THE FOUNDATION FOR LAW AND INTERNATIONAL AFFAIRS REVIEW

VOLUME 3 ISSUE 3 2022

FLIA
Foundation for Law & International Affairs

FOUNDATION FOR LAW AND INTERNATIONAL AFFAIRS REVIEW
ISSN: 2576-6619
4 issues per annum

For further information, please see our website: https://flia.org/flia-review/.

The Foundation for Law and International Affairs (FLIA) is an independent, nonpartisan, nonprofit organization incorporated in Washington, D.C. in 2015. FLIA is an educational, academic, and consultative think tank, as well as a professional network for law and international affairs. FLIA is mandated to promote the international communication, education, and cooperation at the intersection of law and international affairs.

The Fifth International Investment Law Young Scholars Forum

Transnational Investment in Geoeconomic Competition: Risk, Rule, and Order

CONFERENCE PROCEEDING

On May 8, 2022, The Fifth International Investment Law Young Scholars Forum "Transnational Investment in Geoeconomic Competition: Risk, Rule, and Order" was successfully held by Xi'an Jiaotong University School of Law and Silk Road Institute for International and Comparative Law with the support from Xi'an Arbitration Commission and Foundation for Law and International Affairs Review. 11 speakers and 12 commentators participated in the forum. The discussions were academic and cutting-edge. Guest Editor of this issue, Associate Professor Wang Peng organized the translation of forum proceedings.

Zhao Haonan, Wang Mengzhuo, Zhou Wei, Qu Guannan, Ren Yuanyuan, Gao Liang, Fu Sixin, Zhao Yifan, Liu Jiayi, Wang Run and Agdaliya Khusnetdinova (They are all from Xi'an Jiaotong University School of Law) translated the speeches. All speakers confirmed the translation of their own speeches.

The Fifth International Investment Law Young Scholars Forum
Transnational Investment in Geoeconomic Competition: Risk, Rule, and Order

Welcome Address[1]

Moderator: Wang Peng (Associate Professor, Xi'an Jiaotong University School of Law)

Good morning, dear professors and students, welcome to the Fifth International Investment Law Young Scholars Forum. I am Wang Peng, an associate professor at Xi'an Jiaotong University School of Law. It is a great honor to invite Dr. Shan Wenhua, the Dean and Chaired Professor at Xi'an Jiaotong University School of Law to give a keynote lecture at the opening ceremony of this forum. First of all, I would like to briefly introduce this forum. The International Investment Law Young Scholars Forum is a forum aiming to promote academic discussions among young scholars and has always been supported by many senior and established scholars to which we are very grateful. The forum has covered a wide range of topics in international investment law, including Multilateral Reform of Investment Arbitration, New Topics of Investment Law, Global Changes and the Evolution of Investment Law, Clash of Civilizations and Sustainable Development in Investment Law, among others.

The topic of this Fifth Forum is Transnational Investment in Geoeconomic Competition: Risk, Rule, and Order. We invite the speakers and commentators to explore the frontier issues of the fast-changing international economic order. We want to see how the old order changes and how the new order evolves from the prism of transnational investment. We invited many established scholars and experts as commentators, and many outstanding students and young scholars as speakers. Thank you all. Now, let us invite Professor Shan to give us an opening lecture.

Speaker: Shan Wenhua (Dean and Ministry of Education Chair Professor, Xi'an Jiaotong University School of Law)

Topic: Russia-Ukraine Conflict and the "East-West Competition" in International Investment Law

Dear colleagues, students and friends: good morning! First of all, please allow me to welcome and thank you all on behalf of the organizers.

[1] The Welcome Address is translated by Zhao Haonan (Xi'an Jiaotong University School of Law). The translation has been modified and confirmed by the speakers.

The International Investment Law Young Scholars Forum has now entered its fifth session. As Dr. Wang Peng introduced, the latest several sessions had been held in the context of COVID-19 pandemic, which had been rather challenging, but they turned out remarkably successful. Today, I am pleased to cyber meet many old and new friends, and I would like to take this opportunity to express my heartfelt gratitude to you all for your support and help. Indeed, without your long-term and full support, this forum could not have sustained.

Meanwhile, I would also like to take this opportunity to express my regards to Dr. Wang Peng and Dr. Gu Enuo, the two colleagues organizing this forum. As well known, it is not easy to organize a symposium. And it is much more difficult to organize a forum for many consecutive years, particularly under the circumstances of the pandemic.

In addition to this forum, they also persisted and succeeded in compiling the International Economic Law and Policy Weekly and organizing the Light of the World Reading Club. The reading club was actually launched during the Qingming Festival, and it continued regularly regardless of some holidays, such as the International Labor Day. Their dedication and persistence are truly remarkable and admirable.

As introduced by Dr. Wang, the topic of this forum is Transnational Investment in Geoeconomic Competition: Risk, Rule, and Order. It is perfect timing and of great significance. Indeed, geopolitical competition has led to dramatic changes in political and economic landscapes of the world. In particular, the ongoing the Russia-Ukraine Conflict has brought about significant challenges to the current international political and economic order. Consequently, recently there have been many discussions on such challenges and changes.

For example, it has been said that the Russia-Ukraine Conflict would end this round of globalization. This is obviously a major observation, and whether or not it will stand depends on the definition of relevant concepts and the future development of the situation.

Undoubtedly though, the Russia-Ukraine Conflict and the Pandemic, the two major "Black Swan Incidents," have significantly accelerated the so-called de-globalization process, which is most closely related to China. Indeed, it has been pointed out that the so-called de-globalization is essentially a de-sinicization process, as the core of de-globalization seems to be promoting value-based trade and decoupling from unlike-minded countries such as China.

Whether or not it is accurate, such views reflect the expectation and efforts of some states and some politicians. Under such circumstances, more thorough and systematic research and thinking are urgently needed. This forum is therefore held at a perfect time. For example, in terms of international investment law, from a Chinese perspective, the Russia-Ukraine Conflict has raised severe questions and challenges from at least three levels.

Firstly, at the most direct level, the challenge is about the protection of Chinese investment in Ukraine. China has substantial investment in Ukraine. In the context of the

Russia-Ukraine Conflict, is there enough protection for such investment in Ukraine? As happened during the "Arab Spring," it turned out that the protection for Chinese investment in relevant countries was insufficient. China has a Bilateral Investment Treaty (BIT) with Ukraine, but it was signed in 1992 and did not include an ICSID provision for dispute settlement. In general terms, it is one of first-generation Chinese BITs and does not have much detail. Can this BIT provide effective protection? For example, can investors demand adequate compensation for loss due to the war? Is there an issue of fair and equitable treatment breach? How can investors make their claims for such loss? These are the most direct questions. And so far, there seems to be very few studies on such issues.

Secondly, there are issues that can be considered as "secondary disasters." As the old Chinese saying goes, "a fire on the city gate brings disaster to the fish in the moat." The sanctions against Russia following the Russia-Ukraine Conflict, for instance, are rather extensive, which impact on other economies and their companies. As well known, the economic exchanges between China and Russia and the Commonwealth of Independent States (CIS) states have been intensified in recent years. It is difficult to assess the exact impact that the above sanctions will have on China's investment relations with Russia and CIS states at this stage. But the challenges are real and have been felt already. I am in Xi'an now, for example, and Xi'an is known for the running of the China-Europe Railway Express. But its operations have been notably affected by the sanctions. Some observers pointed out that if the conflict continues for a long time, or becomes further expanded and intensified, the Belt and Road Initiative might be greatly affected. Such challenges would certainly be significant ones that require thorough investigations.

Finally, at the macroscopic level, what impact will the Russia-Ukraine Conflict have on the international investment regime as a whole? As well known, originally, the issue in international investment law was the contradiction between the developed and developing countries, the so-called South-North contradiction. Later, particularly in 1990s, it was observed that the South-North contradiction had given way to the Public-Private conflict, namely the conflict between the foreign investors and the host state. However, in recent years, the world seems to be witnessing the emergence of a new dimension of conflicts in international investment law making and implementation, that is the competition between the western liberal market economies and the emerging state-driven economies, which may be termed as "East-West competition." The "poison pill clause" in the United States-Mexico-Canada Agreement (USMCA) is just one of the many examples.

So, what would come after the Russia-Ukraine Conflict? Will the East-West competition be strengthened? Will it be a quantitative increase or a qualitative change, i.e., becoming the main theme of international investment law like the South-North contradiction was? If this happens, how should we deal with it? These are obviously systematic questions that demand considered answers.

Applying a familiar expression, "it was the best of times, it was the worst of times." War and bloodshed, sanctions and economic disasters, and threats of escalation of the

situations including use of nuclear weapons, this is certainly a worst of times. However, on the other hand, as a scholar, one finds it is never short of questions to be answered and problems to be solved. Indeed, problems and questions emerge one after another and become more and more difficult to tackle. They provide great opportunities particularly for young talents such as those in this cyber meeting room. I sincerely hope and firmly believe that with young talents and established authorities gathering around, this meeting would provide useful answers to the above-mentioned questions and problems!

I wish this meeting a great success and everyone a happy weekend! Thank you very much again for your presence and contributions!

Moderator: Wang Peng

Thank you, Professor Shan Wenhua. Professor Shan analyzed the impact of geoeconomic competition on the international investment law, on the construction of the Belt and Road Initiative, on the enforcement of international and unilateral sanctions and on the trajectory of the entire international investment system. Professor Shan laid a solid foundation for our next discussion and also provided a Giant's shoulder for us to climb on.

According to the schedule of the forum, we should start the discussion of the Panel One at 9:00 am. There is still some time. So, I'll introduce some basic rules of the forum to better facilitate our discussion. May I kindly ask all the participants to keep the microphone silent and turn off the camera during the meeting? All the participants are advised to join the meeting in your real name because we will have a question-and-answer after each session. We suggest that the participants type your questions in the chat box and the chairperson of each panel will pick up and communicate the questions with the speakers and commentators. We entrust the chairperson to organize the discussion of each panel with the maximum flexibility.

Without the support of our friends, our forum could not continue. Therefore, I would like to thank all speakers, commentators and co-host institutions, Xi'an Arbitration Commission and Foundation for Law and International Affairs Review for your support, and express my gratitude to our organizers, Xi'an Jiaotong University School of Law and Silk Road Institute for International and Comparative Law, especially the Dean and Professor Shan, the Associate Dean and Professor Li Wanqiang, and colleagues at the Institute many of which serves as chairpersons and commentators.

Finally, I welcome all the audience and invite outstanding doctoral candidates, master candidates and young scholars to join Xi'an Jiaotong University School of Law and Silk Road Institute for International and Comparative Law to explore the new frontiers of international investment law. Now, let's begin the discussion of Panel one.

Panel One[1]

Moderator: Gu Enuo (Associate Professor, Xi'an Jiaotong University School of Law)

Many thanks to Professor Shan Wenhua for his opening remarks for the 5th Young Scholars Forum on International Investment Law. I would also like to thank Associate Professor Wang Peng for his introduction to this forum.

Welcome to the first panel, there are three speakers from the universities in western region of China respectively are Southwest Jiaotong University, Southwest University of Political Science and Law, and Xi'an Jiaotong University. The panel also invited three distinguished scholars as commentators. Each speaker will have ten minutes to share his or her paper, and then more time will be left for commentators.

According to the schedule, the first speaker is Dr. Zhang Qianwen from Southwest Jiaotong University. We are familiar with each other. Not only are we graduated from the same university- Xiamen University, but also she has been a regular speaker at previous Young Scholars Forum. She is currently an Associate Professor at the School of Public Administration of Southwest Jiaotong University. She has been a Visiting Scholar at Global Economics and Law Network Research Centre, Melbourne Law School, and has been selected an academic visitor at Faculty of Law, University of Helsinki in Finland. It is difficult for us to meet each other in person since the COVID-19 pandemic, however, we have always kept in touch. Dr. Zhang Qianwen has been very productive recently in journals like Law Science and Studies in Law and Business. She also has undertaken several provincial research projects of the Ministry of Justice of the People's Republic of China, China Law Society, Sichuan Province Social Science Foundation, etc.

Recently, Dr. Zhang Qianwen mainly focuses on the field of cross-border data flow and data localization. The title of her presentation is "Whether Data Qualified Investment-from the point of view of Einarsson v. Canada," which analyzes the eligibility of data as covered investment, and how it should be considered in international investment arbitration. China, as a major digital economy country, should consider or not incorporate data as a part of investment agreements through upgrading or concluding treaties. Now, I would like to give the floor to Dr. Zhang Qianwen.

The forum does not get the permission from Associate Professor Zhang Qianwen to publish her topic.

Moderator: Gu Enuo

---

[1] The Panel One is translated by Wang Mengzhuo (Xi'an Jiaotong University School of Law), Zhou Wei (Xi'an Jiaotong University School of Law), and Qu Guannan (Xi'an Jiaotong University School of Law). The translation has been modified and confirmed by the speakers.

Many thanks to Dr. Zhang Qianwen for her wonderful presentation in the limited time. Firstly, she gave us an overview of the definition of investment, its property attributes and relationship with intellectual property protection. Then, she introduced the criteria for data identification by arbitral tribunals. Finally, she discussed how China respond to data protection from the government's and enterprises' perspectives. Thanks again for Dr. Zhang's sharing.

The second speaker is Associate Professor Yin Wei from the School of International Law at Southwest University of Political Science and Law. She obtained her Ph.D. degree from Durham University and is currently the Director of the China-Latin America Law Research Centre at Southwest University of Political Science and Law. Her research mainly focuses on International Economic Law, International Investment Law, and legal issues under the Belt and Road initiative. The title of her presentation is "Theoretical Logics of Investment Subsidy Rules and Multi-dimensional Examination of Regulatory Paths."

Speaker: Yin Wei (Associate Professor, School of International Law at Southwest University of Political Science & Law)

Topic: Theoretical Logics of Investment Subsidy Rules and Multi-dimensional Examination of Regulatory Paths

Dear colleagues and participants, good morning. The topic of my presentation today is not my best area of expertise, but I am quite interested in it. Therefore, I have tried to analyse it. My initial thoughts on this topic did not come from the unilateral approach of the European Union, which is mentioned more in this article, but from the provisions of the regional trade and investment agreement, e.g., the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and USMCA that involve state-owned enterprises (SOEs), especially from the perspective of the European Union Competition Law and the United States economic and trade agreements that focus on non-commercial assistance with regard to SOEs. After that, I read a paper named "China's 'Going Global' Policy: Transnational subsidies under the WTO SCM Agreement," written by Victor Crochet and Vineet Hedge (this paper was later published on the Journal of International Economic Law), which triggered my concern about the United States and the European Union's unilateral regulations and initiatives to implement countervailing measures and subsidy reviews on investment-related behaviours and activities. In the process of writing this paper, there were quite a lot of questions and challenges. I've been thinking about the question and challenge section since the first draft was completed, and I've been reading further on the related content. Then I found that in order to make this topic very clear, I need to integrate some theories and knowledge of Competition Law, Competition Policy, Industrial Policy, Trade Remedies and also Investment Law, so my first draft is not thorough enough in some aspects.

My paper includes four main parts, which are the formulation of the problem, the analysis of the existing regulatory approaches and practices of investment subsidies, the multidimensional review of investment subsidy rules and the prospect of investment subsidy rules. But I have not fully completed the last part. In the following time, I would like to share with you some specific considerations of my paper.

In the problem formulation section, I focus on why there is some practice and regulation to "discipline" investment subsidies, and what are the motivations for it? In this section, I just briefly mention the concepts of transnational investment subsidies, investment-related subsidies, or investment subsidies, while the key concepts are elaborated in the second section. In this section, I mainly analyse the competition for rules and systems under the change of international economic and trade pattern, and the conflict between different economic development models, especially in the United States, Europe Union and some emerging market countries represented by China. The "data" mentioned by Dr. Zhang Qianwen just now is a reflection of the competition among the United States, China and Europe Union for the discourse power in the field of rulemaking. The United States, China and Europe Union present different approaches. In terms of regulation of investment-related subsidies, although the United States and Europe Union have paid attention to subsidies for a long time, there are still some differences in their actual paths.

Returning to my familiar area - the issue of SOEs. This issue has been a focal point around subsidies, investment and trade. Subsidies involving investment are actually related to the increasingly active international trade and economic activities of SOEs. For the discipline or restraint on subsidies, from the perspective of the United States and Europe Union, it is to address the advantages and preferential treatment of SOEs as well as the market distortions and unfair competition that SOEs may cause in international trade and economic activities. On the issue of SOE competition, the rise of developing countries as well as emerging market economies have to be brought up. Unlike Western countries, especially those represented by the United States, Europe Union and Australia, which present a gradually conservative attitude towards investment in the current international economic and trade context, developing economies reflect a more open attitude, especially in the case of COVID-19. The relevant practice of China in recent years can be used as evidence. Another aspect is to fill the regulatory gap, including unilateral and multilateral perspective. From the unilateral perspective, for example, Europe Union believes that the current Europe Union regulation is not sufficient to regulate subsidies and the behaviour of SOEs, so Europe Union tries to find new regulatory tools. From the multilateral perspective, several joint statements of the United States, Europe Union and Japan called for further restraint on SOEs subsidies. A few days ago, the staff of four international organisations issued a report on subsidies named "Subsidies, Trade, and International Cooperation." This report mentioned investment incentives in one sentence, but it did not provide further analysis or information, because

there are certain difficulties in the regulation of this area. And investment incentives happen to be the content I want to focus on in this paper.

In terms of existing regulatory approaches and practices, the focus is put on some unilateral initiatives. Instead of focusing on specific provisions in the CPTPP, USMCA and the EU-China Comprehensive Agreement on Investments (CAI), the paper provides a summary of the United States countervailing practices, Europe Union countervailing practices and the draft of Europe Union foreign subsidies regulation. In terms of regulatory approaches, I try to answer the question of what exactly is the investment subsidy that I am focusing on in this paper. There are many related concepts that can be explored together, as there is no general terminology yet. Some scholars use the term offshore investment subsidies, some scholars use the term cross-border or transnational investment subsidies, and some scholars use the term foreign subsidies used in the Europe Union regulation. But the last concept is broader, and it includes the issue related to government procurement. In addition, the term I used at the beginning of this paper is investment-related subsidies, and the type of subsidies is more concerned with the investment incentives. The terminology is not exactly the same in different articles. Some of them use investment incentives, some of them use investment subsidy directly. This paper mainly focuses on the subsidies of exporting countries for inbound foreign investment, and the subsidies of home countries for outbound investment by their own investors. In my paper, I found that currently it is complicated to summarise the current path of investment subsidy rules. It is because that the regulation involves both the importing country perspective and the host country perspective. The regulatory objects also involve both investment in third countries by the exporting country and foreign investment in the host country. Regulatory methods reflected in the existing practice is trade remedy rules of the United States and Europe Union, that is, the legal basis for implementing countervailing measures. In addition, there are competition law-related regulations, which are reflected in the Europe Union's draft regulation on foreign subsidies with competition elements.

This slide shows several investment-related subsidies that I explore in this paper. The first one is subsidies provided by the exporting country to attract foreign investment, typically in the case of the United States' countervailing measures against subsidies received by India for products processed in its special economic zones. The second one is the Europe Union's case on fiberglass fabrics from China and Egypt, where a regulation was made on subsidies received from China for foreign investors producing processed products in the exporting country's special economic zones, which is also a typical case in the current discussion of transnational subsidies by many scholars. The third category, exemplified by the Europe Union's draft foreign subsidies regulation, is the issue of subsidies granted by the home country of investment to its multinational enterprises operating in the host country or for mergers and acquisitions. From the perspective of World Trade Organization (WTO) law, the regulation of traditional subsidies and cross-domain issues are involved here. The other is the issue of traditional subsidies

involved in the field of international trade, which extends to the multinational operation of the investing enterprise. In addition to the unilateral path that I am mainly concerned about, there are multilateral paths such as the CPTPP and USMCA I mentioned earlier. All of which reflect the traditional subsidy rules or subsidy disciplines extended to investment-related issues.

The third part tries to review from different areas of international economic law. that is, the conflict and coordination between the value and logic of the current regulation of investment-related subsidies and WTO law, Investment law and Competition law. In this case, I not only found that the existing rules and practices of investment subsidies reflect the legal nature and conflict with other related legislation, but also found a common factor, which is the notion of development. In the review of the rules and practices of investment subsidies, what caught my attention is that the situation that some foreign enterprises and investment enterprises cooperating with China are subjects to relevant regulation. To a certain extent, it exists challenges for China, such as current unilateral open measures and policy of Pilot Free Trade Zones, as well as the Belt and Road Initiative. It may even affect China's unilateral open initiatives and investment cooperation with members of the Belt and Road Initiative.

The initial idea of this paper is to take a development-oriented approach to debugging and correcting conflicts. From my own point of view, I can neither change the practice and regulation of the Europe Union, nor do I want to propose a response from the perspective of enterprises. Instead, I want to think about how we can make a harmonisation from the perspective of the international economic law.

Due to time limit, I'd like to end my presentation. Thanks for your attention. Any questions or comments are welcome.

Moderator: Gu Enuo

Thanks for the excellent presentation of Dr. Yin Wei. Firstly, she introduced the motivation of cross-border investment subsidies in terms of institutional competition, rule-based competition and competition among state-owned enterprises. Then, she mainly discussed the regulatory path of investment subsidy rules and practices, as well as conflicts and harmonization with WTO rules, investment law and competition law. Finally, she made conclusion and expectation. Thanks again for Dr. Yin' sharing.

The last speaker is Zhou Wei, a master candidate from Xi'an Jiaotong University School of Law. He will share a legal risks report prepared by the research project team from School of Law. Professor Wang Peng and I are the leaders of the project, we would like to analyze the risks that enterprises face with during the implementation of "going global" strategy, especially since the Belt and Road Initiative was put forward. There lies in obvious differences among distinct states in cultural background, religious, political regime, legal system, level of economic development, and so on, which make enterprises inevitably face a variety of risks in the process of foreign investment. Many scholars have

made deep research of risks from political and economic perspective, however, there was not much research on legal risks. This report is a preliminary empirical analysis of the legal risks, and we set out to see whether our hypothesis was true by verifying the model.

The report is divided into three parts, the first part is mainly based on some findings of the annual reports of listed companies, and the second part contains data information through questionnaires collected and collated. Because of the limited time, there were not too many questionnaires, but we will carry on distributing questionnaires in the coming months. The last part is conclusion which combined with the previous contents. Zhou Wei, now, the floor is yours.

Speaker: Zhou Wei (Master Candidate, Xi'an Jiaotong University School of Law)

Topic: Legal Risk Report of Chinese Enterprises' Transnational Investment: An Attempt Based on Text Mining

Thank you, Associate Professor Gu. Good morning to all professors and students, I am Zhou Wei from the project group. I would like to share a part of the results of the project, and more criticisms are welcome.

The report will be presented in four parts. The first part is an overview, the second part is preliminary findings based on annual reports, the third part is simple findings based on questionnaires, and the fourth part is conclusions and outlooks. Due to the time constraints, I will skip the two middle sections and focus on the first and fourth sections.

The overview consists of three areas, origins, the hypothesis and the research methodology. I found two lists, one is the ranking of the stock of foreign direct investment (FDI) in the world's major countries in 2020, the other is the ranking of number of cases each country has been involved in as the home country recently according to ICSID. It is an interesting finding that rankings are similar between two lists, e.g., the United States ranks first in terms of volume of investment and also in number of cases; Netherlands ranks second in terms of volume of investment and the same in number of cases involved. China ranks third in terms of volume of investment, but China ranks twenty-fourth with eight cases in the case list.

Moreover, according to the data collected, from 2010 to 2020, only 56 foreign-related cases were disclosed by Chinese listed companies on the Shanghai Stock Exchange (SSE), while as many as 28,000 Chinese companies have registered outbound investments in 2020. So, the question arises, why is the volume of Chinese companies investing abroad disproportionate to the legal cases disclosed?

The typical research methods of established studies are empirical approach and case analysis. Studies have agreed that Chinese enterprises encountered many risks when investing abroad. But researchers hold different attitudes on the risk management capability of Chinese enterprises. Some believe that enterprises investing abroad have built a healthy legal risk management system, but others believe enterprises' management capability is insufficient. Therefore, the project group made two hypotheses, Hypothesis

One is Chinese enterprises encountered investment risks, but the investment risks are controlled and did not turn into legal cases; Hypothesis Two is Chinese enterprises encountered investment risks, but the risks did not turn into legal cases due to ineffectively defend their rights through legal ways. In another words, this project aims to discuss how Chinese companies investing abroad perceive and manage legal risks.

The methodology of the project is mainly quantitative empirical. There are two sources of data, one is annual reports of listed companies and the other is survey questionnaires. The desired data is continuous, objective, consistent and representative, so annual reports of listed companies are chosen.

It will be better if the sample includes 2013 in which the Belt and Road Initiative proposed, and 2018 in which the trade friction between China and the United States was in full swing. So, the period was arbitrarily set at 11 years from 2010 to 2020. The criteria to select sample is whether the company have disclosed foreign-related risks for more than two years. According to statistics from the second quarter of 2021, there were over 1,900 companies on the SSE, and 1,120 companies in the manufacturing sector. 281 companies in the manufacturing sector met the criteria after screen, accounting for 74% of the sample size, so the manufacturing sector is suitable as the sample for analysis.

Two indexes are set, the risk disclosure index and the risk management soundness index. The risk disclosure Index is the sample size divided by the total number of companies in the industry, which is roughly 25.1%. The risk management soundness Index aims to evaluate the quality of risk information disclosed, with the 5-point Likert scale to comprehensively assess the growth, stability and scientific validity of the disclosed information. Five is the best, one is the worst, three is the medium. There are 35 companies received above 3-point, which accounts for 12.5% of the sample size. The product of these two is 1/32, which means only 1 company has disclosed complete risk information and risk control measures disclosed out of 32 companies. Based on this finding, the first conclusion was draw, the risk disclosure index and the risk management soundness index are low. The drawback of this conclusion is lacking with a benchmark, to estimate the degree only based on the absolute value. Many of the conclusions in the main text are followed this process.

During the data processing, categorical statistics, python and Likert scales help to convert descriptive information into quantitative data.

