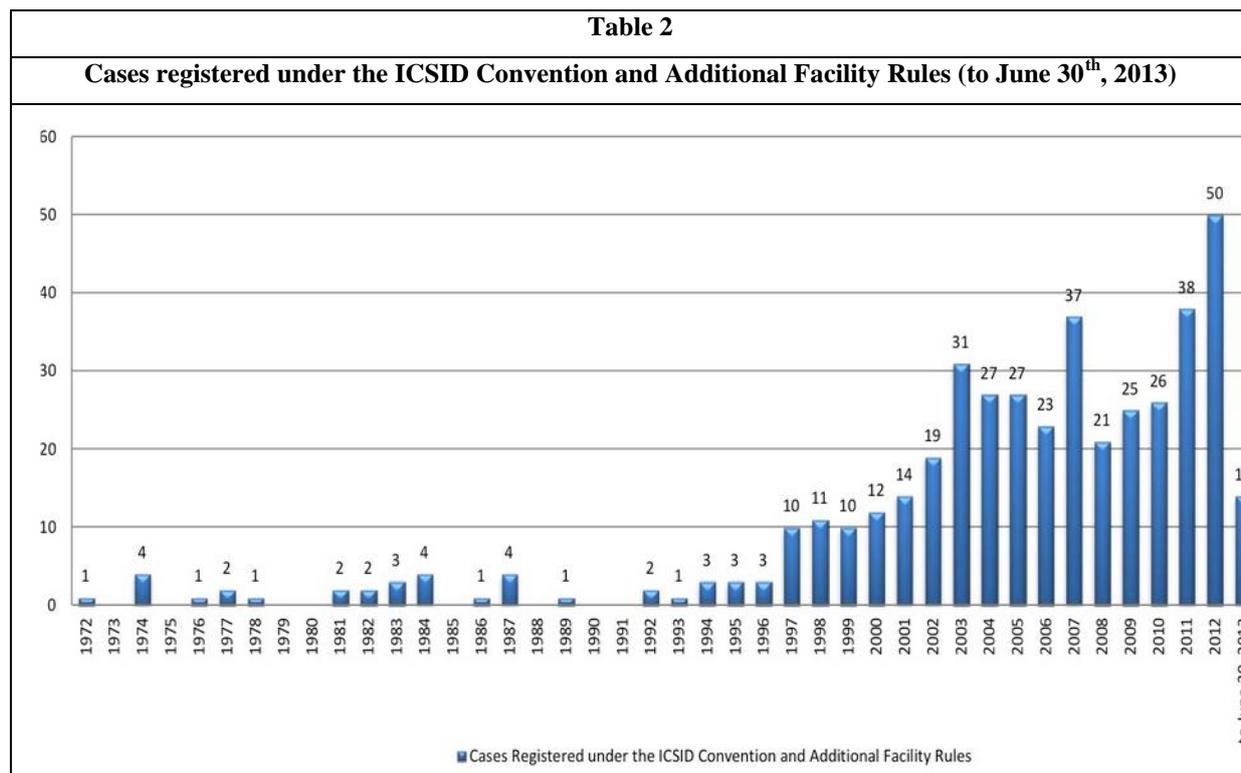
<sup>41</sup> *e.g.*, in Apr. 2007, Bolivia submitted a letter to ICSID, under Art. 71, announcing its decision to withdraw from the ICSID Convention; in Dec. 2007, Peru notified ICSID it withdrew consent for investment arbitrations in the mining and energy sectors; in Nov. 2008, Venezuela communicated to the Netherlands its intention to terminate the Dutch-Venezuela BIT; Ecuador has denounced 9 of its 25 BITs, and announced the renegotiation of the remaining 16; between 2012 and 2013, South Africa terminated the agreements with Luxembourg, Spain, Belgium and Germany. See UNCTAD, *Recent Developments in International Investment Agreements (2007–June 2008)*, New York and Geneva: United Nations, 2008, pp. 4-6, available at: [http://unctad.org/en/docs/webdiaeia20081\\_en.pdf](http://unctad.org/en/docs/webdiaeia20081_en.pdf). For the policies of BRICS states, see further below in this Section, and the next.

<sup>42</sup> See J. Paulsson, *The Denial of Justice in International Law*, Cambridge University Press, 2005, pp. 228-62; M. Sornarajah, *The Retreat of Neo-Liberalism in Investment Treaty Arbitration*, in C. A. Rogers and R. P. Alford (eds.), *The Future of Investment Arbitration*, Oxford University Press, 2009, p. 291; T. H. Yen, *East Asian investment treaties in the integration process: quo vadis?*, in R. P. Buckley, R. Weixing Hu and D. W. Arner (eds.), *East Asian Economic Integration- Law, Trade and Finance*, Elgar, 2011; Chapter 8, pp.183-204.

<sup>43</sup> D. Schneiderman, *Constitutionalizing Economic Globalization*, Cambridge University Press, 2008, pp. 34 and 37-8.

<sup>44</sup> M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, 2004, p. 259.

<sup>45</sup> M. A. Clodfelter, *The adaptation of States to the changing world of investment protection through Model BITs*, ICSID review, no. 24(1), 2009, p. 174.



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The second argument is of an economic nature. The equilibrium of global investment flows – which set the basis of the current BIT framework – is changing quickly: in 2012, developing States have taken over developed States as overall main recipient of FDIs<sup>47</sup>. Within such trend, Europe accounted for almost two thirds of the global FDI decline for 2012, with FDI outflows falling over 37% (to levels similar to financially-troubled 2009, one third from the peak record of 2007), and inflows of 42% (to levels comparable to 2002)<sup>48</sup>. While all major European States still figure amongst the top 20 investor economies world-wide (and are still perceived amongst the most promising investors abroad), the rise of new actors – most

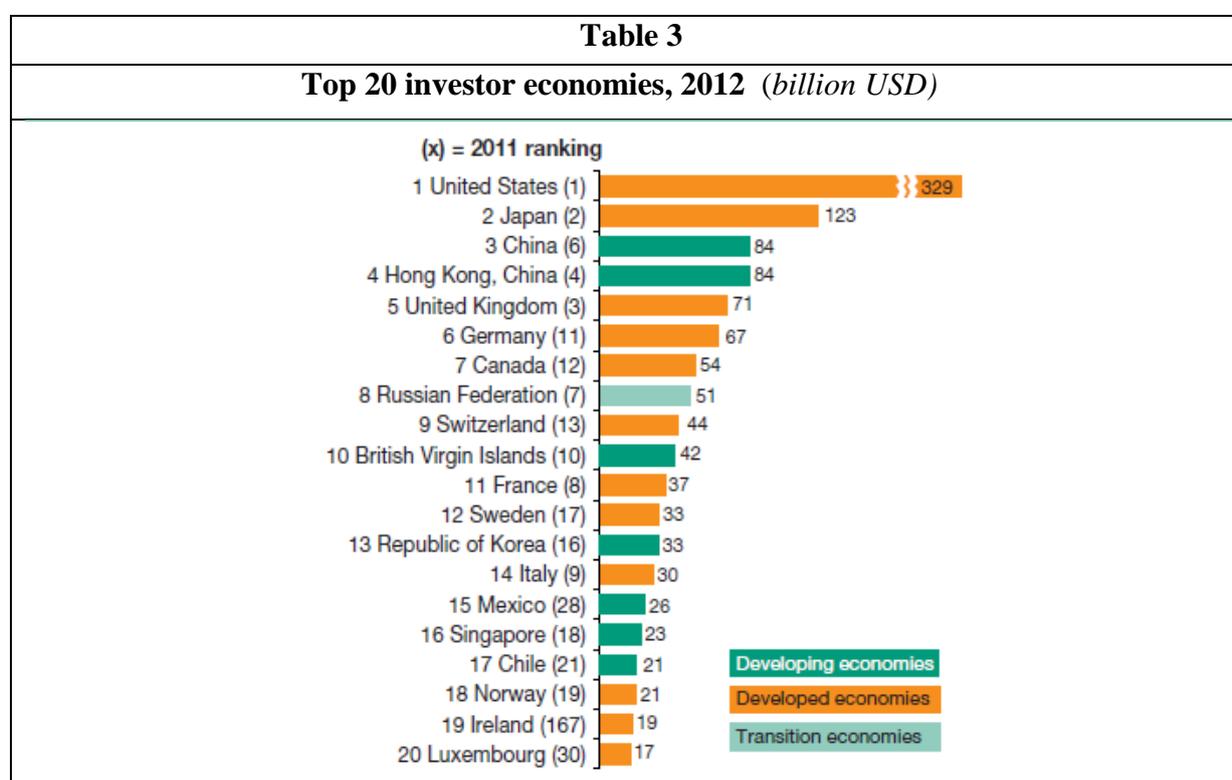
<sup>46</sup> Courtesy of Prof. J. Pauwelyn.

<sup>47</sup> UNCTAD *inv. rep.* 2013, p. 67-72

<sup>48</sup> UNCTAD, *inv. rep.*, 2013, p. 67-72; see, also, Table 4, below.

notably, China – is ever more consistent<sup>49</sup>. It is significant that today the total FDI outward flow from Asia accounts for a share similar to that of the EU (roughly, 22% of the global flow), with BRICS economies, for instance, figuring as top investors in Africa<sup>50</sup>, and major partners in most South American States.

Hence, the roots of the international investment regime may lay in Europe; its future development, however, is believed to rest on Southeast Asia's hands, with China playing an ever more consistent role within and without the region.

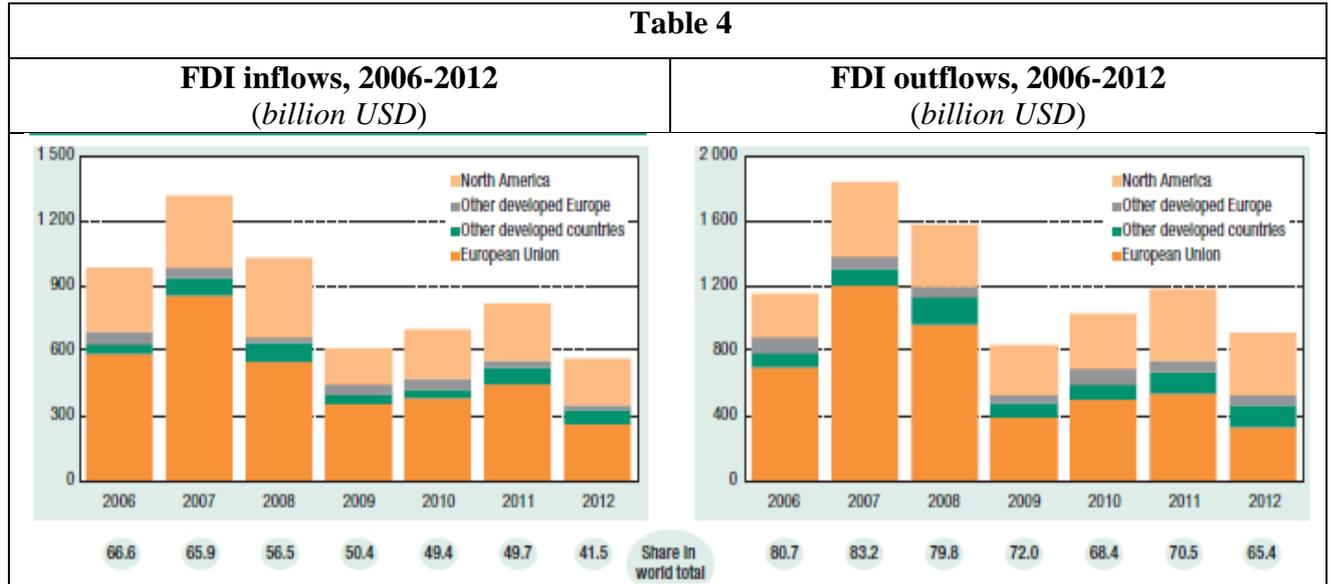


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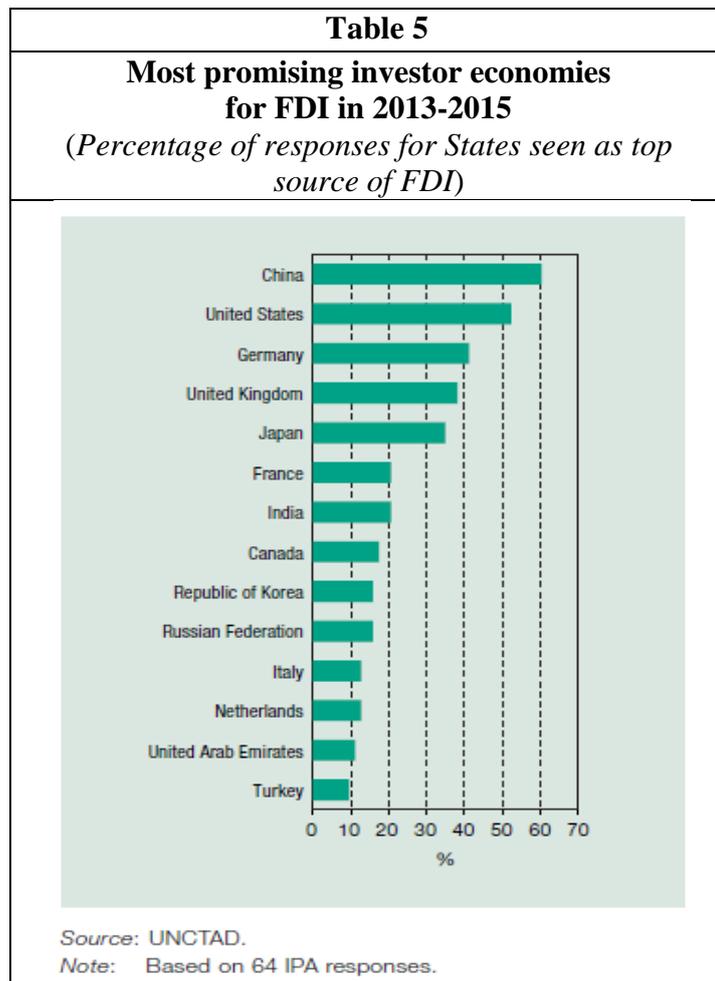
<sup>49</sup> See Tables 3, 4 and 5.

<sup>50</sup> UNCTAD *inv. rep.* 2013, p.5.

<sup>51</sup> Statistic available at the UNCTAD website: [www.unctad.org/fdistatistics](http://www.unctad.org/fdistatistics).



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<sup>52</sup> UNCTAD inv. rep. 2013, p. 63.

### 3. The Chinese experience with investment treaty-making

It is on the ‘C’ of the ‘BRIC’ acronym that the present research focuses, as the current heavyweight of the group – under a demographic, economic, and political perspective. Also, China’s extensive network of investment agreements (second, in the world, only to Germany) results by its early engagement with international investment law (it signed the first BIT in 1982, with Sweden). China today enjoys a network of 119 BITs (of which 94 in force)<sup>54</sup>, plus 6 FTAs featuring a complete investment protection regime. The comparison with the other BRICS States is revealing:

- **Brazil** signed its first BIT in 1994 (with Portugal), signed 17 other BITs but ratified none of them<sup>55</sup> (and it looks unwilling to do so any time soon);
- **Russia** signed its first BIT in 1989 (as USSR, with the Belgium-Luxembourg Economic Union); signed 71 further agreements and has ratified 51 of them<sup>56</sup>;
- **India** signed its first BIT in 1994 (with the UK); as of today, it is signatory to other 83 agreements and has ratified 68 of them<sup>57</sup>;

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<sup>53</sup> UNCTAD *inv. rep. 2013*, p.21.

<sup>54</sup> Source: UNCTAD online database, updated to June 2013: [http://unctad.org/Sections/dite\\_pcbb/docs/bits\\_china.pdf](http://unctad.org/Sections/dite_pcbb/docs/bits_china.pdf); many scholars, however, indicate a higher number; according to the ICSID online database, Chinese BITs are 90, cf., <https://icsid.worldbank.org/ICSID/FrontServlet>; Trakman, instead, refers to over 130 BITs: see L.E. Trakman, *China and Foreign Direct Investment: does distance lend enchantment to the view?*, in *The Chinese Journal of Comparative Law*, vol. 1, issue 2, October 2013, p.2; available at: <http://cjcl.oxfordjournals.org/content/early/2013/09/28/cjcl.cxt015.full#xref-fn-33-1>.

<sup>55</sup> *Id.*: [http://unctad.org/Sections/dite\\_pcbb/docs/bits\\_brazil.pdf](http://unctad.org/Sections/dite_pcbb/docs/bits_brazil.pdf).

<sup>56</sup> *Id.*: [http://unctad.org/Sections/dite\\_pcbb/docs/bits\\_russia.pdf](http://unctad.org/Sections/dite_pcbb/docs/bits_russia.pdf).

<sup>57</sup> *Id.*: [http://unctad.org/Sections/dite\\_pcbb/docs/bits\\_india.pdf](http://unctad.org/Sections/dite_pcbb/docs/bits_india.pdf).

- *South Africa* signed its first BIT in 1994 as well (always with the UK), has signed 46 agreements and ratified 23 of them<sup>58</sup> (at least four of which, however, it has denounced already).

Of these States, only India has a model BIT (of 1993). Conversely, China appears to have adopted a model since 1984 – and, by 1993, it was considering the adoption of its third official update.

In addition, with the exclusion of Russia, the other three States currently display a negative attitude toward agreements for the protection of foreign investors and their investments: Brazil refuses to sign new BITs, and never ratified any of those it signed; South Africa is pursuing a rather steady policy of termination of its BITs<sup>59</sup>; and India has recently frozen all ongoing negotiations, pending the adoption of the new model text<sup>60</sup>.

China, while imposing certain limitations, has been by far the most active and open in pursuing a coherent policy on investment at the international level. Together with a number of domestic reforms, this has resulted in the creation of an environment sufficiently friendly to let western investors forget the nature and past history of the regime governing the Middle Kingdom.

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<sup>58</sup> *Id.*: [http://unctad.org/Sections/dite\\_pccb/docs/bits\\_south\\_africa.pdf](http://unctad.org/Sections/dite_pccb/docs/bits_south_africa.pdf).

<sup>59</sup> Notwithstanding the release of the SADC Model BIT, in July 2012, South Africa has terminated the agreements with Luxembourg, Spain, Belgium and, in October 2013, Germany).

<sup>60</sup> See, e.g., S. Mehdudia, *BIPA talks put on hold*, in *The Hindu*, Jan. 22<sup>nd</sup>, 2013, available at: <http://www.thehindu.com/business/Economy/bipa-talks-put-on-hold/article4329332.ece>.

## **B. China's policy evolution towards FDI and BITs (1949-2013): outline and remarks**

### *1. China and FDI: main periods*

In their celebrated '*Chinese investment treaties – policies and practice*'<sup>61</sup>, of 2009, Prof. Norah Gallagher and Prof. Wenhua Shan divide the history of FDI in China into four periods<sup>62</sup>:

- 1) Nationalization and exclusion (1949-1978),
- 2) Gradual resumption (1979-1991),
- 3) First surge (1992-2000), and
- 4) Second surge (2001-present).

With regard to the Chinese BIT program, since its inception in 1982, they propose three periods (each approximately corresponding to the introduction of a new model text):

- 1) Firstly, the 1980s, with first-generation BITs (tied, since 1984, to the first Chinese Model BIT, adopted that year);
- 2) Secondly, most of the 1990s, comprising first and second-generation BITs (the latter, based on the second Chinese Model BIT, of 1989); and,
- 3) Thirdly, third-generation BITs of the late 1990s (most of which based on the 1997 Model BIT).

It is believed that a fourth period should be added to the previous three, starting from 2006<sup>63</sup>: then, China begun venturing in the territory of FTAs featuring an investment

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<sup>61</sup> N. Gallagher & W. Shan, *Chinese investment treaties – policies and practice*, Oxford University Press, 2009.

<sup>62</sup> *Gallagher & Shan (2009)*, p. 4. L. Li, instead, divides the Chinese BIT program in two phases: 1982-1996 and from 1997 on, with each phase comprising a number of 'sub-phases'; cf., L. Li, *Chinese BIT practice and challenges*, in *Chinese Journal of International and Economic Law*, vol. 17, issue 4, 2010, p. 4.

<sup>63</sup> Such fourth period could begin in 2003 as well, with the renegotiation of the 1983 China-Germany BIT; however, for how innovative such an agreement has been, China will not grant the same standards to another

chapter<sup>64</sup>, followed by the stipulation (and completion) of multi-stage integrated FTAs comprising investment agreements<sup>65</sup>, together with the gradual shift for the North American models' language and structure<sup>66</sup>.

Nevertheless, although each generation of BITs characterized a given period, BITs of different generations may still be negotiated and coexist within a given period<sup>67</sup>.

## 2. From exclusion to resumption

Since its establishment, in 1949, and until 1978, the People's Republic of China opposed FDIs. Before 1949, foreign investors in China controlled key sectors such as railway, mining, textiles, and navigation<sup>68</sup>. Early Chinese Communist governments never explicitly considered a nationalization program (or admitted it ever happened). Nevertheless, the commitment to eliminate foreign investments resulted in that, by 1956, those were effectively eliminated from the country – and, for the following twenty years, excluded<sup>69</sup>. The government favored the 'socialist transformation of capitalist industry and commerce' (also

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State until the 2008 FTA with New Zealand; that is why, rather than relying on an exceptional BIT, the first FTA featuring an FDI protection regime is thought more significant.

<sup>64</sup> China-Pakistan FTA (2006), China-New Zealand FTA (2008), China-Peru FTA (2009).

<sup>65</sup> China-ASEAN Investment Agreement (2009); China-Chile Supplementary Agreement on Investments (2012).

<sup>66</sup> China-Canada BIT (2012) and China-Japan-Korea TIA (2012).

<sup>67</sup> The rationale of such a policy is illustrated further below; in this sense, see also *Gallagher & Shan (2009)*, p. 35, and N. Gallagher & W. Shan, *China*, in *Commentaries to Selected Model Investment Treaties*, C. Brown (ed.), Oxford University Press, 2013, Chapter 4.

<sup>68</sup> T. N. Thompson, *China's nationalization of foreign firms: the politics of hostage capitalism - 1949-1957*, University of Maryland Law School, Occasional Papers/Reprints Series in Contemporary Asian Studies, 1979, n.6 (27), p. 3.

<sup>69</sup> *Id.*, p.10; the sole exceptions being some joint ventures with Soviet Union States.

known as ‘hostage capitalism’ or ‘creeping expropriation’), resorting on occasion to some ‘retaliatory requisitions’<sup>70</sup>. Such an hostility toward foreign investments, investors and international stipulations on the matter was justified, in the eyes of China’s rulers, by two reasons. First, China’s negative experience with the ‘unequal treaties’ with Western States<sup>71</sup> – which brought large segments of Chinese society to regard trade and investment treaties as ‘imperialistic impositions’ not negotiated but, rather, ‘imposed’<sup>72</sup>. Second, changes in the treatment of Western FDIs were often China’s main tool to express some political answers – whether as a matter of provocation or retaliation (*e.g.*, against the protracted tensions for its recognition, or in the context of the War of Korea)<sup>73</sup>.

As a result, and by virtue of the common ideological matrix, China chose to negotiate treaties with its then closest ally, the Soviet Union. In 1950, a (quite generic) ‘Treaty of Friendship, Alliance and Mutual Assistance’<sup>74</sup> was signed. Subsequently, in 1958, China and the USSR concluded the ‘Treaty of Trade and Navigation’ (granting to each other MFN treatment ‘in all trade, navigation’ and ‘other economic relations’)<sup>75</sup>.

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<sup>70</sup> *Id.*, p. 68.

<sup>71</sup> *e.g.*, 1842 Nanking Treaty with the UK, 1844 Wanghia Treaty with the US, 1844 Huagpu Treaty with France (the latter two granting MFN treatment to US and French interests).

<sup>72</sup> For a brief review of the point, see V. Bath, *Foreign investment: the national interest and national security: foreign direct investment in Australia and China*, Sydney Law Review, 34, 2012, p. 5; for a more thorough analysis, see D. Wang, *China’s unequal treaties: narrating national history*, Lexington Books, 2005.

<sup>73</sup> *e.g.*, in 1951 China took over all installations of Shell Oil Company in China, after the UK government of Hong Kong took over an oil tanker the ownership of which was disputed by China; see Thomson, *supra* fn. 68, p.68.

<sup>74</sup> Art. 5 expresses the treaty’s purpose as to ‘develop and strengthen the economic and cultural ties’ between the two States; the Treaty, nevertheless, mostly reproduced the text of a 1945 agreements already concluded between the USSR and the previous Chinese government; the Treaty expired in 1979.

<sup>75</sup> With regard to dispute settlement, Art. 16 of that Treaty provided that the parties would guarantee enforcement of arbitral awards ‘with regard to disputes arising out of the commercial or other contracts of their corporate bodies or institutions, where the Parties have duly agreed to refer the dispute to an ad hoc or permanent arbitral tribunal for settlement.’

Under the leadership of Mao Zedong, Communist China's early economic history was then greatly affected by the 'Great Leap Forward' policy, adopted between 1958 and 1961, aimed at rapidly transforming China from a primarily agricultural to an industrial economy – resorting, *inter alia*, to collectivization of land<sup>76</sup>.

All abovementioned policies, nevertheless, did not bring the hoped results in terms of prosperity and financial stability. The 'Great Leap Forward' has been authoritatively considered 'a very expensive disaster'<sup>77</sup>, directly contributing to the 'Great Famine' of 1958-1961. By the late 1970s, the Chinese economy was on the brink of collapse. Thus, adopting the motto 'it does not matter whether the cat is black or white, as long as it catches mice'<sup>78</sup>, Deng Xiaoping, new leader of the Chinese Communist party, in 1978 steered the 'universal truth of Marxism' to the 'concrete reality of China'<sup>79</sup>. Consequently, considering the time had come to implement a 'socialist system with Chinese characteristics'<sup>80</sup>, through a number of changes in the legal framework (at both domestic as well as international level), Xiaoping inaugurated the 'Open Doors' policy. In order to fuel economic growth, China adopted an extensive plan of modernization, in which the resumption of FDI's (as well as the pursue of advanced technology and management skills) was listed among the top goals. In this perspective, in 1979 the law of 'China-foreign equity joint ventures' was passed by the

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<sup>76</sup> According to Zedong's views, the best way to finance industrialization was for the government to take control of agriculture, thereby establishing a monopoly over grain distribution and supply; this would allow the State to buy at a low price and sell much higher, thus raising the capital necessary for State industrialization.

<sup>77</sup> D. H. Perkins, *China's Economic Policy and Performance*, in R. MacFarquhar, J. K. Fairbank & D. Twitchett (ed.), *The Cambridge History of China*, vol. 15, Cambridge University Press, pp. 483-486.

<sup>78</sup> As reported by the media; e.g., BBC [http://news.bbc.co.uk/2/shared/spl/hi/asia\\_pac/02/china\\_party\\_congress/china\\_ruling\\_party/key\\_people\\_events/html/deng\\_xiaoping.stm](http://news.bbc.co.uk/2/shared/spl/hi/asia_pac/02/china_party_congress/china_ruling_party/key_people_events/html/deng_xiaoping.stm).

<sup>79</sup> M. E. Marti, *China and the Legacy of Deng Xiaoping: From Communist Revolution to Capitalist Evolution*, Brassey's Washington D.C., 2002, p. 10.

<sup>80</sup> *Ibid.*

National People's Congress. In 1982, the Constitution was amended, at Art. 18, to include a reference to foreign investments, confirming their protection under Chinese law. Art. 18 reads:

*'All foreign enterprises and other foreign investment located in China, as well as joint ventures with Chinese and foreign investment located in China, shall abide by the law of the People's Republic of China. their lawful rights and interests are protected by the law of the People's Republic of China'*<sup>81</sup>

The Communist establishment was nonetheless aware that, to reduce foreign investors' mistrust, and to 'win their trust and confidence', it was necessary to 'commit to international obligations through bilateral agreements'<sup>82</sup>. Hence, in 1982 the Chinese BIT program saw the light, with the signature of the first investment treaty, with Sweden – and other 25 States by 1989, and further 68 in the course of the 1990s<sup>83</sup>. Together with a number of additional investor-friendlier domestic regulations<sup>84</sup>, China shifted as well at the international level, becoming a party to the MIGA Convention from its inception, and signing the ICSID Convention in 1990<sup>85</sup>.

Unsurprisingly, earlier Chinese BITs mainly targeted industrialized or capital-exporting States. According to its 'discrete cultural, legal and political traditions'<sup>86</sup>, China's first BIT

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<sup>81</sup> Art. 18, Constitution of the People's Republic of China (amended on Dec. 4<sup>th</sup>, 1982), available at: <http://english.people.com.cn/constitution/constitution.html>.

<sup>82</sup> As reported by S. Li, *Bilateral Investment Promotion and Protection Agreements: Practice of the People's Republic of China*, in P. De Waart, P. Peters and E. Denters (eds.), *International Law and Development*, Martinus Nijhoff, 1988, pp. 177-180.

<sup>83</sup> For the full list of BIT signed by China, see the UNCTAD online database at: [http://unctad.org/Sections/dite\\_pccb/docs/bits\\_china.pdf](http://unctad.org/Sections/dite_pccb/docs/bits_china.pdf).

<sup>84</sup> For a brief overview, see *Gallagher & Shan (2009)*, pp. 5-43.

<sup>85</sup> The Convention entered in force for China in 1993.

<sup>86</sup> Cf., B. Shelley, *Democratic development in East Asia*, Routledge, 2004.

with one such State was concluded with Sweden – perceived more neutral than West Germany, France or the UK (all of whom already gathered some consistent experience with investment negotiations and treaty-making – having concluded, respectively, 33, 19 and 17 BITs<sup>87</sup>). Nonetheless, as the real target was actually the investment potential of economies as such, all BITs China entered into for the three subsequent years were with major capital exporters, such as Germany (1983), France (1984) and Italy (1985) (see Table 7, below).

In this respect, it is important to note that China, despite a developing State, adopted a Model BIT text in 1984 already, after the signature of the China-France BIT<sup>88</sup>. Virtually all subsequent BITs have adhered to such text, with China displaying a negotiating policy similar to that of a capital-exporting State. More than a nationalist attitude *vis-à-vis* capital-exporter States, or the increasingly stronger economic leverage the Chinese government could rely upon (on both developing as well as developed States), the reason of such a rather strict policy is at least partly due to the limited power Chinese officials involved with negotiations disposed of. Such limitation, in turn, rests on the complex (and strictly hierarchical) distribution of power within the Chinese government<sup>89</sup>, and the lengthy procedures necessary to consider modifications to either the attribution of negotiators' powers, or the model text<sup>90</sup>.

It is perhaps because of such reason that, despite negotiations for a BIT with the US (preceded by the restoration of diplomatic relations in January 1979, and the stipulation of the

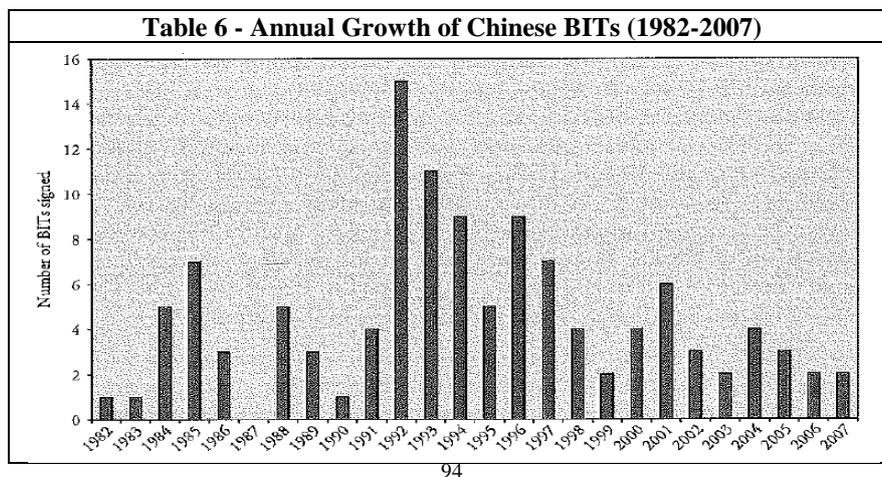
<sup>87</sup> By contrast, in 1982 Sweden had concluded 8 BITs (one more than Italy); see Table 1, above.

<sup>88</sup> According to *Dolzer (1995)*, p.13, most BIT negotiations take as their starting point model agreements of capital-exporting countries ... a central part of BIT negotiations would therefore concern modifications to such a model treaty that may be deemed desirable by the capital-importing countries.

<sup>89</sup> Revealing, in this respect, is a passage in *Gallagher & W. Shan (2009)*, at p. 40, with regard to the negotiations for the 1997 BIT with Barbados: 'The [Request for Authorization of negotiation] suggested the State Council giving a general or standing authorization on such negotiations with other States based on this text, so that the [Ministry of Foreign Trade and Economic Cooperation] and the [Ministry of Foreign Affairs] did not need to seek specific authorization on such negotiations, unless there were 'major changes' in the treaty text'.

<sup>90</sup> For a brief description of the Chinese treaty-making process, see *Gallagher & Shan (2009)*, pp. 33-34.

‘Agreement on Trade Relations’<sup>91</sup>, in July of the same year) begun back in 1983, have so far failed, notwithstanding repeated re-launches (the last two, in December 2007<sup>92</sup> and July 2013)<sup>93</sup>. What the US insisted for (in terms of dispute settlement, national treatment standard and liberalization commitments) was not only too ahead for China’s politics of the time, but also technically not possible, because out of the hands of the negotiators.



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<sup>91</sup> Agreement on Trade Relations between the United States of America and the People’s Republic of China, signed on Jul. 7<sup>th</sup>, 1979, TIAS 9630, 31 UST 4651; the Agreement featured the MFN clause.

<sup>92</sup> Flowing from the US-China Strategic Economic Dialogue.

<sup>93</sup> For an analysis of such failures and the subsequent re-launches of negotiations, see Q. Kong, *US China Bilateral Investment Treaty negotiations: context, focus and implications*, in *Asian Journal of WTO and International Health Law & Policy*, vol. 7, issue 1, 2012, p. 181.

<sup>94</sup> Source: *Gallagher & Shan (2009)*, p. 11.

<b>Table 7</b>		
<b>First Chinese BITs</b>		
BIT no.	Party	Date of signature
1	Sweden	March 29 <sup>th</sup> , 1982
2	Romania	Feb. 10 <sup>th</sup> , 1983
3	<b>Germany</b>	Oct. 7 <sup>th</sup> , 1983
4	<b>France</b>	May 30 <sup>th</sup> , 1984
➤ <i>1984 China Model BIT</i>		
5	Finland	Sept. 4 <sup>th</sup> , 1984
6	<b>Italy</b>	Jan. 28 <sup>th</sup> , 1985
7	Thailand	March 12 <sup>th</sup> , 1985
8	Denmark	Apr. 29 <sup>th</sup> , 1985
9	Netherlands	Jun. 17 <sup>th</sup> , 1985
10	Austria	Sept. 12 <sup>th</sup> , 1985
11	Singapore	Nov. 21 <sup>st</sup> , 1985
12	Kuwait	Nov. 23 <sup>rd</sup> , 1985
13	Sri Lanka	Mar. 13 <sup>th</sup> , 1986
14	<b>UK</b>	May 15 <sup>th</sup> , 1986
15	Switzerland	Nov. 12 <sup>th</sup> , 1986
16	Poland	Jun. 7 <sup>th</sup> , 1988
17	Australia	Jul. 11 <sup>th</sup> , 1988
18	<b>Japan</b>	Aug. 27 <sup>th</sup> , 1988
...		
128	<b>Canada</b>	Sept. 9 <sup>th</sup> , 2012
-	<b>US</b>	- <sup>95</sup>

<sup>95</sup> Negotiations started in 1983; despite repeated re-launches (the latest in Dec. 2007 and Jul. 2013), no agreement has yet been reached upon a final text.

Subsequently, while continuing to pursue investment agreements with major capital exporters (*e.g.*, the UK, in 1986), China started to enter also into BITs with other developing States. Thailand was the first, followed by Singapore, Kuwait, Sri Lanka, Malaysia, Pakistan, and Ghana<sup>96</sup>. In those with developed States, however, China started accepting liberal changes: *e.g.*, the 1986 BIT with the UK, and the 1987 BIT with The Netherlands, allowed for international arbitration<sup>97</sup> – which was an exception to Chinese practice till then – and this despite the fact that both UK and Dutch Models at the time featured arbitration only as an option. China thus appears to have opted, since then, for a two-tier policy: BITs with developed States primarily served the purpose (especially, at first) to build its economic infrastructure through inbound investment; conversely, BITs with developing States – whose text usually coincides with that of the Chinese contemporary Model – were (especially, at first) primarily aimed at forging or strengthening diplomatic alliances<sup>98</sup>. As in the course of the 1990s China's resource needs would begin to grow exponentially, BITs with developing States will shift their focus on Chinese outbound investment (something which will happen just a few year later with developed States as well, with Chinese investment beginning to flow towards the acquisition or control of technology and other advanced skills).

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<sup>96</sup> A separated mention shall be reserved to the 1983 BIT with Romania: Romania has been the most active Socialist State in concluding BITs (the first, in 1976, with the United Kingdom) and has continued to be particularly active also in the post-Socialist era (today, Romania enjoys a network of 84 BITs, almost the size of Italy's network, constituted of 88 agreements); thanks to the 'comradely relationship' of Socialism, and the lack of a Model BIT on the part of China, the 1983 BIT between the two States relies on the experience of Romania (by 1983, already strong of 13 agreements, amongst whom all major European capital-exporters) which, since the 1980 BIT with Senegal, was not new to cover 'direct and indirect capital investments'; thus, so does the first China-Romania BIT. Neither the 1994 renegotiation, nor that of 2007, will keep such exceptional wording.

<sup>97</sup> According to G. Smith, *Chinese Bilateral Investment Treaties: Restrictions on International Arbitration*, Chartered Institute for Arbitration, Sweet & Maxwell, 2010, p. 2; available at: [http://www.kennedys-law.com/files/Uploads/Documents/GordonSmithChineseBilateralInvestment\\_122010.pdf](http://www.kennedys-law.com/files/Uploads/Documents/GordonSmithChineseBilateralInvestment_122010.pdf).

<sup>98</sup> In this sense, see L. Li, *Chinese BIT practice and challenges*, in *Chinese Journal of International and Economic Law*, vol. 17, issue 4, 2010, p. 1.

Despite all early Chinese BITs were relatively conservative – and this is reflected both in the text of its first two models, as well as by China’s practice at the time –, those with developing or socialist States (as opposed to those with developed States) featured certain typical characteristics. Chinese BITs with developing States were more focused on investment promotion and encouragement, and more emphatic on State sovereignty and national jurisdiction; whilst allowing for flexibilities with regard to transfers<sup>99</sup>, they featured more specific provisions (*e.g.*, the definition of investment and its admittance, a thorough consultation process, or the exclusive jurisdiction of national courts with regard to questions over the legality of expropriation procedures)<sup>100</sup>. In any case, most Chinese BITs signed until the mid-1990s provided for FET and MFN treatments, but not NT.

### 3. *The shift: from rejection to shaping global standards of investment law*

According to Gallagher and Shan, in light of the fast changing context and the increasing number of investment stipulations concluded, the Chinese Ministries of Commerce and Foreign Affairs started considering a new Model text since China’s ratification of the ICSID Convention (on Feb. 6<sup>th</sup>, 1993)<sup>101</sup>. It appears that the reason behind the Chinese authorities’ willingness to update the model BIT text (and adopt a simplified BIT negotiation practice, especially with regard to domestic procedures and ministerial competences) were

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<sup>99</sup> S. Li, *Bilateral Investment Promotion and Protection Agreements: Practice of the People’s Republic of China*, in P. De Waart, P. Peters and E. Denters (eds.), *International Law and Development*, Martinus Nijhoff, 1988, pp. 177-180.

<sup>100</sup> *e.g.*, BITs with Thailand, Sri Lanka, Singapore.

<sup>101</sup> *Gallagher & Shan (2009)*, p.40.

mostly two: first, the surge of outward direct investments from China towards the rest of the world, and the growing interest in the protection of Chinese investors in foreign countries by means of BITs (*e.g.*, investor-State arbitration and NT); second, the rise of the competition for FDI, derived from neo-liberalist investment policies of Eastern European and South American States. For instance, with regard to investor-State dispute settlement mechanisms, China still showed a conservative attitude: when acceding to the ICSID Convention (on Feb. 9<sup>th</sup>, 1990), it consented to submit to the Centre's jurisdiction only disputes over the amount of compensation due to expropriation<sup>102</sup>. In this respect, China did not formally modify the substance of its standing policy: consent to *ad hoc* arbitration in such circumstance was already a feature of the 1984 Model BIT. However, following ratification of the Convention, occasional unconditional reference to ICSID was made – the first of which featured in the BIT with Lithuania, in November 1993<sup>103</sup>.

Hence, in 1997 China's State Council approved some key changes that were included in the new text, in the course of China's BIT talk with Canada<sup>104</sup>. It has been noted that a breakthrough was actually achieved during such negotiations – although ultimately unfruitful<sup>105</sup>. The third Model BIT was thus adopted in 1997, amid of, according to Gallagher and Shan, '...much speculation as to why at this stage China, which was attracting unprecedented sums of FDI, needed to revise its Model BIT at all'<sup>106</sup>.

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<sup>102</sup> *e.g.*, the 1994 China-Peru BIT (see Chapter V, Section C1).

<sup>103</sup> Nevertheless, the three subsequent BITs, with Uruguay, Azerbaijan and Ecuador – despite all these States being part of the ICSID Convention already – do not make any reference to ICSID.

<sup>104</sup> *Gallagher & Shan (2009)*, pp. 39-41. Cf., Chapter II, Section A.2.b, at p. 70.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

Together with a number of liberal changes in some substantive provision<sup>107</sup>, the 1997 Chinese Model BIT granted far-reaching consent to international arbitration, including ICSID arbitration, for all investor-State disputes. China's 1980s reluctance to include, *e.g.*, the NT clause (which contributed to the stall of the BIT negotiations with the US) vanished: today China has no objection to insert post-entry NT and MFN guarantees in its BITs. Such changes, implemented systematically since year 2000, thus differentiate those Chinese BITs from their predecessors<sup>108</sup>.

The two-tier policy, nonetheless, persisted: for instance, NT clauses in Chinese BITs with capital-exporting States – *e.g.*, Germany (2003), Belgium (2009) – allow China to maintain only existing non-conforming measures (subject, in addition, to a 'best efforts' rollback promise on the part of China). To the contrary, in Chinese BITs with capital-importing countries – *e.g.*, Guyana (2003) – the application of NT is limited 'without prejudice to its laws and regulations', thus allowing both States to adopt *new* non-confirming measures.

The first BIT based on the new Model text was the 1998 China-Barbados BIT. It included, most notably, access to ICSID arbitration for all investor-State disputes<sup>109</sup>. Since then, the new Model has been employed as template for approximately 40 new stipulations – mostly, with African and South American States. It has also served as a starting point for the

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<sup>107</sup> S. W. Schill, *Tearing down the Great Wall: the new generation investment treaties of the People's Republic of China*, in *Cardozo Journal of International and Comparative Law*, issue no. 15, 2007, p. 73.

<sup>108</sup> Such difference is so important that new agreements could be regarded as a *per se* new generation of Chinese BITs; cf., J. Xiao, *The ASEAN-China investment agreement: a regionalization of Chinese new BITs*, Society of International Economic Law, 2010, p.14-15; available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1629202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629202).

<sup>109</sup> The 1997 China-South Africa BIT was the first where China accepted investor-State dispute arbitration for all disputes; nevertheless, not being South Africa party to the ICSID Convention, Art. 9 of the BIT featured only *ad hoc* arbitration.

dozen renegotiations China went through – mostly, with European States –, at times increasing the guarantees beyond the Model wording (*e.g.*, the China-Germany 2003 renegotiation). Most of these new BITs followed the new Model and included full access to ICSID jurisdiction<sup>110</sup>.

With the adoption of the ‘Go Global’ strategy, in 1999, and the new ‘Outline of the 10<sup>th</sup> Five-Year Plan for National Economy and Social Development’, in 2001, China increasingly focused on outbound investment<sup>111</sup>. With regard to the BIT program, the ‘masterpiece’ may be considered the 2003 renegotiation of the 1983 BIT with Germany. In that innovative<sup>112</sup> agreement, China agreed on particularly high standards of investment protection which, whilst not replicated in subsequent agreements<sup>113</sup>, would anyway set the basis for the negotiations of the investment discipline featured in Chinese FTAs since 2008, as well as for the BIT with Canada and the Trilateral Investment Agreement with Japan and Korea, both of 2012<sup>114</sup>.

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<sup>110</sup> There have been exceptions: the 1999 China-Qatar BIT still features the dispute settlement provision of the 1984 Chinese Model.

<sup>111</sup> It is also worth recalling that in 2003 China acceded to the WTO.

<sup>112</sup> As considered in the OECD Report *Novel Features in Recent OECD Bilateral Investment Treaties*, OECD International Investment Perspectives, 2006; available at <http://www.oecd.org/investment/international/investmentagreements/40072428.pdf>.

<sup>113</sup> *e.g.*, with regard to the FPS standard: amongst the agreements concluded in 2005, the protection and security standard (termed as ‘full’ for the first time with France, in 1984) is ‘full’ only in the BIT with the Czech Republic, while ‘most constant’ with Spain and Portugal; in the 2006 BIT with India, FPS is not even mentioned, while in the 2007 renegotiations with Cuba it is still phrased in the terms of the 1984 Chinese BIT.

<sup>114</sup> One commentator described the Chinese BITs since 2006 as a third, more balanced, generation of investment treaties. Indeed, there are some new, and important, elements in Chinese BITs concluded since 2006. For instance, the 2006 China-India BIT seeks to clarify indirect expropriation; the China-Mexico BIT (2008) contains a waiver clause with respect to investor-State arbitration. Nevertheless, it appears that such clauses are due more to negotiation bargains with specific States, rather than part of a systemic approach; see C. Cai, *China-US BIT negotiations and the future of investment treaty regime: A grand bilateral bargain with multilateral implications*, in *Journal of International Economic Law*, n.12, 2009, p. 462.

On the one hand, thus, China, like India, Brazil and South Africa, tends to resist investment rules restraining its ability to regulate foreign investments<sup>115</sup>, as well as those on liberalization<sup>116</sup>. Such stance contributes to shape a trend which, to some extent, is having effect globally: in 2012, UNCTAD noted how ‘...in general governments became more selective about the degree of FDI involvement in different industries of their economies’<sup>117</sup>. Even the most liberal State in this respect appears at least in part having changed its policy: for instance, it has been noted how the US too has ‘...dramatically shrunk virtually every right originally accorded to foreign investors...’, compared to the 1987 Model<sup>118</sup>. A growing shift away from the more neo-liberalist approach has been noted<sup>119</sup>, and the Calvo doctrine (as embedded in traditional Chinese BITs<sup>120</sup>) seems again in vogue<sup>121</sup>.

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<sup>115</sup> Cf., J. W. Salacuse, *Towards a global treaty on foreign investment: the search for a grand bargain*, in N. Horn (ed.), *Arbitrating foreign investment disputes: procedural and substantive legal aspects*, Kluwer Law International, 2004, p. 75.

<sup>116</sup> Cf., the cautious stance adopted by Chinese scholars during the negotiations of the China-ASEAN investment agreement; e.g., C. Huiping, *China-ASEAN investment agreement negotiations: the substantive issues*, in *The journal of world investment & trade*, vol. 7, 2006, p. 143-163.

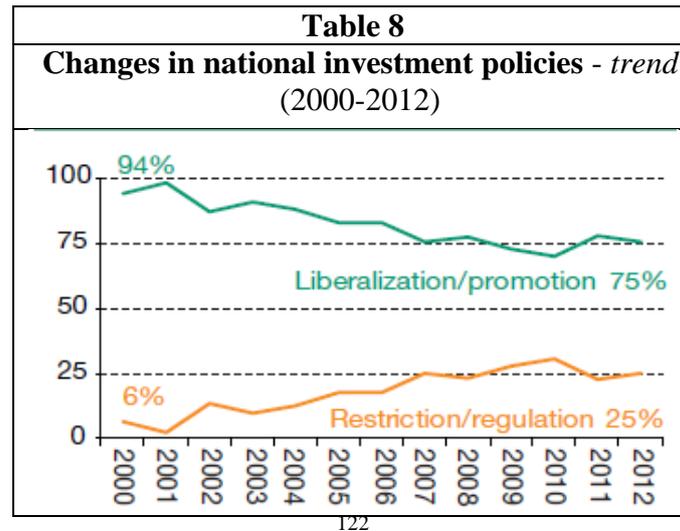
<sup>117</sup> The list of instances provided for ‘specific FDI regulations and restrictions’ features, along Bolivia and Benin, a number of OECD States (Canada, Hungary, Italy); sectors concerned with such measures are mainly extraction, manufacture, finance and telecommunication; see *UNCTAD inv. rep. 2013*, p. 95-98; see, also, Tables 8 and 9, below.

<sup>118</sup> J. Alvarez, *The return of the State*, in *Minnesota Journal of International Law*, no. 20(2), 2011, p. 235.

<sup>119</sup> *Gallagher & Shan (2009)*, p.43; according to Profs. Dolzer and Schreuer, however ‘...the global policy trends in national policy developments do not point in one direction...’, referring to the opposing trends between Asia and Africa, on the one hand, and South America, on the other; cf., R. Dolzer and C. Schreuer, *Principles of international investment law*, Oxford University Press, 2012, at p. 85, and UNCTAD, *World Investment Report*, 2011, p. 94.

<sup>120</sup> *i.e.*, a preliminary pre-set window of time, during which the judiciary of the host State is given a possibility to redress the alleged mistreatment (see Chapter II).

<sup>121</sup> On the renewed rise of the Calvo doctrine and the decline of the neo-liberalist approach, see W. Shan, ‘*From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the changing landscape in international investment law*’, in *Northwestern Journal of International Law and Business*, vol. 27, issue 3, 2007; pp. 631-664.



**Table 9**  
**Changes in national investment policies - number of measures (2000- 2012)**

Item	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Number of countries that introduced changes	45	51	43	59	80	77	74	49	41	45	57	44	53
<b>Number of regulatory changes</b>	<b>81</b>	<b>97</b>	<b>94</b>	<b>126</b>	<b>166</b>	<b>145</b>	<b>132</b>	<b>80</b>	<b>69</b>	<b>89</b>	<b>112</b>	<b>67</b>	<b>86</b>
Liberalization/promotion	75	85	79	114	144	119	107	59	51	61	75	52	61
Restriction/regulation	5	2	12	12	20	25	25	19	16	24	36	15	20
Neutral/indeterminate <sup>a</sup>	1	10	3	0	2	1	0	2	2	4	1	0	5

Source: UNCTAD, Investment Policy Monitor database.  
<sup>a</sup> In some cases, the expected impact of the policy measure on the investment is undetermined.

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On the other hand, China has kept a more open (yet consistent) stance than any other BRICS State towards FDIs. As a result, today China is second only to Germany for number of BITs concluded. This is quite striking, for a State outright neglecting foreign investment until 1978, and that has signed its first BIT in 1982. Moreover, China realized sooner than other

<sup>122</sup> UNCTAD *inv. rep.* 2013, p. xix.

<sup>123</sup> UNCTAD *inv. rep.* 2013, p.92.

States that competition for FDIs is no longer confined between nation-States but, increasingly, between regions<sup>124</sup>, and that more and more States were ‘...likely to submit to a regional approach in attracting FDIs’<sup>125</sup>. According to UNCTAD, FTAs that include investment chapters have a stronger impact in terms of increased FDI flows than BITs<sup>126</sup>. Consequently, China joined the trend to incorporate the investment discipline into FTAs<sup>127</sup>. Such a move is also partly explained with China’s need to update the vast web of investment agreements weaved before the adoption of the 1997 Model. Indeed, especially with regard to the earlier stipulations (*e.g.*, those of 1982-1992), an update in the standards of protection China now granted – and received, in order to better protect Chinese investments abroad – was due.

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<sup>124</sup> According to UNCTAD, eight of the ten non-BIT agreements featuring a discipline for investment concluded in 2012 are of a regional nature, with at least 110 States currently involved into regional negotiations of some kind; *UNCTAD inv. rep. 2013*, pp. 103-118; see, also, Table 10, below.

<sup>125</sup> See K. H. Wee, H. Mirza, *ASEAN Investment Cooperation: Retrospect, Developments and Prospects*, 2005, p. 2; available at: <http://www.gapresearch.org/finance/ASEAN%20Investment%20Cooperation.pdf>.

<sup>126</sup> UNCTAD, *The role of international investment agreements in attracting foreign direct investment to developing countries*, 2009, p. 110; on the new ‘category’ of ‘trade and investment’ agreements, see A. De Mestral and A. Falsafi, *Investment provisions in regional trade agreements: a more efficient solution?*, in A. De Mestral and C. Lévesque (eds.), *Improving International Investment Agreements*, Routledge, 2013; p. 107-134; in fn. 3 at p. 116, the authors expressly include in such new category the agreements focus of this research in Chapters IV-V.

<sup>127</sup> See H. Chen, *China-Asean investment agreement negotiations*, Research article, Higher Education Press and Springer-Verlag, 2006; p. 424; available at [http://download.springer.com/static/pdf/535/art%253A10.1007%252Fs11463-006-0018-1.pdf?auth66=1386505336\\_a70eb4075f411711d6ad6e5449f69941&ext=.pdf](http://download.springer.com/static/pdf/535/art%253A10.1007%252Fs11463-006-0018-1.pdf?auth66=1386505336_a70eb4075f411711d6ad6e5449f69941&ext=.pdf).

#### 4. Chinese FTAs and modern agreements on investments

With the conclusion of the 2006 FTA with Pakistan, China ventured for the first time in the territory of FTAs featuring an investment chapter<sup>128</sup>. Such chapter, far from being a breakthrough *per se*, was actually filled with the 1997 Model text (which anyway constituted an upgrade to the previous investment discipline between China and Pakistan, anchored to the 1984 Model BIT). The ice was, nevertheless, broken, and China (because of the reasons outlined in Sect. 3, above) was ready to turn to more complex and diversified agreements, such as the FTA signed with New Zealand in 2008, the 2009 and 2012 agreements on investments (part of multi-stage FTAs<sup>129</sup>) concluded, respectively, with ASEAN and Chile, and the latest investment treaties of 2012 – bilateral, with Canada, and trilateral, with Korea and Japan.

It is on those agreements that this research focuses, in its second part (Chapters IV, V and VI). Indeed, a comparative analysis on such treaties, and their relation with the previous stipulations, has not yet been performed – to some extent, not surprisingly so<sup>130</sup>.

With regard to FTAs, China has signed twelve of those, so far. Not all of them contain investment protection rules. As per the following brief preliminary overview:

- The first two, the 2003 Closer Economic Partnership Arrangements with Hong Kong and Macao, do not provide for investment protection (nor liberalization);

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<sup>128</sup> The Economic Partnerships with Hong Kong and Macao, or the 2005 multi-stage FTA with Chile, did not feature any investment discipline for investments.

<sup>129</sup> In Eastern Asia, the practice of signing a preliminary ‘Framework Agreement’, that focuses on structure and objectives of the subsequent agreements (those, featuring the substantial obligations the parties undertake with regard to a specific matter - *e.g.*, investment) appears to be common practice.

<sup>130</sup> Still in 2009, Gallagher and Shan noted that existing research on Chinese BIT is either outdated or incomprehensive, confined to a limited number of BITs with States from a particular, albeit important, part of the world; cf., *Gallagher & Shan (2009)*, p. 3.

- The 2006 China-Pakistan FTA features a chapter on investments; nevertheless, the text reproduces the 1997 Chinese Model BIT<sup>131</sup> (and contains no rules on investment liberalization);
- With the FTA concluded in 2008, China and Singapore, rather than updating their bilateral investment protection regime (based on a 1985 BIT), decided to incorporate the investment agreement at the time still being negotiated, as part of the multi-stage integrated FTA, between China and ASEAN<sup>132</sup>;
- As of the investment chapter in the 2008 China-New Zealand FTA, here it is where China agreed to new clauses – and to change the formulation of those it was already accustomed to. The agreement features post-entry NT, a grandfather clause for existing non-confirming measures, MFN for both pre- and post-entry stage, full FET, conditions for lawful expropriation (with ‘Hull rule’), and *a priori* consent to international arbitration of any legal dispute directly concerning investments; nevertheless, it does not set out the objective of progressive liberalization – otherwise quite common in Chinese BITs since 2000, especially with developed States<sup>133</sup>;
- The investment chapter in the 2009 China-Peru FTA may resemble, at a first glance, that of the China-NZ FTA (especially, with regard to the overall architecture of dispositions); a more careful analysis, however, shows that some provisions’ wording departs from such template and draws, instead, from

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<sup>131</sup> Cf., Chapter II; however, the Amending Protocol of 2008 uniquely features the possibility to establish, in Pakistani territory, ‘China-Pakistan Investment Zones’, where the Pakistani government grants specific advantages (especially, on tax and bureaucracy matters) to Chinese investors.

<sup>132</sup> Art. 84 China-Singapore FTA.

<sup>133</sup> See Chapter IV.

the parties' respective knowledge and background (*i.e.*, the 1997 Chinese Model and the 2006 US-Peru FTA); the chapter features, also, a number of original formulations<sup>134</sup>.

- The 2009 Agreement on Investment between China and ASEAN (hereinafter, CAIA), part of a multi-stage FTA, displays remarkable similarities with the ASEAN Agreement on Investment (hereinafter, ACIA), of the same year; the CAIA features also commonalities with both the China-NZ FTA as well as the China-Peru FTA (having the negotiations for all such agreements taken place roughly at the same time, this may not surprise)<sup>135</sup>;
- The 2010 China-Costa Rica FTA operates a *renvoi* to the 2007 BIT between the two States (whose text is entirely drawn from the 1997 Chinese Model)<sup>136</sup>;
- No investment discipline of the sort is, as of today, implementing the 2010 Economic and Cooperation Framework Agreement between China and Taiwan (and, considering China's stance on Taiwan's sovereignty, a discipline on investment protection is perhaps hard to come by anytime soon)<sup>137</sup>;
- The 2012 Supplementary Agreement on Investment (hereinafter, SAI) between China and Chile, part of the multi-stage integrated FTA signed back in 2005, replaced the 1994 China-Chile BIT (entirely drawn from the 1984 Chinese Model text); together with the 2012 BIT with Canada (signed on the same day,

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<sup>134</sup> See Chapter V.

<sup>135</sup> For a thorough analysis, see Chapter IV.

<sup>136</sup> Art. 89 of the China-Costa Rica FTA simply reaffirms the commitments under the China-Costa Rica BIT.

<sup>137</sup> In a note, Taiwan's Mainland Affairs Council stress that the agreement with China is necessary to 'avoid being marginalized by regional economic integration'; Chapter 2 of the Framework Agreement sets out range and timetable for the future negotiations over agreements on trade and investments liberalization; the document is available at <http://www.mac.gov.tw/public/data/051116322071.pdf>.

and negotiated for the 18 previous years), it represents the first agreement based on, especially under a structural perspective (but, also, for a good portion of the wording employed) the North American Models<sup>138</sup>;

- The 2013 FTA with Iceland, underlying the geopolitical rationale of the agreement<sup>139</sup>, features no novelty of sort and, with respect to investment protection, simply operates a *renvoi* to the outdated 1994 BIT between the parties (featuring the text of the 1989 Chinese Model);
- The 2013 FTA with Switzerland, lastly, does not cover investment protection at all; the single-page Chapter 9, limited to ‘investment promotion’, features only two -generic- provisions. The investment matter between the Parties is thus left to the 2009 BIT, which replaced the 1986 agreement (changing the template of reference from the Chinese to the Swiss Model).

The brief overview above appears to highlight that China’s strategy with regard to FTAs is, primarily, that to conclude agreements focused on trade<sup>140</sup>. Nevertheless, where an investment agreement is included (in the form of a chapter, or a separate agreement within the framework of a multi-stage FTA) such part of the stipulation then appears to be regarded by

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<sup>138</sup> For a detailed analysis, see Chapter VI.

<sup>139</sup> While Iceland could hardly offer much in terms of trade volumes and investment flows, it was strategic to China’s quest for more influence in the Arctic: China has for long sought to join the Arctic Council (an eight-nations intergovernmental body promoting cooperation in the region) as a permanent observer – a goal frustrated in 2009 and 2011, with its request for admission rejected. It is not a case that, upon signature of the FTA with Iceland (Apr. 15<sup>th</sup>, 2013), the two Parties issued a joint statement calling for new bilateral cooperation on ‘...human rights, gender equality, labor issues, *Arctic affairs*, as well as cooperation on geothermal development, culture, education and tourism’ (emphasis added). One month later, on May 15<sup>th</sup>, 2013, the Arctic Council eventually granted permanent-observer status to China, along with India, Italy, Japan, Singapore and South Korea. Permanent observers have no voting rights in the Council but, unlike *ad hoc* observers, they are automatically invited to the Group meetings.

<sup>140</sup> As opposed to exploit the occasion for adopting a more liberal approach towards both trade and investments; China, thus, appears not prepared yet to undertake systematic investment liberalization obligations under FTAs.

China as an opportunity to update old BIT regimes – when an investment rationale for doing so is felt (and the case of Iceland is a clear epitome of such an approach). If the existing BIT belongs to the new generation of Chinese BITs (or, also, if it belongs already to an old generation BIT, and yet there is neither investment nor political opportunity for further negotiations in this respect), then the FTA will either incorporate (*e.g.*, Singapore) or operate a *renvoi* to (*e.g.*, Costa Rica, Iceland) the previous agreement – or, also, the two stipulations will be kept entirely separate, with no cross references at all (*e.g.*, Switzerland). Nevertheless, where FDI protection regimes are negotiated, it is no longer the case for those to represent ‘simply BITs in FTAs with tiny adaptations’<sup>141</sup>. Such an approach has at least partly changed since 2008 (*i.e.*, the China-NZ FTA and the China-Peru FTA), and even more so since 2012 (*i.e.*, the SAI with Chile, in parallel with the BIT with Canada). The SAI with Chile is especially believed to set an important reference for future negotiations.

It may be noted, under a political point of view, that even when venturing in the FTA domain, China carefully chose its counterpart each time – especially, for the ‘warm-up’ stipulation. For the first practice with BITs it chose a Western (Sweden) and a Socialist (Romania) State, both with robust experience in the field and yet not major partners in either trade or investment. The same approach was adopted for FTAs: the firsts, in fact, have been with Pakistan – a nowadays ‘Chinese protectorate’<sup>142</sup>, and New Zealand – a developed market economy whose dimension is, nevertheless, negligible (compared to other OECD economies, or China).

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<sup>141</sup> *Xiao (2010)*, p.20.

<sup>142</sup> According to media sources, in 2010, when a US delegate confronted a Chinese diplomat about Beijing’s uncompromising support for Pakistan, the Chinese reportedly responded with a heavily-loaded sarcastic remark: ‘Pakistan is our Israel. You got a problem with that?’; cf., Al-Jazeera: <http://www.aljazeera.com/indepth/features/2010/10/20101028135728235512.html>.

China – today, the second largest economy in the world – is responsible for a great portion of inbound and outbound foreign investments, having become the third largest investor world-wide, after the US and Japan<sup>143</sup>. It is currently the fifth largest recipient of outward FDI, and recently overtook the US as the world's largest trading nation<sup>144</sup>. China is investing significantly in Africa, Asia, and South America, primarily to meet its energy supply needs (it is a net importer of, *inter alia*, oil, gas, and coal). According to UNCTAD, China has concluded 119 BITs (94 of which currently in force)<sup>145</sup>, plus six FTAs comprising an investment protection discipline. Nonetheless, there is still space for growth and negotiations: still four of the top-ten FDI sources in China (*i.e.*, Hong Kong, Taiwan, the US and Macao) do not enjoy an investment promotion, protection and liberalization regime.

Such further expansion may, nevertheless, not come easily. China's rising outward investment flow faces increasing skepticism abroad. This is partly the result of *i*) the leading role of state-owned enterprises in the Chinese investment outflow, *ii*) the speed with which this has grown, *iii*) the negative image of the home country in some quarters, and *iv*) the challenges it poses to established competitors<sup>146</sup>. For this reason recently China has been called to implement, next to its relatively well-established 'going-out' policy, a purposeful 'going-in' strategy, to guide investments of Chinese firms to ensure contributions to host

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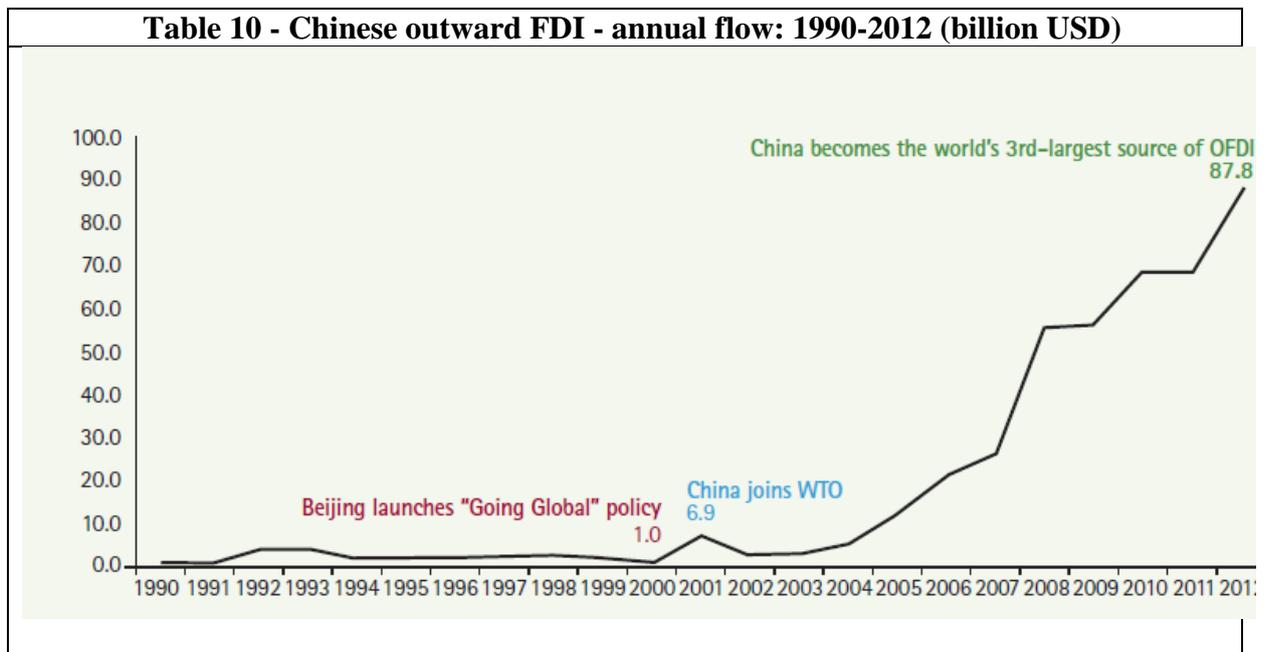
<sup>143</sup> UNCTAD, *World investment report 2013 – Global value chains: investment and trade for development*, 2013, available at : [http://unctad.org/en/PublicationsLibrary/wir2013\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf); p. xiii.

<sup>144</sup> L. E. Trakman, *China and Foreign Direct Investment: Does Distance Lend Enchantment to the View?*, p.2.

<sup>145</sup> Source: UNCTAD online database, updated to June 2013; available at: [http://unctad.org/Sections/dite\\_pccb/docs/bits\\_china.pdf](http://unctad.org/Sections/dite_pccb/docs/bits_china.pdf).

<sup>146</sup> As recently put in K. P. Sauvant & V. Z. Chen, *China needs to complement its "going-out" policy with a "going-in" strategy*, Columbia FDI Perspectives, n. 121, May 12<sup>th</sup>, 2014.

States' economic, environmental and social development, and take place within fair governance mechanisms<sup>147</sup>.



<sup>147</sup> *Ibid.*

<sup>148</sup> Asia-Pacific Foundation of Canada, *China goes global*, Nov. 4<sup>th</sup>, 2013, p. 8, available at: <http://www.asiapacific.ca/surveys/chinese-investment-intentions-surveys/china-goes-global-2013>.

### 5. The absence of known investor-State disputes with China

China has succeeded in attracting an impressive and ever more consistent flow on inbound direct investment over the past fifteen years – and it is perceived to be economically and politically positioned to further extend its global influence over FDI markets. Nevertheless, notwithstanding the comprehensive network of agreements devoted to the protection of foreign FDI in China, as of today there is no publicly known investor-State arbitration award in which China was the respondent, nor current investor claims pending against China<sup>149</sup>.

On the one side, China appears concerned to project an image of fair host State, ‘friendly’ towards foreign investors – which (usually) receive handsome returns on their investments<sup>150</sup>. On the other side, some considerations may ultimately persuade foreign investors from pursuing investor-State arbitration against China.

Firstly, there is uncertainty as to the law that would govern the enforcement of an investment award. Despite in 1983 China amended its constitution to include a new provision confirming the protection of foreign investments under Chinese law<sup>151</sup>, whether investment treaties override Chinese domestic law is a matter open to question – which falls into the wider debate with regard to the status of all international treaties within the Chinese legal system. A 2002 regulation by the Supreme People’s Court has clarified that Chinese

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<sup>149</sup> Conversely, Chinese investors abroad against foreign governments are growing (e.g., the recent 2.2. billion USD claim brought by China’s Ping insurance company against Belgium); cf., M. Heymann, *International law and the settlement of investment disputes relating to China*, in *Journal of International Economic Law*, no. 11, 2008, pp. 518-521.

<sup>150</sup> *Trakman (2013)*, p. 5.

<sup>151</sup> Art. 18 of the Chinese constitution; cf., fn. 81, above.

administrative courts<sup>152</sup>, in adjudicating international cases involving trade and investment, should apply only Chinese law<sup>153</sup>. This means that international trade and investment agreements must be transformed into Chinese law before they can be applied and implemented<sup>154</sup>. With regard to implementation, the Supreme Court – abiding by the fundamental principles of international relations (*i.e.*, *bona fide* and *pacta sunt servanda*) held that regulations implementing international agreements should be interpreted in a manner consistent with international treaties, when more than one interpretation is possible<sup>155</sup>.

Secondly, perhaps in order to counterbalance such uncertainties, China's policy is to usually offset foreign investors concerns (*e.g.*, that they might receive less than FET, or will be subject to indirect expropriation) by according better than NT standard<sup>156</sup>. It is because of such a policy that, still in 2012, the EU Directorate General for Trade considered initiating investor-State arbitration against China likely to be a 'last resort'<sup>157</sup>, as investors conceivably benefit more from reaching a negotiated settlement with China than they would with

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<sup>152</sup> Chinese administrative courts are – without exception – a preliminary necessary passage for foreign investors wishing to pursue investor-State arbitration against China; BITs, however, usually include a time-limit for such courts to render a decision (which varies from 3 to 6 months, depending on the treaty), after which the investor may, in any case, initiate the arbitral proceeding.

<sup>153</sup> Arts. 7 and 8 of the *Provisions on some issues on the adjudication of administrative cases concerning international trade*, Aug. 29<sup>th</sup>, 2009; the regulation, applies also to investments; cf., *Gallagher & Shan (2009)*, p. 51.

<sup>154</sup> As it happens, nevertheless, with, *e.g.*, the German or Italian legal systems.

<sup>155</sup> Art. 9, *Provisions on some issues on the adjudication of administrative cases concerning international trade*, Aug. 29<sup>th</sup>, 2009.

<sup>156</sup> Cf., the quick settlement (two months after registration of the case) in *Ekran Berhad v People's Republic of China*, ICSID Case no ARB/11/15 (24 May 2011); see also L. E. Trakman, *Enter the Dragon IV: China's Proliferating Investment Treaty Program*, UNSW Centre for Law, Markets and Regulation, available at: <http://www.clmr.unsw.edu.au/article/deterrence/public-v-private-enforcement/enter-dragon-iv-chinas-proliferating-investment-treaty-program>.

<sup>157</sup> L. Rubinacci, *EU-China Investment Relationship, Update on State of Play*, DG Trade – Civil Society Dialogue, Mar. 7<sup>th</sup>, 2012; available at: [http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc\\_149185.pdf](http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149185.pdf).

arbitration<sup>158</sup>. It cannot be overlooked, also, that in the context of the negotiations for a China-EU investment agreement the EU Parliament recently expressed concerns ‘...about the unreliability of China's judicial system, which fails to enforce contractual obligations, and about the lack of transparency and uniformity in the application of the regulatory regime governing investments’<sup>159</sup>.

Nevertheless, while it may be unlikely to witness anytime soon with China a situation like that of Argentina in 2001, it can hardly be dismissed that a sequence of events producing severe economic repercussions, forcing the Chinese government to alter its policies towards any aspect of foreign investment, could trigger a wave of investment claims. In nowadays globally interconnected economic context, such a scenario is not to be excluded. Thus, it is believed that China’s extensive BIT network, coupled with the unprecedented – and still growing – flow of FDI into the mainland, will likely result for China to be respondent in an investment case much earlier than a *corralito* will affect its vigorous growth.

Notwithstanding the cautiousness adopted in crafting a web of clear and uniform rules for its foreign investment protection program, China, like all States, ‘...labors under two connected handicaps whenever [it] seek[s] to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions’<sup>160</sup>. Given its extensive treaty regime, it may thus prove ‘not realistic’

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<sup>158</sup> *Trakman (2013)*, p.3.

<sup>159</sup> EU Parliament, text P7\_TA(2013)0411, adopted on Oct. 9<sup>th</sup>, 2013, at point 10; the text is available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-411>.

<sup>160</sup> ‘...The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim ... human legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring. This inability to anticipate brings with it a relative indeterminacy of aim’; Prof. H. L. A. Hart, *The concept of law*, Oxford University Press, 1961, pp. 232-257.

for China to preserve its 'MianZi', *i.e.*, the reputation on the international stage as never having a case filed against it at ICSID<sup>161</sup>.

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<sup>161</sup> W. Shan and N. Gallagher, *China*, in C. Brown (ed.), *Commentaries on selected model investment treaties*, Oxford University Press, 2013, pp. 131-181, at p. 181.

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## II. BUILDING THE CHINESE MODEL BIT

### A. General characteristics of the Chinese Model BIT

#### 1. Adopting a Model BIT: policy rationale

As illustrated, China appears having developed a Model BIT since 1984 – well before most OECD States, and all major developing States (such as, *e.g.*, India or Mexico). China, thus, understood early the possible benefits deriving from the adoption of a Model agreement on investment. Prof. Newcombe highlights four of them<sup>162</sup>:

- i) Enabling a State to establish and clarify foreign investment policy and negotiating positions for BIT negotiations;
- ii) Promoting uniformity in State's treaty practice<sup>163</sup> (being negotiated with a number of treaty partners), reducing the risk of potential inconsistencies among the BITs of that State;
- iii) Providing for a strategic negotiating advantage to the proffering State (as the model becomes the basis for negotiations, with the State counterpart put in the position to react to an established framework);
- iv) Promoting predictability with respect to the treatment foreign investors may expect<sup>164</sup>.

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<sup>162</sup> A. Newcombe, *Developments in IIA treaty-making*, in A. De Mestral and C. Lévesque (eds.), *Improving International Investment Agreements*, Routledge, 2013; p. 21.

<sup>163</sup> *Ibid.*, recent treaty practice suggest that States are increasingly concerned with consistency among their BITs (and, especially, clarifying limits to the application of the MFN treatment).

<sup>164</sup> Such last element is perhaps less evident: foreign investors have usually little awareness of the international legal framework governing their investment; nor usually decide to make an investment on the basis of the presence (or lack) of the relevant BIT.

It may be considered that China has always been very concerned with all such four policy aspects – the second criterion leading on the others. Indeed, China managed to achieve a remarkable degree of uniformity amongst its BITs, if one considers that:

- i) The early adoption of a model text – which draws from the experience of the major European States – allowed China to always ‘impose’ its model as template for all negotiations (there appear to be no exceptions, until the 2006 BIT with India);
- ii) The wording of such template never underwent serious modifications in actual stipulations;
- iii) More than half of Chinese BITs have been entered into in the early 1990s<sup>165</sup>.

As it will be illustrated, all Chinese models reveal strong ties with the German and British Model texts. Thus, while generally the overall structure and most provisions (as well as the subsequent actual stipulations) may appear quite similar (or anyway equivalent), in some respects those differences – and the changes between one model and the other – reflect special Chinese attitudes towards international law and international dispute settlement mechanisms<sup>166</sup>.

According to Gallagher and Shan, it appears that China has adopted three model texts over the time. The first was adopted by China’s State Council in the early 1980s (around 1984)<sup>167</sup>. According to the information provided by China’s Ministry of Commerce, the State Council subsequently adopted the second model text in the late 1980s (around 1989)<sup>168</sup>.

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<sup>165</sup> Cf., Table 6, above.

<sup>166</sup> In this sense, already, *Dolzer (1995)*, p. 5-6.

<sup>167</sup> *Gallagher & Shan (2009)*, p. 421; English version provided by the Chinese Ministry of Commerce.

<sup>168</sup> *Id.*, p. 427; English translation provided by Prof. Shan.

Lastly, the third version was adopted in the second half of the 1990s (around 1997)<sup>169</sup>. Such latter version is, officially, the current working text for BIT negotiations.

The analysis that follows focuses on the 1997 Model, the innovations its adoption brought with respect to the previous texts, and those accepted by China with subsequent stipulations.

## 2. China's evolution throughout the Model texts

### a. Structure

China's 1997 Model BIT comprises a Preamble and 13 Articles. This is a standard format when compared with European BITs: *e.g.*, the UK Model text has 14 articles<sup>170</sup>; the German Model 13<sup>171</sup>, the French Model 11<sup>172</sup>, the Italian Model 14<sup>173</sup> (see Table 11, below). Conversely, it appears rather brief compared with the US Model (37 Articles and a few Annexes)<sup>174</sup>, or the Canadian Model (52 Articles and several Annexes)<sup>175</sup>. China has thus followed – until 2012, and anyway for all its official Model texts – the shorter European models, rather than the more prescriptive North American models<sup>176</sup>.

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<sup>169</sup> *Id.*, p. 433; English version provided by the Chinese Ministry of Commerce.

