

# The Gradual Application of Investor-State Dispute Settlement — A Review of Cases on International Investment Arbitration Involving China

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**Abstract:** As a crucial part of international investment law practice, Investor-State Dispute Settlement (ISDS) has attracted wide attention from sovereign states and investors. In recent years, the number of ISDS cases involving China has gradually increased. Meanwhile, China also participates in the practice of ISDS as a respondent. As both the host and home state, China is gradually transforming from passive participation in ISDS to active usage of the mechanism as a result of its participation in international investment arbitration. The experience of China-related international investment disputes shows that China should further take the initiative to grasp the trend of diversification of jurisdictional proof requirements and effectively strengthen the application of the prevailing rules for the interpretation of international treaties. It should also timely revise the provisions of the dispute settlement text of investment treaties and actively participate in the formulation of current rules on multilateral investment issues.

**Keywords:** Investor-State Dispute Settlement (ISDS), Host State, Home State, Arbitral Award, Multilateral Investment Reform

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## I. EVOLUTION OF INVESTOR-STATE DISPUTE SETTLEMENT

Since the 1950s, the number of International Investment Agreements (IIAs) has been continuously increasing worldwide, with a total of 2584 IIAs

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that are in force currently.<sup>1</sup> IIAs typically include Bilateral Investment Treaties (BITs), regional investment agreements, or agreements containing investment protection provisions. After World War II, the International Bank for Reconstruction and Development (IBRD), one of the “three pillars of the world economy”, organized the drafting of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) in 1965 and established the International Centre for Settlement of Investment Disputes (ICSID), which later has close legal ties with the IBRD.<sup>2</sup> One of the most important functions of ICSID is to settle investment disputes between investors and host states.

In fact, the Agreement on the Promotion and Protection of Investments signed between Germany and Pakistan in 1959 is considered the first IIA to include provisions on the treatment of investors given by the host state. This agreement also includes dispute settlement provisions based on arbitration between states. With the increasing number of signed BITs, investors themselves began to seek better dispute settlement procedures to ensure that the host state could fulfill its obligations under the treaty. In the mid-1970s, a significant new type of dispute settlement provision emerged in some BITs, known as ISDS. Currently, almost all effective IIAs embed ISDS, which provides international arbitration and other alternative methods for foreign investors to settle legal disputes arising from their investments in the host state.

While cases of diplomatic protection and State-to-State disputes still exist, by far the most common approach to settling investment disputes is for the investor to make a request directly to the host state. ISDS is obviously an attractive option for investors, since they do not need to ask their home governments for help settling disputes. Instead, they could tailor their arbitration request accordingly, and if things go well, they could receive full compensation directly.<sup>3</sup> In terms of the content of the IIA system, it usually consists of the investment agreement itself, a series of treaties, rules and institutions dealing

<sup>1</sup> UNCTAD, World Investment Report (2023), p. 71, [https:// unctad.org/publication/world-investment-report-2023](https://unctad.org/publication/world-investment-report-2023) (Last Visited on February 29, 2024).

<sup>2</sup> Christoph H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, 2009, p. 13.

<sup>3</sup> Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials*, Edward Elgar Publishing, 2020, p. 472.

with investment arbitration, and decisions by arbitral tribunals to apply and interpret the investment treaty.<sup>4</sup> Taking ICSID as an example, since it received the first treaty-based ISDS case in 1972, it has reached 1091 ISDS cases as of now.<sup>5</sup> If institutional arbitration cases accepted by the Permanent Court of Arbitration (PCA) and other institutions, as well as *ad hoc* arbitration cases conducted by the United Nations Commission on International Trade Law (UNCITRAL) are taken into account, the number of cases generated by ISDS is twice the number of cases handled by the World Trade Organization (WTO).<sup>6</sup> Therefore, the current IIA system still revolves around ISDS, which in turn is also a prerequisite for the existence of ISDS.

## II. STATUS OF CHINA'S PARTICIPATION IN ISDS

China joined the ICSID Convention in 1993 and has been a member for over 30 years. Since 2007, China has participated in ISDS in a “dual capacity”. Namely, Chinese investors have initiated investment arbitration as claimants, or the Chinese government has served as a respondent in investment arbitration. From passively responding to international investment arbitration to gradually using ISDS to protect its own rights and interests, China's participation in ISDS has led to a rapid increase in the number of cases. In recent years, Chinese investors' ability and experience in utilizing investment arbitration have also gradually improved. These transformations not only mirror China's increasingly deepened role in the global investment governance framework, but also demonstrate the markedly enhanced ability of Chinese investors to comprehend and utilize international rules.

Here is an overview of China's participation in international investment disputes. Currently, China has been involved in 34 ISDS cases. Among them, there are 25 cases where Chinese investors initiated the arbitration as claimants, and 9 cases where the Chinese government served as the respondent. In terms

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4 Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime*, Oxford University Press, 2017, p. 3.

5 ICSID Case Database, [https:// icsid.worldbank.org/cases/case-database](https://icsid.worldbank.org/cases/case-database) (Last Visited on July 13, 2025).

6 Zhengyi Zhang, Whether as an Alternative to Dispute Settlement Mechanisms: Investor-State Dispute Prevention Mechanisms and Its Implementation Paths, *International Economics and Trade Research*, Vol. 39, No. 10, 2023, p. 96.

of China's participation in ISDS, approximately 73.53% of the cases were initiated by Chinese investors (See Figure 1).<sup>7</sup>

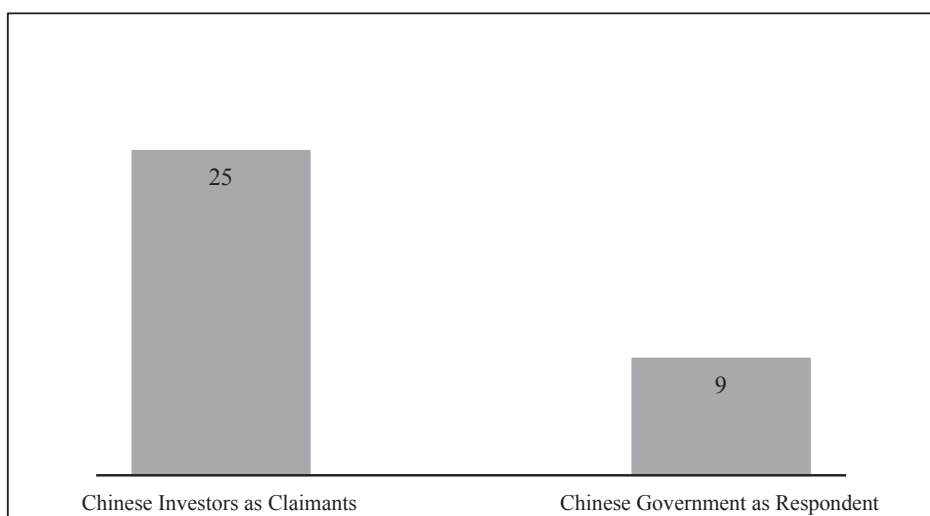


Figure 1: Chinese Investors/Government's Participation in ISDS

In terms of Chinese investors' utilization of ISDS, 13 cases have been concluded. Among them, there have been 4 cases where investors' claims have been upheld by tribunals, with a success rate of approximately 30.77%. The host state government has received support in 6 cases, resulting in an investor's failure rate of approximately 46.15%. The 2 cases have been settled or discontinued (See Figure 2).

From the perspective of geographical distribution, Chinese investors have initiated investment arbitration against countries in Asia, Europe, Africa, South America, North America, and Australia, accounting for approximately 40% (10 cases), 24% (6 cases), 16% (4 cases), 8% (2 cases), 8% (2 case), and 4% (1 case), respectively. The countries where Chinese investors have initiated the most investment arbitration are Vietnam, Laos, and Tanzania, each accounting for approximately 8% (2 cases) (See Figure 3).

<sup>7</sup> UNCTAD, Investment Dispute Settlement Navigator, China, [https:// investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china](https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china) (Last Visited on July 13, 2025).

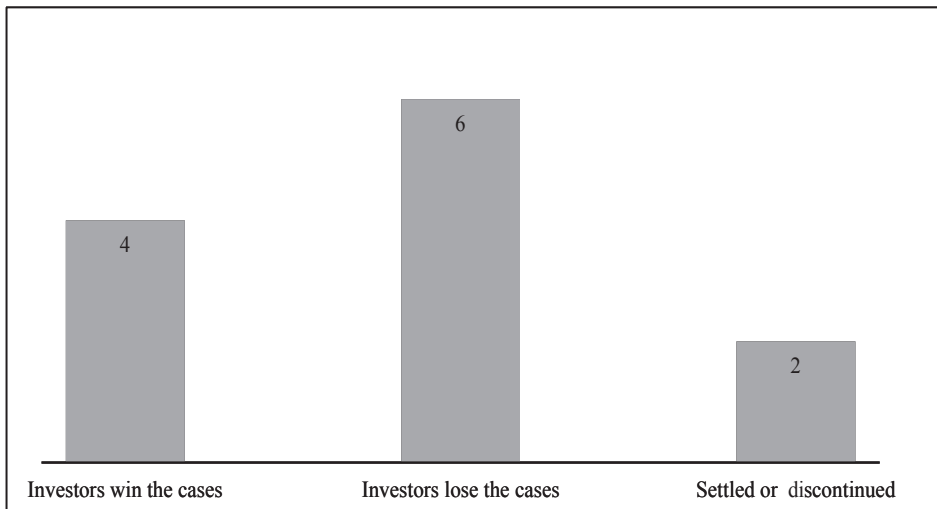


Figure 2: In Favor of Investors against States

Note: The award result for the remaining one case (*Qiong Ye and Jianping Yang v. Kingdom of Cambodia*), which was concluded most recently, has not been published yet.