The questionnaire consists of three parts, the first part is basic information of enterprises, the second part is legal risks they encountered, and the third part is measures to cope with legal risks. However, the collection of questionnaires is not optimistic, only 29 valid questionnaires have been received so far, so the conclusions drawn by its information may be deviated from the reality. Similar with the annual reports, the questionnaire information was processed in such a way as to convert the qualitative data into quantitative data. Categorical statistics meet the requirement as the questionnaire is structured information.

The second part of the report presents some preliminary findings based on the annual report information, mainly on risk types, risk causes, risk response and dispute resolutions. There are 35 sub-categories of risk in 5 major categories have been identified, mainly includes foreign exchange risk, macroeconomic risk, raw material price fluctuation risk, commodity price fluctuation risk and corporate management risk. Since the corporate management risk is ranked fifth, the second conclusion has been drawn that the capability of corporate management cannot fully prevent risks encountered against the company.

The third part of the report is preliminary findings based on questionnaires and divided into three areas, the main business of sample companies, the legal risks encountered by sample companies and risk responses.

Three typical types of legal risks encountered by the sample companies are breach of contract by the customer, changes in laws and regulations by the host government and environmental, intellectual property and labor protection risks.

The conclusion is divided into two parts, one is findings based on annual reports and questionnaires, and the response to the established hypothesis, the other part is main shortcomings of the study.

Based on above analysis, there are 18 conclusions have been drawn, 9 conclusions from annual reports are as follows:

(1) The risk disclosure index is 25.1% and the risk management soundness index is 12.5%, the risk disclosure of the sample data is low.

(2) The capacity of corporate management does not fully protect companies against risks encountered, as the corporate management risk ranking fifth in risk type list.

(3) Causes of risks are concentrated at the systemic and national levels, which are difficult for companies to influence proactively.

(4) A quarter of companies disclosed relatively closed causes of risk, within only one aspect of cause.

(5) Typical risk response measures focus on conceptual updating and standard optimization, lacking in specificness and guidance for the risk management regime.

(6) Half of the sample enterprises' disputes over overseas investments were related to intellectual property rights.

(7) The majority of legal disputes are heard in courts of developed countries.

(8) The proportion of cases involving large amounts in court litigation is higher than arbitration, but the time taken for arbitration awards is shorter than court litigation.

(9) Settled and withdrawn cases accounted for about 30% of cases, higher than the proportion of concluded cases.

9 findings of questionnaires are as follows:

(1) Enterprises investing overseas are mainly concentrated in two industries, mining and manufacturing, and the main modes of overseas investment are subsidiary corporation and joint venture.

(2) 45% of the sample enterprises' overseas investment business accounted for more than 40% of their revenue, which means sample enterprises have a high degree of internationalization.

(3) More than half of sample enterprises are concerned about the local economic environment, market conditions, business environment and political stability of the host country.

(4) Three typical legal risks are breach of contract by customers, changes in laws and regulations of the host government and environmental protection, intellectual property rights and labor protection.

(5) The main restrictions encountered by the sample enterprises' overseas investments from the host governments are localization requirements and limitation for cross-border capital flows.

(6) Measures taken by sample enterprises to deal with legal risks mainly include improving the company's internal risk management system and hiring law firms to help assess and mitigate risks.

(7) When choosing law firms, most of the sample enterprises choose "a Chinese law firm + a law firm in the host country."

(8) When it comes to resolving legal disputes, the legal approach accounts for nearly 60% of the total.

(9) Sample companies are willing to acquire the risks information associated with host countries with the help of government agencies.

Based on the above conclusions (1) (2) (3) (4) (5) drawn from annual reports and the conclusions (6) (9) drawn from questionnaires, it's tended to support Hypothesis Two, Chinese enterprises encountered investment risks, but the risks did not turn into legal cases due to ineffectively defend their rights through legal ways.

In fact, the report also suffers from an inadequate sample recovery rate, which may lead to some deviations from the facts. Additionally, in annual reports part, the logic inferred the established hypotheses through some conclusions still needs to verify. Furthermore, there may have been operational errors in the information collecting process.

In the next step, we will improve the research model and analysis more interesting findings. This is all. Thank you all.

Moderator: Gu Enuo

Thanks for Zhou Wei's sharing. Empirical study does not have obvious effect in short term, and not only data collection is time-consuming, but also data refining and processing. Although there are some places less than satisfactory, our research team will do further improvement.

Next, we will move on to the panel discussion part. We are honored today to invite three commentators, they are respectively Professor Zhao Jun from Zhejiang University

Guanghua Law School, Dr. Lai Huaxia from Peking University School of International Studies and Dr. Liu Yang from Renmin University of Law School.

Professor Zhao Jun received his J.D. degree from Cornell University, M.A. and LL.M from Harvard University. He was selected as one of Young Changjiang Scholars of the Ministry of Education of the People's Republic of China. Professor Zhao has published several articles in the national authoritative journals of CSSCI, including Social Sciences in China, Chinese Journal of Law and Chinese Journal of International Law. He is also a frequent speaker at both international law and international economic law conferences home and abroad, with complete and thorough comments which have both the depth and breadth.

Now we are looking forward to Professor Zhao's comments in this panel. Professor Zhao, the floor is yours.

The forum does not get the permission from Professor Zhao Jun to publish his comments.

Moderator: Gu Enuo

Many thanks for Professor Zhao's wonderful comments. Professor Zhao shared his key insights about international law studies, which are: one "keyword," two "overall situations," three "kinds of perspectives," four "sets of contradictions," five "attentions," six "patterns of thinking" and seven "aspects of coordination." Moreover, he provided insightful and unique comments on the papers of three speakers, specifically combined the rule of law at home and in matters involving foreign parties, as well as how to use digital technology to do legal research and etc. Thanks again for Professor Zhao's valuable insights.

There are two other distinguished commentators in our panel, Dr. Lai Huaxia and Dr. Liu Yang. Dr. Lai Huaxia is Assistant Professor at Peking University School of International Studies. She is fluent in the methods and theories of both law and politics and specializes in international economic law and international organizations. She received her Ph.D. in international law and M.A. in political science from University of Washington, M.A. in international relations from Peking University, and B.A. in international relations from University of International Relations.

Dr. Liu Yang is Assistant Professor at Renmin University of China Law School, and also a Research Fellow at Law and Technology Institute of Renmin University of China. He received Doctor of Judicial Science (S.J.D.) from University of California, Los Angeles, and LL.M from Harvard University.

Both of them are very active in the academic community, always bring us a series of large-scale academic events, including but not limited to international law annual forum, Global Law and Strategy Roundtable and etc. Additionally, they often organize interdisciplinary workshop involving different disciplines, such as law, history, political

science and sociology either on regular or irregular basis. All in all, they have a wide range of interests and professional fields, and we are looking forward to their comments. Dr. Lai, now, the floor is yours.

Commentator: Lai Huaxia (Assistant Professor, Peking University School of International Studies)

Thank you, Dr. Gu, thanks for your introduction, and thanks for Dr. Wang Peng's kind invitation. I have always been looking forward to participating in this event organized by Xi'an Jiaotong University School of Law, but not as diligent as those professors who have already contributed, I have not been able to submit any manuscript formally, so this time I am participating as a commutator and I come with a learning attitude. It is indeed like what Professor Zhao Jun mentioned just now, the 10 papers selected by this forum are all very good, and I have learnt a lot from them, especially as Professor Zhao Jun just mentioned, using new methods to study old problems, or using classic methods to study new problems, the papers I read all have very good reflections and set a good example for me.

Well, as a commentator in the first panel, my feeling is indeed that we need to have a current perspective on some of the classic issues of international investment law. Then I think the current perspective is not limited to the geopolitical perspective, but also includes the perspective of new methods presented to everyone by Dr. Wang Peng and his collaborators, as well as thinking on new issues, etc., so these papers are very inspiring to me. Then I will share with you my learning experience in the order I read.

The first paper presented by Dr. Zhang Qianwen, which is a very important issue about whether the data is eligible for investment. When I got this paper, I read the abstract first, and then read that Dr. Zhang mentioned the Salini Test in particular, and then I felt that the fourth prong in the Salini Test was more controversial, which was about whether the investment has promoted the development of the host country. But we said that the Salini Test was controversial when it was first proposed, but after the accumulation of case law in the following years, this problem has been basically solved.

Well, the controversy about development in the Salini Test very well reflects the tension between the North and the South contained in the international investment law mentioned by Professor Shan Wenhua and Professor Zhao Jun just now. In particular, the modern international investment law, when it first emerged, generally traces its origin back to the bilateral agreement signed by Germany and Pakistan in the 1950s. If we regard the historical period after World War II as the start-up period of modern investment law, then most of the investment at this time is limited to some more traditional investment fields such as natural resource mining. So, in such a problem and such a situation, it is of course very meaningful to use development as the basis for judging this eligibility standard. It was relevant to the developing countries at that time

who had just gained political independence and their series of efforts to maintain economic sovereignty.

However, such a large international environment or application problem faced by international investment agreements has now undergone some changes. For example, natural resources and their mining are still very important issues, but as mentioned by Dr. Zhang in the paper data-related, this is also a very important issue, or what is more closely related to our country is various investments related to infrastructure construction and so on.

So, I think it is more meaningful to examine the issue of investment in the context of such a big historical change, so if, for example, this point can be emphasized in the text. The Salini Test is only used as the criterion for judging eligibility, and if Dr. Zhang is writing about a universal norm, I think it may be a process to change the concept from partially accepted to universal accepted and can mention it a little. Because there may be some historical implications for understanding the emerging redefinition of investment.

Then there is another point that I saw that Dr. Zhang had published a paper related to data and international investment law in the journal named “Fa Xue” before, that is, the cross-border flow of data and exception clauses, so when I read the new work, I was thinking that there is actually a certain connection between these two issues.

Of course, the premise of applying the exception clause is to first establish that the data is regarded as an investment, and first to determine its eligibility. However, based on your previous research, I think the core problem of data and international investment law may still fall in the regulatory space of sovereign countries, which is the public-private conflict mentioned by Professor Shan in the opening just now, then such a public-private conflict may be a combination of East-West conflict, because it involves data localization requirements, etc., so I think if the issue of eligible investment can be combined with the issues of data security or digital sovereignty, there may be a better sense of introductory for readers outside of international investment law.

Then, after such a sense of introduction, we can conduct a more in-depth discussion on this legal issue. In fact, Dr. Zhang has done a very detailed discussion. I think it will be more interesting to talk about its historical background.

Dr. Zhang took the case of Canada as an example. No judgment has been made in this case, so I am also looking forward to what the final judgment will look like. I guess it may be more to rely on intellectual property, because this is a relatively mature legal reasoning basis. However, from such a perspective, how to evaluate the representativeness of precedents, for example, may need to be reconsidered.

So of course, this is the first case involving the issue of data eligibility, and it has indeed attracted a lot of attention. But on the other hand, in the field of investment law in the field of investment, the reference value of a single case is relatively limited, because in such a case it is based on North American Free Trade Agreement (NAFTA), other cases may be based on a bilateral agreement, it uses not an international multilateral convention

with universal qualifications, it may still need to be slightly distinguished from the reference meaning of trade law cases.

So what issues, outside of case law, might have a bigger impact on the issue of data eligibility? For example, some new regional economic agreements, which redefine the data issue, or discuss such an issue in some multilateral occasions. I think combining these aspects may help us understand the place of data eligibility. Well, this is Dr. Zhang's article, and the second is Dr. Wang Peng's very interesting attempt at text mining.

After reading it, I felt that this was a very large empirical contribution, because we can see that there are already very strong opinions on this issue in various in-depth studies in Chinese, English, and other languages that I do not understand. Moreover, when Chinese companies go abroad, the political, legal and economic risks they face are not completely new, because for example, I believe that the United States or Japan, especially Japan, when their companies go abroad to invest, will also face many similar problems, so it is very necessary to conduct a comprehensive empirical analysis on these problems, because it will provide a benchmark and a reference basis for the subsequent analysis of this problem. From this point of view, I think the research project itself is indeed very creditable.

Because I don't know much about private international law, I still read more about public international law and investment law, so I am very curious about this paper by Dr. Wang and your team. How does it combine with investment law? For example, do your questionnaires involve, for example, bilateral investment treaties, and its specific mechanisms? For example, whether it is the first generation of this Chinese BIT or the latest generation of Chinese BIT, does it have a significant impact on investors' overseas investment? The investment law literature often says that a bilateral investment agreement is a credible commitment, but it is more of a theoretical analysis, so because many of your data are questionnaires for business practitioners, I think if we can clarify this issue, in fact, the empirical evidence is a very big contribution, that is to say, to what extent such a BIT is effective for them. My understanding is that many practitioners engaged in cross-border investment works in the industry, because they are not in the law, even say that if they are not in the investment law, their understanding of BIT is relatively limited at first, or they have a certain understanding, they will take this as a last resort, or he has no particular confidence in the specific implementation method in the future, that is, there are still some differences between the logic of our law and the logic of the economy and the logic of the industry.

Therefore, I am very curious about the final research results and various findings of your project, and how it communicates with the mainstream discourses and assumptions of international investment law or international political economy. This is what I am particularly curious about.

Then there is the third article by Dr. Yin Wei, I really like her article, this issue is so important.

This issue is very complicated. It is not only an issue of international economic law, but also involves the discussion of domestic competition law and other jurisprudence. At the same time, it is also a highly politicized issue.

The latest Organization for Economic Cooperation and Development (OECD), the World Bank and the IMF jointly published a report on subsidies, which is setting an agenda, so for such a highly technical and highly politicized issue, I think it was very thoroughly written by Dr. Yin Wei, and the legal and political considerations of all aspects involved in this issue are well written, and then I am very grateful to Dr. Yin for her contribution in this regard.

Then I have two questions. The first one is a changing thing, a moving target. Which direction will it go in the end? I think it may be a little too early to predict. This is the first point, and then the analysis of the political aspects related to this may also need to be adjusted.

The second point is that we can put this issue not only in the geo-economic conflict between China and Western countries, but in such a big framework, we can even put it in the re-integration of investment law and trade law, such a recent development in international economic law. My own experience is that investment and trade have never been separated. The boundaries of disciplines will lead us to say that investment law is a discipline, and trade law is another discipline. Investment law is based on the arbitration cases of various bilateral investment agreements or regional economic agreements, and then trade law base on the WTO, as if they are separate, but such a separation, I think, is only a theoretical separation.

So, in economic practice, trade and investment have never been separated, or we look at the development of trade and investment law. In the 19th Century, there were various legal provisions on trade and investment that were emerging, and they were also discussed together. Well, such a separation is a very special historical phenomenon after World War II, so such a historical phenomenon is now on the verge of being interrupted or suspended. For example, more and more regional economic agreements put trade and investment together, so this is an overall framework arrangement.

The specific mechanism is to take Dr. Yin Wei's research on this issue as an example, the cross-border subsidy, which is actually closely related to trade, that is, how do we view such a problem from a broader historical perspective, rather than just limiting it to the economic and strategic competition between China and Western countries on this issue, I think it can serve as a reference for Dr. Yin.

Because of these three Professors and their cooperative teams, they finally want to provide a policy reference for the Chinese government. When we make policy reference, of course, first and foremost, it is to safeguard national interests. Then when we think about countermeasures, in addition to a clear understanding of national interests and legal tools, there is also a very important point, that is, we must not have a wishful thinking, but to understand the objective world, have a more comprehensive understanding. Such a comprehensive understanding does not only include this Western country. When we talk

about foreign countries, it is easy to limit it to OECD countries, for example. What do African countries think about this cross-border subsidy? And what do African countries think about the adequacy of the data? In particular, big data social media has had a great impact on the internal affairs of many States.

We say this information, this fake news and so on, so in such an issue, it is not considered to be protected by bilateral investment agreement in such a form of investment, or it falls in the category of applying exception clause and so on, I think it needs multi-consideration. The position of each country, we say that the current international relations is multilateralism, is a multipolar, that multipolar certainly not only includes not only China and the main economic rivals, this is the first.

The second point is that when we observe these issues, we should not focus on the relatively recent historical period since 2010s or the rapid growth of China's foreign investment. If we push this point back a little further, to a time when China was still in an economic or international economic position that was not so strong, and then pay attention to some of the propositions and positions of other similar countries, I think it is important for us to understand ourselves and understand the world.

Many immature suggestions have been discussed, this is the end of my review, Dr. Gu, thank you.

Moderator: Gu Enuo

Many thanks for Dr. Lai's elaborate comments. She has put forward some good suggestions on each paper from different perspectives. The first speaker was suggested to the further improving and thinking from the perspective of "south-north contradictions," "public-private conflict," "data sovereignty and security." The second speaker was suggested to take a broader perspective, either from regional culture or historical chronology. As for the empirical research report, it should consider to what extent the investment treaty is beneficial to investors, how to interrelate the report with international investment law and political economic, not merely concerning the operation of enterprises and investors. Thanks again for Dr. Lai's comments. Now let's welcome Dr. Liu, the floor is yours.

Commentator: Liu Yang (Assistant Professor, Renmin University of China Law School)

Thank you very much Dr. Gu. First of all, I have three things to thank and one thing to be sorry about. Thanks to Xi'an Jiaotong University School of Law and Silk Road Institute for International and Comparative Law for holding such a good conference and Dr. Wang Peng. I noticed that this form of activity is quite special in domestic forums, that is, the speaker must provide articles first, the speaker speaks less, and the commentators speak more. I think this is a correct or reasonable discussion to condense

the research agenda. We've been involved before, so I'm very grateful to have me here. Second, thanks to the authors of the three articles and their teams for contributing very innovative and thoughtful articles, I have learnt a lot. Third, thanks to Dr. Gu, Dr. Gu correctly invited Professor Jun Zhao in the front, and very generously listed Dr. Lai Huaxia and me together, packaging the non-performing assets and high-quality assets all together. I said that the background of the subject is very broad, and this is the research ability of Dr. Lai. I am sorry because I only teach public international law at Renmin University of China, and I do not involve international investment law in my teaching. And today, I read a few authors, and logically we should exchange seats. I am relatively junior, and you should be the ones to comment on me. I am learning from you, so I am very, very grateful to the moderator, Dr. Gu.

I mainly talk about some of my own thoughts. Here I will make a simple explanation, that is, I think that such seminars are not mainly for the improvement of papers and suggestions for the improvement of details, but for discussions on research directions, at least this is my feeling.

Therefore, my following discussion is mainly based on these aspects. Of course, I completely agree with the views and suggestions of the previous two professors. In particular, Professor Zhao Jun taught me a lot and I have learnt a lot. I will follow Professor Zhao's guidance writing articles and doing research in the future writing articles and doing research.

The first thing I would like to discuss is Dr. Zhang Qianwen's article. Dr. Zhang's article is very interesting, and I very much agree with Professor Zhao Jun's earlier comment that this may be a new issue, and Dr. Zhang used a more familiar perspective and method to discuss it.

I think the orientation is based on this framework, but I have some more specific suggestions to say that because it is now dealing with data validation and related issues, it is now in the development of realization, so we need to distinguish to some extent, is this a very practice-oriented or an academic article? I would suggest making a clear distinction as to who you are talking to, as this can have some impact in terms of the writing style and the depth of problem awareness. At the moment it looks like it is more front-end, and it is more forward in terms of discussing with the arbitrator of the tribunal how they should go about defining that part.

However, there is a bit of tension in the end of this article, trying to discuss it without entering the specific practical context, but to discuss how to solve this problem in general, such as how to define it in the investment agreement. The main question I want to discuss is what problem this article wants to solve, what data problem does it want to solve, and whether it is an eligible investment problem. Because it can be divided into at least two scenarios, the first scenario is the law-making. In the preparatory negotiation, it is directly stipulated what Dr. Zhang suggests. If this is the consideration, then the factors that need to be considered are different, and the factors that need to be considered are also different, for example, it may be necessary to consider the settlement of this issue by the

domestic laws of the contracting states, which is closer to what Dr. Yin Wei said in the article, and there may be some new events in the domestic laws of various countries.

Then in the process of international law-making, the conclusion and drafting of bilateral or multilateral treaties, how to deal with these different modes, and how to comprehensively coordinate such modes. Then I think that comprehensive coordination or dealing with differences is a basic issue, a core issue, and there is another way in the arbitral tribunal, such as discussing the Salini Test, then if this is the case, it will enter a more traditional and classic way of discussion, the materials to be discussed and the factors to be paid attention to are different.

For example, the Salini Test itself has 4 prongs, so should I put it in, and whether this text should be modified, then the institutional environment it is in is a given, isn't it? That is what we expect the next arbitration to be like, right?

So, I consider this big issue should be clearly defined first, that is, what problem Dr. Zhang wants to deal with. If you want to deal with these two problems at the same time, of course it may have an influence. For example, some events in the arbitral tribunal may affect the follow-up treaty negotiations. If you want to deal with two issues at the same time, the length of your article or the amount of information for substantive analysis may increase by 2 to 3 times. This is the first point.

The second question is a common problem that our existing future law institutes or data law research need to face, that is, we have to clarify the front-end matters. Data is not a concept, right? Dr. Zhang has mentioned the ownership of data, but if we look at the legislation of various countries or some typical countries, it does not use the concept of data ownership; it uses data processing, and data processing also includes storage, including calculation, including some kind of form of transfer. So, this base point is different, why is the base point different? This goes back to a low-level description or analysis, that is, why is data valuable in investment? This issue has to be made clear first, so what are the scenarios in which it is valuable? What are the difficulties you may encounter in investing? We have specific cases here, so if we only discuss specific arbitration, I think this issue is relatively easy to solve, because the form of disputes has already emerged, that is, investors and home countries are restricting the value of data. It is a given condition, and it doesn't need to be discussed any more.

But what if it is a general treaty negotiation, or how to deal it with general international investment law? If data is an investment issue, then this problem becomes very big, and it may have to deal with many links in data processing. For example, Dr. Zhang Qianwen, I just noticed that you also talked about the problem of algorithms in your speech. We generally think that the data related to the algorithm is not a typical problem of the data itself. Of course, the intervention of the algorithm will make the data valuable. But the key here is that we need to discuss in which scenario is data valuable.

At this time, there will be some controversies. This article is relatively brief on this issue, but I think this matter needs to be made clear, because this is the focus of the new form of legislation, and there may be two ways to deal with it. The first is to solve new

problems with old methods, which is a hidden danger. There are many cases in international law, public international law, environmental law and investment law, which solve new techniques through evolutions and cover new techniques. So, the question to be considered here is whether such complex and valuable scenarios or situations can be covered by evolution.

The other focus that can be considered to deal with the problem is the problem of complexity, because data processing will involve many inconsistent and sometimes conflicting scenarios, then you always want to use an overall system to treat it as an investment, may arouse some complications. I think this article can also discuss further on this issue.

Of course, these two problems I just talked about cannot solved by this article, however the current overall situation, including the problems that need to be solved in the Chinese and English documents I have read, most of those may be discussed in each scenario with a case-by-case manner. I consider Dr. Zhang is very ambitious in developing theories, that is, the overall regulation, which may be unavoidable in the end from both a practical and theoretical point of view, so it may be necessary to consider a plan. So here are my two suggestions for this post.

The first is to solve the problem of which scenario to define data as investment, whether it is in arbitration or treaty negotiation. The second is why data has investment value. The underlying logic and analysis, as well as the core problems behind it, or the accompanying theories will all be different.

Dr. Yin Wei's article has been written very thoroughly. Everyone is concerned about this issue. Professor Zhao said earlier that the boundary between politics and law needs to be clarified. I completely agree, but I want to talk about why there is a necessity to lineate the boundary between political and law.

Because the beginning of this problem is the combination of politics and law. Some people want to bring political logic into the law. Some of our scholars want to clear it out and solve it in a fair and transparent way through rules. Then this is what we generally think of as legalized solution.

But this matter itself, like our forum, talks about geographic cases in the context of economics and politics. I agree with this basic analysis. In this article, I think the overall problem to be dealt with also has one or two premises to be clear.

The first is the problem of perspective. When I read this article, I felt that there were three or four switching perspectives. It was like a very advanced documentary. There was a bird's-eye view and a close-up view. Sometimes from the perspective of the United States or the European Union, and sometimes from the perspective of developing countries or China, the focuses and value orientations of different countries' perspectives on this issue are different. I don't think it is necessary to adopt only one perspective, but this awareness should be clear, because it will involve the value issues mentioned by Professor Zhao Jun and Dr. Lai Huaxia.

The second question is that Dr. Yin has now dealt with several models in detailed, such as the American model, the European Union model based on competition law, and so on. I think Dr. Yin needs to make a decision on the characterization of these things. It is the unilateral behavior or unilateral practice of various countries. One mode is to regard it as a mode, which is what I just said about Zhang Qianwen. It is a demonstration, it is a reference, it is a practice, it is a plan, and it is the trigger state of this Brussels Effect. I tell you this thing is good; it is good without actual competition.

Then another country came up with it, and the United States came up with its plan. It is possible that other countries, such as Dr. Yin said that development is the driving force, and that is the third model. So, when discussing the mode, it is less practical.

It seems to be relatively neutral to discuss between these modes. In multilateral or other scenarios, in negotiation, in the treaty, which method can be used to deal with it, this is a question of mode selection, which is relatively close to institutional competition. The first article is about institutional competition. Institutional competition is different. Institutional competition has actors. It is necessary to take out these models and the interests behind them. Clarify the conditions of competition, limit the constraints, and if it is competition, there will be the driving force behind this model, and how it intersects with other models.

It is an entirely different framework, and its overall problem awareness is also different. Awareness of the problem is who is driving the rules behind it, and why this rule wins and spreads to other places, while others doesn't. Then the comparison of its final results is not the rationality that scholars have seen from the perspective of God, or to measure it with objective standards, but the part that may have a little experience, or the part that needs to introduce actors. Now this issue does not seem to be clear.

In which aspect does Dr. Yin hope to discuss this issue. The reason why this is not clear is because I don't know whether Dr. Yin wants to give a practical plan in response to the investment subsidies suggested by the European Union and the United States, or whether she wants to make a step back observation, an academic observation, I think this is the first point to discuss.

The second point is that even if we are not experts, how do we view the issues behind this discussion? If you look at a specific country, its identity is in different changes. In trade, it is an importing country or an exporting country. In investment, there are investors and home countries. Its identity changes, and its interests also changes. China is in the same way on this issue, why?

The first one is that we are expanding opening up and further deepening reforms, so what do you think our national interests shall direct in on subsidies related to investment? Is it to strive for more legal and reasonable rule space for this existing model, or do you think we just need to change it, because for example, there may be problems such as inefficiency, etc. I think this is the first one.