<sup>170</sup> Both the 1991 as well as the 2006 Models.

<sup>171</sup> Both the 1991 as well as the 2008 Models.

<sup>172</sup> France 2006 Model BIT.

<sup>173</sup> Italy 2003 Model BIT.

<sup>174</sup> Both the 2004 and 2012 Models.

<sup>175</sup> Canada 2004 Model BIT; the draft Model of 2006 comprises, instead, 42 provisions.

<sup>176</sup> In this sense also *Gallagher & Shan (2009)*, p. 43.

The Chinese Model BIT contains most provisions commonly found in BITs, namely:

- Preamble;
- Definitions;
- Substantive articles (*i.e.*, admission; standards of treatment; expropriation and compensation; compensation for damages and losses; transfers; subrogation);
- Settlement of inter-State and investor-State disputes;
- Final provisions (*i.e.*, application; consultations; entry into force, duration and termination).

The Table below outlines the structural similarities between the Chinese Model – whose number and sequence never changed throughout the models – and the models of European G7 members.

Art.	PRC	UK	DE	FR	IT
1	Definitions	Definitions	Definitions	Definitions	Definitions
2	Promotion and protection of investment	Promotion and protection of investment	Admission and protection of investments	Promotion and admission of investments	Promotion and protection of investments
3	Treatment of investment	National treatment and most-favored-nation provisions	National and most-favored-nation treatment	Fair and equitable treatment	National treatment and the most favored nation clause
4	Expropriation	Compensation for losses	Compensation in case of expropriation	National treatment and most favored nation treatment	Compensation for damages or losses
5	Compensation for damages and losses	Expropriation	Free transfer	Dispossession and indemnification	Nationalisation or expropriation
6	Transfer	Repatriation of investment and returns	Subrogation	Free transfer	Repatriation of capital, profits and income
7	Subrogation	Exceptions	Other provisions	Settlement of disputes between an investor and a contracting party	Subrogation
8	Settlement of disputes between contracting parties	Reference to International Centre for Settlement of Investment Disputes <sup>177</sup>	Scope of application	Guarantee and subrogation	Transfer procedures
9	Settlement of disputes between investors and one Contracting Party	Disputes between the contracting parties	Settlement of disputes between the contracting states	Special commitment	Settlement of disputes between the contracting parties
10	Other obligations	Subrogation	Settlement of disputes between a contracting state and an investor of the other contracting state	Settlement of disputes between Contracting Parties	Settlement of disputes between investors and contracting parties
11	Application	Application of other Rules	Relations between the contracting states	Entry into force and termination	Relation between governments
12	Consultations	Scope of Application <sup>178</sup>	Registration clause	-	Application of other provisions
13	Entry into force, duration and termination	Entry into Force	Entry into force, duration and notice of termination	-	Entry into force
14	-	Duration and Termination	-	-	Duration and expiry

<sup>177</sup> In the alternative UK BIT Model the provision is labeled ‘Settlement of disputed between an investor and a host State’.

<sup>178</sup> In the alternative UK BIT Model the provision is labeled ‘Territorial extension’.

## b. Contents: outline and key notions

According to Gallagher and Shan, in light of the fast changing global and domestic context, and the increasing number of investment stipulations concluded, the Chinese Ministries of Commerce and Foreign Affairs started considering a new model text since China's ratification of the ICSID Convention (on Feb. 6<sup>th</sup>, 1993)<sup>179</sup>. It appears that the reason behind the Chinese authorities' willingness to adopt the new BIT regime were mostly two:

- i) first, the surge of outward direct investments from China towards the rest of the world, and the growing interest in the protection of Chinese investors in foreign countries by means of BITs (*e.g.*, investor-State arbitration and NT);
- ii) second, the rise of the competition for FDIs, derived from neo-liberalist investment policies of post-USSR-collapse Eastern Europe, and South America (for instance, with regard to investor-State dispute settlement mechanisms).

Hence, in 1997 (in the course of China's BIT talk with Canada), China's State Council approved some key changes, subsequently included in the new text<sup>180</sup>. The third Model BIT was thus adopted in 1997, amid of, according to Gallagher and Shan, '...much speculation as to why at this stage China, which was attracting unprecedented sums of FDI, needed to revise its Model BIT at all'<sup>181</sup>.

Together with a number of liberal changes in some substantive provision<sup>182</sup>, the 1997 Chinese Model BIT granted far-reaching consent to international arbitration, including ICSID arbitration, for all investor-State disputes. China's 1980s reluctance to include, *e.g.*, the NT

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<sup>179</sup> *Gallagher & Shan (2009)*, p. 40.

<sup>180</sup> *Id.*, p.41.

<sup>181</sup> *Id.*, p.39.

<sup>182</sup> See *Schill (2007)*, p. 73.

clause (which contributed to the stall of the BIT negotiations with the US), vanished: the 1997 Model reveals no objection to insert post-entry NT and MFN guarantees in its BITs.

The 1997 Model has been systematically employed as template for negotiations only since year 2000<sup>183</sup>. In the meantime, China put in place a two-tier policy: for instance, NT clauses in Chinese BITs with other capital-exporting States – *e.g.*, Germany (2003), Belgium (2009) – are alike and allow China to maintain its existing non-confirming measures only (subject to a ‘best efforts’ rollback promise by China). To the contrary, in Chinese BITs with capital-importing countries – *e.g.*, Guyana (2003) – the application of NT is limited ‘without prejudice to its laws and regulations’, thus, allowing for both States to adopt *new* non-confirming measures.

The first BIT based on the 1997 Model was the 1998 China-Barbados BIT (it included, most notably, access to ICSID arbitration for all investor-State disputes<sup>184</sup>). Since then, the new Model has been employed as template for approximately 40 new stipulations – mostly, with African and South American States. It has also served as a starting point for the dozen renegotiations China went through – mostly, with European States – in which it often increased the guarantees beyond the Model language (*e.g.*, the China-Germany 2003 renegotiation). Most of these new BITs followed the new model and included full access to ICSID jurisdiction<sup>185</sup>.

China’s 1997 Model displays some key features which may be regarded as typical ‘Chinese characteristics’. Those are the preamble, the notion of investment, the standards of

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<sup>183</sup> *e.g.*, the 1999 China-Qatar BIT still features the dispute settlement provision of the 1984 Chinese Model.

<sup>184</sup> The 1997 China-South Africa BIT was the first where China accepted investor-State dispute arbitration for all disputes; nevertheless, not being South Africa party to the ICSID Convention, Art. 9 of the BIT featured only *ad hoc* arbitration.

<sup>185</sup> There have been exceptions: *e.g.*, the 1999 China-Qatar BIT still features the dispute settlement provision of the 1984 Chinese Model.

treatment, the standard for compensation, the transfer regime and the investor-State dispute settlement mechanism. Below, a brief overview of each of those. A thorough analysis on the provision of scope and the notion of investment follows in Section B of this Chapter.

*i. The preamble*

The principal purpose of an international treaty is usually reflected in the preamble, which provides for the ‘color, texture and shading’<sup>186</sup> of the entire stipulation. Before the adoption of the 1984 Model, China had signed four BITs<sup>187</sup>. In those earlier agreements, the preambles are quite simple: China’s first BIT, in 1982, with Sweden, follows the traditional Swedish pattern in outlining only the desire to ‘maintain fair and equitable treatment for investments’<sup>188</sup>. The 1983 China-Germany BIT features, according to the German custom, the parties’ effort ‘to create favorable conditions for investments’. The 1988 BIT with Australia features the *ratione legis* requirement at the preamble stage, which has become over the time quite frequent (in addition to the model language)<sup>189</sup>.

The progressive enrichment of the standard preamble is considered contributing at checking expansive interpretations against any measure, regardless of its nature and public welfare effect<sup>190</sup>.

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<sup>186</sup> As magisterially synthesized in the WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WT/DS58/AB/R, at paras. 152, 153 and 155.

<sup>187</sup> Sweden (1982), Romania (1983), Germany (1983), France (1984).

<sup>188</sup> Such simple formulation is standard in Swedish BITs (cf., 1981 BIT with Pakistan; also, the 1978 BIT with Egypt where, however, such principle is associated to the typically French BIT preambular objective to ‘promote the development of economic, industrial and technical cooperation’).

<sup>189</sup> e.g., BIT with Nigeria BIT (1997), Trinidad and Tobago (2002), Guyana (2003), Benin (2004).

<sup>190</sup> In this sense, *Gallagher & Shan* (2009), p. 51.

Usually drawn from the Chinese Models (which show no changes amongst themselves in this respect), the preamble to actual Chinese stipulations has generally followed one pattern – which was employed for the first time in the 1984 BIT with Belgium-Luxembourg. The Model preamble recites as follows:

*'Intending to create favorable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party;*

*Recognizing that the reciprocal encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors and will increase prosperity in both States;*

*Desiring to intensify the cooperation of both States on the basis of equality and mutual benefits;*

*Have agreed as follows:'*

The preamble, which does not mention any specific principle or extensive commitment, determines for the Chinese BIT three general purposes:

- i) To facilitate and attract investments;
- ii) To contribute to the prosperity of the contracting parties;
- iii) To cooperate on the basis of equality and mutual benefits.

Coherently with China's general policy towards commitments in international investment law, the preamble appears structured to avoid 'pro-investor' presumptions or interpretations<sup>191</sup>: although it is there recognized that primary purpose of the BIT is to attract

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<sup>191</sup> e.g., such as in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, Decision on Jurisdiction, Jan. 29th, 2004, ICSID Case No. ARB/02/6.*, at para. 116: 'The object and purpose of the BIT supports an effective interpretation of Art. X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble, it is intended 'to create and maintain favorable conditions for investments by investors of one Contracting Party in the territory of the other'. It is legitimate to resolve uncertainties in its interpretation so as to favor the protection of covered investments'; see, also, *Gallagher & Shan (2009)*, p. 50.

investments (first principle), it is also essential that such investment shall be beneficial to the host State (second and third principles).

*ii. Notion of investment and investor (Art. 1)*

All Chinese Model BITs link the scope of the definition of investment to the way in which the investment is made. Only assets ‘invested by investors of one Contracting Party in the territory of the Latter’ are covered investments under the treaty. This is important, as China’s policy with regard to admission of foreign investment follows a systematic ‘one-by-one’ approval system<sup>192</sup>. Thus, any investment that is not properly approved does not qualify as an investment and therefore cannot rely on the BIT protection.

With regard to the notion of investor, it has been noted that in recent years, with the gradual establishment of a market economy and the parallel expansion of outward investments, China, drawing from the notions of US and EU FTAs and BITs, attaches less and less qualifications to investors in respect of China. This is evident in the 1997 Model BIT, as well as in most BITs signed since then<sup>193</sup>.

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<sup>192</sup> For an illustration of China’s FDI approval system: *Chapter III: Examination and Approval Procedures for Verifying and Setting up Projects*, in *Invest in China - 2012*, MOFCOM, available at: [http://www.fdi.gov.cn/1800000121\\_10000161\\_8.html](http://www.fdi.gov.cn/1800000121_10000161_8.html); for a more in-depth legal analysis: W. Shan, *The legal framework of EU-China investment relations – a critical appraisal*, Hart Publishing, 2005, Chapter 4.

<sup>193</sup> C. Huiping, *China-ASEAN investment agreement negotiations: the substantive issues*, in *The journal of world investment & trade : law, economics, politics*, vol. 7, 2006; p. 155.

iii. *Standards of treatment (Arts. 2-3)*

As of the standard of treatments, it shall be noted that the NT standard has not been widely used in Chinese BIT practice<sup>194</sup>. In the earliest Model BIT, China did not include NT at all. The 1986 BIT with the UK was the first where such standard of treatment was included, even though only as a ‘best effort’ clause, requiring the parties to implement it ‘to the extent possible’<sup>195</sup>. Such a clause was, nevertheless, an improvement, and it became featured in the 1989 Model.

The 1997 Model BIT grants NT and non-discriminatory treatment to foreign investment; however, such treatments are still subject to the laws and regulations of the host State. It has been found that this is largely due to the fact that NT cannot be implemented unless there is a market economy<sup>196</sup> (and China, despite its gradual opening, still adopts a planned economy model).

Even in those more recent cases where the otherwise typical ‘subject to local laws’ requirement has been removed (*e.g.*, the 2003 China-Germany BIT), China maintained a grandfather clause<sup>197</sup> allowing for the continuation of non-conforming measures incompatible with national and non-discriminatory treatments.

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<sup>194</sup> W. Shan, *China and international investment law*, in L. E. Trakman, N. Ranieri, *Regionalism in international investment law*, Oxford University Press, 2013, pp. 214-252, at p. 233. Shan also stresses that the 1967 OECD Draft Convention on the Protection of Foreign Property did not contain a NT provision either.

<sup>195</sup> Art. 3.3 China-UK BIT (1986).

<sup>196</sup> *Gallagher & Shan (2009)*, pp. 44-45.

<sup>197</sup> *Ad. 3 to Arts. 2 and 3, China-Germany BIT.*

iv. *Expropriation and standard of compensation (Art. 4)*

China granted protection against expropriation since its first model text. Since 1984, the conditions for a legitimate expropriation are comprised in a clear list of four elements:

- a) public interests,
- b) under domestic legal procedure,
- c) without discrimination,
- d) against compensation.

Three of those conditions (*i.e.*, a), c) and d)) were drawn from the UK Model; in the Chinese model, however, they are elaborated in the form of a list, whose second element (*i.e.*, under domestic legal procedure) is made explicit. Such a fourth element will be later featured as well in the 1992 US Model (although not in the form of a list), while it is framed still today in a different fashion in both the German and British Models<sup>198</sup>.

With regard to the standard of compensation, while some discipline has always been envisaged, no Chinese model resorts to the ‘Hull formula’ of ‘adequate, prompt and effective’ compensation. Beside the rather convoluted parenthesis of the 1989 Model, both 1984 and 1997 Models accept that compensation shall be ‘equivalent to the value of the expropriated investment’. In the latest Model, drawing from the identical wording in this respect of both British and German Models, China also proposed a more articulated (and less vague) phrasing, with regard to the fact that compensation shall be made ‘without delay, be effectively realizable and freely transferable’.

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<sup>198</sup> Cf., Comparative Table on expropriation, in the Annex, at p. 368.

v. *Transfers (Art. 6)*

The 1997 Model subjects transfers of investment to the host State's 'laws and regulations'. It has been noted that this is necessary as China still implements an exchange control policy (particularly, on capital account), and its currency, the renmibi, is not yet freely convertible<sup>199</sup>. Such a rule has been partly liberalized in recent BIT practice: in the 2003 China-Germany BIT, the requirement has been lifted, replaced by *Ad. 5* to Article 6, establishing temporarily that '...transfers shall comply with the relevant formalities stipulated by the present Chinese laws and regulations relating to exchange control', pending that such formalities will be '...no longer required according to the relevant provisions of Chinese law'. It is thought that those provisions relating to free transfers will ultimately be abandoned altogether, as China further liberalizes its foreign exchange control regime<sup>200</sup>.

vi. *Investor-State dispute settlement (Art. 8)*

In both 1984 and 1989 Models, China's consent to investor-State arbitration was limited to *ad hoc* arbitration on the amount of compensation due to expropriation. In such an instance, the norm provided for a complete set of rules for the appointment of arbitrators, the arbitral procedure and the issuance of the award<sup>201</sup>. The first -exceptional- instances where China consented for 'any dispute' to be submitted to (*ad hoc*) arbitration were the 1986 BIT with the UK and the 1987 BIT with the Netherlands. With the ratification of the ICSID

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<sup>199</sup> *Gallagher & Shan (2009)*, p. 45.

<sup>200</sup> *Ibid.*

<sup>201</sup> Cf., Annex, at p.327.

Convention, in 1993, China occasionally adjusted the text of the model clause, in order to provide consent for ICSID arbitration – nevertheless, always only with regard to disputes on the amount of compensation due to expropriation. At times, it also included the option – subject to an additional expression of consent of the host State – to submit ‘any dispute concerning other matters’ to ICSID arbitration<sup>202</sup>. China did not systematically offer unconditional access to arbitration (other than amount-of-compensation due to expropriation) until the 1998 BIT with Barbados<sup>203</sup>. Since then, the majority of BITs negotiated (or renegotiated) by China included full access to ICSID jurisdiction<sup>204</sup>.

With the 1997 Model, China included a ‘fork in the road’ clause, requiring investors to choose either a local court or ICSID arbitration to resolve the dispute (where the matter cannot be settled within the prescribed cooling-off period of six months). Where ICSID arbitration is chosen, the State party may require the investor to go through a domestic administrative review procedure before commencing arbitration. The ‘fork in the road’ clause has, nonetheless, been substantially watered down in some of China’s more recent BITs: *e.g.*, the China-Germany BIT stipulates that a disputing party may withdraw a dispute from the domestic courts and submit it to international arbitration. Such a path has been followed also in many recent stipulations, both FTAs and BITs<sup>205</sup>.

It shall be noted, nevertheless, that while on the one hand China gradually accepted full ICSID jurisdiction on all investment claims, and diluted the fork in the road clause, on the

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<sup>202</sup> The China-Peru BIT of 1994 is an instance of both cases.

<sup>203</sup> Whether such protection could be extended to other States by the operation of a MFN clause, is a matter of controversy; for an analysis on the matter, see *Gallagher & Shan (2009)*, Chapter 8.

<sup>204</sup> Amongst the few exceptions, *e.g.*, the 1999 China-Qatar BIT, featuring a 1984 Model text-based provision.

<sup>205</sup> Amongst the latest stipulations, an exception appears to be the FTA with Iceland, which does not feature any investment protection regime but only operates a *renvoi* to the 1994 BIT between the parties (anchored to the 1984 Chinese Model).

other it systematized – and, when possible, strengthened – the typical administrative review procedure, which is now mandatory in *all* BITs signed by China. Such domestic procedure does not appear in any model text but, with no exception, is inserted in the Protocol attached to the stipulation<sup>206</sup>.

The following section analyzes in greater detail the ties between all Chinese Model texts and those of the most influential European States in the field (*i.e.*, Germany and the United Kingdom). Focuses of the comparative analysis are the provision of scope and the notion of investment. The detailed comparison offered will thus highlight *i*) China's treaty-making with regard to these two essential BIT provisions, *ii*) the broad commonalities that Chinese and the European models share in this respect (as opposed to the North American models), and *iii*) the distinctive features of the Chinese texts, as a reflection of China's core interests (and concerns) in the field.

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<sup>206</sup> See Chapters IV and VI.

<b>Table 12 – Chinese Model BITs – Investment</b>	
<b>Art. 1.1 China Model '84 and '89</b>	<b>Art. 1.1 China Model '97</b>
1. The term 'investment' means every kind of asset invested by investors of one CP in accordance with the laws and regulations of the other CP in the territory of the Latter, and in particular, though not exclusively, includes:	<i>[idem]</i>
(a) movable, immovable property and other property rights such as mortgages and pledges;	(a) movable and immovable property and other property rights such as mortgages, pledges <b>and similar rights</b> ;
(b) shares, stocks and any other kind of participation in companies;	(b) shares, <b>debentures</b> , stock and any other kind of participation in companies;
(c) claims to money or to any other performance having an economic value;	(c) claims to money or to any other performance having an economic value <b>associated with an investment</b> ;
(d) copyrights, industrial property, know-how and technological processes;	(d) <b>intellectual property rights, in particular</b> copyrights, <b>patents, trade-marks, trade-names</b> , technical process, know-how <b>and good-will</b> ;
(e) concessions conferred by law, including concessions to search for or exploit natural resources.	(e) <b>business</b> concessions conferred by law <b>or under contract permitted by law</b> , including concessions to search for, <b>cultivate, extract</b> or exploit natural resources.
-	Any change in the form in which assets are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the CP in whose territory the investment has been made.

<b>Table 13 – Chinese Model BITs – Returns</b>	
<b>Art. 1.3 China Model '84 and '89</b>	<b>Art. 1.3 China Model '97</b>
The term 'returns' means the amount yielded by investments, such as profits, dividends, interests, royalties or other legitimate income.	The term 'returns' means the amount yielded from investments, including profits, <b>capital gains</b> , royalties, <b>fees</b> and other legitimate income.

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments: a comparative perspective, from the model BITs to the latest stipulations"

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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

<b>14 – Chinese Model BITs – Investor</b>		
<b>Art. 1.2 China Model ‘84</b>	<b>Art. 1.2 China Model ‘89</b>	<b>Art. 1.2 China Model ‘97</b>
The term ‘investor’ means:	The term ‘investor’ means:	The term ‘investor’ means:
in respect of the People’s Republic of China:  (a) natural persons who have nationality of the People’s Republic of China <b>in accordance with its laws</b> ;  (b) economic entities, established in accordance with the laws of the People’s Republic of China and domiciles in the territory of the People’s Republic of China;	In respect of the People’s Republic of China:  (a) natural persons who have nationality of the People’s Republic of China;  (b) [idem];	(a) natural persons who have nationality of either CP <b>in accordance with the law of that CP</b> ;  (b) <b>legal entities, including companies, associations, partnerships and other organizations, incorporated or constituted</b> under the laws and regulations of either CP <b>and have their seats in that CP.</b>
In respect of the ____: (a) ____; (b) ____.	[idem]	

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments: a comparative perspective, from the model BITs to the latest stipulations"  
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Table 15 – Chinese Model BITs – Promotion, Protection and Treatment of Investment

	Arts. 2, 3 and 10 China Model '84	Arts. 2, 3 and 10 China Model '89	Arts. 2, 3 and 10 China Model '97
<b>Prom.</b>	2.1 Each CP shall encourage investors of the other CP to make investments in its territory and admit such investments in accordance with its law and regulations.	[idem]	[idem]
<b>FET &amp; FPS</b>	3.1 Investment and activities associated with investments of investors of either CP shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other CP.	2.2 [1 <sup>st</sup> sent] Investments made by investors of each CP shall <b>at all times</b> be accorded fair and equitable treatment and shall enjoy <b>constant protection and security</b> in the territory of the other CP.	2.2 Investments of the investors of either CP shall enjoy the constant protection and security in the territory of the other CP.  <b>3.1</b> Investments of investors of each CP shall <b>all the time</b> be accorded fair and treatment in the territory of the other CP.
<b>Min. St. of Treat.</b>	-	2.2 [2 <sup>nd</sup> sent] Neither CP shall, without prejudice to its laws and regulations, <b>in any way</b> impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other CP.	<b>2.3</b> Without prejudice to its laws and regulations, neither CP shall <b>take any</b> unreasonable or discriminatory measure against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other CP.
<b>UC</b>	-	2.2 [3 <sup>rd</sup> sent] Each CP shall observe any <b>obligations</b> it may have entered into with regard to investments of investors of the other CP.	<b>10.2</b> Each CP shall observe any <b>commitments</b> it may have entered into with the investors of the other CP as regard to their investments.
<b>NT</b>	-	3.3 In addition to the provisions of Paras. 1 and 2 of this Article [MFN and FPS], either CP <b>shall, to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations</b> to the investments of investors of the other CP, <b>the same as</b> that accorded to its own investors.	<b>3.2</b> Without prejudice to its laws and regulations, each CP <b>shall accord</b> to investments and activities associated with such investments by the investor of the other CP <b>treatment not less favorable</b> than that accorded to the investment and associated activities by its own investors.
<b>MFN</b>	3.2 The treatment and protection referred to in Para. 1 of this Article [FET & FPS] shall not be less favorable than that accorded to investments	<b>3.1</b> Neither CP shall, <b>in its territory</b> , subject investments <b>or</b> activities associated with investments of investors of the other CP to	<b>3.3</b> Neither CP shall subject investments <b>and</b> activities associated with such investments <b>by the</b> investors of the other CP to treatment less

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments: a comparative perspective, from the model BITs to the latest stipulations"

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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

	and activities associated with such investments of investors of a third State.	treatment less favorable than that accorded to investments <b>or</b> associated activities <b>by</b> investors of <b>any</b> third State.	favorable than that accorded to the investments <b>and</b> associated activities by <b>the</b> investors of any third State.
	-	3.2 Neither CP shall, in its territory, subject <b>investors</b> of the other CP, as regards their management, maintenance, use, enjoyment or disposal of their investments or activities related with investments, to treatment less favorable than that which it accords to investors of any third State.	-
	3.3 The treatment <b>and protection</b> as mentioned in Paras. 1 and 2 of this Art. [ <b>FET, FPS and MFN</b> ] shall not include any preferential treatment accorded by the other CP to investments of investors of a third State based on custom unions, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.	3.3 The treatment as mentioned in Paras. <b>1, 2 and 3</b> of this Art. [ <b>MFN and NT</b> ] shall not include any preferential treatment accorded by the other CP to investments of investors of a third State based on custom unions, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.	<b>3.4 The provision of Para. 3 of this Art. [MFN] shall not be construed so as to oblige one CP to extend to the investors of the other CP the benefit of any treatment, preference or privilege by virtue of:</b> (a) any custom union, free trade zone, economic union and <b>any international agreement resulting in such union, or similar institutions;</b> (b) any international agreement or arrangement relating <b>wholly or mainly</b> to taxation; (c) any arrangement for facilitating <b>small scale</b> frontier trade <b>in border areas</b> .
<b>Other Oblig.</b>	10. If the treatment to be accorded by one CP in accordance with its laws and regulations to investments or activities associated with such investments of investors of the other CP is more favorable than the treatment provided for in this Agreement, the more favorable treatment shall be applicable.	[idem]	10.1 If the <b>legislation</b> of either CP <b>or international obligations existing at present or established hereafter between the CP</b> result in a position entitling investments by investors of the other CP to a treatment more favorable than is provided for by the Agreement, such position shall not be affected by this Agreement.

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments: a comparative perspective, from the model BITs to the latest stipulations"

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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Table 16 – Chinese Model BITs – Expropriation		
Art. 4 China Model '84	Art. 4 China Model '89	Art. 4 China Model '97
1. Neither CP shall expropriate, nationalize or take similar measures (hereinafter referred to as 'expropriation') against investments of investors of the other CP in its territory, unless the following conditions are met:	[idem]	[idem]
(a) for the public interests; (b) under domestic legal procedure; (c) without discrimination; (d) against compensation.	(a) for the public interests; (b) under <b>appropriate</b> legal procedure; (c) without discrimination; (d) against compensation.	[idem as '84]
2. The compensation mentioned in Para. 1, (d) of this Art. shall be <b>equivalent to the value</b> of the expropriated investment at the time when expropriation is proclaimed, ... [see below]  ... be convertible and freely transferable. The compensation shall be paid without unreasonable delay.	2. The compensation shall be <b>calculated on the basis of the market value</b> of the investment expropriated immediately before the proclamation of the decision of expropriation <b>or before the impending expropriation becomes public knowledge.</b> <b>Where the market value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognized principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors.</b> <b>The compensation shall include interest calculated at a normal rate applicable to the currency used in the original investment from the date of expropriation to the date of payment.</b> The amount of compensation finally determined shall be paid to investors with convertible currencies and be freely transferable without <b>undue</b> delay.	2. The compensation mentioned in Para. 1 of this Art. shall be <b>equivalent to the value</b> of the expropriated investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge.  <b>The value shall be determined in accordance with generally recognized principles of valuation.</b>  The compensation shall include interest at a normal <b>commercial</b> rate from the date of expropriation until the date of payment.  The compensation shall also be made <b>without delay</b> , be <b>effectively realizable</b> and freely transferable.

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments: a comparative perspective, from the model BITs to the latest stipulations"

di VACCARO INCISA GIUSEPPE MATTEO

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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

<b>Table 17 – Chinese Model BITs – Investor-State Dispute Settlement</b>	
<b>Art. 9 China Model '84 and '89</b>	<b>Art. 9 China Model '97</b>
1. Any dispute between an investor of one CP and other CP in connection with an investment in the territory of the other CP shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.	[idem]
2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the CP accepting the investment.	2. If the dispute cannot be settled through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted <b>by the choice of the investor</b> :
3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Para. 1 of this Art., it may be submitted at the request of either party to an ad hoc tribunal.	(a) to the competent court of the CP that is a party to the disputes;
The provision of this Para. shall not apply if the investor concerned has resorted to the procedure specified in the Para. 2 of this Art.	<b>(b) to ICSID under the ICSID Convention, done at Washington on March 16, 1965, provided that the CP involved in the dispute may require the investor to go through the domestic administrative review procedures specified by the laws and regulations of that CP before the submission to ICSID.</b>
[Para. 4: appointment of the ad hoc tribunal; see Annex*]	-
[Para. 5: procedure of the ad hoc arbitration; see Annex*]	-
6. The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on both parties to the dispute. Both CP shall commit themselves to the enforcement of the decision <b>in accordance with their respective domestic law.</b>	<b>4.</b> The arbitration award shall be final and binding upon the parties to the dispute. Both CP shall commit themselves to the enforcement of the award.
7. The tribunal shall adjudicate in accordance with the law of the CP to the dispute accepting the investment including its rules on the conflict of laws, the provision of this Agreement as well as the <b>generally recognized principles of international law accepted by both CP.</b>	<b>3.</b> The arbitration award shall be based on the law of the CP to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the <b>universally accepted</b> principles of international law.
[Para. 8: costs of the ad hoc arbitration; see Annex*]	-

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments: a comparative perspective, from the model BITs to the latest stipulations"

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## **B. The tight relation with the major European Models: focus on the provision of scope and the notion of investment**

### *1. The provision of scope: to what the BIT applies*

Within a comparative perspective, the focus of the analysis turns firstly on the ‘subject’ of the treaty. Currently, BITs may be divided into two ‘families’: on the one side, those stemming from the major European models, whose ‘application’ provision (placed towards the end of the treaty) provides that the agreement ‘shall apply to *investments*’<sup>207</sup>; on the other, those relying on the North American models, whose ‘scope’ provision (found at the very beginning of the treaty) determines that the BIT applies to ‘*measures* adopted or maintained by a Party...’<sup>208</sup>.

The ‘application’ or ‘scope’ provision is thus important, as its presence and formulation contribute in identifying the conceptual ‘family’ the stipulation under analysis belongs to.

As found, according to the structural features, all Chinese models stem from the major European models. An analysis of the application provision (featured in Art. 11 of all Chinese models), not only confirm such relationship, but it reveals how tight such bond is. As per most of the text – and thanks also to the early BITs concluded with Germany and Britain<sup>209</sup> –, China took more than just inspiration from the British and German models. It may actually be considered that the text of the provision resembles to some extent a patchwork of the British and German wording of the same provision – to which the firmest and longest-standing *topos*

<sup>207</sup> Emphasis added; this is since the very first BIT, the 1959 Agreement between Germany and Pakistan (Art. 9); with regard to Model BITs, the German and British expressly state so (respectively, at Art. 8 and Art. 12); the French and Italian Models, despite not featuring an ‘application’ provision as such, follow the same set-up.

<sup>208</sup> Emphasis added; Art. 2 of US (2004 and 2012) and Canada (2004 and 2006) Models.

<sup>209</sup> Respectively, in 1983 and 1986.

of the Chinese BIT (*i.e.*, the explicit call for respect of domestic laws and regulations; hereinafter, *ratione legis*) is attached. Table 18, below, provides a comparative illustration of the above.

The wording of the provision may be thus highlighted as follows:

- ‘This Agreement shall apply to investments which are made prior of after its entry into force’ is extracted from both British and German Models, whose wording is identical, with the exception of the characterizing ‘Agreement’ from the British model, and the ‘prior’ *in lieu* of ‘before’ from the German model; China thus operated, here, a merger<sup>210</sup>;
- ‘...in accordance with the laws and regulations of the other Contracting Party...’ is the typical Chinese *ratione legis* condition<sup>211</sup> (which derives, nevertheless, from the German ‘consistent with the latter’s legislation’);
- ‘...by investors of either Contracting Party ... in the territory of the other Contracting Party’ comes from the German model;
- In the 1997 Model, extracting additional words from the British Model formulation, China added, at the end of the provision: ‘...but [the Agreement does] not apply to the disputes arose before its entry into force’ (*i.e.*, the *ratione temporis* criterion); the addition, however, reproduces only a few essential words out of the

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<sup>210</sup> Interestingly, China discarded the word ‘also’ (in the locution ‘this treaty shall also apply’) opening the German provision. The word – which is nevertheless featured in the 1983 China-Germany BIT, and kept in the 2008 German model – was perhaps deemed unclear in that context.

<sup>211</sup> According to Schill, such systematic requirement of Chinese BITs is due more to a general distrust towards international investment arbitration, than an effective desire to provide a chance of domestic redress via the domestic administrative courts; see Stephan W Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People’s Republic of China*, in *Cardozo Journal of International and Comparative Law*, issue 15, 2007, pp. 92-93.

original sentence (much longer), thus creating an equivalent yet more synthetic phrasing.

China's treaty-*bricolage* technique in building its first model BIT, in 1984, thus emerges, as well as its rationale: relying on major trade and investment powers and 'perfect' their texts, in the sense of simplicity and clarity.

Over the years -and models-, the 'application' provision has not gone through substantial changes. Beside the earliest stipulations, featuring the *ratione temporis* criterion only<sup>212</sup>, the *ratione legis* and *loci* soon appeared to complete the provision<sup>213</sup> – with the notable exception of the 1986 China-UK BIT<sup>214</sup>. It may be noted that, in the context of the re-negotiations of the 1983 China-Germany BIT, Germany did not insist for updating the definition in accordance with its own model (being the content substantially equivalent), but accepted to rely on the old 1984 Chinese text (which, nevertheless, constituted an update from the 1983 regime).

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<sup>212</sup> In the 1982 BIT with Sweden, the provision simply states: 'This Agreement shall apply to all investment made after July 1, 1979'.

<sup>213</sup> e.g., Art. 9 China-Germany BIT (1983): 'This Agreement shall also apply to investment made from July 1<sup>st</sup>, 1979, by investor of a CP in the territory of the other CP in accordance with its laws and regulations'.

<sup>214</sup> The 1986 China-UK BIT lacks the provision entirely (however, *ratione legis* and *loci* are featured in the definition of investment); indeed, the British model BIT, even in its latest version (2006), focuses solely on the moment when the dispute arises, not considering any *rationes*.

Table 18 – Application				
Art. 11 PRC Model '84/'89	Art. 11 PRC Model '97	Art. 12 UK '06	Art. 8 DE '08	Art. 12 PRC-DE '03
This Agreement shall apply to investments which are made prior or after its entry into force by investors of either CP in accordance with the laws and regulations of the other CP in the territory of the Latter.	This Agreement shall apply to investments made prior or after its entry into force by investors of one CP in the territory of the other CP in accordance with the laws and regulations of the CP concerned, but not apply to the disputes arose before its entry into force.	This Agreement shall apply to all investments, whether made before or after its entry into force, but shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force.	This Treaty shall also apply to investments made prior to its entry into force by investors of either CP in the territory of the other CP consistent with the latter's legislation.	[idem as PRC '84/'89]

## 2. The notion of investment

The definition of investment and investor are key elements of an investment agreement, as the scope of the agreement is delimited primarily through those definitions<sup>215</sup>, and only qualified investments and investors enjoys the protection provided for by the agreement. The definition of investment, in particular, interacts with other substantive provisions (such as, *e.g.*, the NT clause, or the investor-State dispute settlement mechanism), thus playing an important role in shaping the overall investment framework<sup>216</sup>. Such definition is also tightly connected to the State attitude towards investment liberalization: the broader the definition, the more protection is likely to be offered to investments<sup>217</sup>.

<sup>215</sup> UNCTAD, *Scope and definition*, UNCTAD series on issues in International investment agreements, 2011, p. 1; available at: <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=354>.

<sup>216</sup> Cf., *Report (2002) of the Working Group on the Relationship between Trade and Investment to the General Council*, WTO, WT/WGTI/6, Dec. 9<sup>th</sup>, 2002, p. 6.

<sup>217</sup> *Id.*, pp. 3-5. As opposed to narrow definitions, normally preferred in investment-liberalization contexts. A narrow approach is an enterprise or transaction -based definition, focused on FDI; a broad approach is an asset-based definition, with options for the inclusion or exclusion of various categories of investments. Most BITs

From the embryo open-list pivoting on ‘capital’ enshrined in the 1959 Germany-Pakistan BIT<sup>218</sup>, and the broad notion of ‘property’ featured in the Draft Convention on the Protection of Foreign Property<sup>219</sup>, the definition of investment has gone through a process of standardization, especially amongst the European models. While no universally binding concept of investment is established, all major Models build on a common open-ended structure and notion<sup>220</sup>.

The notion of investment contained in the 1997 Chinese Model BIT reproduces mainly the wording employed already back in the 1984 Model. This in turn merged, for the most part, elements either common or distinctive of the British and German Models. A detailed analysis of these texts (including the China-Germany BIT, subsequently used as template for the investment regime featured in Chinese FTAs) is deemed essential in outlining the treaty-making policy choices of China, with regard to investment stipulations.

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adopt the broad approach, as it provides for comprehensive, rule-based protection and guarantees high standards of treatment for all categories of foreign investments. Since a broad definition of investment entails the liberalization of all forms of capital movement, and increase the risk of destabilizing short-term flows, a narrow definition is usually adopted in liberalization-oriented agreements. A narrow definition may fit the entire agreement and make it unnecessary to further delineate the BIT’s scope and coverage; a broad definition, on the other hand, requires more flexibility, which can be achieved by structuring specific commitments within the substantive provisions dealing with pre-establishment commitments. As modern investment agreements cover both liberalization and protection aspects, the current approach seems to consist in the use of different definitions for the pre- and post- establishment phases of investments: narrow, for the former (*i.e.*, market access and investment liberalization), and broad, for the latter.

<sup>218</sup> Art. 8.1: ‘(a) The term ‘investment’ shall comprise capital brought into the territory of the other Party for investments in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge. The term ‘investment’ shall also include the returns derived from and ploughed back into such ‘investment’. (b) Any partnership, companies or assets of similar kind, created by the utilization of the above mentioned assets shall be regarded as ‘investment’.’

<sup>219</sup> Art. 9.c: ‘‘Property’ means all property, rights and interests, whether held directly or indirectly, including the interest which a member of a company is deemed to have in the property of the company.’; the comment attached to the text of the Draft Convention stresses, at p. 43, that the use of the term ‘property’ was ‘...meant to be used in its widest sense which includes, but it not limited to, investments’.

<sup>220</sup> *e.g.*, German, British, Dutch, French, Italian, US Models; the only exception appears to be the Canadian Model.

Comparative Table 19, below, outlines commonalities and differences amongst the relevant agreements.

Table 19 – Investment				
Art. 1.1 PRC '84 / '89	Art. 1.1 PRC '97	Art. 1(a) UK '06 <sup>221</sup>	Art. 1.1 DE '08 <sup>222</sup>	Art. 1.1 PRC-DE '03
1.1 The term 'investment' means every kind of asset invested by investors of one CP in accordance with the laws and regulations of the other CP in the territory of the Latter, and in particular, though not exclusively, includes:	[idem]	1(a) 'investment' means every kind of asset, owned or controlled <sup>223</sup> directly or indirectly, and in particular, though not exclusively, includes:	1.1 the term 'investments' comprises every kind of asset which is directly or indirectly invested by investors of one CP in the territory of the other CP. The investments include in particular:	1.1 the term 'investment' means every kind of asset invested directly or indirectly by investors of one CP in the territory of the other CP, and in particular, though not exclusively, includes:
(a) movable, immovable property and other property rights such as mortgages and pledges;	(a) movable and immovable property and other property rights such as mortgages, pledges and similar rights;	(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;	(a) movable and immovable property as well as any other rights <i>in rem</i> , such as mortgages, liens and pledges;	(a) [idem PRC '84]
(b) shares, stocks and any other kind of participation in companies;	(b) shares, debentures, stock and any other kind of participation in companies;	(ii) shares in and stock and debentures of a company and any other form of participation in a company;	(b) shares of companies and other kinds of interest in companies;	(b) shares, debentures, stock and any other kind of interest in companies;
(c) claims to money or to any other performance having an economic value;	(c) claims to money or to any other performance having an economic value associated with an investment <sup>224</sup> ;	(iii) claims to money or to any performance under contract having a financial value;	(c) claims to money which has been used to create an economic value or claims to any performance having an economic value;	(c) [idem to PRC '97]
(d) copyrights, industrial property, know-how and technological processes;	(d) intellectual property rights, in particular copyrights, patents, trademarks, trade-names, technical process, know-how and good-will;	(iv) intellectual property rights, goodwill, technical processes and know-how;	(d) intellectual property rights, in particular copyrights and related rights, patents, utility model patents, industrial designs, trademarks,	(d) intellectual property rights, in particular copyrights, patents and industrial designs, trademarks, trade-names, technical processes, trade and

<sup>221</sup> Art. 1.a of the 1993 UK Model BIT is identical to that featured in the 2006 Model (with the sole exception of a more synthetic chapeau); for the sake of space and clarity, thus, the latter only is featured in the Table.

<sup>222</sup> Art. 1.1 of the 1991 German Model 1991 is contained in that, more articulated, of the 2008 Model (only differences being a more synthetic chapeau, a simpler listing for the IP-related items, and the addition of the last sentence); for the sake of space and clarity, thus, the latter only is featured in the Table.

<sup>223</sup> Art. 1 US 1992 Model: '...investment in the territory of one Party that an investor owned or controlled, directly or indirectly...'

<sup>224</sup> As in Art. 1.a.iii of the 1992 US Model BIT.

			plant variety rights; (e) trade-names, trade and business secrets, technical processes, know-how, and goodwill;	business secrets, know-how and good-will; <sup>225</sup>
(e) concessions conferred by law, including concessions to search for or exploit natural resources.	(e) business concessions conferred by law or under contract permitted by law <sup>226</sup> , including concessions to search for, cultivate, extract or exploit natural resources.	(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.	(f) business concessions under public law, including concessions to search for, extract or exploit natural resources;	(e) [idem to PRC '97] <sup>227</sup>
-	Any change in the form in which assets are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the CP in whose territory the investment has been made.	A change in the form in which assets are invested does not affect their character as investments and the term 'investment' includes all investments, whether made before or after the date of entry into force of this Agreement.	Any alteration of the form in which assets are invested shall not affect their classification as investment. In the case of indirect investments, in principle only those indirect investments shall be covered which the investor realizes via a company situated in the other CP.	Any change in the form in which assets are invested does not affect their character as investments.

<sup>225</sup> Such wording has been reused, *e.g.*, in the 2005 China-Portugal BIT (while the 2001 China-Netherlands BIT makes use of the wording of the 1997 Model).

<sup>226</sup> Art. 1.a.v 1991 US Model BIT: 'any right conferred by law or contract, and any licenses and permits pursuant to law'.

<sup>227</sup> Employed also, *e.g.*, in the China-Netherlands (2001) and China-Finland (2004) BITs.

Table 20 - Promotion of Investments			
PRC '84/'89/'97	UK '06	DE '08	PRC-DE '03
2.1 Each CP shall encourage investors of the other CP to make investments in its territory and admit such investments in accordance with its law and regulations.	2.1 Each CP shall encourage and create favourable conditions for nationals or companies of the other CP to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.	2.1 Each CP shall in its territory promote as far as possible investments by investors of the other CP and admit such investments in accordance with its legislation.	2.1 [idem Art. 2.1 PRC '84]

### a. The opening statement

*'The term investment means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the Latter, and in particular though not exclusively, includes:'*<sup>228</sup>

- Words common to both German and British Models, employed since the 1984 Chinese Model, such as:
  - The traditional 'every kind of assets' locution in the chapeau,
- Words specific of the British Model, most notably:
  - The locution introducing the open-list ('and in particular, though not exclusively, includes'),
- Words specific of the Chinese Model:
  - The articulated chapeau (unchanged since 1984), which adds three elements to the otherwise synthetic models of the early 1990s:

<sup>228</sup> Art. 1.1, 1997 Chinese Model BIT.

- ‘*invested by investor* of one Contracting Party’
- ‘*in accordance with the laws and regulations* of the other Contracting Party’
- ‘*in the territory* of the Latter’

It shall be noted that such articulated phrasing of the investment chapeau is featured since China’s first BIT, in 1982, with Sweden. As such, however, it is not featured in any preceding agreements of Germany, the UK, The Netherlands, France, Italy, Sweden, Switzerland or Japan. Also, it shall be noted that China, until the renegotiation of the BIT with Germany, in 2003, *never* gave up on such locution. It is therefore to be concluded for the *strategic* importance attributed by China to those elements, all apparently intended to introduce clear limits *ratione personae*, *legis* and *loci* to the BIT coverage.

*i. ‘In accordance with the laws’: the *ratione legis* requirement*

By comparison with the German and British Models, the opening statement of Art. 1 displays only one original -yet substantial- addition. It requires the investment, in order to properly qualify as such, to be an asset invested ‘...in accordance with the laws and regulations of the other Contracting Party’<sup>229</sup>. For the purpose of this research, such condition is understood as the *ratione legis* requirement. Such requisite, not uncommon in less recent BITs, has been a

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<sup>229</sup> Emphasis added.

constant for China since the conclusion of its first BIT, in 1982<sup>230</sup> – and, until the 2003 renegotiation with Germany<sup>231</sup>, a *topos* of all Chinese stipulations.

Starting with *Salini v. Morocco*<sup>232</sup>, the *ratione legis* requirement has been understood that reference to a host State's domestic law concerns not the definition of the term investment, but solely the legality of the investment. In response to the argument advanced by Morocco, that the concept of investment should have been determined with reference to its own domestic law, the tribunal held that the *ratione legis* requirement:

*'...refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Investment Treaty from protecting investments that should not be protected because they would be illegal'*<sup>233</sup>.

The use of the term 'illegal' has triggered in the subsequent case-law additional speculation. The *ratione legis* requirement has subsequently fallen under the scrutiny of at least three ICSID tribunals: *Inceysa Vallisoletana v. El Salvador*<sup>234</sup>, *World Duty Free v. Kenya*<sup>235</sup>, and *Fraport v. Philippines*<sup>236</sup>. China was not a party in any of such cases. In the second, the

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<sup>230</sup> China-Sweden BIT, Art. 1.1.

<sup>231</sup> Subsequent stipulations and renegotiations have not followed a uniform path, in this regard: *e.g.*, the 2004 BIT with Uganda does not feature the *ratione legis* condition in the investment definition, but the 2006 BIT with India does (along with the rather exceptional adoption of the British Model language and structure).

<sup>232</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, Jul. 23<sup>rd</sup>, 2001.

<sup>233</sup> *Id.*, para 46.

<sup>234</sup> *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2<sup>nd</sup>, 2006.

<sup>235</sup> *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, Oct. 4<sup>th</sup>, 2006.

<sup>236</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award Aug. 16<sup>th</sup>, 2007 (decision annulled, on grounds unrelated to the present analysis, on Dec. 23<sup>rd</sup>, 2010).

investment not made ‘in accordance with the law’ was weighed against a criminal norm (considered as part of the international *ordre public*)<sup>237</sup>, violated in order to obtain (or facilitate) establishment. In the first case, however, the tribunal focused on the multiple violations of the procedural rules performed the investor in order to secure the tender<sup>238</sup>. In the third, then, the respondent successfully pleaded that the investor ‘consciously, intentionally and covertly’ structured its investment in a way in which it knew was in violation of the Philippines’ law on foreign participation and control in public utility companies<sup>239</sup>. In this respect, no question of estoppel was held against the Philippines (from raising violations of its own law as a jurisdictional defense), as there was ‘...no indication in the record that the Republic of the Philippines knew, should have known or could have known of the covert arrangements which were not in accordance with Philippine law’<sup>240</sup>.

While some scholar has expressed concerns as to the way the issue was dealt with, *e.g.*, in *Fraport*<sup>241</sup>, it appears, to the contrary, that by making use of the *ratione legis* clause the Philippines’ intention (along with China and other States resorting to such clause, and also part of

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<sup>237</sup> *i.e.*, bribery to the President of the Republic of Kenya; see *supra*, fn. 235, para. 105.

<sup>238</sup> See *supra*, fn. 234, paras. 104-127.

<sup>239</sup> See *supra*, fn. 236, para. 323.

<sup>240</sup> *Id.*, para. 347.

<sup>241</sup> *e.g.*, G. Bottini, expressing concerns with regard to the application of a criterion as such in the case of corruption; cf., G. Bottini, *Legality of investments under ICSID jurisprudence*, in M. Waibel, A. Kaushal, K. L. Chung, C. Balchin, *The backlash against investment arbitration*, Wolters Kluwer, 2010, pp. 297-314; p. 309. The problem, however, appears not correctly posited.

the investment arbitral jurisprudence<sup>242</sup>) is to protect its domestic civil and administrative laws and regulations on investments<sup>243</sup>, with particular attention to those on admission<sup>244</sup>.

In this sense appears to be understood, *e.g.*, the amendment to the 1995 China-Cuba BIT, where the Parties agreed that ‘in accordance with the laws and regulations’

‘...shall mean that for any kind of invested assets to be considered as investment protected in this Agreement, it shall be in accordance with any of the investment modalities defined by the legislation of the Contracting Party receiving the investment and registered as such in the corresponding registry’<sup>245</sup>.

Hence, the concern appears, first of all, procedural (rather than substantial); also, more of a civil and administrative (rather than criminal) nature. By including the *ratione legis* requirement, it appears the Parties intend to establish an objection on admissibility, if not directly on the jurisdiction of the arbitral tribunal. The notion of ‘investment’ is linked to the investor’s compliance with the requirements dictated by the domestic law to operate a business, and the administrative *iter* for admission<sup>246</sup>. Designed (and understood) as such, the provision grants

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<sup>242</sup> *e.g.*, *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Jul. 14<sup>th</sup>, 2010.

<sup>243</sup> As it appears also to suggest Arbitrator Cremades in his dissenting opinion appended to the *Fraport* decision, at para. 1: ‘...even if [the investor’s conducts] were in violation of the [criminal law on nationalization], would [that] strip the Claimant’s of all treaty protection? The majority thinks so, but I do not, particularly given that the shareholding of the Claimant ... was legal under Philippine law (as the majority accepts).’

<sup>244</sup> On the differences with regard the different regimes of admissions amongst investment treaties, cf., T. Pollan, *Legal framework for the admission of FDI*, Eleven International Publishing, 2006; in *Dolzer (2012)*, at p. 88, it is synthetically illustrated the difference between admission and establishment, in that ‘...the right of ‘admission’ concerns the right of entry of the investment in principle, whereas the right of ‘establishment’ pertains to the conditions under which the investor is allowed to carry out its business during the period of investment’; cf., also, D. Carreau and P. Juillard, *Droit international économique*, Dalloz, 2010, at p. 361.

<sup>245</sup> Emphasis added, the text of the BIT is reported in *Ghallagher & Shan (2009)*, p. 55.

<sup>246</sup> In this sense, see, *e.g.*, *Dolzer (1995)*, p. 3.

essential importance to the Party's administrative regulations – as only assets invested accordingly will be considered investments covered by the BIT guarantees. In this perspective, the *ratione legis* clause could be regarded as operating on the admissibility plane for cases of -alleged- violation of civil and administrative norms. It would be up to the tribunal to determine the existence of such violations (as the purpose of the creation of the investment protection system was indeed to avoid the host State's civil court -and this still is one its main features), thus having jurisdiction on the admissibility of the applicant's claim. However, when the norm being infringed is of a criminal nature (*e.g.*, bribery), unless there is agreement between the investor and the host State on its existence (admittedly, unlikely), the tribunal should probably decline its jurisdiction, or stay the proceedings until a final determination has been reached by the host State's penal courts. It is uneasy to understand the foreign investment protection system as created to avoid the host State *criminal* courts: a private-based investment tribunal does not enjoy jurisdiction in such matter (and should be bound by the finding of the domestic criminal courts in assessing the facts put before it), not even to determine the existence of crimes considered part of some international *ordre public*. In any case, the conservative reading of the *ratione legis* clause China ascribes to is believed significant, as China still operates a systematic case-by-case admission screening on each foreign investment<sup>247</sup>.

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<sup>247</sup> China has undertaken some international obligations to open up certain service sectors in accordance with GATS commitments; nevertheless, the entry of foreign investment is dealt with in China's domestic laws and regulations. According to the 'Regulation on Guiding Foreign Investment' and the 'Industrial Catalogue for Guiding Foreign Investments' (both available online in their latest versions) all industries and sectors (covering manufacturing, services and agriculture) related to foreign investment are classified into four categories: encouraged, permitted, restricted and forbidden; the number of conditions and permits required by each of them varies greatly; for a detailed description of those and for an overview of China's FDI approval system, see W. Shan, *The legal framework of EU-China investment relations – a critical appraisal*, Hart Publishing, 2005, Chapter 4.

That the real concern is a uniform application of the domestic civil and administrative laws may be also confirmed by the fact that, in the 2003 renegotiation of the BIT with Germany, China, on the one hand, agreed to remove the locution ‘in accordance with the laws and regulations’ from the definition of investment from the definition of investment in Art. 1; on the other hand, however, it kept, at Art. 2 (investment promotion and protection), the condition that ‘each Contracting Party shall ... admit such investment in accordance with its laws and regulations’<sup>248</sup>. Moreover, while on the one hand China for the first time accepted, at Art. 9 of the Model, arbitration as the *sole* mechanism for the settlement of disputes, it confirmed the other constant Chinese *topos* in investment treaties: *Ad.* 6 to Art. 9 (investor-State dispute-settlement mechanism) obliges the investor to first refer ‘...the issue to an administrative review procedure according to Chinese law...’ before submission of the dispute to arbitration.<sup>249</sup>

As recently noted, China supports the principle that ‘foreign investment does promote national development very much on the condition that it can be effectively regulated’<sup>250</sup>.

## ii. *Direct and indirect investments*

The explicit mention and coverage of ‘indirect investments’ found its way in investment treaties only after the US adopted it in the 1992 Model<sup>251</sup>. Nevertheless, it is still quite an

<sup>248</sup> The same happens in the 2004 China-Uganda BIT.

<sup>249</sup> A different and more limited interpretation (for which the clarification provided in the China-Cuba BIT ‘...means that to qualify as an investment protected by the BIT, it must take one of the accepted forms of foreign investment in China and register such investment with China’s registration authorities’) is instead provided in *Gallagher & Shan (2009)*, pp. 55-56.

<sup>250</sup> C. Cai, *China*, in W. Shan (ed.), *The legal protection of foreign investment – a comparative study*, Hart Publishing, 2012; p. 281 (emphasis added).

uncommon feature. The first mention in this regard dates back to the 1967 Draft Convention on the Protection of Foreign Property<sup>252</sup> – which, however, has not been followed consistently by States<sup>253</sup>. The German Model BIT of 1991, as well as the British draft Model of 1993, do not feature such wording. The situation has progressively changed, as now the models of almost all major European States<sup>254</sup>, as well as the US and Canadian models, feature such wording. Nevertheless, it is not yet a common feature in actual agreements<sup>255</sup>.

The 1997 Chinese Model BIT does not make any reference to ‘direct’ and ‘indirect’ investments. Nevertheless, it appears that on that same year China negotiated a BIT with Gabon granting protection to ‘every kind of investment invested directly or indirectly...’<sup>256</sup>. Further six years had to lapse, however, before a similar wording would resurface in a Chinese BIT: in 2003, with the renegotiation of the BIT with Germany, the Parties agreed to include such catch-all locution.

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<sup>251</sup> Art. I.1.a., US model BIT.

<sup>252</sup> At Art. 9 (Definitions).

<sup>253</sup> Despite the Draft Convention is recognized to have ‘...played an important role in the development and formulation of subsequent treaties negotiated by OECD member states’; cf., e.g., E. Denza and S. Brooks, *Investment Protection Treaties: United Kingdom Experience*, International and Comparative Law Quarterly, vol. 36, no. 4, 1987, p. 910.

<sup>254</sup> *i.e.*, 2008 German Model, 2006 British Model, 2005 French Model; the 2003 Italian Model, however, does not.

<sup>255</sup> See Annex, Table ‘investment chapeau in German BITs: elements’, at p. 378.

<sup>256</sup> According to the unofficial translation reported in *Gallagher & Shan (2009)*, pp. 67-68; the text of the BIT is not available on the major online databases.

In addition to such inclusion, the 2003 China-Germany BIT features China's first definition of 'indirect' investment<sup>257</sup> (definition which, with a different formulation, will be subsequently included in the German Model as well<sup>258</sup>).

Along many other States, China's reluctance to provide express coverage for indirect investments (demonstrated, *e.g.*, by the fact that such addition is not featured in the renegotiated agreement with The Netherlands, of 2001, nor in the 2006 stipulation with India) is perhaps justified by the fact that, the distinction between 'direct' and 'indirect' investment is not clear-cut among scholars<sup>259</sup>. As such, the exclusion of indirect investments clears the ground from additional controversy, in case of a dispute.

China's next BITs expressly covering direct and indirect investments (beside Gabon and Germany) are the 2005 renegotiation with Portugal, and the 2007 agreement with Seychelles<sup>260</sup>. Interestingly, the 2005 renegotiation with Spain features the British-derived notion of 'ownership or control' (with 'control' at least partly reaching the extent of 'indirect investment').

Out of the four agreements mentioned, only the BITs with Germany and Seychelles provides for an express definition of what 'indirect investment' means (the latter features also a definition of 'indirect control', at Art. 1.3). Amongst subsequent agreements, only the 2008 FTA with New Zealand does so.

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<sup>257</sup> *Ad* 1.b to Art. 1; however, the 1984 China-France BIT, at Art. 1.b, includes '...autres forms de participation directes ou indirectes, même minoritaire, au société constituée sur le territoire de l'unes des Parties'

<sup>258</sup> Art. 1.1, final sentence: 'In the case of indirect investments, in principle only those indirect investments shall be covered which the investor realizes via a company situated in the other Contracting State'.

<sup>259</sup> See *Dolzer (2012)*, p. 60-65.

<sup>260</sup> *Gallagher & Shan (2009)*, pp. 68-69.

In a comparative context and under a treaty-making perspective, it is worth noting the links tying the four agreements – which stress, once more, China’s inclination for merging provisions from other treaties. Table 21, below, provides an illustration of this.

<b>Ad 1b to Art.1 PRC-DE '03</b>	<b>Art. 1 PRC-ES '05</b>	<b>Art. 1 PRC-SC '07</b>	<b>Art. 135 PRC-NZ FTA '08</b>
<p>“Invested indirectly” means invested by an investor of one CP through a company which is <b>fully or partially owned</b> by the investor and having its seat in the territory of the other CP.</p>	<p>1.1 [<i>idem PRC Model '84</i>]</p> <p>1.2 Investment made <b>in the territory of one CP</b> by any company of that same CP which is actually <b>owned or controlled</b> by investors of the other CP shall likewise be considered as investment of investors of the latter CP if they have been made in accordance with the laws and regulation of the former CP.</p>	<p>1.2 ‘Invested indirectly’ includes:</p> <p>1) <b>invested by an investor of one CP through a company which is fully or partially owned</b> by the investor and having its seat in the territory of the other CP, and</p> <p>2) <b>investments of legal persons of a third State which are owned or controlled</b> by investor of one CP and which have been in the territory of the other CP in accordance with the laws and regulations of the latter.</p> <p>The relevant provisions of this Agreement shall apply to such investments only when such third State has no right or abandons the right to claim compensation after the investments have been expropriated by the other CP.<sup>262</sup></p>	<p>Investment means every kind of asset invested, <b>directly or indirectly</b>, by the investors of a Party in the territory of the other Party including, but not limited to, the following: [...]</p> <p>Investment includes investments of legal persons of a third country which are <b>owned or controlled</b> by investors of one Party and which have been made in territory of the other Party. The relevant provisions of this Agreement shall apply to such investments only when such third country has no right or abandons the right to claim compensation after the investments have been expropriated by the other Party.</p>

The attitude of China towards the express coverage of indirect investment appears not to have changed: despite the shift for the North American model, and the numerous structure- and

<sup>261</sup> Parts highlighted with the same color are identical (this Table does not follow the table of highlights).

<sup>262</sup> The sentence is related to the finding of the International Court of Justice in the *Barcelona Traction* case (where it decided that the Belgium government was barred to exercise diplomatic protection for its citizens who owned the majority of the shares in a Canadian company against Spain; cf., *Case concerning the Barcelona Traction Light and Power Company Limited*, Judgment, I.C.J. Reports 1970, p. 3.

content- related changes China brought into the stipulations of 2012 with Canada, Chile and Japan and Korea, none of such agreements provides in that sense<sup>263</sup>.

### iii. *The objective criteria*

Differently than the US<sup>264</sup> and Canada<sup>265</sup>, China stuck with the major European States and offered scarce reaction (until 2012<sup>266</sup>) to the doctrinal debate on the existence, necessity and use of objective criteria to support the interpreter in determining what an investment *is* – and that, starting with *Fedax*<sup>267</sup> (1997) and, most notably, *Salini*<sup>268</sup> (2001), has opposed, *e.g.*, *Joy Mining*<sup>269</sup> (2004), *Mitchell*<sup>270</sup> (2006; annulment proceeding), *Saipem*<sup>271</sup> (2007) and *MHS*<sup>272</sup> (2007; subsequently annulled) to, *e.g.*, *MCI*<sup>273</sup> (2007), *Biwater*<sup>274</sup> (2008), *MHS*<sup>275</sup> (2009;

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<sup>263</sup> See Chapter VI.

<sup>264</sup> Art.1 US Models '04 and '12: 'investment means every asset that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.

<sup>265</sup> Art. 1 Canada Model, paras. (VI)-(IX) of the definition of investment.

<sup>266</sup> See Chapter VI.

<sup>267</sup> *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3.

<sup>268</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, Jul. 23<sup>rd</sup>, 2001.

<sup>269</sup> *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11.

<sup>270</sup> *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7.

<sup>271</sup> *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07.

<sup>272</sup> *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10.

<sup>273</sup> *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6.

<sup>274</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

annulment proceeding) and *Abaclat*<sup>276</sup> (2011). Thus, Chinese Models – as the vast majority of investment models and actual stipulations – do not list objective criteria to qualify the notion of investment.

The first exception appears to be the 2003 renegotiation with Germany, where *Ad. 1.a* to Art. 1 provides the following clarification:

‘For the avoidance of doubt, the Contracting Parties agree that investments as defined in Article 1 are those made for the *purpose* of establishing lasting economic relations in connection with an enterprise, *especially* those which allow to exercise effective influence in its management.’ (emphases added)

Compared with the North American models since 2004, and the doctrinal criteria debated in the above mentioned decisions, the text of the *addendum* appears to offer a compromise solution: out of the four (contribution, duration, risk and development) or five (with the addition of profits/returns) criteria individuated by the *Salini* school, the treaty assumes as *preconditions* the elements of ‘contribution’ and ‘risk’ (as the investment ‘purpose’ is ‘in connection with an enterprise’) but that of ‘duration’ (*i.e.*, ‘lasting economic relations’) appears *controlling* (thus potentially excluding at least some forms of venture capitalism). As of the ‘effective influence’ the investor may exercise, through the investment, on the management of the enterprise, it appears, contrary to Gallagher and Shan<sup>277</sup>, that the use of the preceding word ‘especially’ implies for such an ‘influence’ to be understood as an *inclusive* criterion (*i.e.*, to support the qualification of investment as such, when from the analysis of the other elements a clear-cut

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<sup>275</sup> Note however, the dissenting opinion of Judge M. Shahabuddeen.

<sup>276</sup> *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction, Aug.4<sup>th</sup>, 2011.

<sup>277</sup> *Gallagher & Shan* (2009), p. 59.

answer may not be ascertained), rather than a self-standing one. Such a reading is also consistent with the 25% minimum share-holding stake required by Chinese law for joint-ventures to properly qualify as ‘foreign invested enterprise’ (and thus enjoy the related benefits).

The wording featured in this respect in the 2003 China-Germany BIT is, nevertheless, exceptional. It will remain so until 2012, with China’s shift toward the North American model, and the stipulations with Canada and Chile. Such apparent recent convergence of China appears dictated ultimately by prudence: even outside of the ICSID regime<sup>278</sup> (*i.e.*, the case for the majority of Chinese BITs, which still do not feature ICSID arbitration among the dispute settlement mechanisms), tribunals have provided inconsistent answers as to what constitute an investment<sup>279</sup>. The insertion of the objective criteria serves the scope to guide the analysis of the interpreter over those elements expressly listed and consented to, and reduce the resort to others.

### **b. The asset-based list**

Earlier investment treaties used not to focus much on the definition of investment: placed about the end of the agreements, together with the rest of definitions, there would be no

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<sup>278</sup> Thus in the absence of interpretive speculations arising out of the presence of the term ‘investment’ in Art. 25 ICSID Convention, outlining the jurisdiction of the Centre.

<sup>279</sup> Magisterial is the synthesis of the UNCITRAL case *Romak v. Uzbekistan* provided by Dolzer and Schreuer: ‘The Tribunal ... considered that the work ‘investment’ in a BIT must have a meaning of its own. In support, the Tribunal (surprisingly) referred to the illustrative, non exhaustive definition in the applicable BIT and also to the conclusion of a trade agreement on the same day the BIT was signed. To identify the autonomous meaning of ‘investment’, the Award turned to the Black’s Law Dictionary, but subsequently decided to require three criteria: contribution, duration and risk. In this context, the Tribunal assumed that the term ‘investment’ should be presumed to have the same meaning in the context of ICSID and outside ICSID. At the same time, the Tribunal that the parties are free to define an ‘investment’ in the way they wish. In the end, the Award examined the three criteria and ruled that the wheat sales satisfied none of them.’; cf., *Dolzer (2012)*, p. 73-74.

illustrative list (whether exhaustive or not) but something rather synthetic such as ‘the term ‘investment’ shall comprise all categories of assets’<sup>280</sup>. The situation changed in 1965, as the Germany-Iran BIT featured the first illustrative list<sup>281</sup> – close indeed to what has become the norm until today.

With regard to the evolution of the asset-based illustrative list of Chinese BITs, Table 19 (above) highlights the broad commonalities amongst the Chinese, British and German Model BIT structure and choice of words. Led by the increasing expansion of the BIT networks of Germany and the UK, and with the tacit policy goal to keep its international investment treaties as uniform as possible, with the 1997 Model (and the 2003 BIT with Germany), China accentuated the progressive assimilation of the European models’ wording<sup>282</sup>. The text of the list can be divided into the following four categories:

➤ Words common to both German and British Models, employed since the 1984

Chinese Model, such as:

- Most of the definition of property rights (movable and immovable properties ... such as mortgages, pledges...’),
- The basic elements from the IP category (technical processes, know-how, goodwill),

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<sup>280</sup> Art. 8 Germany-Ethiopia BIT (1964); structure-wise, the 1967 OECD Draft Convention on the Protection of Foreign Property place as well the definitions around the end of the stipulation (Art. 9).

<sup>281</sup> Art. 8 Germany-Iran BIT (1965).

<sup>282</sup> As of the format, it follows the German path set with the 1959 BIT with Pakistan, which China chose since its first BIT with Sweden; the British Model appears, instead, relying on the OECD Draft Convention on the Protection of Foreign Property; therefore, while the categories listed in the German Model are also featured in the UK Model BIT, since the *order* in which they are listed (especially in the 1984 Chinese Model) is identical to the German practice, in Table 19 they are marked in red.

- Most of the concession category,
- The ‘change of form of investment’ clause.
- Words specific of the German Model, in particular:
  - The catch-all phrasing for contractual rights (‘...performance having an economic value’)<sup>283</sup>,
  - The more comprehensive list of elements featured in the IP category;
  - In the 2003 Renegotiation: at letter *b*) (company participations), the substitution of the legal term ‘participation’ with the wider ‘interest’ (in the otherwise British-based definition ‘any other kind of participation in companies’);
- Words specific of the British Model, most notably:
  - The catch-all formulation for property rights (‘and other property rights’)<sup>284</sup>,
  - In the concession category, the legal requirements ‘conferred by law’ and ‘under contract’, and the inclusion of the ‘cultivation’ activity.

The Chinese strive for clarity, while subsuming its model text from the best practice of the time (*i.e.*, German and British), resulted in a ‘collage’ technique: less clear definitions in one model (because resorting to more vague or unusual wording – *e.g.*, ‘financial’ *in lieu* of ‘economic’, ‘any other rights *in rem*’ *in lieu* of ‘any other property rights’) have been replaced with that of the other. It is significant that the replacements made by China in favor of the British

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<sup>283</sup> As also in the 1992 US Model BIT (Art. 1.a.iii), and differently from the British Model: ‘...performance under contract having a financial value’.

<sup>284</sup> As opposed to the German: ‘...any other right *in rem*...’.

Model made their way in the 2003 renegotiation with Germany (as opposed to *i*) stick with the wording of the 1983 China-Germany BIT, already featuring a number of advanced elements subsequently made part of the 1997 Model, or *ii*) rely on the German draft text soon to become the 2005 Model).

Conversely, with regard to the wording specific of the Chinese Model, it shall be noted that the *ratione personae*, *legis* and *loci* criteria made their way in the subsequent German practice, at times all of them (*e.g.*, BITs with USSR and Poland, of 1989; Brazil, 1995; Iran, 2002), at times only *personae* and *loci* (*e.g.*, China, 2003; Libya, 2004), at times only *legis* (*e.g.*, India, 1995; Indonesia, 2003; Yemen, 2005; Oman, 2007)<sup>285</sup>. With the 2008 Model BIT, Germany ultimately adopted in the model both *ratione personae* and *legis* in the chapeau of the definition of investment.

With regard to other differences between the Chinese and the major European models over the notion of investment, it may be noted also that:

1. Under letter *a*) (property rights: ‘movable and immovable property and other property rights such as mortgages, pledges and similar rights’), the widening locution ‘*and similar rights*’ is added; as such, however, it may seem redundant, as the sentence includes already the catch-all ‘and other property rights’ (and in fact it does not appear in any of the stipulations under consideration in this research);
2. Under letter *c*) (contractual rights: ‘claims to money or to any other performance having an economic value associated with an investment’), the wording ‘*associated*

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<sup>285</sup> Nevertheless, most times Germany kept the simple 1991 Model approach (*e.g.*, BITs with Guyana, 1994; Croatia, 1997; Gabon, 1998; Lebanon, 1999; Nigeria, 2000; Timor-Leste, 2005; Guinea, 2006); it appears, in this respect, that more articulated stipulations were reserved to counterparts with either a stronger negotiating position, or investment potential; cf., Annex, Table ‘Germany BITs: chapeau of the notion of investment – elements’, at p. 378.

*with an investment*' is added; despite limiting the scope of the provision, the addition clarifies the necessity of a connection of the claim with an investment activity: a simple claim to money, hence, is unable to qualify as investment *per se*;

3. Under letter *e*) (concessions: 'business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources'), the words '*permitted by the law*' are added; the repetition of the *ratione legis* requirement in this context –not featured in the German or British practice and models–, is common in Chinese BITs with both capital importing and exporting States, and has been perceived as '...demonstrat[ing] China's cautious stand towards business concessions to foreign companies'<sup>286</sup>; it may be noted, nevertheless, that a similar formulation is featured in the 1992 US Model BIT ('any right conferred by law or contract, and any licenses and permits pursuant to law'<sup>287</sup>), subsequently kept in the 2004 and 2012 Models<sup>288</sup>;
4. The 'change of form of investment' clause is followed, in the last sentence of the provision, by the addition '...provided that such change is in accordance with the laws and regulations of the CP in whose territory the investment has been made'; the rationale behind such specification is that the transformed investment, whilst enjoying the same treatment as the original investment, is subject to the same requirements and

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<sup>286</sup> *Gallagher & Shan (2009)*, p. 65.

<sup>287</sup> Art. 1.a.v.

<sup>288</sup> Art. 1, at let. g) of the definition of 'investment': 'licenses, authorizations, permits, and similar rights conferred pursuant to domestic law'.

conditions upon which it was firstly approved<sup>289</sup>; as such, however, the clause is not featured in any of the agreements under consideration.

It may be noted that China will resist to change its definition, both with regard to structure and content of the provision, also in the 2012 stipulations with Canada and Chile. This means that the ‘traditional’ property rights category<sup>290</sup> will keep its position as first of the list – as opposed to the last, of the North American models – as in all European models.

### c. Returns

The definition of returns in China’s investment treaties and models follows a curious evolutionary path: the wording of the first Chinese stipulation, back in 1982 with Sweden, is already identical to the 1997 Model. Sweden, which by the time of the conclusion had signed already 7 BITs<sup>291</sup>, never before indicated a definition for ‘returns’ (nor it did for a while after the conclusion of the BIT with China<sup>292</sup>). It may thus be concluded that it was upon China’s insistence that such definition was elaborated. Table 22, below, shows the broad commonality with the British practice at the time.

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<sup>289</sup> *Gallagher & Shan (2009)*, p. 70.

<sup>290</sup> As defined by *Dolzer (1995)*, p. 27.

<sup>291</sup> With Ivory Coast (1965), Madagascar (1966), Senegal (1967), Egypt and Yugoslavia (1978), Malaysia (1979) and Pakistan (1981).

<sup>292</sup> The almost contemporary BIT with Yemen (1983) makes use of the standard British formula; the subsequent BITs with Tunisia (1985) and Hungary (1987) do not feature a definition for returns.

Table 22 – Returns				
Art. 1.3 PRC '84 & '89	Art. 1.3 PRC '97 (& '82 PRC-Sweden)	Art. 1(b) UK '06 <sup>293</sup>	Art. 1.2 DE '08	Art. 1.3 PRC-DE '03
1.3 The term 'returns' means the amount yielded by investments, such as profits, dividends, interests, royalties or other legitimate income.	1.3 The term 'returns' means the amount yielded from investments, including profits, dividends, interests, capital gains, royalties, fees and other legitimate income.	1(b) 'returns' means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;	1.2 The term 'returns' means the amounts yielded by an investment for a definite period, such as profit, dividends, interest, royalties or fees;  2.4 Returns from an investment, as well as returns from reinvested returns, shall enjoy the same protection as the original investment.	1.3 <i>idem as PRC '97</i>  <i>Ad Art. 1, let. c: Returns from the investment and from reinvestments shall enjoy the same protection as the investment.</i>

Indeed, the 1983 China-Germany BIT provides for a significantly simpler definition:

'the term 'returns' means the amounts yielded by an investment for a definite period<sup>294</sup>, such as profit, dividends, interest and other legitimate income'.

Moreover, China kept, in the list of instances of all its Models, the rather generic (and at that time typical of the German practice) 'and other legitimate income'; Germany, nevertheless, discarded such wording since its 1991 Model, substituting it with the more precise 'royalties or fees' (already used in the British practice)<sup>295</sup>.

<sup>293</sup> The definition is unchanged since the first BIT with Egypt, in 1975.

<sup>294</sup> For a definite period' is a typical German expression – surviving today in the 2008 Model – which, however, has been used by China only with Germany.

<sup>295</sup> The German list of instances regularly used at the time was ultimately not successful (especially in its mention of 'licences'): the 1981 BIT with Somalia, 1982 BIT with Lesotho and the 1983 BIT with Panama list '...profit, dividends, interest, licence or other fees'.

### 3. China's BIT program: a clear and uniform strive for predictability

The preliminary analysis carried out in this Chapter let emerge that China's BIT program – under a treaty-making perspective – is based on two essential concepts: clarity and uniformity.

Clarity, as China prudently based all investment models (and subsequent stipulations) upon international best practices. For the first three models, this has meant, for the most part, the German and British Model BITs – the wording of each selected (or merged into each other), for each provision, on the basis of a criterion of simplicity aimed at avoiding vague, indefinite or unclear expressions (potentially leading to expansive interpretations or unexpected outcomes -in the eyes of China- by interpreters). As a result, China often resorted to a 'collage' technique: less clear definitions in one model (because resorting to a more vague or unusual wording) have been replaced with that of the other. When necessary, the result was then 'colored' with the addition of Chinese core interests (*e.g.*, the *ratione legis* requirement, in the definition of investment). In other words, in building its Model BITs China appeared primarily concerned with securing the predictability of the overall legal investment systems it adhered to.

Uniformity, as in negotiating new investment agreements China tends to rely almost invariably upon its model BIT (when not outright 'imposing' it). Consequently -and unsurprisingly-, the vast majority of Chinese BITs reproduces the content of one Chinese model. In this respect, the three texts China adopted over the time are pretty similar, in terms of structure and wording used (as opposed, *e.g.*, to the consistent changes brought by the US, in 2004, to its Model of 1992). The innovations each time introduced – especially, with the 1997 Model (*e.g.*, NT clause, investor-State dispute settlement) – are drawn in a consistent fashion from the best European practices – already the term of reference for building the entire model. In those cases

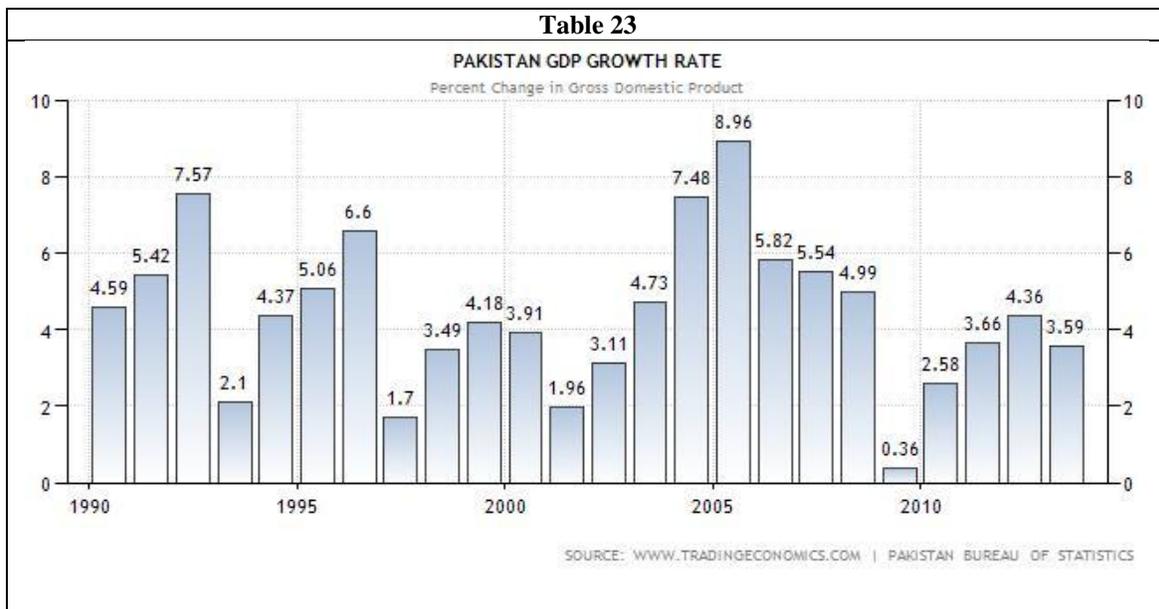
where it consented to go beyond the model text, in terms of guarantees provided, China did so either because of the reliance it placed on a trusted and more experienced State partner for the agreement (*e.g.*, the 2003 China-Germany BIT), or drawing from the experience of such latter, while negotiating a preliminary agreement with some State with which China enjoys close diplomatic ties, yet not overly significant economic relationship (*e.g.*, BITs with Seychelles and South Africa, FTA with Pakistan). In this respect, too, China's effort may be understood as that of avoiding unpredictable results out of the new commitments it engages itself with new, more modern stipulations.