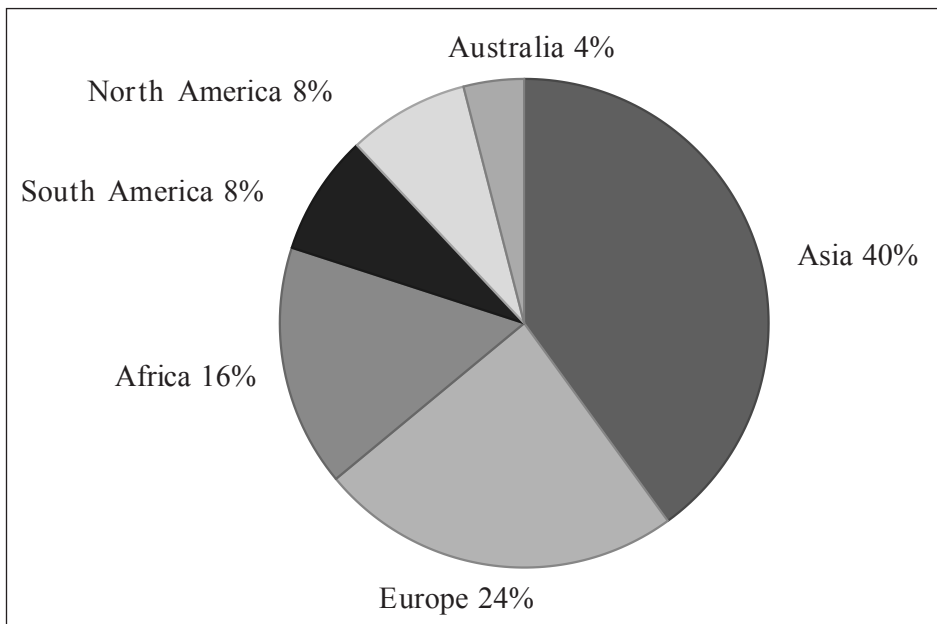


Figure 3: States' Geographical Distribution of Cases Claimed by Chinese Investors

With the Chinese government as a respondent, 5 cases have been concluded. Among them, there have been 2 cases where China won as a host state, with a 40% success rate for the government. Currently, there are no cases where investors have won against the government. The remaining 3 cases were settled or discontinued (See Figure 4).

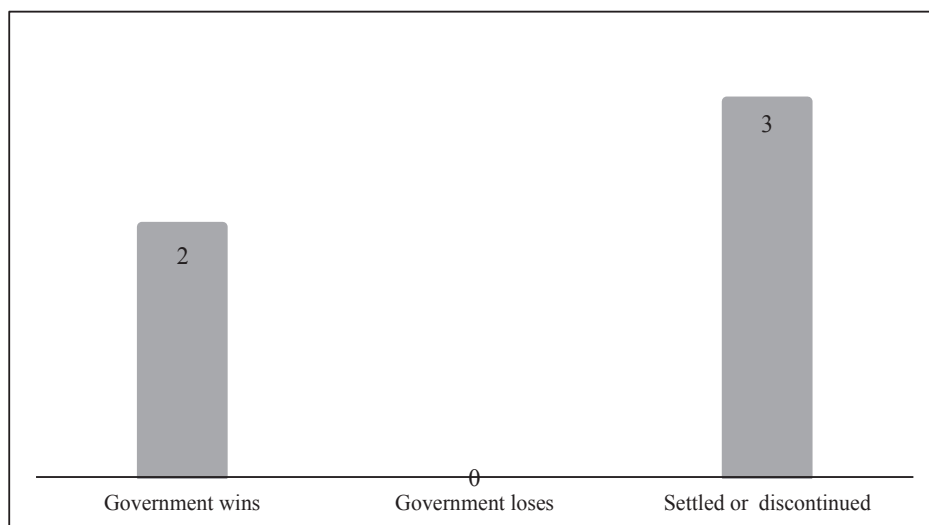


Figure 4: In Favor of the Chinese Government against Investors

Based on geographical distribution, investors from Asia and Europe have initiated investment arbitration against the Chinese government. Asian investors account for approximately 66.67% (6 cases), while European investors account for approximately 33.33% (3 cases). Among them, Singaporean investors have filed 3 investment arbitration cases against the Chinese government, accounting for one-third of the cases in which the Chinese government serves as the respondent (See Figure 5).

Compared with the more than 1,000 existing international investment arbitration cases, China's participation in ISDS is still in its infancy. In international arbitration cases, the frequency of Chinese investors as applicants participating in ISDS is significantly higher than that of the Chinese government as respondents. However, investors' success rate is relatively

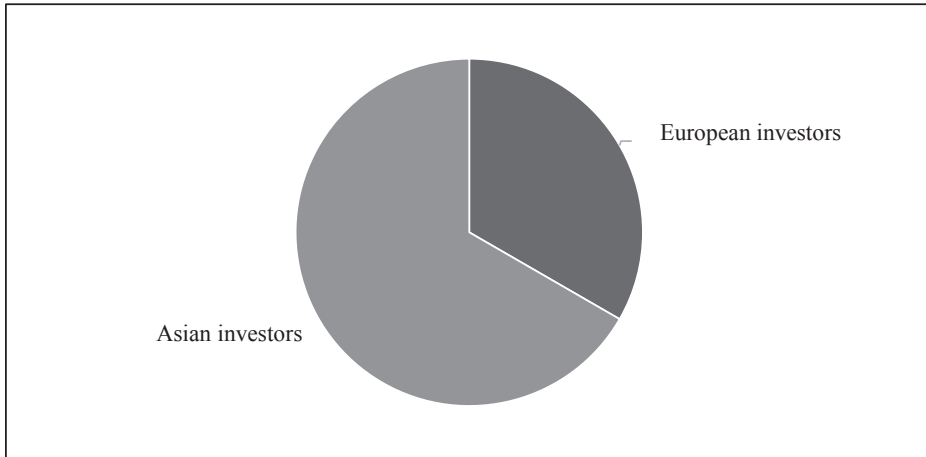


Figure 5: Foreign Investors Initiate Investment Arbitration against the Chinese Government

low. Based on the concluded cases where the Chinese government served as the respondent, settlement or discontinuance of the proceedings has become the second possibility for the government to win the case. With the revival of international investment and the implementation of the Belt and Road Initiative on overseas investment policy, ISDS will become an unavoidable topic for Chinese investors and the Chinese government, and the scope and depth of related legal disputes will continue to expand.

### III. INVESTMENT ARBITRATION CASES INITIATED BY CHINESE INVESTORS AND THEIR MAJOR ARGUMENTS

Since 2007, Chinese investors have started using ISDS to protect their rights and interests. Currently, a total of 25 cases have been filed by Chinese investors as claimants. The overview of these cases is shown in Table 1.

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Table 1: Overview of Cases Filed by Chinese Investors as Claimants