The second is the need to distinguish between several types of subsidies, that is, the issue of strategic interests, because it is very clear that this issue obviously has a

geopolitical factor, it is to curb China's global influence in the economic field, so it is a systemic and there is a geopolitical systemic consideration. I personally think this kind of problem is different, that is, in the basic position, I think it needs to be firmly fighting for the rules space, international law cannot be rounded up on this thing. Whether from the perspective of Dr. Yin's development, or from other perspectives, I think this and the previous discussions on further reform and deepening of openness, our enterprises may have taken certain aspects out to invest, which is not the same, I think these two scenarios need to be distinguished.

The third small question is that Dr. Yin discussed development at the end. The issue of development is very important, I think this article currently involves a very important topic, but now it seems to me that it is led by development and comes up with a narrative that doesn't fully respond to the things you said earlier. This does not mean that we cannot do this in practice. In practice, we can still use development as a discourse to construct an overall legal solution, as well as solutions outside the law. However, at the implementation level, development is the guide. At the specific operational level, how to deal with the things mentioned above may still need to be finished first, or I think that even if you don't need development as a cap, your discussion below can be carried out. The last part seems to me more like a separate initiative, saying that we can sort out all the previous things, and finally package them into development, then this is a new contribution, this is what the global development initiative can include, or an interesting discussion and addition of what should be included. But for this article, I think this tail is too heavy, and it takes too much to make it clear.

The third article is that Dr. Gu, Dr. Wang and Zhou Wei and their fellow team have done a lot of research. I think the problem needs to solve is that although the article reflects a lot of effort, it still feels like the assumptions are not clear and the conclusion is not clear, which is my biggest feeling.

Just now, Dr. Lai expressed a similar view from a more academic perspective, that is, what does this article have to communicate with investment law? If you look at it through the lens of investment law, what is the specific problem? I want to express this question more abstractly, that is, even if I don't look at investment law, only look at legal risks, what exactly is this article trying to say?

My specific questions are these two. The first one is that although this article has done text mining and processing through Python, if you read the annual report, the data collected are the reports of these listed companies on their own legal risks, so your data is these companies' own perceptions of risk, so what is the point of discussing perceptions.

I consider the most important question in discussing perception is whether his perception is correct, or how valuable his perception is. There is a problem to be dealt with is the benchmark, the comparison benchmark, what its perception is compared with, this article has not clearly solved this problem.

The second is the final conclusion of the article. It just supports the second hypothesis. The second hypothesis is that there are relatively few cases disclosed by listed

companies. A question will arise here, that is, what is the relationship between legal risks and legal cases? If you only look at this conclusion, you can say that the disclosure of legal cases by overseas listed companies in our country is relatively small, relatively insufficient. Let's take a look at the original text —due to the lack of scientific and effective countermeasures, we rarely resort to legal means when encountering legal risks, so fewer legal cases have been disclosed. What do I think this conclusion conveyed? It is said that this research design is invalid for observing or evaluating case disclosure, because it is relatively rare for this reason. If you have this conclusion, can you still use this research to observe the cases disclosed by the companies? This is a big problem. Or when you study the cases exposed by them, what do you want to observe? This is a big question.

The third is that we all know that even with a very narrow sense of legal risk or litigation risk, arbitration risk, the risk of entering into judicial or third-party resolution procedures, you need to look at the disclosure of what has emerged has become litigation or arbitration, or what has been initiated, and the potential threat, this is the most typical legal risk issues into the decision-making horizon.

Now the report, due to observable reasons, only reports the lawsuits or arbitrations that are presented, so the ones I talked about earlier already pose a serious risk, how those things are observed, and whether there are serious implications for not observing those risks.

I seem to feel that this problem needs to be solved with some kind of proxy, but I can't come up with a good solution right now. The last one is the definition of risk, because risk is not a legal concept, but a management concept. Risk can be roughly divided into 3 to 4 stages. It is a curve. The front is relatively flat, and then it gradually rises to become a crisis or realization, and then finally settles down, which is about such a stage.

So, when we talk about legal risks, which stage does your lens have observed, this is not clear, or now I did not see a very clear treatment in the current report, which is actually consistent with the problem I talked about above.

If you recognize the legal risk as the last time there is an arbitration or a lawsuit, then it needs to be questioned whether this report it is observing the risk or just the case.

Because I consider the research on risk is to prepare in advance for our overseas listed companies. There are a lot of suggestions in the report. If the object of the research is to move forward in this curve, then a more general definition is needed, that is, how to dig out this piece of information in this annual report. Now it gives me the feeling that I dug up the legal affairs of various companies in the annual report, or the methods of describing risks with 100 standards in the annual report and put them all together. But this is all about his own perception, not about the perception of core events and core potential threats. These are two problems.

I think this report has done a good job so far, we read a lot of unknown information previously from this general observation, which is very important, but I think this is a

good chapter one, there should be chapter two, three, four, five, six, seven later, so I also look forward to the wonderful follow-up research of Dr. Gu, Dr. Wang, and Zhou Wei. Thank you.

Moderator: Gu Enuo

Many thanks for Dr. Liu's unique comments. For the first article, the suggestion is mainly from two aspects, one is whether data qualified investment, and the other is underlying logic of data value. For the second article, the suggestion could be divided into several parts, including perspectives, models, scenarios, and development process. For the empirical report, it is a preliminary research and there still are some problems, such as the relationship between the legal risks and cases, the research of subject are more than just enterprises and etc. Thanks again for Dr. Liu's comments.

Speaker: Wang Peng

Thank you, Professor Zhao, Professor Lai and Professor Liu for the comments. I agree with Professor Zhao that the project will benefit a lot if we could combine some information technologies to achieve automated processing. Professor Lai emphasized the importance of dialogue with the mainstream political economy research. Professor Liu commented on the data and hypothesis of the research from which we also learned a lot.

This report is a very preliminary version. The time of manual coding in this empirical study far exceeded our expectations, and this report is now a product of a year of work. Because our data processing is predominantly manual, with close to 2,000 annual reports, we have not progressed as far as expected. We have positioned the whole project as theory-oriented empirical research with the core hypothesis that Chinese outbound enterprise gradually learned to cope with the legal risk associated with foreign direct investment. The learning curve of various types of Chinese outbound enterprise may vary.

In the current descriptive analysis, we can see a clear pattern of the two-eight law in the disclosure of risk causes which is in line with our expectations. This serves as a starting point and our larger vision for this project is an approach of micro international law, a study of international law-related issues with specific theoretical concerns and clear institutional constraints. It is motivated by the idea that the rise or great renaissance of China must have a solid organisational foundation, particularly in terms of corporate organisations which is what we are concerned with in this project.

For example, is there a scale effect that the larger enterprise better cope with the risk? Is there a tendency of bureaucratisation if the enterprise regardless of their ownership reaches a certain size? Does the governance structure of different enterprises, e.g., state-owned enterprises, private enterprises, foreign enterprises or mixed ownership enterprise etc., have some systemic impacts on their response to cross-border investment

risks? Do some traditional Chinese cultural and political concepts, including “serving the people” and corporate social responsibility, have an impact, and if so, what kind of impact, on the legal performance of risk management? We will try to engage with mainstream international legal theories as well as international political economy theories in the process.

Another point is the problem of risk transmission mentioned by Professor Zhao and other commentators just now, e.g., the corelations between different types of risks at different levels and the transmission trajectory of one risk to another.

We plan to adopt certain informational techniques to automate the data collection and processing, to update it in real time and to allow some interaction. But this obviously needs some technical basis. We have this idea, but we are in the experimental stage. Thank you.

Panel Two[1]

Moderator: Wang Peng

Dear all, thank you very much to come to Panel One. We have two speakers and two commentators. The first speaker is Liu Xinchao, a Ph.D. candidate from School of Law at Tsinghua University and the second speaker is Agdaliya Khusnetdinova, a Ph.D. candidate from Xi'an Jiaotong University School of Law. We have two commentators: Associate Professor Diego Mejia-Lemos, who is a distinguished research from Xi'an Jiaotong University School of Law, and Associate Professor Sun Nanxiang from the Institute of International Law at Chinese Academy of Social Sciences. Each of the speaker have 10 minutes slotted for the presentation and then we will have comments from the two commentators for 20 minutes respectively. If having spared time, we will have two rounds of Q&A. Now, we invite the first speaker Liu Xinchao. Xinchao, floor is yours.

Speaker: Liu Xinchao (Ph.D. Candidate, School of Law at Tsinghua University)

Topic: International Law Based ISDS Counterclaim: The Archimedes' Fulcrum towards a New International Economic Order?

It is my honor to have this opportunity to share my view with you on the applicable law of investor-state dispute settlement (ISDS) counterclaims. My name is Liu Xinchao, currently a second year Ph.D. candidate from School of Law of Tsinghua University, and my research concentrates on corporate responsibilities under international law.

Today, I would like to talk about the application of international law in ISDS counterclaims to determine corporate obligations, focusing on the dual asymmetry of foreign investment as the root cause, and provides prospective solutions on existing problems. Since most current discussions on ISDS counterclaims are still focusing on procedural issues, my topic may be a little forward-looking and therefore relatively weak in practicability.

In traditional perspective, international law only has binding force on states and international organizations. Recently there is increasing application of international law directly on private corporations in ISDS counterclaims. Two cases, Aven v. Costa Rica and Urbaser v. Argentina, explicitly noted that corporations should be bound by obligations under international law—although finally neither counterclaim succeeded. The reasonings concerning corporate international obligations seemed undisputed in the two awards, but actually this is the most fiercely debated issue in the field of international

[1] The Panel Two is translated by Wang Run (Xi'an Jiaotong University School of Law) and AGDALIYA KHUSNETDINOVA (Xi'an Jiaotong University School of Law). The translation has been modified and confirmed by the speakers.

human rights law, where states are still debating whether corporations should undertake obligations under international law. So, such development in investment law is rather surprising in contrast to human rights field.

So, why is this happening? Why investment tribunals, once designed to protect foreign investment, start to hold corporations responsible under international law, even bypassing developments in human rights law? Actually, the original asymmetrical design of investment arbitration and the issue here called “corporate impunity” in human rights law are one single problem as reflected in local and international level, that is, the changing power balance between transnational corporations and third world states is not correspondingly addressed in the international legal order. Such imbalance can be reflected as what I call “dual asymmetry” of foreign investment.

This page illustrates how local asymmetry, also known as corporate impunity, emerged. Simply speaking, in globalization led by neoliberal economy, transnational corporations as foreign investors are able to make profits through loose regulation of third world states, with potential damage on local environment and human rights, but no legal framework can be applied to restrict them effectively.

This diagram shows the mutual enhancement between local and international asymmetry. Most scholars would discuss one of them, but they are seldom observed in juxtaposition. Faced with corporate impunity, host states either neglect it or take regulatory measures, and we can see that either way, the local asymmetry cannot be compensated, because at international level, investors are still asymmetrically protected by ISDS mechanisms. This will further chill regulatory will of host states, and the two asymmetries will enhance each other in a circle, until one of them is exterminated. My point of view is that, if we want to break such dual asymmetry efficiently and effectively, the best way is to establish corporate obligations under international law. If corporations can be held liable under general international law, especially in human rights and environmental aspects, investment tribunals could then invoke these well-established rules and principles to decide whether foreign investors infringed local public interest in explicit and ascertainable legal terms, comparing to non-binding and autonomous guiding principles lacking normativity and uniformity. In such way, the local asymmetry can be remedied through international adjudication, and international asymmetry can be corrected in cases where investor protection is less necessary than public interest preservation.

Another question is why investment arbitration is more suitable to develop corporate international obligation than other places, like international courts or treaty negotiation? It can be observed that investment arbitration has certain advantages for new legal definitions to emerge and prosper, as listed here: first, party consent makes sovereign will subject to judicial conduct, therefore states can no longer influence the development of international law here through their practice and expressions. Second, comparing to international courts, investment tribunals with decentralized organization and reputation could stimulate arbitrators to elaborate on international law issues. As can be observed in

Aven and Urbaser, even if the counterclaim would be ultimately refuted based on some very apparent procedural reasons, the two tribunals seemed so enthusiastic in talking about corporate international obligations. Finally, as international law is inevitably fragmented into different regimes, development of law in one specific legal field is hard to be accepted and reconciled with another. The judicial nature of investment arbitration provides a platform where different values and considerations conflict and harmonize, without limitation of specific field of law. The only place that has all three attributes is investment arbitration.

While most scholars support international regulation of corporate conducts, opinions are divided on whether international law should directly bind corporations. Some scholars consider applying international law in ISDS counterclaims are neither necessary nor practical. However, simply applying domestic law in international investment tribunals cannot change the deficient domestic legislature, which contributes significantly to the continuance of corporate impunity. Therefore, reinforcing domestic law in international adjudication cannot effectively resolve the local asymmetry. In most investor claims, international law is applicable as a standard of investment protection. So at least, the applicable law in a single dispute should be equally applied on the host state and foreign investor. For example, if "international law" is applicable to the investor's claim, the same should also be applied to decide the responsibility of the investor in the counterclaim, especially when the tribunal believes the application of merely domestic law cannot lead to a justifiable result.

Some scholars still hesitate on whether corporations as private entities could undertake international obligations. However, deciding obligation capacity through subjectivity is actually a circular argument in international law. In one word, endowment of subjectivity cannot hold validity in general international law, which has both and equal inductive and deductive sources. But the problem is that certain large states are unwilling to give up the traditional perspective, so we still need a breakpoint to make corporate international obligation resonate with positive legal materials. Otherwise, these states will continue to insist that imposing international obligations on corporations is a mischaracterization of international law. Such reluctance also resulted in the ambiguity of the scope of corporate international obligations, which further deters corporate willingness to be bound.

Last are some of my imaginations on the future of ISDS counterclaims and corporate international obligations. First, as for the possible breakpoint I mentioned, I think obligations erga omnes has such potential. On the one hand, as obligations owed to international community as a whole, it is defined through who is protected, rather than who is bound. So, identity or subjectivity is no longer important. On the other hand, very few obligations are included in its scope, and all of them are generally recognized by almost all states, so it would be easier for corporations to agree to be bound. One problem in human rights law development was that states haste to put all kinds of obligations on corporations at once, which will definitely cause opposition.

Another prospect is a possible form of international adjudication against corporate impunity, namely "reverse paradigm"—where host states sue investors. There was almost no such kind of case in history, but if states are permitted to do this, they can refrain from adopting imperfect regulatory measures that may lead to ISDS claims and compensations. Reverse paradigm could also eradicate procedural limitations on counterclaims, like the requirement of same subject matter. But these thoughts are immature and need further research.

To wrap up, the development of corporate international obligation is actually the power balancing process between local governments and transnational capital. ISDS, once created to protect investment from abuse of public power, has to transform to respond to public interest concerns to preserve its legitimacy. It has created an enchanted field for legal practice of corporate international obligation to develop, and such development may ultimately correct the dual asymmetry as the core weakness of the globalization guided by neoliberalism. This is why I consider international law based ISDS counterclaims have the potential to act as the Archimedes' Fulcrum to move the world towards a New International Economic Order.

This concludes my presentation today. Thank you so much for listening and all comments and criticisms are highly welcomed!

Moderator: Wang Peng

Thank you, Liu Xinchao for giving us a very comprehensive overview of the issues, namely whether or not counterclaims for foreign investors should be accommodated by the current structure. He gave us a very good, actually very perceptive theoretical framework at the very beginning, namely the asymmetry at the local and international levels, and then whether counterclaim in investment arbitration is feasible, desirable and how to materialize that. Thank you very much, Xinchao. Now we invite the second speaker Agdaliya Khusnetdinova to give her presentation on digital industry policy. Agdaliya, floor is yours.

Speaker: Agdaliya Khusnetdinova (Ph.D. Candidate, Xi'an Jiaotong University School of Law)

Topic: Digital Industrial Policy Through Data Localization in China and Russia: Similar but Differentiated Conceptualization of Cyber Sovereignty

Thank you very much, professor. Thank you for the introduction. Good afternoon, everyone. It's a great opportunity and pleasure for me to introduce paper in today's seminar. My name is Agdaliya Khusnetdinova, and I am a Ph.D. candidate from Xi'an Jiaotong University School of Law. Paper Mainly analyses data localization policies in four main regions and defines differences in understanding of the cyber sovereignty concept in two models of China and Russia.

The presentation includes three main parts, the first analyses the rise of cyber sovereignty, the second part makes an overview of data localization policy in four main regions, and the third part analyses the cyber sovereignty conceptualization in Russia and China.

For the rise of cyber sovereignty, we can talk first about traditional sovereignty. Traditional sovereignty can be traced back to the Westphalian Peace Treaty in 1648. State sovereignty is described in the treaty that all countries have sovereignty over their territories and no country can interfere. The main principles of state sovereignty are self-determination, non-intervention, and self-defense. In any case, sovereignty is linked to a territory and has a territorial dimension.

But it seems that in the late 20th Century a crisis of state sovereignty started. The main reasons for the crisis of state sovereignty are the market economy, the growth of internet, and the importance of digital network communication. Crucial features of state sovereignty also have been weakened, such as its ability for law enforcement, ability to define and defend its territorial boundaries as well as control of the economy and internal affairs.

The internet and digital network communication also challenged traditional state sovereignty. The digital spheres do not have any relation with spheres defined by territorial boundaries. But, although, the internet also became a new source of new sovereignty and a rise of cyber sovereignty.

Here we can see the main steps taken by China to rise cyber sovereignty from 2014 till now. Most prominently, China passed a Cyber Security law in 2017, which focuses on establishing a uniform regulatory regime for cyber security and data protection. In the following year, China passed the e-commerce law. Further, there is a new Personal Information Protection Law, which took effect on November 1, 2021, focusing on data security, data flow transformation, and personal data protection.

For Russia's cyber policies, we can see that the main legislation for cyber security policies is the Federal Law. Most important, the 2014 Law Amendment, requires companies to process and store data on Russian nationals in databases located in Russia. And another important amendment made in 2019, more known as Sovereign Internet Law, prescribes the establishment of an alternative DNS system and the purpose of which is to ensure the functionality of the Internet in case of its disconnection from the global network.

In the digital age, data became an important economic and strategic resource. Many countries apply data localization policies, and European countries apply different requirements for data flow. If we look at the main sectors for data localization policies, the first position is the accounting, tax, and financial sector, second place is occupied by personal data and other sources, such as government and public emerging digital services and telecommunications.

The overview of data localization policies in four main regions reveals that China requires all-important personal data which relates to critical information infrastructure to

be localized. Similarly, Russia requires all personal data of citizens to be stored locally. For the European Union, there are some requirements for the data flow that concern all European Union countries. Meanwhile, the United States requires defence data to be localized.

Although there are different definitions of cyber sovereignty, all countries still defend cyberspace in case of internal intervention. Mainly, cyber sovereignty implies storage location, regulation, and federated clouds. Data not only can be kept in a personal data centre but also can be linked to a certain country, which has its regulations and federated clouds. Examples include Russian Roscomnadzor and in China Golden Shield Project.

Mainly, our research is focused on the development of cyber sovereignty policies in Russia and China. Recently there have been collaborations between both countries in control of Internet activities and new law regulations, such as Russia's Sovereign Internet Law in 2019 and Cybersecurity Law in China in 2016. The main finding of our research is that Russia's and China's policies have a common interest in national security, but at the same time they have different geopolitical outlooks on the rise of cyber sovereignty. Russia's model similar to China's model on data flow is premised on the importance of network and data security as a national security issue. But the different geopolitical outlook outlines the policies for cyber sovereignty and the main rationales behind it. Unlike China, Russia put less attention on the economic agenda for digital development and has been less successful in boosting the domestic digital sector. The main rationales for applying cyber sovereignty policy are mostly political issues. But not the same with China, the main focus has been done on the economic agenda. The economic perspective for China became more central and important to the data regulation policies. We can assume that the Russian agenda mostly focused on a political perspective, while China focused on an economic perspective.

To conclude the contribution of the two models, we may say that both models contribute to the democratization of international relations and as well the evolution of the international system, promote the evolution of the statuses and roles of different actors in cyberspace, and help to coordinate and integrate different values among nations.

Thank you for your attention and comments.

Moderator: Wang Peng

Thank you, Agdaliya Khusnetdinova. She gave us an overview of the digital policy or digital industry policy, especially data localization in China and Russia respectively and compare the two models, despite those two models, in a way, share the name of cyber sovereignty. It's interesting to see how to conceptualize two countries' practice in existing general international law, especially from the principle of sovereignty. Agdaliya Khusnetdinova outlined that two countries have both economic and political dimensions in digital industry and both countries are in a way offensive and defence at the same time

but with different focuses: Russia is more on the geopolitical concern and offensive in regional sphere while China has a certain kind of economic infrastructure or competitive advantage and therefore more focus on the economic side with few outlooking geopolitical concerns. And of course, both countries have domestic concerns for the national security. Thank you Agdaliya Khusnetdinova for the introduction.

Now we come to the comment part. We have two commentators. Please allow me to introduce them more before we invited them to give the comments. The first commentator is Associate Professor Diego Mejia-Lemos. He is a Distinguished Research at Xi'an Jiaotong University School of Law. Before Diego joined our law school, he graduated from the National University of Singapore, and worked at the Permanent Court of Arbitration as well as other leading law firms. His research interest covers mainly general international law and international dispute resolution.

Commentator: Diego Mejía-Lemos (Distinguished Research Associate Professor, Xi'an Jiaotong University School of Law)

I would like to start by thanking the organizers, my colleagues, associate professors Wang Peng and Gu Enu0, for a very well-run event. It is a pleasure to be here again this year in the forum. Today is the Mother's Day, Happy Holiday to all the mothers in the room! That will be all Mandarin I am going to use today, as I do not want to run the risk of saying anything inaccurate in my comments to the presenters.

I turn to the first paper, by Liu Xinchao. I read it with great interest and my comments will be based not only on the paper but also on the presentation. I have observations on three levels. Firstly, as to the significance of the topic, I believe that the suitability of ISDS for holding multi-national corporations accountable and legally responsible is a topic that is worthy of study, in particular, the possibility of doing so through counterclaims. However, I would like to frame my comments in the same way I would if I were evaluating this paper (and also the paper by the second speaker) in terms of different publication possibilities that academic journals. And I would say that this is a paper that requires major revisions. If I were a reviewer, I would be happy to recommend this paper for publication, but subject to major revisions, to which I now turn.

Secondly, both in terms of the presentation and the paper, I am not sure whether the major conceptual frames chosen to articulate its claim are indeed appropriate. In particular, I wonder about the appropriateness of relying on the notion of international personality as well as the notion of obligation, notably the kind of obligation that would bind multi-national corporations in their capacity of foreign investors. I also wonder to what extent a new international economic order is indeed a project the author would wish to revive, in light of several developments, in terms of foreign investment policies of the states that initially supported that initiative, back in the day. I would think preliminarily that there may be more contemporary conceptual frameworks to give an expression to that interest. In particular, within the context of the different ways in which the reform of

the ISDS system has been framed, within the context of the United Nations Conference on Trade and Development (UNCTAD) working group dealing with the topic.

Thirdly, turning to the content of the paper and how it is developed, there is an issue of asymmetry, and it is important to bring it to the fore. I am wondering whether it is best to do so, relying on the different theories that the author has considered. One of the theories is the question of counterclaims. I have investigated the topic as it may relate to potential counterclaims by host states in connection with measures concerning climate change, because there are potential developments in relation to climate change. Counterclaims have several benefits, some of which are linked to the very nature of international arbitration. One of the benefits for host states is that relying on a procedural means within the context of international arbitration would be the most likely way to hold accountable multinational companies, among others, provided that the counterclaim is admissible and prevails on the merits. Therefore, it would lead to remedies that would be contained in an award that can be, in principle, enforced in several jurisdictions, depending on which treaty applies. There are many benefits to it.

However, several arguments that author made in the presentation and the paper are debatable, notably the contention that we could rely on counterclaims to allow arbitral tribunals to become legislators. You seem to suggest that, by consenting to arbitration, states are giving away their powers to fashion the international law of foreign investment. I would be very cautious in making those claims, because they make assumptions on several levels, which are highly contestable, if not wrong. In the first place, it assumes that this is part of the debates in the literature concerning what is the real value of jurisprudence, generally, in international law, and whether international courts and tribunals are in fact lawmakers and, in particular, in the field of ISDS. However, to assume such a law-making role on the part of international courts and tribunals would run against practice because, since states do oppose such developments.

For example, the decision in Lotus remains an authority for certain general propositions. However, its particular content was rejected in later developments in the law of the sea. Turning to the particular context of investment, take, for instance, the approach of the Maffezini tribunal to the scope of the MFN clauses, which has been rejected by certain states in their treaty practice following the adoption of this decision. One should be careful with that. Even assuming that decisions of international courts and tribunals are not subsidiary means, but make the law, insofar as they create binding obligations on their parties, the scope of obligation would be extended beyond the settlement of the particular dispute that has been brought under a particular investment treaty. This is another reason one should not over-rely on ISDS as a means to effect this reform.

Speaking more generally about the use of counterclaims, I felt that the paper did deal with some of the major cases, namely, the Perenco and Burlington decisions. However, I think it has insufficiently engaged with questions concerning the jurisdiction over counterclaims and the extent to the issue that depends on the applicable rules. So, on one

hand, you should have considered how the issue would be decided under the ICSID Convention and the applicable rules, and, on the other, how it would be decided under the UNCITRAL Rules, in which case you also need to take into account whether you are applying the 1970 UNCITRAL Rules or the ones as revised in 2010, the latter arguably taking a wider approach to the admissibility of counterclaims.

In terms of admissibility, one key factor would be whether, under the applicable arbitration rules and the applicable investment treaty, an arbitral tribunal admits a connection that is merely factual as opposed to a legal one. And an important point that not only concerns the use of counterclaims in the two instances that author mentioned, the Burlington and Perenco cases, dealing with environmental claims, is that in both cases the counterclaim had a basis in domestic law. However, it would be important to bear in mind that there are also tribunals that have adopted a very restrictive view on that, such as the tribunals in Saluka v. Czech Republic and, more recently, Paushok v. Mongolia. The Paushok tribunal clearly expressed concerns over the appropriateness of applying Mongolian law being applied to non-Mongolian entities by a non-Mongolian authority, as a matter of general international law.