### III. THE -CAUTIOUS- BEGINNING OF A NEW ERA: THE 2006 CHINA-PAKISTAN FTA AND THE FIRST INVESTMENT CHAPTER IN A CHINESE FTA

#### A. The Islamic Republic of Pakistan

##### 1. *Pakistan macroeconomics: overview*

With a modest GDP of roughly 230 billion USD spread over a population of approximately 180 million, the Islamic Republic Pakistan has a high economic growth potential, although hampered by some decade-long phase of social and political instability. The resulting cautiousness of foreign investors is reflected in Pakistan's irregular growth rates over the past twenty years (cf., Table 23, below).



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<sup>296</sup> Source: Tradingeconomics, at: <http://www.tradingeconomics.com/pakistan/gdp-growth-annual>; see also the World Bank, at: <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG/countries/PK?display=graph>.

In the past four years the economy has hardly grown more than 4% *per annum*<sup>297</sup> – well below the region's average. Forecasts do not estimate substantial change for 2014<sup>298</sup>.

Trade freedom in Pakistan is constrained by a trade-weighted average tariff rate approximately of 9.5%, and a complex system of non-tariff barriers. Foreign direct investment has been declining (in 2012 was around 1.4 billion USD<sup>299</sup>), discouraged by political instability, sectarian conflict, and heavy bureaucracy.

Pakistan has been party to the first BIT ever signed, back in 1959, with Germany. Since then, however, Pakistan has concluded 46 BITs (only 25 of whom in force)<sup>300</sup>, the most recent with Kuwait (2011) and Turkey (2012). A BIT with China was signed in 1989. Negotiations for a BIT with the US date back to 2004, but have been held hostage of political disagreements between the parties. Resumed first in 2010 and then in July 2013, the matter appears yet to be addressed on serious note<sup>301</sup>.

The following brief analysis of the history and current status of the political and economic ties between these two States is aimed at illustrating the rationale behind China's decision to sign its first comprehensive FTA with Pakistan.

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<sup>297</sup> Source: World Bank, at: <http://data.worldbank.org/country/pakistan>.

<sup>298</sup> Source : New York Times, at: <http://tribune.com.pk/story/659134/pakistan-likely-to-miss-gdp-growth-target-for-fiscal-year-2013-14/>.

<sup>299</sup> Source: Secretariat of Pakistan Prime Minister, at: [http://www.pakboi.gov.pk/index.php?option=com\\_content&view=article&id=180&Itemid=137](http://www.pakboi.gov.pk/index.php?option=com_content&view=article&id=180&Itemid=137).

<sup>300</sup> Source: UNCTAD, at: [http://unctad.org/Sections/dite\\_pccb/docs/bits\\_pakistan.pdf](http://unctad.org/Sections/dite_pccb/docs/bits_pakistan.pdf).

<sup>301</sup> According to the Pakistani Associated Press: [http://www.app.com.pk/en /index.php?option=com\\_content&task=view&id=244940&Itemid=2](http://www.app.com.pk/en /index.php?option=com_content&task=view&id=244940&Itemid=2).

## 2. The Sino-Pakistani relationship

Amongst the first non-Communist States (and the second Muslim, after Indonesia), to recognize the People's Republic, Pakistan established diplomatic relations with China on May 21<sup>st</sup>, 1951 (correspondingly breaking ties with Taiwan's Republic of China). Since then, the relationship between the two States has been close and mutually supportive, to the point of being compared to that between the US and Israel<sup>302</sup>.

The basic traits of the Sino-Pakistani 'all-weather' friendship<sup>303</sup> may be summarized as follows. After early recognition, Pakistan's good offices proved essential to the People's Republic restoration of diplomatic ties with the West<sup>304</sup>, and in channeling China's influence (and investments) into the Muslim Middle-East. The two States back their respective international sovereignty claims (*i.e.*, for China, those on Xinjiang, Taiwan and Tibet; for Pakistan, that over Kashmir). At the beginning of the 1960s, as China's relationship with India deteriorated<sup>305</sup>, that with Pakistan grew stronger: in 1966, China started providing military assistance to Pakistan; in

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<sup>302</sup> According to media sources, in 2010, when a US delegate confronted a Chinese diplomat about Beijing's uncompromising support for Pakistan, the latter reportedly responded with a sarcastic remark: 'Pakistan is our Israel. You got a problem with that?'; see, *e.g.*, Al-Jazeera, at: <http://www.aljazeera.com/indepth/features/2010/10/20101028135728235512.html>.

<sup>303</sup> For an analysis of such definition, see M. Beckley, *China and Pakistan: Fair-Weather Friends*, in *Yale Journal of International Affairs*, Vol. 7, Issue 1: March 2012, pp. 9-22; available at: <http://yalejournal.org/wp-content/uploads/2012/04/Article-Michael-Beckley.pdf>.

<sup>304</sup> Symbolically reconstituted in 1972, with the visit of US President Nixon to China, eased by Pakistan; see Y. Wang, *Transformation of Foreign Affairs and International Relations in China, 1978-2008*, Social Sciences Academic Publishers, 2011, p. 6.

<sup>305</sup> Up to triggering the Sino-Indian War (Oct. 20<sup>th</sup> - Nov. 21<sup>st</sup>, 1962).

1972, a strategic alliance between the two States was formed<sup>306</sup>, and economic cooperation plans were formalized in 1979<sup>307</sup>. Subsequently, as the Soviet Union began collapsing and the US strategic interests shifted from Pakistan to India, ties with China further cemented (also, given the modest trade and investment volume existing between the US and Pakistan<sup>308</sup>). Since the 1980s, economic and military assistance from China increased, propelled also by the common geopolitical goal to circumscribe India's influence in Asia. In the course of the 1990s, China stepped in to provide essential support to Pakistan's military nuclear aspirations (while the US Congress, for that same reason, in October 1990 – and for several subsequent years – suspended all military assistance and frozen economic aids<sup>309</sup>). Lastly, recent US foreign policy actions (*e.g.*, Afghanistan and Iraq wars, the killing of Osama Bin Laden on Pakistani soil) further increased Pakistan reliance on China.

Such 'special relationship' tends to provide benefits to both sides. Currently, China is Pakistan's most reliable source of trade, investment, aid, and military support. In turn, Pakistan has been considered as contributing to four strategic objectives of China<sup>310</sup>, such as:

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<sup>306</sup> M. Beckley (2012), p. 10.

<sup>307</sup> *Ibid.*

<sup>308</sup> Up-to-date figures provided by the United States Census Bureau, *Trade in Good with Pakistan*, report available at: <http://www.census.gov/foreign-trade/balance/c5350.html>.

<sup>309</sup> According to the US Central Intelligence Agency, starting from the 1980s the US provided Pakistan with a 'massive infusion' in terms of economic aids, some of which went to pay the cost of Pakistan's support of the Afghan refugees fleeing after the 1979 Soviet invasion, and to enhance Pakistani military capability; cf., <https://www.cia.gov/library/publications/the-world-factbook/geos/pk.html>.

<sup>310</sup> E. A. Feigenbaum, *China's Pakistan Conundrum*, in *Journal of Foreign Affairs*, Council on Foreign Relations, Dec. 4<sup>th</sup>, 2011; available at: <http://www.foreignaffairs.com/articles/136718/evan-a-feigenbaum/chinas-pakistan-conundrum>.

- i) Ensuring security and stability in China's less developed western (and Muslim) provinces, and
- ii) Anchoring those in a web of cross-border economic activity;
- iii) Bottling up India in the subcontinent (forestalling its influence in East Asia);
- iv) Hampering the attempts of any other major power (particularly, the US) to advance interests in continental Asia at China's expense (through, *e.g.*, military deployments or permanent access arrangements).

Nevertheless, the days when Pakistan was considered a model for other developing countries (early 1960s), and China an international pariah, are old story. The rise of the People's Republic as a world major player – as opposed to Pakistan's continued social and political instability<sup>311</sup> – is re-shaping contents and meaning of the Sino-Pakistani relationship.

In recent years, China's 'friendship' has become indispensable to Pakistan in several occasions. For instance, in support of Pakistan's efforts to cope with the heavy floods that affected the Indus river basin in July and August 2010, China donated 250 million USD, and sent 4 military rescue helicopters<sup>312</sup>. Shortly thereafter, during his visit to Pakistan, China's premier channeled investment deals worth more than 30 billion USD. Lastly, in May 2013, China allowed for the just implemented bilateral currency swap agreement, amounting to roughly 1.5 billion

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<sup>311</sup> *Id.*, Determined by high corruption, falling foreign investment, weak currency (the rupee has depreciated more than 40% since 2007), underperforming official economy, thriving black market, lack of a proper industrial base and the limited market potential (in the short-to-mid term at least).

<sup>312</sup> According to Xinhua, China's official press agency, at: [http://news.xinhuanet.com/english2010/china/2010-09/23/c\\_13526461.htm](http://news.xinhuanet.com/english2010/china/2010-09/23/c_13526461.htm).

USD, to be used by the Central Bank of Pakistan to rebuild its depleted foreign currency reserves<sup>313</sup>.

The relationship with Pakistan is therefore currently controlled by strategic elements, rather than economic (and the unofficial comparison made by a Chinese diplomat with the US-Israeli relationship is revealing<sup>314</sup>). China's repeated calls for 'pragmatic cooperation' on investment in public infrastructure, transport links between the two countries, agriculture, defense and healthcare<sup>315</sup> are in nature much different than those reserved, *e.g.*, to ASEAN. For instance, aside from its touted role as a short-cut for Chinese imports of Middle-Eastern oil, China's first-hand development of the Gwadar port (approximately 600 km West of Karachi) is considered part of a strategic plan to project China's navy into the Indian Ocean<sup>316</sup>. Moreover, increasing concerns on al-Qaeda-linked training camps in Pakistan – and the destabilizing spill-over effects

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<sup>313</sup> When Pakistan first proposed a bilateral currency swap agreement, China apparently refused, expressing scant interest for trade in Pakistani currency. The – unusual, for China – long lapse of time between the signature of the swap agreement and its implementation is considered proof of such a disfavor: signed between the respective Central Banks in Dec. 2011, it has been implemented only on May 7<sup>th</sup>, 2013. The agreement, amounting to roughly 1.5 billion USD in both currencies, was supposed to push the global use of the Chinese yuan, increase China's trade influence and share within the region, and allow Pakistan and China to trade directly within their own currencies. Nevertheless, Pakistan's Central Bank requested the activation of the credit line just a few days after implementation, due to a sharp dip of foreign exchange reserves. It has been noted that the strained use of a currency swap arrangement to build reserves may ultimately prove an expensive undertaking for Pakistan: analysts predict that China will ultimately convert the arrangement into a loan. From Pakistan, the move has been seen as part of an increasing tendency to seek help from 'friendly countries', in the attempt to avoid unsavory reforms otherwise required by the IMF as a precondition to any fresh bailout program (it proved, nonetheless, hardly effective, as Pakistan and the IMF agreed on Jul. 4<sup>th</sup>, 2013, for an additional 5.3 billion USD loan). Pakistan will thus have to return the loan in Chinese currency after three years, using the dollars it holds to buy yuan back from the market and paying a mark-up on the borrowed sum at a rate higher than the Shanghai interbank market rate, directly impacting – once again – on its reserves.

<sup>314</sup> See *supra*, fn. 142 and 302.

<sup>315</sup> The last of whose on Jul. 4<sup>th</sup>, 2013, visiting Chinese Premier during a speech to the Pakistani Senate; cf., [http://www.china.org.cn/business/2013-05/24/content\\_28919889.htm](http://www.china.org.cn/business/2013-05/24/content_28919889.htm).

<sup>316</sup> According to the Times of India; cf., [http://articles.timesofindia.indiatimes.com/2013-07-05/pakistan/40390785\\_1\\_gwadar-china-and-pakistan-kashgar](http://articles.timesofindia.indiatimes.com/2013-07-05/pakistan/40390785_1_gwadar-china-and-pakistan-kashgar).

those may produce in the Muslim-populated Chinese border province of Xinjiang – have pushed China to offer counter-terrorist military assistance, and to set up military bases on Pakistani soil, to tackle first-hand the issue<sup>317</sup>.

Therefore, the geo-political rationale is believed essential in understanding the legal framework the Parties have established for the regulation of the reciprocal trade and investment flows. In such context, China vests the role of the capital-exporting State, and Pakistan the recipient of Chinese investments, in an almost unilateral fashion.

## **B. The China-Pakistan FTA**

### *1. Negotiations and policy rationale*

In April 2005, China and Pakistan launched negotiations for the establishment of a free trade area. The China-Pakistan FTA (hereinafter, CPAFTA)<sup>318</sup> was signed shortly thereafter, on Nov. 24<sup>th</sup>, 2006, and took effect on Jul. 1<sup>st</sup>, 2007. The CPAFTA is the second FTA signed by China, after that with Chile (which, however, at the time did not feature an investment protection regime<sup>319</sup>).

That the CPAFTA represents a ‘cautious first’, for China, is almost self-evident. The agreement features 83 provisions spanning through 12 Chapters (and 46 pages) – as opposed,

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<sup>317</sup> According to the Times of India; cf., [http://articles.economictimes.indiatimes.com/2011-10-26/news/30324160\\_1\\_tribal-region-tribal-belt-tribal-areas](http://articles.economictimes.indiatimes.com/2011-10-26/news/30324160_1_tribal-region-tribal-belt-tribal-areas).

<sup>318</sup> The text of the Treaty is available at <http://fta.mofcom.gov.cn/topic/enpakistan.shtml>.

<sup>319</sup> The ‘Supplementary Agreement on Investment of China-Chile Free Trade Agreement’ has been signed on Aug. 9<sup>th</sup>, 2012.

*e.g.*, to the China-Peru FTA, signed three years later, comprising 201 provisions over 17 Chapters (and 123 pages). In this respect, it may be noted that Pakistan did not enjoy an earlier agreement with the US – as did, instead, Peru (since 2006) – to rely upon as template for negotiations. Nevertheless, in light of the outlined Chinese policy<sup>320</sup>, such can hardly be considered as a casual choice.

With regard to the substance of the FTA, as tariffs are Pakistan's main trade policy instrument – and the overall growth of imports is making such instrument, notwithstanding trade concessions, an increasing source of tax-revenues (currently, about one-fifth of the Pakistani budget<sup>321</sup>) –, it may not surprise that Pakistani authorities have opted for moderate commitments under the CPAFTA (*e.g.*, at first, less than 35% of duty-free tariff lines). On the other hand, considering China's lack of previous experience with this type of agreement, and its firm grip on the principle of reciprocity in determining the extent of trade concessions<sup>322</sup>, it may not surprise either that those contained in the stipulation with Pakistan are amongst the most limited ever

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<sup>320</sup> Cf., Chapter I and II, above.

<sup>321</sup> According to WTO's *Third Trade Policy Review of Pakistan - Report by the Secretariat*, WTO/WT/TPR/S/193, 10 Dec. 2007, p. xi; according to the Pakistan Institute of Trade and Development, the revenue loss incurred to Pakistan due to exemptions offered to Chinese products in post-FTA period was about 2.4 million USD in 2006-07 (during the Early Harvest Program), which skyrocketed to over 70 millions USD in 2009-10; cf., *2012 Evaluation of China-Pakistan FTA*, Pakistan Institute of Trade and Development, 2012, p. 4, available at: [http://www.pitad.org.pk/Publications/13-Pak-China%20FTA\\_report\\_final\\_version\\_4.pdf](http://www.pitad.org.pk/Publications/13-Pak-China%20FTA_report_final_version_4.pdf)

<sup>322</sup> China's commitments to eliminate tariffs in its trade agreements are based on reciprocity, rather than a general policy of openness. In general, the agreements notified by China to the WTO, especially under Article XXIV of GATT 1994, have relatively high tariff line and bilateral import coverage; this is not the case, however, for all its agreements: in those with Chile, Peru, and New Zealand, China committed to eliminate duties on 94.6% to 97.2% of its tariffs (corresponding to 88% to 99.1% of its bilateral imports from these trading partners); cf., *Trade Policy Review: China*, WTO, WT/TPR/S/264, 2012, available at: [http://www.wto.org/english/tratop\\_e/tp\\_r\\_e/tp364\\_e.htm](http://www.wto.org/english/tratop_e/tp_r_e/tp364_e.htm).

signed by China – ultimately making the CPAFTA the least tariff-reducing agreement, after that with Singapore<sup>323</sup>.

Nevertheless, neither the rather unpretentious terms of the CPAFTA, nor the modest current trade volume<sup>324</sup> (especially for China, as Pakistan runs an already substantial trade deficit), match the political connection between the two States. Indeed, additional agreements, and the revision of those already signed, have been – and are currently being – carried out<sup>325</sup>.

## 2. Trade and investment rationale

### **a. Trade**

By concluding the CPAFTA, in 2007, China and Pakistan agreed on a two-stage tariff-reduction scheme for all products. With the first phase (concluded in 2012) 85% of tariff lines have been reduced at different rates (0, 5, 20 and 50%)<sup>326</sup>. Negotiations are currently being carried out for the implementation of the second phase, to reach a duty-free objective on 90% of tariff lines by 2015. As of today, the Agreement provides for an average 6.2% tariff – a rate

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<sup>323</sup> Not considering the special arrangements with Taiwan, Macao and Hong Kong; moreover, nearly all chapters of the CPAFTA are excluded from liberalization.

<sup>324</sup> China's imports and exports of goods with Pakistan in 2010 weighted 0.1% and 0.4% of total, respectively; cf., *Third Trade Policy Review of Pakistan - Report by the Secretariat*, WTO, WTO/WT/TPR/S/193, 10 Dec. 2007.

<sup>325</sup> e.g., the Amending Protocol to the CPAFTA, in 2008; also, the CPAFTA Agreement on Trade in Services, entered into force in 2009. The first phase of the FTA ended on Dec. 31st, 2012; Pakistan and China have held talks as to the expansion of scope and depth of the CPAFTA since June 2012; cf., Associated Press: [http://app.com.pk/en /index.php?option=com\\_content&task=view&id=134447&Itemid=2](http://app.com.pk/en /index.php?option=com_content&task=view&id=134447&Itemid=2).

<sup>326</sup> Duties on approximately 35% of products across different concessions (corresponding, for China, roughly to 45% of its imports from Pakistan) have been progressively made duty-free by the end 2010.

significantly higher than all FTAs signed by China (with the sole exception of the China-Singapore FTA)<sup>327</sup>. Nevertheless, the average applied MFN tariff-rate decreased from a pre-CPAFTA level of 20.4% to 13.9% in 2009. The trade volume between the countries reached 12.4 billion USD in 2012, from 8 billion USD in 2010, with Chinese exports contributing to a major part of the volume (Chinese exports stood at 6.9 billion USD, while imports from Pakistan were recorded at 1.8 billion).

On the one hand, China eliminated mostly tariffs on products where Pakistani exports to China increased in the post-FTA period, such as cotton products and textiles (60-70% of overall Pakistani exports to China), chromium ores, copper, marble and travertine, fish and rice<sup>328</sup>. Pakistan's exports to China have increased steadily from 259 million USD in 2003 to 1 billion USD in 2009, with an average growth rate of exports to China of roughly 25% *per annum*. Nevertheless, despite being the 4<sup>th</sup> largest export destination for Pakistani products, Pakistan's share of Chinese total imports counts for a mere 0.1%<sup>329</sup> – a figure hardly compatible for a State with a population of 180 million.

On the other hand, Pakistan imports a wide range of manufactured goods from China<sup>330</sup>, and granted duty-free access to products which subsequently registered the highest import value in the post-FTA period, such as electric and electronic equipments (50-60% of all Chinese

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<sup>327</sup> It may nevertheless be noted that, despite the limited concessions, a survey assessing the attractiveness of the preferential regime between Pakistan and China relative to MFN treatment revealed the CPAFTA to be the most utilized FTA among all other FTAs of Pakistan; source: *CPAFTA Review (2012)*, Pakistan Institute of Trade and Development, p. 11.

<sup>328</sup> See *supra*, fn. 321.

<sup>329</sup> *CPAFTA Review (2012)*, p. 22

<sup>330</sup> Including, most notably, electrical equipment and appliances, machinery, organic chemicals, manmade fibers and iron; cf., *supra*, fn. 321, p. 20, Section *Geographical Composition of Pakistan's Imports (up to 2009)*.

exports to Pakistan)<sup>331</sup>, light-vessels, machines and mechanical appliances and products, ingredients for pesticides, vegetables, antibiotics. Imports figures from China show a significant increase: in 2003, total imports were valued at around 1 billion USD, which rose to around 3.7 billion in 2009. That year China ranked already as Pakistan top import partner, with a share of approximately 15% of its overall imports (the US, by comparison, had a share of less than 6%, supplying mostly industrial machinery).

Chinese exports have risen persistently even in sectors not granted preferential treatment. To the contrary, Pakistan has been unable to consistently increase its exports towards China. Pakistan's trade deficit with China is found to rest on mainly two factors. The first is the State's modest industrial sector (and the export composition towards China reveals the lack of diversification, with concentration in raw material and intermediate goods, providing little shift to Pakistan's penetration in the Chinese consumer market). The second is the fierce competition from States with a similar export composition (*i.e.*, ASEAN Member States, India, Bangladesh, Egypt and Sri Lanka) enjoying lower tariffs and other exemptions through specific arrangements with China, which has to some extent eroded CPAFTA's export preferences, ultimately making Pakistani goods uncompetitive in the Chinese market<sup>332</sup>.

The trade imbalance between Pakistan and China is perceived hardly adjustable on the basis of CPAFTA's current concessions. Actually, some Pakistani entrepreneurs, claiming for substantial competition from their Chinese counterparts (*e.g.*, paper and ceramic sectors), have

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<sup>331</sup> CPAFTA Review (2012), p. 11.

<sup>332</sup> CPAFTA Review (2012), p. 10.

called for caution in the next round of negotiations of concessions, as some sectors of the Pakistani industry have already been ‘suffered heavily’ due to the CPAFTA<sup>333</sup>.

## b. Investment

Despite in the late 1990s consistent development projects have been planned, especially in the energy sector (*e.g.*, the completion, in 1999, of a 300-megawatt nuclear power plant in the Punjab province), military and technological transactions continue to vest a key role in the economic relationship between the two States.

China’s FDI stock in Pakistan amounted in 2010 to over 1.800 billion USD<sup>334</sup>, ranking first in Asia after two ASEAN Member States (*i.e.*, Singapore and Myanmar) and China’s special administrative regions (*i.e.*, Hong Kong and Macau). The annual flow of Chinese investments in Pakistan has shifted from less than 1.5 million USD in 2004 to 330 million in 2010<sup>335</sup> – a size almost equivalent to the outflow towards Japan or the United Arab Emirates on the same year, second only to Iran and Turkmenistan (excluding some ASEAN Member States – *e.g.*, Singapore, Myanmar, Cambodia, and Thailand – and the special administrative regions of Hong Kong and Macau). It cannot be missed that in 2007, year of entry into force of the CPAFTA, Chinese investments in Pakistan peaked at over 910 million USD.

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<sup>333</sup> Cf., Federation of the Pakistani Chamber of Commerce and Industry <http://fpcci.org.pk/PressRelease.aspx>; see, also, *CPAFTA Review (2012)*, p. 10.

<sup>334</sup> Source: Ministry of Commerce – People’s Republic of China, *2010 Statistical Bulletin of China’s Outward Foreign Direct Investment*, p. 88; available at: <http://english.mofcom.gov.cn/article/statistic/foreigninvestment/201109/20110907742320.shtml>.

<sup>335</sup> *Id.*, p. 82.

	2004	2005	2006	2007	2008	2009	2010
Flow	1.42	4.34	-62.07	910.63	265.37	76.75	331.35
Stock	36.45	188.81	148.24	1068.19	1327.99	1458.09	1828.01

336

Nevertheless, the discontinuous flow of Chinese investment into Pakistan (cf., Table 24) is determined by the latter's uncertain social, political and legal framework. Despite Pakistan's strategic location and friendship (and while Chinese investments may gush into places traditional capital-exporting countries would otherwise avoid), China privileges lower-risk investments. Recently, some Chinese companies are reported to have abandoned their investments projects, as perception of risk rose. For instance, in September 2011, a large private Chinese miner pulled out of a 19 billion USD investment project to build a coal mine and power and chemical plants in the Sindh province (Pakistan's largest foreign-investment deal to date), because of security concerns<sup>337</sup>.

It shall be noted, moreover, that Chinese strategic investments in Pakistan are usually brought through State-owned companies. Recently, as part of a State-driven effort to boost the annual trade volume between the two States from 12 to 20 billion USD, Pakistan and China reached an agreement upon the construction, by Chinese companies, of several economic and industrial developments, and the establishment of trade corridors and railway links on their

<sup>336</sup> *Idem*; data extracted from the tables at p. 82 and p. 88.

<sup>337</sup> According to the Wall Street Journal: <http://online.wsj.com/article/SB10001424052970203405504576600671644602028.html>.

shared border (whose ‘Karakoram Highway’ – built in the 1970s, and which has served as a vital link between the two countries for nearly half a century – is reportedly in need of renovations and expansion, to handle the increasing flow of goods and people between the two sides<sup>338</sup>). Moreover, of particular attention for the Chinese authorities is the current development of the Gwadar deep-sea port<sup>339</sup>.

Hence, despite the hurdles Pakistan’s social and political instability poses, it seems that China intends to maintain its role as the country’s principal investor.

### *3. Investment protection regime*

China and Pakistan concluded a first BIT – the Agreement on Reciprocal Encouragement and Protection of Investments<sup>340</sup> – back in 1989. By the time such agreement was signed, China already was party to 21 BITs, and Pakistan to 8<sup>341</sup>. Thus, both States had already gathered some consistent experience with treaty-making in the international investment protection field. If one considers the different balance of power at the time existing between China and Pakistan (and of each of them vis-à-vis the rest of the world), it may not surprise that, while the template for the

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<sup>338</sup> According to the Spiegel International Online: <http://www.spiegel.de/international/world/china-expands-karakoram-highway-to-pakistan-a-844282.html>.

<sup>339</sup> Works were at first financed by China but managed by the Singaporean PSA International; in 2013, management was handed over to State-run Chinese Overseas Port Holdings.

<sup>340</sup> The text of the 1989 China-Pakistan BIT is available at: <http://pk2.mofcom.gov.cn/article/bilateralcooperation/bilateralagreement/200508/20050800248870.shtml>.

<sup>341</sup> With Germany (1959), Romania (1978), Sweden (1981), Kuwait (Mar. 1983), France (June 1983), Korea (May 1988), and the Netherlands (Nov. 1988).

1989 BIT indeed was the 1984 Chinese Model, a number of elements were drawn from Pakistan's earlier stipulations with Germany and Sweden. Such 'exceptions' will not be repeated in 2006, with the conclusion of the CPAFTA.

Chapter IX of the CPAFTA features the Agreement's investment protection discipline. Reaffirming China's approach to BITs with capital-importing States since 2000 (*e.g.*, China-Myanmar BIT), the text is literally drawn, in its entirety, from the 1997 Chinese Model BIT. Investment protection standards are thus higher than those featured in the 1989 BIT – and, consequently, the CPAFTA investment rules represent an update of the old BIT<sup>342</sup>.

Indeed, the content of the investment chapter is all but groundbreaking. The strategic, rather than commercial, nature of the CPAFTA emerges at a glance by looking at structure and content the Parties agreed upon on the matter: Chapter IX comprises 11 provisions (Arts. 46-56) spanning over roughly 5 pages, with the investor-State dispute settlement mechanism confined into one undersized norm, without reference to any specific set of arbitral rules.

With regard to the provisions, it may be noted that, in the transition from the Chinese Model to Chapter IX, two have been expunged. These are Art. 11 ('Application'), and Art. 13 ('Entry into force, duration and termination') of the Model. The investment-specific provision on application is merged into the general Art. 4 of the FTA ('Application of this Agreement') which, however, addresses only the *ratione loci* criterion and not the *ratione temporis* (*i.e.*, 'investment made prior or after the entry into force' of the agreement) as well. The same is for the BIT-specific provision of entry into force, duration and termination, distributed between Art. 81 (Entry into force) and Art. 82 (Termination) of the FTA. In this respect – and as for the provision

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<sup>342</sup> J. Xiao, *Chinese BITs in the Twenty-First Century: Protecting Chinese Investment*, in J. Chaisse and P. Gugler (eds.), *Expansion of Trade and FDI in Asia*, Routledge, 2009, p. 18-19.

on application – the investment-typical trait disappears: the ‘transition regime’ of continued protection after termination (usually offered to investments for 10 years subsequent to termination) is not featured in the CPAFTA.

Being Chapter IX CPAFTA for China the first investment chapter featured in a FTA, it may be understandable the cautious approach adopted by the People’s Republic in *i*) relying on some already consolidated model (its own) and *ii*) signing the Agreement with a State with which trade and investment flows are well defined (in its own favor). Subsequent stipulations will be far more sophisticated (and original) – starting from the list of definitions: *e.g.*, the 2008 China-NZ FTA, or the 2012 China-Canada BIT.

To conclude, under the foreign investment protection regime perspective, it appears that the most notable feature of the CPAFTA is that it indeed features some. In 2007, the majority of FTAs did not feature such a regime, but focused on trade. Around the same period, China’s most influential neighbor in terms of trade and investment -Japan- was already party to a number of significant trade arrangements, rather than investment. The EU as well, because of competence constraints vis-à-vis its Member States (as the Treaty of Lisbon had not yet come into effect), negotiated agreements focused only on trade. Only the FTAs concluded by the US and Canada featured, in some cases, a Chapter dedicated to the protection of foreign investments. However, the CPAFTA is far from the sophistication of such agreements, in both terms of quantity and quality of the contents featured. It appears, rather, that China had begun looking, for the development of its policy on the matter, at ASEAN and its progressive multi-stage FTA including a regime for the protection of intra-ASEAN investments. Chapter IX of the CPAFTA represents, in this respect, just a cautious step forward – a safe ‘hybrid’ –, which will be followed by much more consistent developments, as it will be illustrated in the following Chapter.

**IV. THE 2008-2009 WESTERN PACIFIC ‘FRENZY’: CHINA-NZ FTA, ACIA, AANZFTA AND CAIA**

Between 2008 and 2009, four agreements have been concluded in the Southwest Pacific area – all of which comprising, or establishing, a FDI protection regime. These are the treaties between China and New Zealand (hereinafter, China-NZ FTA), the Comprehensive Investment Agreement of the Association of Southeast Asian Nations (hereinafter, ACIA), the ASEAN-Australia-New Zealand FTA (hereinafter, AANZFTA), and the China-ASEAN Investment Agreement (hereinafter, CAIA). Negotiations for all these agreements are partly (when not mostly) overlapping, with China and ASEAN being Party to at least one of them. Still, beside the obvious similarities, all four agreements present differences which show the core interests whose protection the contracting Parties insisted for, on the different negotiation tables. The following analysis will thus focus, firstly, on the agreements’ counterparts (Section A), then on a comparative review of the structure and notion of investment amongst all four agreements (Section B) and, lastly, on the investment protection regime established in the two agreements to which China is a Party (Section C).

## A. The relevant counterparts: New Zealand and ASEAN

### 1. New Zealand

#### a. Political factor and negotiations for the China-NZ FTA

New Zealand has traditionally displayed a proactive stance towards China. Such a political stance is known in the region as ‘the four firsts’<sup>343</sup>: New Zealand has been the first Western State to conclude a BIT with China upon its accession to the WTO (August 1997), the first developed economy to recognize China’s status as a market economy (April 2004), and the first to enter into negotiations for a FTA with China (November 2004), concluded with the first comprehensive FTA ever signed by the People’s Republic (April 2008).

On Nov. 19<sup>th</sup>, 2004, at the APEC meeting in Santiago de Chile, China and New Zealand announced the commencement of negotiations for an FTA. The China-NZ FTA was signed on Apr. 7<sup>th</sup>, 2008, in Beijing, after fifteen rounds of negotiations spanning over roughly three years. The Agreement entered in force on Oct. 1<sup>st</sup>, 2008, after ratification by the New Zealand Parliament<sup>344</sup>.

Covering *ab origine* areas such as trade in goods, trade in services and investment, the Agreement is the first comprehensive FTA China ever signed. Nevertheless, while the stipulation effectively improves market access for both economies, the size of New Zealand’s economy (and its lack of any relevant strategic industry) do not justify, *per se*, the agreement implementation

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<sup>343</sup> According to the New Zealand Ministry of Foreign Affairs & Trade, as reported in the official China-NZ FTA website, at: <http://www.chinafta.govt.nz/3-Progressing-the-FTA/1-Why-China/Four-firsts.php>.

<sup>344</sup> Which passed it by an overwhelming majority: 104 affirmative votes over 121 expressed.

costs on the part of China<sup>345</sup>. The FTA's underlying rationale lied, for both sides, in strategic implications beyond the commercial aspects<sup>346</sup>. On the one side, in fact, New Zealand's fishing industry plans to exploit the increased opportunities to use processing facilities over a wider range of locations in China. On the other (and more significantly), China has made of New Zealand a 'test case' before moving forward with larger developed economies, assessing in the meantime its ability to comply with international standards<sup>347</sup>.

An innovative feature of the Agreement for China is that it provides for temporary movement of natural Chinese persons to New Zealand<sup>348</sup>. Such a feature has subsequently become ever more important to China: even the skinny 2013 FTA with Iceland covers the topic. Concerns over such arrangements, however, have been expressed by Amnesty International<sup>349</sup>.

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<sup>345</sup> Which are relatively consistent, as involving a number of central, provincial and local government agencies.

<sup>346</sup> G. Hawke, *Strategy more than commerce: China-New Zealand FTA*, East Asia Forum, Jul. 30<sup>th</sup>, 2010, available at: <http://www.eastasiaforum.org/2010/07/30/strategy-more-than-commerce-china-new-zealand-fta/>.

<sup>347</sup> In this sense, D. Kalderimis and C. Tripp, *Investment chapter of the NZ-China FTA*, in *New Zealand Law Journal*, May 2009, pp. 156-160; available at: [http://www.chapmantripp.com/publications/Documents/nzlj\\_2009\\_4\\_kal.pdf](http://www.chapmantripp.com/publications/Documents/nzlj_2009_4_kal.pdf).

<sup>348</sup> Chapter 10 China-NZ FTA.

<sup>349</sup> Concerns have been expressed with regard to the weakening effect the FTA may have on 'already minimal' labour rights obligations that exist in all other New Zealand trade agreements, and thus the potential incomparability with fundamental principles of the International Labour Organization. Moreover, the NGO criticises the lack of an explicit exclusion of the importation of products of child and prison labour (*i.e.*, originated from China's 're-education through labour' camps). Concerns have been raised also with regard to the lack of transparency of the work of the Select Committee (with specific regard to the absence of some public consultation requirement). Cf., Amnesty International, *Human rights diminished in NZ-China FTA*, available at: [http://www.amnesty.org.nz/media\\_release/Human\\_rights\\_diminished\\_in\\_NZ\\_China\\_FTA](http://www.amnesty.org.nz/media_release/Human_rights_diminished_in_NZ_China_FTA). See, in this respect, the concerns expressed in the text adopted by the European Parliament on Oct. 9<sup>th</sup>, 2013, at let. L): 'whereas goods for export to the EU which are produced in forced labour camps, such as under the Re-education through Labour (RTL) system, generally known by the name Laogai, should not benefit from investments made under this bilateral investment agreement'.

With regard to investment protection, Chapter 11 of the FTA provides for further protections and improved measures to facilitate investments, in addition to the regime already in place under the 1988 China-New Zealand Investment Protection and Promotion Agreement<sup>350</sup> (see Section C1, below). In their joint two-year Review Report of 2010<sup>351</sup>, the Parties noted that obligations under Chapter 11 applying to measures affecting investors and their investments (*e.g.*, Art. 138, NT; Art. 139, MFN; Art. 142, Transfers; Art. 143, FET) appear to have been met. Indeed, no dispute, either between the Parties or between one of them and an investor of the other, is publicly known.

#### **b. New Zealand's stance on investment protection**

With regard to investment, a notable aspect of the China-NZ FTA is that it brings both Parties within the world of binding international investor-State arbitration. Chapter 11 features the FDI protection regime (whose Section B is devoted to the investor-State dispute settlement mechanisms).

New Zealand's investment treaty practice is modest, considering the limited number of investment agreements to which it is Party to, and its non-significant experience with international investment disputes.

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<sup>350</sup> Also known as IPPA; the text of the agreement is available on the UNCTAD online database: [http://unctad.org/sections/dite/ia/docs/bits/china\\_newzealand.pdf](http://unctad.org/sections/dite/ia/docs/bits/china_newzealand.pdf).

<sup>351</sup> *Two-year review joint report*, published on the China-NZ FTA official website; available at: <http://www.chinafta.govt.nz/4-Events-and-press/2-Press-releases/joint-report-feb2011.pdf>.

As of the treaty-making in the field, it appears that prior to the China-NZ FTA, New Zealand had signed eight investment agreements. Of these, two (with Samoa) have expired; two (with Argentina and Chile) are not in force; two (with Mexico and the US) are not BITs in substance but ‘exploratory’ agreements; and the remaining two were the 1988 Investment Promotion and Protection Agreements (hereinafter, IPPA) with mainland China and the 1995 BIT with Hong Kong<sup>352</sup>. None of New Zealand’s previous BITs, including those with China and Hong Kong, contained a full investor-State arbitration reference. In line with China’s first two Model BITs, the IPPA provided only for an investor to submit a dispute ‘involving the amount of compensation resulting from expropriation’ to arbitration<sup>353</sup>. This meant that the question of *whether* there had been an expropriation needed first to be settled between the Parties. Only the 1995 NZ-Hong Kong BIT stated that, in the event of a dispute, the investor and the host state should seek to agree the procedures for settlement within six months, after which the investor or the State could submit the dispute to arbitration<sup>354</sup>. As of the FTAs, only that stipulated with China in 2008, and the AANZFTA of 2009, feature a comprehensive investment protection regime. The ‘Closer Economic Partnership’ signed with Australia in 1983, that concluded with Thailand in 2005, and the ‘Trans-Pacific Strategic Economic Partnership’ with Chile, Brunei and Singapore of 2005 do not contain an investment protection discipline.

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<sup>352</sup> According to UNCTAD, as of June 2013, New Zealand has signed (excluding the 1988 IPPA with China) BITs with Hong Kong (1995), Chile (1999), Argentina (1999) and Australia (2010); see: [http://unctad.org/Sections/dite\\_pccb/docs/bits\\_new\\_zealand.pdf](http://unctad.org/Sections/dite_pccb/docs/bits_new_zealand.pdf).

<sup>353</sup> Art. 13.3 China-New Zealand IPPA (1988).

<sup>354</sup> Art. 9 Hong Kong-New Zealand BIT.

As of New Zealand's involvement in investment arbitration, only one instance results, to date: the 1989 ICSID *Mobil Oil*<sup>355</sup>. Nevertheless, the case arose under a contract-based ICSID arbitration (as opposed to a standing offer to arbitrate featured in the relevant BIT), and it was settled by the parties and the proceedings discontinued.

### c. FTA's economic rationale and data

With regard to the FTA's trade rationale, it shall be preliminarily noted the gradual pace the Parties established for the implementation of the respective obligations. Indeed, the FTA is expected to be phased out in over 12 years: by 2016, all tariffs for Chinese exports to New Zealand will be eliminated and, by 2019, 96% of New Zealand's exports to China will be duty free.

In the meantime, notwithstanding the global economical downturn, the early stages of implementation resulted in an increase of 25% of the two-way trade to in 2009 (with New Zealand's exports to China rising by 43%). China is currently New Zealand's third largest trading partner, taking over 1.6 billion USD of New Zealand's trade in goods, and over 1 billion USD in services<sup>356</sup>. Furthermore, early effects of the FTA have been particularly evident for New Zealand in the agricultural sector, which is experiencing an export boost: in 2008, China was New

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<sup>355</sup> *Mobil Oil Corporation v. New Zealand*, ICSID case no. ARB/87/2; proceedings terminated with Decision dated Nov. 26<sup>th</sup>, 1990.

<sup>356</sup> According to the New Zealand Ministry of Foreign Affairs and Trade: <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/China/index.php>.

Zealand's 12<sup>th</sup> most important agricultural trading partner; in 2012 it was 2<sup>nd</sup>, just behind Australia<sup>357</sup>.

Before turning to the comparative analysis of the relevant Agreements, the following Section introduces the Association of Southeast Asian Nations and outlines the geopolitical, economic and trade links with the People's Republic.

## *2. The Association of Southeast Asian Nations*

### **a. Brief history of the Association**

Preceded by the 1961 Association of Southeast Asia<sup>358</sup>, the Association of Southeast Asian Nations (hereinafter, ASEAN) was established on Aug. 8<sup>th</sup>, 1967, when the governments of Indonesia, Malaysia, the Philippines, Singapore, and Thailand signed the Bangkok Declaration<sup>359</sup>. The founding Members States were subsequently joined by Brunei Darussalam (1984), Vietnam (1995), Laos and Myanmar (1997) and Cambodia (1999). Membership is currently sought by East Timor, while Papua New Guinea is granted 'Special Observer' status since 1976<sup>360</sup>.

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<sup>357</sup> According to a 2013 report published by the Federate Farmers of New Zealand: <http://www.fedfarm.org.nz/publications/media-releases/article.asp?id=691#.Uv0NTPsz3Q0>.

<sup>358</sup> Known under the acronym of 'ASA' and formed by the Philippines, Malaysia and Thailand.

<sup>359</sup> Available at <http://www.asean.org/news/item/the-asean-declaration-bangkok-declaration>.

<sup>360</sup> Delayed accession of Papua New Guinea in ASEAN – formally justified by its absence of diplomatic relationships with several ASEAN Member States, and by substantial concerns for the continued political instability

As per the broad terms of the Bangkok Declaration, the Association aims at accelerating economic growth, social progress and cultural development in the region, while promoting regional peace and stability through the rule of law and adherence to the principles of the Charter of the United Nations. Objectives and means of the Association have progressively been better defined and structured. Drawing from the European Union's past integration experience and institutional architecture, in January 2007 the Member States signed the 'Roadmap for an ASEAN Community 2009-2015'<sup>361</sup>, envisaging to bind their domestic policies and economies through three inter-governmental areas of common action: the 'Political-Security Community', the 'Economic Community' and the 'Socio-Cultural Community'. On the same occasion, with the explicit intention to move closer to 'an EU-style community'<sup>362</sup>, the Association also adopted the 'ASEAN Charter'<sup>363</sup> (entered in force on Dec. 15<sup>th</sup>, 2008), providing the ASEAN with legal status and institutional framework to support the realization of its objectives. Preliminary pillars of the future 'economic community' are three treaties: the Agreement on Trade in Goods (formally, 'Agreement for the establishment of the ASEAN Free Trade Area'; hereinafter, AFTA Agreement), the Agreement on Trade in Services, and the Agreement on Investment (formally, 'ASEAN Comprehensive Agreement on Investment'; hereinafter, ACIA).

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and social unrest of the country (and its consequent inability to comply with Art. 6 of the ASEAN Charter) – has been compared to Turkey's endless audition for membership in the EU: slow, frustrating and increasingly uncertain; see S. Jacobs, *No thanks, not yet: PNG's ASEAN bid*, East Asia Forum, Dec. 4<sup>th</sup>, 2012; available at <http://www.eastasiaforum.org/2012/12/04/no-thanks-not-yet-pngs-asean-bid/>.

<sup>361</sup> 12<sup>th</sup> ASEAN Summit; the text of the Roadmap is available on the ASEAN official website at: <http://www.asean.org/asean/about-asean/overview>.

<sup>362</sup> See L. Phillips, *Southeast Asian countries plan EU-style union by 2015*, EU Observer, Mar. 3<sup>rd</sup>, 2009, available at: <http://euobserver.com/foreign/27699>; also, A. Romann, *Greater heights for China-ASEAN ties*, China Daily, Jan. 16<sup>th</sup>, 2013, available at: [http://www.chinadaily.com.cn/hkedition/2013-01/16/content\\_16123033.htm](http://www.chinadaily.com.cn/hkedition/2013-01/16/content_16123033.htm).

<sup>363</sup> Available on the ASEAN online website, at: <http://www.asean.org/asean/asean-charter>.

## b. Economic data and perspective

With a combined population of over 600 million and a nominal GDP of over 2 trillion USD, a positive trade balance, and a consistent growth rate<sup>364</sup>, the ASEAN, seen as a block, represents a market second only to China and India, in terms of size and economic outlook. Not surprisingly, the world's trade powerhouses have wrestled in the recent past to secure the best trade conditions with the Association<sup>365</sup>, while FDI in the region keeps increasing<sup>366</sup>. In 2010, for instance, ASEAN was reached by foreign investments for an overall amount of 76 billion USD (2.7 of which came from China, bringing the combined Chinese FDI stock in ASEAN to over 14 billions<sup>367</sup>).

The extensive network of trade agreements built with all States in the area – such as China, Japan, South Korea, India, Australia and New Zealand – has put the Association in the unique position for it to announce, on Dec. 10<sup>th</sup>, 2012, the beginning of negotiations for a ‘Regional Comprehensive Economic Partnership’<sup>368</sup>, spanning 16 States collectively pooling a

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<sup>364</sup> Source, ASEAN online website, available at: <http://www.asean.org/resources/2012-02-10-08-47-55>.

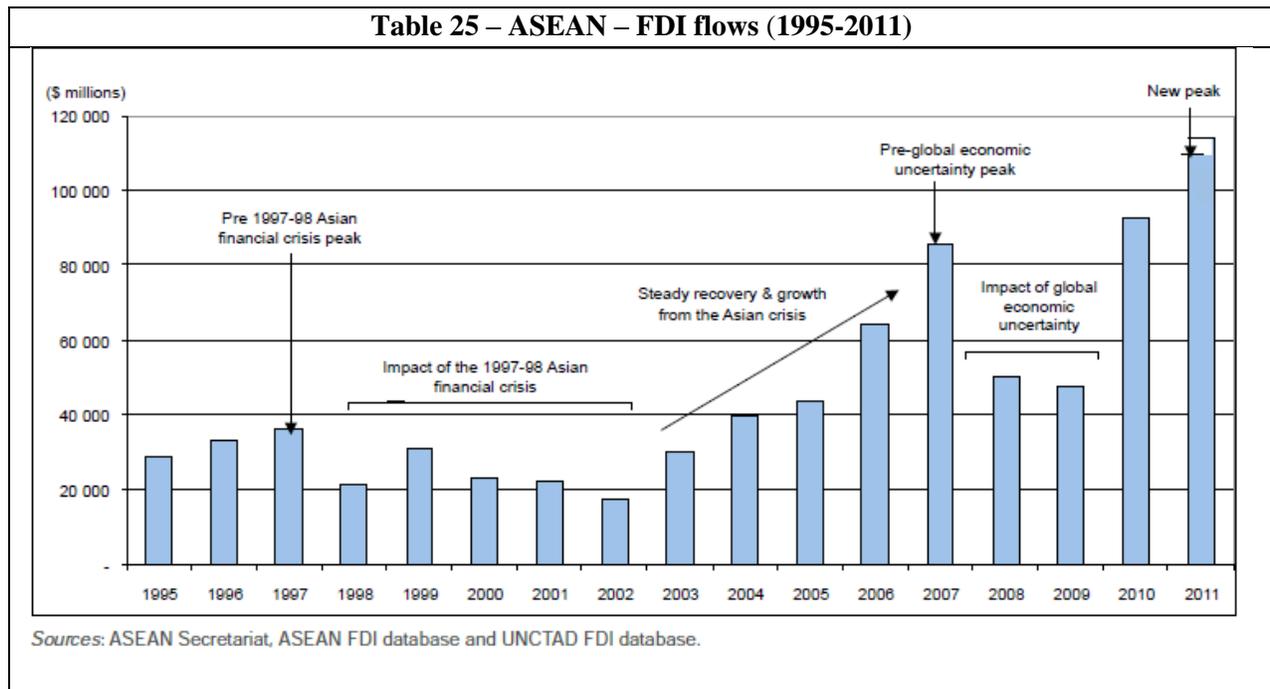
<sup>365</sup> Despite ASEAN collectively constitutes the US fourth largest trading partner, the US is lagging behind in this respect: to the conclusion of a generic ‘Trade and Investment Arrangement’, in 2006, nothing has followed (the text of the agreement is available at: [http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset\\_upload\\_file932\\_9760.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file932_9760.pdf)).

<sup>366</sup> Statistic available on the ASEAN online website, at: <http://www.asean.org/images/2013/resources/statistics/Selected%20Key%20Indicators/SummaryTable.pdf>.

<sup>367</sup> It is worth noting that out of such 14 billion USD, 6 are stocked in Singapore; source: *Statistical Bulletin of Chinese Outward Foreign Direct Investment*, 2010, p.102.

<sup>368</sup> According to the Chinese Ministry of Commerce and Trade; see: [http://fta.mofcom.gov.cn/enarticle/enasean/chianaseanews/201212/11355\\_1.html](http://fta.mofcom.gov.cn/enarticle/enasean/chianaseanews/201212/11355_1.html).

market of over 3 billion people, and a combined GDP of about 19.78 trillion USD (*i.e.*, roughly half of the global market and about one-third of the global economic output).



369

### c. ASEAN Free Trade Area

With regard to trade, ASEAN Member States signed the AFTA Agreement back in 1992<sup>370</sup>. In order to join the Association, each prospective Member State has been required to underwrite the AFTA (but granted flexible time-frames to implement the tariff reduction

<sup>369</sup> Source: *ASEAN Investment Report 2012 – the changing FDI landscape*, ASEAN Secretariat, July 2013, p. 3; available at: [http://www.asean.org/images/2013/other\\_documents/AIR%202012%20Final%20%28July%202013%29.pdf](http://www.asean.org/images/2013/other_documents/AIR%202012%20Final%20%28July%202013%29.pdf).

<sup>370</sup> The text of the agreement is available on the ASEAN website, at: <http://www.asean.org/communities/asean-economic-community/category/asean-trade-in-goods-agreement>.

obligations therein contained). The Agreement is based on the ‘Common Effective Preferential Tariff’ scheme, according to which all goods originating within ASEAN enjoy preferential tariff regimes (ranging from 0 to 5%). Nevertheless, countering AFTA’s ostensible liberalization of a large percentage of trade between the parties, it has been noted the persistence of long lists of Sensitive or Highly Sensitive goods (usually of great interest to the exporters of the trading partners) subject to lesser cuts, longer implementation periods or no liberalization<sup>371</sup>.

Unlike the EU (and until at least 2015, when the ASEAN Economic Community and the ASEAN single market are expected to be constituted), the AFTA does not create a custom union in addition to the free trade area; therefore, ASEAN Member States -still- do not apply a common external tariff on extra-ASEAN imports, but rely on their respective national schedules.

#### **d. ASEAN Investment regime**

The investment regime within ASEAN has been established progressively. In 1987, the Member States concluded the ‘ASEAN Agreement on the Promotion and Protection of Investments’ (also known as ‘ASEAN Investment Guarantee Agreement’)<sup>372</sup>, containing rules of investment protection. A decade later (on Oct. 7<sup>th</sup>, 1998), with the aim to further liberalize intra-

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<sup>371</sup> L. Cuyvers , P. De Lombaerde and S. Verherstraeten, *From AFTA towards an ASEAN Economic Community ... and Beyond*, CAS Discussion Paper, Institute on Comparative Regional Integration Studies, United Nations University, 2005; available at: [http://www.cris.unu.edu/UNU-CRIS-Working-Papers.19.0.html?&txtnews\[tt\\_news\]=83&cHash=2156052ddda685d731f21d0f444b2178](http://www.cris.unu.edu/UNU-CRIS-Working-Papers.19.0.html?&txtnews[tt_news]=83&cHash=2156052ddda685d731f21d0f444b2178).

<sup>372</sup> The text of the agreement is available on the WTO website, at: [http://www.wipo.int/wipolex/en/other\\_treaties/details.jsp?treaty\\_id=444](http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=444).

ASEAN investments, the ‘Framework Agreement on the ASEAN Investment Area’<sup>373</sup>, was signed. Built upon a ‘negative’ (or ‘top-down’) approach<sup>374</sup>, such agreement notably provided for general obligations of opening up of industries, and NT at both pre- and post-entry stage. By the end of the following decade (on Feb. 26<sup>th</sup>, 2009), ASEAN Member States at last signed the ‘Comprehensive Investment Agreement’ (hereinafter, ACIA). According to Art. 47, upon its entry into force (on Mar. 29<sup>th</sup>, 2012), both earlier agreements have been terminated and consolidated into the ACIA.

Notwithstanding the inclusion of different individual clauses ‘customizing’ the obligations of each Member State within the ACIA framework<sup>375</sup> (reflecting the different positions with regard to investment protection maintained by the Member States within the

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<sup>373</sup> The text of the treaty is available on the ASEAN website, at: <http://www.asean.org/communities/asean-economic-community/item/framework-agreement-on-the-asean-investment-area-2>.

<sup>374</sup> For an illustration of the concept, see R. Adlung and H. Mamdouh, *How to design trade agreements: top down or bottom up?*, WTO Staff Working Paper RSD-2013-08, 18 June 2013; available at: [http://www.wto.org/english/res\\_e/reser\\_e/ersd201308\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201308_e.pdf).

<sup>375</sup> Despite nominally multilateral, ASEAN treaties are considered bilateral in nature. According to Art. 31.1.d of the Vienna Convention on the Law of Treaties (VCLT), States may make reservations in a unilateral declaration when signing, ratifying, accepting, approving or acceding to a treaty where they are satisfied with most of the terms of a treaty but want ‘to exclude or to modify the legal effect of certain provisions of the treaty in their application’ to them. However, such legal technique reflects here bilateralism: in treaty practice, most reservations do not deal with the substantive provisions of the treaties, while ‘reservations’ in ASEAN-related agreements may tailor core treaty provisions: contracting Parties customize the general provisions for themselves, by adding paragraphs or footnotes excluding or modifying different rules applicable to them in the treaties. Thus, reservations are innovatively transformed into treaty provisions: as a part of the negotiated deal, such ‘unilateral’ provisions have the effect of reservations without objection. According to Art. 21 VCLT, such modifications in the treaty provisions will consequently be applied in regime of reciprocity between the ‘reserving’ party and the other parties. Such method of multilateral investment treaty-making may expedite the negotiators’ efforts – and strengthens the impression of ASEAN as increasingly integrated. See Yen T. H., *East Asian investment treaties in the integration process: quo vadis?*, in Ross P. Buckley, R. Weixing Hu, D.W. Arner (eds.), *East Asian Economic Integration: Law, Trade and Finance*, Edward Elgar Publishing, 2011., p. 192-193.

Association<sup>376</sup>), the Agreement, by keeping into account international best practices in the field<sup>377</sup>, features an advanced investment protection discipline (*e.g.*, NT and MFN at both pre- and post- entry level), and has served as template for the China-ASEAN Investment Agreement. It has been noted, in fact, that the rules on FET, expropriation and compensation, as well as the exception clauses, are similarly worded<sup>378</sup>. As for the investor-State dispute settlement mechanism, although the provisions in the ACIA are more extensive and detailed, the essence is much alike that featured in the CAIA<sup>379</sup>.

#### **e. China-ASEAN FTA**

##### *i. Political factor and negotiations*

On Jul. 19<sup>th</sup>, 1991, invited to attend the opening session of the 24<sup>th</sup> ASEAN Ministerial Meeting in Kuala Lumpur, China (represented by the Foreign Minister) expressed interest in

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<sup>376</sup> *e.g.*, fn. 14 to Art. 33.1.b ACIA requires additional written consent for submission of the dispute to ICSID arbitration, when the host State is the Philippines; in the CAIA, Thailand tailored the agreement's definition of investment by adding a para. to allow its discretionary determination of 'owned' and 'controlled' by 'natural persons or juridical persons of a non-Party', in order to deny treaty benefits without breaching its MFN obligations. For an overview of the stance of Malaysia, Indonesia, Thailand and the Philippines with regard to investment liberalization, see the *WTO Report on the meeting held on 3-5 July 2002: note by the Secretariat*, WTO/WT/WGTI/M/18, 3 Sept. 2002.

<sup>377</sup> The robust external relations of ASEAN have been found to have a 'catalyst effect' on the integration process of the association itself: in this respect, the ACIA has been acknowledged to absorb the results from negotiations of other external treaties; see *Yen (2011)*, p. 188.

<sup>378</sup> J. Xiao, *Chinese BITs in the Twenty-First Century: Protecting Chinese Investment*, in J. Chaisse and P. Gugler (eds.), *Expansion of Trade and FDI in Asia*, Routledge, 2009, p. 14; for a more detailed analysis of such similarity, see further below in this Chapter, Section D.2.

<sup>379</sup> See further below in this Chapter, Section D.2.

cooperating with ASEAN. In December 1997 – in the midst of the financial crisis that hit most ASEAN economies – the first China-ASEAN summit (‘ASEAN+1’) was held<sup>380</sup>.

In November 2001, China and ASEAN announced they agreed to begin negotiations for the establishment of a free trade area between them. China was well placed in negotiating an FTA with ASEAN (as opposed, *e.g.*, to the US or Japan) because all parties, as developing States, could reciprocally maintain trade barriers without violating WTO rules when disagreeing on the relevant trade concession<sup>381</sup>. One year later, at the sixth China-ASEAN summit<sup>382</sup>, the ‘Framework Agreement on China-ASEAN Comprehensive Economic Cooperation’<sup>383</sup> (hereinafter, CAFTA Framework Agreement) was signed. The Framework, less concrete than an Economic Partnership Agreement<sup>384</sup>, is not a comprehensive agreement *ab initio* but, rather, a skeleton upon which a multi-stage comprehensive FTA has to be built upon. The Agreement was

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<sup>380</sup>At that time, China’s hold on the value of the renmibi served as a regional anchor, contributing to keep under check successive rounds of competitive devaluations. Such move prevented the crisis from becoming more acute for ASEAN States, while it put under stress China’s own exports (as much cheaper goods from the crisis-plagued region competed with Chinese goods).

<sup>381</sup> This is because, under the ‘enabling clause’ of WTO rules, developing States do not have to cover ‘substantially all the trade’ in their FTAs. In this respect, it may be noted that Japan moved in parallel to China and South Korea’s integration moves, starting FTA projects with Singapore, Malaysia, Thailand, the Philippines, Brunei and Indonesia on a separate basis. Such different strategy derives from the different regime of obligations under WTO rules binding Japan as a developed State (*i.e.*, to eliminate trade barriers for substantially all trade with its FTA partners), which is more difficult to achieve in multilateral negotiations. As of investment protection, while negotiations for the ASEAN–Japan Comprehensive Economic Partnership were concluded in 2008, negotiations on an investment agreement have never been launched. This may be also due to the existing web of FTAs and BITs that Japan enjoys with all individual ASEAN Member States (except Myanmar), coupled with Japan’s traditional focus on trade, rather than investments, policies and agreements. Cf., *Yen (2011)*, pp. 188-189.

<sup>382</sup> Held on Nov. 4<sup>th</sup>, 2002.

<sup>383</sup> The text of the Framework Agreement is available on the World Bank website, at: <http://wits.worldbank.org/GPTAD/PDF/archive/ASEAN-China.pdf>.

<sup>384</sup> Which China has with Hong Kong and Macao.

thus at first perceived by many as largely symbolic. That impression was destined to change quickly, as China soon pushed to follow up with negotiations<sup>385</sup>.

The China-ASEAN FTA (hereinafter, CAFTA) has been fully implemented on Jan. 1<sup>st</sup>, 2010, and it is comprised of three Agreements: Trade in Goods (hereinafter, CAFTA Trade Agreement), Trade in Services, and Investment (hereinafter, CAIA) – respectively concluded (at an astonishing pace) in November 2004, January 2007 and August 2009.

The CAFTA established the world's largest free trade area amongst developing States, and it is considered a model of 'South-South cooperation'<sup>386</sup> – especially taking into account the wide differences of political systems amongst the States parties to it. The Agreement is stemmed with the underlying rationale to improve ties other than economical, contributing to the region's overall stability<sup>387</sup> – e.g., in the context of the numerous territorial disputes still to be solved, and with the attempt to avoid that those spill out in the form of trade disputes (or worse)<sup>388</sup>.

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<sup>385</sup> A. Antkiewicz and J. Whalley, *China's new regional trade agreements*, in *The World Economy*, Blackwell Publishing, vol. 28(10), October 2005, p. 1546.

<sup>386</sup> H. Qi, *Investment Law in the China-ASEAN Free Trade Agreement*, in *Journal of East Asia and International Law*, vol. 5, issue 2, Autumn 2012, p. 3.

<sup>387</sup> This is one of the purposes of the organization (cf., ASEAN Charter: <http://www.asean.org/asean/asean-charter>); the EU has recognized the ASEAN's role in this respect in multiple occasions (cf., EU External Action website: [http://eeas.europa.eu/asean/index\\_en.htm](http://eeas.europa.eu/asean/index_en.htm)).

<sup>388</sup> Within the CAFTA forum, for instance, the border dispute between China and Vietnam has been settled recently with a 'Demarcation Agreement' signed on Dec. 31<sup>st</sup>, 2008 (cf., Xinhua News Agency, *China, Vietnam Settled Land Border Issue*, at: [http://news.xinhuanet.com/english/2009-02/23/content\\_10878785.htm](http://news.xinhuanet.com/english/2009-02/23/content_10878785.htm)). Nevertheless, demarcation disputes between China and individual ASEAN States are not off the deck – e.g., that over the Spratly islands (or Nansha islands, for China), in the South China Sea, currently occupied by small military contingents from China, Taiwan, Vietnam, the Philippines and Malaysia (in addition to Brunei's claims of exclusive economic zone over the South-Eastern part of the archipelago); see O. Saleem, *The Spratly Islands Dispute: China Defines the New Millennium*, in *American University International Law Review*, vol. 15, 2000, p.527.

Aware of the mixed feelings amongst ASEAN Member States towards the resurgence of the Middle Kingdom, China has taken a number of steps aimed at smoothing anxieties. A first important milestone has been marked with China's accession to the WTO, in 1997. Also, beside the (somewhat paternalistic) support during the 1997 financial crisis, China-ASEAN relations substantially improved when China joined, in 2003, the 1976 'Treaty of Amity and Cooperation'<sup>389</sup> – a key ASEAN security protocol in which the signatory Parties commit to treat each other as strategic partners for peace and prosperity. In addition, since the signature of the CAFTA Framework Agreement, in 2002, a number of trans-national platforms for cooperation in trade and investment have been established (among which, the China-ASEAN Cooperative Fund and the China-ASEAN Interbank Association).

Nevertheless, it has been repeatedly pointed out that while China is ASEAN's natural trading partner, the similarity of the respective industrial structures makes it also a strong competitor, with potentially far reaching impact on ASEAN strategic outlook and economic prosperity<sup>390</sup>. China's current cost-competitiveness, the dynamism of its economy and its role as major exporter and magnet for FDI, are all factors shared with most ASEAN States, but on a much larger scale. It is quite natural for ASEAN members to witness the rise of China with a mixed sense of threat and hope<sup>391</sup>. On the one hand, the sense of economic threat derives from the sheer size of China's economy, and its potential ability to 'flood the market' with competitively-

<sup>389</sup> As reported by the BBC Network, see <http://news.bbc.co.uk/2/hi/business/3173546.stm>; the text of the Treaty is available on the website of the National University of Singapore, at: <http://cil.nus.edu.sg/1976/1976-treaty-of-amity-and-cooperation-in-southeast-asia-signed-on-24-february-1976-in-bali-indonesia-by-the-heads-of-stategovernment/>.

<sup>390</sup> Trade and investment relations between China and ASEAN has been described as potentially competitive, rather than complementary: see *Chen (2006)*, p.427.

<sup>391</sup> S. Y. Chia, *ASEAN-China Free Trade Area*, Paper for presentation at the AEP Conference (Hong Kong, Apr. 12-13, 2004), Singapore Institute of International Affairs, 2004, available at: [www.hiebs.hku.hk/aep/Chia.pdf](http://www.hiebs.hku.hk/aep/Chia.pdf).

priced products. Still today, the past concerns that China's vast and cheap labor force may capture ASEAN's market shares in the US, EU and Japan, as well as threaten ASEAN industries in their domestic markets and local products – especially on goods such as textiles, footwear, and steel – are not entirely vanished<sup>392</sup>. On the other hand, ASEAN economies, through the CAFTA, have gained a consistent advantage in accessing the Chinese 1.3 billion-strong consumer market (gradually substituting Japan as the regional growth-engine partner). The result is that today China-ASEAN economic cooperation is shifting from trade to investment, with ASEAN's investment in China overtaken by China's investment in ASEAN<sup>393</sup>. ASEAN States now regularly and officially request China to invest more in the region<sup>394</sup>. In the meantime, China has attracted within its territory investments from across ASEAN (from food producers such as Thailand's CP Foods to airlines such as Malaysia's Air Asia).

As of China, while the CAFTA – and the ingratiating actions taken to ease its negotiations and conclusions – may represent in some respect a burden for the People's Republic<sup>395</sup>, privileged access to investment opportunities in the ASEAN space such, *e.g.*, raw materials, technology and skilled yet inexpensive labor (in such areas as accountancy services, engineering

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<sup>392</sup> As concede by Z. Wei, vice-chairman of China Council for the Promotion of International Trade; see: <http://english.people.com.cn/90001/90778/90861/7081485.html>.

<sup>393</sup> For an illustration of the recent investment flows, see T. A. Masron and Z. Yusop, *The ASEAN investment area, other FDI initiatives, and intra-ASEAN foreign direct investment*, in *Asian-Pacific Economic Literature*, vol. 26, issue 2, November 2012, pp. 88-103.

<sup>394</sup> *e.g.*, the 44<sup>th</sup> ASEAN Economic Ministers Meeting; cf., *Qi* (2012), p. 8.

<sup>395</sup> *e.g.*, the Harvest Program.

and nursing) are considered more than a worthy trade-off. Not incidentally, China's investment in those areas has increased sharply in the last few years<sup>396</sup>.

*ii. Trade and investment rationale*

With the entry into force of the CAFTA Trade Agreement, in 2004, 90% of imported goods between China and the six founding Members of ASEAN were made duty-free (for the other four Members, tariff adjustments is expected to follow in 2015). The average tariff rate on Chinese goods sold within ASEAN decreased from 12.8 to 0.6%, while the average tariff rate on ASEAN goods sold in China decreased from 9.8 to 0.1%. The Agreement progressively touches upon goods included in the 'Sensitive Track List' – comprising a 'Sensitive List' and a 'Highly Sensitive List'. Tariffs on goods falling within the Sensitive List have been reduced to 20% in 2012, and will be further reduced to 0-5% by 2018; those goods falling within the Highly Sensitive List will be reduced to 50% by 2015. Taking into account the sectors still not exempt from tariff reductions, the average overall tariff level has declined to 4.5% (compared with the average MFN rate of 8.1%). In China's case, the overall simple *ad valorem* average for 2009 under the CAFTA is 2.5% (compared with some 9.7% MFN rate)<sup>397</sup>.

In light of its size and growth, the economic activity to, from and within the CAFTA represents today a considerable driver of global economic growth. Back in 2004, China's export in ASEAN States amounted to approximately 24 billion USD, and ASEAN's into China to

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<sup>396</sup> Source: *ASEAN Investment Report 2012 – the changing FDI landscape*, ASEAN Secretariat, July 2013, p. 6-8.

<sup>397</sup> Source: Philippines' Department of Trade and Industry; see: <http://www.dti.gov.ph/dti/index.php?p=688>.

roughly 40 billion. In 2010, ASEAN has become the fourth largest trade partner of China (after the EU, the US, and Japan); China also became ASEAN fourth largest trade partner<sup>398</sup>. According to official statistics, following the entry into force of the CAFTA Trade Agreement, the trade in goods between ASEAN and China boosted significantly, experiencing an average growth of over 25% per year between 2004 and 2008<sup>399</sup>. By 2015, ASEAN is expected to become China's top trading partner, with annual trade topping 500 billion USD<sup>400</sup>.

As of investments, Table 26 (below) shows how, despite the rapid growth, the flows between China and ASEAN is still comparatively small – as the main sources of FDI for both sides are the US, the EU and Japan. Nevertheless, as China encourages its private enterprises to invest abroad with the 'Going Out' policy<sup>401</sup>, flows between China and ASEAN are expected to rise sharply. ASEAN has already become the largest market of investment abroad for Chinese enterprises in a variety of sectors<sup>402</sup>. In 2011, FDI from China to ASEAN topped 7 billion USD, up from 3.26 billion in 2002. Of those, non-financial FDI reached 2.54 billion USD, growing by over 13% in a year (*e.g.*, Chinese investments in Malaysia alone rose to 370 million USD, up from 66 million in 2010). By middle 2012, China's cumulative investment in ASEAN reached 18.8 billion USD.

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<sup>398</sup> *Qi (2012)*, p. 8

<sup>399</sup> See *Xiao (2010)*; of the same author, see *ASEAN-China FTA: A Pragmatic Approach to Regulating Services and Investment*, in J. Chaisse and P. Gugler (eds.), *Competitiveness of the ASEAN Countries: Corporate and Regulatory Drivers*, Elgar, 2010 p. 400.

<sup>400</sup> According to *Qi (2012)*; see, also, A. Romann, *Greater heights for China-ASEAN ties*, *China Daily*, Jan. 16<sup>th</sup>, 2013, available at: [http://www.chinadaily.com.cn/hkedition/2013-01/16/content\\_16123033.htm](http://www.chinadaily.com.cn/hkedition/2013-01/16/content_16123033.htm).

<sup>401</sup> C. Huiping, *China-ASEAN investment agreement negotiations*, in *Frontiers of Law in China*, vol. 1, issue 3, September 2006, p. 11.

<sup>402</sup> *Qi (2012)*, p. 2.

**Table 26 - China's outward FDI flows into ASEAN countries 2005-2010 (million USD)**

Country/Region	2005	2006	2007	2008	2009	2010
Brunei	1.50	—	1.18	1.82	5.81	16.53
Myanmar	11.54	12.64	92.31	232.53	376.70	875.61
Cambodia	5.15	9.81	64.45	204.64	215.83	466.51
Indonesia	11.84	56.94	99.09	173.98	226.09	201.31
Laos PDR	20.58	48.04	154.35	87.00	203.24	313.55
Malaysia	56.72	7.51	-32.82	34.43	53.78	163.54
Philippines	4.51	9.30	4.50	33.69	40.24	244.09
Singapore	20.33	132.15	397.73	1550.95	1414.25	1118.50
Thailand	4.77	15.84	76.41	45.47	49.77	699.87
Vietnam	20.77	43.52	110.88	119.84	112.39	305.13
<b>Total</b>	<b>157.71</b>	<b>335.75</b>	<b>968.08</b>	<b>2484.35</b>	<b>2698.10</b>	<b>4404.64</b>

Note: Data for 2005, 2006 include only non-financial outward FDI flows.

403

**Table 27 - China's outward FDI stock into ASEAN countries 2005-2010 (million USD)**

Country/Region	2005	2006	2007	2008	2009	2010
Brunei	1.90	1.90	4.38	6.51	17.37	45.66
Myanmar	23.59	163.12	261.77	499.71	929.88	1946.75
Cambodia	76.84	103.66	168.11	390.66	633.26	1129.77
Indonesia	140.93	225.51	679.48	543.33	799.06	1150.44
Laos PDR	32.87	96.07	302.22	305.19	535.67	845.75
Malaysia	186.83	196.96	274.63	361.20	479.89	708.80
Philippines	19.35	21.85	43.04	86.73	142.59	387.34
Singapore	325.48	468.01	1443.93	3334.77	4857.32	6069.10
Thailand	219.18	232.67	378.62	437.16	447.88	1080.00
Vietnam	229.18	253.63	396.99	521.73	728.50	986.60
<b>Total</b>	<b>1256.15</b>	<b>1763.38</b>	<b>3953.17</b>	<b>6486.99</b>	<b>9571.42</b>	<b>14350.21</b>

Note: Data for 2005, 2006 include only non-financial outward FDI stock.

404

<sup>403</sup>2010 Statistical Bulletin of China's Outward Foreign Direct Investment, available at <http://www.hzs.mofcom.gov.cn/accessory/201109/1316069658609.pdf>, p.102.

<sup>404</sup> *Id.*

## **B. Genesis and correlation amongst the Agreements**

Between April 2008 and August 2009, two FTAs featuring investment chapters (*i.e.*, PRC-NZ FTA and AANZFTA) and two investment agreements flowing from multi-stage comprehensive FTAs (ACIA and CAIA) have been signed in the western Pacific – over an area spanning from China to New Zealand and encompassing the entire Southwest Asia and Australia –, redesigning the legal trade and investment framework of the region. Those agreements – whose negotiations mostly overlapped (see Table 28, below) – present remarkable similarities.

<b>Table 28</b>	
<b>2003-2009 negotiations for FTAs and investment agreements in the Southwest Pacific</b>	
China – New Zealand FTA (PRC-NZ FTA)	<ul style="list-style-type: none"> <li>• negotiations started on Nov. 2004</li> <li>• signed on Apr. 2008</li> <li>• in force since Oct. 2008</li> </ul>
ASEAN Comprehensive Investment Agreement (ACIA)	<ul style="list-style-type: none"> <li>• negotiation started in 2003</li> <li>• signed Feb 2009</li> <li>• in force since Mar. 2012 (after the ratification of Indonesia)</li> </ul>
China-ASEAN Investment Agreement (CAIA)	<ul style="list-style-type: none"> <li>• negotiations started on June 2003</li> <li>• signed on Aug. 2009</li> <li>• in force for some signatories (since 2009: Malaysia, China, Brunei, the Philippines; since 2010: Cambodia, Indonesia)</li> </ul>
ASEAN-Australia-New Zealand FTA (AANZFTA)	<ul style="list-style-type: none"> <li>• negotiations started early 2004</li> <li>• signed on Feb. 2009</li> <li>• with the ratification of Indonesia (Jan. 2012), in force for all Parties</li> </ul>

The analysis of recent Chinese stipulations on investments cannot disregard these new treaties which – sharing subject matter, most of the parties, and being negotiated in the same geographic area, at approximately the same time – have undoubtedly influenced each other in their making.

Even a perfunctory analysis reveals that the German and British Model BITs have continued to be used as general template for the negotiations – and much of them, in terms of structure and wording, is still featured in such new stipulations. More specifically – and beside the broad commonalities between the two European models – the German Model (mostly, through the 1997 Chinese Model BIT and the 2003 BIT with Germany), maintained considerable influence in those agreements where China is a party (*i.e.*, China-NZ FTA and CAIA). The British Model shows, instead, a considerable weight in those agreements where most of the parties share historical ties with the United Kingdom (*i.e.*, ACIA and AANZFTA). Nevertheless, being the ASEAN organization already accustomed to negotiations and stipulations of international investment treaties, and considering the influence there exercised<sup>405</sup> by NAFTA Chapter 11, the three more recent agreements (*i.e.*, ACIA, CAIA and AANZFTA) also display an increasing reliance on the US Model BIT (see Table 30, below). Such significant reliance on the most influential models, coupled with some original formulations (as reactions to some controversial developments of the investment arbitral jurisprudence<sup>406</sup>), are probably at the basis of ASEAN's claim that the ACIA is founded on 'international best practices'<sup>407</sup>.

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<sup>405</sup> And experience gathered, through the subsequent arbitral case-law.

<sup>406</sup> As noted by Prof. Brown: '...it is apparent that the Model BIT is an important instrument which represents, inter alia, an expression of a State's investment policy, its negotiating position on the protection of foreign investment, as well as (in some cases) its reaction to the jurisprudence emanating from arbitral tribunals'; C. Brown, *The*

## 1. Main characteristics of the Agreements

### a. Structure

A first comparative look at the investment protections regimes featured in the four agreements reveals that those where China is a Party are the most synthetic. China-NZ FTA and CAIA, in fact, comprise 24 and 27 provisions, respectively; ACIA and AANZFTA, 49<sup>408</sup> and 28. The 27 norms of the CAIA are not even divided into sections – while the other three agreements separate substantive protections (Section A), from the investor-State dispute settlement mechanism (Section B) – the ACIA, in addition, features Section C, with the final dispositions.

As of the model of reference for the structure of the agreement, China's resistance to adopt right away the North American standard – to which the ASEAN is accustomed to, and New Zealand adopted in the parallel negotiations for the AANZFTA – emerges starkly. Indeed, in addition to its conciseness, the CAIA not only has no sections, but comprises the entire dispute settlement regime into a single provision<sup>409</sup> – as per its Model BIT.

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*development and importance of the model bilateral investment treaty*, in C. Brown (ed.), *Commentaries on selected model investment treaties*, Oxford University Press, 2013; p. 2.

<sup>407</sup> Yen (2011), p. 188.

<sup>408</sup> The length of ACIA is determined in particular by Section B, as the treaty provides for a optional yet complete set of rules for the arbitral procedure.

<sup>409</sup> Art. 14, CAIA.

## b. Development of the list of definitions

Preliminarily, it may be observed a trend towards the composition of a more comprehensive list of definitions (contained in the first article of the investment chapter or treaty)<sup>410</sup>. All four agreements have thus developed the European simplified list (featuring only investments, investors and returns – and, at times, territory) into a more analytical, US Model-inspired, version (typical also of many recent international agreements and legal practice). Nevertheless, while all such lists have become more comprehensive, no agreement has reached the high level of detail of the US Model BIT – perhaps felt, with its thirty-six definitions, unnecessary (especially, with respect to acronyms of widely recognized international organizations or treaties). Thus, additions have, for the most part, dealt with substantive definitions (*e.g.*, ‘natural’ and ‘juridical’ person, ‘measure’) or more formal definitions whose content, however, is not internationally established with binding force elsewhere (*e.g.*, ‘freely usable currency’).