| No. | Year Registered | Case No.   | Applicable Rules | Claimant(s)                                                                                                                                                                                        | Respondent(s)                            | Instrument(s) Invoked                                                    | Status of Proceeding |
|-----|-----------------|------------|------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|--------------------------------------------------------------------------|----------------------|
| 1   | 2007            | ARB/07/6   | ICSID            | Tza Yap Shum                                                                                                                                                                                       | Republic of Peru                         | China-Peru BIT (1994)                                                    | Concluded            |
| 2   | 2010            | ARB/10/20  | ICSID            | Standard Chartered Bank (Hong Kong) Limited                                                                                                                                                        | Tanzania Electric Supply Company Limited | Power Purchase Agreement (PPA)                                           | Concluded            |
| 3   | 2010            | PCA2010-20 | UNCITRAL         | China Heilongjiang International Economic & Technical Cooperative Corporation, Beijing Shougang Mining Investment Company Limited, Qinhuangdaoshi Qinlong International Industrial Company Limited | Mongolia                                 | China-Mongolia BIT (1991)                                                | Concluded            |
| 4   | 2012            | ARB/12/29  | ICSID            | Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited                                                                                           | Kingdom of Belgium                       | China-Belgium-Luxembourg BIT (1984), China-Belgium-Luxembourg BIT (2005) | Concluded            |
| 5   | 2012            | PCA2012-12 | UNCITRAL         | Philip Morris Asia Limited (Hong Kong)                                                                                                                                                             | The Commonwealth of Australia            | Hong Kong-Australia BIT (1993)                                           | Concluded            |
| 6   | 2013            | PCA2013-13 | UNCITRAL         | Sanum Investments Limited                                                                                                                                                                          | Lao People's Democratic Republic         | China-Laos BIT (1993)                                                    | Concluded            |
| 7   | 2014            | ARB/14/30  | ICSID            | Beijing Urban Construction Group Company Limited                                                                                                                                                   | Republic of Yemen                        | China-Yemen BIT (1998)                                                   | Concluded            |
| 8   | 2015            | ARB/15/41  | ICSID            | Standard Chartered Bank (Hong Kong) Limited                                                                                                                                                        | United Republic of Tanzania              | Power Purchase Agreement (PPA)                                           | Concluded            |
| 9   | 2017            | ADHOC/17/1 | ICSID            | Sanum Investments Limited                                                                                                                                                                          | Lao People's Democratic Republic         | China-Laos BIT (1993)                                                    | Pending              |
| 10  | 2018            | 2018       | Ad hoc           | Zhongshan Fucheng Industrial Investment Company Limited                                                                                                                                            | Federal Republic of Nigeria              | China-Nigeria BIT (2001)                                                 | Concluded            |
| 11  | 2019            | 2019       | UNCITRAL         | Jetion Solar Company Limited and Wuxi T-Hertz Company Limited                                                                                                                                      | Hellenic Republic                        | China-Greece BIT (1992)                                                  | Concluded            |
| 12  | 2020            | ARB/20/26  | ICSID            | Fengzhen Min                                                                                                                                                                                       | Republic of Korea                        | China-Korea BIT (2007)                                                   | Pending              |
| 13  | 2020            | 2020       | Ad hoc           | Wang Jing, Li Fengju, Ren Jinglin and Others                                                                                                                                                       | Republic of Ukraine                      | China-Ukraine BIT (1992)                                                 | Pending              |
| 14  | 2020            | 2020       | UNCITRAL         | Shift Energy Japan KK                                                                                                                                                                              | Japan                                    | Hong Kong, China SAR-Japan BIT (1997)                                    | Concluded            |

(Continued from Previous Table)

| No. | Year Registered | Case No.     | Applicable Rules | Claimant(s)                                                                                                    | Respondent(s)                   | Instrument(s) Invoked                                                                             | Status of Proceeding |
|-----|-----------------|--------------|------------------|----------------------------------------------------------------------------------------------------------------|---------------------------------|---------------------------------------------------------------------------------------------------|----------------------|
| 15  | 2021            | ARB/21/36    | ICSID            | Alpene Limited                                                                                                 | Republic of Malta               | China-Malta BIT (2009)                                                                            | Pending              |
| 16  | 2021            | ARB/21/42    | ICSID            | Qiong Ye and Jianping Yang                                                                                     | Kingdom of Cambodia             | ASEAN-China Investment Agreement (2009)                                                           | Concluded            |
| 17  | 2021            | 2021         | UNCITRAL         | Wang Jiazhu                                                                                                    | Republic of Finland             | China-Finland BIT (2004)                                                                          | Pending              |
| 18  | 2021            | PCA2021-15   | Ad hoc           | Beijing Everyway Traffic and Lighting Company Limited                                                          | Ghana                           | China-Ghana BIT (1989)                                                                            | Concluded            |
| 19  | 2022            | ARB/22/2     | ICSID            | Huawei Technologies Company Limited                                                                            | Kingdom of Sweden               | China-Sweden BIT (1982)                                                                           | Pending              |
| 20  | 2022            | ARB(AF)/22/7 | ICSID            | Power China HuaDong Engineering Corporation and China Railway 18 <sup>th</sup> Bureau Group Company Limited    | Socialist Republic of Vietnam   | ASEAN-China Investment Agreement (2009)                                                           | Pending              |
| 21  | 2022            | ARB/22/20    | ICSID            | PCCW Cascade (Middle East) Limited                                                                             | Kingdom of Saudi Arabia         | China-Saudi Arabia BIT (1996)                                                                     | Pending              |
| 22  | 2023            | PCA 2023-35  | Ad hoc           | JuneField Gold Investments Limited                                                                             | Republic of Ecuador             | China-Ecuador BIT (1994)                                                                          | Pending              |
| 23  | 2023            | ADM/23/1     | Ad Hoc           | Power China HuaDong Engineering Corporation and China Railway 18 <sup>th</sup> Bureau Group Company Limited    | Socialist Republic of Vietnam   | China-Vietnam BIT (1992)                                                                          | Pending              |
| 24  | 2023            | ARB/23/8     | ICSID            | China Machinery Engineering Corporation                                                                        | Republic of Trinidad and Tobago | China-Trinidad and Tobago BIT (2002)                                                              | Pending              |
| 25  | 2024            | ARB/24/21    | ICSID            | Bacanora Lithium Limited, Sonora Lithium Limited, and Ganfeng International Trading (Shanghai) Company Limited | United Mexican States           | China-Mexico BIT (2008) and United Kingdom of Great Britain and Northern Ireland-Mexico BIT(2006) | Pending              |

### A. *Tza Yap Shum v. Republic of Peru*

Tza Yap Shum, a Chinese investor from Hong Kong, commenced this arbitration against the Republic of Peru. The claimant claimed that a series of actions taken by Superintendencia Nacional de Administracion Tributaria (SUNAT) against TSG del Peru S.A.C. (TSG) in which he had invested violated the 1994 Agreement between the Government of the Republic of Peru and the

Government of the People's Republic of China for the Reciprocal Promotion and Protection of Investment (China-Peru BIT). Tza Yap Shum is a 90% indirect shareholder of TSG, having invested \$400,000 through his wholly-owned company in Peru since 2002. In September 2004, SUNAT issued a report on TSG's tax audit and subsequently notified the company to pay nearly \$3.5 million in taxes and penalties. In January 2005, SUNAT implemented a "tax lien seizure order" to freeze TSG's bank account. Following such interim measures, TSG was unable to utilize Peruvian banks for its transactions and could not operate normally. Successively, TSG initiated administrative review procedures and judicial review by tax courts to challenge the detention order. However, the relevant authorities only reduced the amount of taxes payable instead of revoking or discontinuing the measures. On September 29, 2006, Tza Yap Shum submitted the case to ICSID according to the China-Peru BIT, naming Peru as the respondent.

Legal issues discussed in the decision lay in whether SUNAT's audit and the interim measures implemented by SUNAT constitute an indirect expropriation of Tza's investment. What is the appropriate compensation for expropriation? Which party is responsible for arbitration costs? In July 2011, the Tribunal determined that the interim measures imposed by SUNAT were arbitrary in nature and constituted an indirect expropriation. Thus, Tza was awarded compensation and interest. In 2011, Peru filed a timely application for annulment of the award rendered in July 2011. On February 12, 2015, the *ad hoc* Committee dismissed its application for annulment.

As the first case in which a Chinese investor used ICSID and the first case in which China participated in ISDS, it has attracted global attention. Notably, it raised questions about the applicability of the BIT to the Special Administrative Region (SAR). Specifically, under the principle of "one country, two systems", whether Chinese residents with the right of abode in the Hong Kong SAR are entitled to invoke the 1994 China-Peru BIT and can file a claim for compensation with ICSID against the host state without the permission of the host state's government.<sup>8</sup> This case marks a milestone in China's participation

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<sup>8</sup> An Chen, Four Challenges to the Jurisdiction of the ICSID in the Case of *Tza Yap Shum v. Peru* — Does the China-Peru BIT Applied to the Hong Kong Special Administrative Region of China under "One Country, Two Systems"? *Journal of International Economic Law*, Vol. 17, No. 1, 2010, p. 3.

in ISDS and promotes discussions on legal issues related to the application of ISDS both domestically and internationally, especially promoting concerns about Investor-State arbitration cases involving China's SAR.

*B. Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*

This case originated from a dispute arising out of a Power Purchase Agreement (PPA). The legal disputes analyzed by the tribunal in the case included reconsideration of the tribunal's decision on jurisdiction and the recalculation of tariffs, interest rates and fees. After several procedures, the tribunal rendered its award on September 12, 2016, deciding that the tribunal had jurisdiction over the case. The tribunal upheld the applicant's claim for arrears and interest under the PPA and calculated the tariff rate and interest rate based on the PPA. On January 6, 2017, the respondent filed an application for annulment of the case. The *ad hoc* Committee dismissed its application for annulment on August 22, 2018. It is noteworthy that the respondent in this case is not a host state, but an independent entity, namely Tanzania Electric Supply Company Limited, which is also a party to the agreement directly signed with the investor.