The final point is your reliance on the notion of the subjectivity of international persons. At some point, you correctly mentioned the Urbaser v. Argentina, but in that case, the reliance on the concept was more to the effect of saying, where there are the obligations, multinational corporations could not rely on the fact that they are not subjects of law of the same kind as states to hold themselves immune to those obligations. But I think, therefore, it has only a negative implication. There was no intent to draw a positive implication, in the sense that any subjectivity under international law that can be accorded to multinational corporations would be a basis for rights and obligations that otherwise do not have a basis on international law. In that sense, the author discusses the Reparations for Injuries Advisory Opinion towards the end of the paper, rather than doing so in the beginning, when it would be helpful to see what are the limitations of the notion of subjectivity in international law. The key factor is not whether a given entity is a subject of international law, but rather what are the powers, rights, and obligations international rules vest in that person.

Lastly, your reliance on the notion of governance-related obligations correctly refers to the fact that governance-related obligations belong to the international community and that obligations may be defined by whom they are owed to. However, that does not detract from the fact that there must be a primary rule of international law imposing the obligation. This is why, no matter whether the obligation is imposed on an entity or several entities under a given treaty or generally to the international community, the role of general international law is important.

There must be an obligation binding on the entity, and this is one of the big problems attempts to hold multinational corporation responsible under international law face. In principle, not many obligations are binding on states and corporations, no matter whether those obligations are regular obligations or governance-related obligations.

Now turning to the second paper, it equally raises a very important topic, touching on the intersection between the exercise of sovereignty and cyberspace and how there have emerged different approaches to it. Some comments follow. It is clear to me that the topic is an important one. However, what is not clear to me at this stage and was not clarified by the presentation either is what particular contribution you seek to make to the literature. The author major claimed, as I understood it having read the paper and then listened to presentation, is that there are different approaches. The author looked at the approaches of Russia and China and, while these two approaches are standing in contrast to the American approach, however, they are not entirely similar in that the Chinese approach appears to take into account economic considerations, whereas the Russian approach seems to emphasise political considerations. I think that, given the amount of work that the author has put into the paper, which I recognize is quite a lot, your conclusion, it seems to me, is not formulated in a way that conveys contribution's significance. In sum, it is not clear to me what is the contribution being made to the literature.

Turning to the very concept of cyber-sovereignty, this makes me wonder whether sovereignty is the appropriate conceptual framework to rely on. There are different approaches to sovereignty that are discussed in your paper, but, in a way, that could be improved or be dealt with more coherently. In the beginning, the author discussed the notion of sovereignty and brought us back to the Peace of Westphalia, which seems a very remote reference point. In terms of authorities, it would be more helpful to rely on more contemporaneous ones than the aforementioned treaties. The Peace of Westphalia does not define the concept of sovereignty as such, but rather represented a transition from empire, in that case the Holy Roman Empire, to nation-state, as major unit of power.

I consider a reference more important and relevant to your discussion will be the Island of Palmas award, defining sovereignty by linking it to the independence of states, and emphasising the notion of exclusivity, which seems to me to be a concern that is common to the two approaches you examine. The author mentioned that cyber-sovereignty is extraterritorial. It was not very clear to me, therefore, why rely on sovereignty, it being a primarily territorial concept. I do agree with the approach of maintaining the territory element of sovereignty in approaches to its exercise in the cyber-space, but it is not very clear to me whether extending the concept of sovereignty as such is the right way to conceptually frame its exercise in the cyber-space. Speaking about sovereignty, it is important to know what kind of sovereignty is involve, and distinguish between spheres of sovereignty, since there is external sovereignty and internal sovereignty. It seemed to me that the paper was mainly focused on internal sovereignty, in particular the notion of the jurisdiction, notably legislative jurisdiction, because nowhere in the paper you refer to the other forms of jurisdiction that a state exercises based on its sovereignty, namely adjudicative jurisdiction or enforcement jurisdiction. It appeared to me that analysis was more at the level of policymaking and legislation. I would think that legislative jurisdiction would be a more concrete way of

framing the concept as a form of internal sovereignty exercise with respect to the cyber-space.

But then this leads me to wonder whether paper is engaging sufficiently with several logical questions. Why did the author speak of cyber-sovereignty? Why not just speak about sovereignty? Because ultimately, if you defend an emphasis on territoriality, which seems to be key to the two approaches that you mentioned, the classical notion of sovereignty should suffice.

Thus, it seems to me it is not necessary to re-frame the concept of sovereignty as cyber-sovereignty. Instead, what the author would need to engage in is rather an ontological examination of what is cyber-space. In that sense, internal sovereignty, as elaborated on in the Tallinn Manual, can be disaggregated into different layers of cyber-activities. There is a physical infrastructure, which is comprised within a first, hardware-oriented, layer. There is a second layer, which is a logical layer, concerned with software instead of hardware. And then there is a third layer, which is the layer of the different entities, whether they are corporate or individual, engaged in cyber-activities, based on a given physical infrastructure and through the use of a given software structure. Despite the impression that cyber-space and entities engaged in cyber-activities are entirely outside the control of states, there are different ways in which states can ultimately assert their sovereignty over such space, persons and activities.

In this case, there is internal sovereignty, exercised through the jurisdiction you seem to analyse, and impacting different layers of cyber-phenomena. Take, for example, the physical layer, over which a state has sovereignty and jurisdiction, and the control it has over entities operating in the cyber-space, namely the different persons, corporate and non-corporate, including individuals, under a state's jurisdiction. And also, the extent to which it can regulate the technical content of the software, that is run on the respective hardware. So, the different layers of the cyberspace, based on this understanding that I have discussed, are all amenable to be framed in terms of the traditional concept of state sovereignty, in this case, internal sovereignty. I think on this note I conclude, because I may be running out of time, but I would be happy to further individual feedback. Thank you.

Moderator: Wang Peng

Thank you, Diego, for the very detailed, very thought-provoking comments from a reviewer's perspective on whether the draft is ready for the submission to journals. Thank you very much, Diego.

Now we come to our second commentator. Please allow me to introduce Associate Professor Sun Nanxiang. He is at the Institute of International Law of Chinese Academy of Social Sciences. His research covers international economic law and cyber law. He studied at Southwest University of Political Science and Law and obtained a bachelor's degree in international economics and trade, a master's degree in international law and

Ph.D. in international law. He is the council director of the Cyber and Information Law Society under the China Society of Law, and one of Top 100 young scholars in Beijing Law Society. He conducted academic research at the Max Planck Institute, World Trade Institute, Swiss Institute of Comparative Law and the University of Technology, Sydney previously. He has published several monographs such as Legal Issues Concerning Internet Regulations in the International Trade Regime and also published more than 40 academic papers in influential journals, such as Peking University Law Journal, Global Law Review, Asian Journal of WTO & International Health Law and Policy, as well as 10 commentaries in newspapers and media such as People's Daily. We are very grateful that we could have Sun Nanxiang with us given the pandemic situation in Beijing. Nanxiang, floor is yours.

Commentator: Sun Nanxiang (Associate Professor, Institute of International Law of Chinese Academy of Social Sciences)

Thank you, Professor Wang Peng. It's my great honour to participate in the 2022 International Investment Law Young Scholars Forum. I deeply appreciate that Xi'an Jiaotong University and Professor Wang had contributed a lot to the young scholar seminars for these 5 years. According to the arrangement of Professor Wang, I will share some views on the two English presentations as well as their papers. The first paper is from Dr. Liu Xinchao, and his theme of paper is related to ISDS reform.

Dr. Liu shares us with a clear picture of international law and particularly the ISDS reform. And his presentation has lot of insightful thoughts. For instance, he said the relationship between international investment law and public international law shall be viewed according to the social demand theory on corporate international regulation. It is an interesting angle to analyse the issues of international investment law. And Dr. Liu introduces the terms of corporate in punitive and corporate international obligation into his paper. This is a heated topic today. To be simplified, currently, environmental and human rights law is an emerging topic of international academia. If the terms of corporate international obligation, as well as corporate international responsibility, is deeply analysed, it will change more or less the whole picture of international investment law. And nowadays, we shared the view about the competitions in geo-political era. I think Dr. Liu's topic urges us to think further about ISDS reform and new international economy law order.

Nowadays, China has participated in a lot of activities for reshaping the international order. From this point of view, the paper also benefits for the change of global order. Without doubts, Dr. Liu's presentation is clear and interesting, helping us to catch all the point he wants to share.

As far as I concerned, I humbly try to provide some suggestions for his paper. First, in the paper, he used a lot of theoretical and cross-disciplinary research tools. In my opinion, the combination of international investment law and human rights law or

environmental law shall be based on the textual links in international treaties or conventions, such as the provisions on BITs. So how to insert human rights or environmental obligations into investment law? It is commonly advocated by a lot of international lawyers via treaty interpretation and treaty application.

For example, in the BITs or in WTO law, the preface of the general exception provisions offers some hints that require investors to abide by the environmental obligations set by the host states. I think it's the starting point to research about the relationship between investment law and human right law. Therefore, though the author focuses on the procedural issues, the substantive obligations should also be paid attention to. Because the different BITs provisions, as well as different substantive obligations, will arrive to difference conclusions and results in international awards. In short, if the paper examined the primary and secondary resources in detail, it would benefit for the audience to catch about the whole picture.

Second, it is the definition of the terms "corporate international obligation" and "corporate international responsibility." In the paper, Dr. Liu shares a lot of views about why corporation should be the subject of international law. But I think it's a different issue between why the corporation should be the subject of international law and whether cooperation could shoulder the duty and responsibility in international law. They are different issues, for instance, from the perspective of international organization. Why do we say that the international organization is the subject of international law because they have the legal capacity to contract and sign the international conventions such as BIT, according to the doctrines of public international law. But the cooperation is without a legitimate personality to be a contracting party in international conventions in the domain of public international law.

But why the corporation can sue or be sued in international investment tribunal? Because it comes from the consent of the states. So, in this point, the states have sovereignty, and the sovereignty participate in public international affairs, however, corporation did not have this until now. From another angle, the author tells us that the corporation may have some public power. The corporation power is something like a sovereign power. I think it is a quite innovative idea to look into the future of international law, as well as incurring the participation of super big and transnational corporations into reforming international investment order. From this point of view, I personally could be convinced by the author that corporation should be the subject of international law.

The last but not the least, I want to share some different academic ideas with this paper. For instance, the author said that the tribunal's power is higher than the parties. I'm not convinced by this idea, and I think that the power between tribunals and states is quite complicated. The states have their sovereignty, as well as the discretion to recognize and enforce international awards to some extent. It is inaccurate to evaluate whose power is higher. Particularly, the tribunals only can examine the legal facts and express legal reasoning on the issue whether the parties' behaviours violate international treaties.

Additionally, the author said that the cooperation cannot be the subject of international law. But in public international law, the corporation can also be the subject of international law indirectly. For example, suppose that the corporation is accorded by the government power, they are also the subject to the international law in the angle of public international law.

Finally, it shall be noted that the reasons why international investment law is fragmentated, not just about the procedural issues, but also the substantive obligations: Because there are too many BITs and investment chapters in FTAs around the globe, causing a lack of a uniform international investment regime currently.

In short, the presentation and paper of Dr. Liu has probed the emerging issue in the international investment. Dr. Liu has provided us a picture of ISDS future reform. I learned a lot from the presentation and as well as the paper, so congratulations for Dr. Liu's wonderful job.

The second paper is about data and sovereignty. Agdaliya Khusnetdinova shares us the different perceptions to protect data security from Chinese experience and Russian experience. She said that the issue of data localization is closely relevant with physical industries, which is very insightful since data is valuable for modern economic development. But the key point is how to balance between the interest to protest sovereignty and the interest to economic development. It shall be noted that, cyber security has many faces to analyse, a lot of political and economy elements contribute to the rules and the perceptions of cyber sovereignty in different nations. This insightful view urges us to think a further step that how to divide the concept of cyber sovereignty.

I totally agree with Professor Diego Mejia-Lemos said before. In cyberspace, they have different layers, such as the physical layer, in internet. According to different layers, different rules and regulation modes are applied. In the paper, Agdaliya only takes data localization as an example. I think the concept of cyber sovereignty is more than data issues only. More broadly, data transfer and disclosure of source code, as well as Artificial Intelligence application, are also relevant with cyber sovereignty. I try to understand why the author chooses data localization as only one example to analyse the issue of cyber security. However, if the author could define the concept of cyber sovereignty clearly, my suggestion is that according to Professor Diego, it is suggested to analyse the issues of difference layers in internet, for the purpose to offer the audiences a picture of cyberspace.

Furthermore, another of my suggestions is about the future of the rules of cyber sovereignty. As far as I know, China, nowadays, is no just protecting national security in cyber society, but also opens its numerous internet industries for foreign investors. For instance, from the perspective of international trade and investment law, China signed and enforced Regional Comprehensive Economic Partnership (RCEP) currently. RCEP is a regional, comprehensive economic partnership agreement. In this agreement, it regulates in the chapter of electronic commerce that the contracting parties shall guarantee the free transfer of data if the data transfer is for a conduct of business. Additionally, China

actively applies to join CPTPP and Digital Economy Partnership Agreement (DEPA). The provisions of CPTPP and DEPA also require free transfer of business data.

The question is how to understand cyber security in this perspective? My view is that if the data is for the purpose of business, the domestic internet regulation should not constitute an unnecessary trade barrier. From another angle, in the domain of protecting public interest and national security, the state has its inherent right to regulate. Therefore, it is suggested that the author should add some words about China and Russia's attitudes towards electronic commerce after the examination on data localization issues.

In short, this paper reflects a heated theme in current international academia. This paper provides us a big picture about cyber sovereignty, particularly, comparing between China's and Russia's modes.

Commentator: Sun Nanxiang

I have no other comments. I totally agree with what Professor Diego have said. These two papers written by Liu Xinchao and Agdaliya really raise a lot of heated topics currently that we have to confront with and try to give insightful thoughts. It is a difficult task, but I think the analysis on these two papers has significant values for international academia. So, my final word is that keep the interest and polish the papers as much as possible.

I wish these two papers will publish successfully later and thank you again.

Speaker: Agdaliya Khusnetdinova

Thank you, professor. Thanks a lot to Professor Diego and Professor Sun Nanxiang for giving us valuable comments and rising important questions. Regarding the comments of Professor Diego, for the main contribution of our research, I tried to examine two models from Russia and China policies on cyber sovereignty, analyse data localization policy of two models, which is very different from the United States model and try to show that Russian model and Chinese model, although they are similar, have differences and how does two models contribute on international law in comparison with the United States. But although, I do agree that my arguments are not very strong, and it needs further research. Thank you, professor, for all comments, which opened for me new perspective and gave me an opportunity to understand and find more questions. Further, on comments of Professor Sun Nanxiang, I also appreciate all comments and completely agree with recommendations you have made. And I would definitely also consider other examples except data localization. As for me it was quite challenging to find arguments and evidence to prove my statement, so I will definitely consider further academic research on my topic. Thank you so much. And once again, thank you, Professor Wang Peng for giving an opportunity to present paper in today's seminar. Thanks a lot.

Commentator: Diego Mejía-Lemos

Sure, thank you. I shall make some further comments very briefly, to wrap up what I said and address some of the points that were made in response. Regarding the first speaker, you correctly mention the issue of the concept of governance-related obligations, the consequence of bringing claims for responsibility.

But I would insist again that this is an issue of standing. So, it does not dispose of the limitations I mentioned of the concept of legal subjectivity. And the main point is that it does not dispose of the issue of where the obligation comes from. One should bear in mind three aspects. I say this not to defeat your argument, but rather to refine it. The first is the source of the obligation, the second is the character of the obligation, its nature. Then, the third is the procedure and implications of characterization of an obligation. But these three issues remain separate and legal subjectivity does not have an impact on all of them.

What I would suggest for the first speaker is to maintain the topic, but rethink its conceptual framework, by addressing its current overreliance on the concept of legal subjecthood and the ability of international courts and tribunals not only to develop the law within the context of particular disputes but, more broadly, to create it. Because another factor that I did not mention, in addition to the status of decisions of international courts and tribunals, is the question of the lack of consistency among ISDS tribunals, leading them to deny there exist an arbitral jurisprudence proper.

Indeed, even if you insist on attributing wide law-making powers to ISDS tribunals, you would still be faced with the reality that their holdings are not very consistent, and they are not inconsistent only as a result of the fact that they are applying a network of treaties based on each treaty's text, but also on account of other factors. I would be happy to elaborate further, if the first speaker pursues this project.

As for the second speaker, Agdaliya, I had forgotten to say that, if I were a reviewer, I would be also inclined to accept the paper, but subject to major revisions. I think that I agree with professor Sun Nanxiang's approach, and I believe that, and this applies to both speakers, when you see commentators touching on similar issues, this is an indication that there is a problem in your argument. In addition, the observations are not made to defeat your respective theses, but rather to refine your argument. I think, as for Agdaliya's paper, the main issue is to find what is the scholarly value of entering into this analysis of the internal practice of China and Russia on cyber-security.

I would echo Professor Sun Nanxiang's observation that has to do with the concept of sovereignty as traditionally understood. While the states have a domain, however, in so far as they start to assume international obligations, the performance of those obligations in their internal sphere can have an impact on what these states decide to do.

I guess Professor Sun Nanxiang correctly referred to the interaction between not only the legislation and the policy on cyber security generally, but more broadly to what extent policy and legislation in the application of internal law can be impacted by obligations that states assume in the fields of trade and protection of foreign investment.

Professor Sun Nanxiang correctly refers in the case of China to the entry into force of RCEP, which is a very important treaty and also China's stated interest in joining CPTPP, which also contains standards which could indirectly have an impact on the regulation of cyber-activities, regarding the protection of related investments and trade of data.

The provisions mentioned by Professor Sun Nanxiang on e-commerce have relevance. The concept of sovereignty provides a starting point, but I would say that you would still need to refine its use, by telling your audience why they are looking at a given country's legislation, and why you try to establish a difference between models adopted across legislations. One more point is that it seems to me, the Chinese model and Russian models have many similarities. However, it was not clear to me why it would make methodological sense to study them by exclusive contrast to American model, all the more since it seems European model maybe lie somewhere in between the spectrum composed by the aforementioned models. Indeed, you touched on the European regulation, but ultimately portrayed your discussion as a dualistic competition of models. Nevertheless, I would think that a more nuanced approach is called for, placing the various legislative models along a spectrum, as noted earlier.

Agdaliya mentions that the Chinese approach has currently incorporated elements that are found in European model. It seems to be an approach that is still developing. So, I would suggest keeping a more open mind, notably in terms of the classification of models. I will conclude here. Thank you again for your responses and this pleasant interaction.

Panel Three[1]

Moderator: Liu Hong (Director, Arbitration Research Centre of Xi'an Arbitration Commission; President, Arbitration Court of Shanxi Pilot Free Trade Zone)

Dear Professors and guests, good afternoon! The second Panel of the Fifth International Investment Law Youth Scholars Forum starts now. I am Liu Hong, the moderator of this panel, from Xi'an Arbitration Commission. Thanks for the sponsor's invitation. I believe your speeches and comments will be very wonderful. The time of the second panel in the afternoon is from 1:30 to 3:30. Each speaker will speak for 10 minutes and then it will be comments for 20 minutes. Please pay attention to it. Well, let's welcome our first speaker, Fan Xiaoyu, a Ph.D. Candidate from Wuhan University Institute of International Law.

Speaker: Fan Xiaoyu (Ph.D. Candidate, Wuhan University Institute of International Law)

Topic: The Conflict and Coordination between International Investment Law and Economic Sanctions

Hello, professors and students online and offline. I'm Fan Xiaoyu, a Ph.D. candidate from Wuhan University Institute of International Law. Thank you very much for giving me this opportunity to share. The topic of my speech is mainly analysed from the perspective of empirical analysis of investor-state arbitration. The topic of the thesis was inspired by the current Russia-Ukraine war, which involves a lot of economic sanctions, such as the measures taken by the United States and Western countries against Russia and the countermeasures taken by Russia. I think the external characteristics of economic sanctions have more or less infringed on the rights and interests of investors to a certain extent.

In the process of writing this thesis, I found some related problems, such as what impact economic sanctions will have on the jurisdiction and admissibility of the arbitral tribunal. Do economic sanctions constitute a country's domestic public policy and international public policy? What is the legal status of unilateral economic sanctions in the host country? Whether the sanctions will constitute a violation of the terms of investors' rights and treatment under BIT, then, when the host country faces such claims from investors, what defences can be invoked to provide legal reasons for the economic sanctions it has taken? What impact will economic sanctions have on the recognition and enforcement of awards? There are many problems involved. The paper I submitted did

[1] The Panel Three is translated by Ren Yuanyuan (Xi'an Jiaotong University School of Law) and Gao Liang (Xi'an Jiaotong University School of Law). The translation has been modified and confirmed by the speakers.

not cover all of these aspects, but I would like to raise these questions for your consideration.

The paper is mainly divided into five parts: the first part will overview the current ISDS practice involving economic sanctions. The second part analyses some procedural points of contention that have been dealt with by the tribunal. The third part analyses the controversial merits that are not dealt with. The fourth part demonstrates what kind of intrinsic value conflict exists between economic sanctions and international investment law. The final part puts forward some thoughts on trying to coordinate the two conflicts.

I made a list of ISDS cases involving economic sanctions and found 17 related cases. Of course, it does not mean that economic sanctions play a vital role in all these cases. In some cases, economic sanctions only constitute background information. However, in other cases, economic sanctions do affect many aspects of investor-state arbitration, such as jurisdiction and admissibility, recognition and enforcement of awards, force majeure, fair and equitable treatment of BIT and so on. I determined that certain characteristics exist in the ISDS cases. (1) From the year of distribution, all cases were filed after 2010, and there were 8 cases in 2021. (2) The legal issues involved in the cases are very extensive. (3) In different cases, the status of the host country is different. For example, sometimes it is the target of sanctions, sometimes it is the initiator of sanctions, and sometimes it is neither, but a third party, in order to comply with extraterritorial sanctions proposed by other countries. (4) There are many kinds of economic sanctions involved.

At present, the disputes involved are mainly procedural, and mainly the beginning and end of the procedure. The beginning refers to jurisdiction and admissibility, and the end refers to the recognition and enforcement of the award. With regard to the merits of the case, this aspect has not been addressed in the current ruling by the tribunal. Partly because the current cases are very new and many are still pending, another reason is that in some cases, the tribunal refused to analyse the issue of economic sanctions. The impact on jurisdiction and admissibility is reflected in two cases, the first case is Stati and others v. Kazakhstan, the second case is Bank Melli Iranand Bank Saderat Iran v. Bahrain. In both cases, the host countries have put forward jurisdictional defences. They submitted that investors have violated economic sanctions, and therefore, the tribunal should refuse jurisdiction.

In Bank Melli Iranand Bank Saderat Iran v. Bahrain, the tribunal conducted a very detailed analysis of the issue of jurisdiction. Two conclusions deserve attention. One is that only the sanctions measures formulated by the United Nations Security Council belong to this part of international public policy. This conclusion has been mentioned in some previous judicial practices, such as a number of cases of the International Court of Justice, but I think it is the first time to be mentioned in investor-state arbitration. Since the jurisdiction may be refused only if the sanction measures formulated by the United Nation Security Council are violated, the arbitration tribunal in this case went on to examine whether the investors have violated the United Nations' sanction. The tribunal

examined in great detail the existing evidence provided by the host country, that is, 26 loans, and examined them one by one. From this, it reached the conclusion that there was insufficient evidence to prove that there was a violation of the sanctions of the United Nations Security Council, so the tribunal did not support the defence of the jurisdiction of the host country.

As for the impact of sanctions on the recognition and enforcement of awards, it is mainly reflected in three cases: Crystallex v. Venezuela, Koch Minerals v. Venezuela, and Dayyani v. South Korea (II). The first two cases seek recognition and enforcement in the United States. The American court confirmed the decisions of both cases, but the economic sanctions did affect the execution process. Because the investors seek to attach Petróleos de Venezuela, S.A.'s assets, those assets had already been frozen by the United States in 2019. This raises the issue of whether it possible to seek the execution of such assets without the special license of the Office of Foreign Assets Control (OFAC) of the United States Department of the Treasury. This is what was at issue in the execution proceedings in both cases. At present, these two cases are still pending, and no final conclusion has yet been reached.

The third case is Dayyani v. South Korea (II). South Korea proposed that due to the financial sanctions imposed by the United States, it was unable to pay the amount of the award to the investors. On January 13, 2022, South Korea issued a statement that OFAC has approved issuance of a special license, which paves the way for South Korea to compensate Iranian investors over the dispute.

There are still many merits that have not been fully handled in the current ISDS practice. I think the issue can be analyzed from two aspects: the investor's claim and the host country's defence. As the practice of ISDS is currently inconclusive, the analysis in these two sections is prospective.

First, what terms under BIT can investors claim and defend against the damage caused by economic sanctions? The expropriation clause, fair and equitable treatment, unreasonable or discriminatory measures, and full protection and security may become the basis for investors' claims. It does not mean that all economic sanctions constitute a violation of these terms, because whether they constitute such a violation depends on the circumstances of individual cases. However, there are some external characteristics of economic sanctions, such as lack of due process, lack of reasonable relief to investors, failure to give investors a due process hearing, failure to provide sufficient evidence when making economic sanctions, lack of proportionality between sanctions measures and their actions, etc. These external characteristics can easily make people question whether economic sanctions will constitute a violation of these terms.

Secondly, what specific defences could be raised by the host State? Under the BIT, the host country may raise national security defence that the economic sanctions it adopts are for the consideration of national security. In addition, in customary international law, the defences that the host country can raise may include force majeure, necessity, and countermeasures. However, I have come to the conclusion that there are certain

thresholds of these defences, and the thresholds are relatively high. And in the previous ISDS practice, different tribunal draw different conclusions in ISDS practice. Therefore, it is uncertain whether such defences can be supported by the tribunal.