The progression is evident for China, which from the three standard definitions featured in all its Model BITs went to six, in the PRC-NZ FTA, and reached twelve, in the CAIA (with two of them, *i.e.*, ‘AEM’ and ‘MOFCOM’, being mere acronyms). The list will be further widened in the 2012 stipulations with Chile and Canada (reaching, respectively, 18 and 22 items).

Table 29, below, provides a comparative illustration of the point.

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<sup>410</sup> As opposed to the US practice which, in all FTAs stipulated, placed the list of definitions at the end of the stipulation (usually, Section C, dedicated to this purpose).

Table 29 - List of definitions <sup>411</sup>						
US Model '04 (36 items)	PRC-NZ FTA '08 (6 items)	ACIA '09 (11 items)	AANZFTA '09 (9 items)	CAIA '09 (12 items)	PRC-CA BIT '12 (22 items)	CCSAI '12 (18 items)
-	-	-	-	AEM	-	-
Central level of Government	-	-	-	-	-	-
Centre	-	-	-	-	-	= US
Claimant	-	-	-	-	-	= US
-	-	-	-	-	-	Commission
-	-	-	-	-	-	Committee
-	-	-	-	-	Confidential information	-
Covered investment	-	US +	US +	-	= US (+/-)	-
-	-	-	-	-	Disputing CP	-
-	-	-	-	-	Disputing investor	-
Disputing parties	-	-	-	-	-	= US
Disputing party	-	-	-	-	≠	= US
Enterprise	= US	-	-	-	~ US (+)	~ US (+)
Enterprise of a Party	~ US	-	-	-	-	-
Existing	-	-	-	-	~ <sup>412</sup> US	-
-	-	-	-	-	Financial service	-
-	-	-	-	-	Financial institution	-
-	-	-	-	-	-	Free Trade Agreement
Freely usable currency	-	= US (+)	= US (+)	= US (+)	-	= US
GATS	-	-	-	= US	-	-
Government procurement	-	-	-	-	-	-
ICSID Additional Facility Rules	-	-	-	-	= US	= US
-	-	-	-	-	ICSID	-
ICSID Convention	-	-	-	-	= US	= US
-	-	-	-	-	IP rights	-
Investment	≠	≠	≠	≠	≠	≠
Investment agreement	-	-	-	-	-	-
Investment authorization	-	-	-	-	-	-
Investor	-	≠	-	-	-	≠
Investor of a non-Party	-	-	-	-	-	-
Investor of a Party	~ US = AANZ	~ <sup>413</sup> PRC- NZ/AANZ	~US = PRC-NZ	~ <sup>414</sup> PRC-NZ / AANZ	~ US	-
-	-	-	-	-	Investment of an investor of a CP	-

<sup>411</sup> Symbols: '=': identical definition; '≠': different definition; '+': enriched definition; '-': missing definition; '(+/-)': minor variations; '~': similar wording.

<sup>412</sup> Labeled 'existing measure'; wording equivalent but not identical.

<sup>413</sup> Labeled 'investor'; missing 'seeks to make' (exclusion of pre-establishment protection).

<sup>414</sup> Missing 'seeks to make' (exclusion of pre-establishment protection).

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Juridical Person	-	YES	= ACIA (-)	ACIA +	-	-
-	-	-	Juridical person of a Party	-	-	-
Measure	-	US +	= ACIA <sup>415</sup>	ACIA +	US +	ACIA +
-	-	-	-	MOFCOM	-	-
National	-	-	-	-	-	= US
-	≠ <sup>416</sup>	Natural Person	= ACIA	= ACIA <sup>417</sup>	-	-
-	-	Newer ASEAN Member States	-	-	-	-
New York Convention	-	-	-	-	-	-
Non-disputing Party	-	-	-	-	-	-
Person	-	-	-	-	-	-
Person of a Party	-	-	-	-	-	-
Protected information	-	-	-	-	-	-
Regional level of government	-	-	-	-	-	-
Respondent	-	-	-	-	-	= US
-	-	-	Return	≠ <sup>418</sup>	≠	-
Secretary General	-	-	-	-	-	= US
-	-	-	-	SEOM	-	-
State enterprise	-	-	-	-	-	-
-	-	-	-	-	-	Supplementary Agreement on Trade in Services
Territory	-	-	-	-	= US	-
-	-	-	-	-	Tribunal	= PRC-CA BIT
TRIP Agreement	-	-	-	-	-	-
UNCITRAL Arbitration Rules	-	-	-	-	= US	= US
-	-	WTO	-	-	-	-
WTO Agreement	-	= US	-	= US	= US	-

The analysis that follows focuses on the notions of investment and return, in order to review the vast treaty-making process that has involved, around different tables, negotiators from thirteen States.

<sup>415</sup> Identical wording framed into two different voices: ‘Measure’ and ‘Measure by a Party’.

<sup>416</sup> Labeled ‘Natural Person of a Party’ and with different content.

<sup>417</sup> Labeled ‘Natural person of a Party’.

<sup>418</sup> Same as UK Model BIT.

2. The intertwine between the notions of investment, covered investment, and scope and application: *ratione loci*, *ratione temporis* and *ratione legis* of the Agreements

With regard to the notion of investment, it must be preliminarily noted that, drawing from the US Model BIT, the ACIA and AANZFTA add, in the list of definitions, that of ‘covered investment’, thus exhausting both *ratione loci*<sup>419</sup> and *ratione temporis*<sup>420</sup> of the respective treaties in such definition. Nevertheless, stressing ASEAN’s concern for the respect of domestic civil and administrative procedures of its Member States with regard to admittance and approval of foreign investments, both treaties add also a *ratione legis* criterion (*i.e.*, investments must be admitted in accordance with the laws, regulations and policies of the host State)<sup>421</sup>.

The agreements to which China is a Party reflect, on the other hand, an approach more adherent to its own Model BIT – displaying China’s reluctance to go through overwhelming changes in the structure of investment treaties, and the desire to maintain an overall coherent set of similar stipulations (and thus the refusal to embrace *sic et simpliciter* the US Model). Hence, in line with the German Model<sup>422</sup>, in the PRC-NZ FTA and the CAIA the *ratione loci* is expressed a

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<sup>419</sup> *i.e.*, ‘the territory of each Party’; cf., Chapter II and III.

<sup>420</sup> *i.e.*, ‘investment ... in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter’, Art. 1 US Model, 4.a ACIA and 2.c AANZFTA; cf., Chapter II, Section B.

<sup>421</sup> The AANZFTA makes the condition only eventual (‘where applicable’); in the ACIA, to the contrary, the admission phase (and the investor’s compliance with it) appears mandatory, while the eventual supplemental condition (‘where applicable’) refers to the requirement for the investment to be ‘specifically approved in writing by the competent authority of a Member State’; cf., Chapter II, Section B.

<sup>422</sup> The British Model adopts a broad yet very synthetic opening statement for the definition of investment, focusing only on ‘every kind of asset, owned or controlled directly or indirectly’; see Table below.

first time already in the definition of investment. The *ratione temporis*, on the other hand, is left into the ‘Scope’ provision<sup>423</sup> (successor of the old Model BIT-based ‘Application’ provision – extinct, in fact, in all four stipulations<sup>424</sup>). It is with the *ratione legis*, however, that it is possible to draw an element in favor of the theory for which China applies two different standards in investment agreements<sup>425</sup> – yet exercised in a not entirely clear fashion, along the lines ‘developed’ v. ‘developing’, ‘capital exporter’ v. ‘capital importer’, ‘western’ v. ‘eastern’ State. In fact, the exigency to include such criterion is much less felt in the British Model, where it appears only as an exceptional condition against admission (*i.e.*, each Party ‘shall admit’ the investment ‘...subject to its right to exercise powers conferred by its laws...’<sup>426</sup>). In the German Model, however, it is featured twice, framed in general terms, both in the ‘Promotion and protection’ provision (*i.e.*, each Party shall ‘admit such investments in accordance with its legislation’<sup>427</sup>) and in the ‘Application’ provision (*i.e.*, the treaty applies to investments made ‘...consistent with the [host State] legislation’<sup>428</sup>). It may not surprise that, in its Models and stipulations, China systematically adhered to the more ‘controlling’ German approach. Consequently, sharing ASEAN with China the same concern and mind set at the basis of the

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<sup>423</sup> Art. 137.6 PRC-NZ FTA and Art. 2.2 CAIA; see Section C, below.

<sup>424</sup> The ‘Application’ provision of the German Model (Art. 8) restate the *ratione temporis* and *loci* of the BIT; in the UK Model, instead, only the *ratione temporis* is mentioned (being an explicit mention of the *ratione loci* not featured at all); in all Chinese Models the ‘Application’ provision is a merger of the British wording for the *ratione temporis* and the German wording for the *ratione loci* (see Table 18, in Chapter I, Section B).

<sup>425</sup> On the Chinese dual standard in investment treaties, see L. Li, *Chinese BIT practice and challenges*, in *Chinese Journal of International and Economic Law*, 17(4), 2010.

<sup>426</sup> Art. 2.1 British Model BIT.

<sup>427</sup> Art. 2.1 German Model BIT.

<sup>428</sup> Art. 8 German Model BIT.

*ratione legis* criterion, even less surprising appears that, leveraging on the old BITs between China and each ASEAN Member State, in the CAIA the definition of investment features the wording of the first Chinese Model of 1984, expressly mentioning ‘in accordance with the relevant laws and regulations of the other Party’ at the heart of the provision<sup>429</sup>.

### 3. The notion of investment: characteristics

In any investment treaty, the notion of investment flows from the choice made between the two general terms of reference for the model or stipulation: the synthetic European or the more detailed North American. Despite the undeniable ties displayed by ACIA and AANZFTA with the US Model, the notion of investment follows, in all four Agreements, the European Models – in terms of structure and most of the wording used. Notwithstanding the broad commonalities, however, differences among the provisions exist – and let emerge the concerns of the relevant negotiating Parties with respect to such a significant notion.

#### a. The chapeau

All agreements keep the European chapeau ‘investment means every kind of asset’, and followed, for the most part, the order therein featured for the illustrative list of categories. None resorts to the so-called ‘objective criteria’, employed in the chapeau of the relevant US Model

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<sup>429</sup> Art. 1.1.d CAIA.

provision. All four Agreements share, instead, the sentence opening the list of instances provided ('...including, but not limited to, the following'). Such wording is not featured in any model, and shows the reciprocal influence the negotiations of the four agreements had on each other. As of the intertwine amongst the agreements, with regard to the explicit mention or coverage of 'direct and indirect' investments, 'owned or controlled' and *ratione legis* criteria, it is interesting to note the following:

- 1) on the one side, China's literal reliance on the 2003 BIT with Germany for the stipulation with Western, liberal and market-economy New Zealand; thus, in the **China-NZ FTA**, China accepted the express mention of 'direct and indirect' investments (featured in both German and British Models as well);
- 2) on the other side, the preference of ASEAN, Australia and New Zealand for the British Model – identically reproduced, in this respect, in both **ACIA** and **AANZFTA**; however, in both cases, the final wording, while retaining 'owned or controlled', curtails the Model's express mention of 'direct and indirect' investments;
- 3) lastly, the skepticism of ASEAN and China for either wording is manifest in that, in the **CAIA**, both 'owned or controlled' and 'directly and indirectly' criteria disappear, substituted by the *ratione legis* requirement<sup>430</sup>.

From such analysis, the drift between two conceptually different stances toward the investment matter emerges. On the one side, ASEAN and China appear more focused on the

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<sup>430</sup> Actually strengthened, with the introduction of the term 'policies' in addition to 'relevant laws and regulations'.

protection of policy and sovereign concerns; on the other, market economies adopt a more liberal approach, with no additions to the kernel definition of investment<sup>431</sup>.

### **b. The asset-based list**

With regard to the list of investment exemplifications, it appears *prima facie* that, while the overall structure of the European models has been maintained in all four agreements, elements and categories featured have been progressively but substantially beefed up. Nevertheless, a quite clear distinction in this respect has to be drawn between, on the one side, the slightly earlier FTA with New Zealand – relying more consistently on China’s latest Model BIT (and that with Germany) – and, on the other side, the other three stipulations – whose general term of reference appears to be the British Model.

#### *i. China-NZ FTA*

The categories listed under letters *a)* to *e)* (*i.e.*, property rights, company participations, contractual rights, intellectual property rights, concessions) of the China-NZ FTA do not show particular innovations, by comparison with the China-Germany BIT. Among the minor changes (brought by concurrent negotiations – for China, of the CAIA, and for New Zealand, of the AANZFTA), it may be noted that, in the attempt to avoid extensive interpretations, claims to money are expressly tied to ‘contracts’ (as in the other three Agreements); such addition (drawn

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<sup>431</sup> The only exception is the US Model where, however, such additional wording is intended to provide guidance to the subsequent interpreter in case of dispute (as opposed to circumscribing tout-court the treaty coverage).

from the British Model), coupled with the previous wording (drawn from the 1997 Chinese Model), brings the final formulation to: ‘claims to money or any other contractual performance having an economic value associated with an investment’. A dual test is thus clearly established, as the claim has to:

- i)* arise out of a contract and
- ii)* flow from an investment.

Letters *f)* and *g)* appear quite innovative, especially for China,

The first, moving from letter *c)* of the US Model, features, in a category distinct from letter *b)* (‘shares, debentures, stock and any other kind of participation in companies’), a ‘list of covered liabilities’: ‘bonds, including government issued bonds, debentures, loans and other forms of debt, and rights derived therefrom’. It appears that the Parties have tried, in the first place, to draw a clearer distinction between debts as investments and those resulting from normal trading activity (thus, excluded from the BIT protection). Moreover, with regard to the express mention of ‘government issued bond’, such novel wording has been probably introduced upon insistence of China, and reflects concerns over the macroeconomics of New Zealand, at both public and private level. Indeed, New Zealand’s gross external debt has recently breached 150% of GDP (higher than Italy), with one of the worse leverage ratios amongst OECD countries (worse than Greece); government debt-over-GDP, despite still below 40%, has doubled in the past three years<sup>432</sup> and, as the Ministry of the Treasury recently reported, the share of external debt in the corporate sector (owed to overseas companies that have equity interests in New

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<sup>432</sup> Source: Ministry of the Treasury of New Zealand, *Special Topic: New Zealand's external debt - an international comparison*, Monthly Economic Indicators - January 2013; available at: <http://www.treasury.govt.nz/economy/mei/jan13/03.htm>.

Zealand) amounts to 26% of GDP (more than double the OECD average)<sup>433</sup>. As China steps in both public and private economy of New Zealand<sup>434</sup>, such a provision appears thus aimed at guaranteeing Chinese interests in the future (in the attempt to avoid an Argentina-like investment riddle).

As of letter *g*), its novelty consists in that it features two catch-all locutions (‘any right conferred by law or under contract and any licenses and permits pursuant to law’) aiming at opening to no reservation categories *a*) to *d*), the first, and specifically *e*), the second. In such latter aspect, it may be noted that the wording appears extracted from the US Model (and in fact the provision is listed under the same letter *g*); nevertheless, the US Model lacks a ‘concession’ category such as those featured in the European models). In terms of coherency of the registry used, however, the result is not adamant: the use of two different registries (*i.e.*, European and American), especially within the same norm, may result into confusion, and to subsequent exhausting interpretative exercises. The same problem, nevertheless, is shared with ACIA and AANZFTA: both Agreements feature an even closer wording to the US Model, yet they maintain the European ‘concession’ category (let. *e*)), wording (most) and structure.

## *ii. ACIA and AANZFTA*

The analysis of the lists of investment instances contained in ACIA and AANZFTA reveals three main elements:

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<sup>433</sup> *Id.*

<sup>434</sup> See, *e.g.*, the note of the Ministry for Foreign Affairs, reporting that public spending increases are financed through loans from China, available at: <http://www.mfat.govt.nz/Countries/Pacific/Cook-Islands.php>.

1. Structural (*i.e.*, adoption of the roman numerals) and substantial (whether not literal at once) reliance on the British Model (*i.e.*, *i*) property rights, *ii*) company participation, *iv*) claims to money and *vi*) concessions; plus the definition of ‘return’);
2. Where departures from the British Model have been adopted, both Agreements share identical (or equivalent) structure and wording (*i.e.*, *chapeau*, *ii*) company participation, *iv*) contractual rights, *iii*) IP rights, *v*) and *vi*) concessions and permits) ;
3. Increased reliance on the US Model BIT, where clarifications of, or additions to, certain provisions was felt needed (*i.e.*, notion of ‘covered investment’, *ii*) company participations, *v*) permits).

### *iii. CAIA*

The list contained in the CAIA shows remarkable structural and linguistic similarities with ACIA and AANZFTA. This adds to the claim that the ACIA served as template for the negotiations with China<sup>435</sup> (and for the AANZFTA). By the same token, the differences between CAIA and ACIA, especially when the latter shares identical wording with the AANZFTA, are believed to display either fundamental points of interest for China, or common understandings between China and ASEAN which could not be properly developed with full market economies – thus within the contexts of the PRC-NZ FTA (for China) or the AANZFTA (for ASEAN).

Moreover, China’s conservative approach towards treaty innovations must be taken into account: modifications aimed at clarifying or simplifying the overall structure and language of

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<sup>435</sup> *Yen (2011)*, see *supra*, fn. 375.

the treaty are generally welcome, while those imposing (or implying) substantial changes (in either structure or language) encounter more resistance in finding their way into the final draft.

Following such conceptual scheme, it may be inferred China's insistence for 'purging' the ACIA-template of the US Model-led innovations therein featured, and for the adoption instead of a structure more coherent with the Chinese (*i.e.*, European) Model.

Consequently, it may not surprise, as illustrated earlier (see Chapter II, Section B), China's disfavor for the notion of 'covered investment' (implying an excessive overturn, within the treaty, of the criteria at the very basis of the stipulation), nor the reinstatement of the *ratione legis* criterion at the very heart of the definition of investment (actually strengthened, with the addition of ACIA's 'policies' to 'laws and regulations').

Moreover, it may also be understood the preference for the British Model wording for the 'property rights' and 'contractual rights' categories (respectively, *i*) and *v*)), as introducing no substantial variation with respect to the Chinese Model.

The introduction of the notion of 'juridical person' in the 'company participations' category (*ii*)), establishing a clearer civil-law legal standard (as opposed to the British Model 'company') was, instead, accepted. Indeed, such wording was already present, *e.g.*, in the BIT with Germany (despite not referred to China)<sup>436</sup>; in the same category, however, China refused to include the US Model-derived 'bonds'.

Noteworthy, then, is the articulation of the 'IP rights' category, featuring an unprecedented list of items.

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<sup>436</sup> *i.e.*, in the German definition of investor, at Art. 1 China-Germany BIT (2003).

In the ‘concession’ category, while resorting to the wording of its own 1997 Model, China agreed to remove the ‘permitted by law’ locution (perhaps enfranchised by the presence of the *ratione legis* in the chapeau); in addition, those further US Model-based specifications contained in both ACIA and AANZFTA (*i.e.*, turnkey, construction, management, production or revenue-sharing contracts) have been well discarded, as well as the special ‘liability list’ category agreed in the PRC-NZ FTA (see *supra*, i.).

### c. Change of form of investment and returns

As of the change of form of investment, all four Agreements follow the German Model<sup>437</sup>; the CAIA and the AANZFTA share the same wording, expressly protecting also ‘reinvested returns’ (in the ACIA, instead, the ASEAN has opted, drawing from the British definition of return, for the express inclusion of the concept of ‘return’ into that of investment).

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<sup>437</sup> For all agreements, featured in the last sentence of the definition of investment: Art. 135 China-NZ FTA, Art. 4 ACIA, Art. 1 CAIA, Art. 2.c Chapter 11 AANZFTA.

Table 30 - <u>Investment (and return)</u>					
	Art. 1 US '04	Art. 135 PRC-NZ FTA '08	Art. 4 ACIA '09	Art. 2(c) AANZFTA '09	Art. 1 CAIA '09
<b>Covered investment</b>	'covered investment' means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.	-	4.a 'covered investment' means, with respect to a Member State, an investment in its territory of an investor of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing by the competent authority of a Member State;	2.a covered investment means with respect to a Party, an investment in its territory of an investor of another Party, in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and which, where applicable, has been admitted by the host Party, subject to its relevant laws, regulations and policies;	-
<b>Chapeau</b>	'investment' means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:	Investment means every kind of asset invested, directly or indirectly, by the investors of a Party in the territory of the other Party including, but not limited to, the following:  *[as in PRC-DE, except dark green]	4.c 'investment' means every kind of asset, owned or controlled, by an investor, including but not limited to the following:	2.c [idem ACIA]	1.d 'investment' means every kind of asset invested by the investors of a Party in accordance with the relevant laws, regulations and policies of another Party in the territory of the latter including, but not limited to, the following:  *[as in PRC Model '84, except 'policies' and dark green]

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<p><b>Property rights</b></p>	<p>(a) an enterprise;  (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.</p>	<p>(a) [idem as PRC model '84, '97 and PRC-DE]</p>	<p>(i) [idem UK Model]</p>	<p>(i) [idem UK Model]</p>	<p>(i) [idem UK Model]</p>
<p><b>Company participation</b></p>	<p>(b) shares, stock, and other forms of equity participation in an enterprise;</p>	<p>(b) [idem PRC Model '97]  *[and as in PRC-DE, with 'participation' in lieu of 'interest']</p>	<p>(ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived therefrom;</p>	<p>(ii) [idem ACIA, without 'or interest']</p>	<p>(ii) shares, stocks and debentures of juridical persons or interests in the property of such juridical persons;</p>
<p><b>Contractual rights</b></p>	<p>-</p>	<p>(c) claims to money or to any other contractual performance having an economic value associated with an investment;  *[as in PRC '97 and PRC-DE, plus 'contractual']  (g) [part] any right conferred by law or under contract [...]</p>	<p>(iv) claims to money or to any contractual performance related to a business and having financial value; [fn3]  [fn3*] For greater certainty, investment does not mean claims to money that arise solely from: (a) commercial contracts for sale of goods or services; or (b) the extension of credit in connection with such commercial contracts.  * [Drawn from the Canada Model, featured in PRC-CA BIT]</p>	<p>(iv) [idem ACIA]</p>	<p>(v) [idem UK Model]</p>

<p><b>IP rights</b></p>	<p>(f) intellectual property rights</p>	<p>(d) [idem PRC-DE]</p>	<p>(iii) intellectual property rights which are conferred pursuant to the laws and regulations of each MS;</p>	<p>(iii) intellectual property rights which are recognized pursuant to the laws and regulations of each Party and goodwill;</p>	<p>(iii) intellectual property rights, including rights with respect to copyrights, patents and utility models, industrial designs, trademarks and service marks, geographical indications, layout designs of integrated circuits, trade names, trade secrets, technical processes, know-how and goodwill;</p> <p><i>*[based on PRC-DE, without 'business secret' but with 'utility models']</i></p>
<p><b>Concessions</b></p>	<p>(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;</p>	<p>(e) concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources;</p> <p><i>*[as PRC '97 and PRC-DE, but missing 'business']</i></p>	<p>(vi) business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources.</p>	<p>(vi) [idem ACIA]</p>	<p>(iv) business concessions conferred by law, or under contract, including concessions to search for, cultivate, extract, or exploit natural resources;</p> <p><i>*[as PRC '97, but missing 'permitted by law']</i></p>
	<p>(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;</p>	<p>(g) [part] ... any licences and permits pursuant to law;</p>	<p>(v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;</p>	<p>(v) [idem ACIA]</p>	<p>-</p>

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<b>Debt instruments [and derivatives]</b>	(c) bonds, debentures, other debt instruments, and loans  (d) futures, options, and other derivatives;	(f) bonds, including government issued bonds, debentures, loans and other forms of debt, and rights derived therefrom;	-	-	-
<b>Change of form</b>	-	[idem PRC-DE]  *[as in PRC '97, first sent.]	Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment:  *[as in PRC-DE, plus 'or reinvested']	[...] [idem CAIA]	[...] any alteration of the form in which assets are invested or reinvested shall not affect their character as investments;
<b>Reinvested returns</b>	-	-	-	[...] [idem CAIA]	For the purpose of the definition of investment in this Sub-para., returns that are invested should be treated as investments [...]
<b>Returns as investment</b>	-	-	The term 'investment' also includes amounts yielded by investments, in particular, profits, interest, capital gains, dividend, royalties and fees.	-	-

### C. Focus: investment protection in the China-NZ FTA

#### 1. Chapter 11: main features

Compared to China's typical standard up to 2008 (granted, *i.e.*, by the investment treaty model, actual BITs and the 2006 China-Pakistan FTA), the China-NZ FTA appears a complex and detailed agreement. It comprises 214 articles in 18 Chapters (plus Preamble, 14 Annexes and 2 Implementing Arrangements), spanning through 121 pages.

The investment protection regime established with Chapter 11 of the China-NZ FTA contains rules of investment protection including: post-entry NT and the grandfathering of existing non-confirming measures; the MFN for both pre- and post- entry stage and FET; five conditions upon which a lawful expropriation is allowed, and the 'Hull Rule'; *a priori* consent to international arbitration of any legal dispute directly concerning an investment. Most of these rules are common in Chinese BITs since 2000, the standard of investment protection equals that in BITs with capital-exporting States<sup>438</sup>. The Agreement, however, does not set out the objective of progressive liberalization. The Chapter, while undoubtedly influenced by the concurrent negotiations taking place in the region (*e.g.*, ACIA, CAIA, AANZFTA), features a number of original elements some of which, however, are destined to remain unique of the China-NZ FTA – thus, showing the 'test' character of the Agreement.

In the course of the analysis of the Chapter's provisions, comparative reference will be made – beside the concurrent regional stipulations – to the 2001 China-Netherlands BIT (as typical recent BIT with a capital exporting State), the 2003 China-Germany BIT (as China's most advanced BIT, in terms of investment protection guarantees), and the 2012 China-

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<sup>438</sup> *Xiao (2010)*, p. 19.

Canada BIT (the latest BIT China entered into, and the first with China's model shift, from the European to the North American).

Preliminarily – and beside the specific wording each time used – it is possible to note the progressive material extension of the investment protection regime: in 2001, the BIT with the Netherlands comprised 15 articles; in 2003, with Germany, 16; the investment Chapter in the 2006 FTA with Pakistan comprises 11 provisions; the 2008 investment chapter of the China-NZ FTA features 23 provisions; the 2012 BIT with Canada reaches 35 articles (plus 8 pages of official 'Explanatory Memorandum').

## 2. Investment protection standards

Still in 2012, the China-NZ FTA has been considered, by some Chinese scholar the agreement that should receive 'special attention', as it '...includes the most complicated investment rules in the history of Chinese investment treaties'<sup>439</sup>. What follows is a review of the investment discipline therein featured, partly challenging the assertion above, in light of China's contemporary and subsequent stipulations with ASEAN, Canada and Chile.

The first provision of Chapter 11, Art.135, contains a broad **definition** of 'investment', which includes 'every kind of asset invested, directly or indirectly', including but not limited to property, shares, claims to money, intellectual property rights, concessions, bonds and rights conferred by law or contract. As noted (cf., Section B.3, above), the definition

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<sup>439</sup> C. Cai, *China*, in W. Shan (ed.), *The legal protection of foreign investment – a comparative study*, Hart Publishing, 2012, p. 252.

unusually covers both direct and indirect investments<sup>440</sup>. Notably, Art. 1 provides coverage for to investments of legal persons of third countries which are nevertheless owned or controlled by investors of one Party<sup>441</sup>. Thus, investments by a New Zealand or Chinese investor may still be covered even if directly made through an offshore vehicle. In this respect, however, drawing from the case-law in *Rompetrol*<sup>442</sup>, Art. 149 contains a denial of benefits clause against investments of investors of one Party made through a legal entity owned or controlled by nationals of the other Party or a third party.

As of the definition of ‘investor’, it is considered as such the one who ‘make, is making or has made’ an investment. The adoption of a wording almost equal to the North American Models<sup>443</sup> is a particularly innovative step for China, as it appears to grant protection to both pre- and post- establishment phases. Footnote 9 to Art. 135, however, limit the coverage of such provision, expressly including only MFN and transfers.

Art. 137 defines the **scope** of Chapter 11, within the context of the FTA. The overall formulation is original with respect to the past experience of both Parties, partly merging elements from the ACIA and the US and Chinese Models, partly resorting to unique formulations. The provision echoes as well the language of the 2004 Canada Model BIT (to which China will adhere entirely in 2012, with Art. 2 of the China-Canada BIT). The investment Chapter is thus established to apply to *measures* (and this is a first, for China, as

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<sup>440</sup> Conversely, the definition does not appear in the 2012 BIT with Canada; this, however, should not be understood as a departure from the expansive trend referred to above (rather, the China-Canada BIT is based on the Canadian Model).

<sup>441</sup> Provided that such third country has no right to claim compensation for expropriation, or has forgone such claim.

<sup>442</sup> *Rompetrol Group BV v. Romania*, Decision on Jurisdiction, Apr. 18<sup>th</sup>, 2008, ICSID Case No. ARB/06/3.

<sup>443</sup> Art. 1 of both US and Canada Models feature and even wider coverage with regard to pre-establishment: the first referring to investors that ‘attempts to make’, the second that ‘seeks to make’.

opposed to *investments*<sup>444</sup>) adopted or maintained by a Party relating to investors, and investments of investors, of the other Party. Para. 6, then, reflects the provision on application featured in the Chinese Model<sup>445</sup>.

Art. 138 contains the **NT** clause. The provision draws from the North American models BIT wording (*i.e.*, Art. 3 of both US and Canada Models) excluding, however, the pre-establishment protection. Moreover, the provision coverage is limited by Art. 141.1 (a grandfathers clause to China's benefit, allowing for pre-existing non-conforming measures to be maintained). Another limit is listed in para. 3, which provides that Art. 138 NT guarantee may not be understood to apply to any measure not covered already by NT clauses featured in other BITs China or New Zealand are already party to.

Art. 139 contains the **MFN** provision. The overall wording echoes that of the North American models<sup>446</sup>. Here, however, the two usually distinct paragraphs – the first focusing on investors, the second on investments (despite otherwise equally worded) – are merged into a single one, as per the Chinese custom<sup>447</sup>. It is nevertheless noteworthy that China has expressly agreed, for the first time, to extend the coverage of MFN with respect to the *admission* of investments, thus not limiting the protection to the otherwise usual post-

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<sup>444</sup> Cf., Chapter II, Section B.1.

<sup>445</sup> Art. 11; the provision extends protection to all investments made by investors of a Party within the other Party's territory, whether made *before or after* the entry into force of the Agreement (provided these were not at that date already the subject of judicial or arbitral review).

<sup>446</sup> Art. 4 of both US and Canada Model BITs.

<sup>447</sup> Cf., Art. 3.3 China 1997 Model BIT.

establishment phase only<sup>448</sup>. Moreover, apparently reacting to the doctrinal debate pivoting on the extent of the MFN clause<sup>449</sup>, para. 2 establishes:

‘For greater certainty, the obligation in this Article does not encompass a requirement to extend to investors of the other Party dispute resolution procedures other than those set out in this Chapter’.

Art. 142 contains a detailed (7 paragraphs spanning over two pages) **transfer** of payments provision. *Prima facie*, the article appears relaxing China’s tight exchange controls; however, para. 3 provides that transfers must still ‘comply with the relevant formalities stipulated by the present laws and regulations of China relating to exchange control’ (subject to certain more detailed guarantees as to how and in what way those controls may be applied). Despite the provision’s structure (and length) is similar to that contained in the 2012 China-Canada BIT<sup>450</sup>, the condition of para. 3 is absent in such latter agreement. Notably, nevertheless, at let. *c*) China agreed to contain within sixty days the discharge of such formalities. It appears thus evident the gradual process China went (and it is still going) through in this respect.

Article 143.1 features FET and FPS guarantees. With regard to **FET**, it may be preliminarily noted that China’s BITs with Germany and the Netherlands do not provide for a definition of the standard. Here, instead, the treatment is established as fair and equitable as long as ‘...in accordance with commonly accepted rules of international law’. The wording,

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<sup>448</sup> The same coverage will soon afterward be agreed in the China-ASEAN Investment Agreement, at Art. 5.1.

<sup>449</sup> *e.g.*, *Maffezini v. Spain*, ICSID Case no. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, Jan. 25<sup>th</sup>, 2000, (2001) 40 ILM 1129; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, Dec. 8<sup>th</sup>, 2008; *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Award on Jurisdiction, 24 October 2011. Cf., Chapter II, Section B.2.a.iii.

<sup>450</sup> Art. 12 China-Canada BIT (2012).

original, is slightly yet potentially significantly different than ‘...the international law minimum standard of treatment for aliens as evidenced by general State practice accepted as law’, featured in Art. 4.2 of the China-Canada BIT (which mirrors Art. 5 of Canada Model BIT). In addition, para. 2 specifies that the FET guarantee prohibits denial of justice: the Parties must ‘...ensure that, having regard to general principles of law, investors are not denied justice or treated unfairly or inequitably in any legal or administrative proceeding affecting the investments of the investor’. Such wording, absent in either European and North American models, is similar to that featured in the CAIA<sup>451</sup> and ACIA<sup>452</sup> (the two, equally worded). Similarity becomes even more accentuated with regard to the **FPS** standard, imposing on the Parties the duty to ‘...take such measures as may be reasonably necessary in the exercise of [their respective] authority to ensure the protection and security of the investment’. Lastly, drawing from the North American models<sup>453</sup> but resorting to a simplified wording, para. 5 of Art. 143 reduces the catch-all nature of the FET guarantee by providing that a breach of any article of Chapter 11 does not establish *per se* a breach of Art. 143. The provision is also featured – with a wording identical to that of the North American models, in ACIA<sup>454</sup>, CAIA<sup>455</sup> and AANZFTA<sup>456</sup>.

Art.145 features the **expropriation** provision. Drawing from the Draft Convention on the Protection of Foreign Property<sup>457</sup>, the Parties have added, to the customary four conditions

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<sup>451</sup> Art. 7.2.a CAIA.

<sup>452</sup> Art. 11.2.a ACIA.

<sup>453</sup> Art. 5.3 for both US and Canada Model BITs.

<sup>454</sup> Art. 11.3 ACIA.

<sup>455</sup> Art. 7.3 CAIA.

<sup>456</sup> Art. 6.3 AANZFTA.

<sup>457</sup> Art. 3 (Taking of property) let. ii, Draft Convention on the Protection of Foreign Property (1967).

(i.e., *a*) public purpose; *b*) in accordance with domestic law; *c*) carried out in a non-discriminatory manner; *e*) on payment of the fair market value of the expropriated investment immediately before the expropriation measures were taken), a fifth one (let. *d*)), adding the requirement for the measure to be ‘not contrary to any undertaking which the Party may have given’<sup>458</sup>. The insertion of such a condition, which draws the umbrella clause in the expropriation provision, is noteworthy, as not featured *i*) in previous stipulations of either Party, nor usually featured *ii*) in modern agreements, or *iii*) in any model or stipulation being considered in the present analysis. Such renewed addition has been found resulting from recent case-law<sup>459</sup>. It is worth noting, in this respect, that Chapter 11 does not feature an **umbrella clause** as such (like the subsequent Agreement with Canada), probably to avoid debate about the circumstances in which a contract claim maybe ‘elevated’ into a treaty claim.

The meaning of Art. 145 is elucidated in Annex 13 (‘Expropriation’), which – rarely for BITs – provides clear interpretative guidelines on what type of actions constitute expropriation. It is there provided that expropriation may be *direct or indirect*<sup>460</sup> and will extend to *interferences* with tangible or intangible property rights. The meaning of *indirect* expropriation is however confined to measures found to be:

- (a) ‘equivalent to direct expropriation ... depriv[ing] the investor in substance of the use of the investor’s property...’;
- (b) either severe or indefinite; and
- (c) disproportionate to the public purpose.

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<sup>458</sup> See Art. 5.1.b China-Netherlands BIT

<sup>459</sup> *Kalderimis* (2009), p. 159.

<sup>460</sup> Cf., Chapter 2, Section B.2.a.ii.

In addition, Annex 13 contains a carve out for the reasonable exercise of State ‘police powers’, intended to offer a safe harbor for regulation reasonably justified in the public interest<sup>461</sup>. Future disputes in this respect may thus dwell on drawing the boundary between indirect expropriation and the proper exercise of police powers. The standard of compensation (Art. 145.2), drawing for the most part from the 2001 BIT with the Netherlands<sup>462</sup>, but with elements of the 2003 BIT with Germany, shares almost all its entire wording with the ACIA<sup>463</sup>.

### 3. Dispute settlement

The most important feature of Chapter 11 is the investor-State dispute resolution procedure (Section 2, Arts. 152-158). The procedure can be summarized as follows:

- Once a dispute arises, it is subject to a six-month negotiation and consultation period before the investor may submit it to arbitration (Arts. 152 and 153);
- If the dispute cannot be settled amicably, the investor may submit the dispute to arbitration, provided that the investor gives three months’ notice to the State party, which may then require the investor to ‘go through any applicable domestic administrative review procedures ... which may not exceed 3 months’ (Art. 153.2); it

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<sup>461</sup> This takes account of criticisms of the early operation of the NAFTA investment chapter - e.g., *Metalclad Corp. v. United Mexican States*, 40 I.L.M. 36, 50, para. 103 (ICSID 2000); *S.D. Myers, Inc. v. Canada*, 40 I.L.M. 1408, 1440 para. 281 (NAFTA Arb. 2000); see, also, G. A. Alvarez and W. W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, in *Yale Journal of International Law*, vol. 28, issue 365, 2003, p. 378.

<sup>462</sup> Art. 5.1.c China-Netherlands BIT.

<sup>463</sup> Art. 14.2.b ACIA; the provision is particularly clear in paras. 3 and 4 and with regard to the rules of determination of the fair market value in cases of currency freely convertible or not.

is not clear, however, whether an investor may trigger the three-month administrative review period during the six-month negotiation period. This accommodates China's Administrative Review Procedure, enacted into legislation in 1999 (also factored into the Agreements with the Netherlands<sup>464</sup>, Germany<sup>465</sup> and Canada<sup>466</sup>);

- The investor has the choice of ICSID or UNCITRAL arbitration (Art. 153.1);
- The 'fork-in-the-road' appears more a 'roundabout': an investor may pursue both domestic court remedies and investment treaty arbitration, provided it withdraws its case from Court before final judgment (Art. 153.3); the substance of the provision is maintained also in the CAIA<sup>467</sup>; China's policy shift in this respect is evidenced by looking at the equivalent provision in the 2001 BIT with the Netherlands<sup>468</sup>, where China at the time agreed that '...in case a legal dispute concerning an investment in the territory of the People's Republic of China has been submitted to a competent domestic court, this dispute may be submitted to international dispute settlement, on the condition that the investor concerned has withdrawn its case from the domestic court'.
- Following the North American models, Art. 154.1 bars the possibility to raise claims to a period of three years following the investor's discovery (or reasonable

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<sup>464</sup> Protocol to Art. 9, China-Netherlands BIT (2001).

<sup>465</sup> Protocol ad Art. 10, China-Germany BIT (2003).

<sup>466</sup> Arts. 20-21 (plus Annex C to Art. 21); the procedure here outlined is quite sophisticated: a round of consultations shall be held within 30 days of submission of notice of intent to submit the dispute to arbitration; even after such step, a claim may be submitted to arbitration only if at least six months have elapsed since the alleged breach and at least four since the notice of intent. Moreover, if the dispute relates to a Chinese measure, a four-month (as opposed to three, such as in the Agreement with New Zealand) internal administrative 'reconsideration procedure' is required; it appears, however, that such step could be initiated anytime after the consultation phase has elapsed.

<sup>467</sup> Art. 14.5 CAIA.

<sup>468</sup> Art. 10.2, China-Netherlands BIT (2001).

discoverability) of the breach; the provision is featured also in ACIA<sup>469</sup>, CAIA<sup>470</sup>, AANZFTA<sup>471</sup> and China-Canada BIT<sup>472</sup>.

There is existing case law on the enforcement of **cooling-off periods** and requirements to submit to local procedures before commencing arbitration<sup>473</sup>. In some cases these so-called ‘formal requirements’ have not been upheld. However, this result has usually been reached by engaging more favorable dispute resolution procedures on an MFN basis. The express dis-application of Art. 139 to other dispute procedures would render such arguments difficult in this context.

A further interesting feature is Art. 154.2, permitting a State party to file an objection that an investor’s **claim is manifestly without merit**, within 30 days of the constitution of the tribunal. This is borrowed from the 2006 review of Art. 41.5 of the ICSID Arbitration Rules, and is intended to give to the State Party an opportunity to pursue a form of ‘strike out’ application against frivolous claims – which, without specific authorization, is usually not contemplated in international arbitration<sup>474</sup>.

Art. 156 provides a rudimentary **consolidation** provision, where multiple investors file claims arising out of the same circumstance. The norm, however, lacks teeth, as it merely

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<sup>469</sup> Art. 34.1.a ACIA.

<sup>470</sup> Art. 14.6 CAIA.

<sup>471</sup> Art. 22.1.a AANZFTA.

<sup>472</sup> Art. 21.2.f China-Canada BIT, almost equally phrased as Art. 26.2.c Canada Model BIT, and Art. 26.1. US Model.

<sup>473</sup> e.g., *Murphy Exploration and Production Company International v. Republic of Ecuador*, Award on Jurisdiction, Dec. 15<sup>th</sup>, 2010, ICSID Case No. ARB/08/4.

<sup>474</sup> G. Petrochilos, S. Noury and D. Kalderimis, *Annotated Commentary to the ICSID Arbitration Rules*, in L. Mistelis (ed.), *Concise International Arbitration*, Kluwer, 2010.

directs the parties to consult, rather than giving power to a tribunal to order consolidation (as opposed to the subsequent BIT with Canada, featuring a detailed procedure at Art. 26).

Following once more the North American models<sup>475</sup>, as well as the ACIA<sup>476</sup>, AANZFTA<sup>477</sup> and China-Canada BIT<sup>478</sup>, Art. 158 specifies that a tribunal cannot award **punitive damages**, and that any award against a State party is restricted to monetary damages and restitution of property. It would thus seem that other forms of specific performance and mandatory injunctions are not permissible. The provision is, conversely, absent in the earlier BITs with the Netherlands and Germany, as well as in the CAIA<sup>479</sup>.

Article 158.5 provides that a disputing party may not seek **enforcement** of a final award until all ‘applicable review procedures’ have been completed. The provision, as subsequently clarified in the BIT with Canada<sup>480</sup>, creates a *de facto* stay of enforcement whilst time-limits to resort to an annulment committee (in the case of ICSID arbitration) or to revise or set aside the award (in the case of UNCITRAL arbitration), and the subsequent relevant procedures, have not lapsed. As such, the norm may prove somewhat dispiriting for investors who have won convincingly in front of the Tribunal and may be an incentive to elect UNCITRAL arbitration. On the other hand, China’s reservations to the New York Convention include that China ‘...will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national

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<sup>475</sup> *i.e.*, Art. 34.1.b US Model BIT and Art. 44.1.b Canada Model BIT.

<sup>476</sup> Art. 41.2.b ACIA.

<sup>477</sup> Art. 28.2.b AANZFTA.

<sup>478</sup> Art. 28.2.b China-Canada BIT.

<sup>479</sup> European models, nevertheless, do not feature a specific provision on award at all.

<sup>480</sup> Art. 32.3 China-Canada BIT, modeled on Art. 45.3 of the Canada Model BIT.

law<sup>481</sup>. In this respect, the Supreme People's Court has held that disputes between a foreign investor and the government of a host country are not commercial, thereby indicating that an investor-State dispute cannot be enforced in China pursuant to the New York Convention<sup>482</sup>. Nevertheless, para. 6 provides that a disputing party '...shall abide by and comply with an award without delay'. This mirrors the language in Art. 53 of the ICSID Convention. Despite displaying a clear political will, such correspondence does not, *per se*, constitute a legal obligation.

#### **D. Focus: investment protection in the CAIA**

##### *1. Negotiations and main characteristics*

Between 1985 (BIT with Thailand) and 2001 (BIT with Myanmar), China concluded an investment agreement with each ASEAN Member State. Nonetheless, because of the changes brought in Chinese templates and actual stipulations over such considerable span of time, the guarantees offered in those treaties varied significantly. China felt thus the exigency to promote a more uniform investment protection regime throughout the region. Such result has been achieved through the CAIA. Negotiations begun in June 2003, with the establishment of the Working Group on Investment within the China-ASEAN Trade

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<sup>481</sup> Source: UNCITRAL online website: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

<sup>482</sup> As highlighted by Mr. Gilles Gauthier, Director of the Investment Trade Policy Division of Foreign Affairs and International Trade Canada, at a conference held by the Canadian Bar Association, in 2007 (see: [https://www.cba.org/abc/sections\\_international\\_f/pdf\\_Arbitration\\_issues\\_discussion\\_paper\\_FINAL.pdf](https://www.cba.org/abc/sections_international_f/pdf_Arbitration_issues_discussion_paper_FINAL.pdf)); see also the 2012 report of the EU-SME Centre (Centre for Small and Medium Enterprise of the EU), *Dispute settlement with Chinese companies*, available at <http://www.eusmecentre.org.cn/content/dispute-settlement-chinese-companies>; also, cf., *Kalderimis (2009)*, p. 156-160.

Negotiation Committee. The Agreement has been subsequently signed after eight official rounds of negotiations between the Parties (and more consultation meetings of the Working Group) on Aug. 15<sup>th</sup>, 2009.

Compared to the negotiations for the CAFTA Trade Agreements in Goods and Services, those for the Investment Agreement lasted for a much longer time<sup>483</sup>. On the one side, the legal foundations established with the BITs already in force between China and each ASEAN Member State served to provide a general framework for early negotiations. Moreover, China agreed to make use of the ACIA as template for the negotiations (mostly, however, due to the lack of a more suitable alternative)<sup>484</sup>. Such latter text, however, is a comprehensive agreement featuring relatively high standards for investment treatment, protection, and liberalization. In this respect, besides a general consensus, China unwillingness to make specific commitments over investment liberalization – to which ASEAN Members were already bound (among themselves and with other countries<sup>485</sup>), and insisted for China to embrace – slowed down the pace of negotiations. The difference between China and ASEAN centered on the extent of the commitment *already* undertaken by the Parties with the signature of the CAFTA Framework Agreement, in 2002. There, in fact, let. *a*) of Art. 5 ('Investment') resort to a rather vague language – namely, to '...progressively liberalize the investment regime'. Out of such ambiguous wording, the negotiating Parties

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<sup>483</sup> For those hurdles, see *Huiping (2006/FLC)*, pp. 423-431.

<sup>484</sup> As it can be inferred from the *China-ASEAN FTA Factsheet*, published on the website of the Ministry of Trade and Industry of Singapore, Jul. 23<sup>rd</sup>, 2004, available at: [http://www.mti.gov.sg/public/FTA/firm\\_FTA\\_Default.asp?sid=179&cid=1902](http://www.mti.gov.sg/public/FTA/firm_FTA_Default.asp?sid=179&cid=1902).

<sup>485</sup> *e.g.*, AANZFTA (2009), ASEAN-South Korea Investment Agreement (2009); both agreements provide for pre- and post-entry NT. Therefore, with respect to the question of whether investment rules in a FTA should include pre-entry NT, the answer given by ASEAN appears clearly affirmative. See, also, V. Bath, *ASEAN: the liberalization of investment through regional arrangements*, in L. E. Trakman, N. Ranieri, *Regionalism in international investment law*, Oxford University Press, 2013, pp. 182-213.

concluded for different understandings as to the substantive obligations to be subsumed<sup>486</sup>. On the one side, ASEAN argued that, were liberalization not included, there was no need to negotiate a separate investment protection agreement, as the existing ten BITs between China and each ASEAN Member State were enough to promote and protect investments. In ASEAN's perspective, the new investment regime was meant to improve the *liberalization* of direct investments in the free trade area<sup>487</sup>, rather than simply relocating those rules on protection already existing at a bilateral level. On the other side, China's 'timid, overcautious and indecisive'<sup>488</sup> policy approach towards investment liberalization obligations in FTAs was due in part to its lack of experience in multilateral investment negotiations and investment liberalizations, and in part to the limited authority of the Chinese negotiating delegation<sup>489</sup>. Conversely, China appeared to understand the negotiation of an investment agreement within new FTAs as an opportunity to *update* old BITs<sup>490</sup>. As illustrated in the following sections, a compromise somewhere in between the exigencies expressed by both Parties has been ultimately reached.

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<sup>486</sup> *Huiping (2006/FLC)*, p. 1-2

<sup>487</sup> Specific issues related to investment liberalization include, *e.g.*, the definition of 'investor' and 'investment', market access, NT and pre-establishment NT; China firstly disagreed over the necessity of investment liberalization, then on the approaches and modalities to address progressive liberalization in the prospective investment agreement. ASEAN insisted on a negative (or 'top-down') approach, while China only agreed to a positive (or 'bottom-up') approach. The issue was reportedly heatedly discussed in the 7<sup>th</sup> TNC-WGI meeting. The following two TNC-WGI meetings focused on the modality argument again without any result. Relevant meeting reports are confidential; cf., *Huiping (2006/FLC)*, p. 9-10.

<sup>488</sup> See *Chen (2006)*, p. 427.

<sup>489</sup> *Id.*, p. 426; issues concerning investment liberalization should be dealt with by the Chinese State Council; see *Chen (2006)*; cf., Chapter I Section B.2.

<sup>490</sup> Cf., *Xiao (2010)*.

The resulting CAIA has been defined as ‘new wine in a new bottle’<sup>491</sup>, relatively to the existing BITs between China and individual ASEAN Member States, as providing for higher standards of investment protection (especially with regard to those concluded before year 2000). Beside some notable exceptions, the overall impression is that the choice of the Parties has been to privilege the creation of a stable and predictable legal environment for investment<sup>492</sup>. The most significant changes are:

- a) the establishment of NT obligation (although for pre-entry stage only)<sup>493</sup>;
- b) the extension of *a priori* consent to international arbitration<sup>494</sup>; and
- c) the establishment of a clear standard of compensation<sup>495</sup>.

Nevertheless, most of the investment protection regime ultimately codified in the CAIA is common to most BITs signed by China since year 2000. The effective protection of investments in relation to the standards of treatment provided for in the Agreement is restrained by several factors. Lastly, despite ASEAN’s efforts in this sense, the Agreement rarely touches upon the issue of investment liberalization<sup>496</sup>, unlike other investment arrangements featured in FTAs (*e.g.*, NAFTA Chapter 11). By comparison, it has been noted that the CAIA is overall less comprehensive and less rigorous than the ACIA, as

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<sup>491</sup> *Id.*, p. 16-17.

<sup>492</sup> *Qi (2012)*, p.5.

<sup>493</sup> Art. 4 CAIA; in this respect, China ultimately consented to change its otherwise uniform policy to the contrary.

<sup>494</sup> Art. 14 CAIA.

<sup>495</sup> Art. 8 CAIA.

<sup>496</sup> On the other hand, China agreed on further liberalization in trade in goods and services (*contra*: B. Mercurio, *Bilateral and regional trade agreements in Asia: a skeptic’s view*, in R. P. Buckley, R. Weixing Hu and D. W. Arner (eds.), *East Asian Economic Integration- Law, Trade and Finance*, Elgar, 2011, pp. 121-149); however, China in order to conclude the Investment Agreement China committed to cover investment liberalization in future agreements; see *Chen (2006)*, p. 428

incorporating the former's general NT, compensation for expropriation and dispute resolution measures, but none of the liberalizing schemes (such as a ban on performance requirement and extended NT)<sup>497</sup>. As a result, it has been considered that the CAIA is part of a strategy of 'regionalization' of the new generation of Chinese BITs, and an instance of China's influence on rule-making at regional level. In this sense, the Agreement would represent 'old wine in the new bottle'<sup>498</sup>. It shall be noted, nevertheless, that ASEAN has kept a different stance (and pace) over investment liberalization in subsequent negotiations with other parties, thus the CAIA is hardly considered by some as an example of Chinese influence in the region<sup>499</sup>.

As to the entry into force of the Agreement, contrarily to what established in the ACIA, Art. 27 CAIA does not require full ratification from all Parties (*i.e.*, China, on the one side, and each ASEAN Member State, on the other), nor it binds ASEAN as a whole with China. ASEAN Member States are free to decide when to ratify the Agreement, and in principle may opt out in the future. Such fragmented ratification process is unusual for the 'ASEAN way' consensus. As indicated in the latest 'Table of ASEAN Treaties/Agreements and Ratifications'<sup>500</sup>, of March 2012, the CAIA has been acceded by Malaysia (Aug. 28<sup>th</sup>, 2009), China (Dec. 12<sup>th</sup>, 2009), Brunei Darussalam (Dec. 21<sup>st</sup>, 2009), the Philippines (Dec. 29<sup>th</sup>, 2009), Cambodia (Sept. 15<sup>th</sup>, 2010) and Indonesia (Oct. 11<sup>th</sup>, 2010).

With regard to the main structural features, the CAIA is composed of a Preamble and 27 provisions spanning through 32 pages. Articles 1-13 deal with the substantial protection of investments, while investor-State dispute settlement is condensed in long Article 14.

<sup>497</sup> M. Soderberg (ed.), *Changing power relations in northeast Asia: implications for relations between Japan and South Korea*, Routledge, 2011, p.148.

<sup>498</sup> *Xiao (2010)*, p. 20.

<sup>499</sup> *Ibid.*

<sup>500</sup> Available on the ASEAN online website at: <http://www.asean.org/archive/document/Table%20of%20Agreement%20and%20Ratification%20as%20of%20March%202012.pdf>.

The following analysis aims at examining the content of the principal provisions on investment protection, both substantive and procedural, comparing them with those contained in other relevant agreements such as, *e.g.*, the ACIA (the Parties' recognized template for the agreement), the BITs with Germany, the Netherland and Canada (all belonging to the latest generation of Chinese agreements on investment), the China-NZ FTA (concurrently negotiated, with another State in the region).

## 2. Substantive protection of investments

- **Investment** (Art. 1 let. d)

Art. 1.d CAIA features a broad asset-based definition of investment. It begins with the open-model locution 'every kind of asset', and follows with an illustrative list comprising the usual five categories of investment (despite listed in a different than usual order): *a*) movable and immovable property; *b*) shares, stocks and debentures; *c*) IP rights; *d*) business concessions; *e*) claims to money. While number and most contents of these categories are shared also with the Chinese Model, the provision echoes also structure and wording of Art. 4.c ACIA, yet featuring a less ample list, and resorting to a more precise and less redundant wording<sup>501</sup>. Overall, departures from the ACIA served the purpose to bring the list of definitions more in line with the Chinese Model – with minor adjustments extracted from the

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<sup>501</sup> *e.g.*, Art. 4.a ACIA features the category of 'covered investment' (*i.e.*, as that admitted according to the law of the host State), but then restates, at c.iii, 'intellectual property right which are *conferred pursuant to the laws and regulations of each Member State*' (*in lieu* of a definition or list of protected IP rights, as in Art. 1.d.iii CAIA); also Art. 4.c.iv ACIA lists 'claim to money or to any contractual performance related to a business and having financial value', which Art. 1.d.v CAIA simplifies in 'claims to money or to any performance having financial value' (almost identical to the 1984 Chinese Model). The same is for Art. 1.d.ii: 'share, stocks and debentures of juridical persons or interests in the property of such juridical persons': no mention of 'any other form of participation' (Art. 4.c.ii ACIA) or 'any kind of participation' (Art. 135 NZ).

British Model. Nevertheless, being the illustrative list non-exhaustive, the impact of such different wording may not result ultimately significant before an arbitral tribunal.

It is to be noted, however, the first (of many) indications contained in the Agreement, aiming at directing (*rectius*, restricting) the future interpreter: para. 2 of Art. 1 establishes that:

‘The definitions of each of the above terms shall apply unless the context otherwise requires, or where a Party has specifically defined any of the above terms for application to its commitments or reservations’.

Table 30 (above) shows how the chapeau of the definition of investment relies for the most part on the China-NZ FTA (which, in turn, is derived for the most part from the 2003 China-Germany BIT). The only difference is about the reintroduction of the *ratione legis* criterion (typical of all Chinese Models and the vast majority of stipulations) ‘in accordance with the relevant laws, regulations and policies of another Party...’. The inclusion of the term ‘policies’ in the Chinese Model wording appears aimed at widening the discretion of the host State. Footnote 1 to Art. 1, specifies that ‘policies’ shall be understood as ‘...those affecting investment that are endorsed and announced by the government of a Party, and made publicly available in a written form’.

As of the returns of investments, the Agreement reflects the development in recent international investment treaties<sup>502</sup> by qualifying those as investment as well. By comparison to Art. 4.c ACIA it may be noted that, while placed here as well at the end of the paragraph,

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<sup>502</sup> As opposed to China’s older BITs, offering reduced guarantees; cf., *Qi (2012)*, p.5.

the wording used is more simple and clear, as simply stating ‘returns that are invested should be treated as investments’<sup>503</sup>.

Lastly, again with the aim to reduce interpretative exercises, para. 3 of Art. 1 features the following original provision:

‘In this Agreement, all words used in the singular shall include the plural, and all words in the plural shall include the singular, unless the context otherwise requires.’

Chinese doctrine ultimately considered that, compared with the 2012 US Model BIT, the definition of investment provided in the CAIA is more suitable for the development of economy and investment practice in China and the ASEAN<sup>504</sup>.

- **Investor** (Art. 1 let. e)

The definition of investor provided in the CAIA, entirely drawn from Art. 4.e ACIA, is that of ‘a natural person of a Party or a juridical person of a Party that *is making* or has made an investment in the territories of the other Parties’ (emphasis added). The wording ‘is making’ extends the Agreement’s protection to the pre-establishment phase of the investment. as per the China-NZ FTA, however, footnote 3 to Art. 1 limits such protection to MFN treatment (Art. 5) and transfers and repatriation of profits (Art. 10) only. Otherwise, only investors who have actually made the investment, in the post-establishment stage, may enjoy the Agreement’s protection. Such specification, absent in the ACIA, displays China’s

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<sup>503</sup> The relevant part of the provision recites: ‘The term ‘investment’ also includes amounts yielded by investments, in particular, profits, interest, capital gains, dividend, royalties and fees. Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment’.

<sup>504</sup> *Qi (2012)*, p.5.

unwillingness to commit on investment liberalization obligation – and the limited concessions made under the CAIA.

- **Scope of Application** (Art. 3)

Art. 3 is one of the few instances within the CAIA where the final draft of the provision appears, rather than an improvement, a step back, in terms of clarity of the norm and coherence with the rest of the text of the treaty.

In principle, structure (*i.e.*, identification of the territorial and temporal ambit of application, followed by the list of exceptions) and wording of the provision follow Art. 3 ACIA. However, with regard to the coverage of investments made *prior* the entry into force of the Agreement, para. 2 draws from the China-NZ FTA and merges the letter of the first part of para. 6<sup>505</sup> and para. 4 (in such order) of Art. 137 (possibly, the most complex provision of that agreement). It shall be noted that para. 4 replicates the wording of Art. 28 of the 1969 Vienna Convention on the Law of Treaties (featured, in the same context, in Art. 2.3 of the US Model BIT as well). A visual comparison of the two provisions is deemed appropriate for the subsequent analysis:

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<sup>505</sup> The second part of the paragraph is literally translated into the second part of Art. 14.2.a (listing exclusions from the application of the investor-State dispute settlement norm).

<b>Table 31 – ‘scope of application’: the mishap</b>	
Art. 3, para. 2, CAIA	Art. 3, para. 2, ACIA
Unless otherwise provided in this Agreement, this Agreement shall apply to all investments made by investors of a Party in the territory of another Party, whether made before or after the entry into force of this Agreement. For greater certainty, the provisions of this Agreement do not bind any Party in relation to any act of fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.	This Agreement shall apply to existing investments as at the date of entry into force of this Agreement as well as to investment made after the entry into force of this Agreement.

Even a perfunctory comparison of the two provisions shows that the CAIA provides for a more complex formulation than that featured in the ACIA. Indeed, over the time the ‘scope’ provision (along with many others) has partly changed its nature and often gone hypertrophic – especially with regard to the bars placed *against* possible claims arising out of investments made prior the entry into force of the relevant stipulation. In agreements dating back to early 2000 – such as, *e.g.*, the China-Netherlands and China-Germany BITs – the provision would simply be labeled ‘application’, focus on ‘investments’, provide coverage for those made ‘prior of after the entry into force’, and be exhausted in a few lines (with language similar, when not identical, to that just exemplified)<sup>506</sup>. Sometimes, no limit in this respect would be provided at all (as it still happened in some recent BIT)<sup>507</sup>. In the CAIA and ACIA the label changed in ‘scope of application’ and, in the China-Canada BIT, ‘scope and

<sup>506</sup> *e.g.*, Art. 11 China-Germany BIT and Art. 12 China-Netherlands BIT; both labeled ‘Application’.

<sup>507</sup> *e.g.*, Art. 2 China-Canada BIT (drawn from Art. 2 of the Canada Model BIT).

application<sup>508</sup>; in all three cases – plus the agreement with New Zealand – the shift for the North American models set up resulted in the focus of the provision to shift to *measures* adopted (or maintained) relating to investors and/or their investments; out of these four agreements, only the China-Canada BIT does not include in the provision a number of ‘exceptions’ to the agreement’s coverage.

Despite the rather convoluted construction, Art. 3.2 CAIA is believed to ultimately grant to investments the same level of protection as most agreements. Besides the - unknown<sup>509</sup> - reasons that brought such a complex formulation to light, it appears that goal of the first sentence is to reduce possible extensive interpretations out of ACIA’s ‘existing investment’ wording (*i.e.*, speculations as to what constitutes an ‘existing’ investment). The second sentence, however, by relying on Art. 28 VCLT and introducing in the scope provision new categories such as ‘acts’, ‘facts’ or ‘situations’ that have ‘ceased to exist’ before the Agreement’s entry into force, appears a gauntlet thrown at the speculator. Those acts, facts and situation, in any case, ultimately represent the sole exceptions to the Agreement’s coverage.

The list of exclusions from the application of the Agreement contained in para. 4, while for the most part a being drawn or rephrased from those already featured in the ACIA and China-NZ FTA, appears carefully drafted:

- Let. *a*) (taxation measures) is drawn from paras. 2-3 of Art. 204 China-NZ FTA;
- Let. *b*) (government procurement) is entirely drawn from letter *b* of Art. 137.5 China-NZ FTA;

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<sup>508</sup> All emphases added.

<sup>509</sup> Art. 3 does not appear to have been a contentious issue, in this respect at least; see *Chen (2006)*.

- Let. *c*), beside the traditional exception for ‘subsidies or grants provided by a Party’, contains an additional *caveat* (unfeatured anywhere else): ‘any conditions attached to the receipt or the continued receipt of such subsidies or grants whether or not such subsidies or grants are offered exclusively to domestic investors and investments.’; such exception from coverage echoes that listed among the non-conforming measures allowed in derogation to NT and MFN standards in Art. 6.1;
- Let. *d*) (services supplied in the exercise of governmental authority) features identical content than letter *d* of Art. 3.4 ACIA;
- Let. *e*) contains the common exception for measures affecting trade in services.

- **National Treatment (Art. 4)**

CAIA’s NT provision appears to be a well-accomplished attempt to merge the best parts of two of the reference-templates with China’s most significant stipulation by then: Art. 138 China-NZ FTA and Art. 5 ACIA. The final content is believed to be simple, clear and effective, for the following two reasons.

Firstly, the provision consists of one paragraph only (like in the Agreement with New Zealand), thus avoiding the redundancy of two equally-worded paragraphs whose only difference is the subject of the protection – *i.e.*, first investors and then investments (as, *e.g.*, featured in Art. 5 ACIA). Improving Art. 138 China-NZ FTA (which makes no reference to ‘investors’, resorting instead to a seemingly catch-all yet quite ambiguous ‘investments and activities associated with such investments’), the provision here synthetically yet clearly refers to ‘...investor of another Party and their investment...’.

Secondly, the list of ‘protected treatments’. Here, confirming China’s cautious approach towards investment liberalization, pre-entry stage protection<sup>510</sup> is not featured (notwithstanding the opinion of Chinese scholars, offered during negotiations<sup>511</sup>); however, as of the post-entry stage, the list includes:

- elements of both treaties (*i.e.*, management, conduct, operation, maintenance, use, sale – with ‘sale’ featured in the agreement with New Zealand as ‘disposal’),
- one original element (‘liquidation’) and
- an original -and wide- locution as of the investor’s disengagement from its investment (‘or *other forms* of disposal of such investment’, as opposed to ACIA’s less clear ‘other disposition’; the ambiguous ‘enjoyment’, featured in the agreement with New Zealand, has been discarded).

The provision appears, thus, synthetic yet complete, achieving the goal to craft a clear norm. The only flaw could be seen in the perhaps unnecessarily complicated construction related to the investment’s disposal (‘sale, liquidation or other forms of disposal’). It is nevertheless found that the simple use of the word ‘disposal’ (as per the FTA with New Zealand) includes all forms of disengagement, thus *per se* sufficient.

- **Most-Favored Nation Treatment (Art. 5)**

With regard to the MFN treatment, it appears *prima facie* that China ultimately agreed to extend the protection to the pre-entry stage. However, it has been noted already that the CAIA’s MFN clause is the most surprising, because of its self-contradictory content<sup>512</sup>.

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<sup>510</sup> *e.g.*, Art. 5 ACIA: admission, establishment, acquisition and expansion.

<sup>511</sup> *Huiping (2006/FLC)*, p. 26.

<sup>512</sup> *Yen (2011)*, p. 201.

Para. 1 sets out the MFN principle, by merging the best of the equivalent provisions from the ACIA and the China-NZ FTA (and attempting to provide for further simplification). Firstly, as per the NT (and the equivalent provision in the China-NZ FTA), the clause is contained in one paragraph only<sup>513</sup>. Again, as for the NT clause, but without the constraint of the exclusion of the pre-entry stage, the ACIA and China-NZ FTA lists of protected treatments under the MFN clause are here merged. In addition, the vague ‘activities associated with’ investment (featured in the China-NZ FTA) is removed, and ACIA’s ‘other disposition of investment’ is refined into ‘other forms of disposal’<sup>514</sup>. As synthetic and clear the disposition may appear, however, the following paragraphs render the treatment potentially meaningless, as they allow for a completely discretionary application of the clause itself<sup>515</sup>.

Para. 2 sets an entirely new provision with regard to the application of the MFN treatment clause and its relation to subsequent agreements. According to such provision:

‘Notwithstanding paragraph 1, if a Party accords **more favourable treatment** to investors of another Party or third country and their investments **by virtue of any future agreements** or arrangements to which that Party is a party, **it shall not be obliged to accord** such treatment to investors of another Party and their investments. However, **upon request** from another Party, it shall accord adequate opportunity to **negotiate** the benefits granted therein’. (emphasis added)

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<sup>513</sup> As opposed to two, one dedicated to investment and the other to investors, but otherwise equally worded, such as in Art. 6 paras. 1 and 2 ACIA.

<sup>514</sup> Thus resulting into: ‘admission, establishment, acquisition, expansion, management, conduct, operation, maintenance, use, liquidation, sale, and other forms of disposal of investment’.

<sup>515</sup> *Yen (2011)*.

The hortatory obligation ‘to accord adequate opportunity to negotiate the benefit therein’ renders thus the MFN clause not automatically applicable to future agreements. It is possible to discern, in this respect, the traditional stance of China – shared by ASEAN Parties – with regard to the borders (and contents) of the notion of State sovereignty – also *vis-à-vis* the investment jurisprudence: consent is granted, in light of the circumstances that brought the Agreement to be signed, only with regard to past and present situations, and may not be intended by investors (or interpreters) as a white check for future additional benefits – unless specifically agreed through subsequent negotiations.

To further hamper the protection afforded, para. 3, on the one side, provides that MFN treatment shall not include any preferential treatment already granted through other international instruments; on the other, it forecloses the opportunity for investors to invoke the MFN clause with regard to ‘any existing bilateral, regional and/or international agreements or any forms of economic or regional cooperation’. The standard set here is at odds with the automatic application of the MFN clause with regard to any agreements – exemplified by Art. 4.5 of China-Netherlands BIT (extending MFN protection to ‘any treatment more favorable arising out of obligation existing at present or established hereafter, at domestic level or between the Parties’) <sup>516</sup>. The provision is different also from Art. 139 China-NZ FTA, which allows for differentiated treatment to be adopted or maintained under FTAs or other multilateral agreement in force *prior* to the China-NZ FTA. The MFN protection in the CAIA is thus weakened in a fashion that goes beyond the traditional exceptions to the MFN clause, usually set by contracting parties in the exclusion list annexed to (or part of) investment agreements.

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<sup>516</sup> Cf., Art. 4 China-Germany BIT (where such conditionality is absent at all), or Art. 6 ACIA.

Lastly, para. 4 (featured in both Art. 139.3 China-NZ FTA and footnotes 4.a to Art. 6 ACIA) excludes from the scope of application of the MFN clause the procedural ambit, by establishing that:

‘For greater certainty, the obligation in this Article does not encompass a requirement for a Party to extend to investors of another Party dispute resolution procedures other than those set out in this Agreement’.

The provision appears responding to the doctrinal debate with regard to the extent of the scope of the MFN clause, and its relation with State consent<sup>517</sup>.

Further circumscribing the automatic protection granted by the NT and MFN clauses, Art. 6 CAIA (non-conforming measures) provides that such obligations shall not apply to any existing or *new* non-confirming measures maintained or adopted by a Party, as well as the continuation or amendment of those non-conforming measures. With reference to already existing non-confirming measures, the provision has been provided for in other Chinese investment agreements<sup>518</sup>; however, it is the first time *future* measures are included. Such provision may thus allow a Party to withdraw a non-discriminatory treatment of foreign investors without violating NT and/or MFN obligations (as, *e.g.*, in the case of unilateral grant of non-discriminatory treatment by means of domestic law). Investment protection granted through Articles 4 and 5 may thus result undermined to a great extent.

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<sup>517</sup> For a view firmly grounded on the public international law rationale, see the recent dissent of Prof. L. Boisson de Chazournes in *Garanti Koza LLP v. Turkmenistan*, Decision on Jurisdiction, Jul. 3<sup>th</sup>, 2013, ICSID Case No. ARB/11/20, available at: <http://www.italaw.com/cases/2176>.

<sup>518</sup> *e.g.*, China-Germany BIT (2003); see *Xiao (2009)*, p. 126.

- **Fair and Equitable Treatment and Full Protection and Security (Art. 7)**

China introduced a definition of FET and FPS standards for the first time in its agreement with New Zealand. In the CAIA, the FET standard is entirely drawn from Art. 11 ACIA, structure and wording. There, as here, the standards is left unqualified and de-linked from international practice (and interpretation)<sup>519</sup>, as para. 1 makes no reference to ‘international’ standards of treatment (as opposed, *e.g.*, to Art. 143.1 China-NZ FTA: treatment ‘...in accordance with commonly accepted rules of international law’<sup>520</sup>).

Para. 2.b, equally worded in CAIA, ACIA and China-NZ FTA<sup>521</sup>, enshrines the FPS obligation, binding the Parties to ‘...take such measures as may be reasonably necessary to ensure the protection and security of the investment of investors’.

Lastly, para. 3, here as well reproducing the wording of ACIA and China-NZ FTA<sup>522</sup>, determines that any breach of the Agreement does not imply a breach of FET<sup>523</sup>.

The lack of reference to international standards contained in paras. 1 and 2, the definitions of FET and FPS in para. 2 and the prohibition of automatic breach outline above and featured in para. 3, have been found as attempts to respond to the current debate over each

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<sup>519</sup> For a review on the point, see UNCTAD, *Fair and equitable treatment*, UNCTAD Series on International Investment Agreements II, 2012, p. 20-32.

<sup>520</sup> Cf., both North American models; also, Art. 4 of the 2012 BIT with Canada (drawn from Art. 5 Canada Model), where FET and FPS are not defined, relying instead upon the understanding of those clauses in international law and general State practice.

<sup>521</sup> Art. 143.3 China-NZ FTA.

<sup>522</sup> The only addition being ‘or separate international agreement’ (reflecting the multi-stage process of CAFTA).

<sup>523</sup> Such exception has become common practice in nowadays investment treaty-making, and follows a 2001 interpretative note by the NAFTA Free Trade Commission. As noted in the *UNCTAD Report on FET 2012* (at p. 33), if FET is understood as part of the minimum standard of treatment under customary international law, it becomes clear that a violation of a treaty obligation does not necessarily amount to a violation of a customary norm. A problem may emerge, however, when FET is de-linked from international standards. The purpose of such a provision is, in any case, to prevent tribunals from automatically finding a breach of the FET standard when another provision in the treaty has been breached, (such as in *SD Myers v. Canada*, First Partial Award, 13 November 2000, para. 261).

of these issues<sup>524</sup> and appeared aimed (this time, in a quite clear manner) at improving the predictability of the outcome of future disputes between host States and foreign investors (while stressing the Parties' understanding of the notion of State consent and State responsibility).

- **Expropriation (Art. 8)**

Art. 8 CAIA outlines the protection granted to foreign investors in case of expropriation of their investment by the host State. Structure and language are strongly influenced by the equivalent norm featured in the China-NZ FTA (Art. 145). The provision, nevertheless, draws also elements from Art. 14 ACIA, and the BITs with Germany and the Netherlands. In addition, it features a number of new elements, all of which once again apparently aimed at directing the subsequent interpreter toward a predictable outcome.

The first part of para. 1, establishing that expropriation is in principle not admitted, appears to be drawn from the Chinese Model (whose wording is unchanged in this respect since 1984). With regard to the wording used to include the case of 'creepy expropriation', in the CAIA China restored its Model '...other *similar* measures against investments...', in lieu of the British and US standards 'measures *equivalent* to' (featured, instead, in both Art. 145 China-NZ FTA and Art. 14 ACIA), or the German standard '*tantamount*' (featured at Art. 4.2 China-Germany BIT).

Such choice is comprehensible, on the part of a relatively inexperienced China, in terms of overall coherence and uniformity of China's stipulation on expropriation; nevertheless, in the otherwise quite conservative pattern chosen by the Parties in drafting the CAIA, it appears that the use of term 'equivalent' would have been better suited, as less wide

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<sup>524</sup> See, e.g., C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles*, Oxford University Press 2007, pp. 226-246.

that ‘similar’ and consequently establishing a higher threshold against extensive interpretations.

The second part of para. 1, containing the *caveat* conditions for expropriation to legitimately take place (*i.e.*, *a*) justified by a public purpose, *c*) carried out in a non-discriminatory manner, *b*) in accordance with domestic law and *d*) upon compensation), follows the wording of the China-NZ FTA<sup>525</sup>. Two differences, however, may be noted – both indicating the Parties’ reliance of the Chinese Model. The first is that the sequence of conditions follows the one featured in the Model; the second is that the 5<sup>th</sup> condition of the China-NZ FTA (*i.e.*, Art. 145.1.d: ‘not contrary to any undertaking which the Party may have given’), featuring the expropriation-specific umbrella clause, has been discarded (and replaced by the general umbrella clause, at Art. 18).

Para. 2, establishing the method for the determination of the amount to compensate when expropriation occurs, appears to be a merger of the language of different agreements. The provision establishes:

‘Such compensation shall amount to the fair market value of the expropriated investment at the time when expropriation was publicly announced or when expropriation occurred, whichever is earlier, and it shall be freely transferable in freely usable currencies from the host country. The fair market value shall not reflect any change in market value occurring because the expropriation had become publicly known earlier’.

The first observation to be made is that China agreed to discard the wording of its Model<sup>526</sup>. The provision echoes closely that featured in the ACIA (Art. 14.2.b), thus relying

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<sup>525</sup> Art. 145.1 China-NZ FTA.

<sup>526</sup> Art. 4 (of all Chinese Models) is the only provision which has kept evolving from one model to another – and, in all three models, it is framed anyway in a rather convoluted -and anyway outdated- fashion.

for the first part on the British Model<sup>527</sup>, and for the second, on the US Model<sup>528</sup> (the latter, already used in the China-NZ FTA). With respect to the ACIA provision, the CAIA eliminates the US-derived (and somewhat redundant) locution ‘immediately before’ (extraneous to European and Chinese vocabulary on the matter). Also, it replaces the ‘applicable’ (unique of ACIA) with the British ‘earlier’, in the locution ‘whichever is earlier’. Both such modifications appear aimed at improving the overall clarity of the provision, avoiding the risk to trigger issues as to extent and understanding of ‘immediately’, or what is ‘applicable’ between the two listed criteria (*i.e.*, expropriation announcement or occurrence), respectively. As of the public knowledge of expropriation (as detrimental factor for the investment’s value), the provision, by sticking with the ‘publicly announced’ wording of ACIA<sup>529</sup>, appears aimed at avoiding potentially extensive interpretations arising from the rather vague criteria ‘earlier knowledge’ (China-NZ FTA) or ‘earlier public knowledge’ (BITs with Germany<sup>530</sup>, the Netherlands<sup>531</sup> and Canada<sup>532</sup>). Lastly, by determining that compensation ‘...shall be freely transferable in freely usable currencies from the host country’, para. 2 originally features a synthetic yet complete and clear formulation to define the quality of both transfer and currency, in relation to compensation<sup>533</sup>.

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<sup>527</sup> Art. 5 UK Model; *e.g.*, ‘such compensation shall amount’, ‘whichever earlier’.

<sup>528</sup> *i.e.*, relying entirely on Art. 6.2.b and 6.2.c US Model, with regard to ‘fair market value’ and the guarantee against the impact the public-knowledge of the expropriation may cause to such value.

<sup>529</sup> Recalling to some extent the ‘proclamation’ of expropriation referred to in the first two Chinese Models (Art. 4).

<sup>530</sup> Art. 4.2 China-Germany BIT (2003).

<sup>531</sup> Art. 5.1.c China-Netherlands BIT (2001).

<sup>532</sup> Art. 10.1 China-Canada BIT (2012).