*C. China Heilongjiang International Economic & Technical Cooperative Corporation, Beijing Shougang Mining Investment Company Limited, Qinhuangdaoshi Qinlong International Industrial Company Limited v. Mongolia (Beijing Shougang v. Mongolia)*

In this case, the claimants filed their arbitration requests pursuant to the 1991 Agreement between the Government of the People's Republic of Mongolia and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments (China-Mongolia BIT). The claimants argued that the revocation of exploration and mining licenses violated the provisions of the BIT on expropriation and compensation. The major disputes between the parties were about the tribunal's jurisdiction and applicable law, the merits of the claimants' claim of unlawful expropriation and the amount of compensation. After a hearing, the tribunal rendered its award on June 30, 2017, confirming that it had no jurisdiction over the case. The tribunal noted that the phrase used in Article 8, paragraph 3 of the BIT

was not “disputes involving compensation for expropriation” but “disputes involving the amount of compensation for expropriation”.<sup>9</sup> China’s early signing of similar investment agreements and contracting practices indicate that China is reluctant to submit the justification for expropriation measures to international arbitration. In this case, the Chinese companies demanded the return of the mining licenses from Mongolia, containing allegations about the justification for the expropriation measure, which was therefore beyond the scope of the jurisdiction of the tribunal.<sup>10</sup> Although in September 2017, the companies applied to the US District Court for the Southern District of New York for annulment of the award, the application was still dismissed.

*D. Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium  
(Ping An v. Belgium)*

This case concerned a dispute submitted to ICSID on the basis of the Agreement between the Government of the People’s Republic of China and the Belgium-Luxembourg Economic Union on the Encouragement and Reciprocal Protection of Investments, which entered into force on October 5, 1986 (the 1986 BIT) and the Agreement between the Government of the People’s Republic of China and the Belgium-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, which entered into force on December 1, 2009 (the 2009 BIT). The claimants relied on the 1986 BIT for the substance of their claims and on the 2009 BIT for the jurisdiction of this tribunal. The claimants asserted that Belgium had violated the relevant provisions of the above-mentioned BITs regarding fair and equitable treatment as well as compensation for expropriation. However, Belgium raised five objections to the tribunal’s jurisdiction, including objections to *ratione temporis*, *ratione materiae*, *ratione voluntatis*, no *prima facie* case, and the monetary gold case principle. According to the parties’ arguments, the tribunal discussed the principles of treaty interpretation, the principle of non-retroactivity, dispute settlement and

<sup>9</sup> *China Heilongjiang International Economic & Technical Cooperation Corp. etc. v. Mongolia*, PCA Case No. 2010-20, Award, para. 443.

<sup>10</sup> Xiaoli Shi, *The Upgrading of China-Mongolia Bilateral Investment Agreements under the Belt and Road Initiative*, *Contemporary Law Review*, Vol. 36, No. 2, 2022, p. 134.

retroactivity, successive BITs, etc. The tribunal held that its jurisdiction could be extended to disputes arising before the establishment of the tribunal, which received little support in Investor-State arbitration. On April 30, 2015, the tribunal rendered the award that the claimants' claim was dismissed due to a lack of jurisdiction. The core argument in the case focused on whether the 2009 BIT could be applied to investment disputes that had arisen before its entry into force but had not been subject to judicial or arbitration proceedings. This involved the issue of the treaty's application in time. However, the tribunal's reasoning, as well as its interpretation, also gave rise to some controversy. For example, the tribunal adopted incomplete substantive legal reasoning, which led to a failure to correctly weigh and judge the interests of the parties to the dispute. It also relied too heavily on formal legal reasoning, failed to strictly adhere to the principle of good faith interpretation, and ignored the importance of complementary methods of interpretation.<sup>11</sup> Although different parties in China have expressed varying degrees of regret over Ping An Group's loss of jurisdiction, in the long run, this case has positive significance for China's improvement in handling the relationship between new and old BITs, especially in terms of clarifying the application of transitional clauses.

*E. Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia (Philip Morris v. Australia)*

The applicant filed its arbitration requests based on the 1993 Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (Hong Kong-Australia BIT). The dispute in this case arose from the respondent's enactment and enforcement of the Tobacco Plain Packaging Act 2011 and the implementing regulations known as the Tobacco Plain Packaging Regulations. The Claimant alleged that the plain packaging legislation prohibited the use of intellectual property on tobacco products and packaging, diminishing the value of its investments in Australia and constituting an illegal expropriation and a violation of fair and equitable treatment. The main arguments in this case were the tribunal's

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<sup>11</sup> Yong Liu, Investment Arbitration Case on *Ping An v. Kingdom of Belgium* – Taking Inter-temporal Law on the Application of Treaties as a Perspective, *Global Law Review*, Vol. 38, No. 4, 2016, pp. 167–171.

jurisdiction and applicable law, the respondent's objections to jurisdiction, unlawful expropriation, counterclaims, and remedies. The tribunal focused on issues such as the concept of "control", the existence of investment, whether the application fell within the scope of the temporal jurisdiction of the treaty, and whether the claimant abused its rights. The tribunal found that the investor's restructuring of the company structure to obtain protection under the investment treaty had constituted an abuse of rights to procedure, as the restructuring through the acquisition of the Australian subsidiary occurred during a reasonable period in which the dispute could have arisen and was primarily done to obtain treaty protection.<sup>12</sup> Therefore, the tribunal rendered an award on jurisdiction and admissibility on December 17, 2015. In accordance with UNCITRAL rules, the tribunal ordered the claimant to pay a certain amount and interest to the respondent on March 8, 2017. This case also raised considerations about the relationship between intellectual property rights (IPRs) and public health in international investment practices. The conflict between IPRs and public health under investment agreements stems ultimately from an imbalance in IPRs and public health legislation in investment agreements, which leads to an imbalance between investors' IPRs and the host state's right to regulate public health.<sup>13</sup>

*F. Sanum Investments Limited v. Lao People's Democratic Republic  
(Sanum v. Laos)*

The claimant filed its requests based on the 1993 Agreement between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic concerning the Encouragement and Reciprocal Protection of Investments (China-Laos BIT). In this case, the arguments focused on whether the claimant was a qualified investor protected by the BIT, whether it had the right to make claims under the BIT, and whether the respondent agreed to arbitration. Besides these arguments, the tribunal also

<sup>12</sup> *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, paras. 585–588.

<sup>13</sup> Yan He, The Conflict and Coordination of Intellectual Property Rights and Public Health under the Threshold of Investment Agreements: Reflections on the Two Philip Morris Cases, *Studies in Law and Business*, Vol. 30, No. 6, 2013, p. 43.

considered the legal application in the proceeding. On December 13, 2013, the tribunal made a jurisdictional decision, determining that the China-Laos BIT was applicable to the Macao SAR. In addition, the tribunal confirmed the claimant's status as an investor but could only arbitrate on its expropriation claim. However, in the award rendered on August 6, 2019, the tribunal found that the claimant had failed to meet its burden of proof to establish the necessary facts to support its legal position. Therefore, the claimant's claim was dismissed. The Lao government was not satisfied with the tribunal's decision on jurisdiction. Thus, the government applied for a review of the arbitration award to the Singapore High Court on January 10, 2014. The court supported Laos's claim that the China-Laos BIT did not apply to Macao SAR, and the expropriation claim of Sanum Investments Limited fell outside the scope of the China-Laos BIT. Sanum Investments Limited appealed to the Singapore Court of Appeal on August 27, 2015. On September 29, 2019, the Court of Appeal overturned the High Court's award in 2015 and finally determined that the China-Laos BIT applied to the Macao SAR.

This case has once again raised concerns about whether the BIT concluded by China could apply to the SARs. Currently, the prevailing view in China holds that China's BITs with foreign countries do not apply to Hong Kong and Macao SARs as a general principle, with applicability being the exception.<sup>14</sup> After the award in this case, the former Director-General of the Department of Treaty and Law, Ministry of Foreign Affairs of China pointed out that "China's conduct of the application of treaties to the Hong Kong and Macao SARs, based on the 'one country, two systems' policy, is clearly stated in the Sino-British and Sino-Portuguese Joint Declarations, in the basic laws of the two SARs, and in the Note of the Permanent Representative of China to the United Nations. It has also had solid support from treaty practices over the past 20 years, which has become a recognized practice in the international community, especially foreign governments".<sup>15</sup> With the development of the times, the application of BITs to SARs should also consider the practical needs of future investment practices. Some scholars believe that Hong Kong and Macao SARs are active

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14 Baihua Gong and Suilong Wu, *A Review of Investor-Host State Arbitration Cases Involving China*, Shanghai People Press, 2020, p. 197.