The next question is what kind of intrinsic value conflict exists between economic sanctions and investment law. I think we can consider the internal value conflict from the following three questions:

The first is whether the sanctions belong to the scope of the traditional power of the host country. Under the background of so emphasizing the return of the regulatory power, can the host country think that the right to implement economic sanctions belongs to a part of the regulatory power? The second question is whether economic sanctions are part of public policy. This is divided into domestic public policy and international public policy. At present, Russia and the European Union have confirmed in judicial practice that the economic sanctions adopted by their own countries belong to domestic public policy. Is it international public policy? It has also been confirmed in the cases I mentioned earlier that the sanctions of the United Nations Security Council are in line with international public policies, but the unilateral economic sanctions proposed by other countries are not. The third issue is the level of effectiveness between economic sanctions and investment treaty obligations. At the level of international law, that is, when there is a conflict between the United Nations sanctions and the obligations under the international investment treaty such as the BIT of a foreign country, according to the explicit provisions of the Charter of the United Nations, it can be inferred that the United Nations' sanctions have higher effect than the obligations of the investment treaty. However, if it is not the United Nations' sanctions, but the unilateral sanctions, can the host country's sanctions measures fight against its violations of BIT and international investment agreements? As treaty obligations must be observed has become a basic norm of international law, my conclusion is negative, but there may be many factors that are difficult to determine in practice.

Finally, I put forward some prospects for coordinating the two contradictions, such as whether economic sanctions can be included in the new generation of international investment agreements. Of course, there are some provisions that already cover economic sanctions. The first is the transfer clause, which provides that in the exceptional cases of economic sanctions, a contracting party can adopt or maintain measures relating to cross-border capital and payment transactions. The second is the denial of benefits clauses. Apart from these two articles, there are few references to economic sanctions in other articles. This is still insufficient to solve the massive economic sanctions currently faced. If economic sanctions are included in the new generation of BIT, are they included as an element in the existing clauses, such as dispute settlement clauses, the non-precluded measures clause and the national security exception clauses? Or is it better to provide a separate economic sanctions clause in the investment contract, modelled on international commercial contracts, which specifies the relevant obligations and liabilities?

Another question is what the disputing parties can do. From their interests, how can they protect their rights and interests in economic sanctions and ISDS cases? Investors could stipulate their rights and obligations in the case of economic sanctions in the investment contract beforehand and could actively use ISDS to challenge the economic sanctions of the host country after the dispute occurs.

From the perspective of the host countries, if they want to reduce the risk of ISDS claims due to sanctions, they must meet the basic rationality advocated by international investment law and goodwill such as due process emphasized above. However, the current situation is that in the Russia-Ukraine war, various countries are slightly irrational. They may not have time to consider whether their economic measures may violate their obligations under international investment law. They are more in pursuit of a timely measure to achieve their own political objectives.

In addition, what can the tribunal do in the process of dispute settlement? At present, the legitimacy of international economic sanctions is very uncertain, and there is a lot of grey area. In order to reduce this uncertainty, the arbitral tribunal can provide such guidance through reasonable award. However, because it involves great political sensitivity, whether the tribunal is willing to solve this problem in the process of dispute resolution is a substantial question. It is worthy to consider how to solve these economic sanction issues in ISDS.

There are still some remaining problems. Although many cases have been cited, not all of the decisions are closely related to economic sanctions. In addition, it is also important to consider whether investor-state arbitration is really a suitable platform for dealing with disputes over economic sanctions. We know that domestic courts, the International Court of Justice and other platforms are also dealing with this issue. Finally, there are some technical issues, such as how economic sanctions affect the application of law in arbitration. This concludes my speech today. I hope you can criticize and correct. Thank you.

Moderator: Liu Hong

OK, thank you, Dr. Fan. Thank you very much for your wonderful speech. Then the second speaker is Cai Yongjie, a Ph.D. candidate from School of Law of Tsinghua University. Please welcome Dr. Cai.

Speaker: Cai Yongjie (Ph.D. Candidate, School of Law of Tsinghua University)

Topic: ISDS in Geopolitics at the Intersection of the ISDS Regime and Intellectual Property Rights

Thank you, Mr. Wang Peng, and Ms. Liu Hong, for giving me this opportunity to share my recent research with you today.

First, I will introduce the motivation for the selection of the topic and analyse the reasons why this issue would arise now, in terms of the whole background of the research, i.e., the historical evolution of international investment protection. Next, the analysis of two ISDS cases related to intellectual property rights, in methodology and ideas, is the main focus. Finally, the international trade agreements that content both investment and intellectual property rights chapters are closely examined to present and explore various issues that arise from this intersection.

As to the motivation of this topic, I have carefully thought about how to present this intersection. The issues involve international investment law, international trade law, and domestic law of each country. As mentioned by former speakers, the ISDS regime is gradually shifting from the original position of protecting investors to preserving the traditional space of the host country. One of the main concerns is the conflict between the private interests of the investors' property and the public interests of countries, such as public health.

Therefore, I decided to choose the area of intellectual property to highlight the conflict between public and private interests under the ISDS regime. The main reason is that intellectual property rights have a higher public interest compared to general property goods. For example, in the case of vaccines, there are provisions for compulsory licensing. Consequently, through the two intellectual property rights related ISDS cases, one can get a clearer sense of how conflicts between public interest and private interest are resolved in the ISDS regime as a whole, as well as in the arbitral tribunal.

Additionally, I discuss international trade agreements containing both investment and intellectual property chapters to evaluate how countries, in the overall geopolitical context, decide to reform the ISDS regime or limit its development in order to achieve their future goals when faced with conflicts between public and private interests in intellectual property cases.

The background of this research explored reasons for the gradual transition from the original perspective of protecting foreign investors to the direction of preserving the regulatory power of the host country. Initially, the entire ISDS regime was created to balance the developmental imbalance between capital-exporting countries and capital-importing countries. In fact, as many speakers have mentioned earlier, these capital-exporting countries wanted to protect their own property invested in the host country, so they raised the protection standards for their investments. In addition, there are also substantive principles regarding the most-favored-nation principle and fair and equitable principle. As for the procedural level, it is through the ISDS mechanism to obtain rights that may not be available in the domestic courts of host countries.

However, the occurrence of a number of intellectual property investment cases in recent years has led to the question of whether the ISDS mechanism is appropriate to continue or what changes should be made.

I will focus on two IP-related ISDS cases. The first case is the trademark-related case, which focuses on the issue of plain packaging for tobacco products. This case

focused on the issue of plain cigarette packaging, because Australia and Uruguay require that cigarette packaging follow numerous restrictions, i.e., the size and placement of logos. As a result, Philip Morris sought relief through three separate dispute resolution forums, including the ISDS mechanism, WTO dispute resolution, and Australian domestic court.

Echoing the previous section, the dispute is fact cross-cutting in nature. Although the parties have sought to repeal the Tobacco Plain Packaging Act through different forums, the arbitral tribunals, the WTO Appellate Body and the Supreme Court of Australia, both have held that the Tobacco Plain Packaging Act, while regulating the use of trademarks, does not restrict the right to use the trademark in its entirety. Additionally, the fact that a trademark was originally registered in the host country does not mean that an investor has the right to enforce the trademark. Consequently, the host country did not act arbitrarily in enacting the Act, but rather based its requirement on public health and national safety considerations. Therefore, in this case, the arbitral tribunal, the WTO Appellate Body, and the domestic court all agreed that the public interests of public health may, to some extent, override the private interests of intellectual property rights owners in this case.

A similar trend can be observed in Eli Lilly case, in which a pharmaceutical company's patent was revoked by Canada, owing to the lack of utility. Eli Lilly case is similar to the former Philip Morris cases in that the revocation should be upheld on the account of public health over intellectual property rights. However, there was a change of position, and the Supreme Court of Canada subsequently overturned the original rule on patent utility. Thus, although the tribunal has taken a position in favour of preserving public interest, there are other ways for investors to influence host countries. For example, the United States, Canada and Mexico also revised the ISDS mechanism in USMCA (NAFTA), and Eli Lilly's lobbying was the possible driving factor.

What are the impacts of these two cases on the ISDS system and intellectual property investments? First, before CPTPP, since TPP has been greatly impacted by the withdrawal of the United States, provisions on TRIPS-plus rights that were strongly supported by the United States were suspended in CPTPP, such as provisions to enhance drug protection. The scope of application of ISDS has also been limited. The ISDS mechanism of CPTPP may not be available to investors if the investments were derived from investment contracts. The Australian Tobacco Plain Packaging Act was challenged by tobacco companies in the Philip Morris cases, leading to Australia's subsequent boycotting approach to the ISDS mechanism. Behind the narrowing application of ISDS in CPTPP, the most important driving factors behind it are Australia and New Zealand. They have on several occasions publicly expressed their unwillingness to have the ISDS mechanism in CPTPP, and there is even a reciprocal agreement between these two countries that they will not bring an ISDS claim against each other.

TTIP, a bilateral investment agreement between the United States and the European Union, was greatly influenced by geopolitics. It could have been concluded smoothly but stalled due to Donald Trump's unwillingness to negotiate in 2016. The drafts of TTIP

proposed a number of new reforms to the ISDS mechanism, such as protecting the public interest when cases involve intellectual property rights for pharmaceuticals. As to how the ISDS framework should be reformed, the European Union further proposes a multilateral investment court system, so that the ISDS mechanism would gradually incline to a permanent court. For example, with judges instead of arbitrators, the hope is that the structure of the ISDS mechanism can be substantially reformed, so that countries previously opposed to the ISDS mechanism will be more willing to accept it.

China officially announced its willingness to actively participate in CPTPP last year, and also signed the China-EU Comprehensive Investment Agreement (CAI) with the European Union in the same year. The attitude of these countries towards the reform of the ISDS mechanism and the cross-cutting issues involving intellectual property right investment may affect China's future negotiation of international investment agreements and international trade agreements.

Meanwhile, in order to maintain the right to express internationally and in line with the international trend of intellectual property right, the Copyright Law of the People's Public of China and the Patent Law of the People's Public of China have successively increased the protection of intellectual property right in recent years. However, should we insist that the criteria that public interest protection take precedence over private interest in intellectual property rights? How should we balance public interest and private interest in investment arbitration cases? These are questions that deserve further consideration in the future.

In brief, since China is currently between a capital-exporting country and a capital-importing country, we need to think about what attitude should be adopted in the future and how to protect intellectual property right while preserving the traditional rights of the host states.

Here are my remarks today, thank you! I welcome your advice.

Moderator: Liu Hong

Thank you very much, Dr. Cai, for your wonderful sharing. Next, we have our third speaker, Dr. Wen Zhiyuan, a Ph.D. candidate from Xiamen University School of Law.

Speaker: Wen Zhiyuan (Ph.D. Candidate, Xiamen University School of Law)

Topic: What is the Future of Preferential Treatment for Foreign Investors in International Investment Agreement Reform

Good afternoon. It's an honour to have the opportunity to present at the Youth Forum. I will mainly introduce the motivation for choosing this topic, the structure of this thesis, and the problems and challenges while writing this thesis.

This thesis is a part of my ongoing research on the issue of international investment agreements reform from the perspective of domestic investors. There are three main parts

to my research: one is the existence of preferential treatment for foreign investors compared with domestic investors; the second is an analysis of the challenges that preferential treatment faces now; and the third is how to deal with such challenges. Regarding the existence of preferential treatment, for example, foreign investors enjoy more favourable treatment than domestic investors in terms of standards of compensation, fair and equitable treatment, and etc. And only foreign investors can initiate ISDS, while domestic investors have to resort to remedies in domestic courts. The formulation of preferential treatment is closely related to the history of international investment agreements (IIAs). For a long time in history, preferential treatment was not considered a problem. But nowadays, in the context of the legitimacy crisis of ISDS and the ongoing reform of IIAs, preferential treatment is facing challenges at all levels, especially from the domestic level. For example, Ecuador, Colombia, and the European Union, among others, are beginning to examine the constitutionality of IIAs: whether the international investment agreements are compatible with equality before the law. In the face of such challenges, there are now two main courses. One is to cancel the preferential treatment, and the other is to limit preferential treatment. The cancellation of preferential treatment contains the exclusion of ISDS, withdrawal from the BITs. And the limitation of preferential treatment is what I will mainly discuss today, I mainly focus on the practice of the United States and Europe Union.

This thesis has six main sections. In addition to the introduction and the conclusion, it includes a discussion of the evolution of the preferential treatment limitation, the reasons behind, the content of the no greater rights provisions, and an evaluation of the effects of the limitation.

International investment agreements have long granted foreign investors preferential treatment over domestic investors, such as the standard of compensation, fair and equitable treatment. In the context of legitimacy crisis and reform, developing countries have proposed the Calvo Doctrine, which emphasizes the equality between domestic investors and foreign investors. Developed countries have also started to advocate the limitation of preferential treatment due to the increase of ISDS cases. Domestic investors, who are unable to resort to investment arbitration, also openly oppose the privilege for foreign investors. The principle of equality has also been further raised in the academia to challenge this preferential treatment enjoyed by foreign investors. In response to these, countries have taken different approaches. For example, some countries would support the return of local remedies. This thesis specifically describes the approaches of the United States and Europe Union, how they limit the preferential treatment. The main research questions of this thesis are why and how to limit the preferential treatment and whether the limitation is effective.

As for the United States, its approach is to include a clause in the preamble of the IIAs it concludes, namely no greater rights clause. This approach stems from a change in the United States investment treaty negotiation policy after 2002. In 2002, the United States passed the Bipartisan Trade Promotion Authority Act, which contains the no

greater substantive rights. In this Act, it is confirmed that, firstly, the American domestic law already provided a high level of protection; secondly, one of the negotiating objectives of the American international investment agreements was to ensure that foreign investors in the United States would not be granted greater substantive rights than American investors in the United States; and thirdly, it set forth some specific objectives, including reducing or eliminating exceptions to the principle of national treatment, seeking to establish standards for expropriation and compensation for expropriation consistent with United States legal principles and practice, and seeking to establish standards for fair and equitable treatment consistent with United States legal principles and practice. Consistent with the change in American investment treaty negotiation policy, four American free trade agreements bring into the no greater rights clause in the preamble.

The European Union was influenced by the United States to come up with the idea of no more preferential treatment. The reason for this is that during the negotiations of TTIP between the two sides, the United States made no more substantive rights one of its negotiating objectives. The European Union, therefore, came up with the principle of no more favored treatment. This practice is further reflected in the negotiation of CETA between the European Union and Canada, especially in the joint interpretation of CETA. This trend has further spread to Australia, the United Kingdom, and other countries in their treaty negotiation practice.

The reasons for limiting preferential treatment can be summarized as three shifts and two constants. First, there are three shifts: the first is the shift in identity from capital-exporting countries to capital-importing countries, as mentioned by many speakers today, which has led countries to consider IIAs from a long-term perspective, rather than just from the perspective of a capital-exporting country at the negotiation moment; the second is the shift in risk. If preferential treatment is expanded, the risk of investment arbitration will also increase; and the third is the shift in value. The value of equality is receiving more and more attention, and it is believed that international investment agreements should uphold the concept of fairness and equality, and the coherence of domestic investment protection standards and international investment protection standards should be promoted in order to avoid causing reverse discrimination against domestic investors. There are two other constants, including the constancy of foreign capital flows and the constancy of institutionalization. Since foreign investment flows are still frequent, the real need to protect foreign investment still exists. The institutionalization remains the same, meaning that countries are still actively advocating the reform of IIAs and insisting on the path of institutionalized reform.

With respect to the content of the clause, I analysed the interpretative power of the clause, the one-way or two-way nature of the clause, and whether it covers the substantive scope or also the procedural scope. Firstly, the preamble clause, as part of the IIA, is interpretative and serves to limit the tribunal's ability to expand its interpretation. There is only one case in which this clause has been applied, Gramercy v. Peru. In this

case, this clause was invoked to argue for limiting the scope of protected investments. This case has not yet been decided and I will further follow the latest developments in this case. Secondly, whether the provisions limiting preferential treatment are one-way or two-way. As for the American clause, due to changes in its investment treaty policy, the preamble clause in the investment agreement only provides for the limitation of preferential treatment of foreign investors in the United States., but not for the treatment of American investors in other countries. The European Union, on the other hand, does not make a one-way restriction. Thirdly, on whether it also covers procedural scope, the wording suggests that American clause covers only substantive rights, while the European Union may also cover procedural rights.

In terms of the clause's effect, there are two points worth mentioning. The first point is that the clause has played a positive role in limiting the higher preferential treatment of foreign investors. The second point is that the practical effect of the clause is still limited for three main reasons: first, it is a limitation of the preferential treatment clause and does not eliminate preferential treatment; second, it does not replace specific substantive provisions, such as fair and equitable treatment, or covered investment provision; and third, it is inherently ambiguous. It does not set out what preferential treatment is, so there is some ambiguity in its interpretation.

The conclusion of this thesis is that the limitation of preferential treatment for foreign investors will be a trend of IIAs reform, and the modes and methods of limitation will be more diverse than those mentioned in this thesis. It could be stipulated not only in the preamble but also in the substantive provisions and even procedural provisions. Therefore, it is necessary to further compare and analyse the domestic investment protection standards and international investment protection standards and strive to realize the coherence between the international and domestic legal systems. Above is the main structure and content of this thesis.

When it comes to the problems and challenges in writing this thesis, there are mainly twofold. Firstly, as to the current arbitration practice, now there are just a few cases where this clause is applied, so it is still difficult to evaluate the exact practical effect. Secondly, this thesis only focuses on the limiting clause itself, and the study of other limited substantive clauses still needs to be conducted.

That brings me to the end of my presentation. Thank you for listening. Your comments are appreciated.

Moderator: Liu Hong

Thank you very much Dr. Wen for your wonderful speech. Thank you to the three speakers for their wonderful sharing. Next, we would like to invite the commentators to review the papers of the three speakers. The first reviewer, please. The first reviewer is Mr. Shen Wei, a professor and Ph.D. supervisor from KoGuan School of Law at Shanghai Jiao Tong University. Mr. Shen received his LL.B. and LL.M. degrees from East China

University of Political Science and Law, the second LL.M. degree from University of Michigan, the third LL.M. degree from Cambridge University, and Ph.D. degree from The London School of Economics and Political Science. Mr. Shen's main research areas include international investment law, corporate governance, financial regulation, and international commercial arbitration. Up to now, Mr. Shen has published 8 books in English, 4 edited books in English, 5 books in Chinese, and more than 220 academic papers in English or Chinese, which is very fruitful indeed. Next, we would like to invite Mr. Shen Wei to comment on the papers from three speakers.

Commentator: Shen Wei (Professor, KoGuan School of Law at Shanghai Jiao Tong University)

Thank you, Ms. Liu, for your introduction. First of all, I would like to thank Professor Wang Peng of Xi'an Jiaotong University School of Law and the team for arranging this learning opportunity for me. I also attended both sessions throughout the morning and listened to the talks. In the afternoon, I will mainly focus on international investment law, and I will share some of my thoughts.

I have been studying international investment law for some time. Since the World Trade Organization has hit a bottleneck, most of the domestic scholars engaged in international economic law have made a big shift in the past 10 years and put more effort into the study of international investment law, which has also entered a bottleneck stage after this period of high productivity. In recent years, when I attended Ph.D. or LL.M. thesis defences, there were a lot of articles related to international investment law. For the Ph.D. candidates I supervised, I asked them to write articles on international financial law in the past two years. I find that there are many things worth studying in international financial law, but relatively few people write about it, which may have a lot to do with the high technical content of international finance law itself.

Among the three topics presented just now, one is the intersectionality, which is the topic of Dr. Cai who mainly concerned the intersection of international investment law and intellectual property law. There has been a lot of research in international investment law, touching upon the intersection with intellectual property rights, trade and finance, such as financial security and financial prudential principle related research. Dr. Wen Zhiyuan talked about one of the more prominent issues in international investment law, namely, the issue of balance, which is a disciplinary feature of international investment law itself, or one of the more mainstream studies in the discipline at present. Dr. Fan's topic is relatively new. She studied not only international investment law, but also the structural aspects of international economic law. Therefore, this is a good choice of topics for all three speakers. But if I only position myself as a reader, then I still have a lot of questions.

First is this article by Dr. Fan. This article deals with one of the big problems facing international investment law, or international economic law, namely structural problems. What is meant by structural problems? The international economic order after World War

II, in general, divided the rules of trade and investment and the rules of national security, called parallel systems or dualistic structures. In other words, in most cases, the rules of trade and economy are not bothered by the rules of security, and only in very extreme cases can security rules intervene in the field of trade and economy. Therefore, after World War II, the entire international economic and trade system is in a relatively stable state, such as the World Trade Organization, the Washington Convention, and the Washington Centre. In other words, these governance systems and governance norms are relatively stable, rarely troubled by security issues. Of course, there are exceptions in extreme cases. You can find that in economic and trade, such as in the WTO and international investment law, security is not a very prominent and urgent issue, and in general, the cases are relatively few. But in the last 10 years, especially after the global financial crisis in 2008, a big change has occurred. This has a lot to do with the rise of the non-traditional nature of security issues, i.e., security issues are now no longer confined to the military issues they used to be, such as military security and homeland security, but also involve many new types of security, including information, health, environmental protection, carbon neutrality. Technology, like artificial intelligence, also has become impacted by security issues. Therefore, among the security issues, non-traditional security is more prominent. This has a lot to do with the international situation after the global financial crisis. For example, the importance of financial security in economic security has been raised to the height of national security. This is also the case in the United States which also raised financial security or foreign investment to the height of national security. Therefore, security issues began to collide with the international economic and trade system. This is a structural problem, or what can be called the security dilemma in international economic law or international economic rules, that is, after the collision between security issues and the economic and trade system, will there be major changes to the international economic and trade system or the international economic governance system after the World War II?

Therefore, Dr. Fan's topic is a cross-cutting issue that deals with the structural problem, namely, what kind of changes will happen to the practice of international investment arbitration when sanctions are encountered in the field of international investment or international investment arbitration, either by the host state or foreign investor, or by third country sanctions? What kind of interpretation and constraints will the original BIT rules be subject to? Therefore, this study is not a study of sanctions. Rather, it is a study of international investment law.

This article is a fairly well-done article from the reader's perspective, but there are some questionable points. For example, the title of the article is empirical research, but the empirical evidence is only a list of cases involving sanctions in BIT cases, just a table, and then an analysis of the sanctions involved in these dozen cases. The empirical research in this article stops here and does not go further, which is not the same as the traditional empirical research in economics or econometric research. If empirical research requires regression of data and measurement, then the compilation and review of a dozen

cases is hardly enough for empirical research in the sense of empirical study. It might be more objective to change it to an examination of the sanctioning factors in international investment arbitration, or an analysis, or a jurisprudential study, or, alternatively, to add a dash and a subheading: an examination of existing cases.

Second, if the general tone of this article is to set out empirical research, then it can be developed and analysed. However, if we look at the fullness and logic of the article, I think the theme of this article is the jurisprudential issue in relation to or the impact of sanctions on international investment arbitration or international investment arbitration rules. Therefore, it would be smoother for the reader if some of the jurisprudential issues could be extracted and then analysed in this article, i.e., the empirical evidence could be used as a starting point and then the jurisprudential issues could be studied after that.

What is the jurisprudential issue here? For the most part, at least in these cases, it seems that United Nations' sanctions or multilateral sanctions are relatively rare, and most of the cases arise from unilateral sanctions. What is the impact of the legal regime related to unilateral sanctions on the existing international investment rules? That is such a jurisprudential issue.

There have been several commercial arbitration cases of this kind in China, namely, after the adoption of the anti-foreign sanctions law in China, some disputing parties have filed requests for non-enforcement of arbitral awards at the stage of recognition and enforcement of commercial arbitral awards on the grounds that the arbitrators were sanctioned in the cases. There are such cases in Shanghai, Guangzhou and Shenzhen. I myself have seen one or two unreported cases that are still at the first instance stage. We probably will see more such cases while sanctions become a general problem, at least in the field of anti-foreign sanctions law, and similarly, in the field of international investment law. But it is contingent, not inevitable. Many scholars seem to have discussed whether the public policy implications of the epidemic will cause a surge in the number of major international investment cases in international investment law and have done a lot of research and published some articles. But these cases are still relatively few and fortunately there is no such trend.

If we start from this jurisprudential issue, what follows in this article will be very satisfying, i.e., the discussion on the interpretation of sanctions, the legal basis of their effectiveness, whether they are within the scope of regulatory power, whether they involve public policy, and the issue of the hierarchy of regulatory power, investor rights protection, investment obligations, etc. The question of the hierarchy of investment obligations, however, does not seem to be so difficult to solve, or to rise to such a level. The difficulty is the conflict between the effectiveness of sanctions as a unilateral measure and the effectiveness of the international investment arbitration system. The conflict between the effectiveness of unilateral sanctions and investment treaty obligations is relatively certain, because unilateral sanctions do not prevail over such a fundamental principle of international law as treaty compliance.

So, from a reader's point of view, I think this is a good choice of topics, especially from the large number of domestic studies that focus on sanctions and counter-sanctions. It is very innovative to have a cross-cutting and marginal study like this one, which digs into sanctions and counter-sanctions factors and jurisprudential issues within a particular discipline.

The second article, by Dr. Cai, discusses the issue of harmonization, that is, the relationship between international investment law and other legal systems, such as dispute resolution, finance, trade, and so on. I read this article twice. This article, from a reader's perspective, was hard for me to resonate with because it had a lot of different issues.

If we split the title of this article, we can find that it talks about several things. One thing is geopolitics. Putting geopolitics into the study of international economic law is also an idea followed by many scholars after the Sino-US trade friction, including the rules on state-owned enterprises, WTO reform, and the study of CPTPP, all of which can be put in this framework. Just from the title, we expect that she is going to talk about the intersection of ISDS and intellectual property rights, which is in international investment arbitration and involves the legal issues of intellectual property rights. I myself have written an article on the TRIPS-plus rule and exceptions in the context of international investment rules. But then I read her article and realized that my preconceptions were incorrect. This article discusses some of the issues facing international investment law: the first part discusses how international investment law has changed over the last few decades; the second part deals with the issue of ISDS, the dilemma of reform facing the issue of investor-host country investment disputes; the third part looks at several cases involving intellectual property rights in international investment disputes, such as Philip Morris v. Australia, with a discussion on what issues intellectual property rights present in these cases.