<sup>533</sup> All other treaties, instead, divide such content in two sentences, focusing first on the ‘realizable’ and ‘transferable’ aspects of compensation; then, in another sentence, on the freely usable/convertible currency: *e.g.*, Art. 14.2.c ACIA and Art. 13.3 China-Canada BIT (‘fully realizable and freely transferable’), or Art. 145.2

With regard to the standard of compensation, a brief mention shall be made also with regard to the ‘Hull rule’ (*i.e.*, that the payment has to be ‘prompt, adequate, and effective’)<sup>534</sup>. Traditionally, capital-exporting States advocate for such rule. Para. 2 of Art. 8 CAIA provides that compensation shall amount to the fair market value at the time of expropriation, that it shall be freely transferable and settled and paid without unreasonable delay. It has been consequently found that the provision reflects, in principle, the Hull rule<sup>535</sup>. Nevertheless, the rule is moderated with the introduction of certain limits, featured in paras. 2, 3 and 4 – which display in part some original content, and in part are drawn from the ACIA. The choice of words and the content of the provisions as a whole may be understood as a re-affirmation of State sovereignty, and appear aimed at providing guidance (or, rather, attempt to limit unexpected interpretations) to subsequent interpreters. It is believed that such an attempt is clearly discernible in that:

- In relation to public knowledge of expropriation, para. 2 makes use of the wording ‘publicly announced’ – in lieu of the more vague ‘known’ employed in Art. 145 of the China-NZ FTA: the formal will of the State shall be drawn only from *formal* declarations or statements. While the second part of the paragraph nevertheless reaffirms that the final evaluation should not be affected by the earlier public

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China-NZ FTA, Art. 4.2 China-Germany BIT and Art. 49.2 CPFTA (‘effectively realizable and freely transferable’); followed by ‘freely convertible currency’ (New Zealand, the Netherlands and Canada) and ‘freely usable currency’ (ACIA). The sentence in the CAIA does not feature ‘realizable’ as a quality of compensation; rather, it puts together freedom of transfer and freely usable currency. This is believed to avoid a redundancy – as it may be uneasy to understand how an ‘effectively/fully realizable’ compensation which is also ‘freely transferable’ may ultimately not be made into a ‘freely usable/convertible currency’ (and in any case, immediate questions as to the State’s *bona fide* would emerge).

<sup>534</sup> For a brief review of the Hull Rule, see the definition provided by the Jean Monnet Centre for International and Regional Economic Law and Justice, available at: <http://www.jeanmonnetprogram.org/archive/papers/97/97-12-III.html>.

<sup>535</sup> *Xiao (2010)*, p. 10-11.

knowledge of the expropriation process, the first part appears aimed at introducing an obligation for arbitrators to properly assess what, if occurred, such earlier ‘public knowledge’ means (*e.g.*, newspapers? Financial blogs? Rumors in closed investment circles?), barring purely deductive reasonings for which a sudden fall of the market value is connected to the host State conduct, once expropriation actually occurred;

- With regard to the timing for compensation to occur, in the attempt to limit subsequent speculations on what the ‘reasonable’ span of time is, para. 3 resort to the opposite term, determining that ‘...compensation shall be settled and paid without *unreasonable* delay’ (emphasis added); the result is to establish a higher threshold in favor of the State, for the criterion of ‘un-reasonability’ shifts the focus of the evaluation on the factual circumstances taking places each time in the host State against the duty to provide for prompt compensation, rather than on the investor’s expectations<sup>536</sup>;
- Para. 4 features an exception, drawn entirely from footnote 10 to Art. 14.1 ACIA, with regard to land. It is determined that expropriation relating to land shall be de-linked from international standards and evaluated instead, under both a legal and an economic perspective, through the domestic law of the host State. As such, the exception may result in fairly reduced assessments in this specific context, allowing for what already admitted in many legislations (on even more general terms), that expropriation for public purposes will be corresponded only with

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<sup>536</sup> Also, replicating the content of Art. 14.3 ACIA, footnote 6 to para. 3 establishes that domestic law shall be used in order to determine the interests eventually due for delayed compensation (but only when the host State is Malaysia, Myanmar, the Philippines or Vietnam).

‘indemnification’, rather than ‘compensation’<sup>537</sup> (thus possibly not taking into account the fair market value criterion).

Analyzing the CAIA’s substantive guarantees, it appears that China and the ASEAN have made an effort in ‘keeping things clear and simple’, within an overall -shared- perspective where the role of States is undoubtedly more consistent than in stipulations either Party has with major capital exporters.

### 3. Investor-State dispute settlement mechanism

Differently than contemporary (*e.g.*, ACIA) and subsequent (*e.g.*, China-Canada BIT) stipulations, the CAIA does not feature a set of treaty-based set of procedural rules for the conduct of the arbitral proceedings<sup>538</sup>. The investor-State dispute settlement mechanism is condensed into one long provision, Art. 14 (‘Investment dispute between a Party and an investor’), articulated in ten paragraphs spanning over four pages. While the final result is original – and a distinctive feature of the CAIA – the provision nevertheless borrows a number of elements from ACIA, China-NZ FTA and the US Model BIT. A much lower

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<sup>537</sup> cf., *e.g.*, the Italian law D.P.R. 327/01, ‘Testo unico delle disposizioni legislative e regolamentari in materia di espropriazione per pubblica utilità’, with regard to indemnification (as opposed to reparation) against expropriation.

<sup>538</sup> The text of the Agreement does not even address those few aspects dealt with in the China-NZ FTA, there felt probably the most sensitive by the Parties (*i.e.*, Art. 154, ‘Admissibility of Claims and Preliminary Objections’; Art. 155, ‘Interpretation of Agreement’; Art. 156, ‘Consolidation of Claims’; Art. 157, ‘Publication of Information and Documents Relating to Arbitral Proceedings’; Art. 158, ‘Awards’).

resemblance may thus be found with the rather skinny norms featured in the earlier BITs with the Netherlands<sup>539</sup> or Germany<sup>540</sup>.

Para. 1 specifically lists the guarantees whose -alleged- breach legitimizes the investor to initiate arbitration: NT, MFN, FET, expropriation, compensation for losses and transfer, and repatriation of profits. The provision is almost equivalent to Art. 32.a ACIA<sup>541</sup>. At the time of the conclusion of the CAIA, such listing technique was a novelty for China: nothing as such appears in the previous agreements with the Netherlands or Germany (whose provisions make use of the same general wording ‘dispute concerning an investment’), nor in that, almost contemporary to the CAIA, with New Zealand (whose Art. 152 displays a limited narrowing of the traditional formulation, with the addition of the word ‘directly’: ‘any dispute ... directly concerning an investment’). Other less recent agreements limit foreign investors’ ability to sue China only with respect to dispute on the amount of compensation (*e.g.*, until 2012, also with States exporting significant amounts of capital to China, such as Japan and South Korea; nevertheless, the old BITs have been replaced in 2012, with the signature of the China-Japan-Korea Trilateral Investment Agreement). A similar list will be subsequently used in the BIT with Canada (Art. 19). Since the Canadian Model does not make use of such technique<sup>542</sup>, it may be concluded for China’s (and Canada’s) preference for a more precise definition of the types of dispute admitted to arbitration. Once again, the attempt appears that to preliminarily screen some issues out of the interpreter’s desk – limiting preposterous claims, on the one side, and extensive interpretations, on the other.

<sup>539</sup> Art. 10 China-Netherlands BIT (2001).

<sup>540</sup> Art. 9 China-Germany BIT (2003).

<sup>541</sup> The only difference being that the ACIA’s list includes also breaches of the ‘senior management and board of directors’ provision.

<sup>542</sup> Art. 21 allows for investors to bring claims with regard to all violation of the substantive rights contained in Section B.

However, while the closed list may be considered as an attempt to improve predictability and reliability of the dispute settlement mechanisms featured in the Agreement, the *labor limae* operated on the provision contains a potentially disruptive redundancy (featured in Art. 32.b ACIA as well), in that the listed breach is then additionally required to cause ‘...loss or damage to the investor in relation to its investment *with respect to the management, conduct, operation, or sale or other disposition of an investment*’<sup>543</sup> (emphasis added). Such phrase uses a language incoherent (because partly different<sup>544</sup>) with that employed in the NT and MFN clauses and, as such, it *de facto* reopens the door of interpretation in relation to each of these terms, potentially greatly reducing the previous circumscribing effort. Perhaps recognizing that no *effet utile* could be brought with the new rather complex formulation, in 2012 China agreed with Canada<sup>545</sup> to resort to the more usual wording (already contained in Canada Model BIT: ‘...the investor has incurred loss or damage by reason of, or arising out of, that breach’<sup>546</sup>).

Para. 2 bars from arbitration those claims arising out of *events* occurred (or disputes settled) prior to the entry into force of the Agreement; the same applies to those disputes already under judicial or arbitral process by that time. While echoing paras. 2 and 3 of Art. 29 ACIA, there are substantial differences, and the final wording here is not featured in any other stipulation. Perhaps due to successive rounds of negotiations on the point, in fact, an inconsistency between the wording featured in para. 2 of Art. 14 and that of para. 2 of Art. 3

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<sup>543</sup> Emphasis added; in addition, it may be noted that and under the investment liberalization perspective, the CAFTA does not allow an investor to claim for violations of the MFN standard in the pre-entry stage under the; see *Xiao (2010)*, p. 11.

<sup>544</sup> Note the use of the locution ‘other disposition of an investment’, drawn from Arts. 6, 7 and 32 ACIA, which is instead substituted in the CAIA, at Art. 4 and 5, but not here, with ‘other forms of disposal of investments.’

<sup>545</sup> Art. 20 China-Canada BIT (2012).

<sup>546</sup> Arts. 22 and 23 China-Canada BIT (2012).

(‘Scope of application’) emerges. Art. 3.2 is, in fact, integrally imported from Art. 137 China-NZ FTA (actually, it is a merger of its paras. 6 and 4, in such order). As noted above<sup>547</sup>, the ‘scope’ provision of that investment chapter introduces some limitations against certain kinds of investments, incoherent with the wording featured in the investor-State dispute settlement provision.

The following Table provides a comparative illustration of the issue:

<b>Table 32 – CAIA application and investor-State arbitration provisions: a registry blur</b>	
<b>Art. 3.2 CAIA</b>	<b>Art. 14.2 CAIA</b>
<b>(‘Scope of Application’)</b>	<b>(‘Investment disputes between a party and an investor’)</b>
[integrally imported from Art. 137, paras. 6 and 4, China-NZ FTA]	[echoing Art. 29.3 ACIA <sup>548</sup> ]
Unless otherwise provided in this Agreement, this Agreement shall apply to all investments made by investors of a Party in the territory of another Party, whether made before or after the entry into force of this Agreement. For greater certainty, the provisions of this Agreement do not bind any Party in relation to any <i>act</i> or <i>fact</i> that took place or any <i>situation</i> that ceased to exist before the date of entry into force of this Agreement.	This Article shall not apply: (a) to investment disputes arising out of <i>events</i> which occurred, or to investment disputes which had been settled, or which were already under judicial or arbitral process, prior to the entry into force of this Agreement ...

As it appears from the Table, Art. 14.2 CAIA, despite resorting to a different wording, enshrines the same principle of Art. 3.2, and is logically *contained* in such latter provision. As the words there used are the VCLT ‘act’, ‘fact’ and ‘situation’ (not ‘events’, as in Art. 14), it appears that a claim arising out of an ‘event’ occurred before the entry into force of the CAIA

<sup>547</sup> See pp. 194-195 and Table 32 (above), with the analysis of Art. 3 CAIA.

<sup>548</sup> Art. 29 (Scope and Coverage) of Section B (Investment Dispute Between an Investor and a Member State) ACIA, at para. 3, recites: ‘This Section shall not apply to claims arising out of events which occurred, or claims which have been raised prior to the entry into force of this Agreement’.

(therefore, not arbitrable), which however constitutes a ‘situation’ that has not ceased to exist (hence, protected by the CAIA), enjoys (*rectius*, endures) a ‘special regime’, for which the investor may resort to arbitration only if the host State offers a further expression of consent.

Para. 4 contains the Parties’ consent to investor-State arbitration, and the list of the options available to the investor. Two are the considerations to be made, in this respect. Firstly, the article’s chapeau is -once more- literally drawn from the China-NZ FTA (Art. 153.1), with only one different word. Such a difference consists, in relation to the investor’s duty/possibility to litigate the issue (once consultations fail), in the substitution of the ‘shall’ (used in earlier agreements with Western States<sup>549</sup>) with ‘may’. It may not surprise that the milder verb is featured in the ACIA. Secondly, the juxtaposition operated by the Parties between ACIA and China-NZ FTA has resulted in another inconsistency that may be cause of inconvenience for the investor. After the chapeau, in fact, para. 4 lists the dispute settlement mechanisms available to the investor, which are:

- a) Domestic courts;
- b) ICSID arbitration;
- c) ICSID additional facility rules<sup>550</sup>;
- d) UNCITRAL arbitration and
- e) Other institutional or *ad-hoc* arbitration (subject to additional consent by the disputing parties).

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<sup>549</sup> Rather, it is there stressed the pre-emptive consent to arbitration: Art. 9.2 China-Germany BIT provides that once the consultation period lapses fruitlessly, the dispute ‘...*shall*, at the request of the investor ... be submitted for arbitration’ (emphasis added); Art. 10.3 China-Netherlands BIT expressly refer, in this respect, to ‘unconditional consent’; Arts. 21.1 and 23 China-Canada BIT (modeled on Arts. 26 and 28 of the Canada model BIT), make use of ‘may’ and focus on the limits of State consent.

<sup>550</sup> Were either the host or the investor State not to be member of the ICSID Convention.

The list is drawn from Art. 33.1 ACIA (with the exclusion of the Regional Center for Arbitration of Kuala Lumpur), and includes ‘domestic courts’. The CAIA, however, does not feature the frame-provision contained in para. 4 of Art. 29 ACIA (‘scope of coverage’ of the investor-State dispute-settlement section of that Treaty), which affirms the primacy of domestic courts (where sought by the investor) over any other dispute settlement mechanism<sup>551</sup>. Consequently, in the CAIA the investors appear to be required to go through the prescribed six months consultation phase before resorting to *any* dispute settlement mechanism, *including* domestic courts. For the investor, such detour appears ‘inescapable’, in light of the previously outlined explicit exclusion of the dispute settlement mechanisms from the ambit of the MFN clause<sup>552</sup>. The provision appears, thus, establishing a *mandatory negotiating phase* with the relevant political organs of the host State. Such a choice is coherent with the general policy China adopts with foreign investors (with negotiations always -so far- avoiding the resort to -or continuation of- the arbitral proceedings)<sup>553</sup>.

Lastly, it may be worth noting that China’s less recent agreements with States exporting capital into China (such as, *e.g.*, the old BITs with Japan and South Korea), only feature *ad hoc* arbitration with treaty-specified rules<sup>554</sup>.

Before the investor may submit the dispute to arbitration, para. 4 and, especially, para. 6 of Art. 14 mandate a series of conditions, the most relevant of which are:

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<sup>551</sup> The provision recites: ‘Nothing in this Section shall be construed so as to prevent a disputing investor from seeking administrative or judicial settlement available within the country of a disputing Member State’.

<sup>552</sup> Art. 5.4 CAIA.

<sup>553</sup> Cf., Chapter I, Section B.5.

<sup>554</sup> China-Netherlands and China-Germany BITs: ICSID and *ad hoc*; China-NZ FTA: ICSID or UNCITRAL.

- A six months ‘cooling-off’ consultation period, running from the moment of the investor’s ‘request for consultation and negotiations’ (the period may be waived if the host State agrees to do so)<sup>555</sup>;
- A further ‘notice of intent’ to submit the dispute to arbitration 90 days before the claims is actually submitted<sup>556</sup> (it is unclear, however, whether the notice could be sent during the cooling-off period already);
- Subsequent to the ‘notice’, an obligation for the investor to go through, were the State to so require, ‘...any applicable domestic administrative review procedure’<sup>557</sup>; the difference with Art. 153.2 of the FTA with New Zealand (from which the provision is drawn almost literally, and has progressively become a signature element of China’s investment arrangements) is striking, in that it does not feature any time-limit for the administrative body to render its decision (and upon which the investor can take further action<sup>558</sup>);

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<sup>555</sup> The provision, identical to Art. 153 China-NZ FTA, is substantially equivalent to the ‘six months from the date either party to the dispute requested amicable settlement’ required by Art. 10.3 China-Netherlands BIT (2001), or the ‘six months of the date when [the dispute] has been raised’ featured in Art. 9.2 China-Germany BIT (2003), or the ‘180 days of the receipt ... of a request for consultation’ established in Art. 32 ACIA (2009). The more recent stipulation with Canada (2012) draws from the latter’s 2004 Model BIT and features, with a slight change of wording, a more investor-oriented discipline (‘at least six months have lapsed *since the events* giving rise to the claim’, Art. 21.2.b, emphasis added).

<sup>556</sup> Art. 14.6.b (first sentence) and Art. 14.6.b.iii CAIA; the provision is literally extracted from Art. 34.1.b ACIA; such requirement, in the form of ‘three months’, figures also in Art. 153.1 China-NZ FTA; in the 2004 Canada Model BIT, at Art.26.1.d, it is featured 90 days as well; in the 2012 BIT with China, however, such period has been extended to ‘four months’ (Art. 21.2.c); earlier stipulations provided no such road-block.

<sup>557</sup> Art. 14.6.b (second sentence): the traditional Chinese *topos* (cf., Chapter I, Section B.5, and fn. 136).

<sup>558</sup> In the China-NZ FTA such limit is determined in three months; in the 2012 China-Canada BIT is four months (Annex C.21); nevertheless, being such requirement a typical feature of the current arrangements with China, it may be considered that the 1999 Chinese Law on Administrative Reconsideration provides that the procedure therein featured may last for four months maximum.

- The dispute should be submitted to arbitration within three years from the moment the investor has (or should have) become aware of the breach<sup>559</sup>.

Once the ‘notice of intent’ is submitted, para. 6.b.ii bars the investor to initiate or continue proceedings (with the exclusion of those seeking for interim measures)<sup>560</sup> elsewhere.

The outlined system seems to throw a number of road-blocks on the investor’s way to arbitration. It seems evident the intent – which fits well in the Chinese (and, more generally, the South-East Asian) general understanding of the role of the State in settling international disputes, the notion of sovereignty (also in light of the relevant role State-owned companies and sovereign funds play in some of them) and international dispute settlement – to limit the disruptive potential of pure ‘capitalistic’ investor-State arbitration: in this sense, amongst the many provisions that point in this direction, paras. 5, 8, 9 and 10 of Article 14 outline a consistent role for the States Parties:

- Para. 5, outlining the ‘**fork in the road**’ provision, establish a compromise ‘dual regime’ solution: as per the agreement with New Zealand<sup>561</sup>, general rule (advocated by China) is to leave the possibility for the investor to resort to arbitration open even when the dispute has been submitted already to domestic courts (provided that no final judgment has been issued); nevertheless, reflecting the different positions within ASEAN with regard to dispute settlement, para. 5 also determines that the investor’s first procedural choice shall be final when the

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<sup>559</sup> Art. 14.6.a (equivalent to Art. 34.1.a ACIA; 154.1 China-NZ FTA; 21.2.f China-Canada BIT), and standard in the North American models.

<sup>560</sup> The provision draws from Art. 34, paragraphs 1.c and 2, ACIA.

<sup>561</sup> Art. 153.3 China-NZ FTA.

claim is brought against Indonesia, the Philippines, Thailand and Vietnam<sup>562</sup>; a similar ‘dual regime’ is also featured in the 2012 BIT with Canada<sup>563</sup>.

- Para. 8 is entirely drawn from Art. 27 of the ICSID Convention. There are at least two rationales for which the provision (equally featured in the ACIA as well<sup>564</sup>), has been transposed from the Convention. Firstly, not all ASEAN Member States are parties to the ICSID Convention. Secondly, Art. 27 is that provision that, while purporting for the Parties to give up **diplomatic protection**, it actually reintroduces it when ‘...the other Party has failed to abide by and comply with the award rendered...’. Also, Art. 27 expressly allows for ‘informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute’. It may not be a chance that the ICSID provision that grants to the State an unofficial yet non-marginal role in the settlement of investment disputes is explicitly copy-pasted in the investment agreement between China and ASEAN.
- Para. 9, whose strict content is not featured in any other agreement, introduces a **re-politicizing element** (as opposed to the de-politicizing principle governing investor-State arbitration)<sup>565</sup> in those cases where the enforcement of a taxation measure results in a claim of expropriation by the investor: here, the allegedly breaching State may request the investor’s State to hold consultations ‘...with a

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<sup>562</sup> Art. 34.1.c ACIA requires the investor to submit a ‘...written waiver of [its] right to initiate or continue any proceedings before the court or administrative tribunals of the disputing Member State, or other dispute settlement procedure, of *any* proceeding with respect to *any* measure alleged to constitute a breach referred to in Art. 32 (Claim by an Investor of a Member State)’, (emphasis added).

<sup>563</sup> Annex C.21, with Canada opting for the ‘one and final’ regime (para. 3) and China for the more flexible approach (para. 2).

<sup>564</sup> Art. 34.3 ACIA.

<sup>565</sup> See, *inter alia*, P. E. Comeaux and N. S. Kinsella, *Protecting foreign investment under international law – legal aspects of political risk*, Oceana Publications Inc., 1997, pp. 217-246.

view to determining whether the taxation measure in question has an effect equivalent to expropriation or nationalization'. The provision binds the arbitral tribunal eventually subsequently constituted to '...accord serious consideration to the decision...' taken by the States. Such a construction seems aimed at 'locking up' the subsequent interpretation of the tribunal – unless of some (quite unlikely) open contradiction of international standards by the State parties when providing their interpretation. The provision thus appears exhausting, in this limited respect, the utility of investor-State arbitration each time the Parties manage to agree (within six months from the investor's request for consultation, as determined in para. 10)<sup>566</sup>.

Refining the wording of Art. 34.2 ACIA, para. 7 grants investors the right to request **provisional measures**. The provision makes use of a particularly effective and clear language, in comparison with that usually employed in this respect in similar agreements (when the issue is actually dealt with at all): the BITs with the Netherlands, Germany or New Zealand do not touch upon the issue, while the BIT with Canada makes use of a quite generic (and tooth-less) formula<sup>567</sup> recalling the language of Article 41 of the Statute of the International Court of Justice<sup>568</sup>. Here, instead, it is established:

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<sup>566</sup> Such provision, however, may appear of modest tenure if compared to Art. 155 China-NZ FTA; in there, it is established not only that the tribunal '...shall, upon request of the State party, request a joint interpretation of the Parties on *any* provision of this Agreement that is in issue in a dispute' but such joint decision '...shall be binding on the tribunal, and *any* award must be consistent with that joint decision' (all emphases added); in other words, were the States to agree, the tribunal would be called to simply function as a notary of their decision, which would acquire *ultra vires* character by law.

<sup>567</sup> Article 31 China-Canada BIT.

<sup>568</sup> Article 41.1 Statute of the International Court of Justice: 'The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party'.

‘No Party shall prevent the disputing investor from seeking interim measures of protection, not involving the payment of damages or resolution of the substance of the matter in dispute before the court or administrative tribunals of the disputing Party, *prior* to the institution of proceedings before any of the dispute settlement for a referred to in para. 4, for the preservation of its rights and interests.’ (emphasis added)

With respect to Art. 34.2 ACIA, Art. 14.7 presents a consistent improvement. The introduction of the wording ‘prior to the institution of proceedings’ (absent in the ACIA), aims at avoiding potentially disruptive (or dilatory) effects resulting from the consideration of the same issue by two benches (*i.e.*, the domestic court and the arbitral tribunal). In such perspective, it appears a positive innovation. It also indicates China’s trust in the arbitral *fora* listed in the Agreement – as after the institution of proceedings, the only authority vested with the power to grant interim measures is apparently the arbitral tribunal alone. Such aspect is stressed also by the absence, in the CAIA, of that entire set of provisions (instead present in the ACIA) dealing with the regulation of the arbitral procedure<sup>569</sup> – here left, instead, entirely on the already existing body of procedural rules of such *fora*. Lastly, as the language chosen focuses on the Parties’ commitment not to interfere with the right of the investor, it may be consequently assumed the commitment to honor the determination of the body that will order the interim measure, whether a domestic court or an arbitral tribunal.

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<sup>569</sup> Art. 35 (Selection of arbitrators), Art. 36 (Conduct of the arbitration), Art. 37 (Consolidation), Art. 38 (Expert reports), Art. 39 (Transparency of arbitral proceedings), Art. 40 (Governing law), Art. 41 (Awards).

### **E. China's first detachment from the European tradition**

The analysis carried out in the four previous Sections of this Chapter highlighted, on the one hand, the steps China has taken toward the modernization of its international investment protection standards with the stipulation of China-NZ FTA and CAIA. The modifications and adaptations introduced stress, on the other hand, China's core interests, in whose respect minor (or no) changes have been consented to. The Chapter has also showed a significant divide between the general understanding of international investment protection: on the one side, China (with ASEAN) still opts for a more traditional stance with regard to the role of the State (and the limit of its consent) in international investment stipulations *vis-à-vis* potential disputes with private foreign investors; on another side, the AANZFTA shows the more liberal standards Australia and New Zealand – along some ASEAN States – are committed already to (or have accepted anyway).

By conjugating China and ASEAN standpoints, the CAIA, nevertheless, is believed to provide, for the time being, a thorough instance of international investment law as it stands in Southeast Asia. The relevance of such a stipulation is revealed in the reference China will make to it in subsequent negotiations (cf., Chapter V and, especially, VI).

Thus, in updating its investment protection standards, China appears concerned primarily with avoiding the disruptive effect the system produced -in the eyes of a sovereign State- with some arbitral case-law. Such an objective is addressed either by providing for clear answers to current doctrinal debates in the text of the treaty or, where this is not possible, reserving to the State some treaty-based privileges in order to avoid – or contain – the outcome of future decisions rendered against it. Hence, China's approach to the matter appears permeated with the usual cautiousness, in light of the delicate balance it shall strike

between its major capital-importing and developing State needs, those -constantly increasing as well- tied to its recent status of major capital-exporter, and its current status of ‘socialist market economy’.

In such latter perspective, China’s progressive reliance on the institutional international arbitration system is noteworthy, and reflected in both China-NZ FTA and CAIA by the slim set of treaty rules presiding dispute settlement mechanisms – both firmly grounded on ICSID.

China’s outlined partial detachment from the European models of investment protection, with China-NZ FTA and ACIA, is justified, *inter alia*, by the fact that no European State has ever signed an FTA (in light of the shared competence regime with the EU on the matter), nor has the EU ever signed a comprehensive FTA (because of the past competence constraints *vis-à-vis* its Member States). China could have thus turned to NAFTA, as the comprehensive FTA binding the North American States, particularly relevant for its members, maturity and experience gathered through dispute settlement. However, such an option was probably felt too tight for China (especially, under the market liberalization perspective), which aims, rather, at gaining privileged access to reliable supply lines for its domestic manufacturing and energy sectors, or new markets to export its production output to. Under such perspective, ASEAN’s success in progressively establishing trade and investment bonds between developing States was felt as best fit to China’s needs to enter the world of comprehensive FTAs featuring an investment discipline as well. The expertise gathered with CAIA and China-NZ FTA paved the way to the eventual conclusion of the 18-year long negotiation process with Canada for a BIT, and sped up negotiations for the China-Chile SAI (cf., Chapter VI).

## V. THE 'TRANSITION AGREEMENT' OF 2009 WITH PERU: THE CPEFTA

### A. The Republic of Peru

#### 1. Peru macroeconomics: overview

With a coastline stretching over 2500 km along the Northern Pacific coast of South America, Peru – along Chile, Australia, Canada and Norway (all States with whom China is negotiating, or has already concluded, a FTA) – enjoys vast deposits of natural resources. Like Chile, Peru leverages on the trade and foreign investments in such resources to support its development.

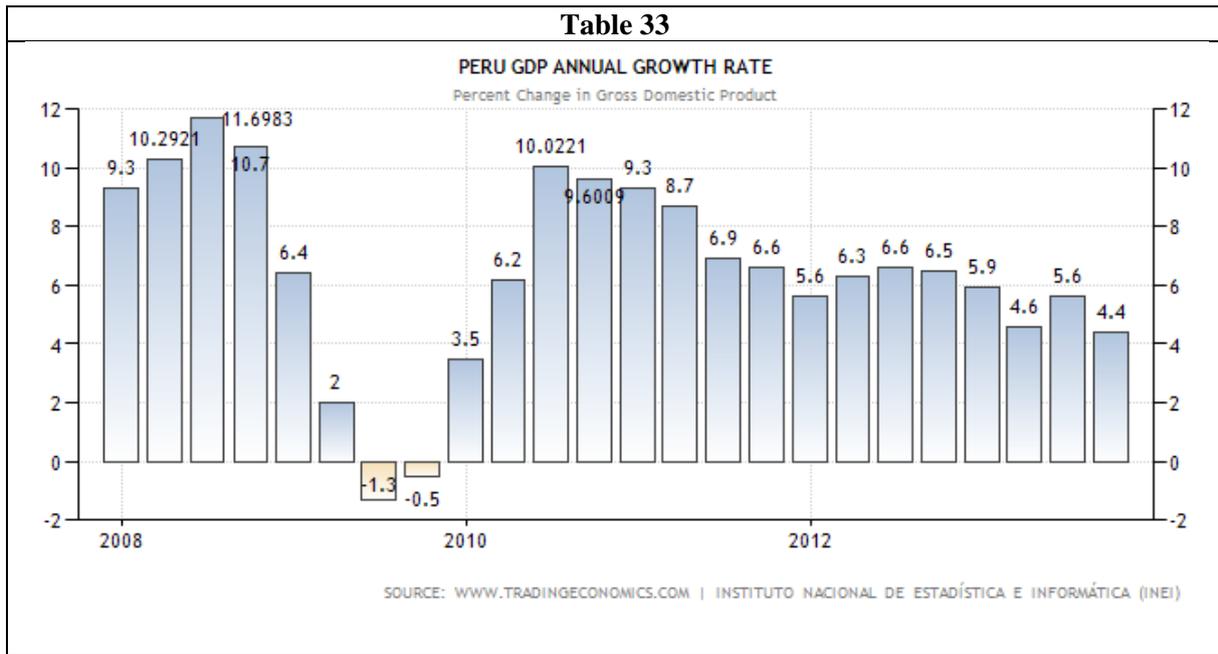
Historically, Peru's major private sources of private investments (and tax revenues) have been tied to mining and exports of raw materials (copper, gold, zinc, and fish). In 2012, the extractive industry contributed to 15% of the overall Peruvian GDP – with minerals accounting for about 60% of total exports.

Over the last decade, Peru has experienced an economic boom, fueled by rising exports (in both terms of trade volume and value), improved flows of trade and investment, and macroeconomic stability. Average annual GDP growth between 2002 and 2012 has been of 6.4%<sup>570</sup>.

Currently, Peru's economy performs better than expected, against the protracted global uncertainties, thanks to its continued reliance on mineral exports. Nevertheless, Peru still does not enjoy a stable and self-sustained growth, and the State's GDP (about 200 billion USD in 2012) is unequally distributed amongst its 30 million inhabitants.

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<sup>570</sup> Despite growth slowed in the wake of the 2008 global economic crisis, Peru was not hit by recession in 2009, and strongly rebounded of almost 9% in 2010. Source: World Bank, at: <http://www.worldbank.org/en/country/peru/overview>.



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## 2. Peru stance towards international trade and investment agreements

Peruvian economic policy has varied widely over the past decades. Protracted political and economical instability, coupled to an unfavorable policy framework for foreign investments, made the State for long an unattractive destinations to foreign investors. Such a policy changed in 1990, when a more liberal government was installed and, along a decade of stability and growth, ended price controls, protectionism, restrictions on foreign direct investment, and embarked in a thorough privatization program of state-owned companies<sup>572</sup>.

<sup>571</sup> Source : Trading economics, at: <http://www.tradingeconomics.com/peru/gdp-growth-annual>; see also the World Bank, at: <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG/countries/PE?display=graph>.

<sup>572</sup> 46% of FDI in that period concentrated in the privatization program; continued growth throughout the 1990s was briefly stalled by the 1997 Asian financial crisis.

In 1991, Peru signed its first BIT, with Switzerland. According to ICSID, today Peru is party to 32 BITs, only one of whom not in force<sup>573</sup>. The latest stipulation is of 2008, with Japan. Peru has concluded a BIT with six of the seven G7 members<sup>574</sup> – and with the seventh, the US, it shares a comprehensive FTA (featuring a foreign investment protection regime)<sup>575</sup>.

Over the past few years, Peru – member to the GATT since 1951, and to the Andean Community since 1969 – has put some consistent effort in the conclusion of free trade arrangements. According to SICE<sup>576</sup>, since 2005 Peru has become party to 11 bilateral FTAs<sup>577</sup> (plus 2 signed but not yet in force<sup>578</sup>), 1 multilateral undertaking<sup>579</sup>, and 2 agreements with regional organizations<sup>580</sup>. Out of the 13 bilateral FTAs, only three do not feature a foreign investment protection regime; those, however, may not be understood as a form of resistance of Peru on the matter; in fact:

- The 2011 FTA with Japan has been complemented with a BIT signed on the same year;
- The 2011 FTA with Thailand is limited to trade in goods only;

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<sup>573</sup> *i.e.*, the BIT with Singapore (2003), which is destined not to be ratified, as superseded by the 2008 FTA between the parties, featuring an investment protection regime (Ch. 10); source: ICSID online database, at: [http://unctad.org/Sections/dite\\_pccb/docs/bits\\_peru.pdf](http://unctad.org/Sections/dite_pccb/docs/bits_peru.pdf).

<sup>574</sup> France (1993), United Kingdom (1993), Italy (1994), Germany (1995), Canada (2006), Japan (2008).

<sup>575</sup> Signed on Apr. 12<sup>th</sup>, 2006, in force since Feb. 1<sup>st</sup>, 2009.

<sup>576</sup> Foreign Trade Information System of the Organization of American States, *Information on Peru*, available at: [http://www.sice.oas.org/ctyindex/PER/PERAgreements\\_e.asp](http://www.sice.oas.org/ctyindex/PER/PERAgreements_e.asp).

<sup>577</sup> US (2006), Chile (2006), Canada (2008), Singapore (2008), China (2009), South Korea (2010), Costa Rica (2011), Japan (2011), Mexico (2011), Panama (2011), Thailand (2011).

<sup>578</sup> Guatemala (2011), Venezuela (2012).

<sup>579</sup> MERCOSUR (2005).

<sup>580</sup> EFTA (2008), EU (2012).

- The 2012 FTA with Venezuela is affected by the latter's political stance towards international trade and investment at large.

With the exception of the agreements with Singapore and Mexico (and the three above), the investment regime of all FTAs concluded by Peru closely follow the US traditional structure<sup>581</sup>, and most (when not all) contents. The 2008 FTA with Singapore is instead more similar to arrangements such as ACIA and CAIA<sup>582</sup>; this may not surprise, taken into account the concurrent negotiations for the three agreements, and the reciprocal influence they played over the respective final texts. As of the FTA with Mexico, this follows a structure more similar to the US Model BIT, rather than the rearrangement adopted by the US for its FTAs.

Peru's current attitude towards foreign trade and investment may thus be considered open indeed. It appears that the State is emulating Chile's policy on the matter, in the attempt to replicate the latter's two decades of growth and stability.

## **B. The China-Peru FTA**

### *1. Political factor and negotiations*

In 1874, Peru was the first South American State to establish diplomatic ties with China. Relations with mainland China were interrupted as a consequence of the 1949 regime change in the mainland. On Nov. 2<sup>nd</sup>, 1971, diplomatic relations were restored.

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<sup>581</sup> *i.e.*, comprising three sections: A – substantive obligations; B – investor-State dispute settlement; C – definitions.

<sup>582</sup> Noteworthy, *e.g.*, the interim measures clause: the wording of Art. 17.5 is the same as in Art. 14.7 CAIA.

Before trade or investment, China and Peru historically shared flows of immigration. In the mid-1800s, more than 100.000 Chinese moved to Peru to work as indentured servants<sup>583</sup>. Today, Peru homes the largest ethnic Chinese community of Latin America.

Over the past two decades, relations have evolved in economical terms as well, due to progressive reforms and opening of domestic markets both States pursued. As in the early 1990s the Peruvian government implemented pro-export policies, China sought to tap into Peru's natural resources wealth – whose mining potential is of great interest to China –, in both terms of trade and investment<sup>584</sup>.

China's interest in Peru is thus primarily tied to secure a supply of raw materials (but also fish catch and some agricultural product) for its domestic market. The China-Peru FTA (hereinafter, CPEFTA) is perceived, under such perspective, as an 'efficient weapon to resist or scale down regional trade protectionism'<sup>585</sup>. Nevertheless, prospective investment opportunities in developing Peru's basic infrastructure are also important. The State still lacks a robust transportation system, and its power generation potential – estimated in roughly 100.000 megawatts (70% from hydropower and 30% from wind; over 15 times its present-day energy needs) – is so underexploited Peru currently figures as a net importer of energy<sup>586</sup>.

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<sup>583</sup> At that time Peru needed labor force to work mainly in the sugar cane and cotton plantations along its coast line: workforce scarcity resulted from abolition of slavery (in 1845), as many up-to-then slaves left the fields. Cf., also, the effects of massive Chinese migration on the Peruvian (and Mexican) Spanish vicerealties (*e.g.*, the Spanish barbers' revolts), illustrated by W. Bernstein in *A splendid exchange – how trade shaped the world*, Grove Press - New York, 2008, pp. 198-204.

<sup>584</sup> With the beginning of the privatization process of mining companies, in the early 1990s, the Chinese 'Shougang' company was one of the first to invest: in 1992, Chinese 'Shougang and Zijing Mining Group' bought the state company 'Hierro Peru' (controlling the only site in Peru for the extraction of iron ore), for approximately 120 million USD.

<sup>585</sup> According to Zhu Hong, deputy director of the Ministry of Commerce's Department of International Trade and Economic Affairs; interview to China Daily, Mar. 2<sup>nd</sup>, 2010; available at: <http://english.people.com.cn/90001/90778/90861/6905598.html>.

<sup>586</sup> Ten per cent of Peru import is oil (crude and petroleum); it is to be noted that, to compensate for the current shortages in power supply, miners are building their own generators for mining operations; cf., KPMG, *Peru* –

Nevertheless, as of now, the dynamic of China's relationship with Peru – Beijing's need of raw materials and Lima's desire to boost exports – is in line with the general approach the former adopts with Latin America as a whole<sup>587</sup>.

Peru, on the other hand, in opening up without reservation to international investment and trade, seeks to diversify its international partnerships, in attempting to maximize the political capital its natural resources provide<sup>588</sup>. The FTA policy adopted in the past few years (outlined above, Section A.2), is revealing, in this respect. The results are coherent with such a policy, with Peru's major trade partners being China, the US, the EU, Japan and Brazil – with the US and China recently switching the first two spots<sup>589</sup>. While China since 2011 has become Peru's principal trade partner, its share of Peru's trade is not overwhelming, by comparison with the US or the EU, and investment from the latter two is still far more important than FDI coming from China.

Nevertheless, Peru appears placing great expectations on the development of trade and investment relations with China (unlike Venezuela, which has fallen out of China's favor due to its continued policy uncertainty and poor economic management). In this sense, *e.g.*, the recent completion of the Trans-Amazon Highway to Brazil shows Peru's plans for stimulating trade between the two State through its Pacific ports.

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*Mining Country Guide*, 2013, available at: <https://www.kpmg.com/Ca/en/industry/Mining/Documents/Peru.pdf>; p. 13.

<sup>587</sup> Cf., B. Kotschwar, T. H. Moran, J. Muir, *Chinese Investment in Latin American Resources: The Good, the Bad, and the Ugly* (working paper), Peterson Institute for International Economics, Feb. 2012; available at: <http://www.iie.com/publications/wp/wp12-3.pdf>; see, also, Chapter VI, Section A.2.a.ii.

<sup>588</sup> *e.g.*, in April 2013, Peru's president visited China; however, in May 2012 he traveled to Japan and South Korea but not China; also, Peru recently made military purchases from South Korea.

<sup>589</sup> The US has been Peru's largest trading partner between 2006 and 2011 (following the entry into effect of the FTA), when it has been replaced by China.

Negotiations for a China-Peru FTA were formally proposed by Peru on November 2006, during the APEC summit. Upon successful completion of a joint feasibility study (on Sept. 7<sup>th</sup>, 2007), during the subsequent APEC summit China and Peru announced the beginning of negotiations. The first round was held in Lima in January 2008, all seven subsequent rounds following closely. On Nov. 19<sup>th</sup>, 2008, the Parties announced they reached an agreement over the final text of the trade pact. The CPEFTA was signed on Apr. 28<sup>th</sup>, 2009 and it entered into force on Mar. 1<sup>st</sup>, 2010. The Agreement is the second comprehensive FTA China signed (after that with New Zealand, in 2008) and the first with a South American State.

## *2. Trade and investment rationale*

Upon the entry into force of the CPEFTA, approximately 60% of the two-way trade in goods between Peru and China has been made duty-free. Tariffs on another 30% will be gradually nullified in 2015 and 2020. Currently, over 60% of Peruvian goods – constituting over 85% of the overall exports – enjoy duty-free entry into China. Taken as a whole, almost 95% of goods – that make up 99% of Peru’s exports to China – access the Chinese market at a preferential tariff rate. As of China, over 60% of goods – comprising over 60% of Chinese exports to Peru – are admitted tariff-free<sup>590</sup>. Each Party also attached a list of goods excluded from preferential treatment. Peru excluded 592 items considered ‘sensitive’ (e.g., textile, clothing, footwear and some metal-mechanical products), accounting for approximately 10%

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<sup>590</sup> Source: Chinese Ministry of Commerce and Trade, at: <http://fta.mofcom.gov.cn/topic/enperu.shtml>.

of Chinese imports to Peru. By the same token, China excluded good whose import from Peru could create tensions in its domestic market (*e.g.*, wood, paper, some agricultural products)<sup>591</sup>.

China's consent to Peru's limited trade concessions – an exception to the otherwise traditional Chinese policy of reciprocity on the matter<sup>592</sup> – is believed to highlight the true rationale of CPEFTA. Peru is the world's second largest producer of copper, and holds the second-largest known reserves of such element<sup>593</sup>. It is also the second largest producer of silver, the sixth of gold, it ranks among the top five producers of lead and zinc, and has significant reserves of coal, iron ore, tin, sulfur, phosphate, potash, and natural gas. Unsurprisingly, mineral exports account for about 60% of Peru's total shipments abroad<sup>594</sup>. In addition, it is worth nothing that Peru accounts for nearly 10% of the world's catch of fish.

In 2011 – the year after the entry into force of CPEFTA –, China became Peru's most important trade partner, accounting for about 15% of Peru's exports. The trend has been confirmed in 2012, with China importing 17% of Peru's overall exports (worth in excess of 8 billion USD)<sup>595</sup>. Currently, China and the US are Peru's main trade partners, for both import and export.

As per other South American States, however, Peruvian exports to China are overwhelmingly commodity-based (while imports are value-added manufactured products)<sup>596</sup>.

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<sup>591</sup> *Id.*

<sup>592</sup> Cf., *Trade Policy Review: China*, WTO, WT/TPR/S/264, 2012, available at: [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp364\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp364_e.htm).

<sup>593</sup> In both cases, after Chile.

<sup>594</sup> Cf., *supra*, fn. 592.

<sup>595</sup> By comparison, the US accounted for 13% (approximately 6 billion USD) of Peru exports; source: Ministry of Commerce of Peru, *Anuario 2012*, available at: <http://www.aduanet.gob.pe/aduanas/informae/2012/evolucioncomer12.htm>.

<sup>596</sup> Cf., *Kotschwar (2012)*.

The trends set (or increased) by CPEFTA have not gone free of criticism (especially, on Peru's side). Certain industries (*e.g.*, Peru textile sector) have filed complaints, and anti-dumping investigations have followed. The Peruvian Ministry of Commerce, nonetheless, notes that CPEFTA is contributing to diversify the State exports<sup>597</sup>.

<b>Product</b>	<b>Million USD</b>
Total amount	7,692.4
1. Copper ore	3,415.6
2. Fishmeal	885.5
3. Iron ore	852.7
4. Lead	805.7
5. Copper Cathode	684.1
6. Copper “Blister”	223.3

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As of investments, it shall preliminarily be noted that the overall stock of foreign FDI in Peru is still quite modest, amounting to less than 23 billion USD<sup>599</sup>. The Chinese portion of such amount is about 3.5% (approximately, 800 million USD). China's stock remains, thus, well below that of the EU<sup>600</sup>, or the US<sup>601</sup>. It shall be noted, nevertheless, that Chinese investment begun in 1992 only<sup>602</sup>.

<sup>597</sup> According to Peruvian Vice-Minister of Foreign Trade Carlos Posada Ugaz, interview of D. Qingfen, *Peru expects to diversify exports to China*, in China Daily USA, Dec. 11<sup>th</sup>, 2012, available at: [http://usa.chinadaily.com.cn/business/2012-12/11/content\\_16004346.htm](http://usa.chinadaily.com.cn/business/2012-12/11/content_16004346.htm).

<sup>598</sup> Source: Ministry of Commerce of Peru; available at: [http://www.aduanet.gob.pe/aduanas/informae/XPaisPartMensual\\_01122012.htm](http://www.aduanet.gob.pe/aduanas/informae/XPaisPartMensual_01122012.htm).

<sup>599</sup> According to the Private Investment Promotion Agency of Peru; cf.: <http://www.proinversion.gob.pe/default.aspx?ARE=1&PFL=0>; statistics by the Central Bank of Peru, taking into account not only addition of new capital but also reinvestment, the total stock of FDI in Peru at the end of 2012 was 63.4 billion USD.

<sup>600</sup> Main EU investors are Spain (21%), U.K. (6%) and Italy (3%).

Also, although Chinese investments are increasing, the year-on-year trend is not constant. China's investment interests are focused on copper, agriculture and fishing<sup>603</sup>. According to statistics released by the Peruvian Ministry of Energy and Mines, as of January 2013, most long-term investment projects currently being undertaken in Peru (amounting roughly to 55 billion USD) are in the mining sector; China's share of such amount is 22% (over 12 billion USD – *i.e.*, the largest stake from a single State)<sup>604</sup>.

Lastly, it may be noted that, as FDI rises in Peru, so grows the resistance by indigenous peoples against mining concessions and the development of mining projects in rural areas (irrespective of the nationality of the investor). In 2011, adhering to the International Labor Organization's Convention, Peru passed a law (strengthened in May 2013) granting to indigenous populations the right to a non-binding 'prior consultation' vote of approval on projects potentially affecting their communities. As Chinese companies are reluctant to engage in dialogue with non-governmental organizations, activist groups, and non-Chinese media<sup>605</sup>, they are currently facing some bitter opposition<sup>606</sup>, occasionally forcing them to put the projects on hold<sup>607</sup>.

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<sup>601</sup> The US account for 13% of the Peru's FDI stock.

<sup>602</sup> Cf., *supra*, fn. 584.

<sup>603</sup> After some failed attempt, on Mar. 13<sup>th</sup>, 2012, 'China Fishery Group Ltd.' bought 9.9% of shares (valued 54.8 million USD) of 'Copeinca', one of the largest Peruvian fishing companies. China is the principal buyer of Peruvian fish meal, whose export accounts for over 40% of the world output; China is the principal world importer of fish meal, with a share of 41% of the total.

<sup>604</sup> *e.g.*, in 2010, Chinese mining companies 'Minmetals', 'Chinalco', 'Shougang and Zijin Mining Group' announced plans to invest more than 7 billion USD in Peruvian mining projects by 2017.

<sup>605</sup> In Africa, for instance, foreign companies undertaking large investment projects sometimes negotiate directly with national leaders; in South America, instead, Chinese companies have been forced to venture into the give-and-take dynamics of local politics; cf., N. Parish Flannery, *Political risk: what should investors know about China's interest in Peru?*, in *Forbes* online, Sept. 17<sup>th</sup>, 2013, available at: <http://www.forbes.com/sites/nathanielparishflannery/2013/09/17/political-risk-what-should-investors-know-about-chinas-interest-in-peru/>. Also, significant is Sauvant and Chen recent observation that '...To operate and prosper successfully in a host country, Chinese firms need to overcome the liability of foreignness - and, in some

## C. Foreign investment protection regime

### 1. The terms of reference, and the 1994 China-Peru BIT

In analyzing the foreign investment protection regime China and Peru agreed upon in the CPEFTA, the terms of reference should be four:

- The 1994 BIT between the parties;
- The 1997 Chinese Model BIT (and the 2003 China-Germany BIT);
- The other international arrangements on both trade and investment China was still negotiating (such as the CAIA), or whose negotiations had just been concluded (such as the China-NZ FTA), between January and November 2008 (*i.e.*, between the beginning and the conclusion of the negotiations for the CPEFTA);
- The earlier comprehensive FTAs stipulated by Peru – especially, the 2006 FTA with the US.

The 1994 China-Peru BIT<sup>608</sup> reproduces, in all but one provision, the 1984 Chinese Model (thus featuring no NT treatment). The exception is Art. 8, enshrining the dispute

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countries, the additional liability of being Chinese. They need to integrate tightly into local communities, become insiders and build a positive brand. This involves extra efforts in sourcing inputs from local firms (giving them a stake in the success of Chinese investors), hiring and training local employees, learning the local language (or at least English), respecting local customs, becoming members of local organizations, and employing corporate social responsibility (CSR) practices'; in K. P. Sauvart & V. Z. Chen, *China needs to complement its "going-out" policy with a "going-in" strategy*, Columbia FDI Perspectives, n. 121, May 12<sup>th</sup>, 2014.

<sup>606</sup> *e.g.*, the project in the Morococha district of Peru of Chinese 'Chinalco', which requires the relocation of 5,000 local residents.

<sup>607</sup> In January 2013, China's 'Lumina Copper' put a 2.5 billion USD project in Peru's Cajamarca region on hold, as facing strong opposition from local communities.

<sup>608</sup> The text of the 1994 China-Peru BIT is available on the UNCTAD online database, at: [http://unctad.org/sections/dite/ia/docs/bits/peru\\_china.pdf](http://unctad.org/sections/dite/ia/docs/bits/peru_china.pdf).

settlement discipline. Here, in fact, while arbitration is maintained as a remedy reserved only for ‘disputes involving amount of compensation for expropriation’, the rules featured in the 1984 and 1989 Chinese Models for the appointment and procedure of the arbitral tribunal<sup>609</sup> are replaced, tout-court, with ICSID arbitration (here, the only possible mechanism). Such a change is probably due to China’s accession to the ICSID Convention, in 1993. Same origin should be attributed to the optional clause that follows, at para. 3 of Art. 8, where the Parties agreed that ‘any disputes concerning other matters between an investor of either Contracting Party and the other Contracting Party may be submitted to the Center if the parties to the disputes so agree’.

## 2. Chapter 10 CPEFTA: main characteristics

Composed of 17 provisions (Arts. 126-143) spanning through approximately 13 pages, Chapter 10 CPEFTA features the treaty’s investment protection regime. The Chapter constitutes an update of the 1994 China-Peru BIT. Nevertheless, it also draws from the China-NZ FTA, as well as from the concurrent negotiations for the CAIA. Elements have also been borrowed from the 2004 US Model BIT – via Chapter 10 of the 2006 Peru-US FTA (entirely literally drawn from the US Model). Other provisions, however, feature an at least partially original formulation, which is not found in other previous (or subsequent) stipulations of China, nor in any model text.

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<sup>609</sup> Art. 9, paras. 5, 6 and 8, 1984 Chinese Model.

What follows is a brief analysis of the most notable innovations brought, by comparison to the relevant model texts and the other agreements the parties had stipulated on the matter in or around the time of conclusion of the CPEFTA.

The **definition of investment** (Art. 126) is entirely drawn from the 1997 Chinese Model BIT<sup>610</sup> – the only difference being that the ‘change of form of investment’ clause is not explicitly featured<sup>611</sup>.

The provision of ‘**scope and coverage**’ (Art. 127) merges elements from the China-NZ FTA<sup>612</sup> and the CAIA<sup>613</sup>. The Article reproduces the six paragraphs found in the elaborate text of the China-NZ FTA. In both agreements, para. 5 excepts government procurements from the application of the agreement. Nonetheless, in the CPEFTA, Art. 127.6 – drawn from the CAIA, yet with simplified wording –, explicitly extends the Chapter’s coverage to measures of government procurement affecting FET, FPS, expropriation, compensation for losses, transfers, subrogation, denial of benefits and dispute settlement. Thus, the exception provided in para. 5 only excludes NT and MFN treatment.

The first two paragraphs of the **NT** clause (Art. 130), are drawn from the US Model wording<sup>614</sup> – with the exclusion of the protection regarding ‘establishment, acquisition and expansion’. Original is, instead, para. 3, which features an exception for differential treatment accorded to ‘socially or economically disadvantaged minorities and ethnic groups’. Such clause, absent in the US-Peru FTA, appears aimed at safeguarding the interests of Peruvian

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<sup>610</sup> Art. 9 China Model BIT (1997).

<sup>611</sup> Conversely, the clause is maintained in Art. 135 China-NZ FTA.

<sup>612</sup> Art. 137 China-NZ FTA (2008).

<sup>613</sup> Art. 3 CAIA (2009).

<sup>614</sup> Art. 3 US Model BIT.

indigenous communities. A footnote specifies that ‘minorities include peasant communities; ethnic groups means indigenous and native communities’.

Art. 131 as well, featuring the **MFN** treatment clause, reproduces the wording of the US Model<sup>615</sup> in its first two paragraphs (this time, including ‘establishment, acquisition and expansion’ as well). The third paragraph replicates the original exception in favor of indigenous communities. Lastly, para. 4 reproduces the content of the Chinese Model BIT<sup>616</sup>, providing that the MFN clause does not operate with regard to treatment deriving from form of economic integration with third States.

The fine *labor limae* brought on the **FET and FPS** treatment provision (Art. 132) appears to show, on the one hand, some resistance on the part of Peru to adjust to the rather concise provision featured in the CAIA, but also from that agreed in the China-NZ FTA. Table 35, below, comparatively illustrates similarities and difference among the agreements in this respect. On the other hand, para. 1 shows China’s continued diffidence towards some generic reference to ‘customary international law’. Discarded in the CAIA, restricted as ‘commonly accepted rules of international law’ in the China-NZ FTA, in the CPEFTA China eventually had to accept its insertion. Nevertheless, it did not capitulate to the US Model formulation as such, but rather reversed the relation between the standard and customary law. Thus, the US Model

‘...accord treatment in accordance with customary international law, including fair and equitable treatment and full protection and security’

has become, in the CPEFTA,

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<sup>615</sup> Art. 4 US Model BIT.

<sup>616</sup> Art. 3 China Model BIT (1997).

‘...accord fair and equitable treatment and full protection and security in accordance with customary international law in its territory to investment of investors of the other Party’.

The treatment is, hence, not generally based on international custom, to which FET and FPS are explicitly included; rather, FET and FPS are granted only to the extent acknowledged by customary rules. It is believed such latter to be a tighter formulation. Subsequently, let. *a)*, *b)* and *c)* of Art. 132 reproduce, in a different order, the exceptions already featured in the US Model. Let. *d)*, lastly, introduces a novel clause, specifying that the FPS guarantee does not provide, in any case, for a better treatment to that accorded to nationals of the Party where the investment has been made.

As of the **expropriation** provision, para. 1 of Art. 133 appears to be a merger of the US Model BIT<sup>617</sup> (first part of the sentence) and the Chinese BIT<sup>618</sup> (second part of the sentence). Table 36, below, provides an illustration of that. The substantive change is in that the Chinese ‘other similar measures’ has been substituted with the UK-derived ‘directly or indirectly through measures equivalent to expropriation’. It is believed that China agreed to such a more protective standard in light of the almost unilateral flows of investment characterizing the China-Peru relationship: in other words, the adoption of the US standard is intended to the advantage of Chinese investors. The provisions follows with the four conditions for a valid expropriation to take place, drawn from the Chinese Model. To the first of those (‘public interest’), a footnote is attached, specifying that the term is equivalent to ‘public purpose’ and ‘public necessity’ (thus reproducing the specification contained in the US Model, yet excluding the reference there contained to customary international law).

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<sup>617</sup> Art. 6 US Model BIT.

<sup>618</sup> Art. 4 Chinese Model BIT (1997).

Lastly, with regard to the standard of compensation, the US Model-derived principle of ‘fair market value’ is introduced<sup>619</sup>, while the provision maintains the Chinese Model the structure and language.

Lastly, Art. 139 CPETA features the **investor-State dispute settlement** mechanism. As in the CAIA<sup>620</sup>, the matter is exhausted in a single long provision, and merges elements of the Chinese and US Models. The approach appears that to ‘modernize’ the Chinese discipline, drawing from the US Model with respect to elements or formulations commonly accepted in international practice yet still missing in the Chinese Model; nevertheless, modifications perceived too complex – or that would bring a convoluted result – are rejected. Thus, para. 1 replicates the Chinese Model<sup>621</sup>, while para. 2 (listing the investor’s option with regard to dispute settlement) rephrases the wording of the CAIA in a fashion closer to the US Model<sup>622</sup>, concluding with a tight fork in the road clause, providing that the choice ‘...shall be definitive and exclusive’. The choice is unusual for China which, in its Model (as well as most stipulations), tends to accept a dual recourse (arbitration and court) as long as the domestic court has not reached a final decision. Once again, it appears China consented to such alteration in light of the terms of the economic relationship with Peru. Noteworthy, also, is the exclusion, with regard to governing law, of the otherwise usual for China explicit reference to domestic law: para. 3 mentions only ‘...this Agreement and applicable rules of international law’. Subsequently, para. 6 resort to the wording of the 1984 Chinese Model, in establishing that the award ‘...shall be final and binding upon both parties to the dispute. Both parties shall

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<sup>619</sup> As per Art. 6.2.b US Model BIT, and Art. 10.7.2.b US-Peru FTA.

<sup>620</sup> Art. 14 CAIA (2009).

<sup>621</sup> Art. 8.1 Chinese Model BIT (1997).

<sup>622</sup> The list of choices is drawn from Art. 24.2 US Model – present as well in Art. 10.16.3 US-Peru FTA.

commit themselves to the enforcement of the award'. Lastly, para. 7, entirely drawn from the US Model<sup>623</sup>, outlines the type of remedies an arbitral tribunal may award to the investor<sup>624</sup>.

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<sup>623</sup> Art. 34.1 US Model BIT.

<sup>624</sup> i.e., monetary damages and/or restitution of property (in such latter case, the host State may nevertheless choose to pay the corresponding amount of monetary damages *in lieu* of restitution).

**Table 35 – FET and FPS standards**

Art. 143 China-NZ FTA	Art. 132 CPEFTA	Art. 7 CAIA	Art. 10.5 US-Peru FTA (identical to Art. 10.7 US Model BIT)
<p>1. Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy the full protection and security in the territory of the other Party in accordance with commonly accepted rules of international law.</p> <p>2. Fair and equitable treatment includes the obligation to ensure that, having regard to general principles of law, investors are not denied justice or treated unfairly or inequitably in any legal or administrative proceeding affecting the investments of the investor.</p> <p>3. Full protection and security requires each Party to take such measures as may be reasonably necessary in the exercise of its authority to ensure the protection and security of the investment.</p> <p>4. Neither Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the</p>	<p>1. Each Party shall accord fair and equitable treatment and full protection and security in accordance with customary international law in its territory to investment of investors of the other Party.</p> <p>2. For greater certainty,</p> <p>(a) the concepts of “fair and equitable treatment” and “full protection and security” do not require additional treatment to that required under the minimum standard of treatment of aliens in accordance with the standard of customary international law;</p> <p>(b) a determination that there has been a breach of another provision of this Agreement or another international agreement does not imply that the minimum standard of treatment of aliens has been breached;</p> <p>(c) “fair and equitable treatment” includes the prohibition against denial of justice in criminal, civil, or administrative proceedings in accordance with the general accepted</p>	<p>1. Each Party shall accord to investments of investors of another Party fair and equitable treatment and full protection and security.</p> <p>2. For greater certainty:</p> <p>(a) fair and equitable treatment refers to the obligation of each Party not to deny justice in any legal or administrative proceedings; and</p> <p>(b) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the investment of investors of another Party.</p> <p>3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, shall not establish that there has been a breach of this Article.</p>	<p>1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.</p> <p>2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:</p> <p>(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and</p>

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments: a comparative perspective, from the model BITs to the latest stipulations"

di VACCARO INCISA GIUSEPPE MATTEO

discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014

La tesi è tutelata dalla normativa sul diritto d'autore (Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).

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<p>investors of the other Party.</p> <p>5. A violation of any other article of this Chapter does not establish that there has been a violation of this Article.</p>	<p>principles of customary international law; and</p> <p>(d) the “full protection and security” standard does not imply, in any case, a better treatment to that accorded to nationals of the Party where the investment has been made.</p>		<p>(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.</p> <p>3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.</p>
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<b>Table 36</b>		
<b>Expropriation - chapeau</b>		
Art. 10.7 US-Peru FTA	Art. 4 PRC Model 1997	Art. 133 CPEFTA
No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:	Neither Contracting Party shall expropriate, nationalize or take other similar measures (hereinafter referred to as “expropriation”) against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met:	Neither Party shall expropriate or nationalize, either directly or indirectly through measures equivalent to expropriation or nationalization (hereinafter referred to as “expropriation”) against investments of investors of the other Party in its territory, unless the following conditions are met:

### 3. CPEFTA investment protection: a transition regime

Chapter 10 CPEFTA reveals an investment discipline still anchored to the Chinese Model BIT. The new regime represents, for the most part, an update of the 1994 China-Peru BIT to China’s 1997 Model standards. A number of innovations have, nevertheless, been introduced, thanks to the agreements concluded just some time earlier with New Zealand (Apr. 2008), and that about to be signed with ASEAN (Aug. 2009). Some changes denote a specific attitude of China, evident also in other stipulations (or at the time ongoing negotiations), when in the position of the capital-exporting State. In fact, when the negotiating counterpart has already in place an equivalent agreement with the US, it appears that China insists to be granted the same standards and concessions<sup>625</sup>. In some limited respect, it was possible to observe such a policy in

<sup>625</sup> As long as this is compatible with the Chinese discipline, and does not introduce an excess of structural or linguistic alteration in the text.

the agreement with New Zealand<sup>626</sup>. In a more sophisticated fashion, this will be evident as well in the subsequent stipulation with Chile<sup>627</sup>. Also, this is the reason that ultimately brought the negotiations for a China-Australia FTA to failure<sup>628</sup>.

To conclude, with regard to investment protection at least, the CPEFTA appears a ‘transition agreement’: under a comparative perspective, the changes introduced with the China-NZ and CAIA beforehand, and those with the China-Chile SAI and China-Canada BIT afterwards, are either more significant or systematic. Were China’s two-tier policy with regard to investment protection to be confirmed also for the FTAs currently being negotiated, the CPEFTA could nevertheless represent a precedent for those with capital-importing States.

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<sup>626</sup> *i.e.*, the express inclusion, in the definition of investment of the China-NZ FTA, of New Zealand’s government-issued bonds; cf., Chapter IV, Section B.3.b.i, at p. 161.

<sup>627</sup> Cf., Chapter VI.

<sup>628</sup> Australia refused to grant Chinese investors the same treatment accorded to US investors: the investments of these latter (together with those from New Zealand) are the only not subject to review from the Australian Foreign Investment Review Board up to a value of 1 billion AUS dollar. For all other States – including China – such threshold is much lower, set at 258 million AUS dollar. Cf., R. Wallace, *Free-trade push may open door to China*, *The Australian*, Jul. 18<sup>th</sup>, 2013; available at: <http://www.theaustralian.com.au/national-affairs/policy/free-trade-push-may-open-door-to-china/story-fn59nm2j-1226681027576#>.

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Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments:  
a comparative perspective, from the model BITs to the latest stipulations"

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discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014

La tesi è tutelata dalla normativa sul diritto d'autore (Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).

Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

**VI. THE LATEST BILATERAL STIPULATIONS OF 2012: THE CHINA-CANADA BIT AND THE CHINA-CHILE SAI**

On Sept. 9<sup>th</sup>, 2012, during the APEC Summit in Vladivostok, China signed two investment agreements: the ‘Supplementary Agreement on Investment of the Free Trade Agreement between Chile and China’ (hereinafter, China-Chile SAI) and the ‘Agreement for the Promotion and Reciprocal Protection of Investment’ with Canada (hereinafter, China-Canada BIT).

Canada and Chile are, for China, relevant partners for a number of reasons. Both States are developed OECD economies, major exporters of raw materials, and overlook large portions of the Pacific coastline of the American continent (thus enjoying direct sea trade routes to and from China).

A comparative approach applied to the investment treaties China concluded with each of them reveals undeniable similarities: both share a common matrix (the Canadian Model BIT), and structure and contents of each contribute to reveal the new policy of China with respect to investment stipulations – epitomized, most notably, by China’s ‘model shift’ and the adoption of the North American model, *in lieu* of the European.

The following analysis focuses first on the political and economic background of both stipulations (Section A), then provides for an overview of the structure and main features of each of those (Section B) and, lastly, offers a thorough review of the notion of investment, under a treaty-making perspective (Section C).

## A. The counterparts: Canada and Chile

### 1. The Commonwealth of Canada

The second largest State on Earth, its East coast stretching for roughly 1.000 km along the Pacific Ocean, Canada's vast reserves of natural resources (*e.g.*, natural gas, oil, zinc, uranium, gold, nickel, aluminum, steel, iron ore, coal, lead<sup>629</sup>) make it one the few advanced market economies which are also net energy exporters<sup>630</sup>. For the purpose of this research, it is worth noting that Canada is also a world supplier of agricultural products<sup>631</sup>. With a population of just 35 million, Canada is the only G7 member that could have not been hit by recession, in 2009<sup>632</sup>, had its economy not been so tightly bound to that of the US. Along with Australia, Canada is the only other G20 liberal market economy whose outlook is consistently positive<sup>633</sup>.

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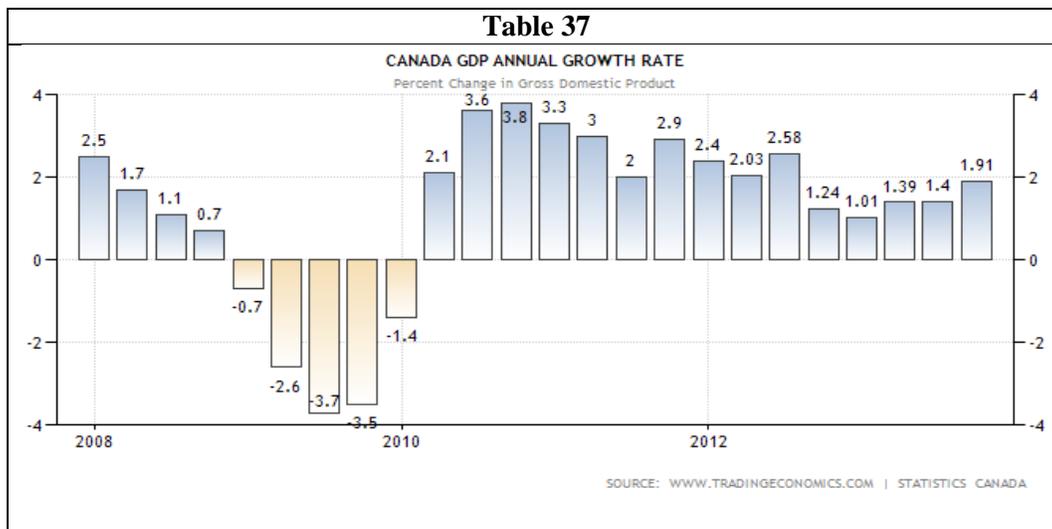
<sup>629</sup> Source: Canadian Ministry of Natural Resources, <https://www.nrcan.gc.ca/home>.

<sup>630</sup> Source: World Bank, <http://data.worldbank.org/indicator/EG.IMP.CON.S.ZS>.

<sup>631</sup> Source: Government of Canada, Bureau of Statistics, <http://www.statcan.gc.ca>.

<sup>632</sup> Cf., Table 37.

<sup>633</sup> OECD, *Canada - Economic forecast summary (November 2013)*; available at: <http://www.oecd.org/eco/outlook/canadaeconomicforecastssummary.htm>.



634

### a. Political factor and negotiations for a China-Canada BIT

Together with the US, until September 2012 Canada was the only other major developed economy without an investment agreement with China.

The first attempts to negotiate a bilateral investment treaty between China and Canada date back to 1994. Difficulties in reconciling the Parties' positions on a number of issues, however, stalled off negotiations. Part of the difficulty in reaching an agreement has been attributed to divergences in the respective BIT programs<sup>635</sup>. As with ASEAN, however, China's accession to the WTO, in 2001, contributed to mitigate the respective rigidities.

<sup>634</sup> Source: Trading Economics, <http://www.tradingeconomics.com/canada/gdp-growth-annual>.

<sup>635</sup> e.g., China's early refusal to negotiate for investor-State dispute settlement mechanisms; see J. Carter, *The protracted bargain: negotiating the Canada-China Foreign Investment Promotion and Protection Agreement*, in *Canadian Yearbook of International Law*, vol. 47, 2009, p. 197.

In September 2004, China and Canada thus revamped the negotiation process. Nevertheless, other 8 years had to lapse, before the Parties were able to announce, in January 2012, that an agreement upon the final text was reached. The ‘Agreement for the Promotion and Reciprocal Protection of Investment’ between China and Canada was subsequently signed on Sept. 9<sup>th</sup>, 2012. It is not yet in force, pending Canada’s ratification (notwithstanding China’s repeated calls in this sense<sup>636</sup>).

With the signature of the BIT with Canada, the US is the only G7 economy left without an investment agreement with China<sup>637</sup>.

#### **b. Economic rationale of the China-Canada BIT**

China currently ranks as the 9<sup>th</sup> most important investor in Canada. Chinese FDI’s have grown critically since 2006 (taking over Canadian FDI to China in 2007), reaching 11 billion USD in 2012<sup>638</sup> (to date, the annual flow from China to Canada is about three times that from

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<sup>636</sup> Cf., China’s Xinhua Press Agency of Oct. 13<sup>th</sup>, 2013: [http://news.xinhuanet.com/english/china/2013-10/18/c\\_132811261.htm](http://news.xinhuanet.com/english/china/2013-10/18/c_132811261.htm).

<sup>637</sup> Most US Corporations, however, can circumvent such problem through subsidiaries placed in States with a BIT with China; in any case, recently talks for the US-China BIT have been resumed; see, e.g., Reuters Press Agency, at: <http://www.reuters.com/article/2013/07/12/us-usa-china-dialogue-trade-idUSBRE96A0ZD20130712>.

<sup>638</sup> Within the Asia Pacific region, China ranks 2<sup>nd</sup>, after Japan; source for all statistics mentioned: *Statistical Bulletin of China’s Outward Foreign Direct Investment*, various years; also: Asia-Pacific Foundation of Canada, *China goes global*, Nov. 4<sup>th</sup>, 2013, pp. 8-9, available at: <http://www.asiapacific.ca/surveys/chinese-investment-intentions-surveys/china-goes-global-2013>.

Canada to China<sup>639</sup>). Such an amount, nonetheless, represents less than 2% of total FDIs in Canada, which exceeds 570 billion USD<sup>640</sup>.

While recently showing interest also for the agricultural sector, Chinese investments in Canada is primarily directed to tapping the country's oil and gas reservoirs<sup>641</sup>. It is estimated that Chinese enterprises invested approximately 25 billion USD in the Canadian oil sector between 2007 and 2013<sup>642</sup>. Considered the long-term horizons, large commitments of capital and the usually tight domestic regulation over the field, concessions for the extraction of oil and gas represent the archetypal investment BITs are intended to safeguard<sup>643</sup>. Thus, China's interest for an investment agreement with Canada was a matter of course. The stipulation of the BIT is, also, a signal that Chinese investment in Canada are not only welcome but – as today in most Western hemisphere – sought.

On the other hand, the conclusion of the China-Canada BIT is beneficial for Canadian investors in China too, as they are now granted the protection already offered to all other major

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<sup>639</sup> Cf., Table 40.

<sup>640</sup> The US is the dominant source of FDI in Canada, with investments covering more than 50% of the total (approximately 300 billion USD); cf., fn. 655, below.

<sup>641</sup> e.g., Chinese CNOOC's acquisition of Canadian Nexen for 14 billion USD, approved by the Canadian government in 2012 and closed in February 2013, is the largest FDI by a Chinese firm to date.

<sup>642</sup> According to the Heritage Foundation, *China - global investment tracker*, 2013; available at: <http://www.heritage.org/research/projects/china-global-investment-tracker-interactive-map>.

<sup>643</sup> It is not a coincidence that, according to ICSID, oil and gas (and mining) disputes represent the most common type of ICSID investment disputes – accounting for approximately 25% of all disputes (by far the largest contribution to its caseload than any other economic sector – the next is the power sector, constituting 12% of ICSID's caseload); cf., World Bank, *ICSID Caseload Report – Statistics*, Issue 2011-1, available at: <https://icsid.worldbank.org/ICSID/Servlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English11>. Also, it is not by chance that the largest 'multilateral' international investment treaty, the Energy Charter Treaty, includes the protection of oil and gas investment among its principal objectives; ratified by approximately 50 States, as well as the European Union, both China and Canada hold observer status.

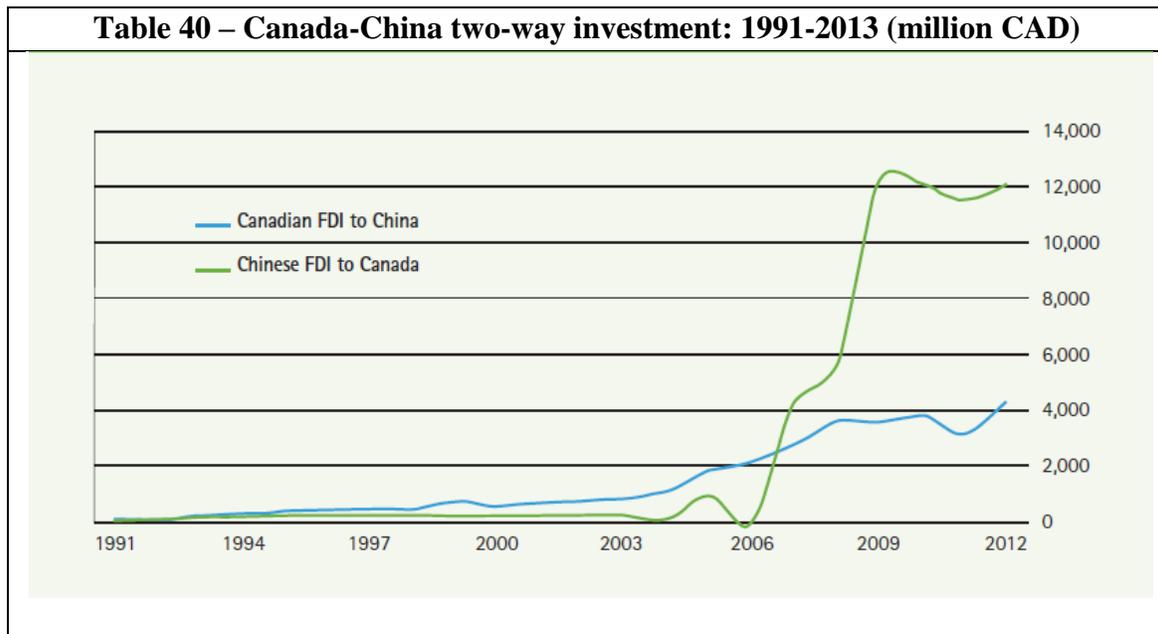
market economies (with the exception of the US). Currently, Canada plays a modest role when it comes to investment in China. Tables 38 and 39, below, show the investment flows between the two States, and provide a comparison with those between Canada and the US.

	1980	1990	2009	2010	2011	2012
US	45,354	75,718	269,470	286,115	279,936	294,022
China	-	-	11,003	10,906	10,365	10,838

644

	1980	1990	2009	2010	2011	2012
US	16,072	54,071	229,972	226,322	246,839	260,61
China	-	5,402	3,202	3,423	2,823	3,817

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<sup>644</sup> Source: Asia-Pacific Foundation of Canada, available at: <http://www.asiapacific.ca/statistics/investment>.

<sup>645</sup> *Id.*

### c. Canada stance on foreign investment protection

According to UNCTAD, Canada is party to 34 BITs, 28 of which in force<sup>647</sup>. Out of the G7 States, only Japan has concluded a smaller number of investment agreements<sup>648</sup>. Also by comparison with the G20 or OECD groups, Canada stands amongst the States with fewer agreements.

Like Japan, Canada appears to have focused principally on trade agreements. Currently, Canada is party to 9 FTAs already in force<sup>649</sup>, plus one pending ratification<sup>650</sup>. Six of these stipulations comprise an investment protection regime<sup>651</sup> (and, in the other two cases, Canada had an earlier BIT in place already<sup>652</sup>). Only the agreements with the EU and Israel, thus, do not feature an investment protection discipline (in the first case, by reason of the EU limited competence before the entry into force of the Lisbon Treaty, in 2009; in the second, as the

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<sup>646</sup> Source: Canadian Statistics Bureau – Government of Canada, Table 376-0051; available at: <http://www.statcan.gc.ca/start-debut-eng.html>.

<sup>647</sup> Source: UNCTAD online database, updated to June 2013; available at: [http://unctad.org/Sections/dite\\_pccb/docs/bits\\_canada.pdf](http://unctad.org/Sections/dite_pccb/docs/bits_canada.pdf).

<sup>648</sup> Japan, traditionally more focused into trade, is party to 11 BITs only (noteworthy, however, it has signed in 2012 the Trilateral Investment Treaty with China and South Korea); the US is party to 46 BITs; cf., Table 1 (Chapter I, Section A.1).

<sup>649</sup> NAFTA (1994), Israel (1997), Chile (1997), Costa Rica (2002), Peru (2009), EU (2009), Colombia (2011), Jordan (2012), Panama (2013).

<sup>650</sup> Honduras (2013).

<sup>651</sup> NAFTA, Chile, Peru, Colombia, Panama, Honduras.