15 Hong Xu, The Practice of the Application of International Treaties to the Hong Kong and Macao Special Administrative Regions, *Legal Daily*, October 22, 2016, p. 4.

factors in promoting the Belt and Road initiative. Therefore, if China BITs does not apply to Hong Kong and Macao SARs, investors in these regions will lose protection from BITs when implementing foreign investments in the Belt and Road region, which is very unfavorable for investors.<sup>16</sup>

*G. Beijing Urban Construction Group Company Limited v. Republic of Yemen (Beijing Urban Construction v. Yemen)*

The claimant filed its arbitration requests based on the Agreement between the Government of the People's Republic of China and the Government of the Republic of Yemen on the Encouragement and Reciprocal Protection of Investments (China-Yemen BIT), which came into effect on April 10, 2002. During the phase of jurisdiction arguments, the parties debated issues such as *Ratione Personae* and *Ratione Materiae*, Most-Favored-Nation Treatment (MFN Treatment), Qualified Investment, and the Treaty or Contract Basis of the Claims. The tribunal rendered the award on May 31, 2017, affirming its jurisdiction over the case and agreeing with the respondent's general proposition that there was controversy over the use of an MFN provision to extend the scope of the respondent's consent to the dispute settlement clause. Therefore, the tribunal limited its jurisdiction to requests related to the claimant's expropriation allegations. On June 7, 2018, the tribunal issued a procedural order pursuant to Article 43(1) of the ICSID Arbitration Rules, noting the discontinuance of the proceeding. This case is the first international investment arbitration brought by a Chinese contractor to ICSID for overseas construction projects and is of great significance to Chinese companies. Despite supporting the respondent's objection to expanding the dispute settlement scope through the MFN treatment clause during the arbitration, the tribunal still confirmed its jurisdiction over the case. The tribunal confirmed that engineering contracts fell within the scope of qualified investments and that the claimant qualified as a national under Article 25 of the ICSID Convention. It also held that the dispute over "any dispute relating to the amount of compensation payable" under Article 10 of the China-Yemen BIT included disputes over

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<sup>16</sup> Zaicheng Yi and Yi Zhu, Study on the Application of China-foreign BITs to Hong Kong and Macao Investors — From the Perspective of *Tza Yap Shum* Case and *Sanum* Case, *International Business Research*, Vol. 39, No. 2, 2018, p. 73.

whether expropriation had occurred and whether there was an obligation to provide compensation. Furthermore, based on existing investment arbitration practice, the tribunal tended to interpret treaties to expand its jurisdiction, which was also favorable to the claimant in international arbitration.<sup>17</sup>

#### *H. Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*

The claimant filed its requests based on the Implementation Agreement between the Government of the United Republic of Tanzania and Independent Power Tanzania Limited (IPTL) dated June 8, 1995 (the Implementation Agreement) and the ICSID Convention. This dispute relates to the claimant's allegations against the respondent about the breach of Articles 15 and 16 of the Implementation Agreement and the validity of the claimant's termination of the Implementation Agreement. The tribunal deliberated on issues of jurisdiction, legal liability, and the amount of compensation and costs, and rendered its award on October 11, 2019. The tribunal declared that it had jurisdiction over the parties and the dispute. Therefore, the tribunal upheld the compensation request made by the claimant.

Compared to the previous case, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, the claimant's requests in this case were still based on the investment contract, but the respondent was no longer the private entity, but the host state, which made this case become a typical Investor-State arbitration case. The tribunal in this case supported the claimant's requests based on the contract, finding that Tanzania had violated the relevant provisions of the Implementation Agreement and should pay for compensation and damages.

#### *I. Sanum Investments Limited v. Lao People's Democratic Republic*

The claimant filed its requests based on the 1993 Agreement between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic concerning the Encouragement and Reciprocal

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<sup>17</sup> Baoqing Han, Feasibility Analysis of ICSID Arbitration in Resolving Disputes in Overseas Contracted Projects – Taking the *Beijing Urban Construction Group v. Republic of Yemen* Case as an Example, *Journal of International Trade*, No. 7, 2015, p. 175.

Protection of Investments (China-Laos BIT). The case involved the gaming industry, and it applied *ad hoc* arbitration. By August 30, 2021, the tribunal had decided on the respondent's requests. The case is currently still pending.

*J. Zhongshan Fucheng Industrial Investment Company Limited v.  
Federal Republic of Nigeria (Zhongshan Fucheng v. Nigeria)*

The claimant filed its requests based on the 2001 Agreement between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments (China-Nigeria BIT). The case was brought as an *ad hoc* arbitration, with the seat of arbitration in London, United Kingdom, and the award was rendered on March 26, 2021. The dispute involved civil engineering in the construction industry. The claimant alleged that the respondent had violated the provisions of the China-Nigeria BIT concerning unreasonable discrimination, fair and equitable treatment, and indirect expropriation. After hearings, the tribunal upheld the claimant's requests, finding that Nigeria had indeed breached its obligations under the China-Nigeria BIT. The tribunal ordered Nigeria to pay compensation and mental damages to Zhongshan Fucheng Industrial Investment Company Limited.<sup>18</sup> This case is another example of Chinese investors achieving success in international investment arbitration, and it is also the first case in which Chinese investors have prevailed against an African host state.

*K. Jetion Solar Company Limited and Wuxi T-Hertz Company Limited v.  
Hellenic Republic*

The claimant filed its arbitration requests based on the 1992 Agreement between the Government of the People's Republic of China and the Government of the Hellenic Republic for the Encouragement and Reciprocal Protection of Investments (China-Greece BIT). The claimant's reason was that the claimant and its Greek subsidiary, BRITE Hellas AE, were in trouble with their photovoltaic investment project in northern Greece. The case involved electricity, gas, steam and air conditioning supply and was subject to UNCITRAL rules. As of now, the case has been concluded.

<sup>18</sup> *Zhongshan Fucheng Industrial Investment Co. Ltd. v. The Federal Republic of Nigeria*, Final Award, para. 198.

*L. Fengzhen Min v. The Republic of Korea*

The claimant filed its arbitration requests based on the 1997 Agreement on the Encouragement and Reciprocal Protection of Investments between the Government of the People's Republic of China and the Government of the Republic of Korea (China-Korea BIT). The case involved a real estate project. It applied the ICSID Convention and its arbitration rules. By September 3, 2021, the tribunal had issued an order regarding the procedures. Currently, the case is still pending.

*M. Jing Wang, Fengju Li, Jinglin Ren and Others v. Republic of Ukraine*

The claimant filed its arbitration requests based on the 2004 Agreement between the Government of the People's Republic of China and the Government of the Republic of Ukraine concerning the Encouragement and Reciprocal Protection of Investments (China-Ukraine BIT). The claimants argued that the state authorities' alleged actions to freeze the claimants' acquisition of shares in the aerospace company Motor Sich constitutes a breach of treaty obligations. The case involved other transportation equipment manufacturing sectors. Currently, the case is still pending.

*N. Shift Energy Japan KK v. Japan*

The claimant filed its arbitration requests based on the 1997 Agreement between the Government of Hong Kong (China) and the Government of Japan for the Promotion and Protection of Investment (Hong Kong-Japan BIT). The case involved electricity, gas, steam and air conditioning supply. It applied the UNCITRAL rules. More details are unknown, but the tribunal rendered its award on February 1, 2023, deciding in favour of State.

*O. Alpene Limited v. Republic of Malta*

The claimant filed its arbitration requests based on the 2004 Agreement between the Government of the People's Republic of China and the Government of the Republic of Malta on the Promotion and Protection of Investments (China-Malta BIT). The case involved the finance sector. It applied the ICSID Convention and its arbitration rules. By July 20, 2022, the claimant had applied for provisional

measures. Currently, the case is still pending.

*P. Qiong Ye and Jianping Yang v. Kingdom of Cambodia*

The claimant filed its arbitration requests based on the 2009 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations (ASEAN-China Investment Agreement). The case involved the information and communication sectors. It applied the ICSID Convention and its arbitration rules. By March 31, 2025, the tribunal had rendered its award; attached to the award is a partially dissenting opinion by arbitrator Christopher Harris. Currently, the case has been concluded.

*Q. Jiazhu Wang v. Republic of Finland*

The claimant filed its arbitration requests based on the 2004 Agreement between the Government of the People's Republic of China and the Government of the Republic of Finland concerning the Encouragement and Reciprocal Protection of Investments (China-Finland BIT). The case involved the wholesale and retail trade sectors, and it applied the UNCITRAL rules. Currently, the case is still pending.

*R. Beijing Everyway Traffic and Lighting Company Limited v. Ghana  
(Beijing Everyway v. Ghana)*

The claimant filed its arbitration requests based on the 1989 Agreement between the Government of the People's Republic of China and the Government of the Republic of Ghana concerning the Encouragement and Reciprocal Protection of Investments (China-Ghana BIT). The case originated from an underlying contract between the claimant and the respondent, namely the Engineering, Procurement, Installation and Commissioning Contract (EPIC Contract). Under the EPIC Contract, the claimant agreed to supply equipment and provide technical services to the respondent for the planning, design, construction, supervision, operation and training of the Accra Metropolitan Area Traffic Management Project. However, on November 19, 2020, the Parliament of Ghana rescinded the EPIC Contract, which led to claims made by claimant for

unpaid project costs. After hearings, the tribunal noted that Article 10(1) of the China-Ghana BIT limited disputes on the amount of compensation. Thus, the tribunal supported the respondent's position and determined that it had no jurisdiction over the case.<sup>19</sup>

*S. Huawei Technologies Company Limited v. Kingdom of Sweden*

The claimant filed its arbitration requests based on the 1982 Agreement on the Mutual Protection of Investments between the Government of the People's Republic of China and the Government of the Kingdom of Sweden (China-Sweden BIT). The case involved the information and communication sectors. It applied the ICSID Convention and its arbitration rules. By July 27, 2022, the tribunal had issued an order regarding the procedure.