In the article wrote, I also cited the Philip Morris case as an example. But it was more about the existence of an exception to intellectual property provisions in international investment arbitration or international investment law, such as whether Australia, e.g., in Philip Morris v. Australia, could use the health exception or the general exception to deny its obligations to the investor. I could not follow very well the key issue in this article. Therefore, the connection of several things in this article is rather loose. What is the academic contribution of this article? For example, the article could have talked about the TRIPS-plus obligations in international investment arbitration and international investment law, and there is a big debate between developed countries and developing countries, which may involve geopolitical factors. Some of our scholars believe that TRIPS-plus cannot be accepted as it may cause great costs to our technological innovation and economic growth. It seems that our government goes a little faster than the scholars on the TRIPS-plus and accepted TRIPS-Plus in the first phase of the US-China economic and trade agreement. The general exceptions have no place in it.

This may be a geopolitical issue, and there is a relatively large conflict between our country and the United States. This, however, is not the issue discussed.

Dr. Wen was talking about one of the most hotly researched issues in international investment law, which is the rebalancing between the host state's right to regulate and the protection of foreign investors' rights. The theoretical starting point of this issue is that international investment law or the whole international investment law system, in general, tends to protect foreign investors after World War II. Therefore, in the rebalancing context, the complaint is that there were too many protections for foreign investment before, and now it is necessary to balance the host state's right to regulate. Dr. Wen chose a different path, that is, instead of talking about expanding the host state's regulatory power, she suggests lowering the level of protection of foreign investors' rights. There are a few foundational issues here that I do not strongly agree with Dr. Wen's arguments.

First, Dr. Wen argues that the BIT's preferential treatment of foreign investors over domestic investors is a rationale for most developing countries to demand reform of the existing international investment law system. Most scholars who write about this will mention that there is a sign that the rights of foreign investors have been over-protected, and the regulatory power of host governments has been restricted in international investment arbitration in the past decades. But empirical research has been done by Susan Franck which may not agree with this. Her book relying on empirical evidence may say the opposite. Susan Franck studied this issue while Ecuador, Bolivia, and Venezuela withdrew from the Washington Convention on the grounds that it was too protective of foreign investors. Susan Franck researched whether the Washington Convention does provide too much protection to foreign investors. She has compiled investment arbitral awards and found that foreign investors win more jurisdictional awards, but the host states win more awards on merits than foreign investors. Some scholars disagree with the European Union's assertion that the existing international investment arbitration system is in a crisis of legitimacy, and empirical research on the same does not provide evidence. The reasons for the legitimacy crisis include several aspects: (i) the disproportionate number of awards is too high; (ii) the choice of arbitrators is too fixed. Empirical research on this issue found that this is not the case, although there are individual cases where the same arbitrators have shifted between the host state and foreign investors. This type of empirical study is more valuable. At least it argues from an econometric point of view that some claims should not be taken for granted. On the question whether the BIT gives foreign investors better treatment than domestic investors, I think this argument is correct from the procedural point of view because a domestic investor who runs into an expropriation case does not go to the Washington Centre to sue its own government. But I have reservations about the proposition that the substantive rules are superior to the treatment given to domestic investors by their own government. In particular, there is a big problem with this article using the United States as an example. The Constitution of United States probably provides the highest standards of investor rights protection, such as expropriation (or taking in the Constitution of United States) and compensation.

Second, this article mentions that the interpretation of the provisions of the TTIP has a clause called "no greater entity rights clause," and "no more favourable treatment clause." This is actually the super-national treatment we often talked about in foreign investment law in the 1990s. As to the "no greater entity rights clause" and "no more favourable treatment clause" in the TTIP quoted here, the article says that the treatment of foreign investors is not higher than that of domestic investors, but rather is further reduced. My understanding is that this clause requires the supranational treatment to be reduced to national treatment. If so, then the tone of the whole article will change.

Third, the article gives several examples in answering the question of why there should be a rebalancing, citing the factors of identity shift, risk shift, and value shift. One of these factors, identity shift, is problematic. The reason that international investment law is based on BITs, rather than MIAs, is that a country is likely to be a significant capital exporter, but not a capital importer, such as China before the 21st Century, and therefore cannot harmonize standards for the protection of substantive rights and procedural rights when entering into a BIT. As a capital-importing country, it wants a lower standard to reduce the likelihood of becoming a respondent itself in ISDS; as an important capital-exporting country, it wants a higher standard of protection to increase the likelihood of its nationals winning their investment abroad. It is a matter of identity or status.

China has a problem called identity shift in its BITs, which causes a change in its discourse. China was originally a capital-importing country. Professor Chen An believes that we have to tighten the safety valve over some procedural elements in BITs, such as the definition of investor investment, while to loosen the safety valve, the host state is easily sued by foreign investors. But in the 21st Century, after the implementation of the "going out" strategy and the Belt and Road Initiative, China has become an important capital-exporting state, and at this time to close the export valve, then the domestic investors while investing abroad cannot easily initiate arbitration against the host state. The BIT should be two-way, so China must lift its substantive and procedural standards in BITs if it wants to protect the outbound investors better. Although China's BITs have more one-way provisions, but more often two-way provisions can be accepted by the counterparts. The article mentions that the United States position has shifted because of the change in its identity, which I think may not be true. Because the United States has always been an important capital exporter and capital importer, there has not been a big change in its identity in FDI. It is still debatable whether there has been a shift in the status of the United States. What factors are then causing the United States to retreat from its position, including substantive rights and procedural standards? For the purposes of this article, I think the risk of being involved in the case is a larger factor. Australia and Canada are both out a lot of money for being a respondent. For example, Australia paid $30 million legal fees in the Philip Morris case and the country was in an uproar. The risk factor involved in the case I think is a valid concern. It may not necessarily be the case to assume that a change in status caused a change in the country's position.

For the rebalancing problem in international investment law or international investment arbitration, most scholars now choose the path of expanding the regulatory power of the host state, because the protection of foreign investors' rights is already relatively high, while the regulatory power of the host state is subject to more restrictions. The regulatory power of the host state needs to be expanded to reach a state of basic parity, which is rebalancing. Therefore, Dr. Wen's idea is quite new, and the idea is to pursue limiting the rights of foreign investors. Whether limiting the rights that have been granted to foreign investors as a path is open to discussion. But there is another path that can be considered, which is to increase the obligations of foreign investors. That is, instead of choosing to expand the host state's regulatory power when the protection of foreign investors' rights is better than the host state's regulatory power, to increase the obligations of foreign investors, such as sustainable development, environmental protection, health and hygiene obligations, and corporate governance and corporate social responsibility, is already present in many BITs.

Wen believes that the "no greater entity rights clause" and the "no more favourable treatment clause" in TTIP are regulated because the rights already granted to foreign investors are higher than the host state's right to regulate, and therefore restrictions are to be imposed on them. The semantics of the original TTIP is still open to examination, but it may be difficult to restrict the rights of foreign investors.

Reading these three articles is very rewarding. Nowadays, international investment law research is becoming more difficult because there are many people studying it, and the research perspectives are abundant. But domestic research, such as empirical research, is still relatively new and young.

Moderator: Liu Hong

Thank you very much, Professor Shen. Professor Shen combined his research and made a wonderful comment on this thesis of the three candidates, and I believe that Professor Shen's suggestions are very important for the improvement of the thesis.

Next, please welcome the second reviewer, Associate Professor Xu Shu from South China University of Technology and Executive Deputy Director of China Centre for Legal Research on Opening Up to the World.

Professor Xu received his LL.B., LL.M. and J.D. from Tsinghua University, and also received his J.D. from Tohoku University, Japan. Professor Xu's research areas include international economic law, international dispute resolution, and the basic law of Chinese Hong Kong and Chinese Macau. Professor Xu has also published several academic papers, including the dilemma of intellectual property protection under international investment treaties and its response, the conflict and coordination of dual-track enforcement mechanisms of international investment treaties, and many other excellent articles.

I also noticed that Professor Xu's article has more fits of our three candidates today. Next, I would like to invite Professor Xu to give his comments.

Commentator: Xu Shu (Associate Professor, School of Law at South China University of Technology)

Okay, thank you, Ms. Liu. Thanks to the committee for invitation to participate in the annual International Investment Law Young Scholars Forum. I have just listened to the special papers of three candidates and the wonderful comments of Professor Shen, which were very rewarding. I will now talk about my learning experience, and please criticize and correct me for any incorrect statements.

First, I will talk about my understanding of what the three papers have in common. In terms of topic selection, all three papers are studies of cross-cutting issues. Dr. Fan's paper is on the relationship between international investment law and economic sanctions, Dr. Cai's paper is on the relationship between international investment law and intellectual property protection, and Dr. Wen's paper is on the relationship between international investment law and domestic investment protection. On the one hand, the attention and research on these cross-cutting issues reflect the expansive and inclusive character of international investment law itself; on the other hand, the sensitivity and insight of the three authors on the frontier issues of international investment law.

In terms of research methods and research approaches, the three papers are very good in terms of both technical discussions of the rules and standards, as well as analysis of the values and concepts behind the issues and the direction of the system. In general, I think all three papers deal with the same theoretical issue, that is, the boundary issue of international investment law. As the three authors mentioned, international investment law is increasingly intersecting with economic sanctions and intellectual property protection, with domestic investment protection, and so on, and influencing each other. Therefore, the boundaries of international investment law are constantly changing, repeatedly switching between expansion and contraction, and maintaining a relatively reasonable balance between stability and flexibility. Dr. Wen mentioned Chinese words in his paper: "Where to come and where to go," which I think is a very good summary, that is, under the system of international investment law, where do economic sanctions, intellectual property protection, and domestic investment protection issues go?

Behind these issues is also the question of how to integrate the international investment treaty regime with extra-treaty regimes, such as trade law regimes, intellectual property treaty regimes, and in particular, with domestic law regimes. In terms of the subject matter of these three papers, the issue of the relationship between international investment law and domestic sanctions law, domestic counter-sanctions law and domestic intellectual property law, and domestic investment protection law and other such extra-treaty mechanisms, are all very important. In the following, I will discuss my thoughts and suggestions in relation to each paper.

First, there is Dr. Fan's paper, which provides a very detailed and in-depth review of the relationship between international investment law and economic sanctions, especially with respect to arbitration practice. However, I also feel that in some aspects, there is still some unfinished business, so I offer several suggestions. The paper analyses economic sanctions as a whole, so can a further typology of economic sanctions be considered? The paper mentions unilateral sanctions, multilateral sanctions, but there are other categorical perspectives that can be considered, such as primary versus secondary sanctions, intra-territorial versus extra-territorial sanctions, explicit versus implicit sanctions, etc. Different types of sanctions do not have the same degree of relevance to international investment law and have different implications for investment law and investment arbitration.

The second suggestion is that there are additional angles of analysis, areas of analysis, with respect to the point of conflict between investment law and sanctions. For example, from the perspective of the relationship between the object of the sanction and the sanction, it could be identified as the investment covered by the investment treaty as appropriate, the investment dispute covered by the investor as appropriate, and so on; from the perspective of the substantive rules, in addition to the rules of post-establishment investment protection, it could also involve the rules of investment establishment, as many sanctions are in the form of prohibition of transactions; from the perspective of procedural rules, regarding economic sanctions in investment arbitration, is it a matter of jurisdiction or a matter of application of law? Even if it is considered as a matter of jurisdiction, the arbitral tribunal has no jurisdiction over disputes regarding economic sanctions per se, but it is still possible to consider the relevant norms of international law that can be applied to the relations between the parties, including the norms of economic sanctions, in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties, for the purpose of application of law. Then, whether the domestic law of economic sanctions should be considered as a matter of fact or as a matter of law? These are questions that deserve further analysis.

The third suggestion is that this paper focuses on the negative, hindering effects of sanctions on investment arbitration, and perhaps also considers the positive, facilitating effects on investment arbitration. For example, I read the paper that the investor in the Yukos case sought recognition of enforcement in an American court, and the court was going to terminate the enforcement proceedings, but then the court considered that the presence of economic sanctions made it difficult for the investor to seek recognition of enforcement of the award outside the United States, given the outbreak of the Russian-Ukrainian Conflict, and therefore found that the enforcement proceedings should not be terminated. This sanction arguably indirectly facilitated the recognition and enforcement of the award.

The fourth suggestion is that the paper mentions drawing on experience in other dispute resolution areas, but it does not expand on that, and it could be specifically compared. For example, outside of the ISDS mechanism, other SSDS mechanisms, like

the ICJ case of Iran v. the United States, international commercial arbitration, and domestic litigation, what are the better experiences in these areas for dealing with economic sanctions? Perhaps a summary could be developed.

The second paper is Dr. Cai's. For Dr. Cai's thesis, I have the same feeling as Professor Shen, that the theme is not focused enough, there are too many elements, but not focused.

The central theme of this paper is intersectionality, that is, the intersection of investment treaties and intellectual property rights. Since the intersection is the theme, it is necessary to further analyse how the intersection is achieved and how the linkage between the two is made. Because intellectual property rights protection is originally a matter covered by intellectual property rights treaties and not directly related to investment treaties, but nowadays investment treaties and investment arbitration cases are increasingly involved in the intellectual property rights policies of host countries, so investment treaties and investment arbitration are gradually becoming a legal tool for investors to challenge the intellectual property rights policies of host countries. Therefore, if we want to discuss the intersection of the two, we have to analyse from the perspective of norm linkage, how the two are combined together and how to achieve the linkage, which can be launched from many aspects of the analysis. For example, from the viewpoint of intellectual property itself, it has property attributes in itself, but does it also have investment attributes under investment treaties? In other words, is it proper investment or not? This is the prerequisite question. For example, in terms of the substantive provisions, which provisions in the investment treaty are relevant to the protection of intellectual property? As I understand it, many provisions in investment treaties can be invoked by investors to challenge the intellectual property rights policy of the host country, such as national treatment, most-favored-nation treatment, fair and equitable treatment, expropriation, umbrella clauses, and prohibition of performance requirements. In addition, there is also the exception clause mentioned by Prof. Shen, which may also be invoked by the host country as a basis for defence.

The second suggestion is that, while focusing on crossover, we should also pay attention to the issue of the boundary between the two. Because investment treaties and investment arbitration cannot involve all aspects of intellectual property rights, otherwise it will lead to the rules established by the original intellectual property treaties being gradually eroded by the norms of investment treaties, and eventually break the balance between private and public rights already established by intellectual property treaties, such as TRIPS. Therefore, I suggest that Dr. Cai follow the new trend of international investment treaty practice. A number of treaties, especially some EU-led investment treaties or free trade agreements, have already cut or decoupled intellectual property rights treaties and investment treaties in some aspects. For example, CETA, the free trade agreement between the European Union and Canada, its Paragraph 6 of Article 8.12 of Chapter 8, provides that a violation of TRIPS, or a violation of the CETA intellectual property chapter itself, does not ipso facto constitute an expropriation, does not ipso facto

imply a violation of investment protection obligations. And then its annex, 8-D, also makes specific provision for each member state to determine for itself how the intellectual property rights provisions are to be implemented in its domestic law, and for issues such as the existence and validity of intellectual property rights to be determined by domestic courts rather than by investment tribunals. So, I think these latest practices are very helpful in looking at these kinds of cross-cutting issues, which may also represent the direction of future developments.

The third suggestion is to consider further pursuing the question of how to deal with the ISDS mechanism, i.e., the relationship between the investment arbitration mechanism and other potentially conflicting mechanisms, particularly the WTO dispute settlement mechanism. If the same intellectual property rights measures are brought to the investment arbitration and WTO dispute settlement bodies respectively, and these two mechanisms come to the same conclusion, no problem, but if they come to different conclusions, what happens at this point? Or is there any way to avoid having two different mechanisms make opposite conclusions on the same intellectual property rights measures? This is very important for cross-issue research and needs to be considered.

The last suggestion is about the cases and the literature itself. The paper mentions the Morris and Eli Lilly cases, but in fact, in addition to these two cases, there are two more recent cases that have emerged. One case is Einarsson v. Canada, which Ms. Zhang Qianwen mentioned in the morning, and the other case is Bridgestone v. Panama. Both of these cases involve intellectual property rights, and Dr. Cai is advised to pay attention to them. In addition, there are two very authoritative monographs in the literature, one is published by Oxford University Press, entitled “The Protection of Intellectual Property in International Law.” This book was published in 2016. Another book is from last year, entitled “The Protection of Intellectual Property Rights on the International Investment Law.” I consider these two books have a lot of issues for the chosen topic, so I suggest to find them and read them.

The third is Dr. Wen’s paper, which I was also very inspired after reading. There are four main recommendations.

The first suggestion is that the heart of the paper is the preferential treatment clause, and at the heart of that clause is a comparison between the standard of protection under investment treaties and the standard of protection under domestic law. According to the formulation of the paper, it is to use the standard of protection under domestic law as a reference, but the question is who will make the comparison, how will the comparison be made, and how will this comparison affect the interpretation and application of investment treaties? Combined with the topic of today’s forum - geopolitics, my understanding is that the American and the European Union’s preferential treatment clause is actually a legal tool to export American law and the European Union’s law to the outside world, that is, with the help of this preferential treatment clause. The United States and the European Union are trying to use their laws as benchmarks to influence the investment protection standards in investment treaties.

The second suggestion, which was also mentioned by Professor Shen just now, is what is the relationship between the protection standard under American law and the European Union law and the treaty protection standard? Which is higher in the end? Or is there no essential difference? If the standard of protection is the same, then what is the significance of investment treaties? What is the point of the substantive provisions, other than the procedure? In this regard, I also suggest you do further in-depth comparative analysis, especially in the context of specific substantive provisions, including expropriation, fair and equitable treatment, and other aspects of the protection of investors' rights in domestic law and investment treaty standards. I also conducted a search in this regard and found that some scholars have done research in this area. One scholar compared American law standard and the investment treaty standard and concluded that the two standards differ in at least some aspects, such as the subject matter of the lawsuit, the cause of action, policy considerations, and evidentiary standards. He concludes that the two standards of protection are not the same. I therefore suggest that you pay more attention to research in this area and make an in-depth comparison between the domestic law standard and the treaty law standard.

The third suggestion is to switch the object of comparison, that is, to make a detailed comparison between the preferential treatment clause and other clauses under the treaty. For example, what is the relationship between the preferential treatment clause and the national treatment clause, as mentioned by Professor Shen just now? Are these two issues the same, or do they intersect, but are not the same? This issue may still need to be clarified. For example, what is the relationship between the preferential treatment clause and other clauses in the treaty, especially the clauses involving the word "domestic law?" I also note that there are some provisions in CETA that use the concept of domestic law, such as Paragraph 7 of Article 8.10, which states that a violation of domestic law does not in itself constitute a violation of fair and equitable treatment, and Article 8.31, which states that the arbitral tribunal has no jurisdiction over questions of legality under domestic law and that the tribunal shall defer to the domestic court's interpretation of domestic law. Since the subject of Dr. Wen's paper is comparing the relationship between domestic law standards and treaty standards, then these articles are also very relevant. There is another article, Article 30.6 of CETA, which says that CETA does not create rights or rights of action under domestic law, and this will also involve the issue of comparison between domestic law standards and international law standards.

The final suggestion is to switch the comparator. It is to compare the preferential treatment clause with the provisions of rules outside the investment treaty. I have in mind a provision, Article 27 of the Vienna Convention on the Law of Treaties, which states that domestic law cannot be used as an excuse for not fulfilling treaty obligations. If at the end of the day investment treaty obligations are interpreted according to the standard of the no greater substantive rights clause, that is, the standard of domestic law, it could lead to the result of using domestic law as a pretext to avoid treaty obligations. This is my final suggestion.

Overall, I studied the three papers and also studied Professor Shen's comments, and it was very rewarding, and I would like to ask for more criticism and correction for any incorrect statements.

Moderator: Liu Hong

Okay, thank you very much, Mr. Xu Shu. Mr. Xu has given very detailed suggestions for each dissertation, especially very clear guidelines and guidance on the works and articles that the three speakers need to focus on when refining their dissertations, including the relevant articles. Thank you again, Mr. Xu. I also thank the three speakers and Mr. Shen Wei and Mr. Xu Shu for their comprehensive and detailed comments.

Three speakers, is there anything I need to say to the professors?

Speaker: Fan Xiaoyu

In order of reporting, I will respond to both professors first. First of all, I am very grateful to Professor Shen Wei and Professor Xu Shu for the advice they provided to me, both of whom were very useful. Both professors' articles are the ones I often cite in my writing process.

Rather than asking me questions, Professor Shen Wei provides more of an analysis of my writing ideas in more epigrammatic terms to help the current listener understand more about what I have written. I recognize that Professor Shen Wei's expressions are very precise. And he said that he would be more interested in reading my article because he thought it might be an empirical analysis. I am rather sorry in this respect that the essay I wrote, with that name, is probably not quite accurate. I simply wanted to provide an overview of current ISDS practice, as an introduction to the legal issues that may be involved and the problems that may be faced in practice. So, I think Professor Shen Wei is right, I probably need to change the article's title.

Professor Shen Wei also raised the question of whether economic sanctions can really generate enough cases in the future, because this question is the current COVID-19 epidemic has not caused a corresponding rise of cases. This is a question I am also considering. This article is not only about the sanctions involved in the Russia-Ukraine war, or the sanctions-related laws that have been enacted nationally or internationally throughout recent years. There have been many previous rounds of such sanctions, whether it was Iran, Libya, Venezuela or Russia, and they have all suffered economic sanctions. Previous arbitration practice does not seem to show an ISDS case that corresponds to the economic sanctions of that era, so I think this suspicion does have its justification. But I would still like to emphasize that I think the damage that economic sanctions currently cause to investors' rights and investments cannot be ignored. And the problems that economic sanctions demonstrate in the area of international investment law

are covered at various levels in domestic law, in international commercial arbitration, and in international courts. This is why I am more interested in this issue.

Professor Xu Shu gave me four suggestions, all of which were very good. If my article is just the tip of the iceberg in this cross-cutting area, then Professor Xu Shu has brought up the whole iceberg. The suggestions he made were very good, and I took them into consideration when I was thinking about the whole article, but the length of this essay was limited, so there was no room for expansion, on the one hand, and the depth of my thinking, on the other hand, was not enough. I know these are questions, but I can't come up with an answer that I am satisfied with yet, so I didn't address it. All these suggestions will be very useful for the improvement of my essay. For example, Professor Xu Shu considered that economic sanctions may have an impact not only after the access, but probably at the investment access as well, which is true. In the Russia-Ukraine war, the United States and the West have issued decrees sanctioning investment in any sector of the Russian economy, and such decrees can be reflected in the access phase. That's all I have to say in response, thank you.

Speaker: Cai Yongjie

In response to the questions from Professor Shen Wei and Professor Xu Shu, in fact, many of the points mentioned by the professors are the parts I choose to carve out, including the TRIPS-plus provisions mentioned by Professor Shen Wei, and different aspects of intellectual property investment mentioned by Professor Xu Shu, as well as some of the substantive provisions, such as the most-favored-nation clause, the fair and equitable treatment clause, and the expropriation clause for countries. Originally, I had included these parts in my writings, but when it came to the final proofreading, I simply eliminated them to avoid blurring the focus. Professors' comments are a great reminder to me that I should reorganize the structure of this article. Thank you both very much for your comments! Thank you all!

Speaker: Wen Zhiyuan

Thank you, moderator. And thank you very much for the comments. First of all, I would like to respond briefly to several points mentioned by Professor Shen Wei. The first is the question of whether preferential treatment of foreign investor exists. This is a very important question that needs to be addressed before finding out the solutions to the challenges preferential treatment faces nowadays. I have already conducted some research on this question. Although it is not a major part of this thesis, I would like to elaborate on this a little bit. My research on the existence of preferential treatment includes comparing the treatment of protection in domestic legal system with the treatment of protection in international investment agreements, especially in the United States and the European Union. There are some relevant papers in this regard, which talk

about constitutional review of international investment agreements. I agree that the existence of preferential treatment is a preliminary question that needs to be resolved first, and there is also a need to further discuss whether these preferential treatments are justified.

Secondly, about the supranational treatment, I have found that the study of this topic is closely related to the research I am conducting now. I will further refine in this area and find new insights.

Then for the reasons why states start to limit the preferential treatment of foreign investors, after listening to the comments, I found that the statement of identity shift is not quite accurate. I will further improve the wording in this regard. As for the path of increasing investor obligations, this is something I would like to add. Professor Shen mentioned the issue of rebalancing, which I also paid attention to during the writing of the thesis. But because I did not want to start from the right to regulate, the rebalancing in the thesis is not a rebalancing of investor rights and host state's right to regulate but balancing between the investment protection currently enjoyed by foreign investors and the investment protection of domestic investors. I have considered other paths before, whether to increase the standard of protection for domestic investors or reduce the standard of protection for foreign investors or even increase the obligations of foreign investors, all of which could be solutions to the challenges. Thank you very much for your suggestions, and I will further improve my research in this area.

I have benefited from Professor Xu Shu's suggestions, including further exploring the investment protection standards in American law and the European Union law, as well as adding the objects of comparison. I have not paid much attention to the provision you mentioned in the CETA. Thank you very much for your suggestions, and I will further improve my research in these aspects.

Moderator: Liu Hong

Thank you, Dr. Wen. Thanks to the three doctors for their responses. That's it for the second panel. Thanks again to the organizers and thanks to Mr. Wang Peng. Bye.

Panel Four[1]

Moderator: Guo Jianping (Assistant Professor, Xi'an Jiaotong University School of Law)

There are three speakers and four reviewers at the fourth penal. We will start with the three speakers and then invite the reviewers to comment. We will have the Q&A session at the end. So, if you have any questions for them, you are welcome to post them in the chat box at any time. The first speaker we have is Gu Tianjie from Zhejiang University Guanghua Law School.

Speaker: Gu Tianjie (Ph.D. Candidate, Zhejiang University Guanghua Law School)

Topic: International Investment as a Weapon - International Investment Law in the Lawfare

Thank you, Mrs. Guo, and thanks to the Xi'an Jiaotong University School of Law for organizing this conference. I am Gu Tianjie, a Ph.D. candidate of international law from Zhejiang University Guanghua Law School.

My doctoral thesis focuses on the relationship between international investment law and domestic law. I have been exploring the links from the perspective of lawfare and legal cooperation. Much of this article is still at the conceptual and conjectural stage, so I hope to receive suggestions from the experts and colleagues at this conference. The structure adopted in this article is a longitudinal one, by identifying legal phenomena, then generalizing and refining the problems and finally suggesting viable solutions.