<sup>652</sup> Costa Rica (BIT of 1998), Jordan (BIT of 2009).

agreement flows out of geopolitical considerations – and the text is equivalent to that agreed between the US and Israel)<sup>653</sup>.

Since WWII, the Canadian economy has been increasingly tied to that of the US<sup>654</sup>. Such substantial dependence results in the US accounting, in 2012, for more than 70% of Canadian exports, approximately 50% of both overall FDI inflow and outflow, and over 20% of GDP<sup>655</sup>. Such a preponderant relationship has for long implied Canada's limited presence in the international trade and investment arena, beyond NAFTA<sup>656</sup>. In the past few years, however, the Canadian Government, with the aim to diversify Canada's export basin and lighten its dependence from the US market, began looking at Central and South America (*i.e.*, the recent FTAs with Panama, Colombia, Peru and Honduras) and Asia (with Canada joining the negotiations for the trans-Pacific Partnership<sup>657</sup>, and signing the BIT with China, both in 2012). In this respect, the agreement with China is noteworthy, as it is the only stipulated with a top-10 investor economy in Canada (beside the NAFTA with the US).

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<sup>653</sup> The text of all treaties mentioned is available on the website of the Canadian Ministry of Foreign Affairs, Trade and Development, at: [http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng#tab\\_1387390390\\_1](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng#tab_1387390390_1).

<sup>654</sup> With the exception of the early 1970s' 'Nixon shock' (a US economic policy imposing heavy duties on all imports, including those from Canada) resulting into Canada evaluating the 'Third Option' (a policy proposal aiming at looking for other trading and investment partners). While the 'Third Option' was eventually never officially adopted, governments' choices of the last few years are a *de facto* restatement of such policy.

<sup>655</sup> Source: Government of Canada, *Trade and Investment Update* 2012, at: [http://www.international.gc.ca/economist-economiste/performance/state-point/state\\_2012\\_point/2012\\_6.aspx?lang=eng](http://www.international.gc.ca/economist-economiste/performance/state-point/state_2012_point/2012_6.aspx?lang=eng).

<sup>656</sup> Notwithstanding the fact that Canada elaborated a Model BIT in 2004.

<sup>657</sup> Along with Mexico.

Canada also gradually revised its 2004 Model BIT: upon request, the Canadian Ministry of Foreign Affairs releases a copy of the 2006 draft Model BIT<sup>658</sup>, which implements a number of changes (and simplifications) with respect to the official working text<sup>659</sup>. For the purpose of the present research, the sub-section below offers a brief overview of the changes introduced in the notion of investment.

*i. Canada 2004 Model BIT and the draft Model of 2006:  
changes in the definition of investment*

In the definition of investment featured in the draft Model of 2006, Canada has brought in a number of changes, most of them apparently derived from the US Model, and all of them aimed at an overall simplification of the definition. Such remains, anyway, more detailed than that featured in any other model. A comparative illustration is offered at Table 44, below.

Focusing on the most significant changes:

- The notion of ‘covered investment’ maintains the original wording of the 2004 Model, enriched of the locution ‘...owned or controlled, directly or indirectly...’; such addition, reflecting the wording the UK Model<sup>660</sup>, represents also an approximation of the Canadian to the US Model (which contains an equivalent

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<sup>658</sup> Sent to the author via email, on Aug. 19<sup>th</sup>, 2013.

<sup>659</sup> For a synthetic review, see C. Titi, *The Evolving BIT: A Commentary on Canada’s Model Agreement*, Investment Treaty News, Jun. 26<sup>th</sup>, 2013; available at: <http://www.iisd.org/itn/2013/06/26/the-evolving-bit-a-commentary-on-canadas-model-agreement/>.

<sup>660</sup> Art. 1.a UK Model (2006).

locution in the chapeau of the definition of investment, listing the investments' objective criteria); as such, the definition ultimately outlined is original;

- The investment list has been reformatted, from Roman numerals to Arab (as well as in the US Model);
- The first three categories of investment (*i.e.*, *a*) an enterprise; *b*) a share, stock or other form of equity participation in an enterprise; *c*) a bond, debenture or other debt instrument of an enterprise) have become substantially (and, for the most part, literally) equivalent to the US Model: the wording of let. *b*) has been uniformed to the US Model, while that of let. *c*), compared to the 2004 Model, has been critically simplified<sup>661</sup>;
- In all subsequent instances, the 2006 draft Model departs from the US Model and maintain, instead, the 2004 list; the wording, however, has been simplified in most cases:
  - Let. *d*), for instance, is reduced to a simple 'a loan to an enterprise';
  - Let. *e*), featuring the exception for financial institutions, lost the redundancy of old sub-para (ii), and the 'for greater certainty' of sub-paras. (iii) and (iv);
  - Let. *g*) has lost another redundancy;
  - Let. *i*) introduces, for the first time in a formal way, 'intellectual property rights' within the investment list (like all other models);

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<sup>661</sup> Let. *a*), 'an enterprise', was already identically featured in both Models.

- Let. j), featuring the catch-all ‘any other’ list, and whose previous text was already equivalent to that featured in the US Model, has been reformulated in its first part, now identical to the US Model wording.
- Canada has, nevertheless, kept almost integrally the ‘exclusion’ category (*i.e.*, ‘investment does not mean’), not featured in the US Model (or any other).

## 2. The Republic of Chile

Stretching over 4.300 km along the Pacific Ocean (more than half of the entire South American continental East coast), over the past two decades Chile managed to exploit its vast natural deposits of copper and nitrates to pursue an overall satisfactory level of development of the country. Propelled by the steady rise in copper prices – fuelled, in turn, by the increased demand of large emerging States (such as, *e.g.*, China) – Chile has become the wealthiest and most stable South American State<sup>662</sup>. In 2010, it also became the first OECD member of the continent<sup>663</sup>.

Chile enjoys not only the world’s largest reserves of copper<sup>664</sup>, but it is also the largest producer (covering more than a third of the worldwide supply)<sup>665</sup>. With copper representing over

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<sup>662</sup> Cf., *UNCTAD inv. rep. 2013*, pp. 2-6 and 57-62.

<sup>663</sup> According to the OECD: <http://www.oecd.org/chile/chilesignsupasfirstoecdmemberinsouthamerica.htm>.

<sup>664</sup> Chile has 28% of the world reserves (more than twice than Peru, ranking 2<sup>nd</sup>); source: US Geological Survey, *Mineral Facilities of Latin America and Canada*, Mineral Resources Program, 2012; pp. 48-49; available at: <http://minerals.usgs.gov/minerals/pubs/commodity/copper/mcs-2012-coppe.pdf>.

40% of all exports – and the State’s main source of income – the rise in demand (and prices) allowed Chile to rebound from a brief recession in 2009 with a growth unparalleled by any other OECD economy (see Table 41, below).

While dependency on the export of copper is a matter of concern in the long term, the current level of development, coupled with an overall modest population of just above 17 million, result in the State to preserve a positive outlook of continued growth of roughly 5% *per annum*.<sup>666</sup>



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<sup>665</sup> *Id.*; copper reserves are estimated around 190,000 million tons; at the current extraction rate, reserves are to last for the next 100 years.

<sup>666</sup> Source, OECD, *Chile - Economic forecast summary (November 2013)*; available at: <http://www.oecd.org/eco/outlook/chileconomicforecastsummary.htm>.

<sup>667</sup> Source: Trading Economics, at: <http://www.tradingeconomics.com/chile/gdp-growth-annual>.

### a. Relations with China

Bilateral trade between China and Chile predates the establishment of diplomatic relations: in 1961, China set up an ‘Economic and Commercial Office’ in Santiago. In 1970, flowing from the election of President Allende, formal diplomatic relations were instated, and Chile became the first South American State to recognize the Chinese mainland government. Diplomatic ties continued also after Pinochet’s 1973 coup d’état – as, despite the regime change, Chile continued to endorse the ‘One China’ policy<sup>668</sup>. In the reciprocally legitimizing policy already adopted with Pakistan<sup>669</sup>, China returned Chile’s recognition by supporting the latter’s Antarctic claims<sup>670</sup>.

Over the 1990s, while beginning to pursue that policy of free trade which will later become the distinctive trait of its foreign politics<sup>671</sup>, Chile supported China’s membership to the WTO until its accession, in 2001.

The strategic geographic location of Chile along the Pacific, and the growing economic and political ties with China, explain why Chile was the only Latin American State invited to

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<sup>668</sup> Along with China, Romania was the only other Communist State not to have severed diplomatic relations with Chile. While China may have done so in light of the continued endorsement of Chile of the ‘One China’ policy, Romania presumably did not change stance also in light of its traditional international investment policy (cf., *supra*, fn. 96).

<sup>669</sup> Cf., Chapter III, Section A.2.

<sup>670</sup> Support became concrete with the joint construction of the ‘Great Wall’ research station within Chile’s claimed area in the Antarctic. Moreover, some joint venture in the production of military equipment was also put in place (with the aim of reducing Chile’s military dependence on the US).

<sup>671</sup> Cf., subsection b, below.

participate to the Asia-Security Summit of 2011<sup>672</sup>. At the conclusion of the event, China and Chile pledged to revamp bilateral military relations<sup>673</sup>.

It is worth noting that the strengthening of China's diplomatic and commercial presence in Chile – as well as in the whole South American continent – is perceived as a matter of concern for the US. Already in 2005, a report for the US Congress considered that ‘...while Beijing's interest in the region appears largely economic, they also have a political and diplomatic dimension and may have longer implications for US interests. [...] China is using Latin America to challenge the United States' supremacy in the Western hemisphere and to build a third world coalition of nations with interests that may have well be at variance or even inimical to American interests and values’<sup>674</sup>.

*i. Negotiations for the China-Chile FTA and SAI*

On Nov. 18<sup>th</sup>, 2005, during the APEC conference in South Korea, Chile and China concluded the trade negotiations for the China-Chile FTA, which was thus signed after just five rounds of negotiations. Chile was the first South American State to conclude a FTA with China – for whom, in turn, that was the first agreement of this kind it ever signed. It is nevertheless worth

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<sup>672</sup> Organized by the International Institute for Strategic Studies, also known as ‘Shangri-La Dialogue’ (from the name of the hotel in Singapore where the Summit was hosted).

<sup>673</sup> See Xinhua Press Report, Jun. 8<sup>th</sup>, 2011: [http://news.xinhuanet.com/english2010/china/2011-06/08/c\\_13918101.htm](http://news.xinhuanet.com/english2010/china/2011-06/08/c_13918101.htm).

<sup>674</sup> Congressional Research Service, *China's Growing Interest in Latin America*, Report for the US Congress, Apr. 20<sup>th</sup>, 2005, p. 5; available at: <http://fpc.state.gov/documents/organization/45464.pdf>.

noting that the China-Chile FTA, which entered in force on Oct. 1<sup>st</sup>, 2006, follows that between Chile and the US (signed in 2003 and entered in force in 2004).

While the Agreement does not feature an investment protection chapter or regime, the Parties expressly committed to negotiate separate agreements on trade in services and investment<sup>675</sup>. Upon conclusion of the former, talks for the ‘Supplementary Agreement on Investment of the Free Trade Agreement between Chile and China’<sup>676</sup> begun on Jan. 14<sup>th</sup>, 2009. The Parties were already bound by a BIT signed in 1994 (reproducing the terms of the 1984 Chinese Model)<sup>677</sup>. After seven rounds of negotiations, on Sept. 9<sup>th</sup>, 2012, the China-Chile SAI was signed<sup>678</sup>. To date, it is not yet in force.

*ii. The agreement’s trade and investment rationale*

The China-Chile FTA, entered in force on Oct. 1<sup>st</sup>, 2006, determines a tariff reduction scheme over three phases (immediate, five and ten years). Out of Chile’s 7,550 tariff-lines, 2,805 have been immediately made duty-free. In October 2007, further 1,947 goods were added to the tariff-free list. As a result, 63% of goods Chile negotiates with China are currently duty-free. By 2015, 97% of all exports to China will be free of tariffs. Exception for sensitive sectors of the

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<sup>675</sup> Art. 120 China-Chile FTA.

<sup>676</sup> The text of the FTA is available on the website of the Chinese Ministry of Commerce and Trade, at <http://fta.mofcom.gov.cn/topic/enchile.shtml>.

<sup>677</sup> The text of the BIT is available on the UNCTAD online database, at: [http://unctad.org/sections/dite/ia/docs/bits/chile\\_china.pdf](http://unctad.org/sections/dite/ia/docs/bits/chile_china.pdf).

<sup>678</sup> Two days earlier, Chile and Hong Kong signed a FTA and announced further negotiations for a comprehensive agreement on investment promotion and protection.

respective economies are admitted (quantified in 1% of Chilean exports, and 3% of Chinese), and comprise 152 specific products (*e.g.*, wheat, sugar, tires, some textiles, metal products and white linen)<sup>679</sup>.

For Chile, one of the main objectives of the FTA is to diversify its exports to China – to date, the main destination of Chilean exports. Currently, over half of Chile's export is concentrated in copper minerals and cathodes of refined copper (in 2010, Chile exported over 12 billion USD of such products to China<sup>680</sup>). Chile's other main exports – all piling, by comparison to copper's volumes and value – are fruits (1.4 billion USD), fish (988 million USD) and wood (562 million USD).

On the other hand, China is Chile's second import partner. Imports from China increased 13% in 2012 over the year before, and 24% compared to 2005. Chinese exports to Chile are more diversified (even though most are consumer and electronic goods, and automotive) and worth approximately 14 billion USD, in 2012. Nevertheless, the strategic importance for China of the FTA with Chile does not rest in the export opportunities Chile's population basin of just above 17 million can offer. Being China the world's largest consumer of copper (approximately 7.9 million tons in 2010) and accounting for almost 40% of the worldwide consumption<sup>681</sup>, it is vital for the People's Republic to secure a consistent and reliable supply of such element from abroad. As

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<sup>679</sup> Tariff schemes and sensitive lists are available on the website of the Chinese Ministry of Commerce and Trade, at: <http://fta.mofcom.gov.cn/topic/enchile.shtml>.

<sup>680</sup> Cf., Chile export to the US of the same products over the same period amounted to 2.13 billion USD.

<sup>681</sup> Domestic production covers roughly 15% of consumption needs.

soon as the China-Chile FTA came into force, in 2006, 80% the Chile's export of copper for 2012 (worth approximately 14 billion USD) went to China<sup>682</sup>.

Consequently, bilateral trade volume, already on a positive trend, has risen consistently since the entry into force of the FTA: amounting to roughly 2.5 billion USD in 2002, it exceeded 17 billion USD by 2009 – with China's imports accounting for 23% of Chile's total exports<sup>683</sup> (from, *e.g.*, the already noteworthy 15% of 2007). In 2012, Chile's export alone towards China was in excess of 18 billion USD<sup>684</sup>. Table 42, below, shows how, despite Chinese exports increased more to Chile than vice versa, Chile still maintains a trade surplus (mostly, determined by the export of copper)<sup>685</sup>.

<i>Year</i>	2000	2001	2002	2003	2004	2005	2006	<b>2007</b>	2008	2009	2010	2011	2012	2013
<b>Exp.</b>	907	1,021	1,240	1,865	3,227	4,445	5,033	10,051	10,005	11,892	17,324	18,620	18,218	19,219
<b>Imp.</b>	951	1,013	1,102	1,290	1,847	2,542	3,599	4,931	6,287	5,117	9,187	11,945	13,531	14,828
<b>Vol.</b>	1,858	2,035	2,342	3,155	5,075	6,988	8,632	<b>14,982</b>	<b>16,831</b>	<b>17,009</b>	<b>26,512</b>	<b>30,565</b>	<b>31,750</b>	<b>34,047</b>
<b>Bal.</b>	-44	8	138	575	1,380	1,903	1,435	5,120	3,178	6,775	8,137	6,674	4,687	4,391

686

<sup>682</sup> Cf., Chile export to the US of copper over the same period amounted to 3.2 billion USD.

<sup>683</sup> Cf., the U.S. account for less than 15%.

<sup>684</sup> Exports to the US totaled 9.4 billion USD.

<sup>685</sup> For a brief overview, see G. C. Gachùz. *Chile's Economic and Political Relationship with China*, in *Journal of Current Chinese Affairs*, 1/2012, pp. 133-154; p. 137; available at: [http://mercury.ethz.ch/serviceengine/Files/ISN/141206/ichaptersection\\_singledocument/920d9916-5c6e-40d8-8faa-dff7bcf2abdf/en/497-522-1-PB.pdf](http://mercury.ethz.ch/serviceengine/Files/ISN/141206/ichaptersection_singledocument/920d9916-5c6e-40d8-8faa-dff7bcf2abdf/en/497-522-1-PB.pdf).

<sup>686</sup> Data extracted from statistics published by Pro-Chile – Ministry of Foreign Affairs of Chile; data for 2000-2009 may be retrieved at: <http://www.prochile.gob.cl/herramientas/material-de-apoyo/estudios-de-mercado/>; data for 2010-2013 is available at: [http://www.prochile.gob.cl/wp-content/blogs.dir/1/files\\_mf/13911990062013\\_Chinaok.pdf](http://www.prochile.gob.cl/wp-content/blogs.dir/1/files_mf/13911990062013_Chinaok.pdf); in bold, the data for the overall bilateral trade volume recorded since the entry into force of the China-Chile FTA (Oct. 2006).

It has been observed that the current trade pattern between China and Chile is analogous to that currently occurring between China and other exporters of natural resources<sup>687</sup>: China provides for significant economic boost to several States in the region, but trade remains almost one-dimensional, as reliance upon the export of raw materials to China does not provide for consistent opportunities for diffusion of expertise or technology, nor productivity growth<sup>688</sup>. In this regard, the relationship stands in stark contrast to that existed between Japan and the ‘East Asian Tigers’ between the 1970s and the 1990s<sup>689</sup>.

As of foreign direct investment, flows started after 1978, mainly in the mining sector. Nevertheless, FDI from China to Chile is limited. Between 1974 and 2008, it reached 685 million USD, representing 0.2% of the total Chinese investments abroad<sup>690</sup>. Chilean FDI in China is limited as well (in 2010, it totaled 212 million USD – only 0.4% of Chilean investment abroad) and focused mostly in the manufacturing (over 88%) and sea transport service (approximately, 10%) sectors, concentrated in the urban areas of Beijing, Guangdong, Hong Kong, Henan and Shandong. FDI between China and Chile is, thus, still underdeveloped: the entry into force of the SAI, by updating the obsolete standard of protection of the 1994 China-Chile BIT (flowing from the 1984 Chinese Model), will eventually contribute in improving flows and stock of both States into each other’s economy.

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<sup>687</sup> According to a statement of Augusto De la Torre (World Bank Economist), reported by A. Arthur in *Beyond the China Boom: Latin America’s Long Term Growth Prospects*, Inter-American Dialogue, Nov. 22<sup>nd</sup>, 2011; available at: [www.thedialogue.org/page.cfm?pageID=32&pubID=2803](http://www.thedialogue.org/page.cfm?pageID=32&pubID=2803).

<sup>688</sup> *Id.*

<sup>689</sup> *Id.*, The ‘Asian Tigers’ benefitted significantly from Japanese trade and investment: the high growth experienced from the 1970s to the 1990s was characterized by large flows of intra-industry trade and FDI with Japan, and a significant diffusion of technology and knowledge, with East Asia functioning as a trade network during the period.

<sup>690</sup> *Gachúz (2012)*, p.144-145.

## **b. Chile's stance on international trade and investment agreements**

According to ICSID, Chile is party to 51 BITs, 39 of which in force<sup>691</sup>. According to SICE<sup>692</sup>, Chile is also party to 12 bilateral FTAs<sup>693</sup>, plus 1 multilateral arrangement<sup>694</sup> and 2 with regional organizations<sup>695</sup>. Chile negotiated with all G7 States either a BIT (Germany, 1991; France, 1992; Italy, 1993; UK, 1996) or a FTA featuring a foreign investment protection regime (Canada, 1997; US, 2003; Japan, 2007). Also with regard to the members of the G20 group (or all major capital exporters – and natural resources importers), Chile negotiated some form of privileged regime for trade and investment.

Consequently, over the past 15 years Chile has acquired a considerable expertise with comprehensive FTA-making (having stipulated a higher number of such agreements than any other State<sup>696</sup>). In the eyes of China – approaching the shift from the European to the North American model of investment protection –, Chile thus represented both an opportunity and a

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<sup>691</sup> Source: ICSID online database, June 2013; available at: [http://unctad.org/Sections/dite\\_pcbb/docs/bits\\_chile.pdf](http://unctad.org/Sections/dite_pcbb/docs/bits_chile.pdf).

<sup>692</sup> Foreign Trade Information System of the Organization of American States.

<sup>693</sup> Canada (1996), Mexico (1998), South Korea (2003), US (2003), China (2005), Panama (2006), Peru (2006), Colombia (2006), Japan (2007), Australia (2008), Turkey (2009), Malaysia (2010).

<sup>694</sup> MERCOSUR (1996).

<sup>695</sup> Central America (1999), EFTA (2003).

<sup>696</sup> For an overview of the Chile's FTA policy, see L. Wehner, *Power, Governance, and Ideas in Chile's Free Trade Agreement Policy*, German Institute of Global and Area Studies, Working Paper no. 102, May 2009; available at: <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=100882>.

‘tolerable risk’. An opportunity, as it could rely on Chile’s experience on the matter and willingness to conclude an agreement with China. A tolerable risk, as the relatively small size of the Chilean economy, coupled with the modest flow of investment towards China (with trade pivoting around the latter’s need to access a stable supply of copper), did not realistically represent a challenge or threat to China’s interests. Moreover, the successful conclusions with Chile of negotiations for a multi-stage FTA featuring a foreign investment protection regime could pave the way to subsequent equivalent stipulations with other South American States.

### **B. Structure and main features of the Agreements: overview**

The conclusion of these two Agreements represents a noteworthy change in China’s treaty-making paradigm of investment treaties. The new Treaties constitute the first complete shift of China from the synthetic European models (comprising 12-15 provisions) to the more structured and analytic North American versions (divided into 3-5 sections, and comprising a number of provisions ranging between 30 and 50<sup>697</sup>).

Under a general and structural point of view, it is possible to see that the two Agreements share, as template, the Canada Model BIT<sup>698</sup>. Both feature and follow the order of the first three

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<sup>697</sup> The US Models of 2004 and 2012 (which are, for the most part, identical, substantially, when not outright literally), are both composed of 3 sections featuring 37 Articles in total, plus 4 draft Annexes; as of the Canadian Models, both are divided into 5 sections, but that of 2004 contains 52 Articles (and 7 draft Annexes), while in that of 2006 the number of provisions is reduced to 42.

<sup>698</sup> Comprising 5 sections (A - ‘Definitions’; B - ‘Substantive obligations’; C - ‘Settlement of Disputes between an Investor and the Host Party’; D - ‘State-to-State dispute settlement procedures’; E - ‘Final Provisions’) as opposed to the tripartition of the US Model (Section A – ‘Definitions and substantive obligations’; Section B – ‘Investor-State

sections therein typically given (Section A – ‘Definitions’; Section B – ‘Substantive obligations’; Section C – ‘Investor-State dispute settlement’); both feature, also, a fourth section (Section D) listing, however, provisions on exceptions and exclusions (rather than State-to-State dispute settlement procedure, as per the Canadian Models). Curiously, it is not China’s Agreement with Canada the one featuring also the fifth section (*i.e.*, Section E ‘Final provisions’), but that with Chile<sup>699</sup>. In this respect, it is worth noting that the adoption of the Canadian Model, a novelty for China, is a first for Chile as well<sup>700</sup>. Table 43, below, shows the structural similarities amongst the US and Canadian Models and China’s Agreements with Canada and Chile. It emerges that, while opening to new structure and contents, China insisted for an overall simplification in both agreements – and the insertion of provisions which, given their consistency with all the previous stipulations considered, may be deemed as presiding China’s current core interests.

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dispute settlement’; Section C – ‘State-State dispute settlement’); As of the European States, nor them, neither the EU on their behalf, have signed FTAs containing investment chapters. When not specified otherwise, the general mention of ‘Canada Model’ implies that there is no difference between the two models of 2004 and 2006.

<sup>699</sup> Section D of the China-Canada BIT features both exceptions and final provisions.

<sup>700</sup> According to SICE, to date Chile has signed 15 Agreements classified as comprehensive FTA; 6 of these, with major capital exporting States, feature an investment section: 4 (*i.e.*, Canada, US, Australia and Japan) follow the US Model BIT structure; the remaining two (*i.e.*, Mexico and Korea) adopt a structure similar to the Canadian Model BIT, but featuring only 4 sections (in lieu of 5), the last of which (D) is dedicated to ‘Investment and Cross-Border Trade in Services Committee’ (rather than exceptions and/or final provisions).

Table 43 - Structure of the Agreements – Comparative overview				
US Model '04/'12	CA Model '04	CA Model '06	PRC-CA BIT	CCSAI
<b>SECTION A</b>	<b>SECTION A – Definitions</b>	<b>Section A – Definitions</b>	<b>PART A</b>	<b>SECTION A – Definitions</b>
1. Definitions	1. Definitions	1. Definitions	1. Definitions	1. Definitions
-	<b>SECTION B – Substantive Obligations</b>	<b>SECTION B – Substantive Obligations</b>	<b>PART B</b>	<b>SECTION B – Investment</b>
2. Scope and Coverage	2. Scope	2. Scope	2. Scope and Application	2. Admission of Investments
3. NT	3. NT	3. Promotion of Investment	3. Promotion and Admission of Investment.	3. NT
4. MFN	4. MFN	4. NT	4. Min. St. of Treat.	4. Performance Req.
5. Min. St. of Treat.	5. Min. St. of Treat.	5. MFN	5. MFN	5. MFN
6. Expr. & Comp.	6. Senior Manag., Board of Dir. & Entry of Personnel	6. Min. St. of Treat.	6. NT	6. Min. St. of Treat.
7. Transfers	7. Performance Req.	7. Compensation for Losses	7. Senior Manag., Board of Directors & Entry of Personnel	7. Compensation for Losses
8. Performance Req.	8. Monopolies & State Enterpr.	8. Senior Manag., Board of Directors & Entry of Personnel	8. Exceptions	8. Expr. and Comp.
9. Senior Manag. & Board of Dir.	9. Res. & Except.	9. Performance Req.	9. Performance Req.	9. Transfers
10. Publication of Law and Decisions Respecting Inv.	10. <b>General Except.</b> <sup>701</sup>	10. Expropriation	10. Expropriation	10. Subrogation
11. Transparency	11. Health, Safety and Env. Measures	11. Transfers	11. Compensation for Losses	11. Denial of Benefits
12. Inv. & Environ.	12. Compensations for losses <sup>702</sup>	12. Transparency	12. Transfers	12. Exclusions
13. Inv. & Labor	13. Expropriation	13. Subrogation	13. Subrogation	
14. Non-conforming meas.	14. Transfer of funds	14. Taxation Meas.	14. Taxation	[cf. Art. 23]
15. Special Formalities & Info. Req.	15. Subrogation	15. Health, Safety and Environmental Meas.	15. Disputes between the CP	
16. Non-derogation	16. Taxation Meas.	16. Corporate Social Resp.	16. Denial of Benefits	
17. Denial of Benefits	17. Prudential Meas. <sup>703</sup>	17. Reservations and Exceptions	17. Transparency of Law, Regulations	[cf. Art. 25]

<sup>701</sup> Art. 10 Canada Model '04 reproduces for the most part Art. 18 of the 2006 draft Model, merging elements from Art. 8 (Non-Conforming Measures), Art. 18 (Essential Security) and Art. 19 (Disclosure of Information) US Model BIT; an equivalent provision is featured in Art. 33 of the China-Canada BIT.

<sup>702</sup> Included into Art. 5 US Model (Minimum Standard of Treatment).

			and Policies	
18. Essential Security	18. Denial of Benefits	18. General Except.	18. Consultations <sup>704</sup>	
19. Discl. of Info.	19. Transparency	19. Denial of Benefits		
20. Financial Services <sup>705</sup>				
21. Taxation				
22. Entry into Force, Duration & Termination				
<b>SECTION B</b>	<b>SECTION C – Settlement of Disputes between an Investor and the Host Party</b>	<b>SECTION C – Settlement of Disputes between an Investor and the Host Party</b>	<b>PART C</b>	<b>SECTION C – Investor-State Dispute Sett.</b>
	20. Purpose	20. Purpose	19. Purpose	
	21. Limitation of Claims with respect to Financial Institutions	21. Claim by an Investor of a Party on its own or on behalf of an Enterprise		
	22. Claim by an Investor of a Party on its own Behalf		20. Claim by an Investor of a CP	
	23. Claim by an Investor of a Party on Behalf of an Enterprise			
	24. Notice of Intent to Submit a Claim to Arbitration			
23. Consultation and Negotiations	25. Settlement of a Claim through Consultation	22. Conditions Precedent to Submission of a Claim to Arb.		13. Consultations and Negotiations
24. Submission of a Claim to Arb.	26. Conditions Precedent to Submission of a Claim to Arb.	23. Special Rule regarding Financial Services	21. Conditions Precedent to Submission of a Claim to Arb.	14. Submission of a Claim to Arbitration
25. Consent of Each Party to Arb.	27. Submission of a Claim to Arb.	24. Submission of a Claim to Arb.	22. Submission of a Claim to Arb.	15. Consent of Each Party to Arb.
26. Cond. & Limitations on Consent of Each Party	28. Consent to Arb.	25. Consent to Arb.	23. Consent to Arb.	16. Conditions and Limitations on Consent of each Party

<sup>703</sup> Exception for the financial system.

<sup>704</sup> The provision is a more sophisticated version of Art. 49 Canada Model '04.

<sup>705</sup> Covering both substantial and procedural aspects; cf. Canada Model '04, Arts. 10 and 17.

27. Selection of Arbitrators	29. Arbitrators	26. Arbitrators	24. Arbitrators	17. Selection of Arbitrators
28. Conduct of the Arbitration	30. Constitution of a Tribunal when a Party Fails to Appoint an Arbitrator or the disputing Parties are Unable to Agree on a Presiding Arbitrator.			18. Preliminary Objections <sup>706</sup>
29. Transparency of Arb. Proceedings	31. Agreement to Appointment of Arbitrators	27. Agreement to Appointment of Arbitrators	25. Agreement to Appointment of Arbitrators	19. Governing Law
30. Governing Law	32. Consolidation	28. Consolidation	26. Consolidation	20. Consolidation of Claims
31. Interpretation of Annexes	33. Notice to the Non-Disputing Party			21. Awards
32. Expert Reports	34. Documents			
	35. Participation by the Non-Disputing Party	29. Documents to, and Participation of, the Other Party	27. The Non-Disputing CP: Docs. and Participation	
33. Consolidations	36. Place of Arb.	30. Place of Arb.		
34. Awards	37. Preliminary Objections to Jurisdiction or Admissibility			
35. Annexes and Docs.	38. Public Access to Hearing and Documents	31. Public Access to Hearing and Documents	28. Public Access to Hearings and Docs.	
36. Service of Docs.	39. Submission by a non-Disputing Party	32. Submission by a non-Disputing Party	29. Submission by a Non-Disputing Party	
	40. Governing Law	33. Governing Law	30. Governing Law	
	41. Interpretation of Annexes			
	42. Expert Reports	34. Expert Reports		
	43. Interim Meas. of Protection	35. Interim Meas. Of Protection and Final Award	31. Interim Meas. Of Protection and Final Award	
	44. Final Award			
	45. Finality and Enforcement of an Award	36. Finality and Enforcement of an Award	32. Finality and Enforcement of an Award	
	46. General	37. Receipts under Insurance or Guarantee Contract <sup>707</sup>		

<sup>706</sup> Drawn from Art. 154 PRC-NZ FTA.

<sup>707</sup> Featured for the first time in the 1996 Chile-Canada FTA (Art. G-38), but otherwise usually not present in the final text of Canada investment agreements.

	47. Exclusions			
<b>SECTION C</b>	<b>SECTION D – State-to-State Dispute Settlement Procedures</b>	<b>SECTION D – State-to-State Dispute Settlement Procedures</b>	<b>PART D</b>	<b>SECTION D – Exceptions</b>
37. State-State Disp. Settl.	48. Disputes Between the Parties	38. Disputes Between the Parties	[see Art. 15]	22. Essential Security
			33. General Exceptions <sup>708</sup>	23. Taxation
			34. Exclusions	24. Measures to Safeguard the Balance of Payment
-	<b>SECTION E – Final Provisions</b>	<b>SECTION E – Final Provisions</b>	-	<b>SECTION E – Final Provisions</b>
	49. Consultations	39. Consultation & Other Actions		25. Transparency
	50. Extent of Obligations	40. Extent of Obligations		26. State-State Dispute Settl.
	51. Commission	41. Exclusions		27. Committee on Inv.
				28. Annexes & Fns.
				29. Relation between this Agreement and the FTA
				30. Amendments
[see Art. 22]	52. Application and Entry into Force	42. Application and Entry into Force	35. Entry into Force and Termination	31. Entry into Force
				32. Duration and Termination
<b>ANNEXES</b>				
ANNEX A – Cust. Int. Law.	ANNEX B.13.1 – Expropriation	ANNEX B.10 – Expropriation	ANNEX B.8 – Exceptions	ANNEX A – Expropriation
ANNEX B – Expropriation	ANNEX C.26 – Standard Waiver and Consent in Accordance with Art. 26 of this Agreement	[Not provided by the Canadian Gov., but implied in the text of the Model]	ANNEX B.10 – Expropriation	ANNEX B – Transfers
ANNEX C – Service of Docs. on a Party	ANNEX C.39 – Submission by Non-Disputing Parties		ANNEX B.12 – Transfers and Exchange Formalities	ANNEX C – Public Debt Chile
ANNEX D – Possibility of a Bilateral Appellate Mechanism	ANNEX I – Reservation for Existing Measures and Liberalization Commitments		ANNEX C.21 – Conditions Precedent to Submission of a Claim to Arb.: Party-Specific Req.	ANNEX D – End of BIT
	ANNEX II – Reservations for Future Measures		ANNEX C.29 – Submission by Non-Disputing Parties	
	ANNEX III – Exceptions from MFN		ANNEX D.34 – Exclusions	
	ANNEX IV – Exclusions from Dispute Settlement			

<sup>708</sup> Cf., Art. 10 Canada Model '04 and Art. 18 Canada Model '06.

### 1. The China-Canada BIT

The 18-year long span of time necessary for an investment treaty to be agreed upon between China and Canada is reflected also in that the final agreement draws upon, *inter alia*, both Canadian Models (sometimes, within a single provision). The definition of investment perfectly depicts such intra-Model merger<sup>709</sup>. It may be inferred that negotiations over those elements already agreed upon before Canada elaborated the 2006 unofficial draft Model have not been subject to further discussion; such draft has, on the other hand, served as a basis for negotiations for the remaining parts.

By the same token, it may be considered that the progressive affirmation of China as a world-class commercial and investment player, both under an economical but also legal perspective (given the sheer number of BITs, all in the synthetic European-based form, it entered into) reversely contributed to the streamlining of the old Canadian Model. Indeed, what was by far the most analytical Model BIT (to some extent, redundantly so) has been, with the 2006 draft, trimmed of 10 articles.

Due to its long and troubled making-process, the China-Canada BIT, despite having certainly contributed to China's shift for the North American model structure, is not flawless. The analysis that follows briefly assesses the Agreement's main characteristics.

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<sup>709</sup> Cf., Section C, below, at p. 284.

The China-Canada BIT comprises 35 provisions, divided into 4 sections<sup>710</sup>. Six Annexes are attached to the Treaty<sup>711</sup>. A number of preliminary observations may be made with regard to the overall structure of the China-Canada BIT – especially, by comparing the final text with the Agreement’s templates (*i.e.*, Canada 2004 Model and 2006 draft Model BIT and, to a more limited extent, the US Model BIT) and the China-Chile SAI, concurrently stipulated.

Like all Canadian Models, the single-article **Part A** features the Agreement’s **list of definition**. In this respect, it may be noted that China agreed to follow the Canadian Model template in the China-Chile SAI as well<sup>712</sup>.

A thorough analysis of the notion of investment follows in Section C<sup>713</sup>. Nevertheless, it is worth noting already that in the Agreement China accepted, for the first time, the insertion of the notion of ‘covered investment’ (in which a -significantly modified- version of the chapeau of the traditional Chinese notion of investment is merged).

It is, however, with **Part B** (featuring the Parties’ **substantive obligations**) that the negotiations’ efforts become more apparent.

For instance, China’s resistance to overturn the traditional order of provisions of its own Model is visible already with Art. 2 ‘Scope and Application’ (reflecting the ‘Scope’ provision of

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<sup>710</sup> *i.e.*, Sections A, B, C, D (not labeled otherwise).

<sup>711</sup> These are: Annex B.8 (Exceptions), B.10 (Expropriation), B.12 (Transfers and exchange formalities), C.21 (Conditions precedent to submission of a claim to arbitration: Party-specific requirements), C.29 (Submission by non-disputing Parties), and D.34 (Exclusions).

<sup>712</sup> In the US Model, Part A comprises both definitions and substantive obligations.

<sup>713</sup> Cf., below, at p. 284.

the Canadian Model); that very provision, nevertheless, disappears in the China-Chile SAI. As of its content, this is almost identical to the equivalent norm of the US Model BIT<sup>714</sup>, rather than the simpler Canadian version. The change of model has implied, for China, to adopt the new perspective with regard to the entire BIT set-up: rather than ‘investments’, principal subject-matter of the BIT are now the governmental ‘measures’ affecting an investment.

Art. 3 perhaps represents, instead, an instance of ‘reverse influence’: while a provision on ‘Promotion and Admission of Investment’ is part and parcel of Chinese and European models and agreements, nothing as such is usually featured in North American stipulations. Here, not only the China-Canada BIT contains such provision (whose wording is drawn from the Chinese Model, identical in this respect since 1984), but it has subsequently become part of the draft Model of Canada (with wording almost identical to that featured in the British Model<sup>715</sup>).

The echo of the older Chinese Model persists inasmuch the BIT does not follow the North American sequence for the three main investment guarantees (*i.e.*, NT, MFN, FET<sup>716</sup>) but features instead that found since the 1989 Chinese Model<sup>717</sup> (*i.e.*, FET, MFN, NT). Such (apparently, not significant) structural resistance on the part of China is probably derived from the more rigid attitude adopted during the first rounds of negotiations, over the ‘90s, with Canada. As an agreement was probably reached in this respect at the time, there has been no

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<sup>714</sup> Art. 2 US Model BIT.

<sup>715</sup> Canada 2006 draft Model, Art. 3 – Promotion of Investment: ‘Each Party shall encourage the creation of favorable conditions for investments in its territory by investors of the other Party and shall admit those investments in accordance with this Agreement’; the only difference with the British Model (Art. 2.1) being the last two words, where ‘laws’ replace ‘this Agreement’; such replacement, however, changes also the overall reach of the protection granted.

<sup>716</sup> Arts. 3-5 for both US and Canada 2004 Models; in the 2006 Canada draft Model is Arts. 4-6.

<sup>717</sup> The 1984 Model does not feature the NT clause.

further or renewed negotiation on the point. In the Agreement with Chile, however, China accepted to modify the sequence, there following the North American traditional order – yet inserting, between NT and MFN, the ‘Performance Requirements’ provision.

Under the label ‘Exceptions’, Art. 8 features, at para. 2, the discipline for non-conforming measures. To the three typical exceptions provided in the North American Models<sup>718</sup> (*i.e.*, already existing non-conforming measure, its continuation or amendment), two further cases are listed, which China already agreed upon in the stipulations with New Zealand<sup>719</sup> and ASEAN<sup>720</sup>. The first is the possibility of *prompt-renewal* of a non-conforming measure (thus excusing brief governmental lapses to provide for the *continuation* of an expired measure). The second is a strengthened ‘golden share’ clause, by which nationality requirements or limitations on the ownership or control of equity interest in State enterprises are allowed at anytime<sup>721</sup>. Rather peculiar is, however, Annex B.8 to Art. 8, which operates a *renvoi* to the equivalent Annex contained in the FTA the parties respectively signed with Peru, providing for a legitimate ground for non-conforming measures to the MFN or NT treatments. The clause has been rather straightforwardly labeled ‘étrange’ and ‘...peu cohérente avec l’esprit de la clause de transparence’<sup>722</sup>.

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<sup>718</sup> Art. 14 US Models; Art. 9 Canada 2004 Model; Art. 7 Canada 2006 draft Model.

<sup>719</sup> Art. 141 China-NZ FTA (2008).

<sup>720</sup> Art. 6 CAIA (2009).

<sup>721</sup> Art. 8.2.a.ii China-Canada BIT (2012).

<sup>722</sup> C. E. Côté, *Investissement*, in *Annuaire canadien de droit International*, 2012, pp. 363-394, at p. 378.

A noticeable difference from the typical North American structure consists in that the State-to-State dispute settlement procedure section, already comprising a single provision<sup>723</sup>, is here ‘downgraded’ to the rank of simple provision, and placed amongst the other substantive obligations, within Part B. The same has happened with the ‘Consultation’ provision<sup>724</sup>, moved as well amongst the substantive obligations (Art. 18); the last part of the Agreement (Part D) is instead devoted to ‘General Exceptions’, ‘Exclusions’ and ‘Entry into Force and Termination’ provisions (Arts. 33-35).

The Canadian ‘accessory’ provisions, dealing with ‘Health, safety and environmental measures’ and ‘Monopolies and State enterprises’<sup>725</sup> or ‘Corporate social responsibilities’<sup>726</sup> have been discarded. Also Art. 17 Canada Model 2004, dealing with the financial-stability concerned ‘Prudential measures’, is not featured, nor in the 2006 draft model neither in the China-Canada BIT. However, in both texts Canada kept the content of the lost provision: in the Agreement with China, it may be found through the combined wording of Arts. 33.3 and 20.2.a.

Even with due regard to the differences outlined above, the overall look of Part B, comprising the Treaty’s substantive obligations, appears undeniably and consistently influenced by the North American (especially, Canadian) template.

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<sup>723</sup> i.e., Section C in the US Model, and Section D in the Canada Model.

<sup>724</sup> Art. 49 and 39 of, respectively, the 2004 and 2006 Canada Models, both featured in Section E - ‘Final Provisions’.

<sup>725</sup> Respectively, Arts. 11 and 8, Canada Model 2004.

<sup>726</sup> Art. 16 Canada Model 2006.

It is with **Part C (investor-State dispute settlement)** that the association of China to the North American models becomes more apparent, in terms of both structure and content. By the same token, it is within this section that Canada's simplification process of its own Model BIT appears more evident – as, in the 2006 draft Model, Section C loses ten Articles. Thus, in the China-Canada BIT, Arts. 21-23 of the 2004 Canada Model are merged into a simplified single provision (Art. 20). The kernel of the (long) provision is contained in (short) para. 1 (with the rest of it focusing on specific consultation requirements for financial claims)<sup>727</sup>.

Another case of intertwined influence exercised, on the one side, by the agreements being negotiated simultaneously and, on the other, by the respective experience on the matter and influence of the Parties, may be found with Art. 21 ('Conditions precedent to submission of a claim to arbitration'). Art. 25 of the 2004 Canada Model, dealing with 'Settlement of a claim through consultation', has subsequently become part of para.1 of Art. 21 China-Canada BIT, and the same happened with the 2006 draft Model (being merged into the equivalent provision, Art. 26). It may be noted that in the synthetic European and Chinese Models the dispute settlement provision is always opened by the negotiation phase, which places quite consistent mandatory 'cooling-off' constraints upon the investor. Both the 1997 China Model and the 2003 China-Germany BIT requires a minimum negotiation period of 6 months. In this respect, and with regard to the Agreement at stake, the minimum period for negotiations has been, however, determined in 30 days – as per the 2004 Canada Model. This may be deemed either to have been something already agreed upon during the negotiations that took place over the 1990s (and that

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<sup>727</sup> As highlighted above, the insistence of Canada over such aspect is particularly evident in that, notwithstanding the simplification process it had its draft model go through, a dedicated provision featuring a 'special rule regarding financial services' has been there restored (Art. 23). None of such specific concern is visible, by comparison, in the US Model.

neither Party wanted to discuss further), or that Canada insisted for having such short period in the BIT with China<sup>728</sup>. Against such latter hypothesis, however, it may be observed that in the 2006 draft Canada Model such cooling-off period has been extended to 60 days.

Noteworthy is also the evolution of the regime with regard to ‘governing law’ and committee on investment, among the Canada Model 2004<sup>729</sup>, the China-Canada BIT<sup>730</sup>, the China-Chile SAI<sup>731</sup>, and the Canada draft Model 2006<sup>732</sup>. The first of these, drawing from NAFTA, features the Commission mechanism, whose functions are, *inter alia*, to ‘resolve disputes that may arise regarding [the Agreement’s] interpretation or application’ and ‘consider any other matter that may affect the operation of this Agreement’. Through such attributions, the Commission can be called to issue an official interpretation of a provision of the Agreement, binding on the arbitral tribunal. In the Canada-China BIT, while making use of an otherwise identical wording than in the 2004 Model, the elimination of the Commission mechanism leaves the task to produce the official interpretation to the ‘Contracting Parties’<sup>733</sup>. Incidentally, this is also the choice of Canada in its 2006 draft Model<sup>734</sup>, beside that of the US Model BIT<sup>735</sup>. It thus

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<sup>728</sup> Nevertheless, the shortening of such ‘cooling-off’ period established in counterbalanced, in Annex C.21 (featuring the fork in road clause), by the increased time (four months) granted to Chinese administrative courts for the traditional reconsideration procedure (by comparison, with the China-Germany BIT, it is three months).

<sup>729</sup> Arts. 40 and 51 Canada 2004 Model.

<sup>730</sup> Art. 30 China-Canada BIT (2012).

<sup>731</sup> Art. 19 and 27 China-Chile SAI (2012).

<sup>732</sup> Art. 33 Canada 2006 draft Model.

<sup>733</sup> The provision also adds an original sentence, probably included upon China’s insistence, subsidiarily yet expressly mentioning, amongst the applicable laws, ‘...where relevant and appropriate, take into consideration the law of the host Contracting Party’.

<sup>734</sup> With a slightly different formulation, at Art. 33.

appears once again that, in the push towards simplification (driven also by China), the China-Canada BIT features a hybrid provision, in between the two Canadian Models. Nevertheless, in the China-Chile SAI the ‘Committee on Investments’ is preserved<sup>736</sup>. Drawing its wording from the equivalent provision in the China-NZ FTA<sup>737</sup>, the norm is here enriched of the only function the committee did not have in the stipulation with New Zealand, *i.e.*, ‘to issue interpretations of any provisions of this agreement, in accordance with Article 19.2 [governing law]’. It has to be consequently concluded that, not being featured the commission/committee mechanism in any of Chile’s stipulations, it was Canada (and not China) to insist for the elimination of such mechanism from the China-Canada BIT.

The rest of the dispute settlement section in the China-Canada BIT is equivalent – when not outright identical – in terms of structure and labeling of the provisions, to the 2006 Canada draft Model. The only differences – in line with China’s aversion for redundancies – consist in two further elisions. The first regards the place of arbitration provision<sup>738</sup>. Once agreed upon the ICSID or UNCITRAL arbitration rules, it was probably felt unnecessary to add an either redundant or potentially conflicting norm. The second exclusion is Art. 37 of the draft Model<sup>739</sup>, which enshrines an exception (not featured in any other model<sup>740</sup>) barring the Parties from asserting as a defense for the alleged damages the fact that the investor is properly covered by an

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<sup>735</sup> Art. 30 Canada 2006 draft Model.

<sup>736</sup> at Art. 27 China-Chile SAI (2012).

<sup>737</sup> Art. 150 China-NZ FTA (2008).

<sup>738</sup> Art. 30 Canada draft Model 2006, and Art. 36 Canada Model 2004.

<sup>739</sup> Reproducing Art. 46.3 Canada Model 2004.

<sup>740</sup> Yet featured in the Investment Chapter of the 1996 Canada-Chile FTA, at Art. G-39.

insurance contract. As placing a rather uncommon treaty-constraint on the host State, the exception has been probably found the Chinese opposition to its inclusion.

As noted above, unlike the Canadian Models **Part D** does not feature the State-to-State dispute settlement mechanism (enshrined, instead, in Art. 15) but the regime for **Exceptions** (Art. 33), **Exclusions** (Art. 34) and **Entry into force and termination** (Art. 35).

Art. 33 features the same content found in Art 18 of the 2006 Canada draft Model<sup>741</sup>, though the disposition of the paragraphs has been partly rearranged.

It is the exclusion provision which, however, is deemed noteworthy. Drawing from Annex IV of the 2004 Canada Model, Art. 34 (combined with Annex D.34) excludes, from both State-State and investor-State dispute settlement mechanisms, domestic decisions by the Parties determining:

- a) whether an investment, subject to review according to the relevant domestic laws, is initially approved, and
- b) whether an investment subject to national security review is permitted.

The norm is interesting, as merging two different core interests of the Parties in a single provision – and finding the agreement of both in what ultimately results a reaffirmation of the principle of sovereignty *vis-à-vis* investment arbitration. Para. 1 of Annex IV of the 2004 Canada Model, in fact, recites:

‘A decision by Canada following a review under the Investment Canada Act, with respect to whether or not to permit an acquisition that is subject to review, shall not

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<sup>741</sup> More complete than the 2004 Canada Model.

be subject to the dispute settlement provisions under Sections C or D of this Agreement’.

Para. 2, then, excludes decisions taken within the competition framework as well.

Thus, the Canadian Model exclusion focuses primarily on ‘acquisitions subject to review’ – exclusion ultimately merged into let. *b*) of Annex D.34 of the BIT with China. This latter, on the other hand, has been traditionally concerned with the *admission* of investment in its territory; the exclusion under let. *a*) thus responds to China’s concerns.

In the Canadian Model of 2004, Annex IV on the Exclusion from Dispute Settlement refers unilaterally to Canada. This is the case also in the Canada-Chile FTA<sup>742</sup>. In the negotiations with China, such Annex provided instead for a sound basis to build a *reciprocal* exception, crafted to safeguard the Parties’ respecting core interests.

The six **Annexes** attached to the China-Canada BIT all consist of additional conditions or specifications to the provisions of the Agreement<sup>743</sup>.

It may be noted that, almost featuring a counter-step to the previously illustrated shortening of the cooling-off period established with Art. 21, Annex C.21 (featuring the fork in road clause) increases the time granted to China’s administrative courts for the ‘reconsideration procedure’ to four months (by comparison, in the China-Germany BIT it is three months).

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<sup>742</sup> Annex G-39.2.

<sup>743</sup> *i.e.*, Annex B.8 (Exceptions), B.10 (Expropriation), B.12 (Transfers and exchange formalities), C.21 (Conditions precedent to submission of a claim to arbitration: Party-specific requirements), C.29 (Submission by non-disputing Parties), and D.34 (Exclusions).

Noteworthy as well is Annex B.10, on expropriation. The text reproduces the wording of the equivalent Annex of the Canadian Model<sup>744</sup>, with the addition of ‘...for the well being of citizens’. Such a locution appears aimed at strengthening the sovereign discretion of the host State in the context of an expropriation – and as such it is coherent with the general set up of China towards the protection of foreign investment that emerges throughout the present research.

## 2. The China-Chile SAI

Differently than with Canada, China had already signed a BIT with Chile, back in 1994. For the most part, however, the China-Chile BIT reproduced the 1984 Chinese Model, with limited (and *de minimis*) variations<sup>745</sup>.

By the time the negotiations for the Supplementary Agreement on Investments of the China-Chile FTA begun, in early 2009, Chile had already signed a FTA featuring an investment chapter with both Canada (in 1996) and the US (in 2003). The FTA with Canada was actually the first bilateral FTA ever signed by Chile<sup>746</sup>. Considering such extensive negotiation activity already carried out on the part of Chile in concluding FTAs with major trade and investment partners, and taking into account China’s progressive shift for the North American models with

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<sup>744</sup> Annex B.13.1.

<sup>745</sup> *e.g.*, the term investor, for instance, is framed with the wording found in the 1989 Chinese Model; the compensation mechanism featured in the expropriation provision (Art. 4.2) is an original formulation (grounded on the UK Model); the ‘scope of application’ provision (Art. 12) limits the application of the BIT to disputes ‘...arisen prior to its entry into force’.

<sup>746</sup> A few months earlier, on June 25th, 1996, Chile signed the MERCOSUR Treaty.

regard to investment stipulations, in analyzing the China-Chile SAI reference shall thus be made to such two agreements as well.

The 1996 Canada-Chile FTA features, in Part 3, the investment protection discipline<sup>747</sup>. It follows the traditional US tripartition with regard to investment protection in FTAs (Section I – investment; Section II – investor-State dispute settlement; Section III – definitions)<sup>748</sup>. Nevertheless, many of the distinctive structural features of the Canada Model BIT are already evident – bridging, on the one hand, the US and UK Models and, on the other, developing the Canadian Model specific traits –, particularly in the dispute settlement section.

The 2003 US-Chile FTA follows as well, at Chapter 10, the traditional US tripartition scheme with regard to investment protection in FTAs. While the agreement may feature a lesser than usual number of provisions, and the final order of those featured in the substantive obligations section may slightly differ from the US Model, contents are identical or equivalent, especially with regard to the main investment guarantees<sup>749</sup>. The investor-State dispute settlement section is entirely drawn from the US Model, structure and content<sup>750</sup>. Annex 10.B, referring to Chile's Public Debt, is deemed noteworthy as, in its stipulation with Chile, China will insert an identical condition<sup>751</sup>. Such explicit attitude of China, to request the same treatment granted by

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<sup>747</sup> Chapter G Canada-Chile FTA.

<sup>748</sup> *i.e.*, placing the definitions in the last Section (C); *e.g.*, US-Korea FTA, US-Morocco FTA.

<sup>749</sup> With the exception of the State-to-State dispute settlement mechanism, featured instead in Chapter 22 of the US-Chile FTA, with reference to the whole agreement.

<sup>750</sup> The only difference being the lack of Art. 35 US Model, 'Annexes and Documents'.

<sup>751</sup> *i.e.*, Annex C China-Chile SAI (2012).

third States to the US, is the same that ultimately brought the China-Australia FTA negotiations to fail<sup>752</sup>.

The China-Chile SAI comprises 5 Sections, featuring 32 provisions<sup>753</sup>; 4 annexes are attached to the agreement. *Prima facie*, the Agreement appears synthetically and effectively organized.

As in the China-Canada BIT, **Section A** is constituted of one provision only (Art. 1), featuring, the **list of definition** (cf., Section C, below).

**Section B (substantive obligations)** comprises 10 provisions. On the one hand, this is a much restricted list, compared, *e.g.*, with the 20 provisions of the US Model, the 17 of the Canada 2006 draft Model, or the 16 of the China-Canada BIT; on the other hand, a few provisions have been moved from this to other sections. Nevertheless, the *prima facie* impression is that of a Section quite adherent to the Chinese Model (*e.g.*, the elimination of the scope provision and the restoration of that on ‘Admission of Investments’, drawn from the Chinese Model). Such an impression is partly defeated where one notices that the Section includes the

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<sup>752</sup> The Australian Government did not agree to increase the threshold at which Chinese-investment were referred to the Foreign Investment Review Board (currently set at 258 million AUS dollar). China insisted for such threshold to be raised to the level granted to the US (*i.e.*, 1 billion AUS dollar). Cf., R. Wallace, *Free-trade push may open door to China*, *The Australian*, Jul. 18<sup>th</sup>, 2013; available at: <http://www.theaustralian.com.au/national-affairs/policy/free-trade-push-may-open-door-to-china/story-fn59nm2j-1226681027576#>.

<sup>753</sup> Thus longer than the 27 provisions of the Chile-US FTA Investment Chapter, but shorter than the China-Canada BIT and all Canadian and American Models.

provisions on ‘Performance Requirements’<sup>754</sup>, Denial of Benefits<sup>755</sup> and Exclusions<sup>756</sup>. Such latter provision is, however, drastically simplified, as it reproduces only part of the typical content of the ‘non-conforming measures’ or ‘reservations and exceptions’ provisions of the US and Canada Models. With regard to the increasing reliance placed upon external agreements to which both contracting State are Parties<sup>757</sup>, it may be noted that Art. 4 (Performance Requirements), formulated in a fashion identical to the China-NZ FTA<sup>758</sup>, operates a *renvoi* (like the China-Canada BIT<sup>759</sup>, the ACIA<sup>760</sup> and the AANZFTA<sup>761</sup>) to the TRIMs Agreement.

The **investor-State dispute settlement** section (**Section C**, Arts. 13-21) is structured following the US Model. Identical, indeed, is the sequence of provisions (and labels) for Arts. 13-17. Art. 13 (Consultation and Negotiations), 14 (Submission of a claim to Arbitration), 15 (Consent of each Party to Arbitration), 16 (Conditions and Limitations on Consent of Each

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<sup>754</sup> Art. 4 China-Chile SAI (2012).

<sup>755</sup> Art. 11 China-Chile SAI (2012).

<sup>756</sup> Art. 12 China-Chile SAI (2012).

<sup>757</sup> In both China-Canada BIT and China-Chile SAI is possible to note an increased reliance over external sources – *i.e.*, multilateral stipulations and simplification of some of the BIT more complex provisions, such as performance requirements (*renvoi*), definitions (*renvoi* or reproduction of same content) and procedural provisions (eliminated, once recalled the overall mechanism for dispute settlement). The trend, evident already the China-NZ FTA and the CAIA, is here further enhanced.

<sup>758</sup> Art. 140 China-NZ FTA (2008).

<sup>759</sup> Art. 9 China-Canada BIT (2012).

<sup>760</sup> Art. 7 ACIA (2009).

<sup>761</sup> Art. 5 AANZFTA (2009).

Party), 17 (Selection of Arbitrators), follow Arts. 23-27 US Model<sup>762</sup>. When compared with either the US or Canada Models, however, the rest of the Section appears considerably simplified, as only the provisions on ‘Governing law’<sup>763</sup>, ‘Consolidation of Claims’<sup>764</sup> and ‘Award’<sup>765</sup> are left in place (and, again, with structure and labels closer to the US than the Canadian Model). Art 18 (Preliminary Objections) is drawn, instead, from the Investment Chapter of China’s FTA with New Zealand<sup>766</sup>. The Treaty set of procedural rules is reduced to the essential, relying instead on those already featured in the dispute settlement mechanisms chosen in the Treaty<sup>767</sup>.

As of the regime for the governing law, a case of reciprocal influence may be inferred. The Canadian Model 2004 has been updated, in the draft Model of 2006, firstly by merging the two previously existing short paragraphs into one, then by adopting the US Model wording<sup>768</sup>. Both such modifications, aimed at simplifying the disposition, are featured in para. 1 of Art. 30 China-Canada BIT. The original element of the paragraph – seemingly introduced upon China’s insistence – is that the provision also features the locution ‘...and where relevant and appropriate,

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<sup>762</sup> The same provisions, labeled slightly differently, are featured, in a different order, in the 2004 Canada Model (Arts. 25-29); in the 2006 draft Model, as well as the China-Canada BIT, the provision of settlement through negotiations is merged into that listing the requirements for a valid submission of a dispute to arbitration (respectively, Art. 22 and Art. 21).

<sup>763</sup> Art. 19 China-Chile SAI (2012).

<sup>764</sup> Art. 20 China-Chile SAI (2012).

<sup>765</sup> Art. 21 China-Chile SAI (2012).

<sup>766</sup> Art. 154; The provision, otherwise structurally and literally equivalent, adds here one original locution, inasmuch the Respondent State may object ‘...that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 21 (Awards)’.

<sup>767</sup> *i.e.*, ICSID arbitration or *ad hoc* arbitration under the UNCITRAL rules; Art. 22.1 China-Chile SAI.

<sup>768</sup> Paras. 1 and 3 of Art. 30 US Model.

[the tribunal shall] take into the law of the host Contracting Party<sup>769</sup>. An analogous provision is found only in the AANZFTA<sup>770</sup>. Lastly, the exception featured in para. 2 (requiring prior consultation between the Parties, were the host State to consider the alleged breach part of the Treaty exceptions regime), absent in the Canadian Model of 2004 (and not part of the US Model), will become part of the 2006 draft Model.

**Section D** of the China-Chile SAI features the **exceptions regime** – as so does Part D of the China-Canada BIT – and is comprised of three provisions (Arts. 22-24)<sup>771</sup>. Nevertheless, in the SAI it is more apparent an attempt to simplify and streamline the overall regime, and a more pronounced integration of this with the rest of the FTA<sup>772</sup>.

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<sup>769</sup> Such formulation is wider than the residual call for the host State domestic law featured in Art. 30.2.b.1 US Model, where it is stated: ‘...if the rules of law have not been specified or otherwise agreed [the tribunal shall apply] the law of the respondent, including its rules on the conflict of laws...’.

<sup>770</sup> Art. 27 AANZFTA (2009).

<sup>771</sup> The inclusion of general exceptions clauses in BITs is a relatively new development, and would appear to be linked, in certain cases, to the rise of new concerns, especially regarding environmental and labour policies. General exceptions refer to the adoption or maintenance of measures to meet policy goals (such, *e.g.*, the protection of human life, the conservation of exhaustible resources, national security, and prudential measures for the financial sector); when such provisions are included in BITs, their language is often drawn from standard general clauses (such as, *e.g.*, Art. XX GATT, Art. XIV and XIVbis GATS, and GATS Annex on Financial Services). It appears that a larger number of agreements now contain clauses on national security or public order, although this does not appear to be a general practice. Neither the latest German, French or Dutch Models contain such exceptions (nevertheless, their NT/MFN treatment clauses do not apply to preferential treatment accorded under economic integration agreements or tax matters); the 2012 US Model BIT now contains an essential security clause (Art. 18), an exception for prudential measures relating to financial services (Art. 20.1), and certain exceptions for taxation measures (Art. 21); Art. 10 of the Canadian Model, unlike NAFTA Chapter 11 and the new US Model BIT, includes a modified Article XX GATT general exceptions provisions, that apply to all obligations in the model treaty.

<sup>772</sup> Chapter XII features a FTA-comprehensive regime for exceptions; on the interpretation issue of investment provisions in trade agreements, see A. De Mestral and A. Falsafi, *Investment provisions in regional trade agreements: a more efficient solution?*, in A. De Mestral and C. Lévesque (eds.), *Improving International Investment Agreements*, Routledge, 2013, p. 107-134, at p. 122-129.

For instance, Art. 22 (Essential Security) operates a *renvoi* to Art. 100 of the FTA (which in turn is drafted in the same terms of Art. 10.4 of both Canadian Models, as well as Art. 33.5 of the China-Canada BIT<sup>773</sup>).

With Art. 23 (Taxation) the synthesis, however, is partly lost. In an apparent redundancy, the provision reproduces paras. 1, 2 and 4 of Art. 101; para. 3 is, instead, discarded<sup>774</sup>). *In lieu* of such latter paragraph, the norm features a novel para. 2, aimed at avoiding interpretative doubts: ‘Except as provided in this Article, nothing in this Agreement shall apply to taxation measures’.

Neither Art. 24 (Measures to safeguard the balance of payment) operates a *renvoi* to the same provision contained in the exception Chapter<sup>775</sup>. There, a general exception is established, to excuse cases of ‘serious difficulties’. Art. 24, instead, draws from the chapeau and all parts relating to investment of Chapter 15 AANZFTA<sup>776</sup>, which is in turn similarly worded to the China-NZ FTA<sup>777</sup>. It is interesting to note that such regime is not featured in the US-Chile FTA (where Art. 23.4 deals only with ‘Balance of payments measures on *trade in goods*’<sup>778</sup>).

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<sup>773</sup> The China-NZ FTA (Art. 201), CAIA (Art. Art. 17), ACIA (Art. 18) and AANZFTA (Chapter 15, Art. 2) contain a slight different formulation – almost identical, however, amongst those Agreements; neither US Model BITs features a proper ‘security exception’ provision; however, Art. 19 covers, in the same terms used in the Canadian Models, the disclosure of information exception; in the US-Chile FTA, Art. 23.2 (Essential Security, placed in Chapter 23, Exceptions) covers only the information exception as well.

<sup>774</sup> Such latter featuring the regime for rights and obligations as in Art. III GATT.

<sup>775</sup> Chapter XIV, Art. 102, China-Chile FTA (2005).

<sup>776</sup> Art. 4 (‘Measures to safeguard the balance of payments’) of Chapter 15 (‘General provisions and exceptions’) AANZFTA (2009), .

<sup>777</sup> Art. 202 China-NZ FTA (2008).

<sup>778</sup> Emphasis added.

**Section E (Final provisions, Arts. 25-32)** includes norms which have been felt by the Parties not properly belonging to any of the previous sections. It appears the template for such structure to be the ACIA, where Section C serves the same scope<sup>779</sup> (despite containing different provisions). With regard to Section E of the SAI:

- Art. 25, featuring the regime on transparency, in all other agreements under consideration is part of the substantive obligations (*i.e.*, Art. 10 and 11, US Models; Art. 19, 2004 Canada Model; Art. 12, 2006 draft Model; Art. 17, China-Canada BIT; Art. 13, Chapter 11 AANZFTA; Art. 19 CAIA; Art. 21 ACIA);
- Art. 26 deals with the State-State dispute settlement mechanism; the regime, deprived of its stand-alone section (C, for US Models and D, for Canadian Models) consists in a simple *renvoi* to the general discipline contained in Chapter X of the FTA;
- Art. 27 establishes the Committee on Investment, and outlines its mechanism and functions<sup>780</sup>;
- Art. 28 (Annexes and footnotes), typical of the US Model<sup>781</sup>, is moved here from the investor-State dispute settlement section;
- Art. 29 (Relation between this Agreement and the FTA) and Art. 30 (Amendments) – which all repeat the ‘constitute an integral part’ locution – may be considered, given the structure of the SAI, coherently placed.

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<sup>779</sup> However, the CAIA follows an entirely different pattern.

<sup>780</sup> See Section B.I, above (specifically, pp. 274-275).

<sup>781</sup> Art. 35 US Model BIT.

- The presence of three articles (Arts. 28-30) devoted to draw a clear line with regard to what constitutes part of the SAI appears derived from the ACIA<sup>782</sup>.

Art. 31 (Entry into force) and 32 (Duration and Termination) are noteworthy, both in terms of structure and content. As of the structure, the division in two different provisions is quite an uncommon choice: both US Models<sup>783</sup>, as well as both Canadian Models<sup>784</sup>, make use of only one provision to this end, as well as the 1997 Chinese Model<sup>785</sup>; it is as well relevant that both the American Models and the 1997 Chinese Model have the same label, in this respect (which is also equivalent to the sum of the labels of the two different provisions: ‘Entry into force, duration and termination’). Such choice is also that of the French and German Model BITs<sup>786</sup> (the latter, China’s past structural term of reference), as well as in China’s BITs with Germany<sup>787</sup> and the Netherlands<sup>788</sup>. Only the British and Italian Models keep the two aspects separated<sup>789</sup> – with the former’s labels matching the wording chosen in the China-Chile SAI. As of the wording, while the echo of the UK Model provision may be felt, Art. 31 is, nevertheless,

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<sup>782</sup> Arts. 44-46 ACIA (2009).

<sup>783</sup> Art. 22 of both US Models.

<sup>784</sup> Art. 52 Canada 2004 Model and Art. 42 Canada 2006 draft Model.

<sup>785</sup> Art. 13 Chinese Model BIT (1997)

<sup>786</sup> Art. 13 German Model BIT (2008) and Art. 11 French Model BIT (2006).

<sup>787</sup> Art. 15 China-Germany BIT (2003).

<sup>788</sup> Art. 15 China-Netherlands BIT (2001).

<sup>789</sup> Respectively, Arts. 13 (‘Entry into force’) and 14 (‘Duration and termination’), and Arts. 13 (‘Entry into force’) and 14 (‘Duration and expiry’).

originally formulated. Para. 2 of Art. 32 appears similar to Art. 35.2 of the China-Canada BIT, while para. 3 is almost identical to Art. 13 of the 1997 Chinese Model<sup>790</sup>.

As a matter of normative content, entirely original are the initial duration and termination periods, as well as the continued protection granted to existing investments after termination, when compared to the other agreements. Art. 35.1 in fact establishes that the SAI shall remain in force for a period of 5 years. On the one side, it could be observed that this is quite a short span of time: the German, British and US Models all set a standard minimum period of 10 years – and so does the China-Germany BIT; China's stipulations with the Netherlands and Canada are set to last for minimum 15 years; the Chinese Models, as well as both Canadian Models, do not set any minimum time-frame. Such unusual short term derives probably by the earlier stipulation between the Parties: in the 1994 BIT between China and Chile a threshold of 5 years is in fact indicated<sup>791</sup>. Both Parties, for understandable reasons (such as, *e.g.*, not to get tied for a too long span of time in a new form of agreement -for China-, or with a potentially excessively influential partner -for Chile), have probably preferred to keep the time frame agreed in the previous stipulation. In this sense goes also the choice of the reduced time-frame for termination to become effective: it does not follow, *e.g.*, that one set in the China-Canada BIT (*i.e.*, 1 year), but it is left to 6 months, as per the 1994 China-Chile BIT.

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<sup>790</sup> Used, as such, also in the China-Netherlands BIT (Art. 15.3); the only difference with the Model provision is that, there, rather than the entire agreement to remain in force for a certain period after termination, only some guarantees – punctually listed – are kept in force.

<sup>791</sup> Art. 13.1 China-Chile BIT (1994).

## C. Focus: the notion of investment

### 1. The China-Canada BIT

At a *prima facie* reading of the definition of investment in the China-Canada BIT, it may appear that China embraced *in toto* the Canadian Model, structure and wording. A second read, however, reveals once more China's insistence for an overall simplification of the fairly complex Canadian treaty machinery – also, through a number of insertions drawn from the US Model (especially, with regard to the provision's content). The following sections analyze the contribution of the different sources to which the Parties relied upon, and the original solutions agreed, which ultimately resulted in the final text.

#### a. **The notion of covered investment**

Preliminarily, it shall be observed that, for the first time, in the Agreement with Canada China accepted to introduce the notion of 'covered investment' – so far, constantly neglected. It is possible to infer Canada's insistence for the maintenance of such a notion: in the China-Chile SAI the definition has been – in accordance with the respective practice of China and Chile – discarded from the final text. The definition is articulated, drawn only in part from the template Canadian Model BIT. Indeed, the final wording appears representing more of a compromise, than a synthesis.

The first part of the definition of covered investments – focusing on investments made before the entry into force of the BIT – is a repetition of the wording featured in the 2004 Canada

Model<sup>792</sup>. Subsequently, an alternative ‘or’ introduces the second part of the sentence, which covers ‘...an investment of an investor *admitted* in accordance with its laws and regulations thereafter...’<sup>793</sup>. The *ratione legis* requirement (*i.e.*, the express mandatory requirement of respect of domestic laws), typical *topos* of China, is here phrased through the past tense ‘admitted’, *in lieu* of the more usual ‘made’. With regard to the current debate over the arbitrators’ review of the licitness of an investment as a jurisdictional requirement<sup>794</sup>, the Parties have thus made here unequivocally clear their intention that the analysis shall be limited, at this stage, only to those laws relating to the admittance of investments – as opposed to a generalized review of the investment’s legality (including, *e.g.*, criminal law). As a result, in this part the provision, despite nominal *de minimis* departures, is equivalent to the ‘application’ provision of the Chinese Model<sup>795</sup>, to which the substitution of ‘made’ with ‘admitted’ represents an improvement.

In the second -and last- part, the sentence follows with the literal transposition of the US Model objective criteria for the qualification of an investment. By comparing this provision with that of the China-Chile SAI, it is possible to determine that such an important innovation has been – surprisingly – upheld by China. It appears that, by shifting to the North American model, China opted for the insertion of such criteria: on the one hand, in fact, Canada does not contemplate them in neither of its Models, nor in any other stipulation to which it is a Party; on the other hand, the simultaneously negotiated SAI with Chile features those criteria as well (as all

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<sup>792</sup> Canada’s 2006 draft Model includes in the definition the notion of ownership or control, absent in the 2004 Model.

<sup>793</sup> Emphasis added.

<sup>794</sup> Cf., Chapter II, Sect. B.2.a.i.

<sup>795</sup> Art. 11 China Model BIT (1997).

agreements concluded by Chile<sup>796</sup> – except that with Canada!). A point may be made with regard to the fact that China, relying on Chile's extensive experience and network of FTAs with investment chapters, conformed to a quite constant trend in the Pacific – perhaps, in light also of the negotiations for the trans-Pacific Partnership<sup>797</sup> –, as all stipulations of Chile in the area, as well as those of the US<sup>798</sup>, include such criteria. *A contrario*, as apparently Canada has tended to discard the objective criteria from the stipulations to which it is a party to, it will be interesting to observe whether such inclusion in the China-Canada BIT will be maintained in subsequent stipulations – or included in a future model BIT.

The final result constitutes a 'separated yet living together' situation, with the coexistence of two self-standing notions of covered investment, separated by the 'or' put in between them, the first reproducing the Canadian standard and the second originally -and, so far, uniquely- combining the typical Chinese *ratione legis* requirement to the typical objective criteria featured in the US chapeau of the notion of investment (actually, *in lieu* of the chapeau, which disappears in the China-Canada BIT). What ultimately is left out of the US chapeau is the direct or indirect ownership or control criterion. As another case of reverse influence, it is interesting to note that the 2006 draft Canadian Model BIT includes the objective criteria as well in the definition of covered investment.

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<sup>796</sup> *i.e.*, the agreements with US, Australia, Japan and Korea; the wording is always the same, drawn from the US Model BIT.

<sup>797</sup> For an analysis on the current negotiations and the significance of such an agreement, especially for the States in the region, see C. L. Lim, D. K. Elms and P. Low (ed.), *The Trans-Pacific Partnership – A quest for a twenty-first-century trade agreement*, Cambridge University Press, 2012.

<sup>798</sup> *e.g.*, the recent KORUS, Art. 11.28.

Being most of the relevant content subsumed into the notion of covered investment, the notion of investment *per se* does not contain, consequently, a chapeau – as it is the case with both Canadian Models. Comparative Table 44, below, provides for a visual support to the above illustration.

### **b. The asset-based exhaustive list**

The first element to catch the attention of the researcher is that, following the Canadian Model, the list of investment instances of the China-Canada BIT is *closed*<sup>799</sup>. Indeed, the formula featured at let. *j*) (*i.e.*, ‘any other tangible or intangible, moveable or immovable, property and related property right acquired or used for business purposes’), drawn from the US Model (and found also in the 2006 draft Canada Model), may constitute a catch-all formula; however, the lack of any ‘may include’ locution preceding the list appears to impose, upon the interpreter, to verify whether the investment actually belongs to one of the categories listed, rather than eventually moving the analysis (whether treaty or doctrine -based) straight to the investment criteria. In this respect, the choice made in the China-Canada BIT may be considered a step towards a more orderly system.

Drawing from the draft 2006 Canadian Model – in this respect, influenced by the US Model, in both structure and wording –, the list of investment types in the China-Canada BIT follows the order therein set. Nevertheless, while let. *a*) (‘an enterprise’) is identically featured in

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<sup>799</sup> The 2004 Canada Model has replaced the old 1994 Model’s non exhaustive asset-based definition with a finite - yet more comprehensive- definition of investments, based on the definition provided in NAFTA Art. 1139.

all US and Canadian models, the text of let. *b*) is here literally drawn from the US Model<sup>800</sup>; that of let. *c*), then, appears to be a mix of US and Canadian Models: on the one side, it keeps the plural form of the terms as featured in the US Model; on the other, it keeps in a separate category (let. *d*)) the loans, and closes with the Canadian locution ‘of an enterprise’. With regard to the simplification that let. *c*) underwent throughout the Canadian Models, it is here perhaps possible to draw another case of reverse influence the negotiations for the China-Canada BIT had on the Canada draft Model. That this part of the Agreement was agreed upon at an early stage already (and anyway, before the elaboration of the draft Model of 2006), and not renegotiated subsequently, appears in that let. *d*) reproduces the text of the 2004 Model, elided of the exception therein featured for loans to a State enterprise.

Subsequently, lets. *e*), *f*), *g*) and *i*) reproduce the simplified content of Canada’s 2006 draft Model. Letter *h*) (*i.e.*, interests in economic activities under contract, which ideally includes the ‘concession’ category of Chinese and European Models) as well mostly reproduces the content of either Canadian Model, with one notable difference. In the part expressly dealing with ‘concessions’, the text suddenly bends back towards the typical wording of the Chinese Model (*i.e.*, ‘...concessions to search for and extract oil and other natural resources...’).

Let. *j*) provides another instance of mutual influence between the draft Canadian Models and the China-Canada BIT. Changing from the 2004 Model, the first part of the provision in fact reproduces the content of let. *h*) of the US Model; the last part, instead, draws from the 2004 Model, resorting to some of its terms to compose a simpler sentence. Such result will be subsequently rephrased in the 2006 draft Model – despite its apparently equivalent meaning.

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<sup>800</sup> Indeed close, but not identical, to the Canadian Model.

The Canadian Model is followed closely by the China-Canada BIT in that the latter features as well the ‘exclusion category’ (*i.e.*, ‘investment does not mean’)<sup>801</sup> – entirely absent in the US Models. The content of let. *k*) (‘claims to money that arises solely from’) thus reproduces that featured in the Canadian Models, with the sole simplification of the elimination, at sub-para. *i*) (‘commercial contracts for the sale of goods or services’), of the British-derived redundant repetition of the agent of such action (*i.e.*, ‘... by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party...’).

Comparative Table 44, below, provides for a visual support of the above illustration.

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<sup>801</sup> Cf., Table 44 (with specific reference to p. 297).