*T. Power China HuaDong Engineering Corporation and China Railway 18<sup>th</sup> Bureau Group Company Limited v. Socialist Republic of Vietnam*

The claimant filed its arbitration requests based on the 2009 ASEAN-China Investment Agreement. The case involved a construction project and applied the ICSID Additional Facility and its arbitration rules. By August 28, 2023, the tribunal had issued an order regarding the procedure.

*U. PCCW Cascade (Middle East) Limited v. Kingdom of Saudi Arabia*

The claimant filed its arbitration requests based on the 1996 Agreement between the People's Republic of China and the Kingdom of Saudi Arabia on the Reciprocal Promotion and Protection of Investments (China-Saudi Arabia BIT). The case involved the information and communication sectors. It applied the ICSID Convention and its arbitration rules. By July 26, 2022, the tribunal had registered an arbitration request.

*V. Junefield Gold Investments Limited v. Republic of Ecuador*

The claimant filed its arbitration requests based on the 1994 Agreement between the Government of the People's Republic of China and the Government of the Republic of Ecuador concerning the Encouragement and Reciprocal Protection

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<sup>19</sup> *Beijing Everyway Traffic & Lighting Tech. Co., Ltd v. The Government of the Republic of Ghana*, PCA 2021-15, Final Award on Jurisdiction, para. 301.

of Investments (China-Ecuador BIT). The claimant held shares in its local subsidiary, Ecuador Minerales S.A., which had mining rights for Río Blanco gold and silver mines. Claims arose out of the government's conduct related to local community protests and illegal mining activities in the Río Blanco mining concession area of the claimant's local subsidiary, as well as court proceedings suspending the claimant's mining operations. Currently, the case is still pending.

*W. Power China HuaDong Engineering Corporation and China Railway  
18<sup>th</sup> Bureau Group Company Limited v. Socialist Republic of Vietnam*

The claimants filed their arbitration requests based on the 1992 Agreement between the Government of the People's Republic of China and the Government of the Socialist Republic of Vietnam concerning the Encouragement and Reciprocal Protection of Investments (China-Vietnam BIT). The case involved a construction project and applied *ad hoc* rules. By August 28, 2023, the tribunal had issued an order regarding the procedure.

*X. China Machinery Engineering Corporation v. Republic of Trinidad  
and Tobago*

The claimant filed its arbitration requests based on the 2002 Agreement between the Government of the People's Republic of China and the Government of the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments (China-Trinidad and Tobago BIT). The case involved a steel industry project and applied the ICSID Convention and its arbitration rules. By April 6, 2023, the tribunal had registered the request for arbitration proceedings.

*Y. Bacanora Lithium Limited, Sonora Lithium Limited, and Ganfeng  
International Trading (Shanghai) Company Limited v. United Mexican  
States*

The claimants filed their arbitration requests based on the 2008 Agreement between the Government of the People's Republic of China and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments (China-Mexico BIT 2008), and on the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion

and Reciprocal Protection of Investments (Mexico-United Kingdom BIT 2006). The case involved a mining concession and applied ICSID Convention and its arbitration rules. By June 10, 2025, The respondent files a request to address the objections to jurisdiction as a preliminary question pursuant to ICSID Convention Article 41(2) and ICSID Arbitration Rule 44. Currently, the case is still pending.

#### IV. CHINA AS RESPONDENT IN INVESTMENT ARBITRATION CASES AND MAJOR ISSUES

Since 2011, there have been cases in which the Chinese government has been involved in international investment arbitration as the respondent. Currently, there are a total of nine such cases. The overview of these cases is shown in Table 2.

##### *A. Ekran Berhad v. People's Republic of China*

The dispute arose from the fact that Sino Malaysia Art & Culture, a subsidiary of Ekran Berhad, had its leasehold rights over land in Hainan Province, which were later revoked by Chinese local authorities. The value of the revoked land was approximately MYR 17.5 million (equivalent to \$5.7 million). The claimant, Ekran Berhad, is a Malaysian company that filed an arbitration request based on the 1988 Agreement between the Government of the People's Republic of China and the Government of Malaysia concerning the Reciprocal Encouragement and Protection of Investments (China-Malaysia BIT). On May 16, 2013, both parties filed requests to suspend the procedure in accordance with Article 43(1) of the ICSID arbitration rules. Although the case was still in its preliminary stages, the primary factor China should consider in responding to international investment arbitration is jurisdictional objections. In 1988, China and Malaysia concluded the BIT, but as a first-generation BIT signed by China, the scope of disputes submitted to arbitration under this treaty was limited to "disputes concerning the amount of compensation and other disputes agreed upon by both parties". When the BIT was signed, China was not yet a member of the ICSID Convention, so the BIT did not provide the provisions that ICSID had jurisdiction over disputes arising therefrom. Subsequently, the annotations of the BIT provided that once China acceded to the ICSID

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Convention, the two countries would engage in consultations to expand the scope of investment disputes under ICSID jurisdiction. However, it appears that no such consultations have ever taken place between the two governments. Since neither party has explicitly indicated their intention to expand the application of ICSID jurisdiction, and the dispute in this case did not fall within the scope of “disputes concerning the amount of compensation and other disputes agreed upon by both parties”, it cannot be concluded that the ICSID tribunal has *prima facie* jurisdiction in this case.<sup>20</sup>

Table 2: Overview of Cases with China as the Respondent

| No. | Year Registered | Case No.   | Applicable Rules | Claimant(s)                                        | Respondent(s) | Instrument(s) Invoked                         | Status of Proceeding |
|-----|-----------------|------------|------------------|----------------------------------------------------|---------------|-----------------------------------------------|----------------------|
| 1   | 2011            | ARB/11/15  | ICSID            | Ekran Berhad                                       | China         | China-Malaysia BIT (1988)                     | Concluded            |
| 2   | 2014            | ARB/14/25  | ICSID            | Ansung Housing Company Limited                     | China         | China-Republic of Korea BIT (2007)            | Concluded            |
| 3   | 2017            | ARB/17/19  | ICSID            | Hela Schwarz GmbH                                  | China         | China-Germany BIT (2003)                      | Pending              |
| 4   | 2017            | 2017       | UNCITRAL         | Surfeit Harvest Investment Holding Pte Limited     | China         | Singapore-Taiwan Province of China EPA (2013) | Pending              |
| 5   | 2019            | PCA2019-39 | PCA              | Jason Yu Song                                      | China         | China-United Kingdom BIT (1986)               | Pending              |
| 6   | 2020            | ARB/20/22  | ICSID            | Macro Trading Company Limited                      | China         | China-Japan BIT (1988)                        | Concluded            |
| 7   | 2020            | ARB/20/34  | ICSID            | Goh Chin Soon                                      | China         | China-Singapore BIT (1985)                    | Concluded            |
| 8   | 2021            | ADM/21/1   | ICSID            | AsiaPhos Limited and Norwest Chemicals Pte Limited | China         | China-Singapore BIT (1985)                    | Concluded            |
| 9   | 2021            | PCA2021-30 | UNCITRAL         | Eugenio Montenero                                  | China         | China-Switzerland BIT (2009)                  | Pending              |

*B. Ansung Housing Company Limited v. People’s Republic of China  
(Ansung Housing v. China)*

This case was related to the claimant’s investment in a golf course and luxury apartment project in Sheyang County, Yancheng City, Jiangsu Province, China.

<sup>20</sup> Zhengyi Zhang, An Empirical Examination of the Jurisdictional Decisions of ICSID Tribunals in the Late Modern Era – The Jurisdictional Defence in China’s First Appealed Case, *Present Day Law Science*, 2011, Vol. 9, No. 6, pp. 116–117.

The claimant filed an arbitration request based on the 2007 Agreement between the People's Republic of China and the Republic of Korea on the Promotion and Protection of Investments (China-Korea BIT). The parties' arguments fell on the limitation period of the BIT and the MFN treatment in the BIT. As the issue of limitation period faced by the arbitral tribunal was a matter of treaty interpretation, the tribunal focused on analyzing the provision regarding limitation period in Article 9(7) of the BIT, which stated that "an investor may not make a claim pursuant to paragraph 3 of this Article if more than 3 years have elapsed from the date on which the investor first acquired, or should have first acquired, the knowledge that the investor had incurred loss or damage". The tribunal found that Ansung submitted its dispute to ICSID and made its claim for purposes after more than three years had elapsed from the date on which Ansung first acquired knowledge of loss or damage. The claim was time-barred and was manifestly without legal merit. Regarding the interpretation of MFN treatment, the tribunal held that the scope of the MFN clause depended on its textual language. The tribunal concluded that the MFN clause in the BIT did not expressly mention international dispute settlement. Thus, it was not necessary to further consider other interpretations of the MFN clause or arguments based on treaty practice or prior awards. After deliberation, the tribunal rendered an award on March 9, 2017, dismissing the arbitration request made by the claimant.