In the history of international investment law and the development of international investment, including FDI, has usually been treated as an object of protection under international and domestic law. However, in the current context of increasing international economic frictions, I personally think that the attributes of international investment may change in the future.

On the one hand, according to the statistics from UNCTAD, the total global investment has fallen to a level which is even lower than that in the 2008 financial crisis. On the other hand, factors such as the COVID-19 pandemic and regional conflicts have led to a rising demand for FDI, which makes FDI particularly scarce. At the same time, international investment has a special socially embedded character, as it is highly tied to the development and interests of the host state, which equip it with a potential for geopolitical competition, as well as a strategic deterrent and economic coercion. Moreover, in light of the current domestic policies of some countries, international direct

[1] The Panel Four is translated by Fu Sixin (Xi'an Jiaotong University School of Law), Zhao Yifan (Xi'an Jiaotong University School of Law) and Liu Jiayi (Xi'an Jiaotong University School of Law). The translation has been modified and confirmed by the speakers.

disinvestment (or divestment) and investment bans are becoming a competitive strategy for some states.

From a historical perspective, large-scale international divestment campaigns in a number of countries have also had a relatively serious impact on national policies as well as on the economic development of host states. From a brief analysis of the Disinvestment from South Africa campaign and the Boycott, Divestment, Sanctions (BDS) movement, as well as the current large-scale divestment campaign against Russia due to the Russia-Ukraine conflict, it can be concluded that: (1) divestment can be an important way for states or non-governmental groups to achieve political goals; (2) disinvestment with a political purpose is usually a combination of governmental and corporate action.

Based on the above background, I have developed the concept of weaponization of international investment. The reason why international investment can be weaponized is its potential deterrent properties for host states, especially for major capital exporting countries. This is partly due to the socially embedded nature of international investment activities mentioned above, and the possible change in the nature of international investment due to the decline in the total volume of international investment; and partly due to the crowding-out effect, which is characteristic of current international investment law, and which to some extent inhibits the regulatory power of host countries, making international investment a potential political and economic deterrence for host states.

Disinvestment is the main form of weaponization of international investment. The literature on the impact of international direct disinvestment is extensive, but most are in the field of economics and management, and mostly define and classify disinvestment from a corporate perspective.

For the purposes of this paper, I have reclassified divestment from the perspective of the host state. I classify divestment into two main types: passive divestment and active divestment. Passive divestment refers to situations where foreign investment is forced to withdraw from a host state due to the host state's own policies or political will, or due to force majeure, in which case the threat of disinvestment to the host state is relatively low and therefore it is difficult to identify as weaponization. Active divestment refers to cases where an investor or the actual influencer of international investment, such as the home state or some other stake holders, wishes to maximize the potential deterrent properties of international investment through divestment, threaten of divestment, investment bans or reduction of investment in order to force the host country to comply or perform a certain act.

I have further classified the weaponization of international investment from the perspective of active divestment, into rule-based style and campaign-based style. In the case of rule-based style of divestment, divestment is closely tied to unilateral economic sanctions. In the United States and the European Union, as well as in some other countries or regions, divestment has been used as a form of unilateral economic sanctions. In the case of campaign-based style of disinvestment, even without the order or policy influence from the investor's home state, some foreign investors still take the initiative to

divest from the host state based on public opinion, moral or pressure of human rights, for example, in the Disinvestment from South Africa campaign, Leon Sullivan of the United States General Group asked American companies to protest against South Africa's system of apartheid by withdrawing investment from the country, or in the BDS campaign against Israel, some foreign investors tried to force Israel to change its oppression of the Palestinian areas by divesting and imposing sanctions.

In economics research, the potential impact of international investment weaponization on host states has usually been analyzed from the perspective of both industrial damage and human rights crises. From the perspective of this paper, whether it is the damage to host industries or the threat to human rights in host states, the fundamental aim of international investment weaponization is to have a more far-reaching impact on the policies or development of host states. The current regulation of international investment weaponization by international investment law is relatively weak. This is partly due to the crowding-out effect, which squeezes the regulatory power of host states and makes them less able to prevent disinvestment. In the process of preventing disinvestment, China may violate the fair and equitable treatment provisions of the BITs or the transfer provisions, which may lead to the threat of ISDS. However, given the current trend towards socialization of international investment law, it is possible that in the future host states may be able to use socialization provisions in international investment agreements, such as corporation social responsibilities (CSR) provisions and enhanced regulatory provisions in host states, to prevent divestment on the grounds of human rights protection or environmental protection.

The last part of the paper is about how China can deal with the possible weaponization of international investment. Considering China's dual status as a major capital-exporting country and a major capital-importing country, I look at both risk prevention and the use of weapons as possible legal constructs for the future.

Firstly, in the event that China is faced with the possibility of large-scale divestment in the future, China can build a legalization path for restricting divestment from the perspective of both domestic law and international law. On the one hand, it is possible to set up a domestic law basis for restricting disinvestment in China, especially as a form of anti-sanctions measure. On the other hand, there is a need to revise the relevant provisions of IIAs and, in the future, to revise some of them, paying particular attention to the trend of socialization of IIAs and paying some attention to CSR provisions and the regulatory power of host states.

Secondly, attention should be paid to the coordination of sovereign wealth funds and the anti-sanctions regime. The performance of sovereign wealth funds has been notable in previous large-scale divestments. On the one hand, the withdrawal of sovereign wealth funds has a strong economic impact on the host states. On the other hand, sovereign wealth funds are backed by the credit of the government, which makes the withdrawal and injection of sovereign wealth funds a strong political signal, and therefore the

withdrawal and injection of sovereign wealth funds in China could be designed as a counter-sanctions measure in the anti-sanctions law in the future.

Thirdly, from a corporate perspective, overseas compliance by Chinese companies should be coordinated with the cluster of anti-sanction norms, especially how Chinese companies can strike a balance between complying with our anti-sanction laws and avoiding mass default in the event that China may issue a divestment order in the future.

That is the main content of my paper. Thank you all and please offer your criticism.

Moderator: Guo Jianping

Thank you, and our second speaker is Shao Hui, a Ph.D. candidate from KoGuan School of Law at Shanghai Jiao Tong University.

Speaker: Shao Hui (Ph.D. Candidate, KoGuan School of Law at Shanghai Jiao Tong University)

Topic: The Dilemma and Pathways of Discourse Power in International Law Studies in China

Good afternoon, professors and students. My name is Hui Shao, a 2019 Ph.D. candidate from KoGuan School of Law at Shanghai Jiao Tong University. My research direction is the basic theories of financial law and international law.

The following content is mainly divided into four parts: The first part is a brief introduction of why we should study international law discourse; The second part talks about the research status of international law and international law discourse in China; The third part talks about what kind of international law discourse is needed for the rising of great powers. The last part discusses how to improve the research level of international law discourse in China based on the research status of international relations. Let's start the first part.

The first part is a brief talk about why international law discourse should be studied. Discourse and power in the context of sociology is a classic proposition put forward by Foucault. In the context of China's opening policy, the discourse of international law is an institutionalized manifestation of the soft power of the state. International law discourse has two basic functions. The first function is to obtain the institutional discourse power needed in the rising of a country through the discourse of international law. The establishment of such institutional discourse power can be obtained through the existing norms of international law and can also create new rules of international law through the basic principles of international law. The second function is to reduce the external cost of the rising of great powers through the discourse of international law. This view was recently put forward by Joseph Nye, who argues that if China's rise is accompanied by an increasing in soft power, it will alleviate external doubts and concerns about China.

The second part is about the current situation of our international law discourse and international law research in China. I did not conduct an empirical study on the current situation of international law discourse in China but described it in combination with communication studies as a whole. It can be divided into two parts. One part is that the discourse of international law is in a weak situation of inarticulate and unintelligible discourse as a whole. The former is that China's voice cannot be expressed, which emphasizes that the discourse is faced with a dilemma in its generation, while the latter is that our voice unable to be spread, which emphasizes that the discourse transmission is faced with a dilemma in its practice.

I quote a general description of the research status of international law in China by Professor He Jiang He from Zhongnan University of Economics and Law in Issue 2 of Oriental Law in 2019. He believes that the study of international law in China can be divided into three levels. The first level is to study the basic principles of international conventions and international law through negotiationism or legal transplantation. I think this level is a consumer of knowledge. At this level, scholars of international law do not actively and actively produce knowledge. The second level focuses on the major international treaties in specific fields to study the specific rules of international law, such as international law of the sea and international aviation law, and to safeguard the legitimate rights and interests of states in specific disputes. Of course, this domain is also a consumer of knowledge and has not been transformed into a producer of knowledge. The third level is using research that is based on the practice of the cases of international law and national system, combining with the international interest and legal culture, especially the traditional legal culture of China as a rising power, to create a new set of general norms of international law, or to establish new a theory of international law that can demonstrate China's legal rights and interests from previous cases of international law and practice. This theory may function as a distinct knowledge producer. From the perspective of the types of international legal studies in China, most of the current research results are still mainly international law studies at the first and second levels, and there are few scholars who take the initiative to carry out original Chinese international legal studies with the attitude of being knowledge producers.

The third level is back to our practice. Take a look at what kind of international law discourse China needs in the course of its rise as an emerging power. In this part, I constructed the hierarchy of needs theory of nation's international law discourse according to the theory of human needs. According to the general rule of discourse generation from low level to high level and the power transition from weak to strong in the rising of countries, especially the rising of great powers, the theoretical study of international law of great powers can be divided into the following stages. The first stage is the rule consistency stage; the second stage is the discourse autonomy stage; the third stage is the order universality stage. These three stages are hierarchical and leap forward respectively. They are combined with China's international law discourse needs and reflect some obvious stage characteristics.

The discourse of international law serves the economic foundation of a country. If the direction of a country's economic development has obviously changed, the discourse of international law study should also change accordingly to actively adapt to the development of this historical process. Here I divide China's discourse needs for international law into two stages. The first stage is from the reform and opening-up in 1978 to its accession to the WTO in 2000, and until the recent outbreak of the Sino-US trade war. China's economy has been in a stage of rapid growth, driven mainly by factors of production and investment scale, which is suitable for the economic foundation of this stage. The study of international law in China is basically at the stage of rule consistency, which is mainly characterized by international integration. The second stage is that since China's economic development entered the new era in 2017, China's economy has shifted from a stage of high-speed growth to a stage of high-quality economic development, marking that the driving force of China's economic development has changed from one driven by production factors and investment scale to one driven by innovation.

The transformation of China's economic foundation can be seen in external relations. Since 2017, China and the United States have been engaged in trade wars, scientific and technological wars, financial wars and legal wars. There is an obvious gap between the rules-based international order advocated by the United States and the international order based on international law principles advocated by China. In particular, the COVID-19 pandemic and the Russia-Ukraine war have further intensified the changes of the international situation and highlighted that the single rule consistency stage can no longer meet the actual development needs of national discourse, which also indicates that different types of discourse need in different stages of national development are different.

The fourth problem is how to improve the discourse level of international law studies in China. The discourse research of international law has sublimated from the stage of rule consistency to the stage of discourse autonomy and order universality. As a whole, it is a process of transformation from knowledge consumer to knowledge producer, which cannot continue to follow the basic Chinese strategy of "crossing the river by feeling for stones" in the previous stage. However, the study of the adjacent subjects of international law can provide us with some thinking worthy of reference, especially international relations. Recently, there has been an obvious shift in international relations, because the western-dominated theory of international relations can hardly explain the foreign relations behavior of non-western countries. After the 21st Century, international relations theory began to try to construct a kind of international relations theory with a real global significance, not only in the sense of Western centrism.

There are two representative schools, one is a critical school represented by Arlene Tickner, the other is a compatible school represented by Barry Buzan. The critical school draws on the theories of Marxism and post-colonialism and adopts a deconstructive approach. It holds that the current international relations are mainly a form of equal rights and identity between subjects and objects. Therefore, if scholars of international relations in marginal countries want to realize the autonomy of discourse and the universality of

order in their studies of international relations, the fundamental path can only be to change the status quo of inequality in the field of knowledge production through revolutionary subversion of a knowledge power structure at the center and edge. Similar to the critical school, the compatible school believes that the discourse hegemony of the current western international relations theory is unreasonable, but the way to change is different. It believes that international relations scholars from non-western countries should be encouraged to carry out active knowledge production. This school of thought should not only include the western knowledge production, but also surpass the western knowledge production, so as to form the global knowledge production practice of international relations in a real sense.

Both the critical school and the compatible school emphasize the use of original knowledge production to change the status quo of the development of international relations, which highlights that if the international discourse would like to take a turn to the stages of autonomy and universality, there needs to be a focus on original knowledge production and look at the question at hand from both the international dimension and the domestic dimension. This is also my article mainly talk about two issues. The first is on the international dimensions—we should deal with the relationship between Chinese international jurisprudence and western centralism international jurisprudence. The second is how to deal with the relationship between China's international jurisprudence and domestic economic, social and political fields in terms of the domestic dimension of discourse. From these two perspectives, my article has preliminarily explored the methodology of the discourse leap of international law in China. This is the end of my speech. I hope professors and students give me more corrections.

Moderator: Guo Jianping

Thank you, the last speaker is also from KoGuan School of Law at Shanghai Jiao Tong University, Ph.D. candidate Jin Siyuan, please.

Speaker: Jin Siyuan (Ph.D. Candidate, KoGuan School of Law at Shanghai Jiao Tong University)

Topic: Security and Public-Private Duality in the Cyberspace Gaming Era—An Analysis Based on the TikTok Incident

Hello, professors and students. First of all, I would like to introduce the basic background of my article. It was that in August 2020, Donald Trump issued an executive order to expel and ban TikTok, the overseas version of TikTok, which was actually based on the China-US trade war that started in 2018. Although the First Phase of the China-US Economic and Trade Agreement came to an end in January 2020, the relationship between China and the United States did not immediately see a significant improvement in the context of COVID-19. Instead, conflicts continued to spread to the finance,

technology, and other fields. The TikTok incident, in fact, is a manifestation of the conflict between China and the United States in cyberspace. This article intends to use the event of TikTok as an introduction to analyze the ways in which the game between China and the United States is carried out in cyberspace, and what the legal basis behind the game is.

My article is divided into four parts, the first part is the origin and development of the United States government's suppression of TikTok; the second part is the network double-edged sword effect demonstrated by the TikTok incident; the third part is the hegemony of online discourse and cybersecurity censorship in the United States; the fourth part is the public-private response to the cybersecurity paradox.

First, I will describe the theoretical framework of my paper, which is the network space game forms between different international subjects. If you look at this picture, I consider it's a game in cyberspace between different international players, and it has different forms of game because of different players. We can see the form of the game between countries, especially between the internet pioneer countries and the internet later-developed countries, which is mainly reflected in the strategic game of online discourse power. The game between state and non-state subjects, especially transnational corporations or private subjects, is mainly in the form of public-private contradictions. However, no matter between countries, or between countries and non-state subjects, the game is all around a core, which is the paradox of network security. What we think of as the paradox of network security is actually the double-edged sword effect of network. The so-called double-edged sword effect is that, while the network improves our production efficiency, reduces the cost of living and enriches people's lives, it will also give birth to a series of new international rules, and these uncertainties may bring some regulatory challenges. Therefore, the network's double-edged sword effect is actually the so-called network security paradox.

In the first part I provide an overview of the development of the United States government's crackdown on TikTok. This table gives a timeline of the United States government's crackdown on TikTok. Starting in July 2020, the United State House of Representatives passed a bill targeting TikTok that forbids federal employees from using it on government devices, the first time it was explicitly proposed. But as early as 2019, the Senate was ready to take up the idea. On August 5, 2020, Donald Trump issued two executive orders against TikTok and WeChat, citing the International Emergency Economic Rights Act. Ban for TikTok was not suspended until February 11, 2021, when the Biden administration took office. On June 9, 2021, President Biden signed another executive order rescinding the Trump administration's ban on downloading and using TikTok in the United States, putting the issue to rest. But I don't think I's over, because Congress passed and Biden signed the innovation and Competition Act of 2021 in June, not long after Biden signed the executive order. The bill released 209 reports on China's science and technology policies, including sanctions on Chinese high-tech companies, controls on cutting-edge technology and restrictions on the cultivation of scientific and

technological talents. From these restrictions, it can be seen that the United States has not shown a slowing trend in its crackdown on Chinese technology companies since Donald Trump became president and then Biden took office.

The second part is the double-edged sword effect of the network demonstrated by the TikTok incident, which is also the core content of the paradox of the network security. I introduce it from two aspects: The first is the technical advantage and influence brought by the network, and my article introduces TikTok in this part. Its biggest feature is intelligent push, which is a kind of personalized recommendation. TikTok is different from previous search engines such as Google and Baidu. TikTok can build a model for each individual user based on the user's historical record, website address and habits. It is more convenient to recommend personalized information intelligently through these models, compared with previous search engines that require customers to manually enter keywords to search for desired information. But it will subtly change the way users think, the way information is spread, the way of entertainment and social interaction, and even change the business logic of the country where users live. Since it will affect the business logic of the country, the United States, as a country that wants to maintain internet hegemony, does not allow such influence to happen. Therefore, this is a major reason why TikTok is suppressed by the United States.

The second aspect addresses the challenges and security risks posed by the network. I divide this analysis into two parts: the first part is about the public-private conflict that cyber empowerment has created in cyberspace. The first is that the internet is a hotbed of populist movements. The birth of the internet is one of the biggest media revolutions since the birth of the printing press, because the internet has an empowering function. The empowerment function is the ability to access and control information, and it goes from being a privilege of the few to a fundamental right that everyone can share online. Why is this a hotbed of populism? You can look at the GameStop versus Wall Street event in February 2021, which is actually the embodiment of populism in the financial field. But the fact that this happened in the stock discussion forum is that the internet has facilitated the emergence of populism, so we say that it may cause some hot issues to some extent. The second part is that transnational enterprises and private sectors often exert pressure on competitors of other countries under the cloak of state, and even influence the formulation of international rules. As we know, in the relationship between transnational corporations and host countries, transnational corporations follow a kind of profit rationality. The so-called profit rationality is the pursuit of profit, which is a primary principle. However, the state follows a strategic rationality, which means that a country needs to consider the overall and long-term interests, including national security, that are related to national security. Therefore, the interaction between multinational companies and countries based on different rationalities shows a relationship between them that is not only a kind of cooperation, but also may cause friction.

The second part is the expansion of the concept of national security in the network environment. The first point is that national security is no longer limited to traditional

military security and war threats. For example, in this cyberspace, the influence of many uncertain factors and security threats may be expanded through the spread of the internet, becoming such a security threat that is difficult to control and prevent, whether it involves a private subject or is through multinational corporations. Therefore, network security will gradually become an important aspect of national security. In recent years, the scope of national security has also expanded from this traditional security to a non-traditional security, so classifying this network security into non-traditional national security has resulted in a generalization of the concept of national security and the ambiguity that determines this factor. The second point is the self-judgment of national security. It is entirely up to a sovereign state to decide what constitutes a threat to national security. As what we call national security is actually a domestic law viewpoint, it is not a unified and recognized concept in international law, and what kind of event constitutes national security is actually determined by a country itself. There is no objective basis for what kind of incident can pose a threat to national security. It may be determined whether an incident endangers the national security of a country through comprehensive consideration of subjective and objective factors. However, if a country under any circumstances vetoes the investment of multinational companies or foreign investors on the grounds of national security, this will result in the destruction of the stability of the international rule system, and even lead to the collapse of the international investment system. Therefore, the expansion of the concept of national security will actually bring certain uncertainty.

Then we asked if the Biden administration would ease the crackdown on Chinese tech companies. I don't think so, based on what I have seen so far. It is because the United States has defined China as a strategic competitor, and this is the first time since Biden took office that he has promoted responsibility for Chinese tech policy in his administration from a Presidential adviser on science and technology to a Cabinet level position. All these measures substantiate that Biden will not change the fact of Sino-US strategic competition since taking office. Therefore, it cannot be ruled out that Biden will suppress or restrict such internet enterprises in China in the future on the basis of national security.

The third part is the network hegemony and network security review of the United States. I also divide it into two parts: The first part is about the internet hegemony and internet discourse strategy of the United States. First, the promotion of TikTok may pose a threat to the internet security hegemony of the United States, as mentioned in the previous part. Second, the national network security strategy system of the United States is supported by three pillars: technology, institution, and discourse. I quoted Professor Shen Yi's discussion on network security. Firstly, technology is the foundation and premise of the system, the United States government technology development in the network infrastructure and key technology. It is the origin of the internet and has provided certain first-mover advantage. It will certainly appear to other countries that the United States has absolute advantages, including Google, Facebook, and other internet giant

enterprises. Secondly, in terms of the system, it is actually the key to the national network security of the United States, because in the control of global information and intelligence, the United States government implements decentralized or covert effective control over key sectors, industries and fields. From the Snowden Incident, we can see to some extent the perfection of American system, or a very mature condition. Thirdly, it is the voice. In fact, the United States has the ability to set the agenda for the global public opinion space, and the ability to shape public opinion with strategic communication as its main feature. TikTok's development, to a certain extent, will have an impact on the American network security strategy system in terms of technical, system or voice.

The second part is the United States investment security review system underlying the background of network security. At present, more scholars are doing research and more papers are being published. I would like to emphasize two points. The first is that the Foreign Investment Risk Assessment Modernization Act of 2018 cites threats to critical American technology and cybersecurity as important national security review factors. In fact, it embodies the concept of technological security as the core, which is to protect American technological strength from other countries.

The last is a public-private response to the cyber security paradox. The so-called public-private response refers to two aspects, one is from the perspective of the government, and the other is from the perspective of enterprises. The government perspective is the construction and perfection of our country's legal system of dealing with foreign economic sanctions. The first point is to improve China's national security review mechanism and relevant legal system. We can see that in 2019, China issued the Foreign Investment Law, which was the first time to clearly establish the foreign investment safety work system. On December 19, 2020, China issued the Foreign Investment Safety Review Measures, which provides a very comprehensive and systematic regulation of the foreign investment security review system. This regulation improves the standards, precision, and transparency of the review process, but it also leaves room for improvement. For example, the Catalogue for The Guidance of Industries for Foreign Investment issued by the National Development and Reform Commission and the Ministry of Commerce has very clear provisions on the restrictions and prohibitions on some industries. Some industries may not fall within the scope of prohibitions and restrictions but may require preliminary safety reviews in accordance with the safety and review measures. How to alleviate the conflict between the two regulations actually needs to be improved in the future. The second point is to build a targeted China blocking approach. We can also see the release of the blocking measures on January 9, 2021. However, the blocking method is actually a more detailed departmental regulation. I think it is relatively low in terms of effectiveness, because it is a departmental regulation. In the absence of provisions of higher law, a departmental regulation shall not set norms that reduce the rights or increase other obligations of citizens, legal persons, and other organizations in Chinese Mainland. Therefore, in the absence of higher law, departmental regulations cannot be used as a direct legal basis but can only be used as a reasoning basis

for judgment, so its effectiveness level is somewhat low. We need to gradually improve China's blocking law system in future legislation.

The enterprise perspective focuses on TikTok's legal strategy for dealing with the cybersecurity paradox. I make two comments. The first is to strengthen internal review of enterprises to reduce security risks. TikTok has repeatedly been the subject of government investigations, judicial reviews, or detention and fines in other countries for matters related to minors' privacy and national security. From the perspective of TikTok's development, it can be improved from two aspects. One is to actively research the local policy and take relevant preventive measures. The other is that companies can consider implementing transparent data privacy and improving content censorship policies. The second is to explore diversified legal remedies. For TikTok, the ISDS mechanism can be used to choose a relief route in the future when a lawsuit is restarted. But as China and the United States have not signed a bilateral investment treaty, TikTok can bring relief measures of international arbitration through subsidiaries of a third country which has signed bilateral investment agreements with the United States. In addition, if TikTok has no choice but to sell its company to an American enterprise, from the perspective of corporate governance, I think it can achieve a kind of actual control through the arrangement of dual-class share structure. This is my analysis of the whole event, which is also the main content of the article. I hope to receive professors' and audience's criticism and correction. Thanks!

Moderator: Guo Jianping

Thank you, Jin Siyuan, and thanks to the two previous speakers for their excellent presentations as well. We are very honored to have four famous professors as reviewers for this panel. First is Professor Xu Chongli, who is also a Ph.D. supervisor from Xiamen University School of Law. He was visiting scholar at a number of well-known universities around the world. He is the Vice President of the Chinese Society of International Economic Law and the Vice President of the WTO Research Society of the Chinese Law Society. Professor Xu enjoys the State Council "Special Expert Benefit" and was selected by the Ministry of Education as one of the first "New Century Talents." Please welcome Professor Xu.

Commentator: Xu Chongli (Professor, Xiamen University School of Law)

I have read the papers of three Ph.D. candidates. and listened to their speeches just now. I think they all address questions that I am very interested in, and I am also deeply inspired. In other words, I should learn from you in the study of these issues. Because I have no specific research on these three issues, while I would like to put forward relevant opinions and suggestions on specific issues, I am not in a position to offer that analysis.

So, my comment today is rather to raise the possible problems of the papers at the macro level, and to raise the one that I think is the most important.

The first paper is Dr. Gu Tianjie's. The topic of his paper is the role of international investment as a weapon in international legal battles. I was interested in and inspired by this topic, because we generally discuss trade as a weapon in the fight against sanctions and counter-sanctions, and perhaps less so about investment as a weapon. In his paper, Dr. Gu Tianjie first showed us the preliminary research status domestically and internationally of economics, management and international investment law as an investment weapons. I estimate that the research on this aspect both domestically and internationally has just begun. This question has not received much attention previously. I would say that the valuable thing about this article is that it raises the issues involved in this aspect. I am particularly interested in the relevant issues of this, and of course the paper ultimately offers valuable countermeasures.

From my point of view, I am interested in two main lines. The first aspect is that if international investment is used as a weapon of struggle, it mainly involves the issue of divestment Dr. Gu mentioned. There are two sides to this divestment. On the one hand, if the host country wants to regulate the withdrawal of foreign investors, what kind of legal problems will be caused? For example, if a foreign investor wants to withdraw, and the withdrawal is an involuntary withdrawal, according to what Dr. Gu said, the host country does not allow withdrawal to regulate investors. This will cause problems in international investment law, such as levy and fair and equitable treatment in BIT, as mentioned in the paper. This prevents people from withdrawing capital, whether by constituting direct or indirect expropriation, and whether by violating the equal treatment of BIT. I would like to see more in-depth research on these legal issues. Of course, so far, there may be no or not many cases in this regard, but Dr. Gu can still do some more prospective studies in this regard based on similar or related past cases. If China is the importing country or host country of investment, research in this area may be meaningful in the future, for we may encounter involuntary withdrawal of investment by foreign investors due to sanctions, struggles, etc. How should we regulate them? If we want to restrict them, will it trigger international investment disputes? What will happen in the direct and indirect expropriation, fair and equitable treatment, etc. mentioned just now, and how should we deal with it? This is one aspect of our line.