Table 44 - Investment – China-Canada BIT				
	Art. 1 US Model '04/'12	Art. 1 Canada Model '04	Art. 1 Canada draft Model '06	Art. 1 PRC-CA '12
<b>Covered investment</b>	“covered investment” means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.	covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter;	“covered investment” means, with respect to a Party, an investment in its territory that is <i>owned or controlled, directly or indirectly</i> <sup>802</sup> , by an investor of the other Party existing on the date of entry into force of this Agreement, as well as an investment made or acquired thereafter;	“covered investment” means, with respect to a CP, an investment in its territory of an investor of the other CP existing on the date of entry into force of this Agreement or an investment of an investor <i>admitted in accordance with its laws and regulations</i> thereafter, and which involves the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk;
	“investment” means	investment means:	“investment” means:	1. “investment” means:
<b>Chapeau</b>	every asset that an investor <i>owns or controls, directly or indirectly</i> , that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:	-	-	-
<b>Company participation</b>	(a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other	(I) an enterprise; (II) an equity security of an enterprise; (III) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of	(a) an enterprise; (b) a share, stock or other form of equity participation in an enterprise; (c) a bond, debenture or other debt instrument of an enterprise;	(a) an enterprise; (b) shares, stocks and other forms of equity participation in an enterprise; (c) bonds, debentures, and other debt instruments of an enterprise;

<sup>802</sup> The insertion – featuring a wording drawn from the chapeau of the UK Model, and equivalent to that featured in the chapeau of the US Model – finds nevertheless an original placement in the draft Model, in the definition of ‘covered investment’.

	<p>derivatives;</p>	<p>the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;</p> <p>(IV) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;</p> <p>(V) (i) notwithstanding subparagraph (III) and (IV) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located, and (ii) a loan granted by or debt security owned by a financial institution, other than a loan to or debt security of a financial institution referred to in (i), is not an investment;</p> <p>for greater certainty: (iii) a loan to, or debt security issued by, a Party or a state enterprise thereof is not an investment; and (iv) a loan granted by or debt security owned by a cross-border financial service provider, other than a loan to or debt security issued by a financial institution, is an investment if such loan or debt security meets the criteria for investments set out elsewhere in this Article;</p>	<p>(d) a loan to an enterprise;</p> <p>(e) notwithstanding subparagraphs (c) and (d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located;</p>	<p>(d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years;</p> <p>(e) notwithstanding subparagraphs (c) and (d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the CP in whose territory the financial institution is located;</p> <p>(f) an interest in an enterprise that</p>
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		(VI) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;  (VII) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (III) (IV) or (V);	(f) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;  (g) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;	entitles the owner to share in the income or profits of the enterprise;  (g) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;
<b>Concessions</b>	(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;  (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and	(IX) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under  (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or  (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;	(h) an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory, such as under:  (i) a contract involving the presence of an investor's property in the territory of the Party, including a turnkey or construction contract, or a concession, or  (ii) a contract where remuneration depends substantially on the production, revenues or profits of an enterprise;	(h) interests arising from the commitment of capital or other resources in the territory of a CP to economic activity in such territory, such as under:  (i) contracts involving the presence of an investor's property in the territory of the CP, including turnkey or construction contracts or concessions to search for and extract oil and other natural resources, or  (ii) contracts where remuneration depends substantially on the production, revenue or profits of an enterprise;
<b>IP rights</b>	(f) intellectual property rights;	_803	(i) intellectual property rights;	(i) intellectual property rights;
<b>Property rights</b>	(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.	(VIII) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business	(j) any other tangible or intangible, moveable or immovable, property and related property rights acquired in the expectation of or used for the	(j) any other tangible or intangible, moveable or immovable, property and related property rights acquired or used for business purposes;

<sup>803</sup> Contained only in the list of definitions: "Intellectual property rights means copyright and related rights, trademark rights, rights in geographical indications, rights in industrial designs, patent rights, rights in layout designs of integrated circuits, rights in relation to protection of undisclosed information, and plant breeders' rights".

		purposes;	purpose of economic benefit or other business	
Exclusions		<p>but investment does not mean,</p> <p>(X) claims to money that arise solely from</p> <p>(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or</p> <p>(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraphs (IV) or (V); and</p> <p>(XI) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (I) through (IX);</p>	<p>but "investment" does not mean:</p> <p>(k) a claim to money that arises solely from:</p> <p>(i) a commercial contract for the sale of a good or service by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or</p> <p>(ii) the extension of credit in connection with a commercial transaction, such as trade financing; or</p> <p>(l) any other claim to money, that does not involve the kinds of interests set out in subparagraphs (a) to (j);</p>	<p>but "investment" does not mean:</p> <p>(k) claims to money that arise solely from</p> <p>(i) commercial contracts for the sale of goods or services, or</p> <p>(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by sub-paragraph (d); or</p> <p>(l) any other claims to money, that do not involve the kinds of interests set out in sub-paragraphs (a) to (i);</p>

## 2. The China-Chile SAI

As noted, the China-Chile SAI keeps the Canadian Model as template for the overall structure of the Agreement. Nevertheless, the contribution of Canada, with regard to the contents, is much reduced – to be, in the definition of investment, almost null. Table 45, below, provides for a comparative illustration of this.

Relying on the 1994 China-Chile BIT, the Parties have restored the contents-scheme typical of Chinese Models (*i.e.*, chapeau and lets. *a*) through *e*) of the asset-based list of investment instances); for those parts not belonging to the Chinese tradition (*i.e.*, lets. *f*) and *g*), plus the exclusion category), the Parties resorted to the US Model BIT, whose wording is equivalent -and mostly identical- to that featured in Chile's 2003 FTA with the US<sup>804</sup>. Moreover, China appears to have relied upon the experience gathered in the negotiations for the CAIA, in order to accommodate a number of innovations in the text. The final result gives, however, more an impression of a restyling of the 1997 Chinese Model (or, also, the 2003 BIT with Germany), rather than the consistent changes visible with the China-Canada BIT.

To begin with, the SAI lacks the notion of 'covered investment'. In this respect, due regard may be paid to the extensive experience of Chile in the field. Chile is Party to six FTAs comprising an investment chapter<sup>805</sup>, yet only one includes the definition of 'covered investment' (*i.e.*, the 2008 agreement Australia<sup>806</sup>), and only another, whilst not listing it into the definitions,

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<sup>804</sup> Ch. 10, Section C, Art. 10.27 US-Chile FTA.

<sup>805</sup> *i.e.*, those with the US, Canada, Australia, Japan, Korea and China.

<sup>806</sup> Whose wording is identical to that featured in the US Model BIT.

makes use of the notion (the 2003 agreement with the US<sup>807</sup>). Being apparent the discomfort of China for such a notion, and having Chile as well not resorted to it in most of its arrangements, it may thus not surprise that ‘covered investments’ have ultimately been discarded from the SAI. In its typical perspective privileging simplicity, China proved unwilling to retain two separate notions – *i.e.*, ‘investment’ and ‘covered investment’ – *in lieu* of one, comprehensive, definition. Hence, while in the BIT with Canada only an articulated version of ‘covered investment’ survived (at the expense of the traditional chapeau to the definition of investment), in the SAI the chapeau has been restored and enriched, keeping part of the innovations introduced in the BIT with Canada – consequently highlighting China’s new core elements in this respect.

In the shift to the North American model, China appears thus prepared to accept the progressive enrichment of the definition of investment, in terms of *i*) general definition, *ii*) introduction of objective criteria and *iii*) a more comprehensive list of instances.

#### **a. The chapeau**

The chapeau of the definition of investment in the China-Chile SAI is nothing more than a re-patch: the first half reproduces the US Model chapeau; the second, the 1984 Chinese Model chapeau. The only modification of the first part is the exclusion of the mention of ‘direct or indirect’ control (whilst, interestingly, both criteria of ownership and control have been included). Considering that, according to China’s practice, in the BIT with Canada all four elements have

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<sup>807</sup> In what may appear as a drafting blur; cf., Ch. 10, Section C, Art. 10.27 US-Chile FTA.

been discarded, it may be concluded for Chile's insistence in keeping the extensive mention of 'control' in the Agreement.

In light of the final text agreed upon in both the BIT with Canada and the SAI with Chile, the objective criteria seem thus to have made their way into China's new paradigm of the notion of investment.

### **b. The asset-based list**

With regard to the asset-based list of investment instances, the first observation to make is that the SAI, by comparison with the China-Canada BIT, retains the non-exhaustive character of the list (by way of the 1984 Chinese Model wording: '...in particular, though not exclusively, includes: ...'). Being the sole exception to China's otherwise homogeneous policy, it may be concluded that the definition in the China-Canada BIT was thus drawn as such upon the insistence of Canada.

More in detail, with regard to such non-exhaustive list:

- Let. *a*) (property rights) is literally and entirely drawn from let. *h*) of the US Model;
- In let. *b*) (company participation), the original wording of the 1997 Chinese Model has been restored (with the only substitution of the word 'enterprise' in lieu 'companies');
- Let. *c*) (contractual rights) features again the 1997 Chinese Model wording; however, this is the only instance where part of the language employed in the BIT

with Canada survived: to the provision is appended a footnote, whose text is extracted from Art. (V)(iii) of Canada's 2004 Model<sup>808</sup> (which is, instead, curiously discarded in the China-Canada BIT);

- Let. *d*) (IP rights) follows, instead, the US Model, with the simple mention of 'intellectual property rights'; it is interesting to note, in this respect, China's abandonment of the progressive comprehensiveness of the German Model (culminated in the articulated definition featured in the 2003 China-Germany BIT); such new simple definition is found to be part of both:

- i*) The trend of simplification that China generally favors, and
- ii*) The progressive reliance, where possible, to external agreements where certain definitions or norms are already established, and to which the parties to the agreements are also Party to<sup>809</sup>.

As such, the tendency appears that to avoid double-standards and subsequent potential interpretative confusions (as the different wording expressly contained in a BIT *vis-à-vis*, for instance, the TRIPS Agreement, may be comprehensibly interpreted as a sovereign choice to include or exclude certain elements from the category in question);

- Let. *e*) (concessions) discards the North American formulation – probably perceived too distant from the Chinese tradition (as observed earlier, China resisted in part to the change also in its stipulation with Canada); the definition

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<sup>808</sup> Which is, in turn, equivalent to that featured in Art. 14.5 (Non-conforming measures) of the US Model.

<sup>809</sup> In this respect, for instance, Art. 8.5 SAI makes reference to the TRIPS Agreement (and, consequently, to all sources and agreements therein featured).

shows a limited *labor limae* over the 1994 China-Chile BIT wording, here enriched with parts of the innovations introduced with the 1997 Chinese Model – without, however, the otherwise redundant ‘permitted by the law’ (as already featured in the chapeau) and the adjective ‘business’ in the locution ‘business concessions’;

- In let. *f*), drawing from the experience with Canada, China agreed to keep in a separate category debt instruments not constituting participations in companies: ‘bonds, loans and other debt instruments’; the enumeration is equivalent and almost identical to the US Model<sup>810</sup> (which, however, features ‘debentures’, here instead listed under the ‘company participation’ category, at let. *b*));
- Let. *g*) (futures, options and other derivatives) represents a novelty for China; the category, not featured in the China-Canada BIT (nor expressly featured in either Canada Model BIT), is literally drawn from the US Model BIT<sup>811</sup>;
- The list is closed by an exclusion, as the Parties agreed expressly not to consider as investments court orders or judgments; the exception, featured already in the Chile-US FTA<sup>812</sup> (and kept by Chile in the 2008 Chile-Australia FTA<sup>813</sup>), is drawn

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<sup>810</sup> Art. 1, notion of investment, let. *c*) US Model BIT.

<sup>811</sup> Art. 1, notion of investment, let. *d*) US Model BIT.

<sup>812</sup> Chapter 10, Art. 10.27.

<sup>813</sup> Chapter 10, Art. 10.1; the Chile-Australia FTA investment chapter features a list of definition identical to the Chile-US FTA investment chapter; while both Chapters are broadly based on the US Model BIT, there are a number of minor differences which, given Chile activism in the field and in the Pacific area, may be inferred to be upheld by Chile during the negotiations.

from the US Model<sup>814</sup>; as such, it has presumably been a welcome novelty for China (it is not contained in the China-Canada BIT);

- Lastly, it may be noted that the British Model -derived 'change of form of the investment' clause, typical of both Chinese and European Models, is here not reproduced.

Comparative Table 45, below, provides for a visual support of the above illustration.

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<sup>814</sup> Art. 1, notion of investment, footnote 3 to let. g) (concessions) US Model BIT.

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La tesi è tutelata dalla normativa sul diritto d'autore (Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).

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<b>Table 45 - Investment – China-Chile SAI</b>			
	<b>Art. 1.1 PRC '97</b>	<b>Art. 1 US Model '04/'12</b>	<b>Art. 1 CCSAI '12</b>
<b>Covered investment</b>	-	“covered investment” means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.	-
<b>Chapeau</b>	1.1 The term ‘investment’ means every kind of asset invested by investors of one CP in accordance with the laws and regulations of the other CP in the territory of the Latter, and in particular, though not exclusively, includes:	“investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:	investment means every kind of asset that an investor owns or controls, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, invested by investors of one Party in accordance with the laws and regulations of the other Party in the territory of the latter, and in particular, though not exclusively, includes:
<b>Property rights</b>	(a) movable and immovable property and other property rights such as mortgages, pledges and similar rights;	(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.	(a) tangible or intangible, movable, immovable property and related property rights such as mortgages, liens, leases and pledges;
<b>Company participation</b>	(b) shares, debentures, stock and any other kind of participation in companies;	(a) an enterprise;  (b) shares, stock, and other forms of equity participation in an enterprise;	(b) shares, debentures, stock and any other kind of participation in enterprises;  *[as in PRC Model '97, with ‘enterprises’ in lieu of ‘companies’]
<b>Contractual rights</b>	(c) claims to money or to any other performance having an economic value associated with an investment;	-	(c) [idem PRC Model '97] [fn.1];  [fn.1*] For greater certainty, investment does not include loans issued by one Party to the other Party.

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			<i>*[Extracted from para. (V)(iii) Canada Model; similar to Non-Conforming Measure Art. 14.5 US Model]</i>
<b>IP rights</b>	(d) intellectual property rights, in particular copyrights, patents, trademarks, trade-names, technical process, know-how and good-will;	(f) intellectual property rights;	(d) intellectual property rights;
<b>Concessions</b>	(e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.	(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;  (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;	(e) concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;  <i>*[as in PRC Model '97, without 'business' and 'permitted by law']</i>
<b>Debt instruments</b>	['debentures' in (b)]	(c) bonds, debentures, other debt instruments, and loans;	(f) bonds, loans, and other debt instruments
<b>Derivatives</b>	-	(d) futures, options, and other derivatives	(g) futures, options, and other derivatives;
<b>Exceptions</b>	-	-	but investment does not mean an order or judgment entered in a judicial or administrative action;  <i>*[idem fn.3 to cat.(g) US Model]</i>
<b>Change of form clause</b>	Any change in the form in which assets are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the CP in whose territory the investment has been made.	-	-

## **D. China-Canada BIT and China-Chile SAI: significant steps towards the North**

### **American models of investment protection**

Throughout the analysis carried out in the previous Sections it has emerged that, with the stipulation of China-Canada BIT and China-Chile SAI, China made one step further towards the protection of foreign investment as featured in the North American model BITs (and FTAs). Such ‘step forward’ has nevertheless left intact China’s attention to safeguard its core interests (*e.g.*, notion, understanding and limits of sovereign State consent granted in the stipulation) and traditional carefulness with respect to treaty-making (in the sense of some clear and -relatively-concise final text).

While choosing the Canadian Model BIT as template (most probably, in light of the long-ongoing negotiations with Canada), China pushed for an overall simplification of the final text. Hence, the number (and sequence) of provisions of the substantive obligation section not only is generally streamlined but, in the China-Chile SAI, is closer to the earlier BIT between the contracting Parties; the dispute settlement section is also synthesized significantly – and this is particularly evident in the China-Canada BIT, by comparison to Canada’s 2004 Model. Moreover, China maintained typical key notions and wording (such as, *e.g.*, the *ratione legis* requirement in the definition of investment). Most notably, it appears that China associated to the *Salini* criteria – as spelled out in the US Model BIT since 2004 – for the determination of what constitutes an investment (criteria instead absent in the Canadian, European, and Chinese Models, as well as in most previous stipulations of Chile, and all those of China).

Thus, it appears that, when a BIT has been previously signed (as it was the case with the 1994 BIT with Chile) reliance on such stipulation, under both structure and wording perspectives,

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is more pronounced (*e.g.*, notion of investment in the China-Chile SAI). Such reliance does not encroach, anyway, upon the developments and changes brought on – such as, *e.g.*, the widening of the asset-based list of investment instances (with the introduction of a new category for futures and options, and another to separate debts instruments from company participations), or the inclusion of the ‘investment does not mean’ exclusion category. These modifications appear aimed at improving the overall clarity of the text. In addition, the eight pages of ‘explanatory memorandum’, placed at the beginning of the text of the Treaty, appears going in such direction as well, providing for some pre-preambular ‘color, texture and shading’ to the subsequent interpretation of the agreement.

Under a treaty-making perspective, China’s structural and spelling shift toward the North American models appears thus coherent with the course started since 2008, with the China-NZ FTA and CAIA. It also appears coherent with the general trend towards higher legal standards recently identified by political economists<sup>815</sup>.

It is thus believed that the conclusion of the China-Canada BIT and China-Chile SAI will ease the eventual establishment of some common standards for the international investment protection regime between China and its two main trade and investment partners – *i.e.*, the US and the EU. As highlighted in Chapter I, the gradual opening to international investment standards on the part of China corresponds to a gradual rethinking of liberal market economies on the matter – especially, from the US. Hence, such outlined convergence may ultimately contribute to the reaching of an agreement upon a final text for the investment treaty China and the US negotiate since 1983.

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<sup>815</sup> Cf., M. S. Manger, *A quantitative perspective on trends in IIA rules*, in A. De Mestral & C. Lévesque (ed.), *Improving international investment agreements*, Routledge, 2013, pp.76-92.

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Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments:  
a comparative perspective, from the model BITs to the latest stipulations"

di VACCARO INCISA GIUSEPPE MATTEO

discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2014

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## CONCLUSION

With a network second only to Germany, China's BIT program – under a treaty-making perspective – is found to be built on two essential concepts: clarity and uniformity.

Clarity, as China prudently based investment models and stipulations upon international best practices. With regard to the three model BITs adopted since 1984, this has meant, for the most part, reference to the German and British models. For each provision, the wording of such latter texts has been selected on the basis of a criterion privileging simplicity, in order to avoid vague, indefinite or unclear expressions – potentially leading to unwarranted expansive interpretations or unexpected outcomes (in the eyes of China) by the interpreters. As a result, China often resorted to a 'collage' technique: less clear definitions in one model (because making use of a more vague or unusual wording<sup>816</sup>) have been replaced with that of the other. When neither template was felt sufficiently clear *per se*, China then proceeded to merge part of each reference provision to craft a new one – whose connection with the models of reference would nonetheless be still evident. Occasionally, the result has then been refined with the insertion of original elements, aimed at preserving what would consequently emerge as China's core interests (*e.g.*, the explicit -and repeated- obligation to respect domestic laws and regulations, or *ratione legis* requirement). In other words, in building its model BITs China appeared primarily concerned with securing the predictability of the overall investment legal systems it adhered to.

Uniformity, as in negotiating new investment agreements China has tended, until very recently, to rely almost invariably upon its model BIT (when not outright 'imposing' it).

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<sup>816</sup> *e.g.*, the use of Latin expressions in the German Model BIT.

Consequently -and unsurprisingly-, the vast majority of Chinese BITs reproduce the content of one Chinese model. In this respect, the three texts China adopted – in 1984, 1989 and 1997 – are closely related in terms of structure and wording used (as opposed, *e.g.*, to the significant changes brought by the US, in 2004, to its Model of 1992). The innovations China each time introduced – especially, with the 1997 Model (*e.g.*, NT clause, investor-State dispute settlement) – have kept being drawn from the best European practices. In those cases where it consented to go beyond the model text, in terms of guarantees provided, China did so either *i*) by reason of the reliance it placed on a trusted and more experienced State partner for the agreement (*e.g.*, the 2003 China-Germany BIT), or *ii*) by drawing from the experience of such latter, while negotiating a preliminary agreement with some State with which it enjoys close diplomatic ties, yet not overly significant economic relationship (*e.g.*, BITs with Seychelles and South Africa, FTA with Pakistan). In this respect, too, China's effort may be understood as that of reducing the chances of unpredictable results out of the new commitments it engages in with new, more modern stipulations.

In updating its investment protection standards, China appears thus concerned primarily with avoiding unexpected interpretive outcomes by subsequent interpreters (with regard, *e.g.*, to the notion of investment, or the ambit of application of the MFN clause). Such strategic goal is addressed in the first place by adjusting the text of new treaties, in order to support -or prevent- further developments of certain interpretive trends (*e.g.*, the adoption of the *Salini* criteria in the notion of investment; the punctual indication of the treaty provisions to which the MFN clause applies). Alternatively, or in addition, during the negotiations China would push to include some treaty-based privilege for the States parties aimed at preventing or limiting innovative or

expansive interpretations (*e.g.*, the Parties' binding interpretation of a treaty clause; the preliminary exception to dismiss manifestly frivolous claims).

China's update of its standards for the protection of foreign investments appears dictated, first and foremost, by the recently acquired (and constantly increasing) status of major capital exporter. In other words, the People's Republic needs to better protect Chinese investments abroad. Nevertheless, China remains also a major capital importer (besides a developing country, and a self-defined socialist market economy): striking a balance among such different exigencies requires for the updating exercise to be carried out with prudence. In this perspective, the People's Republic's complex and hierarchical distribution of power between political and bureaucratic structures renders the decision-making process all but swift.

Since 2006, the process of updating China's foreign investment protection standards is being carried out also through the stipulation of FTAs featuring a regime for the protection of foreign investment. Target of such comprehensive arrangements have been, so far, key strategic geopolitical partners (*e.g.*, Pakistan), key supplier of raw materials (*e.g.*, Chile, Peru, Canada), key regional partners to boost exports of domestic manufacturing (*e.g.*, ASEAN), and a liberal small market-economy (*i.e.*, New Zealand), which served as 'test-agreement' for subsequent negotiations with larger economies with whom China carries more significant bilateral trade and investment relations (*e.g.*, Canada).

In embarking on the FTA program, China begun with Chile (2005) and Pakistan (2006): the first, a stable, resource-rich State with consistent experience in the field, yet not a major capital exporter; the second, the closest -but troubled- ally, strategically important yet economically dependent on China's support. The first investment protection regime featured in a

FTA is that with Pakistan (in the case of Chile, it has been agreed upon only in 2012, with a separate agreement); nevertheless, the discipline therein featured merely reproduces that of the 1997 Chinese Model BIT. Thus, for the purpose of this research, the China-Pakistan FTA is noteworthy to the extent that indeed it is the first featuring a chapter on investment protection.

With the stipulation of the FTA with New Zealand, in 2008, and the Comprehensive Investment Agreement with ASEAN, in 2009, China took more significant steps toward the modernization of its foreign investment protection standards. The modifications and adaptations there introduced stress, also, China's core interests, in whose respect minor (or no) changes have been accepted. The comparative analysis highlighted a divide between the general understanding of the nature and extent of the foreign investment protection system: on the one side, China (with ASEAN) opts for a more traditional stance with regard to the role of the State (and the limit of its consent; *e.g.*, admission of investments, MFN clause, investor-State dispute settlement); on the other, the AANZFTA shows the more liberal standards Australia and New Zealand – along some ASEAN States – are committed to (or have accepted). This is evident already, for instance, since the very outset of those stipulations, in the list of definitions<sup>817</sup>. The research finds, nevertheless, China's progressive unconditional acceptance and reliance on the institutional international arbitration system: both the agreements with New Zealand and ASEAN are firmly grounded on the ICSID dispute settlement mechanism, and feature an otherwise slim set of treaty-based procedural rules.

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<sup>817</sup> Art. 1, para. 2 CAIA directs the interpreter to consider that the given definitions '...shall apply unless the context otherwise requires, or a Party has specifically defined any of the above terms for application to its commitments or reservations'; in addition, para. 3 specifies that '...all words used in the singular shall include the plural, and all words in the plural shall include the singular, unless the context otherwise require'.

By conjugating China and ASEAN standpoints, the CAIA may be considered as reflecting the current shared understanding of the principles of international investment law in East Asia. Indeed, the relevance of such stipulation is revealed by the reference China has made to it in the subsequent negotiations. In this respect, China's partial detachment from the European models of investment protection is justified, *inter alia*, by the fact that no European State has ever signed an FTA featuring some foreign investment protection discipline (in light of the shared competence with the EU on the matter), neither has the EU (because of the past competence constraints *vis-à-vis* its Member States<sup>818</sup>). On the one hand, China desires to avoid arrangements excessively impinging on its sovereignty (or with far-reaching liberalization obligations -such as those of NAFTA-, for which China is still unprepared). On the other, the People's Republic seeks to gain privileged access to *i*) reliable supply lines for its domestic manufacturing and energy sectors, and *ii*) new markets to export its production output to. ASEAN's success in progressively establishing solid trade and investment bonds among developing States was thus felt best fit to China's needs to enter the world of comprehensive FTAs featuring an investment protection discipline. Ultimately, the expertise gathered and progresses made with the agreements with New Zealand and ASEAN contributed to solve the 18-year long negotiation deadlock for a China-Canada BIT, and paved the way for the conclusion of the China-Chile SAI.

With regard to investment protection, the China-Peru FTA, signed a few months earlier than the CAIA – and after much faster negotiations (lasting for, approximately, 10 months) –, represents more of a 'transition agreement': under a comparative perspective, the investment

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<sup>818</sup> It is actually interesting to note that the first BIT the EU received the mandate to negotiate, since the entry into force of the Lisbon Treaty, is indeed that with China. Negotiations are currently ongoing.

discipline appears still anchored to the Chinese Model BIT – beside a number of insertions derived from the US Model, and some original formulations. Nevertheless, the innovations introduced with the China-New Zealand FTA and the CAIA beforehand, as well as those featured in the China-Chile SAI and China-Canada BIT afterwards, are either more relevant or systematic. As noted, by 2009 China was either unprepared or unwilling to become party to an agreement with Peru such as that the latter enjoyed with the US since 2006.

With the conclusion, in 2012, of the BIT with Canada and the SAI with Chile, China took one step further towards the protection of foreign investment as featured in the North American models and practice in BITs (and FTAs). Under a treaty-making perspective, China's structural and textual shift toward the North American models appears thus coherent with the course started with the agreements with New Zealand and ASEAN. In the meantime, nevertheless, China continued to safeguard its core interests (*e.g.*, through the punctual definition of extent and limits of sovereign consent granted in each clause of the agreement) and traditional carefulness with respect to treaty-making (in terms of a clear and a -relatively- concise final text). Most notably, it appears that, with regard to the notion of investment, China associated to the *Salini* criteria as spelled out in the US Model BIT since 2004. This is significant, as no mention of such criteria can be found in the Canadian, European and Chinese model texts – as well as in most previous stipulations of Chile, or all those of China<sup>819</sup>.

While choosing the Canadian Model BIT as template for both negotiations (probably, in light of the long-ongoing discussions with Canada), China nevertheless insisted for an overall

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<sup>819</sup> With the exception of a first partial formulation featured in *Ad. 1* to Art. 1 of the China-Germany BIT (2003).

simplification of the final text. For instance, the number (and sequence) of provisions in the substantive obligation section is streamlined, and echoes the Chinese Model (to the point that, in the China-Chile SAI, the final structure is closer to that of the earlier BIT between the Parties). Moreover, the dispute settlement section is considerably synthesized (and this is particularly evident in the China-Canada BIT, by comparison to the Canadian Model of 2004). China also maintained key notions and wording (such as, *e.g.*, the *ratione legis* requirement in the definition of investment).

China's reliance on the previous agreement (as with the 1994 BIT with Chile) does not encroach, anyway, upon the developments and innovations brought on in the meantime. For instance, the widening of the asset-based list of investment instances, with the introduction *i*) of a new category for futures and options<sup>820</sup>; or *ii*) another devoted exclusively to debts instruments<sup>821</sup>, thus separating them from company participations<sup>822</sup>; or *iii*) the addition of the 'investment does not mean' exclusion category<sup>823</sup>. These and other modifications<sup>824</sup> appear aimed at improving the overall clarity of the text.

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<sup>820</sup> Art. 1, let. *g*) China-Chile SAI.

<sup>821</sup> Let. *c*) of the definition of investment, China-Canada BIT; Art. 1 let. *f*) China-Chile SAI.

<sup>822</sup> Listed separately under let. *b*) of both agreements (conversely, the European and Chinese models list shares and debentures in the same category (property rights)).

<sup>823</sup> Let. *k*) and *l*) of the definition on investment, China-Canada BIT; final sentence of Art. 1 China-Chile SAI.

<sup>824</sup> *e.g.*, the eight pages of 'explanatory memorandum' placed at the beginning of the China-Canada BIT goes in such direction as well, providing for some pre-preamble 'color, texture and shading' to the subsequent interpretation of the agreement.

With regard to the negotiations for an investment treaty China is currently pursuing with its two principal trade and investment partners – *i.e.*, the US and the EU –, the conclusion of China-Canada BIT and China-Chile SAI is believed to contribute at improving the chances that an actual agreement may relatively soon see the light<sup>825</sup>. It is found that, to the gradual and cautious opening to international investment protection standards on the part of China, corresponds a gradual rethinking of liberal market economies on the matter<sup>826</sup>. On the one hand, in fact, it has been noted that the US have ‘...virtually shrunk [...] every right originally accorded to the foreign investor’<sup>827</sup>, and are subject to repeated domestic calls to better regulate the resort to international investment arbitration<sup>828</sup>. On the other, the EU Parliament has recently expressed

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<sup>825</sup> In this sense also W. Shan and N. Gallagher, *China*, in C. Brown (ed.), *Commentaries on selected model investment treaties*, Oxford University Press, 2013, pp. 131-181, at p. 181.

<sup>826</sup> Cf., *e.g.*, L. Peterson, *Out of order*, in M. Waibel, A. Kaushal, K. L. Chung, C. Balchin, *The backlash against investment arbitration*, Wolters Kluwer, 2010, pp. 483-488; relevant the reference, at p. 486, to the new ‘balanced’ model BIT of Norway, and the consideration that ‘...Norway has found itself besieged on all sides as it pursue a more ‘balanced’ investment treaty model ... when the country’s trade ministry circulated a draft text for public comment, business groups and public interest groups responded warily to the compromises embodied in the draft text’. Cf., also, Tables 8 and 9, at p. 55.

<sup>827</sup> Cf., J. Alvarez, *The return of the State*, in *Minnesota Journal of International Law*, no. 20(2), 2011, p. 235.

<sup>828</sup> *e.g.*, Art. 3.G.iv US Trade Act (2002), calling, *inter alia*, for mechanisms for an appellate body to provide coherence to the interpretations of investment provisions in trade agreements (available at: <http://www.gpo.gov/fdsys/pkg/PLAW-107publ210/html/PLAW-107publ210.htm>); *e.g.*, the 2004 Uruguay-US BIT (Annex E), the 2004 Singapore-US FTA (Art. 15.19) or the 2004 Chile-US FTA (Art. 10.19) foresees such possibility, which has been subsequently institutionalized in the 2012 US Model BIT (Art. 28.10). Also, in the context of the negotiations for the US-Korea FTA, cf., *Letter on the Korea Free Trade Agreement to President Obama from 110 members of Congress*, July 22<sup>nd</sup>, 2010 (available at: <http://www.citizen.org/documents/KORUSLetterJuly2010.pdf>), and *Letter on the Korea Free Trade Agreement to President Obama from 550 organizations*, Sept. 22<sup>nd</sup>, 2010 (available at: [http://www.citizenstrade.org/pdf/Korea\\_Opposition\\_Final.pdf](http://www.citizenstrade.org/pdf/Korea_Opposition_Final.pdf)), both requesting to discard from the treaty the investor-State dispute resolution mechanism.

concerns with regard to investment arbitration (and arbitrators) in the context of the negotiations for the China-EU investment agreement<sup>829</sup>.

Consequently, it appears that, in light of the opposing yet converging trends in international investment law between China, on the one side, and the US and the EU, on the other, an agreement upon an investment treaty may be easier to reach in a near future than ever before. In light of the long-ongoing negotiations, and of the commonalities that China's latest stipulations share with the US model, a final text with the US could possibly be agreed first. As of the EU, negotiations may be slowed down by the attention currently posed by the Union's institutions on market access. In 2010, the Council of the European Union expressed the view that '...the main focus of international investment agreements should continue to be effective and ambitious investment protection and market access'<sup>830</sup>. Notwithstanding calls that the EU's newly acquired competence on the common investment policy should seek to focus on post-establishment standards of treatment and protection only (in line with the practice of the major Member States)<sup>831</sup>, the Parliament recently reaffirmed the goal of clear market access

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<sup>829</sup> See the text adopted by the plenary session of the EU Parliament on Oct. 9<sup>th</sup>, 2013, at points 41-47 (available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-411>); specifically, at point 41 the Parliament 'Expresses its deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling-out of legitimate public regulations; demands that the arbitrators appointed by the parties in the context of a dispute be independent and impartial, and that the arbitration provided follow a code of conduct based on the rules adopted by the UN Commission on International Trade Law (UNCITRAL), on those of the International Centre for Settlement of Investment Disputes (ICSID) or on any other international agreements and standards recognized and agreed to by the parties'.

<sup>830</sup> Council of the European Union, Conclusions of a comprehensive European international investment policy, Oct. 25<sup>th</sup>, 2010, at point 16; available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/117328.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf).

<sup>831</sup> A. De Luca, *The legal framework for foreign investments in the EU*, in L. E. Trackman, N. Ranieri, *Regionalism in international investment law*, Oxford University Press, 2013, pp. 120-161, at p. 159.

liberalization on the part of China<sup>832</sup>. Furthermore, it is found that the Parliament's explicit and repeated concerns on the respect of 'high' human and labor rights standards<sup>833</sup> may not contribute to speed up the negotiation process.

Nevertheless, independently of which of the two (the US or the EU) will first conclude the negotiations with China, it is believed that the economic interests at stake will result in the other following soon afterwards. In this sense, what is truly at stake is the chance to set the future standards in international investment law amongst the major capital exporters and importers of the world.

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<sup>832</sup> Cf., fn. 830, point 48.

<sup>833</sup> *Id.*, points 23, 33, 36.

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**ANNEXES AND TABLES**

<b>1. Chinese Model BITs .....</b>	<b>323</b>
<b>2. Structure of major model BITs.....</b>	<b>330</b>
<b>3. Structure of latest Chinese BITs and North American models .....</b>	<b>331</b>
<b>4. List of definitions – Chinese Investment Agreements 2008-2012 .....</b>	<b>336</b>
<b>5. Text of treaty provisions .....</b>	<b>338</b>
<b>6. Others Tables.....</b>	<b>376</b>

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## 1. Chinese Model BITs

<b>Investment</b>	
Art. 1.1 China Model '84 and '89	Art. 1.1 China Model '97
1. The term 'investment' means every kind of asset invested by investors of one CP in accordance with the laws and regulations of the other CP in the territory of the Latter, and in particular, though not exclusively, includes:	<i>[idem]</i>
(a) movable, immovable property and other property rights such as mortgages and pledges;	(a) movable and immovable property and other property rights such as mortgages, pledges <b>and similar rights</b> ;
(b) shares, stocks and any other kind of participation in companies;	(b) shares, <b>debentures</b> , stock and any other kind of participation in companies;
(c) claims to money or to any other performance having an economic value;	(c) claims to money or to any other performance having an economic value <b>associated with an investment</b> ;
(d) copyrights, industrial property, know-how and technological processes;	(d) <b>intellectual property rights, in particular</b> copyrights, <b>patents, trade-marks, trade-names</b> , technical process, know-how <b>and goodwill</b> ;
(e) concessions conferred by law, including concessions to search for or exploit natural resources.	(e) <b>business</b> concessions conferred by law <b>or under contract permitted by law</b> , including concessions to search for, <b>cultivate, extract</b> or exploit natural resources.
-	Any change in the form in which assets are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the CP in whose territory the investment has been made.

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<b>Returns</b>	
Art. 1.3 China Model '84 and '89	Art. 1.3 China Model '97
The term 'returns' means the amount yielded by investments, such as profits, dividends, interests, royalties or other legitimate income.	The term 'returns' means the amount yielded from investments, including profits, <b>capital gains</b> , royalties, <b>fees</b> and other legitimate income.

<b>Investor</b>		
Art. 1.2 China Model '84	Art. 1.2 China Model '89	Art. 1.2 China Model '97
The term 'investor' means:	The term 'investor' means:	The term 'investor' means:
in respect of the People's Republic of China:	In respect of the People's Republic of China:	
(a) natural persons who have nationality of the People's Republic of China <b>in accordance with its laws</b> ;	(a) natural persons who have nationality of the People's Republic of China;	(a) natural persons who have nationality of either CP <b>in accordance with the law of that CP</b> ;
(b) economic entities, established in accordance with the laws of the People's Republic of China and domiciles in the territory of the People's Republic of China;	(b) [idem];	(b) <b>legal entities, including companies, associations, partnerships and other organizations, incorporated or constituted under the laws and regulations of either CP and have their seats in that CP.</b>
In respect of the ____:		
(a) ____;		
(b) ____.	[idem]	

Promotion, Protection and Treatment of Investment			
	Arts. 2, 3 and 10 China Model '84	Arts. 2, 3 and 10 China Model '89	Arts. 2, 3 and 10 China Model '97
<b>Prom.</b>	2.1 Each CP shall encourage investors of the other CP to make investments in its territory and admit such investments in accordance with its law and regulations.	[idem]	[idem]
<b>FET &amp; FPS</b>	3.1 Investment and activities associated with investments of investors of either CP shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other CP.	2.2 [1 <sup>st</sup> sent] Investments made by investors of each CP shall <b>at all times</b> be accorded fair and equitable treatment and shall enjoy <b>constant protection and security</b> in the territory of the other CP.	2.2 Investments of the investors of either CP shall enjoy the constant protection and security in the territory of the other CP.  3.1 Investments of investors of each CP shall <b>all the time</b> be accorded fair and treatment in the territory of the other CP.
<b>Min. St. of Treat.</b>	-	2.2 [2 <sup>nd</sup> sent] Neither CP shall, without prejudice to its laws and regulations, <b>in any way</b> impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other CP.	2.3 Without prejudice to its laws and regulations, neither CP shall <b>take any</b> unreasonable or discriminatory measure against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other CP.
<b>UC</b>	-	2.2 [3 <sup>rd</sup> sent] Each CP shall observe any <b>obligations</b> it may have entered into with regard to investments of investors of the other CP.	10.2 Each CP shall observe any <b>commitments</b> it may have entered into with the investors of the other CP as regard to their investments.
<b>NT</b>	-	3.3 In addition to the provisions of Paras. 1 and 2 of this Article [MFN and FPS], either CP <b>shall, to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations</b> to the investments of investors of the other CP, <b>the same as</b> that accorded to its own investors.	3.2 Without prejudice to its laws and regulations, each CP <b>shall accord</b> to investments and activities associated with such investments by the investor of the other CP <b>treatment not less favorable</b> than that accorded to the investment and associated activities by its own investors.
<b>MFN</b>	3.2 The treatment and protection referred to in Para. 1 of this Article [FET & FPS] shall not be less favorable than that accorded to investments and activities associated with such investments	3.1 Neither CP shall, <b>in its territory</b> , subject investments <b>or</b> activities associated with investments of investors of the other CP to treatment less favorable than that accorded to	3.3 Neither CP shall subject investments <b>and</b> activities associated with such investments <b>by the</b> investors of the other CP to treatment less favorable than that accorded to the investments

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	of investors of a third State.	investments <b>or</b> associated activities <b>by</b> investors of <b>any</b> third State.	<b>and</b> associated activities by <b>the</b> investors of any third State.
	-	3.2 Neither CP shall, in its territory, subject <b>investors</b> of the other CP, as regards their management, maintenance, use, enjoyment or disposal of their investments or activities related with investments, to treatment less favorable than that which it accords to investors of any third State.	-
	3.3 The treatment <b>and protection</b> as mentioned in Paras. 1 and 2 of this Art. [ <b>FET, FPS and MFN</b> ] shall not include any preferential treatment accorded by the other CP to investments of investors of a third State based on custom unions, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.	3.3 The treatment as mentioned in Paras. <b>1, 2 and 3</b> of this Art. [ <b>MFN and NT</b> ] shall not include any preferential treatment accorded by the other CP to investments of investors of a third State based on custom unions, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.	<b>3.4 The provision of Para. 3 of this Art. [MFN] shall not be construed so as to oblige one CP to extend to the investors of the other CP the benefit of any treatment, preference or privilege by virtue of:</b> (a) any custom union, free trade zone, economic union and <b>any international agreement resulting in such union, or similar institutions;</b> (b) any international agreement or arrangement relating <b>wholly or mainly</b> to taxation; (c) any arrangement for facilitating <b>small scale</b> frontier trade <b>in border areas.</b>
<b>Other obl.</b>	10. If the treatment to be accorded by one CP in accordance with its laws and regulations to investments or activities associated with such investments of investors of the other CP is more favorable than the treatment provided for in this Agreement, the more favorable treatment shall be applicable.	[ <i>idem</i> ]	10.1 If the <b>legislation</b> of either CP <b>or international obligations existing at present or established hereafter between the CP</b> result in a position entitling investments by investors of the other CP to a treatment more favorable than is provided for by the Agreement, such position shall not be affected by this Agreement.

<b>Expropriation</b>		
Art. 4 China Model '84	Art. 4 China Model '89	Art. 4 China Model '97
1. Neither CP shall expropriate, nationalize or take similar measures (hereinafter referred to as 'expropriation') against investments of investors of the other CP in its territory, unless the following conditions are met:	<i>[idem]</i>	<i>[idem]</i>
(a) for the public interests; (b) under domestic legal procedure; (c) without discrimination; (d) against compensation.	(a) for the public interests; (b) under <b>appropriate</b> legal procedure; (c) without discrimination; (d) against compensation.	<i>[idem as '84]</i>
2. The compensation mentioned in Para. 1, (d) of this Art. shall be <b>equivalent to the value</b> of the expropriated investment at the time when expropriation is proclaimed, ... [see below]  ... be convertible and freely transferable. The compensation shall be paid without unreasonable delay.	2. The compensation shall be <b>calculated on the basis of the market value</b> of the investment expropriated immediately before the proclamation of the decision of expropriation <b>or before the impending expropriation becomes public knowledge.</b> <b>Where the market value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognized principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors.</b> <b>The compensation shall include interest calculated at a normal rate applicable to the currency used in the original investment from the date of expropriation to the date of payment.</b> The amount of compensation finally determined shall be paid to investors with convertible currencies and be freely transferable without <b>undue</b> delay.	2. The compensation mentioned in Para. 1 of this Art. shall be <b>equivalent to the value</b> of the expropriated investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge.  <b>The value shall be determined in accordance with generally recognized principles of valuation.</b>  The compensation shall include interest at a normal <b>commercial</b> rate from the date of expropriation until the date of payment.  The compensation shall also be made <b>without delay</b> , be <b>effectively realizable</b> and freely transferable.

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<b>Investor-State Dispute Settlement</b>	
Art. 9 China Model '84 and '89	Art. 9 China Model '97
1. Any dispute between an investor of one CP and other CP in connection with an investment in the territory of the other CP shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.	[idem]
2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the CP accepting the investment.	2. If the dispute cannot be settled through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted <b>by the choice of the investor:</b>
3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Para. 1 of this Art., it may be submitted at the request of either party to an ad hoc tribunal.	(a) to the competent court of the CP that is a party to the disputes; (b) <b>to ICSID under the ICSID Convention, done at Washington on March 16, 1965, provided that the CP involved in the dispute may require the investor to go through the domestic administrative review procedures specified by the laws and regulations of that CP before the submission to ICSID.</b>
The provision of this Para. shall not apply if the investor concerned has resorted to the procedure specified in the Para. 2 of this Art.	<b>Once the investor has submitted the dispute to the competent court of the CP concerned or the ICSID, the choice of one of the two procedures shall be final.</b>
[Para. 4: appointment of the ad hoc tribunal; see Table below*]	-
[Para. 5: procedure of the ad hoc arbitration: see Table below*]	-
6. The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on both parties to the dispute. Both CP shall commit themselves to the enforcement of the decision <b>in accordance with their respective domestic law.</b>	4. The arbitration award shall be final and binding upon the parties to the dispute. Both CP shall commit themselves to the enforcement of the award.
7. The tribunal shall adjudicate in accordance with the law of the CP to the dispute accepting the investment including its rules on the conflict of laws, the provision of this Agreement as well as the <b>generally recognized principles of international law accepted by both CP.</b>	3. The arbitration award shall be based on the law of the CP to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the <b>universally accepted</b> principles of international law.
[Para. 8: costs of the ad hoc arbitration; see Table below*]	-

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\*

Art. 9, Paras. 4, 5 and 8 (China Model '84 and '89): *ad hoc* arbitration rules for appointment, procedure, and costs.

4. Such an arbitral tribunal shall be constituted for each individual case in the following way: each party to the dispute shall appoint one arbitrator, and these two shall select a national of a third State which has diplomatic relations with the two CP as Chairman. The first two arbitrators shall be appointed within two months of the written notice for arbitration by either party to the dispute to the other, and the Chairman be selected within four months. If within the period specified above, the tribunal has not been constituted, either party to the dispute may invite the Secretary General of the ICSID to make the necessary appointments.

5. The tribunal shall determine its own procedure. However, the tribunal may, in the course of determination of procedure, take as guidance the ICSID arbitration rules.

8. Each party to the dispute shall bear the cost of its appointed member of the tribunal and of its representation in the proceedings. The cost of the appointed Chairman and the remaining costs shall be born in equal parts by the parties to the dispute.

## 2. Structure of major model BITs

Model BITs – Sequence of provisions					
Art.	PRC (any)	UK	DE	FR	IT
1	Definitions	Definitions	Definitions	Definitions	Definitions
2	Promotion and protection of investment	Promotion and protection of investment	Admission and protection of investments	Promotion and admission of investments	Promotion and protection of investments
3	Treatment of investment	National treatment and most-favored-nation provisions	National and most-favored-nation treatment	Fair and equitable treatment	National treatment and the most favored nation clause
4	Expropriation	Compensation for losses	Compensation in case of expropriation	National treatment and most favored nation treatment	Compensation for damages or losses
5	Compensation for damages and losses	Expropriation	Free transfer	Dispossession and indemnification	Nationalisation of expropriation
6	Transfer	Repatriation of investment and returns	Subrogation	Free transfer	Repatriation of capital, profits and income
7	Subrogation	Exceptions	Other provisions	Settlement of disputes between an investor and a contracting party	Subrogation
8	Settlement of disputes between contracting parties	Settlement of disputes between an investor and a host state	Scope of application	Guarantee and subrogation	Transfer procedures
9	Settlement of disputes between investors and one Contracting Party	Disputes between the contracting parties	Settlement of disputes between the contracting states	Special commitment	Settlement of disputes between the contracting parties
10	Other obligations	Subrogation	Settlement of disputes between a contracting state and an investor of the other contracting state	Settlement of disputes between Contracting Parties	Settlement of disputes between investors and contracting parties
11	Application	Application of other Rules	Relations between the contracting states	Entry into force and termination	Relation between governments
12	Consultations	Scope of Application	Registration clause	-	Application of other provisions
13	Entry into force, duration and termination	Territorial Extension	Entry into force, duration and notice of termination	-	Entry into force
14	-	Entry into Force	-	-	Duration and expiry

### 3. Structure of latest Chinese BITs and North American models

Structure of the Agreements – Comparative overview				
US Model '04/'12	CA Model '04	CA Model '06	PRC-CA BIT	CCSAI
<b>SECTION A</b>	<b>SECTION A – Definitions</b>	<b>Section A – Definitions</b>	<b>PART A</b>	<b>SECTION A – Definitions</b>
1. Definitions	1. Definitions	1. Definitions	1. Definitions	1. Definitions
-	<b>SECTION B – Substantive Obligations</b>	<b>SECTION B – Substantive Obligations</b>	<b>PART B</b>	<b>SECTION B – Investment</b>
2. Scope and Coverage	2. Scope	2. Scope	2. Scope and Application	2. Admission of Investments
3. NT	3. NT	3. Promotion of Investment	3. Promotion and Admission of Investment.	3. NT
4. MFN	4. MFN	4. NT	4. Min. St. of Treat.	4. Performance Req.
5. Min. St. of Treat.	5. Min. St. of Treat.	5. MFN	5. MFN	5. MFN
6. Expr. & Comp.	6. Senior Manag., Board of Dir. & Entry of Personnel	6. Min. St. of Treat.	6. NT	6. Min. St. of Treat.
7. Transfers	7. Performance Req.	7. Compensation for Losses	7. Senior Manag., Board of Directors & Entry of Personnel	7. Compensation for Losses
8. Performance Req.	8. Monopolies & State Enterpr.	8. Senior Manag., Board of Directors & Entry of Personnel	8. Exceptions	8. Expr. and Comp.
9. Senior Manag. & Board of Dir.	9. Res. & Except.	9. Performance Req.	9. Performance Req.	9. Transfers
10. Publication of Law and Decisions Respecting Inv.	10. General Except. <sup>834</sup>	10. Expropriation	10. Expropriation	10. Subrogation
11. Transparency	11. Health, Safety and Env. Measures	11. Transfers	11. Compensation for Losses	11. Denial of Benefits
12. Inv. & Environ.	12. Compensations for losses <sup>835</sup>	12. Transparency	12. Transfers	12. Exclusions
13. Inv. & Labor	13. Expropriation	13. Subrogation	13. Subrogation	
14. Non-conforming meas.	14. Transfer of funds	14. Taxation Meas.	14. Taxation	[cf. Art. 23]
15. Special Formalities & Info. Req.	15. Subrogation	15. Health, Safety and Environmental Meas.	15. Disputes between the CP	

<sup>834</sup> Art. 10 Canada Model '04 reproduced for the most part Art. 18 of the 2006 draft Model, merging elements from Art. 8 (Non-Conforming Measures), Art. 18 (Essential Security) and Art. 19 (Disclosure of Information) US Model BIT; an equivalent provision is featured in Art. 33 of the China-Canada BIT.

<sup>835</sup> Included into Art. 5 US Model (Minimum Standard of Treatment).

16. Non-derogation	16. Taxation Meas.	16. Corporate Social Resp.	16. Denial of Benefits	
17. Denial of Benefits	17. Prudential Meas. <sup>836</sup>	17. Reservations and Exceptions	17. Transparency of Law, Regulations and Policies	[cf. Art. 25]
18. Essential Security	18. Denial of Benefits	18. General Except.	18. Consultations <sup>837</sup>	
19. Discl. of Info.	19. Transparency	19. Denial of Benefits		
20. Financial Services <sup>838</sup>				
21. Taxation				
22. Entry into Force, Duration & Termination				
<b>SECTION B</b>	<b>SECTION C – Settlement of Disputes between an Investor and the Host Party</b>	<b>SECTION C – Settlement of Disputes between an Investor and the Host Party</b>	<b>PART C</b>	<b>SECTION C – Investor-State Dispute Sett.</b>
	20. Purpose	20. Purpose	19. Purpose	
	21. Limitation of Claims with respect to Financial Institutions	21. Claim by an Investor of a Party on its own or on behalf of an Enterprise		
	22. Claim by an Investor of a Party on its own Behalf		20. Claim by an Investor of a CP	
	23. Claim by an Investor of a Party on Behalf of an Enterprise			
	24. Notice of Intent to Submit a Claim to Arbitration			
23. Consultation and Negotiations	25. Settlement of a Claim through Consultation	22. Conditions Precedent to Submission of a Claim to Arb.		13. Consultations and Negotiations
24. Submission of a Claim to Arb.	26. Conditions Precedent to Submission of a Claim to Arb.	23. Special Rule regarding Financial Services	21. Conditions Precedent to Submission of a Claim to Arb.	14. Submission of a Claim to Arbitration
25. Consent of Each Party to Arb.	27. Submission of a Claim to Arb.	24. Submission of a Claim to Arb.	22. Submission of a Claim to Arb.	15. Consent of Each Party to Arb.

<sup>836</sup> Exception for the financial system.

<sup>837</sup> The provision is a more sophisticated version of Art. 49 Canada Model '04.

<sup>838</sup> Covering both substantial and procedural aspects; cf. Canada Model '04, Arts. 10 and 17.

26. Cond. & Limitations on Consent of Each Party	28. Consent to Arb.	25. Consent to Arb.	23. Consent to Arb.	16. Conditions and Limitations on Consent of each Party
27. Selection of Arbitrators	29. Arbitrators	26. Arbitrators	24. Arbitrators	17. Selection of Arbitrators
28. Conduct of the Arbitration	30. Constitution of a Tribunal when a Party Fails to Appoint an Arbitrator or the disputing Parties are Unable to Agree on a Presiding Arbitrator.			18. Preliminary Objections <sup>839</sup>
29. Transparency of Arb. Proceedings	31. Agreement to Appointment of Arbitrators	27. Agreement to Appointment of Arbitrators	25. Agreement to Appointment of Arbitrators	19. Governing Law
30. Governing Law	32. Consolidation	28. Consolidation	26. Consolidation	20. Consolidation of Claims
31. Interpretation of Annexes	33. Notice to the Non-Disputing Party			21. Awards
32. Expert Reports	34. Documents			
	35. Participation by the Non-Disputing Party	29. Documents to, and Participation of, the Other Party	27. The Non-Disputing CP: Docs. and Participation	
33. Consolidations	36. Place of Arb.	30. Place of Arb.		
34. Awards	37. Preliminary Objections to Jurisdiction or Admissibility			
35. Annexes and Docs.	38. Public Access to Hearing and Documents	31. Public Access to Hearing and Documents	28. Public Access to Hearings and Docs.	
36. Service of Docs.	39. Submission by a non-Disputing Party	32. Submission by a non-Disputing Party	29. Submission by a Non-Disputing Party	
	40. Governing Law	33. Governing Law	30. Governing Law	
	41. Interpretation of Annexes			
	42. Expert Reports	34. Expert Reports		
	43. Interim Meas. of Protection	35. Interim Meas. Of Protection and Final Award	31. Interim Meas. Of Protection and Final Award	
	44. Final Award			
	45. Finality and Enforcement of an Award	36. Finality and Enforcement of an Award	32. Finality and Enforcement of an Award	
	46. General	37. Receipts under Insurance or		

<sup>839</sup> Drawn from Art. 154 PRC-NZ FTA.

		Guarantee Contract <sup>840</sup>		
	47. Exclusions			
<b>SECTION C</b>	<b>SECTION D – State-to-State Dispute Settlement Procedures</b>	<b>SECTION D – State-to-State Dispute Settlement Procedures</b>	<b>PART D</b>	<b>SECTION D – Exceptions</b>
37. State-State Disp. Settl.	48. Disputes Between the Parties	38. Disputes Between the Parties	[see Art. 15]	22. Essential Security
			33. General Exceptions <sup>841</sup>	23. Taxation
			34. Exclusions	24. Measures to Safeguard the Balance of Payment
-	<b>SECTION E – Final Provisions</b>	<b>SECTION E – Final Provisions</b>	-	<b>SECTION E – Final Provisions</b>
	49. Consultations	39. Consultation & Other Actions		25. Transparency
	50. Extent of Obligations	40. Extent of Obligations		26. State-State Dispute Settl.
	51. Commission	41. Exclusions		27. Committee on Inv.
				28. Annexes & Fns.
				29. Relation between this Agreement and the FTA
				30. Amendments
[see Art. 22]	52. Application and Entry into Force	42. Application and Entry into Force	35. Entry into Force and Termination	31. Entry into Force
				32. Duration and Termination
<b>ANNEXES</b>				
ANNEX A – Cust. Int. Law.	ANNEX B.13.1 – Expropriation	ANNEX B.10 – Expropriation	ANNEX B.8 – Exceptions	ANNEX A – Expropriation
ANNEX B – Expropriation	ANNEX C.26 – Standard Waiver and Consent in Accordance with Art. 26 of this Agreement	[Not provided by the Canadian Gov., but implied in the text of the Model]	ANNEX B.10 – Expropriation	ANNEX B – Transfers
ANNEX C – Service of Docs. on a Party	ANNEX C.39 – Submission by Non-Disputing Parties		ANNEX B.12 – Transfers and Exchange Formalities	ANNEX C – Public Debt Chile
ANNEX D – Possibility of a Bilateral Appellate	ANNEX I – Reservation for Existing Measures		ANNEX C.21 – Conditions Precedent to	ANNEX D – End of BIT

<sup>840</sup> Featured for the first time in the 1996 Chile-Canada FTA, at Art. G-38, but otherwise usually not present in the final text of Canada investment agreements.

<sup>841</sup> Cf., Art. 10 Canada Model '04 and Art. 18 Canada Model '06.

Mechanism	and Liberalization Commitments		Submission of a Claim to Arb.: Party-Specific Req.	
	ANNEX II – Reservations for Future Measures		ANNEX C.29 – Submission by Non- Disputing Parties	
	ANNEX III – Exceptions from MFN		ANNEX D.34 – Exclusions	
	ANNEX IV – Exclusions from Dispute Settlement			

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#### 4. List of definitions – Chinese Investment Agreements 2008-2012

List of definitions <sup>842</sup>						
US Model '04 (36 items)	PRC-NZ FTA '08 (6 items)	ACIA '09 (11 items)	AANZFTA '09 (9 items)	CAIA '09 (12 items)	PRC-CA BIT '12 (22 items)	CCIA '12 (18 items)
-	-	-	-	AEM	-	-
Central level of Government	-	-	-	-	-	-
Centre	-	-	-	-	-	= US
Claimant	-	-	-	-	-	= US
-	-	-	-	-	-	Commission
-	-	-	-	-	-	Committee
-	-	-	-	-	Confidential information	-
Covered investment	-	US +	US +	-	= US (+/-)	-
-	-	-	-	-	Disputing CP	-
-	-	-	-	-	Disputing investor	-
Disputing parties	-	-	-	-	-	= US
Disputing party	-	-	-	-	≠	= US
Enterprise	= US	-	-	-	~ US (+)	~ US (+)
Enterprise of a Party	~ US	-	-	-	-	-
Existing	-	-	-	-	~ <sup>843</sup> US	-
-	-	-	-	-	Financial service	-
-	-	-	-	-	Financial institution	-
-	-	-	-	-	-	Free Trade Agreement
Freely usable currency	-	= US (+)	= US (+)	= US (+)	-	= US
GATS	-	-	-	= US	-	-
Government procurement	-	-	-	-	-	-
ICSID Additional Facility Rules	-	-	-	-	= US	= US
-	-	-	-	-	ICSID	-
ICSID Convention	-	-	-	-	= US	= US
-	-	-	-	-	IP rights	-
Investment	≠	≠	≠	≠	≠	≠
Investment agreement	-	-	-	-	-	-
Investment authorization	-	-	-	-	-	-
Investor	-	≠	-	-	-	≠
Investor of a non-Party	-	-	-	-	-	-
Investor of a Party	~ US = AANZ	~ <sup>844</sup> PRC- NZ/AANZ	~US = PRC-NZ	~ <sup>845</sup> PRC-NZ/ AANZ	~ US	-

<sup>842</sup> Symbols: '=': identical definition; '≠': different definition; '+': enriched definition; '-': missing definition; '(+/-)': minor variations; '~': similar wording.

<sup>843</sup> Labeled 'existing measure'; wording equivalent but not identical.

<sup>844</sup> Labeled 'investor'; missing 'seeks to make' (exclusion of pre-establishment protection).

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					Investment of an investor of a CP	-
Juridical Person	-	YES	= ACIA (-)	ACIA +	-	-
-	-	-	Juridical person of a Party	-	-	-
Measure	-	US +	= ACIA <sup>846</sup>	ACIA +	US +	ACIA +
-	-	-	-	MOFCOM	-	-
National	-	-	-	-	-	= US
-	≠ <sup>847</sup>	Natural Person	= ACIA	= ACIA <sup>848</sup>	-	-
-	-	Newer ASEAN Member States	-	-	-	-
New York Convention	-	-	-	-	-	-
Non-disputing Party	-	-	-	-	-	-
Person	-	-	-	-	-	-
Person of a Party	-	-	-	-	-	-
Protected information	-	-	-	-	-	-
Regional level of government	-	-	-	-	-	-
Respondent	-	-	-	-	-	= US
-	-	-	Return	≠ <sup>849</sup>	≠	-
Secretary General	-	-	-	-	-	= US
-	-	-	-	SEOM	-	-
State enterprise	-	-	-	-	-	-
-	-	-	-	-	-	Supplementary Agreement on Trade in Services
Territory	-	-	-	-	= US	-
-	-	-	-	-	Tribunal	= PRC-CA BIT
TRIP Agreement	-	-	-	-	-	-
UNCITRAL Arbitration Rules	-	-	-	-	= US	= US
-	-	WTO	-	-	-	-
WTO Agreement	-	= US	-	= US	= US	-

<sup>845</sup> Missing 'seeks to make' (exclusion of pre-establishment protection).

<sup>846</sup> Identical wording framed into two different voices: 'Measure' and 'Measure by a Party'.

<sup>847</sup> Labeled 'Natural Person of a Party' and with different content.

<sup>848</sup> Labeled 'Natural person of a Party'.

<sup>849</sup> Same as UK Model BIT.

## 5. Text of treaty provisions

<u>Application</u>				
Art. 11 PRC Model '84/'89	Art. 11 PRC Model '97	Art. 12 UK '06	Art. 8 DE '08	Art. 12 PRC-DE '03
<p>This Agreement shall apply to investments which are made prior or after its entry into force by investors of either CP in accordance with the laws and regulations of the other CP in the territory of the Latter.</p>	<p>This Agreement shall apply to investments made prior or after its entry into force by investors of one CP in the territory of the other CP in accordance with the laws and regulations of the CP concerned, but not apply to the disputes arose before its entry into force.</p>	<p>This Agreement shall apply to all investments, whether made before or after its entry into force, but shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force.</p>	<p>This Treaty shall also apply to investments made prior to its entry into force by investors of either CP in the territory of the other CP consistent with the latter's legislation.</p>	<p><i>[idem as PRC '84/'89]</i></p>

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<b>Investment</b>				
Art. 1.1 PRC '84 / '89	Art. 1.1 PRC '97	Art. 1(a) UK '06 <sup>850</sup>	Art. 1.1 DE '08 <sup>851</sup>	Art. 1.1 PRC-DE '03
1.1 The term 'investment' means every kind of asset invested by investors of one CP in accordance with the laws and regulations of the other CP in the territory of the Latter, and in particular, though not exclusively, includes:	[idem]	1(a) 'investment' means every kind of asset, owned or controlled <sup>852</sup> directly or indirectly, and in particular, though not exclusively, includes:	1.1 the term 'investments' comprises every kind of asset which is directly or indirectly invested by investors of one CP in the territory of the other CP. The investments include in particular:	1.1 the term 'investment' means every kind of asset invested directly or indirectly by investors of one CP in the territory of the other CP, and in particular, though not exclusively, includes:
(a) movable, immovable property and other property rights such as mortgages and pledges;	(a) movable and immovable property and other property rights such as mortgages, pledges and similar rights;	(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;	(a) movable and immovable property as well as any other rights <i>in rem</i> , such as mortgages, liens and pledges;	(a) [idem PRC '84]
(b) shares, stocks and any other kind of participation in companies;	(b) shares, debentures, stock and any other kind of participation in companies;	(ii) shares in and stock and debentures of a company and any other form of participation in a company;	(b) shares of companies and other kinds of interest in companies;	(b) shares, debentures, stock and any other kind of interest in companies;
(c) claims to money or to any other performance having an economic value;	(c) claims to money or to any other performance having an economic value associated with an investment <sup>853</sup> ;	(iii) claims to money or to any performance under contract having a financial value;	(c) claims to money which has been used to create an economic value or claims to any performance having an economic value;	(c) [idem to PRC '97]

<sup>850</sup> Art. 1.a of the 1993 UK Model BIT is identical to that featured in the 2006 Model (with the sole exception of a more synthetic chapeau); for the sake of space and clarity, thus, the latter only is featured in the Table.

<sup>851</sup> Art. 1.1 of the 1991 German Model 1991 is contained in that, more articulated, of the 2008 Model (only differences being a more synthetic chapeau, a simpler listing for the IP-related items, and the addition of the last sentence); for the sake of space and clarity, thus, the latter only is featured in the Table.

<sup>852</sup> Art. 1 US 1992 Model: '...investment in the territory of one Party that an investor owned or controlled, directly or indirectly...?'

<sup>853</sup> As in Art. 1.a.iii of the 1992 US Model BIT.

(d) copyrights, industrial property, know-how and technological processes;	(d) intellectual property rights, in particular copyrights, patents, trademarks, trade-names, technical process, know-how and good-will;	(iv) intellectual property rights, goodwill, technical processes and know-how;	(d) intellectual property rights, in particular copyrights and related rights, patents, utility model patents, industrial designs, trademarks, plant variety rights;  (e) trade-names, trade and business secrets, technical processes, know-how, and goodwill;	(d) intellectual property rights, in particular copyrights, patents and industrial designs, trademarks, trade-names, technical processes, trade and business secrets, know-how and good-will; <sup>854</sup>
(e) concessions conferred by law, including concessions to search for or exploit natural resources.	(e) business concessions conferred by law or under contract permitted by law <sup>855</sup> , including concessions to search for, cultivate, extract or exploit natural resources.	(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.	(f) business concessions under public law, including concessions to search for, extract or exploit natural resources;	(e) [idem to PRC '97] <sup>856</sup>
-	Any change in the form in which assets are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the CP in whose territory the investment has been made.	A change in the form in which assets are invested does not affect their character as investments and the term 'investment' includes all investments, whether made before or after the date of entry into force of this Agreement.	Any alteration of the form in which assets are invested shall not affect their classification as investment. In the case of indirect investments, in principle only those indirect investments shall be covered which the investor realizes via a company situated in the other CP.	Any change in the form in which assets are invested does not affect their character as investments.

<sup>854</sup> Such wording has been reused, e.g., in the 2005 China-Portugal BIT (while the 2001 China-Netherlands BIT makes use of the wording of the 1997 Model).

<sup>855</sup> Art. 1.a.v 1991 US Model BIT: 'any right conferred by law or contract, and any licenses and permits pursuant to law'.

<sup>856</sup> Employed also, e.g., in the Netherlands and Finland BIT.

<b>Returns</b>				
Art. 1.3 PRC '84 & '89	Art. 1.3 PRC '97 (& '82 PRC-Sweden)	Art. 1(b) UK '06 <sup>857</sup>	Art. 1.2 DE '08	Art. 1.3 PRC-DE '03
1.3 The term 'returns' means the amount yielded by investments, such as profits, dividends, interests, royalties or other legitimate income.	1.3 The term 'returns' means the amount yielded from investments, including profits, dividends, interests, capital gains, royalties, fees and other legitimate income.	1(b) 'returns' means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;	1.2 The term 'returns' means the amounts yielded by an investment for a definite period, such as profit, dividends, interest, royalties or fees;  2.4 Returns from an investment, as well as returns from reinvested returns, shall enjoy the same protection as the original investment.	1.3 <i>[idem as PRC '97]</i>  <i>Ad Art. 1, let. c: Returns from the investment and from reinvestments shall enjoy the same protection as the investment.</i>

<sup>857</sup> The definition is unchanged since the first BIT with Egypt, in 1975.

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Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments:  
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Investment (and return)							
Art. 1.1 PRC '84 and '89	Art. 1.1 PRC '97	Art. 1.1 PRC-DE '03	Art. 1(a) UK '06	Art. 1 US '04	Art. 135 PRC-NZ '08	Art. 4 ACIA '09	Art. 1 CAIA '09
1.1 The term 'investment' means every kind of asset invested by investors of one CP in accordance with the laws and regulations of the other CP in the territory of the latter, and in particular, though not exclusively, includes:	[idem]	1.1 the term 'investment' means every kind of asset invested directly or indirectly by investors of one CP in the territory of the other CP, and in particular, though not exclusively, includes:	1(a) 'investment' means every kind of asset, owned or controlled <sup>858</sup> directly or indirectly, and in particular, though not exclusively, includes:	'investment' means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:	Investment means every kind of asset invested, directly or indirectly, by the investors of a Party in the territory of the other Party including, but not limited to, the following:	4.c "investment" means every kind of asset, owned or controlled, by an investor, including but not limited to the following:	1.d "investment" means every kind of asset invested by the investors of a Party in accordance with the relevant laws, regulations and policies of another Party in the territory of the latter including, but not limited to, the following:
(a) movable, immovable property and other property rights such as mortgages and pledges;	(a) movable and immovable property and other property rights such as mortgages, pledges and similar rights <sup>859</sup> ;	(a) [idem PRC '84]	(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;	(a) an enterprise;  (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.	(a) [idem as PRC model '84]	(i) movable and immovable property and other property rights such as mortgages, liens or pledges;  *[identical structure and wording of UK Model, without the term 'liens']	(i) [idem UK Model]

<sup>858</sup> Art. 1 US '04-'12 Models: '...that an investor owns or controls, directly or indirectly...'; Art. 1 Canada Model: '...investment owned or controlled directly or indirectly...'.  
 [The text in the original image is highlighted in green and grey, indicating the specific terms being compared.]

<sup>859</sup> The wording 'similar right' is taken from the US Model – despite from a different context (see letts. (e) and (g) of the definition of investment).

(b) shares, stocks and any other kind of participation in companies;	(b) shares, debentures, stock and any other kind of participation in companies;	(b) shares, debentures, stock and any other kind of interest in companies;	(ii) shares in and stock and debentures of a company and any other form of participation in a company;	(b) shares, stock, and other forms of equity participation in an enterprise;  (c) bonds, debentures, other debt instruments, and loans  (d) futures, options, and other derivatives;	(b) [idem PRC Model '97]	(ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived therefrom;	(ii) shares, stocks and debentures of juridical persons or interests in the property of such juridical persons;
(c) claims to money or to any other performance having an economic value;	(c) claims to money or to any other performance having an economic value associated with an investment;	(c) [idem to PRC '97]	(iii) claims to money or to any performance under contract having a financial value;		(c) claims to money or to any other contractual performance having an economic value associated with an investment;	(iv) claims to money or to any contractual performance related to a business and having financial value;	(v) [idem UK Model]
(d) copyrights, industrial property, know-how and technological processes;	(d) intellectual property rights, in particular copyrights, patents, trademarks, trade-names, technical process, know-how and good-will;	(d) intellectual property rights, in particular copyrights, patents and industrial designs, trademarks, trade-names, technical processes, trade and business secrets, know-how and good-will; <sup>860</sup>	(iv) intellectual property rights, goodwill, technical processes and know-how;	(f) intellectual property rights	(d) [idem PRC-DE]	(iii) intellectual property rights which are conferred pursuant to the laws and regulations of each MS;	(iii) intellectual property rights, including rights with respect to copyrights, patents and utility models, industrial designs, trademarks and service marks, geographical indications, layout designs of integrated circuits, trade names, trade secrets, technical processes, know-

<sup>860</sup> The exact wording has been reused, e.g., in the 2005 China-Portugal BIT (while the 2001 China-Netherlands BIT makes use of the wording of the 1997 Model).

							how and goodwill; <sup>861</sup>
(e) concessions conferred by law, including concessions to search for or exploit natural resources.	(e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.	(e) [ <i>idem to PRC '97</i> ] <sup>862</sup>	(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.	(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;  (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;	(e) concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources;  *[as PRC '97, but missing 'business']  (g) [part] ... any licences and permits pursuant to law;	(vi) business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources.  (v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;	(iv) business concessions conferred by law, or under contract, including concessions to search for, cultivate, extract, or exploit natural resources;  *[as PRC '97, but missing 'permitted by law']
					(f) bonds, including government issued bonds, debentures, loans and other forms of debt, and rights derived therefrom;		

<sup>861</sup> The norm is based on the PRC-DE BIT provision, from which it removes 'business secrets', adds 'utility models' (*ex DE Model*), and other original elements.

<sup>862</sup> Employed also, *e.g.*, in the Netherlands and Finland BIT.

					(g) [part] any right conferred by law or under contract [...]		
-	Any change in the form in which assets are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the CP in whose territory the investment has been made.	Any change in the form in which assets are invested does not affect their character as investments.	A change in the form in which assets are invested does not affect their character as investments and the term 'investment' includes all investments, whether made before or after the date of entry into force of this Agreement.	-	[idem PRC-DE]	Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment.	[...] any alteration of the form in which assets are invested or reinvested shall not affect their character as investments.
1.3 The term 'returns' means the amount yielded by investments, such as profits, dividends, interests, royalties or other legitimate income.	1.3 The term 'returns' means the amount yielded from investments, including profits, dividends, interests, capital gains, royalties, fees and other legitimate income.	1.3 [idem as PRC '97]  Ad Art. 1, let. c: Returns from the investment and from reinvestments shall enjoy the same protection as the investment.	1(b) 'returns' means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;	-	-	The term "investment" also includes amounts yielded by investments, in particular, profits, interest, capital gains, dividend, royalties and fees.	For the purpose of the definition of investment in this Sub-paragraph, returns that are invested should be treated as investments and [...]

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments: a comparative perspective, from the model BITs to the latest stipulations"

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<b>Investment (and return)</b>					
	<b>Art. 1 US '04</b>	<b>Art. 135 PRC-NZ FTA '08</b>	<b>Art. 4 ACIA '09</b>	<b>Art. 2(c) AANZFTA '09</b>	<b>Art. 1 CAIA '09</b>
<b>Covered investment</b>	'covered investment' means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.	-	4.a 'covered investment' means, with respect to a Member State, an investment in its territory of an investor of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing by the competent authority of a Member State;	2.a covered investment means with respect to a Party, an investment in its territory of an investor of another Party, in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and which, where applicable, has been admitted by the host Party, subject to its relevant laws, regulations and policies;	-
<b>Chapeau</b>	'investment' means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:	Investment means every kind of asset invested, directly or indirectly, by the investors of a Party in the territory of the other Party including, but not limited to, the following:  <i>*[as in PRC-DE, except dark green]</i>	4.c 'investment' means every kind of asset, owned or controlled, by an investor, including but not limited to the following:	2.c <i>[idem ACIA]</i>	1.d 'investment' means every kind of asset invested by the investors of a Party in accordance with the relevant laws, regulations and policies of another Party in the territory of the latter including, but not limited to, the following:  <i>*[as in PRC Model '84, except 'policies' and dark green]</i>
<b>Property rights</b>	(a) an enterprise;  (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.	(a) <i>[idem as PRC model '84, '97 and PRC-DE]</i>	(i) <i>[idem UK Model]</i>	(i) <i>[idem UK Model]</i>	(i) <i>[idem UK Model]</i>
<b>Company participation</b>	(b) shares, stock, and other forms of equity participation in an enterprise;	(b) <i>[idem PRC Model '97]</i>	(ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived	(ii) <i>[idem ACIA, without 'or interest']</i>	(ii) shares, stocks and debentures of juridical persons or interests in the property of such juridical

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments: a comparative perspective, from the model BITs to the latest stipulations"

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		*[and as in PRC-DE, with 'participation' in lieu of 'interest']	therefrom;		persons;
<b>Contractual rights</b>	-	(c) claims to money or to any other contractual performance having an economic value associated with an investment;  *[as in PRC '97 and PRC-DE, plus 'contractual']  (g) [part] any right conferred by law or under contract [...]	(iv) claims to money or to any contractual performance related to a business and having financial value; [fn3]  [fn3*] For greater certainty, investment does not mean claims to money that arise solely from: (a) commercial contracts for sale of goods or services; or (b) the extension of credit in connection with such commercial contracts.  *[Drawn from the Canada Model, featured in PRC-CA BIT]	(iv) <i>idem ACIA</i>	(v) <i>idem UK Model</i>
<b>IP rights</b>	(f) intellectual property rights	(d) <i>idem PRC-DE</i>	(iii) intellectual property rights which are conferred pursuant to the laws and regulations of each MS;	(iii) intellectual property rights which are recognized pursuant to the laws and regulations of each Party and goodwill;	(iii) intellectual property rights, including rights with respect to copyrights, patents and utility models, industrial designs, trademarks and service marks, geographical indications, layout designs of integrated circuits, trade names, trade secrets, technical processes, know-how and goodwill;  *[based on PRC-DE, without 'business secret' but with 'utility models']
<b>Concessions</b>	(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;	(e) concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract	(vi) business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources.	(vi) <i>idem ACIA</i>	(iv) business concessions conferred by law, or under contract, including concessions to search for, cultivate, extract, or exploit natural resources;

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments: a comparative perspective, from the model BITs to the latest stipulations"

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		or exploit natural resources;  *[as PRC '97 and PRC-DE, but missing 'business']			*[as PRC '97, but missing 'permitted by law']
	(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;	(g) [part] ... any licences and permits pursuant to law;	(v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;	(v) <i>idem</i> ACIA	-
<b>Debt instruments [and derivatives]</b>	(c) bonds, debentures, other debt instruments, and loans  (d) futures, options, and other derivatives;	(f) bonds, including government issued bonds, debentures, loans and other forms of debt, and rights derived therefrom;	-	-	-
<b>Change of form</b>	-	<i>idem</i> PRC-DE  *[as in PRC '97, first sent.]	Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment;  *[as in PRC-DE, plus 'or reinvested']	[...] <i>idem</i> CAIA	[...] any alteration of the form in which assets are invested or reinvested shall not affect their character as investments;
<b>Reinvested returns</b>	-	-	-	[...] <i>idem</i> CAIA	For the purpose of the definition of investment in this Sub-para., returns that are invested should be treated as investments [...]
<b>Returns as investment</b>	-	-	The term 'investment' also includes amounts yielded by investments, in particular, profits, interest, capital gains, dividend, royalties and fees.	-	-

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Investment – China-Canada BIT				
	Art. 1 US Model '04/'12	Art. 1 Canada Model '04	Art. 1 Canada draft Model '06	Art. 1 PRC-CA '12
<b>Covered investment</b>	“covered investment” means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.	covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter;	“covered investment” means, with respect to a Party, an investment in its territory that is <i>owned or controlled, directly or indirectly</i> <sup>863</sup> , by an investor of the other Party existing on the date of entry into force of this Agreement, as well as an investment made or acquired thereafter;	“covered investment” means, with respect to a CP, an investment in its territory of an investor of the other CP existing on the date of entry into force of this Agreement or an investment of an investor <i>admitted in accordance with its laws and regulations</i> thereafter, and which involves the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk;
	“investment” means	investment means:	“investment” means:	1. “investment” means:
<b>Chapeau</b>	every asset that an investor <i>owns or controls, directly or indirectly</i> , that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:	-	-	-
<b>Company participation</b>	(a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives;	(I) an enterprise; (II) an equity security of an enterprise; (III) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three	(a) an enterprise; (b) a share, stock or other form of equity participation in an enterprise; (c) a bond, debenture or other debt instrument of an enterprise;	(a) an enterprise; (b) shares, stocks and other forms of equity participation in an enterprise; (c) bonds, debentures, and other debt instruments of an enterprise;

<sup>863</sup> The insertion – featuring a wording drawn from the chapeau of the UK Model, and equivalent to that featured in the chapeau of the US Model – finds nevertheless an original placement in the draft Model, in the definition of ‘covered investment’.