*C. Hela Schwarz GmbH v. People's Republic of China*

The claimant filed its arbitration requests based on the 2003 Agreement between the Government of the People's Republic of China and the Government of the Federal Republic of Germany on the Reciprocal Promotion and Protection of Investments (China-Germany BIT). The case involved spice products and applied the ICSID Convention and its arbitration rules. By January 1, 2022, the tribunal had issued an order regarding the procedure. Currently, the case is still pending.

*D. Surfeit Harvest Investment Holding Pte Limited v. Taiwan Rrovince of China*

The claimant filed its arbitration requests based on the Singapore-Taiwan

Province of China EPA (2013). The case involved financial and insurance activities and applied UNCITRAL rules. The PCA administered the case, which is still pending.

*E. Jason Yu Song v. People's Republic of China*

The claimant, a private UK entity, filed arbitration requests in 2019, and the case is still pending.

*F. Macro Trading Company Limited v. People's Republic of China*

The claimant filed arbitration requests based on the 1988 Agreement between the Government of Japan and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments (China-Japan BIT). The case involved a real estate project and applied the ICSID Convention and its arbitration rules. On September 10, 2021, the tribunal issued an order taking note of the discontinuance of the proceeding.

*G. Goh Chin Soon v. People's Republic of China*

The claimant filed arbitration requests based on the 1985 Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore on Promotion and Protection of Investments (China-Singapore BIT). The case involved real estate and development projects and applied the ICSID Convention and its arbitration rules. On August 25, 2021, the tribunal issued an order taking note of the discontinuance of the proceeding.

*H. AsiaPhos Limited and Norwest Chemicals Pte Limited v. People's Republic of China (AsiaPhos and Norwest v. China)*

The claimants, AsiaPhos Limited and its wholly-owned subsidiary Norwest Chemicals Pte Limited, both established under the laws of Singapore, filed their arbitration requests based on the 1985 Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore on Promotion and Protection of Investments (China-Singapore BIT). The claimant alleged that the respondent's conduct, made through illegal means, had an effect equivalent to expropriation. Thus, the respondent violated Article 6 of the BIT, the fair and equitable treatment clause of Article 3(2), the

full protection and security clause of Article 4, and the commitment to refrain from the expropriation of investments.

The analysis of the arbitration tribunal mainly revolved around the respondent's consent to arbitration. On the one hand, the tribunal, in conjunction with Article 31 of the Vienna Convention on the Law of Treaties (VCLT), concluded that the arbitral consent in Article 13(3) of the treaty did not cover the claimants' claims for indirect expropriation. The scope of the arbitration clause was limited to disputes involving the amount of compensation, whereas disputes about the occurrence and legality of an expropriation could only be brought before domestic courts as provided in Articles 13(2) and 6(2) of the treaty.<sup>21</sup> On the other hand, regarding the respondent's consent to arbitration based on the MFN clause in Article 4 of the BIT, the tribunal found that Singapore and China had agreed that any expansion of the scope of the arbitration clause in Article 13(3) of the BIT would require an explicit and separate agreement by the Contracting Parties. Articles 5, 6 and 11 of the BIT, as the only explicit exceptions to the MFN clause, were not intended to be read as including the dispute settlement provision within the scope of the MFN clause. In particular, in light of the negotiation history of both Articles 13(3) and 6(2) as well as the exchange of letters between Parties, the tribunal cannot draw the conclusion from this list of substantive protections that the MFN clause should, *e contrario*, apply to the scope of consent as contained in Article 13(3) of the Treaty.<sup>22</sup> Therefore, the tribunal concluded that it lacked jurisdiction over the claimants' claims.

### I. *Eugenio Montenero v. People's Republic of China*

Mr. Eugenio Montenero, as a claimant, is a Swiss citizen. He filed his arbitration requests in 2021 based on the 2009 Agreement between the Swiss Federal Council and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments (China-Switzerland BIT). The claimant owned 50% shares in the music festival company H&M Production, registered and established in Hong Kong (China). Mr. Eugenio

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<sup>21</sup> *AsiaPhos Limited and Norwest Pte Ltd. v. People's Republic of China*, ICSID Case No. ADM/21/1, Award, para. 187.

<sup>22</sup> *Ibid.*, para. 218.

Montenero alleged that the company had developed the music festival into an annual event since 2013. However, the local government refused to approve the jazz music festival planned to be held in Hainan Province in 2014. This case is currently pending.

## V. EXPERIENCE AND PROSPECTS OF SETTLING INTERNATIONAL INVESTMENT DISPUTES INVOLVING CHINA

The experience of Chinese investors and the government in settling international investment disputes shows that China is changing from being a “bystander” to a “user” of ISDS. This is closely related to China’s dual identity as a host state and the home state of an investor. In light of the practice of Chinese investors and the government in international investment arbitration, further improvements should be made in areas such as jurisdiction claims, treaty interpretation and amendment, and rules participation.

### A. Grasping Diversified Development of Proof Criteria over Jurisdiction Actively

Jurisdiction is considered to be the power exercised over persons or property in a particular area, or the power to decide cases or issue orders.<sup>23</sup> Jurisdiction is viewed as the cornerstone of the practice of international investment law. It is also the primary issue that needs to be settled when dealing with international investment disputes. In fact, jurisdiction is a critical issue in settling disputes between investors and states. For example, arguments over jurisdiction in arbitration primarily include whether jurisdiction objections raised by the host state are valid, and whether the arbitral tribunal’s reasons for dismissing jurisdiction are reasonable.<sup>24</sup> In international investment arbitration, the arbitration procedure empowers the tribunal to decide its jurisdiction over disputes. As a prerequisite for reviewing the legality of arbitration proceedings and awards, jurisdictional issues determine the legitimacy of the arbitration

<sup>23</sup> Bran A. Garner, *Black’s Law Dictionary*, Thomson Reuters, 2014, p. 980.

<sup>24</sup> Nanshen Sun, Guarantee Mechanisms for Risk Avoidance in Foreign Investment under the Background of the Belt and Road Initiative, *Oriental Law*, No. 1, 2018, p. 28.

tribunal's power. In China's international investment arbitration practice, published arbitration awards show that in nine cases where Chinese investors filed arbitration claims, the arbitral tribunal had jurisdiction in five cases. As for cases where the Chinese government was the respondent, the tribunal had no jurisdiction over three cases. The confirmation of jurisdiction is a prerequisite for the opening of substantive hearings on international investment dispute settlement. Whether as the investor's home state or host state, it is necessary for China to fully grasp the elements of proof for the jurisdiction of the tribunal.

Traditionally, jurisdictional objections in arbitration tribunals revolve around four main issues: the investor, the investment, the existence of an investment, and consent to submission to arbitration. During the jurisdictional phase, the disputed issues between the parties mainly focus on whether the elements in the case meet the four major jurisdictional criteria, which are subjectivity, objectivity, subject matter, and object matter. However, in recent investment arbitration awards involving China, there has been an increase in the analysis of the requirements for time limits and "fork-in-the-road" clauses, which has affected the final decision of jurisdiction. Examples include *Ping An v. Belgium*, *Philip Morris v. Australia*, *Sanum v. Laos* and *Zhongshan Fucheng v. Nigeria*, as well as cases where China is the respondent, such as *Ansung Housing v. China* and *AsiaPhos and Norwest v. China*. This means that the threshold for proving jurisdiction based on traditional jurisdictional criteria is gradually expanding, and the grounds for confirming or rejecting jurisdiction by tribunals are increasing. Therefore, China should prepare thoroughly for the diversified development of proof of jurisdiction on the basis of traditional jurisdictional criteria. It is necessary to incorporate the new certification criteria proposed in previous rulings and to analyze the facts and legal basis in advance in specific cases.

### B. Strengthening the Application of the General Rules of Interpretation of International Treaties

Since the International Court of Justice (ICJ) clarified that the VCLT has customary international law status for its treaty interpretation rules, more and more international investment dispute settlement mechanisms have cited the VCLT's interpretation rules. Therefore, there is theoretical and practical

significance in deeply studying the issue of treaty interpretation.<sup>25</sup> Treaty interpretation has always been a key method of interpretation in international investment arbitration, running through arbitration awards. In China's participation in international investment dispute settlement practice, treaty interpretation has been fully reflected in arbitration awards such as *Beijing Shougang v. Mongolia*, *Ping An v. Belgium*, *Beijing Urban Construction v. Yemen*, *Beijing Everyway v. Ghana*, and *AsiaPhos and Norwest v. China*. The arbitration tribunal takes the treaty's purpose as its primary principle of treaty interpretation, further developing the reasoning and interpretive function of international investment arbitration awards.

Based on the practice of international investment disputes involving China, tribunals usually interpret international investment treaties under the VCLT's interpretation rules. In terms of interpretation methods, the summary of the tribunal in the *Beijing Everyway v. Ghana* case provides some guidance. Firstly, the terms of a treaty, being an agreement under international law, must be given a meaning which is independent of the characteristics of the legal system of either contracting party. Therefore, the outcome of the interpretation must be the same irrespective of either party. Secondly, the "ordinary meaning" must be the meaning attributed to those terms at the time when the treaty was concluded. Thirdly, a tribunal should endeavour to give a meaning to each of the terms interpreted. Fourthly, there are four relevant elements of interpretation identified in the VCLT, namely "good faith", "ordinary meaning", "context" and "object and purpose". All relevant elements should be given equal weight. Fifthly, an investment treaty tribunal is not obliged to accept the decisions of previous investment treaty tribunals.<sup>26</sup> Although the situations of treaty interpretation in international investment dispute settlements may differ from case to case, the treaty interpretation rules based on Article 31 of the VCLT have gradually become the basic guidelines for tribunals to interpret international investment treaties. Most tribunals have analyzed the disputed provisions specifically in terms of their ordinary meaning, context, object and purpose, and have relied on Article 31 of the VCLT as the main basis for treaty interpretation. This is also the prevailing approach in the current process of treaty interpretation in

<sup>25</sup> Naigen Zhang, Treaty Interpretation in ICSID Arbitration: Rules and Jurisprudence, *Business and Economic and Law Review*, No. 1, 2018, pp. 56–57.

<sup>26</sup> *Supra* n. 19, paras. 146–147.

international investment arbitration. Therefore, when China faces international investment arbitration cases, the international treaty interpretation system based on the general rules of the VCLT's interpretation should be the primary way to determine the meaning of the treaty provisions. The parties in cases should also clarify the meaning of the disputed provisions accordingly in order to avoid the ambiguity and uncertainty of the interpretation of contract text.

### C. Revising the Provisions on Dispute Settlement in Investment Treaties Timely

Looking at the BITs that China has signed with foreign countries, there is a lack of uniformity in their scope of application. BITs in the 1980s contained dispute settlement clauses, but those clauses usually did not make a clear distinction between State-State dispute settlement and Investor-State dispute settlement. Most BITs in the 1990s typically limited the scope of disputes submitted for settlement to “the amount of compensation for expropriation”. Different requirements for dispute settlement clauses in BITs arising in different eras would lead to inconsistencies in the scope of application of China's investment dispute settlement with different countries. Since the 21<sup>st</sup> century, China has gradually updated and revised BITs with major investors' home countries such as France, Germany, the Netherlands, and Canada. However, there are still many inconsistent applications of dispute settlement clauses within BITs. It is worth noting that cases of expanding the jurisdiction of investment arbitration tribunals through the MFN clause have frequently occurred and caused arguments. With regard to the scope of the application of the MFN clause, the new version of China's BITs eliminates any possibility of vague or expansionary interpretations.<sup>27</sup> Nevertheless, differences in dispute settlement clauses in China's existing BITs may still cause arguments in practice. In addition, China's model BIT<sup>28</sup> only requires a consultation deadline of six

27 Wei Shen, On the Interpretation and Application of Restrictive Investment Dispute Settlement Clauses in China's Bilateral Investment Treaties, *Peking University Law Journal*, Vol. 24, No. 5, 2012, p. 1066.

28 In April 2010, the Ministry of Commerce drafted the Agreement between the Government of the People's Republic of China and the Government of \_\_\_\_\_ on the Promotion and Protection of Investments, also known as the China Investment Protection Agreement Model (Draft). Article 12 and Article 13 in the Draft correspond to the settlement of disputes between the Contracting Parties and disputes between investors and one of the Contracting Parties, respectively. Comments on this are found in: Xiantao Wen, Draft of China Investment Protection Agreement Model (Part III), *Journal of International Economic Law*, Vol. 19, No. 2, 2012, p. 59.

months for submitting to international investment arbitration, which is slightly simpler than the requirements of other countries' model BITs. In the process of applying for investment dispute settlement, specific requirements such as deadlines and notices are more practical.

Regarding the issue of updating BITs, given the consideration that China has signed a large number of BITs, it is highly likely that China will gradually revise and improve the relevant clauses of its earlier BITs. Currently, China has revised the BITs with countries such as Sweden, Germany, France, Belgium, Luxembourg, Finland, the Netherlands, Switzerland, Bulgaria, Portugal, Spain, Romania, Uzbekistan, Nigeria, and Cuba through updating treaties or adding protocols. The issue of how to handle the relationship between the new and old agreements during the process of revision or updating needs to be addressed. Clarifying the respective application periods and situations under such treaties is crucial. In the *Ping An v. Belgium* case, the main reason why the claims of Chinese investors were dismissed at the jurisdictional stage is the tribunal's non-recognition of the transitional provisions and dispute settlement provisions in the new agreement invoked by the investor. Therefore, when China revises its treaties in the future, it is necessary to fully pay attention to the norms of dispute settlement in transitional clauses. China should specify the applicable provisions for disputes that have already entered judicial or arbitration proceedings, disputes that have been notified but have not yet entered judicial or arbitration proceedings, and disputes that arise after the new treaty enters into force. This is to ensure the proper handling of the relationship between the new and old BITs.

#### D. Participating Actively in Rule-making on Current Multilateral Investment Issues

Over the years, the fragmentation of multilateral investment agreements still exists. Dispute settlement mechanisms at the regional level have also evolved toward plurality, systematization and transparency.<sup>29</sup> The achievement of multilateral international investment rules and the improvement of dispute

<sup>29</sup> Zhengyi Zhang, On the Innovation of Investment Dispute Settlement Mechanisms in Recent Regional Agreements and their Implications — Taking TPP, TTIP, and CETA as Examples, *International Business*, No. 3, 2018, p. 149.

settlement mechanisms have always been the goals pursued by various economies in the process of building an international investment legal system. Since 2017, UNCITRAL Working Group III has been focused on reforming the ISDS. Working Group III held a total of 16 meetings and produced 134 meeting documents. A total of 44 proposals have been put forward by 26 economies, including the European Union and China.<sup>30</sup> ISDS reform represents the latest development in the current international investment dispute settlement mechanism, attracting widespread attention from both investors' home countries and host states. The direction of reform reflects the concerns of various economies about the future of ISDS.

China proposed reform plans in 2020 and 2021, stating that ISDS is generally worth maintaining. China supports the reform proposals advocated by the UNCITRAL Working Group III. The Chinese government is firmly committed to multilateralism and actively promotes international cooperation under the Belt and Road Initiative. It also promotes the building of an open world economy, upholds the concept of shared global governance and promotes the building of a new type of international relationship based on mutual respect, fairness, justice, and win-win cooperation. The current ISDS reform focuses on specific issues, such as the establishment of an advisory center on international investment dispute settlement, the establishment of a permanent mechanism, and the reform of proceedings. To strive to establish an Asia-Pacific regional center for ISDS-related activities, relevant international organizations established by China, such as the Asian Infrastructure Investment Bank and the International Organization for the Prevention and Settlement of Commercial Disputes, could actively integrate into the reform process. This would not only be conducive to the current reform progress but also enhance China's influence and its leading role in the process of formulating multilateral investment rules. With the increasing frequency of cross-border investment, China's involvement in ISDS is also on the rise. Therefore, it is necessary for China to timely track the development of current multilateral investment rules and actively participate in the reform process with the dual identity of an investor's home state and a host state, and put forward constructive opinions. With the

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30 UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state) (Last Visited on February 29, 2024).

increasing complexity of investment disputes and the growing demands of rule compliance, the scope of dispute settlement and the level of investment protection in current economic and trade rules are expanding. Therefore, against the background of the reform of international investment rules, China should fully draw on the practical experience of international investment dispute settlement, further participate in ISDS, and establish its own voice in the system of international economic rules. In the post-globalization era, the deepening development of the global value chain and blockchain models will bring about changes in the investment industry, which will bring higher demand for the cost of rule implementation and the efficiency of dispute settlement. To cope with the development of investment disputes in this era, China can further participate in the practice of multilateral investment dispute settlement on the basis of developing diversified dispute settlement mechanisms. By analyzing ICSID cases and using ISDS reform as a driving force for the new round of changes in international economic and trade rules, China should strive to accurately comb the theoretical development and practical difficulties of ISDS and provide theoretical and practical support for the reform of the international order under the global governance system, especially the development of international investment law practice.

## VI. CONCLUSION

Currently, China has become a major country in attracting investment and making overseas investments. It is of great significance for China to lawfully and properly settle commercial, economic and investment disputes related to the Belt and Road Initiative. However, China's participation in ICSID is very limited. There is still a lack of sufficient exploration and effective advocacy of the elements of International investment dispute jurisdiction. There is an urgent need to explore the theoretical and practical aspects of ISDS and formulate corresponding institutional recommendations. By analyzing China's participation in international investment disputes and summarizing its experience, predictions can be made about the risks involved in China's future participation in international investment dispute settlement mechanisms. Revising and improving domestic legal systems and new-generation investment

agreements will also serve as a reference for effectively resolving international investment disputes between countries and investors, promoting further economic development and opening-up, and serving the practice of building the Belt and Road Initiative. It will support China's active participation in leading the reform and construction of the global governance system and actively safeguarding a worldwide open economy.

(Edited by Yunhan Wang)