		<p>years, but does not include a debt security, regardless of original maturity, of a state enterprise;</p> <p>(IV) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;</p> <p>(V) (i) notwithstanding subparagraph (III) and (IV) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located, and (ii) a loan granted by or debt security owned by a financial institution, other than a loan to or debt security of a financial institution referred to in (i), is not an investment; for greater certainty: (iii) a loan to, or debt security issued by, a Party or a state enterprise thereof is not an investment; and (iv) a loan granted by or debt security owned by a cross-border financial service provider, other than a loan to or debt security issued by a financial institution, is an investment if such loan or debt security meets the criteria for investments set out elsewhere in this Article;</p> <p>(VI) an interest in an enterprise that</p>	<p>(d) a loan to an enterprise;</p> <p>(e) notwithstanding subparagraphs (c) and (d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located;</p> <p>(f) an interest in an enterprise that</p>	<p>(d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years;</p> <p>(e) notwithstanding sub-paragraphs (c) and (d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the CP in whose territory the financial institution is located;</p> <p>(f) an interest in an enterprise that entitles the owner to share in the</p>
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		entitles the owner to share in income or profits of the enterprise;  (VII) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (III) (IV) or (V);	entitles the owner to share in income or profits of the enterprise;  (g) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;	income or profits of the enterprise;  (g) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;
<b>Concessions</b>	(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;  (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and	(IX) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under  (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or  (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;	(h) an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory, such as under:  (i) a contract involving the presence of an investor's property in the territory of the Party, including a turnkey or construction contract, or a concession, or  (ii) a contract where remuneration depends substantially on the production, revenues or profits of an enterprise;	(h) interests arising from the commitment of capital or other resources in the territory of a CP to economic activity in such territory, such as under  (i) contracts involving the presence of an investor's property in the territory of the CP, including turnkey or construction contracts or concessions to search for and extract oil and other natural resources, or  (ii) contracts where remuneration depends substantially on the production, revenue or profits of an enterprise;
<b>IP rights</b>	(f) intellectual property rights;	<sup>864</sup>	(i) intellectual property rights;	(i) intellectual property rights;
<b>Property rights</b>	(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.	(VIII) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes;	(j) any other tangible or intangible, moveable or immovable, property and related property rights acquired in the expectation of or used for the purpose of economic benefit or	(j) any other tangible or intangible, moveable or immovable, property and related property rights acquired or used for business purposes;

<sup>864</sup> Contained only in the list of definitions: "Intellectual property rights means copyright and related rights, trademark rights, rights in geographical indications, rights in industrial designs, patent rights, rights in layout designs of integrated circuits, rights in relation to protection of undisclosed information, and plant breeders' rights".

			other business	
Exclusions		<p>but investment does not mean:</p> <p>(X) claims to money that arise solely from</p> <p>(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or</p> <p>(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraphs (IV) or (V); and</p> <p>(XI) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (I) through (IX);</p>	<p>but "investment" does not mean:</p> <p>(k) a claim to money that arises solely from:</p> <p>(i) a commercial contract for the sale of a good or service by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or</p> <p>(ii) the extension of credit in connection with a commercial transaction, such as trade financing; or</p> <p>(l) any other claim to money, that does not involve the kinds of interests set out in subparagraphs (a) to (j);</p>	<p>but "investment" does not mean:</p> <p>(k) claims to money that arise solely from</p> <p>(i) commercial contracts for the sale of goods or services, or</p> <p>(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by sub-paragraph (d); or</p> <p>(l) any other claims to money, that do not involve the kinds of interests set out in sub-paragraphs (a) to (i);</p>

Investment – China-Chile SAI			
	Art. 1.1 PRC '97	Art. 1 US Model '04/'12	Art. 1 CCSAI '12
<b>Covered investment</b>	-	“covered investment” means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.	-
<b>Chapeau</b>	1.1 The term ‘investment’ means every kind of asset invested by investors of one CP in accordance with the laws and regulations of the other CP in the territory of the Latter, and in particular, though not exclusively, includes:	“investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:	investment means every kind of asset that an investor owns or controls, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, invested by investors of one Party in accordance with the laws and regulations of the other Party in the territory of the latter, and in particular, though not exclusively, includes:
<b>Property rights</b>	(a) movable and immovable property and other property rights such as mortgages, pledges and similar rights;	(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.	(a) tangible or intangible, movable, immovable property and related property rights such as mortgages, liens, leases and pledges;
<b>Company participation</b>	(b) shares, debentures, stock and any other kind of participation in companies;	(a) an enterprise;  (b) shares, stock, and other forms of equity participation in an enterprise;	(b) shares, debentures, stock and any other kind of participation in enterprises;  <i>*[as in PRC Model '97, with 'enterprises' in lieu of 'companies']</i>
<b>Contractual rights</b>	(c) claims to money or to any other performance having an economic value associated with an investment;	-	(c) <i>[idem PRC Model '97]</i> [fn.1];  <i>[fn.1*]</i> For greater certainty, investment does not include loans issued by one Party to the other Party.  <i>*[Extracted from para. (V)(iii) Canada Model; similar to Non-Conforming Measure Art. 14.5 US Model]</i>
<b>IP rights</b>	(d) intellectual property rights, in particular copyrights, patents, trademarks, trade-names, technical process, know-how and good-will;	(f) intellectual property rights;	(d) intellectual property rights;

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<b>Concessions</b>	(e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.	(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;  (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;	(e) concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;  *[as in PRC Model '97, without 'business' and 'permitted by law']
<b>Debt instruments</b>	['debentures' in (b)]	(c) bonds, debentures, other debt instruments, and loans;	(f) bonds, loans, and other debt instruments
<b>Derivatives</b>	-	(d) futures, options, and other derivatives	(g) futures, options, and other derivatives;
<b>Exceptions</b>	-	-	but investment does not mean an order or judgment entered in a judicial or administrative action;  *[idem fn.3 to cat.(g) US Model]
<b>Change of form clause</b>	Any change in the form in which assets are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the CP in whose territory the investment has been made.	-	-

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Promotion of Investments			
PRC '84/'89/'97	UK '06	DE '08	PRC-DE '03
2.1 Each CP shall encourage investors of the other CP to make investments in its territory and admit such investments in accordance with its law and regulations.	2.1 Each CP shall encourage and create favourable conditions for nationals or companies of the other CP to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.	2.1 Each CP shall in its territory promote as far as possible investments by investors of the other CP and admit such investments in accordance with its legislation.	2.2 <i>idem Art. 2.1 PRC '84</i>

Indirect investment – express coverage <sup>865</sup>			
Ad 1b to Art.1 PRC-DE '03	Art. 1 PRC-ES '05	Art. 1 PRC-SC '07	Art. 135 PRC-NZ FTA '08
“Invested indirectly” means invested by an investor of one CP through a company which is <b>fully or partially owned</b> by the investor and having its seat in the territory of the other CP.	1.1 <i>idem PRC Model '84</i>  1.2 Investment made in the territory of one CP by any company of that same CP which is actually <b>owned or controlled</b> by investors of the other CP shall likewise be considered as investment of investors of the latter CP if they have been made in accordance with the laws and regulation of the former CP.	1.2 ‘Invested indirectly’ includes:  1) <b>invested by an investor of one CP through a company which is fully or partially owned</b> by the investor and having its seat in the territory of the other CP, and  2) <b>investments of legal persons of a third State which are owned or controlled</b> by investor of one CP and which have been in the territory of the other CP in accordance with the laws and regulations of the latter. The relevant provisions of this Agreement shall apply to such investments only when such third State has no right or abandons the right to claim compensation after the investments have been expropriated by the other CP. <sup>866</sup>	Investment means every kind of asset invested, <b>directly or indirectly</b> , by the investors of a Party in the territory of the other Party including, but not limited to, the following: [...]  Investment includes <b>investments of legal persons of a third country which are owned or controlled</b> by investors of one Party and which have been made in territory of the other Party. The relevant provisions of this Agreement shall apply to such investments only when such third country has no right or abandons the right to claim compensation after the investments have been expropriated by the other Party.

<sup>865</sup> Parts highlighted with the same color are identical.

<sup>866</sup> Anti-Barcelona Traction clause.

<b>Investor</b>				
Art. 1.2 PRC '84	Art. 1.2 PRC '97	Art. 1(c), (d) UK '06	Art. 1.3 DE '08	Art. 1.2 PRC-DE '03
1.2 The term 'investor' means:	1.2 The term 'investor' means:	1(c) 'nationals' means: 1(d) 'companies' means:	1.3 The term 'investor' means:	1.2 <i>[idem PRC '84]</i>
<p><b>in respect of PRC:</b></p> <p>(a) <b>natural persons</b> who have nationality of PRC <b>in accordance with its laws;</b></p> <p>(b) <b>economic entities</b>, established in accordance with the laws of PRC and domiciles in the territory of PRC;</p>	<p>(a) <b>natural persons</b> who have nationality of either CP <b>in accordance with the laws</b> of that CP;</p> <p>(b) legal entities, <b>including companies, associations, partnerships and other organizations, incorporated or constituted under the laws and regulations of either CP and have their seats in that CP.</b></p>	<p>(c.i) in respect of the UK: physical persons deriving their status as UK nationals from the law in force in the UK;</p> <p>(d.i) in respect of the UK: corporations, firms and associations <b>incorporated or constituted under the law</b> in force in any part of the UK or in any territory to which this Agreement is extended [...];</p>	<p>(a) <b>in respect of DE:</b></p> <p>■ any <b>natural person</b> who is a German within the meaning of the Basic Law [...];</p> <p>■ any juridical person and any commercial or other company or association with or without legal personality which is founded pursuant to the law of DE [...];</p> <p>which in the context of entrepreneurial activity is the owner, possessor or shareholder of an investment in the territory of the other CP, <b>irrespective of whether or not the activity is directed at profit;</b></p>	<p>(b) <i>[idem PRC '84];</i></p> <p>■ <b>[idem PRC '84],</b></p> <p>■ <b>economic entities, including companies, corporations, associations, partnerships and other organizations, incorporated and constituted under the laws and regulations of and with their seats in PRC,</b> irrespective of whether or not for profit and whether their liabilities are limited or not;</p>
<b>In respect of ____:</b> (a) ____; (b) ____.		(c.ii) in respect of ____; (d.ii) in respect of ____.	(b) <b>In respect of ____:</b> - ____; - ____.	(a) <i>[idem PRC '84]</i> - [...]; - [...].

National Treatment					
PRC '84	PRC '89	PRC '97	UK '06	DE '08	PRC-DE '03
-	3.3 In addition to the provisions of Paras. 1 and 2 of this Art. [MFN and FPS], either CP shall, to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investments of investors of the other CP, the same as that accorded to its own investors.	3.2 Without prejudice to its laws and regulations, each CP shall accord to investments and activities associated with such investments by the investor of the other CP treatment not less favorable than that accorded to the investment and associated activities by its own investors.	3.1 [part] Neither CP shall in its territory subject investments or returns of nationals or companies of the other CP to treatment less favourable than that which it accords to investments or returns of its own nationals or companies [...]	3.1 [part] Neither CP shall in its territory subject investments owned or controlled by investors of the other CP to treatment less favourable than it accords to investments of its own investors [...]	3.2 Each CP shall accord to investments and activities associated with such investments by the investors of the other CP treatment not less favourable than that accorded to the investments and associated activities by its own investors.  Ad Art. 3: The following shall more particularly, though not exclusively, be deemed 'activity' within the meaning of Art. 3.2: the management, maintenance, use, enjoyment and disposal of an investment.
-	-	-	3.2 [part] Neither CP shall in its territory subject nationals or companies of the other CP, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or [...]	3.2 [part] Neither CP shall in its territory subject investors of the other CP, as regards their activity in connection with investments, to treatment less favourable than it accords to its own investors [...]	-

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<b>Most Favored Nation treatment</b>					
PRC '84	PRC '89	PRC '97	UK '06	DE '08	PRC-DE '03
<p>3.2 The treatment and protection referred to in Para. 1 of this Art. [FET &amp; FPS] shall not be less favorable</p> <p>than that accorded to investments and activities associated with such investments of investors of a third State.</p>	<p><b>3.1</b> Neither CP shall, <b>in its territory</b>, subject investments or activities associated with investments of investors of the other CP to treatment less favorable</p> <p>than that accorded to investments or associated activities by investors of any third State.</p>	<p><b>3.3</b> Neither CP shall subject investments and activities associated with such investments by the investors of the other CP to treatment less favorable</p> <p>than that accorded to the investments and associated activities by the investors of any third State.</p>	<p>3.1 [part] Neither CP shall in its territory subject investments or returns of nationals or companies of the other CP to treatment less favourable</p> <p>than that which it accords [...] to investments or returns of nationals or companies of any third State.</p>	<p>3.1 [part] Neither CP shall in its territory subject investments owned or controlled by investors of the other CP to treatment less favourable</p> <p>than it accords [...] to investments of investors of any third State.</p>	<p><b>3.3</b> <i>idem as PRC '97</i></p>
-	<p>3.2 Neither CP shall, in its territory, subject investors of the other CP, as regards their management, maintenance, use, enjoyment or disposal of their investments or activities related with investments, to treatment less favorable than that which it accords to investors of any third State.</p>	-	<p>3.2 [part of 1<sup>st</sup> sent] Neither CP shall in its territory subject nationals or companies of the other CP, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords [...] to nationals or companies of any third State.</p>	<p>3.2 [part of 1<sup>st</sup> sent] Neither CP shall in its territory subject investors of the other CP, as regards their activity in connection with investments, to treatment less favourable than it accords [...] to investors of any third State.<sup>867</sup></p>	-
-	-	-	-	<p>3.2 [2<sup>nd</sup> sent] The following shall, in particular, be deemed treatment less favourable within the meaning of this Art.:</p> <p>1. different treatment in the</p>	<p><i>Ad. Art. 3:</i> The following shall, in particular, be deemed "treatment less favourable" within the meaning of Art. 3: unequal treatment in the case of restrictions on the purchase</p>

<sup>867</sup> The US Models as well maintain investors and investment in two distinct paragraphs, with otherwise identical content, for both NT (Art. 3, paras. 1 and 2) and MFN (Art. 4, paras. 1 and 2) standards.

				<p>event of restrictions on the procurement of raw or auxiliary materials, of energy and fuels, and of all types of means of production and operation;</p> <p>2. different treatment in the event of impediments to the sale of products at home and abroad; and</p> <p>3. other measures of similar effect.</p>	<p>of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind as well as any other measures having similar effects.</p>
<p>3.3 The treatment and protection as mentioned in Paras. 1 and 2 of this Art. [FET, FPS and MFN] shall not include any preferential treatment accorded by the other CP to investments of investors of a third State based on custom unions, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.</p>	<p>3.3 The treatment as mentioned in Paras. 1, 2 and 3 of this Art. [MFN and NT] shall not include any preferential treatment accorded by the other CP to investments of investors of a third State based on custom unions, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.</p>	<p><b>3.4 The provision of Para. 3 of this Art. [MFN] shall not be construed so as to oblige one CP to extend to the investors of the other CP the benefit of any treatment, preference or privilege by virtue of:</b></p> <p>(a) any custom union, free trade zone, economic union and any international agreement resulting in such union, or similar institutions;</p> <p>(b) any international agreement or arrangement relating wholly or mainly to taxation.</p>	<p>7.1 [part] The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either CP or of any third State shall not be construed so as to [...] oblige one CP to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from:</p> <p>(a) any existing or future customs, economic or monetary union, a common market or a free trade area or similar international agreement to which either of the CP is or may become a party, [...]; or</p> <p>(b) any international agreement or arrangement relating wholly or mainly</p>	<p>3.3 Such treatment shall not relate to privileges which either CP accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.</p> <p>3.4 The treatment granted under this Art. shall not relate to advantages which</p>	<p><b>3.4 The provisions of Paras. 1 to 3 of this Art. [FET, NT, MFN] shall not be construed so as to oblige one CP to extend to the investors of the other CP the benefit of any treatment, preference or privilege by virtue of:</b></p> <p>(a) any membership or association with any existing or future customs union, free trade zone, economic union, common market;</p>

		<p>(c) any arrangement for facilitating <b>small scale</b> frontier trade <b>in border areas</b>.</p>	<p>to taxation or any domestic legislation relating wholly or mainly to taxation;</p> <p>(c) [EU requirements]</p> <p>7.1 [part] The provisions [...] shall not be construed so as to preclude the adoption or enforcement by a CP of measures which are necessary to protect national security, public security or public order, [...]</p> <p>7.2 [exceptional capital and payments restrictions]</p>	<p>either CP accords to investors of third States by virtue of an agreement for the avoidance of double taxation in the field of taxes on income and assets or other agreements regarding matters of taxation.</p> <p>3.2 [3<sup>rd</sup> sent] Measures that have to be taken for reasons of public security and order shall not be deemed treatment less favourable within the meaning of this Art..</p>	<p>(b) any double taxation agreement or other agreement regarding matters of taxation.</p> <p>Ad Art. 3: Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Art. 3.</p>
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FET & FPS					
PRC '84	PRC '89	PRC '97	UK '06	DE '08	PRC-DE '03
3.1 Investment and activities associated with investments of investors of either CP shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other CP.	2.2 [1 <sup>st</sup> sent] Investments made by investors of each CP shall at all times be accorded fair and equitable treatment and shall enjoy constant protection and security in the territory of the other CP.	2.2 Investments of the investors of either CP shall enjoy the constant protection and security in the territory of the other CP.  3.1 Investments of investors of each CP shall all the time be accorded fair and treatment in the territory of the other CP.	2.2 [1 <sup>st</sup> sent.] Investments of nationals or companies of each CP shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other CP.	4.1 Investments by investors of either CP shall enjoy full protection and security in the territory of the other CP.  2.2 Each CP shall in its territory in every case accord investments by investors of the other CP fair and equitable treatment as well as full protection under this Treaty.	2.2 [ <i>idem</i> Art. 2.2, PRC '97]  4.1 Investments by investors of either CP shall enjoy full protection and security in the territory of the other CP.  3.1 Investments of investors of each CP shall at all times be accorded fair and equitable treatment in the territory of the other CP.

<b>FET &amp; FPS</b>			
Art. 143 China-NZ FTA	Art. 132 CPEFTA	Art. 7 CAIA	Art. 10.5 US-Peru FTA (identical to Art. 10.7 US Model BIT)
<p>1. Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy the full protection and security in the territory of the other Party in accordance with commonly accepted rules of international law.</p> <p>2. Fair and equitable treatment includes the obligation to ensure that, having regard to general principles of law, investors are not denied justice or treated unfairly or inequitably in any legal or administrative proceeding affecting the investments of the investor.</p> <p>3. Full protection and security requires each Party to take such measures as may be reasonably necessary in the exercise of its authority to ensure the protection and security of the investment.</p> <p>4. Neither Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Party.</p> <p>5. A violation of any other article of this Chapter does not establish that there has been a violation of this Article.</p>	<p>1. Each Party shall accord fair and equitable treatment and full protection and security in accordance with customary international law in its territory to investment of investors of the other Party.</p> <p>2. For greater certainty,</p> <p>(a) the concepts of “fair and equitable treatment” and “full protection and security” do not require additional treatment to that required under the minimum standard of treatment of aliens in accordance with the standard of customary international law;</p> <p>(b) a determination that there has been a breach of another provision of this Agreement or another international agreement does not imply that the minimum standard of treatment of aliens has been breached;</p> <p>(c) “fair and equitable treatment” includes the prohibition against denial of justice in criminal, civil, or administrative proceedings in accordance with the general accepted principles of customary international law; and</p> <p>(d) the “full protection and security” standard does not imply, in any case, a better treatment to that accorded to nationals of the Party where the investment has been made.</p>	<p>1. Each Party shall accord to investments of investors of another Party fair and equitable treatment and full protection and security.</p> <p>2. For greater certainty:</p> <p>(a) fair and equitable treatment refers to the obligation of each Party not to deny justice in any legal or administrative proceedings; and</p> <p>(b) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the investment of investors of another Party.</p> <p>3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, shall not establish that there has been a breach of this Article.</p>	<p>1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.</p> <p>2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:</p> <p>(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and</p> <p>(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.</p> <p>3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.</p>

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Minimum Standard of Treatment					
PRC '84	PRC '89	PRC '97	UK '06	DE '08	PRC-DE '03
-	2.2 [2 <sup>nd</sup> sent] Neither CP shall, without prejudice to its laws and regulations, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other CP.	2.3 Without prejudice to its laws and regulations, neither CP shall take any unreasonable or discriminatory measure against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other CP.	2.2 [2 <sup>nd</sup> sent.] Neither CP shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other CP.	2.3 Neither CP shall in its territory impair by arbitrary or discriminatory measures the activity of investors of the other CP with regard to investments, such as in particular the management, maintenance, use, enjoyment or disposal of such investments. [...]	2.3 Neither CP shall take any arbitrary or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other CP.
-	-	-	-	-	Ad Art. 2 (and 3): With regard to PRC Para. 3 of Art. 2 [...] do not apply to (a) any existing non-conforming measures maintained within its territory; (b) the continuation of any such non-conforming measure; (c) any amendment to any such non-conforming measure to the extent that the amendment does not increase the non-conformity of these measures. PRC will take all appropriate steps in order to progressively remove the non-conforming measures. <sup>868</sup>

<sup>868</sup> With the exception of the last (original) sentence, the text of the exception is literally drawn from Art. 14.1 US Model BITs (Non-conforming Measures) and Art. 9 (Reservations and exceptions) Canada Model BIT.

<b>Expropriation</b>					
Art. 4 PRC '84	Art. 4 PRC '89	Art. 4 PRC '97	Art. 5 UK '06	Art. 4 DE '08	Art. 4 PRC-DE '03
<p>4.1. Neither CP shall expropriate, nationalize<sup>869</sup> or take similar measures (hereinafter referred to as 'expropriation') against investments of investors of the other CP in its territory, unless the following conditions are met:</p> <p>(a) for the public interests;            (b) under domestic legal procedure;            (c) without discrimination;            (d) against compensation.</p>	<p>4.1. [idem]</p> <p>(a) for the public interests;            (b) under appropriate legal procedure;            (c) without discrimination;            (d) against compensation.</p>	<p>[idem as PRC '84]</p>	<p>5.1 [1<sup>st</sup> sent] Investments of nationals or companies of either CP shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other CP except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation.<sup>870</sup></p>	<p>4.2 [1<sup>st</sup> sent] Investments by investors of either CP may not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other CP except for the public benefit and against compensation.</p>	<p>4.2 Investments by investors of either CP shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other CP (hereinafter referred to as expropriation) except for the public benefit and against compensation.</p>
<p>4.2. The compensation mentioned in Para. 1, (d) of this Art. shall be equivalent to the value of the expropriated investment at the time when expropriation is proclaimed,</p>	<p>4.2. The compensation shall be calculated on the basis of the market value of the investment expropriated immediately before the proclamation of decision of expropriation or before the impending expropriation becomes public knowledge. Where the market value cannot be readily ascertained, the compensation shall be</p>	<p>4.2. The compensation mentioned in Para. 1 of this Art. shall be equivalent to the value of the expropriated investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge. The value shall be determined in accordance with generally recognized</p>	<p>5.2 [2<sup>nd</sup> sent] Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier,</p>	<p>4.2 [2<sup>nd</sup> sent] Such compensation must be equivalent to the value of the expropriated investment immediately before<sup>873</sup> the date on which the actual or threatened expropriation, nationalization or other measure became publicly known.</p>	<p>4.2 [2<sup>nd</sup> sent] Such compensation shall be equivalent to the value of the investment immediately before the expropriation is taken or the threatening expropriation has become publicly known, whichever is earlier.</p>

<sup>869</sup> Such wording matches the US Model provision (Art. 6.1), save of the verb there used ('may').

<sup>870</sup> Wording shared with Art. 6.1 US Model and Art. 13.3 Canada Model.

<sup>873</sup> Art. 6.2.b US Models: 'be equivalent to the fair market value of the expropriated investment immediately before...'

<p>be convertible and freely transferable. The compensation shall be paid without unreasonable delay.</p>	<p>determined in accordance with generally recognized principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors.</p> <p>The compensation shall include interest calculated at a normal rate applicable to the currency used in the original investment from the date of expropriation to the date of payment. The amount of compensation finally determined shall be paid to investors with convertible currencies and be freely transferable without undue delay.</p>	<p><b>principles of valuation.</b></p> <p>The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. The compensation shall also be made without delay, be effectively realizable and freely transferable.</p>	<p>shall include interest at a normal commercial rate<sup>871</sup> until the date of payment, shall be made without delay, be effectively realizable and be freely transferable.<sup>872</sup></p> <p>The national or company affected shall have a right, under the law of the CP making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this Para.</p>	<p>The compensation must be paid without delay<sup>874</sup> and shall carry the usual bank interest until the time of payment; it must be effectively realizable and freely transferable.</p> <p>Provision must have been made in an appropriate manner at or prior to the time of expropriation, nationalization or other measure for the determination and payment of such compensation. The legality of any such expropriation, nationalization or other measure and the amount of compensation must be</p>	<p>The compensation shall be paid without delay and shall carry interest at the prevailing commercial rate until the time of payment; it shall be effectively realizable and freely transferable.</p> <p>Precautions shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and payment of such compensation. At the request of the investor the legality of any such expropriation and the amount of compensation shall be subject to review by national courts,</p>
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<sup>871</sup> Art. 6.3 US Models: ‘...interest at a commercially reasonable rate...’.

<sup>872</sup> Art. 6.2.d US Models: ‘be fully realizable and freely transferable’.

<sup>874</sup> Same locution in Art. 6.2.a US Models.

			5.2 [...]	subject to review by due process of law.  4.4 Investors of either CP shall enjoy most-favoured-nation treatment in the territory of the other CP in respect of the matters provided for in the present Art.	notwithstanding the provisions of Art. 9.  4.3 Investors of either CP shall enjoy most-favoured-nation treatment in the territory of the other CP in respect of the matters provided for in this Art.
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<b>Expropriation – chapeau</b>		
Art. 10.7 US-Peru FTA	Art. 4 PRC Model 1997	Art. 133 CPEFTA
No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:	Neither Contracting Party shall expropriate, nationalize or take other similar measures (hereinafter referred to as “expropriation”) against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met:	Neither Party shall expropriate or nationalize, either directly or indirectly through measures equivalent to expropriation or nationalization (hereinafter referred to as “expropriation”) against investments of investors of the other Party in its territory, unless the following conditions are met:

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments: a comparative perspective, from the model BITs to the latest stipulations" di VACCARO INCISA GIUSEPPE MATTEO

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Investor-State Dispute Settlement				
Art. 9 PRC '84 and '89	Art. 9 PRC '97	Art. 8 UK '06	Art. 10 DE '08	Art. 9 PRC-DE '03
9.1. Any dispute between an investor of one CP and the other CP in connection with an investment in the territory of the other CP shall <sup>875</sup> , as far as possible, be settled amicably through negotiations <sup>876</sup> between the parties to the dispute.	[idem]	8.1 [part] Disputes between a national or company of one CP and the other CP concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, [...]	8.1 Disputes concerning investments between a CP and an investor of the other CP should as far as possible be settled amicably between the parties to the dispute. To help them reach an amicable settlement, the parties to the dispute also have the option of agreeing to institute ICSID conciliation proceedings.	9.1 Any dispute concerning investments between a CP and an investor of the other CP should as far as possible be settled amicably between the parties in dispute.
9.2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute...	2. If the dispute cannot be settled through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted by the choice of the investor:	8.1 [part] Disputes [...] which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.  8.2 Where the dispute is referred to international arbitration, the national or company and the CP concerned in the dispute may agree to refer the dispute either to:	10.2 If the dispute cannot be settled within six months of the date on which it was raised by one of the parties to the dispute, it shall, at the request of the investor of the other CP, be submitted to arbitration.  The two CP hereby declare that they unreservedly and bindingly consent to the dispute being submitted to one of the following dispute settlement mechanisms of the investor's choosing:	9.2 If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other CP, be submitted for arbitration.

<sup>875</sup> Wintershall, para 119: the use of the word 'shall' [...] is itself indicative of an obligation – not simply a choice or option. The word 'shall' in treaty terminology means that what is provided for is legally binding.

<sup>876</sup> Art. 23 US Models: '...through consultation and negotiation...'

<p>...to the competent court of the CP accepting the investment.</p> <p>3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Para. 1 of this Art., it may be submitted at the request of either party to an ad hoc tribunal.</p> <p>The provision of this Para. shall not apply if the investor concerned has resorted to the procedure specified in the Para. 2 of this Art.</p>	<p>(a) to the competent court of the CP that is a party to the disputes; (b) to ICSID arbitration, provided that CP involved in the dispute may require the investor to go through the domestic <b>administrative review procedures</b> specified by the laws and regulations of that CP before the submission to ICSID.</p> <p>Once the investor has submitted the dispute to the competent court of the CP concerned or the ICSID, <u>the choice of one of the two procedures shall be final.</u></p>	<p>(a) ICSID arbitration [...]; or (b) ICC arbitration [...]; or (c) UNCITRAL arbitrator or ad hoc tribunal [...].</p> <p>If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to UNCITRAL. The parties to the dispute may agree in writing to modify these Rules.</p>	<p>1. ICSID arbitration [...], or 2. ICSID additional facility rules [...], or 3. UNCITRAL arbitrator or ad-hoc tribunal [...], or 4. ICC, LCIA or SCC arbitration [...], or 5. any other form of dispute settlement agreed by the parties to the dispute.<sup>877</sup></p>	<p>9.3 The dispute shall be submitted for arbitration under the ICSID Convention, unless the parties in dispute agree on an ad-hoc arbitral tribunal to be established under UNCITRAL or other arbitration rules.</p> <p><i>Ad Art. 9</i> With respect to investments in PRC an investor of DE may submit a dispute for arbitration under the following conditions only: (a) the investor has referred the issue to an <b>administrative review procedure</b> according to Chinese law, (b) the dispute still exists three months after he has brought the issue to the review procedure, and (c) <u>in case the issue has been brought to a Chinese court, it can be withdrawn by the investor according to Chinese law.</u></p>
[Para. 4: appointment of the ad hoc tribunal; see Table below*]	-			
[Para. 5: procedure of the ad hoc arbitration: see Table below*]	-			
6. The tribunal shall reach its	<b>4. The arbitration award shall</b>		10.3 The <b>award shall be</b>	9.4 Any <b>award</b> by an ad-hoc

<sup>877</sup> Same list of Art. 24.3 US Models.

<p>decision by a majority of votes. Such decision shall be final and binding on both parties to the dispute. Both CP shall commit themselves to the enforcement of the decision in accordance with their respective domestic law.</p>	<p>be final and binding upon the parties to the dispute<sup>878</sup>. Both CP shall commit themselves to the enforcement of the award.</p>		<p>binding and shall not be subject to any appeal or remedy other than those provided for in the Convention or arbitral rules on which the arbitral proceedings chosen by the investor are based. The award shall be enforced by the CP as a final and absolute ruling under domestic law.</p> <p>10.4 [...] 10.5 [...]</p>	<p>tribunal shall be final and binding. Any award under the procedures of the said Convention shall be binding and subject only to those appeals or remedies provided for in this Convention. The awards shall be enforced in accordance with domestic law.</p>
<p>7. The tribunal shall adjudicate in accordance with the law of the CP to the dispute accepting the investment including its rules on the conflict of laws, the provision of this Agreement as well as the generally recognized principles of international law accepted by both CP.</p>	<p>3. The arbitration award shall be based on the law of the CP to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the universally accepted principles of international law.</p>			
<p>[Para. 8: costs of the ad hoc arbitration; see Table below*]</p>	<p>-</p>			

<sup>878</sup> Art. 34.4 US Models and Art. 45 Canada Model: 'An award ... shall have no binding force except between the disputing parties and in respect of the particular case'.

\*

Art. 9, Paras. 4, 5 and 8 (PRC '84 and '89): <i>ad hoc</i> arbitration rules for appointment, procedure, and costs.
4. Such an arbitral tribunal shall be constituted for each individual case in the following way: each party to the dispute shall appoint one arbitrator, and these two shall select a national of a third State which has diplomatic relations with the two CP as Chairman. The first two arbitrators shall be appointed within two months of the written notice for arbitration by either party to the dispute to the other, and the Chairman be selected within four months. If within the period specified above, the tribunal has not been constituted, either party to the dispute may invite the Secretary General of the ICSID to make the necessary appointments.
5. The tribunal shall determine its own procedure. However, the tribunal may, in the course of determination of procedure, take as guidance the ICSID arbitration rules.
8. Each party to the dispute shall bear the cost of its appointed member of the tribunal and of its representation in the proceedings. The cost of the appointed Chairman and the remaining costs shall be born in equal parts by the parties to the dispute.

Tesi di dottorato "China's policy rationale and treaty-making on the protection of foreign investments:  
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## 6. Others Tables

<b>BITs concluded by G7 States (plus Switzerland and Sweden)</b>						
<i>-selected years / total number of BITs-</i>						
	1967 <sup>879</sup> /	1982 <sup>880</sup> /	1983 <sup>881</sup> /	1984 <sup>882</sup> /	1994 <sup>883</sup> /	2013 <sup>884</sup> /
	63	201	220	229	>700	>2860
Germany	33 (>50%)	55 (>25%)	58 (>25%)	59 (>25%)	>90 (>10%)	136/127 (>5%)
France	1	19	23	26 <sup>885</sup>	48	102/91
UK	0	17	21	22	>60	104/92
Italy	1	7	7	7	30	93/73
Japan	0	2	2	2	4	20/15
US	0	0	2	4	24	46/40
Canada	0	0	0	0	6	33/27
Switzerland	16	32	32	33	>60	118/111
Sweden	3	8 <sup>886</sup>	9	9	18	65/62

<sup>879</sup> Release of the Draft Convention on the Protection of Foreign Property.

<sup>880</sup> First Chinese BIT, with Sweden.

<sup>881</sup> China-Germany BIT.

<sup>882</sup> First Chinese Model BIT.

<sup>883</sup> Figures for 1994 are extracted from *Dolzer* (tables at pp. 267-285).

<sup>884</sup> Figures for 2013 are extracted from the UNCTAD database; the total number of BITs currently in force is indicated in *International investment policymaking in transition: challenges and opportunities of treaty renewal*, UNCTAD paper no. 4, June 2013, available at [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf).

<sup>885</sup> The 26<sup>th</sup> Agreement being the 1984 China-France BIT.

<sup>886</sup> The 8<sup>th</sup> Agreement being the 1982 China-Sweden BIT.

<b>First Chinese BITs</b>		
BIT no.	Party	Date of signature
1	Sweden	March 29 <sup>th</sup> , 1982
2	Romania	Feb. 10 <sup>th</sup> , 1983
3	<b>Germany</b>	Oct. 7 <sup>th</sup> , 1983
4	<b>France</b>	May 30 <sup>th</sup> , 1984
➤ <i>1984 China Model BIT</i>		
5	Finland	Sept. 4 <sup>th</sup> , 1984
6	<b>Italy</b>	Jan. 28 <sup>th</sup> , 1985
7	Thailand	March 12 <sup>th</sup> , 1985
8	Denmark	Apr. 29 <sup>th</sup> , 1985
9	Netherlands	Jun. 17 <sup>th</sup> , 1985
10	Austria	Sept. 12 <sup>th</sup> , 1985
11	Singapore	Nov. 21 <sup>st</sup> , 1985
12	Kuwait	Nov. 23 <sup>rd</sup> , 1985
13	Sri Lanka	Mar. 13 <sup>th</sup> , 1986
14	<b>UK</b>	May 15 <sup>th</sup> , 1986
15	Switzerland	Nov. 12 <sup>th</sup> , 1986
➤ <i>1989 China Model BIT</i>		
16	Poland	Jun. 7 <sup>th</sup> , 1988
17	Australia	Jul. 11 <sup>th</sup> , 1988
18	<b>Japan</b>	Aug. 27 <sup>th</sup> , 1988
...		
128	<b>Canada</b>	Sept. 9 <sup>th</sup> , 2012
-	<b>US</b>	- <sup>887</sup>

<sup>887</sup> Negotiations started in 1983; despite repeated re-launches (the latest in Dec. 2007 and Jul. 2013), no agreement has yet been reached upon a final text.

Germany BITs <sup>888</sup> : chapeau of the notion of investment – elements					
State	Year	<i>Ratione personae</i>	<i>Ratione loci</i>	<i>Ratione legis</i>	Directly or indirectly
USSR	1989	X	X	X	-
Poland	1989	X	X	X	-
Guyana	1994	-	-	-	-
Brazil	1995	X	X	X	-
India	1995	-	-	X	-
Croatia	1997	-	-	-	-
Gabon	1998	-	-	-	-
Lebanon	1999	-	-	-	-
Nigeria	2000	-	-	-	-
Sri Lanka	2000	-	-	-	-
Bosnia	2001	-	-	-	-
Morocco	2001	X	X	X	-
Thailand	2002	-	-	-	-
Iran	2002	X	X	X	X
Mozambique	2002	X	X	-	-
Angola	2003	X	X	X	-
Indonesia	2003	-	-	X	-
Guatemala	2003	-	-	-	-
Tajikistan	2003	-	-	-	-
Libya	2004	-	-	-	-
Egypt	2005	X	X	X	-
Ethiopia	2005	-	-	-	-
Timor-Leste	2005	-	-	-	-
Yemen	2005	-	-	X	-
Afghanistan	2005	-	-	-	-
Trinidad and Tobago	2006	-	-	-	-
Guinea	2006	-	-	-	-
Madagascar	2006	X	-	X	-
Oman	2007	-	-	X	-
Bahrain	2007	X	X	X	- <sup>889</sup>
Jordan <sup>890</sup>	2007	X	X	-	X
Pakistan	2009	X	X	X	-

<sup>888</sup> Until the 2009 BIT with Pakistan; the text of the BITs with Iraq and Congo, of 2010 (not in force yet), are not publicly available.

<sup>889</sup> The provision features, nevertheless, a *ratione materiae* requirement, through the ‘in connection with an economic activity’ wording.

<sup>890</sup> The BIT with Jordan features the wording of the 2008 German Model.

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## **BIBLIOGRAPHY**

### ➤ **List of Treaties and other International Legal Instruments**

#### *1. Investment Treaties*

- China-ASEAN Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation (CAIA), 2009
- ASEAN Comprehensive Investment Agreement (ACIA), 2009
- China-Chile Supplementary Agreement on Investments of the Free Trade Agreement (China-Chile SAI), 2012
- China-Canada BIT, 2012
- China-France BIT, 1984
- China-Germany BIT, 1983
- China-Germany BIT, 2003
- China-India BIT, 2006
- China-Italy BIT, 1985
- China-Netherlands BIT, 2001
- China-New Zealand IPPA, 1988
- China-Pakistan BIT, 1989
- China-Peru BIT, 1994
- China-Portugal BIT, 2005

- China-Qatar BIT, 1999
- China-Romania BIT, 1983
- China-South Africa BIT, 1997
- China-Sweden BIT, 1982
- China-Uganda BIT, 2004
- China-UK BIT, 1986
- Egypt-France BIT, 1974
- Egypt-Germany BIT, 1974
- Egypt-Japan BIT, 1977
- Egypt-Italy BIT, 1975
- Egypt-Netherlands BIT, 1976
- Egypt-Switzerland BIT, 1973
- Egypt-US BIT, 1982
- Germany-Ethiopia BIT, 1964
- Germany-Iran BIT, 1965
- Germany-Pakistan BIT, 1959
- Hong Kong-New Zealand BIT, 1995
- Italy-Chad BIT, 1969
- Switzerland-Tunisia BIT, 1961
- UK-Sri Lanka BIT, 1980

❖ *Model BITs*

- Canada model BIT, 1994
- Canada model BIT, 2004
- Canada draft model BIT, 2006
- China model BIT, 1984
- China model BIT, 1989
- China model BIT, 1997
- France model BIT, 2006
- Germany model BIT, 1991
- Germany model BIT, 2008
- Italy model BIT, 2003
- United Kingdom model BIT, 1993
- United Kingdom model BIT, 2005 (with 2006 amendments)
- United States model BIT, 1992
- United States model BIT, 2004
- United States model BIT, 2012

**2. *Free Trade Agreements***

- ASEAN FTA (AFTA), 1992
- ASEAN-Australia-New Zealand FTA (AANZFTA), 2009
- China-Chile FTA, 1994

- China-Costa Rica FTA, 2010
- China-New Zealand FTA, 2008
- China-Iceland FTA, 2013
- China-Pakistan FTA, 2006
- China-Peru FTA, 2009
- Korea-US FTA, 2007
- North American Free Trade Agreement (NAFTA), 1992
- US-Peru FTA, 2006
- US-Chile FTA, 2003
- US-Morocco FTA, 2004

### **3. *Other Treaties***

- Agreement on Trade Relations between the United States of America and the People's Republic of China, Jul. 7<sup>th</sup>, 1979
- China-Taiwan Economic Cooperation Framework Agreement, Jun. 29<sup>th</sup>, 2010
- Draft Convention on the Protection of Foreign Property, OECD, Oct. 12<sup>th</sup> 1967
- General Agreement on Trade in Services (GATS), Apr. 15<sup>th</sup> 1994
- General Agreement on Tariffs and Trade (GATT), Oct. 30<sup>th</sup> 1947
- Statute of the International Court of Justice, 1945
- Treaty of Friendship, Alliance and Mutual Assistance between the Union of Soviet Socialist Republics and the People's Republic of China, Feb. 14<sup>th</sup> 1950

- Treaty of Trade and Navigation between the Union of Soviet Socialist Republics and the People's Republic of China, Apr. 23<sup>th</sup>, 1958
- Vienna Convention on the Law of Treaties, May 22<sup>nd</sup>, 1969

#### 4. *UN Documents*

- General Assembly, Resolution A/RES/S-6/3201, *Declaration for the establishment of a new international economic order*, 1974
- General Assembly, Resolution A/RES/29/3281, *Charter of economic rights and duties of States*, 1974

#### ➤ List of Cases

- *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, Jul. 24<sup>th</sup>, 2008, ICSID Case No. ARB/05/22.
- *Case concerning the Barcelona Traction Light and Power Company Limited*, Judgment, I.C.J. Reports 1970, p. 3.
- *Ekran Berhad v. People's Republic of China*, ICSID Case No. ARB/11/15 (case discontinued in May 2011, before the establishment of the Arbitral Tribunal).
- *Fedax N.V. v. The Republic of Venezuela*, Award, Mar. 9<sup>th</sup>, 1998, ICSID Case No. ARB/96/3.

- *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, Award on Jurisdiction, Aug. 16<sup>th</sup>, 2007, ICSID Case No. ARB/03/25.
  - *Dissenting Opinion*, Mr. Bernardo M. Cremades, Jul. 19<sup>th</sup>, 2007.
- *Garanti Koza LLP v. Turkmenistan*, Decision on Jurisdiction, Jul. 3<sup>th</sup>, 2013, ICSID Case No. ARB/11/20.
  - *Dissenting Opinion of the Decision on the Objection to Jurisdiction for Lack of Consent*, Prof. L. Boisson de Chazournes, Jul. 3<sup>th</sup>, 2013.
- *Gardella S.p.A. v. Côte d'Ivoire*, Award, Aug. 29<sup>th</sup>, 1977, ICSID Case No. ARB/74/1.
- *Hochtief AG v. Argentine Republic*, Award on Jurisdiction, Oct. 24<sup>th</sup>, 2011, ICSID Case No. ARB/07/31.
- *Impregilo S.p.A. v. Argentine Republic*, Award, Jun. 21<sup>st</sup>, 2011, ICSID Case No. ARB/07/17.
  - *Concurring and dissenting opinion*, Prof. B. Stern, Jun. 21<sup>st</sup>, 2011.
- *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, Award, Aug. 2<sup>nd</sup>, 2006, ICSID Case No. ARB/03/26.
- *Joy Mining Machinery Limited v. Arab Republic of Egypt*, Award on Jurisdiction, Aug. 6<sup>th</sup>, 2004, ICSID Case No. ARB/03/11.
- *Maffezini v. Spain*, ICSID Case no. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, Jan. 25<sup>th</sup>, 2000, ICSID Case No. ARB/97/7.
- *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, Award on Jurisdiction, May 17<sup>th</sup>, 2007, ICSID Case No. ARB/05/10.

- *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, Award, Jul. 31<sup>st</sup>, 2007, ICSID Case No. ARB/03/6.
- *Metalclad Corp. v. United Mexican States*, Award, Aug. 30<sup>th</sup>, 2000, ICSID Case No. ARB(AF)/97/1.
- *Mobil Oil Corporation v. New Zealand*, ICSID Case No. ARB/87/2 (proceedings terminated with Decision dated Nov. 26<sup>th</sup>, 1990).
- *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, Award, Feb. 9<sup>th</sup>, 2004, ICSID Case No. ARB/99/7.
- *Murphy Exploration and Production Company International v. Republic of Ecuador*, Award on Jurisdiction, Dec. 15<sup>th</sup>, 2010, ICSID Case No. ARB/08/4.
- *Rompetrol Group BV v. Romania*, Decision on Jurisdiction, Apr. 18<sup>th</sup>, 2008, ICSID Case No. ARB/06/3.
- *Saba Fakes v. Turkey*, Award, Jul. 14<sup>th</sup>, 2010, ICSID Case No. ARB/07/20.
- *Saipem S.p.A. v. The People's Republic of Bangladesh*, Decision on Jurisdiction, Mar. 21<sup>st</sup>, 2007, ICSID Case No. ARB/05/07.
- *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction, Jul. 31<sup>st</sup>, 2001, ICSID Case No. ARB/00/4.
- *S.D. Myers, Inc. v. Canada*, 40 I.L.M. 1408, 1440 para. 281 (NAFTA Arb. 2000).
- *Señor Tza Yap Shum v. The Republic of Peru*, Decision on Jurisdiction and Competence, Jun. 19<sup>th</sup>, 2009, ICSID Case No. ARB/07/6.
- *Señor Tza Yap Shum v. The Republic of Peru*, Award, Jul. 7<sup>th</sup>, 2011, ICSID Case No. ARB/07/6.

- *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on Jurisdiction, Jan. 29<sup>th</sup>, 2004, ICSID Case No. ARB/02/6.
- *Siemens A.G. v. The Argentine Republic*, Decision on Jurisdiction, Aug. 3<sup>th</sup>, 2004, ICSID Case No. ARB/02/8.
- *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, Oct. 12<sup>th</sup>, 1998, WT/DS58/AB/R.
- *Wintershall Aktiengesellschaft v. Argentine Republic*, Award, Dec. 8<sup>th</sup>, 2008, ICSID Case No. ARB/04/14.
- *World Duty Free Company Limited v. The Republic of Kenya*, Award, Oct. 4<sup>th</sup>, 2006, ICSID Case No. ARB/00/7.

➤ **Books & Treatises**

- Bernstein W., *A splendid exchange – how trade shaped the world*, Grove Press - New York, 2008
- Brown C. (ed.), *Commentaries to Selected Model Investment Treaties*, Oxford University Press, 2013.
- Carreau D. and Juillard P., *Droit international économique*, Dalloz, 2010.
- Comeaux P. E. and Kinsella N. S., *Protecting foreign investment under international law – legal aspects of political risk*, Oceana Publications Inc., 1997.

- De Mestral A. and Lévesque C. (eds.), *Improving International Investment Agreements*, Routledge, 2013.
- Dolzer R. and Schreuer C., *Principles of International Investment Law*, Oxford University Press, 2012.
  - Cited as *Dolzer (2012)*
- Dolzer R. and Stevens M., *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, 1995.
  - Cited as *Dolzer (1995)*.
- Gallagher N. & Shan W., *Chinese investment treaties – policies and practice*, Oxford University Press, 2009.
  - Cited as *Gallagher & Shan (2009)*.
- Hart H. L. A., *The concept of law*, Oxford University Press, 1961.
- Li S., *Bilateral Investment Promotion and Protection Agreements: Practice of the People's Republic of China*, in De Waart P., Peters P. and Denters E. (eds.), *International Law and Development*, Martinus Nijhoff, 1988.
- Lim C. L., Elms D. K. and Low P. (ed.), *The Trans-Pacific Partnership – A quest for a twenty-first-century trade agreement*, Cambridge University Press, 2012.
- Liu C., *The Evolution of Chinese approaches to IIAs*, in De Mestral A. and Lévesque C., *Improving International Investment Agreements*, Routledge, 2013.
- Marti M. E., *China and the Legacy of Deng Xiaoping: From Communist Revolution to Capitalist Evolution*, Brassey's Washington D.C., 2002.

- McLachlan C., Shore L. and Weiniger M., *International Investment Arbitration: Substantive Principles*, Oxford University Press, 2007.
- Moran T. H., Graham E. M. and Blomström, *Does Foreign Direct Investment Promote Development?*, Institute for International Economics Center for Global Development, Washington DC, 2005.
- Paulsson J., *The Denial of Justice in International Law*, Cambridge University Press, 2005.
- Pollan T., *Legal framework for the admission of FDI*, Eleven International Publishing, 2006.
- Sacerdoti, G., *Bilateral Treaties and Multilateral Instruments on Investment Protection*, Recueil des cours de l'Académie de Droit International de la Haye, vol. 269, 1997.
- Schneiderman D., *Constitutionalizing Economic Globalization*, Cambridge University Press, 2008.
- Shan W. (ed.), *The legal protection of foreign investment – a comparative study*, Hart Publishing, 2012.
- Shelley B., *Democratic development in East Asia*, Routledge, 2004.
- Soderberg M. (ed.), *Changing power relations in northeast Asia: implications for relations between Japan and South Korea*, Routledge, 2011.
- Sornarajah M., *The International Law on Foreign Investment*, Cambridge University Press, 2004.
- Trakman L. E. and Ranieri N. W. (eds.), *Regionalism in International Investment Law*, Oxford University Press, 2013.

- Waibel M., Kaushal A., Cung K.-H. L. and Balchin C., *The Backlash against Investment Arbitration: Perceptions and Reality*, Kluwer Law International, 2010.
- Wang D., *China's unequal treaties: narrating national history*, Lexington Books, 2005.
- Wang Y., *Transformation of Foreign Affairs and International Relations in China, 1978-2008*, Social Sciences Academic Publisher, 2011.

➤ **Articles**

- Alvarez J., *The return of the State*, in *Minnesota Journal of International Law*, vol. 20, issue 2, 2011.
- Alvarez G. A. and Park W. W., *The New Face of Investment Arbitration: NAFTA Chapter 11*, in *Yale Journal of International Law*, vol. 28, issue 365, 2003.
- Antkiewicz A. and Whalley J., *China's new regional trade agreements*, in D. Greenway (ed.), *The World Economy*, Blackwell Publishing, vol. 28, issue 10, 2005.
- Bambalas A., *Practice of China's Encouragement on Capital Export and it's Protection under International Investment Law: Lithuanian Case*, in *Jurisprudence* , ISSN 1392-6195 , Mykolas Romeris University, vol. 20, issue 2, 2013.
- Bath V., *ASEAN: the liberalization of investment through regional arrangements*, in L. E. Trakman, N. Ranieri, *Regionalism in international investment law*, Oxford University Press, 2013, pp. 182-213.

- Bath V., *Foreign investment: the national interest and national security: foreign direct investment in Australia and China*, in *Sydney Law Review*, vol. 34, no. 1, pp. 5-34, 2012
- Beckley M., *China and Pakistan: Fair-Weather Friends*, in *Yale Journal of International Affairs*, vol. 7, issue 1, March 2012, available at: <http://yalejournal.org/wp-content/uploads/2012/04/Article-Michael-Beckley.pdf>.
  - Cited as *Beckley (2012)*.
- Boisson de Chazournes L., *The growth in investment litigation: perspectives and challenges*, in Echandi R. and Sauvé P., *Prospects in International Investment Law and Policy*, Cambridge University Press, 2013, pp. 306-309.
- Bottini G., *Legality of investments under ICSID jurisprudence*, in M. Waibel, A. Kaushal, K. L. Chung, C. Balchin, *The backlash against investment arbitration*, Wolters Kluwer, 2010, pp. 297-314.
- Bottini G., *Protection on Essential Interests in the BIT Era*, in Weiler T. G. (ed.), *Investment Treaty Arbitration and International Law*, Jurisnet (LLC), vol. 1, 2008.
- Brown C., *The development and importance of the model bilateral investment treaty*, in Brown C. (ed.), *Commentaries on selected model investment treaties*, Oxford University Press, 2013.
- Cai C., *China*, in Shan W. (ed.), *The legal protection of foreign investment – a comparative study*, Hart Publishing, 2012.
- Cai C., *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, in *Journal of International Economic Law*, no.12, 2009.

- Carter J., *The protracted bargain: negotiating the Canada-China Foreign Investment Promotion and Protection Agreement*, in *Canadian Yearbook of International Law*, vol. 47, 2009.
- Chen H., *China-Asean investment agreement negotiations*, in *Frontiers of Law in China*, Higher Education Press and Springer-Verlag, 2006.
  - Cited as *Chen (2006)*.
- Clodfelter M. A., *The adaptation of States to the changing world of investment protection through Model BITs*, ICSID review, vol. 24, no. 1, 2009.
- Côté C. E., *Investissement*, in *Annuaire canadien de droit International*, 2012, pp. 363-394.
- De Luca A., *The legal framework for foreign investments in the EU*, in L. E. Trackman, N. Ranieri, *Regionalism in international investment law*, Oxford University Press, 2013, pp. 120-161.
- De Mestral A. and Falsafi A., *Investment Provisions in Regional Trade Agreements: a more Efficient Solution?*, in De Mestral A. and Lévesque C., *Improving International Investment Agreements*, Routledge, 2013.
- Denza E. and Brooks S., *Investment Protection Treaties: United Kingdom Experience*, in *International and Comparative Law Quarterly*, vol. 36, no. 4, 1987.
- Dolzer R. and Kim Y., *Germany*, in C. Brown (ed.), *Commentaries on selected model investment treaties*, Oxford University Press, 2013, pp. 289-320.
- Douglas Z., *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, in *Journal of International Dispute Settlement*, vol. 2, no. 1, 2011, pp. 97-113.

- Feigenbaum E. A., *China's Pakistan Conundrum*, in *Journal of Foreign Affairs*, Council on Foreign Relations, Dec. 4<sup>th</sup>, 2011, available at: <http://www.foreignaffairs.com/articles/136718/evan-a-feigenbaum/chinas-pakistan-conundrum>.
- Foster G. W., *Investors, States and Stakeholders: Power asymmetries in International investment and the stabilizing potential of investment treaties*, in *Lewis & Clark Law Review*, vol. 17, issue 2, 2013.
- Gachùz G. C., *Chile's Economic and Political Relationship with China*, in *Journal of Current Chinese Affairs*, 2012, available at: [http://mercury.ethz.ch/serviceengine/Files/ISN/141206/ichaptersection\\_singledocument/920d9916-5c6e-40d8-8faa-dff7bcf2abdf/en/497-522-1-PB.pdf](http://mercury.ethz.ch/serviceengine/Files/ISN/141206/ichaptersection_singledocument/920d9916-5c6e-40d8-8faa-dff7bcf2abdf/en/497-522-1-PB.pdf).
  - Cited as *Gachùz (2012)*.
- Gallagher N. & Shan W., *China*, in *Commentaries to Selected Model Investment Treaties*, C. Brown (ed.), Oxford University Press, 2013.
- Heymann M., *International law and the settlement of investment disputes relating to China*, in *Journal of International Economic Law*, no. 11, 2008.
- Huiping C., *China-ASEAN investment agreement negotiations*, in *Frontiers of Law in China*, vol. 1, issue 3, September 2006.
  - Cited as *Huiping (2006/FLC)*.
- Huiping C., *China-ASEAN investment agreement negotiations: the substantive issues*, in *The journal of world investment & trade : law, economics, politics*, vol. 7, 2006.
  - Cited as *Huiping (2006/JWIT)*.

- Kalderimis D. and Tripp C., *Investment chapter of the NZ-China FTA*, in *New Zealand Law Journal*, May 2009, Available at: [http://www.chapmantripp.com/publications/Documents/nzlj\\_2009\\_4\\_kal.pdf](http://www.chapmantripp.com/publications/Documents/nzlj_2009_4_kal.pdf).
  - Cited as *Kalderimis (2009)*.
- Kong Q., *US China Bilateral Investment Treaty negotiations: context, focus and implications*, in *Asian Journal of WTO and International Health Law & Policy*, vol. 7, issue 1, 2012.
- Li L., *Chinese BIT practice and challenges*, in *Chinese Journal of International and Economic Law*, vol. 17, issue 4, 2010.
- Manger M. S., *A quantitative perspective on trends in IIA rules*, in A. De Mestral & C. Lévesque (ed.), *Improving international investment agreements*, Routledge, 2013, pp.76-92.
- Masron T. A. and Yusop Z., *The ASEAN investment area, other FDI initiatives, and intra-ASEAN foreign direct investment*, in *Asian-Pacific Economic Literature*, vol. 26, issue 2, 2012.
- Mercurio B., *Bilateral and regional trade agreements in Asia: a skeptic's view*, in Buckley R. P., Weixing Hu R. and Arner D. W. (eds.), *East Asian Economic Integration-Law, Trade and Finance*, Elgar, 2011.
- Newcombe A., *Developments in IIA treaty-making*, in De Mestral A. and Lévesque C. (eds.), *Improving International Investment Agreements*, Routledge, 2013.
- Orrego Vicuña F., *Reports of [Maffezini's] demise have been greatly exaggerated*, in *Journal of International Dispute Settlement*, vol. 3, no. 2, 2012, pp. 299-327.

- Perkins D. H., *China's Economic Policy and Performance*, in R. MacFarquhar, J. K. Fairbank and D. Twitchett (ed.), *The Cambridge History of China*, vol. 15, Cambridge University Press, 1991.
- Peterson L., *Out of order*, in M. Waibel, A. Kaushal, K. L. Chung, C. Balchin, *The backlash against investment arbitration*, Wolters Kluwer, 2010, pp. 483-488.
- Petrochilos G., Noury S. and Kalderimis D., *Annotated Commentary to the ICSID Arbitration Rules*, in Mistelis L. (ed.), *Concise International Arbitration*, Kluwer, 2010.
- Qi H., *Investment Law in the China-ASEAN Free Trade Agreement*, in *Journal of East Asia and International Law*, vol. 5, issue 2, 2012.
  - Cited as *Qi (2012)*.
- Rubinacci L., *EU-China Investment Relationship, Update on State of Play*, DG Trade – Civil Society Dialogue, Mar. 7<sup>th</sup>, 2012, available at: [http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc\\_149185.pdf](http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149185.pdf).
- Sacerdoti, G., *The proliferation of BITs: conflict of treaties, proceedings and awards*, in P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008.
- Salacuse J. W., *Towards a global treaty on foreign investment: the search for a grand bargain*, in Horn N. (ed.), *Arbitrating foreign investment disputes: procedural and substantive legal aspects*, Kluwer Law International, 2004.
- Saleem O., *The Spratly Islands Dispute: China Defines the New Millennium*, in *American University International Law Review*, vol. 15, 2000.

- Sauvant K. P. & Chen V. Z., *China needs to complement its “going-out” policy with a “going-in” strategy*, Columbia FDI Perspectives, n. 121, May 12<sup>th</sup>, 2014.
- Schill S. W., *Illegal Investments in International Arbitration*, in *Law and Practice of International Courts and Tribunals*, 2012.
  - Cited as *Schill (2012)*.
- Schill S. W., *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, in *The European Journal of International Law*, vol. 22, no. 3, 2011.
  - Cited as *Schill (2011)*.
- Schill S. W., *Tearing down the Great Wall: the new generation investment treaties of the People’s Republic of China*, in *Cardozo Journal of International and Comparative Law*, vol. 15, pp. 77-118, 2007.
  - Cited as *Schill (2007)*.
- Shan W., *China and international investment law*, in L. E. Trakman, N. Ranieri, *Regionalism in international investment law*, Oxford University Press, 2013, pp. 214-252.
- Shan W., *From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the changing landscape in international investment law*, in *Northwestern Journal of International Law and Business*, vol. 27, issue 3, 2007.
- Smith G., *Chinese Bilateral Investment Treaties: Restrictions on International Arbitration*, Chartered Institute for Arbitration, Sweet & Maxwell, 2010, available at: [http://www.kennedys-law.com/files/Uploads/Documents/GordonSmithChineseBilateralInvestment\\_122010.pdf](http://www.kennedys-law.com/files/Uploads/Documents/GordonSmithChineseBilateralInvestment_122010.pdf).

- Sornarajah M., *The Retreat of Neo-Liberalism in Investment Treaty Arbitration*, in Rogers C. A. and Alford R. P. (eds.), *The Future of Investment Arbitration*, Oxford University Press, 2009.
- Titi C., *The Evolving BIT: A Commentary on Canada's Model Agreement*, Investment Treaty News, Jun. 26<sup>th</sup>, 2013, available at: <http://www.iisd.org/itn/2013/06/26/the-evolving-bit-a-commentary-on-canadas-model-agreement/>.
- Thompson T. N., *China's nationalization of foreign firms: the politics of hostage capitalism - 1949-1957*, in *Contemporary Asian Studies*, University of Maryland Law School, vol. 27, n.6, 1979.
- Trakman L.E., *China and Foreign Direct Investment: does distance lend enchantment to the view?*, in *The Chinese Journal of Comparative Law*, vol. 1, issue 2, October 2013, available at: <http://cjcl.oxfordjournals.org/content/early/2013/09/28/cjcl.cxt015.full#xref-fn-33-1>.
  - Cited as *Trakman (2013)*.
- Trakman L. E., *Enter the Dragon IV: China's Proliferating Investment Treaty Program*, UNSW Centre for Law, Markets and Regulation, 2011; available at: <http://www.clmr.unsw.edu.au/article/deterrence/public-v-private-enforcement/enter-dragon-iv-chinas-proliferating-investment-treaty-program>.
- Trakman L. E., *The ICSID Under Siege*, in *Cornell International Law Journal*, University of New South Wales, vol. 45, no. 3, 2012 .
- Vandevelde K. J., *The Bilateral Investment Treaties program of the United State*, in *Cornell Journal of International Law*, vol. 21, 1988.

- Wee K. H., Mirza H., *ASEAN Investment Cooperation: Retrospect, Developments and Prospects*, 2005, available at: <http://www.gapresearch.org/finance/ASEAN%20Investment%20Cooperation.pdf>.
- Xiao J., *The ASEAN-China investment agreement: a regionalization of Chinese new BITs*, Society of International Economic Law (SIEL), Second Biennial Global Conference, University of Barcelona, 2010, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1629202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629202).
  - Cited as *Xiao (2010)*.
- Xiao J., *Chinese BITs in the twenty-first century: protecting Chinese investments*, in Chaisse J. and Gugler P. (eds.), *Expansion of trade and FDI in Asia*, Routledge, 2009.
  - Cited as *Xiao (2009)*.
- Xiao J., *ASEAN-China FTA: A Pragmatic Approach to Regulating Services and Investment*, in Chaisse J. and Gugler P. (eds.), *Competitiveness of the ASEAN Countries*, Elgar, 2010.
- Yen T. H., *East Asian investment treaties in the integration process: quo vadis?*, in Buckley R. P., Weixing Hu R., Arner D.W. (eds.), *East Asian Economic Integration: Law, Trade and Finance*, Edward Elgar Publishing, 2011.
  - Cited as *Yen (2011)*.

➤ **Papers and Presentations**

- Adlung R. and Mamdouh H., *How to design trade agreements: top down or bottom up?*, WTO Staff Working Paper RSD-2013-08, 18 June 2013, available at: [http://www.wto.org/english/res\\_e/reser\\_e/ersd201308\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201308_e.pdf).
- Chia S. Y., *ASEAN-China Free Trade Area*, Paper for presentation at the AEP Conference, Singapore Institute of International Affairs, Hong Kong, 2004, available at: [www.hiebs.hku.hk/aep/Chia.pdf](http://www.hiebs.hku.hk/aep/Chia.pdf).
- Cuyvers L., De Lombaerde P. and Verherstraeten S., *From AFTA towards an ASEAN Economic Community ... and Beyond*, CAS Discussion Paper, Institute on Comparative Regional Integration Studies, United Nations University, 2005, available at: [http://www.cris.unu.edu/UNU-CRIS-Working-Papers.19.0.html?&txttnews\[tt\\_news\]=83&cHash=2156052ddda685d731f21d0f444b2178](http://www.cris.unu.edu/UNU-CRIS-Working-Papers.19.0.html?&txttnews[tt_news]=83&cHash=2156052ddda685d731f21d0f444b2178)
- Kotschwar B., Moran T. H. and Muir J., *Chinese Investment in Latin American Resources: The Good, the Bad, and the Ugly* (working paper), Peterson Institute for International Economics, Feb. 2012, available at: <http://www.iie.com/publications/wp/wp12-3.pdf>.
  - Cited as *Kotschwar (2012)*.
- Wehner L., *Power, Governance, and Ideas in Chile's Free Trade Agreement Policy*, German Institute of Global and Area Studies, Working Paper no. 102, May 2009; available at: <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233 &lng=en&id=100882>.

➤ **Official Reports and Statistics**

- ASEAN Secretariat, *ASEAN Investment Report 2012 – the changing FDI landscape*, July 2013, available at: <http://www10.iadb.org/intal/intalcdi/PE/2013/12820.pdf>.
- Asia-Pacific Foundation of Canada, *China goes global*, Nov. 4<sup>th</sup>, 2013, available at: <http://www.asiapacific.ca/surveys/chinese-investment-intentions-surveys/china-goes-global-2013>.
- EU-SME Centre (EU Centre for Small and Medium Enterprise), *Dispute settlement with Chinese companies*, available at: <http://www.eusmecentre.org.cn/content/dispute-settlement-chinese-companies>.
- Government of Canada, *Trade and Investment Update*, Report, 2012, available at: [http://www.international.gc.ca/economist-economiste/performance/state-point/state\\_2012\\_point/2012\\_6.aspx?lang=eng](http://www.international.gc.ca/economist-economiste/performance/state-point/state_2012_point/2012_6.aspx?lang=eng).
- Government of New Zealand, *Two-year review joint report*, China-NZ FTA official website, 2011; available at: <http://www.chinafta.govt.nz/4-Events-and-press/2-Press-releases/joint-report-feb2011.pdf>.
- Ministry of Commerce of the People's Republic of China, *Invest in China*, 2012, available at: [http://www.fdi.gov.cn/1800000121\\_10000161\\_8.html](http://www.fdi.gov.cn/1800000121_10000161_8.html).
- Ministry of Commerce of the People's Republic of China, *2010 Statistical Bulletin of China's Outward Foreign Direct Investment*, available at: <http://english.mofcom.gov.cn/article/statistic/foreigninvestment/201109/20110907742320.shtml>.

- Ministry of the Treasury of New Zealand, *New Zealand's external debt - an international comparison*, report of January 2013, available at: <http://www.treasury.govt.nz/economy/mei/jan13/03.htm>.
- Ministry of Trade and Industry of Singapore, *China-ASEAN FTA Factsheet*, Jul. 23<sup>rd</sup>, 2004, available at: [http://www.mti.gov.sg/public/FTA/frm\\_FTA\\_Default.asp?sid=179&cid=1902](http://www.mti.gov.sg/public/FTA/frm_FTA_Default.asp?sid=179&cid=1902).
- OECD, *Canada - Economic forecast summary (November 2013)*, available at: <http://www.oecd.org/eco/outlook/canadaeconomicforecastsummary.htm>.
- OECD, *Chile - Economic forecast summary (November 2013)*, available at: <http://www.oecd.org/eco/outlook/chileeconomicforecastsummary.htm>.
- OECD, *Novel Features in Recent OECD Bilateral Investment Treaties*, OECD International Investment Perspectives, 2006, available at <http://www.oecd.org/investment/internationalinvestmentagreements/40072428.pdf>.
- Pakistan Institute of Trade and Development, *2012 Evaluation of China-Pakistan FTA*, available at: [http://www.pitad.org.pk/Publications/13-Pak-China%20FTA\\_report\\_final\\_version\\_4.pdf](http://www.pitad.org.pk/Publications/13-Pak-China%20FTA_report_final_version_4.pdf).
  - Cited as *CPAFTA Review (2012)*.
- UNCTAD, *International investment policymaking in transition: challenges and opportunities of treaty renewal*, UNCTAD paper no. 4, June 2013, available at [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf).
  - Cited as *UNCTAD paper no. 4/2013*.

- UNCTAD, *Fair and equitable treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2012.
  - Cited as *UNCTAD Report on FET 2012*.
- UNCTAD, *International Investment rule-making: stocktaking, challenges and the way forward*, UNCTAD Series on International Investment Policies for Development, United Nations, 2008.
- UNCTAD, *National Treatment*, UNCTAD Series on Issues in International Investment Agreements, 2000, available at: <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=340>.
- UNCTAD, *Recent Developments in International Investment Agreements (2007–June 2008)*, United Nations, 2008.
- UNCTAD, *Scope and definition*, UNCTAD Series on Issues in International investment agreements, 2011, available at: <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=354>.
- UNCTAD, *World Investment Report 2009*, available at [http:// unctad.org/en/pages/PublicationArchive.aspx?publicationid=743](http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=743).
- UNCTAD, *World investment report 2013 – Global value chains: investment and trade for development*, 2013; available at: [http://unctad.org/en/PublicationsLibrary/wir2013\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf).
  - Cited as *UNCTAD inv. rep. 2013*.
- US Congressional Research Service, *China's Growing Interest in Latin America*, Report for the US Congress, Apr. 20<sup>th</sup>, 2005 available at: <http://fpc.state.gov/documents/organization/45464.pdf>.

- World Bank, *ICSID Caseload Report – Statistics*, issue 1, 2011; available at: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English11>.
- WTO, *Report (2002) of the Working Group on the Relationship between Trade and Investment to the General Council*, WT/WGTI/6, Dec. 9<sup>th</sup>, 2002.
- WTO, *Report on the meeting held on 3-5 July 2002: note by the Secretariat*, WT/WGTI/M/18, Sept. 3<sup>rd</sup>, 2002.
- WTO, *Third Trade Policy Review of Pakistan - Report by the Secretariat*, WT/TPR/S/193, Dec. 10<sup>th</sup>, 2007.
- WTO, *Trade Policy Review: China*, WT/TPR/S/264, 2012, available at: [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp364\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp364_e.htm).

➤ **Web-based Sources**

**1. Online Databases**

- ASEAN (<http://www.asean.org>).
- Canadian Bureau of Statistics (<http://www.statcan.gc.ca>).
- Canadian Ministry of Foreign Affairs (<http://www.international.gc.ca/international/index.aspx>).
- Canadian Ministry of Natural Resources (<https://www.nrcan.gc.ca/home>).

- Department of Trade and Industry Philippines, (<http://www.dti.gov.ph/dti/index.php?p=688>).
- EU External Action website (<http://eeas.europa.eu>).
- Federation of the Pakistani Chamber of Commerce and Industry, (<http://fpcci.org.pk/PressRelease.aspx>).
- Foreign Trade Information System of the Organization of American States, (<http://www.sice.oas.org/>).
- Heritage Foundation, *China - global investment tracker*, 2013 (<http://www.heritage.org/research/projects/china-global-investment-tracker-interactive-map>).
- ICSID (<https://icsid.worldbank.org/ICSID/FrontServlet>).
- Kluwer Arbitration (<http://0-www.kluwerarbitration.com>).
- Jean Monnet Centre for International and Regional Economic Law and Justice, (<http://www.jeanmonnetprogram.org>).
- Ministry of Commerce of Peru (<http://www.aduanet.gob.pe>).
- Ministry of Foreign Affairs of Chile (<http://www.prochile.gob.cl>).
- New Zealand Ministry for Foreign Affairs (<http://www.mfat.govt.nz/>).
- OECD statistics (<http://stats.oecd.org>).
- Investment Promotion Agency of Peru (<http://www.proinversion.gob.pe>).
- Trading Economics (<http://www.tradingeconomics.com>).
- UNCITRAL (<http://www.uncitral.org>).
- UNCTAD (<http://unctad.org/en/Pages/Home.aspx> ).

- United States Census Bureau (<http://www.census.gov>).
- United States Trade Representative (<http://www.ustr.gov/>).
- WIPO (<http://www.wipo.int>).
- World Bank (<http://data.worldbank.org>).

## 2. *Media Sources*

- Australia ABC network, available at: <http://www.abc.net.au>.
- Amnesty International, available at: <http://www.amnesty.org.nz>.
- Canadian Bar Association: <https://www.cba.org>.
- China.org.cn, *China to step up investment in Pakistan*, available at: [http://www.china.org.cn/business/2013-05/24/content\\_28919889.htm](http://www.china.org.cn/business/2013-05/24/content_28919889.htm).
- Deen T., *China: Pakistan is our Israel*, Aljazeera, Oct. 28<sup>th</sup>, 2010, available at: <http://www.aljazeera.com/indepth/features/2010/10/20101028135728235512.html>.
- China Daily online, available at: <http://www.chinadaily.com.cn>.
- Hawke G., *Strategy more than commerce: China-New Zealand FTA*, East Asia Forum, Jul. 30<sup>th</sup>, 2010, available at: <http://www.eastasiaforum.org/2010/07/30/strategy-more-than-commerce-china-new-zealand-fta/>.
- Jacobs S., *No thanks, not yet: PNG's ASEAN bid*, East Asia Forum, Dec. 4<sup>th</sup>, 2012, available at: <http://www.eastasiaforum.org/2012/12/04/no-thanks-not-yet-pngs-asean-bid/>.

- Kazim H., *The Karakoram Highway: China's Asphalt Powerplay in Pakistan*, Spiegel International Online, available at: <http://www.spiegel.de/international/world/china-expands-karakoram-highway-to-pakistan-a-844282.html>.
- Mehdudia S., *BIPA talks put on hold*, in *The Hindu*, Jan. 22<sup>nd</sup>, 2013, available at: <http://www.thehindu.com/business/Economy/bipa-talks-put-on-hold/article4329332.ece>.
- New York Times International, *Pakistan likely to miss GDP growth target for fiscal year 2013-14*, Jan 15<sup>th</sup>, 2014 available at: <http://tribune.com.pk/story/659134/pakistan-likely-to-miss-gdp-growth-target-for-fiscal-year-2013-14/>.
- Pakistani Associated Press, available at: [http://www.app.com.pk/en/index.php?option=com\\_content&task=view&id=244940&Itemid=2](http://www.app.com.pk/en/index.php?option=com_content&task=view&id=244940&Itemid=2).
- N. Parish Flannery, *Political risk: what should investors know about China's interest in Peru?*, in *Forbes* online, Sept. 17<sup>th</sup>, 2013, available at: <http://www.forbes.com/sites/nathanielparishflannery/2013/09/17/political-risk-what-should-investors-know-about-chinas-interest-in-peru/>.
- Phillips L., *Southeast Asian countries plan EU-style union by 2015*, EU Observer, Mar. 3<sup>rd</sup>, 2009, available at: <http://euobserver.com/foreign/27699>.
- Qingfen D., interview to the Peruvian Vice-Minister of Foreign Trade Carlos Posada Ugaz, *Peru expects to diversify exports to China*, in *China Daily USA*, Dec. 11<sup>th</sup>, 2012, available at: [http://usa.chinadaily.com.cn/business/2012-12/11/content\\_16004346.htm](http://usa.chinadaily.com.cn/business/2012-12/11/content_16004346.htm).

- Reuters Press Agency, available at: <http://www.reuters.com>.
- Romann A., *Greater heights for China-ASEAN ties*, China Daily, Jan. 16<sup>th</sup>, 2013, available at: [http://www.chinadaily.com.cn/hkedition/2013-01/16/content\\_16123033.htm](http://www.chinadaily.com.cn/hkedition/2013-01/16/content_16123033.htm).
- Secretariat of Pakistan Prime Minister, available at: <http://www.pakboi.gov.pk/>.
- The Times of India, available at: <http://timesofindia.indiatimes.com>.
- Wall Street Journal, available at: <http://online.wsj.com>.
- Wallace R., *Free-trade push may open door to China*, in *The Australian*, Jul. 18<sup>th</sup>, 2013; available at: [http://www.theaustralian.com.au/national-affairs/policy/free-trade-push-may-open-door-to-china/story-fn59nm2j-1226681\\_027576#](http://www.theaustralian.com.au/national-affairs/policy/free-trade-push-may-open-door-to-china/story-fn59nm2j-1226681_027576#).
- Wang X., *Free trade agreement boosts China-ASEAN investment*, English People's Daily online, Jun. 27<sup>th</sup>, 2010 available at: <http://english.people.com.cn/90001/90778/90861/7081485.html>.
- Xinhua China's official press agency, available at: [http://news.xinhuanet.com/english2010/china/2010-09/23/c\\_13526461.htm](http://news.xinhuanet.com/english2010/china/2010-09/23/c_13526461.htm).

➤ **Miscellaneous**

- Arthur A., *Beyond the China Boom: Latin America's Long Term Growth Prospects*, Inter-American Dialogue, Nov. 22<sup>nd</sup>, 2011, available at: [www.thedialogue.org/page.cfm?pageID=32&pubID=2803](http://www.thedialogue.org/page.cfm?pageID=32&pubID=2803) .

- Federate Farmers of New Zealand, 2013, available at: <http://www.fedfarm.org.nz/publications/media-releases/article.asp?id=691#.Uv0NTPsz3Q0>.
- KPMG, *Peru – Mining Country Guide*, 2013, available at: <https://www.kpmg.com/Ca/en/industry/Mining/Documents/Peru.pdf>.
- US Geological Survey, *Mineral Facilities of Latin America and Canada*, Mineral Resources Program, 2012 available at: <http://minerals.usgs.gov/minerals/pubs/commodity/copper/mcs-2012-coppe.pdf>.