Another aspect is the investor's side. What is the boundary of the investor's right to withdraw capital? It is the withdrawal of investors proposed in the paper that may trigger social responsibility clauses, human rights clauses, etc. in BIT. What are the legal consequences of investor withdrawals that trigger these existing BIT or IIA clauses? This is also worth studying. If we study this from the perspective of the country of the investor, how can we prevent a company from triggering the violation of social responsibility and human rights clauses in the BIT if we need to withdraw investment from overseas investments? I consider the paper should have a relatively clear main line anyway. Through the main line, these many related issues that we are going to talk about,

including economics and investment law, can be integrated into one. This is my comment on the paper by Dr. Gu.

The second speaker, Dr. Shao Hui, addressed the dilemma and way out of the discourse of international law in China. This paper belongs to the basic research of international law. I am very interested in this paper. In general, I think it is very theoretical, and Dr. Shao Hui's theoretical foundation in this area is quite generous and solid. It studies from four paths or four aspects of typology, describes the dilemma and relief of our discourse dissemination in international law research, and draws a very clear context for us. His research methods and perspectives have inspired me a lot in many ways.

However, I would like to mention a problem here, which is not the author's research problem, but a broader problem existing in our research on international law. Of course, this topic also influences the spread of the study of international law. But from the perspective of the larger and more fundamental vision, Dr. Shao Hui says it is only for international law to solve the spreading dilemma of China's international law research. Regarding the four ways out of the dilemma set forth in the paper, I don't think it's a realistic goal, at least for now or in the foreseeable future. Why does he say so? Because law is the same as international law, the author mentioned that it is a superstructure and a metaphysical thing. That is to say, if we want to get out of the predicament of China's international law research and dissemination, it is subject to the current state of China's international discourse power. It is what Dr. Shao Hui said, that is, it is subject to the soft power of the whole of China. China's ideology, culture, politics, economic system, and even language have not formed a strong international discourse power and have not formed a relatively strong soft power. He wants to break through the field of international law alone and completely solve the dilemma of dissemination of international law research. I don't think this can be done. Of course, we can make such suggestions, we can work on them, and they may be effective. But not at the level we thought we could achieve our goals.

Dr. Jin Siyuan's paper is the dualistic contradiction between security and public and private in the era of cyberspace game. What left a deep impression on me in his paper was that he made a relatively comprehensive study on the dominant enterprises in network technology and national security culture issues around a TikTok event. If I want to pursue this further, his paper provides a very enlightening observation and perspective. I also posed a question.

First of all, what does the public-private binary contradiction in the title mean? This is very important and is the main thread of the paper. If the main line is not clearly defined, it is impossible for readers to sort out the internal logic behind the content. In the absence of a clear definition, according to the diagram provided to us on page 3 of the paper, it is a form of cyberspace game between different international actors. The public-private game being played here is just the two intersecting parts of the left and the right, and if you look at the whole of the article, it's not really a public-private game,

because you are not just playing public-private games, you are playing public-state games. Whether it is the strategy between countries such as China and the United States, or the game between other aspects, is to determine the overall width of the downward development of this topic in the future. The public and private countermeasures mentioned at the end of the paper are limited improvements to the trend or a technical response, and it is difficult to change the overall situation. But the question in Dr. Jin Siyuan's paper is whether the public-to-public, or state-to-state, game can be brought entirely under the rubric of public-private duality, and if so how. Rounding up to the main line involved on public-private dualism defined among countries engaged in the game or brought to the game of calibration is to start network and network backward countries. But in this area and being brought to the game is not only technical starter or backwardness, but it also more involves national ideology between game and so on. The game among countries that Professor Shan Wenhua talked about involves the game of China becoming more and more ideological and the West becoming more and more sinicized. This is a problem of international politics, not just the problem of network technology being developed early and late.

In general, I wonder if this paper could have been clearer in defining the dual mainline of public and private. Once it is clearly defined, a discussion of how to distinguish the game between public and public or among countries, rather than just technological first-movers and second-movers, would more logically follow. You have to think about how to bring ideological, international political issues under the main line, which is the problem that needs to be solved under the existing framework.

This is a simple comment I have made on the three papers. There may be some inadequacy or even fundamental misunderstanding in what I have said. The three candidates should not pay attention to it that if you think my comment does not make much sense, you can ignore it.

The forum does not get the permission from Professor Zhang Sheng to publish his comments.

Moderator: Guo Jianping

Our next reviewer is Associate Professor Wang Yue from Xi'an Jiaotong University School of Law. Professor Wang received her Ph.D. from the University of Glasgow. Her research interest lies in cyber security law. She is also the deputy secretary-general of the Professional Committee on Cybers Security Law and Policy, as well as a director of the China Association for the Study of Network and Information Law. She serves as an expert at the Central Internet Information Office. Professor Wang has also served as consultant for Alibaba, Youku, and others. Please welcome Professor Wang.

Commentator: Wang Yue (Associate Professor, Xi'an Jiaotong University School of Law)

Thanks very much for Jianping's introduction. I am very glad to have the opportunity to attend this seminar on international investment law for young scholars hosted by Professor Wang and Professor Gu. It is interesting to have the opportunity to hear the research of Chinese new talents in international law.

I benefited a lot from Professor Xu's comments. I mainly study the laws and policies related to cybersecurity and information security. Today, I come here to make comment mainly for two reasons, the first is courage, and the other is the friendship with Professor Wang and Professor Gu. I will focus on the article of Dr. Jin from Shanghai Jiao Tong University to set forth some of my own opinions. If there is any improper point, please forgive me.

Dr. Jin has the spirit of an intellectual. He pays attention to the difficulties of enterprises from the perspective of national interests and proposes countermeasures for the interests of China in the game of great powers with his own expertise, which deserves admiration. This paper by Dr. Jin involves great efforts, sorting out the facts comprehensively and clearly.

Dr. Jin is also very perceptive and has found many legal issues worth studying through the TikTok case. If Dr. Jin wants to make further revisions, I would like to offer some specific suggestions to his article. Firstly, focus more on the main problems of the study. There are many issues discussed in the article, including the issue of the game between powers, appearance of new subject like transnational corporations in international law, cybersecurity, network discourse power, national security exception, national security review, and corporate compliance and countermeasures. Many issues are mentioned, so most of them cannot be discussed in depth. I suggest Dr. Jin choose one or two issues to focus on. This is the first suggestion.

Second, as for the theme of the article, Professor Xu mentioned the public-private dualistic contradiction. The introduction of the theme does not fit with Dr. Jin . It is not TikTok case that wants to horizontally collide over public power, but it has become a point in the game between powers. TikTok has always wanted to be a quiet, short video platform, nothing more.

If we are talking about a real public-private dichotomy, in my opinion the Facebook case in Australia is more appropriate to prove this point. Last year, Australia issued a guideline of mandatory bargaining between news media and digital platforms, resulting in multinational tech giants like Facebook having to pay traditional news media for contents. Facebook removed all Australian news, including weather forecasts, from the platform on the day the new guideline took effect, leaving Australian internet users with no way to browse the relevant pages. The essence behind this case may be a dichotomy between sovereign states and multinational corporations, both of which are competing for some rights behind the regulation of digital platforms. Facebook is defending its economic interests on behalf of large multinational companies, at the cost of blocking a country's

news. This is the manifestation of the influence of the influential platform in the digital age.

The sovereign state has the political power to regulate its own digital platforms, and it feels that this power is unchallengeable. So, in such a situation, platform governance may be a game of public-private dichotomy. In the foreseeable future, the interaction between sovereign governments and multinational technology companies and some of the contradictions between them are more worthy of observation in the issue of digital governance and platform governance.

Thirdly, in terms of the rigorism of argumentation and presentation, there is still room for improvement for the argumentation and presentation of issues related to cybersecurity. For example, privacy and data protection are not distinguished, some detailed distinctions can be made between the two points. In addition, the title is the cybersecurity review system, but what follows demonstrates the foreign investment security review. Foreign investment security review is not cybersecurity review, because China has a special cybersecurity review system, which forms two sets of independent systems with the foreign investment security review system. Most cyber law scholars hold the view that both systems are national security review systems under the National Security Law of the People's Republic of China, which are independent of each other. There is also a data security review system in the Data Security Law of the People's Republic of Chin which was passed last year, a biosecurity review system in the Biosecurity Law of the People's Republic of Chin which was also passed last year, and there will be a security review system in the Secrecy Law of the People's Republic of China that is being revised now. The future of China's security review system may show a state of expansion, and this security review definitely refers not only to the national security review of foreign investment. Dr. Jin may need to make some more in-depth distinctions on this core concept.

Fourth, when stating relevant points, Dr. Jin's grounds of arguments are mainly based on the American policies, laws, and Executive Orders. In fact, some of Chinese national legislation, policies and positions can also be good supporting evidence. For example, the expansion of the concept of national security in the cyber environment, the article uses the evolution of the United States national security concept to make an argument, but in fact, the formation of Chinese overall national security concept can also be a good argument for the expansion of national security. Therefore, it is recommended that Dr. Jin also pay more attention to and understand Chinese national policies and regulations and related positions on cybersecurity, which may be helpful for a comprehensive discussion and support of this issue.

Above are some of my suggestions for Dr. Jin's thesis. Now, I will share some of my immature views on this issue from my own perspective of researching cybersecurity for criticism.

First of all, the trend of nationalization of cybersecurity issues is very obvious. From 2012, Huawei was subjected to a series of supply chain security reviews in the United

States and the United Kingdom, to a series of situations in the United States of TikTok, to the list of Didi in the United States last July, which led to 13 ministries in Chinese Mainland jointly entering Didi to initiate a cybersecurity review. Both the actions of the United Kingdom and the United States against China and some of Chinese own law enforcement actions reveal such a trend.

The review process of some systems at the core of national security face great uncertainty and unpredictability. The cybersecurity review itself is an act of the state, which is not subject to judicial review, and the conclusion of the review is not actionable, only the procedures are justiciable, but not the substantive acts, which determines that cybersecurity review has a stronger implication of sovereignty than administrative superiority.

These defensive rights of companies, whether the lawsuit TikTok filed in the United States or the struggles of some other companies, are greatly limited. There is little room for compromise on the issue of national security. When we talk about cybersecurity now, we need to see that this issue is constantly being nationalized. And once it is nationalized, the space for compromise given to enterprises is actually very limited. This is the first trend.

Second, I address the problem of the compliance of multinational corporations in terms of the cybersecurity review system from the perspective of corporate compliance. One of the views of our research team is that although it is a corporate compliance issue superficially, in the cybersecurity field, its core actually lies in validating the trustworthiness of multinational companies. Security and compliance do not mean that it can be trusted. Just like Huawei before, security is not a problem. A cell phone integrated with some parts of more than 3,000 companies, making the final assembling terminal manufacturer responsible for all the security certification is not fair, and it is also an international product, so why declare its insecurity according to regional reasons? Its compliance is no longer simply a matter of compliance, but a matter of trustworthiness. The focus of compliance for companies is to prove that they are trustworthy, similar to the compliance of national security systems. From the perspective of cybersecurity, there are several aspects of trustworthiness work that can be done. First, it is not only from the perspective of products, but also from the perspective of enterprise internal control. After the 2002 Sarbanes-Oxley Act, the state has raised the requirements for enterprise internal control, requiring enterprises to maintain a clear corporate management structure and equity structure for background checks, ensure that they are not involved in any cyber espionage-related business activities, and ensure that they have not experienced any major security events such as large-scale data breaches in a relatively long period of time. This trend can be seen both in the newly enacted Personal Information Protection Law and in the European Union's GDPR, by first passing background checks on the subject and then maintaining ongoing security audits. Ensuring that one's business complies with the cybersecurity standards of the business destination country is of great importance to enhance trustworthiness. Next, strengthen the supply chain management and self-review,

like conduct security review to my own supply chain, and ensure that all business-related suppliers have the same level of security and trustworthiness as themselves, to make sure that there are no malicious or untrustworthy people or organizations in the whole life cycle of business supply. Finally, actively obtain cybersecurity certifications from business destination countries to help review agencies and countries concerned to dispel security concerns. These are some of the things that companies can do.

Third, looking to the future, the trustworthiness of companies will be equally influenced by external policies. For example, there is a general obligation in the legislation of China to assist in law enforcement. For example, Article 7 of the National Intelligence Law of the People's Republic of China defines the enterprise's obligation to assist law enforcement. Companies have received inquiries from other business destination countries, asking whether they would know about the privacy of its citizens or transfer other data to law enforcement agencies. This is not something that companies themselves can decide through their compliance efforts. There may be prominent conflicts in the future in two aspects.

The first aspect is the platform. If there is any global consensus that can be reached on cybersecurity, I think it is on platform governance. The United States antitrust action is raging. Antitrust investigations have been filed against Facebook in 49 states, and the European Union has recently intensively introduced the Digital Markets Act (DMA), the Digital Services Act (DSA) and the Digital Governance Act (DGA). The cores of this troika point directly to the gatekeeper responsibility of the super internet platform and the intelligence of the super internet platform. And China is also very clearly entering the era of strong regulation. You will see the $18.2 billion fine for Ali and the $3.9 billion fine for Meituan. These internet platforms are actually facing a particularly large dilemma, as written in the article that prevailed in friends circle last year, if the internet is a detour in human history.

It said that democratic countries feel that the internet infringes on their democracy, while authoritarian countries feel that the internet infringes on their authority, and all internet users feel that the internet infringes on their freedom and privacy, while internet platforms feel that they try their best to meet the needs of users with technology, so what is wrong? In the future, some conflicts between the platform and public power, between the platform and the user, and of the platform between the states and the big game between the states will continue to be very sharp.

The second area where the conflict will be very acute is definitely data. In the last decade, data-driven has become a way to support core technology of social operation and development. New relations of production have been formed to transform the established production methods based on the use of data.

The impact of the digital revolution is very comprehensive. After digital itself becomes an irreplaceable source of power for survival and development, the interests it carries make the rational structure of the normative system of data security governance

increasingly complex. Especially after the integration of security values into development, this contradiction will become more prominent.

As an example, a recent legal issue in Chinese Mainland related to important data protection is the conflict between the use of data and the need for data flow, which will certainly be a very burning issue between the public power of the state and the interests of enterprises in the future.

Earlier, the Ministry of Industry and Information Technology issued a consultation draft on data security management measures in the field of industry and information technology, and guidelines for identifying important data in the field of telecommunications. One of the identification guidelines is to include the data related to business development strategies and major decisions of telecom business operators with market value valued at more than 100 billion or subscriber size reaching more than 50 million at the end of the previous year, such as major business development planning, strategic risk assessment, major matters of decision-making, and major project investment decisions, into the scope of important data.

If companies operate international development like TikTok, major investment decisions will need to be made through cross-border data flows, given the difficulty of moving people around in an epidemic. Once these data are classified as important data, the security assessment of data cross-border transfer will be a major obstacle to the normal operation of these enterprises. Therefore, in the past, enterprises would be passive to national security claims, but in the future, facing some claims between platform governance and data security protection and data utilization, enterprises should not and cannot adopt a negative attitude.

As scholars, we also need to do more academic and theoretical research from different perspectives to provide more solutions to these games and conflicts. I hope that these immature views and suggestions can provide some useful references for Dr. Jin today. Well, that's all I want to share. Thank you.

Moderator: Guo Jianping

Our fourth reviewer is Associate Professor Chen Hongrui at Xi'an Jiaotong University School of Law. She was a visiting scholar at the National University of Singapore and the University of Washington. She is also a member of the Chinese Society of International Law. She has been invited to advise government agencies, enterprises and institutions on legal matters. Please welcome Professor Chen.

Commentator: Chen Hongrui (Associate Professor, Xi'an Jiaotong University School of Law)

Thank you, Ms. Guo, for your introduction. After listening to several professors' comments, I actually have more of my own concerns about this issue, and these concerns

may be the sparkling collision of my thoughts that came out while I was reading the paper.

First of all, I think the perspectives of the three articles are relatively new, and these issues are of great theoretical and practical significance. Perhaps the research on these issues is not deep enough now, but if we raise the issues and continue to improve them, we may have better results for both theoretical and practical purposes.

The first article is about international investment serving as a weapon and the related response to it. Divestment is indeed now a more problematic issue, so how to respond to it? Many scholars are now discussing economic sanctions, but I actually consider that divestment and prohibition of divestment is a more advanced form of economic sanctions and counter-sanctions. It may still be at a relatively early stage in the existing research; therefore, the solution is a more complex issue of international law.

Overall, I think that the analysis and the research question of this article are not completely compatible. Probably because it does not classify the disinvestment in the earlier part about the economics of trade, which leads to a solution that is not targeted later. For example, you divide disinvestment into autonomous disinvestment and non-autonomous (passive) disinvestment. For non-autonomous divestment, there is a huge jurisdictional conflict between the country of origin of the capital and the country of import of the capital on this issue. So how is this conflict of jurisdiction resolved? Which jurisdiction takes precedence? Probably this is the main question that we will explore when we discuss the long-arm jurisdiction and the extraterritoriality of the law.

The second one is non-autonomous divestment in the perspective of international investment treaties, whose first contradiction is reflected between the property autonomy of the enterprise and the regulatory power of the state. The transfer clause is involved in the specific provisions. Is there a contradiction between the transfer clause of Chinese international investment treaties, which allow free transfer, and the rule of state imposition of prohibition of disinvestment and the transfer clause? If there is a contradiction, is it possible for a sovereign state to adopt the rule of national security? When there was a huge financial crisis in Latin America, sovereign states also used the prohibition of capital outflow, but in the end, a series of international arbitration results were not very satisfactory to sovereign states. Therefore, some rules or cases should be sorted out in the international investment treaties.

The third is the domestic legal part, which involves relevant countermeasures and the adequacy of legal tools in China’s existing rules. In this case, the setting of non-autonomous measures involves whether the enforcement of foreign autonomous decrees is permissible. This involves the question of comity in national policing, which ultimately comes down to the resolution of conflicts of jurisdiction.

The issue may be a little more complicated when it comes to the discussion of autonomous divestment. Because first of all, it is ultimately a fundamental issue of international law, that is, the subject of international law. We have been discussing the subject matter of international law, and traditional Chinese international law holds that

the subject matter does not include non-state participants, for example, multinational corporations are definitely not the subject matter of international law. But nowadays, some western international law articles or textbooks don't use this concept of subject anymore, they use non-state actors.

In this perspective the company is certainly a non-state participant. Then the issue of the rights and responsibilities of non-state participants in international economic transactions can be discussed in more depth in the relevant articles.

There has been a very important change in international law which is reflected in the evolution of corporate social responsibility by non-state participants in autonomous divestment. In the 1960s, corporate social responsibility for multinational companies was that they should not interfere with the interests of the host country. But today, corporate social responsibility has evolved from non-interference in the internal affairs of the host country to positive action to safeguard international public values.

So, in these cases of non-autonomous divestment, there are some more complex responses to be made, taking into account the preservation of international values by governments and businesses. Because it is not only a question of rules alone, but more of the participation of non-state actors in contemporary international law and the realization of values sought by non-traditional international law.

The last issue needs to be addressed here is about non-autonomous divestment and whether it has an adequate toolbox for China. There was an important bill in the United State in 2018, the Foreign Investment Risk Review Modernization Act. It has an annex a that talks about a confrontation program for joint acts. Of course, it does not refer to the divestment of one company or two companies. This behavior is not a scale divestment that would have an impact on the host country. The United Sates already has a joint boycott in its toolbox, or a joint envelope, mainly for large-scale trade. That bill is very flexible and can be applied to the investment sector.

There is still a lack of a legislative response to this kind of enclosing frame in China. In the United States, this bill only provides for a non-autonomous envelope. That policy was mainly in response to the Arab boycott campaign against Israel, which prohibited foreign investors in the United States, many of whom were listed in the United States had investments in the United States, from implementing the Arab policy against Israel.

In general, I think that by now, when non-state actors are involved in international law, their shaping power is not negligible, that is, their soft power has been weaponized, whether we use this weaponization in quotation marks or not. In fact, the corresponding comparative measures of our international law are not quite adequate, especially since China has not recognized the international law status of these subjects. So, we may have to consider, even if it cannot become a subject of international law, in becoming an actor of international law, should China's governance measures also have a new change?

Dr. Shao Hui's article on the dissemination of the discourse of international law and the way out of the dilemma is a very theoretical article, which is probably beyond my research capacity. Dr. Shao also mentioned Joseph Nye, who was talking about the issue

of coincidental power in the middle of international struggles. Now we are unilaterally emphasizing that China has to keep strengthening its discourse, but are some of the paths that we propose really strengthening our discourse?

I feel that some paths may be missing the point. First of all, strengthening the discourse is a traditional issue in international law. International law is international, and it is an undeniable fact that international law now is a foundation of international law constructed from a western perspective. If we create a completely new set of international law, or our own so-called international law discourse, we are actually breaking one fact, that is, law is scientific and international law is scientific. We may not be able to solve this problem if we simply stand on the perspective that international law is law. Let's look at natural science. let's look at the three laws of Newton. Newton's three laws developed into Einstein's theory of relativity, which seems to overturn Newton's three laws, but in fact this is not the case. It is just that Newton's three laws are applicable in the middle of an environment where the mass is not excessively small for a low-speed movement. In fact, the development of law is also a kind of science, which evolves based on its further refinement on its preconditions and leads to a more advanced set of rules that could take into account the rights and interests of all parties.

The reason why the previous international law was not suitable for us is that it did not take into account the objective facts of non-western countries. This is very important in international law. Because international law inherently lacks a kind of coercive force, a so-called violent organ to guarantee its implementation. What makes it binding is more from the international community's agreement. If such a basis is completely lacking, probably international law will not move forward.

Secondly, I consider China's voice is not heard, and no one believes it even after it is heard. There might be three levels to this problem. The first shallow level is whether we are talking about international law. On some occasions, although we mention international law, are we talking about the law? Secondly, are we talking about international law in a sufficient way? The last level is whether international law can safeguard our national interests and whether we want to build new rules of international governance. Perhaps our fundamental problem now is that in many cases others are talking about law, we are talking about policy; others are talking about policy, we are talking about law. Perhaps we are in a situation of misalignment of discourse.

In the legal application of international law, many premises are required. A rule is a process of inference. Maybe the material of our facts is not sufficient. When arguing a case, our factual material may still be very different from the rules of law, which leads to not speaking sufficiently in the end. For example, in many cases regarding some maritime issues, is finding Chinese porcelain at the location in question necessarily a very good evidence material for the claim of sovereignty? This leads to a primary question for us to think about whether we are talking about international law. Then it comes to the second question that is whether we speak the rules of international law sufficiently.

Regarding the conclusion, I personally think that the focus is how to reflect internationalism in the research. You talked about achieving the transfer from the West to the East again. During the transfer, it is definitely necessary to strengthen the discourse, but it is also necessary to consider international and universal binding effect.

The third issue is the transformation from scholarship to discourse. Discourse is a power, and how does power produce this right to international law? Its coercive power is generated through consensus. Consensus is the rule that underlies the creation of rights. As many scholars of international law addressed, it is binding based on belief.

The last point you talked about is from criticism to construction, and it is true. China, as a big country, may not be quite the same as the traditional third world countries in the study of international law and the construction of international law discourse. China will not necessarily replace the United States as the only hegemon in the future, but at least a permanent member of the United Nations General Assembly, so we will definitely be highly involved in the construction of the international community. So, we can't always be critical, but probably more involved. But participation should still be accompanied by skepticism about the international legal system and the hope that international law will establish a new rule of international governance in the future. The rationality of this rule of governance may be more about the global consensus rather than emphasizing the Chinese characteristics alone.

Of course, international law scholars have made a lot of efforts in this regard. Professor Yi Xianhe has talked about co-progressive international law and proposes to reconstruct an international law with the Chinese concept of individuality and benevolence.

The last paper is from Dr. Jin Siyuan. Professor Wang Yue is a very authoritative expert in this area, and her comment is already very comprehensive, so I will make a brief comment. First of all, I appreciate the way that Dr. Jin concludes a series of events about TikTok and the United States government in the writing, which is a very good method, but this method can be improved further. Everyone is talking about American ban on TikTok based on national security, and the United States itself has reported this. But is this in fact the case? Let's start with a discussion of security. Security is generalized. Everyone thinks that security is a useful tool. Whether it's the international WTO rules or our investment rules, security is non-actionable. Therefore, it seems like if taking out the rule of security, one can do whatever they wish. But when we critically analyze such behavior, we have to distinguish security.

In the case of TikTok, the United States may actually be adopting from three perspectives. The first is national security. This concept of national security may be more in line with the WTO's concept of security exception. The second is a series of blocking measures against TikTok based on public morality. In this perspective, it may be more like a public-private conflict, because the public-private conflict is not only for the United States. In the case of TikTok, the United States parents' committee provided their views on TikTok to the government authorities, arguing that TikTok's mechanism of targeted

delivery is damaging the physical and mental health of American children. In fact, this public-private conflict is happening not only in the United States, but also in China during. In Beijing, a lawsuit was filed against TikTok in which some parents argued that TikTok's indiscriminate delivery mechanism was inducing certain behaviors that affected their children's health.

The third is technology leadership. Another reason for the United States to impose control over TikTok is technology leadership. Its logic is that technology leadership can maintain national security. In another word, it equates technology leadership with national security. But I think there is still a distance between the two and a distinction needs to be made. From a legal perspective, a distinction should be made between the reasons for the blockade of the United States. in the TikTok case. Then we can think more deeply about this issue. Only then can concrete measures against national security generalization be proposed.

The second issue is that in the TikTok case, you talked about network security and so on. When it comes to network security, there are some latest international rules. Maybe this case does not involve the latest international rules because there is no relevant legislation between China and the United States. But suppose this case can be applied to a certain latest rule, how do we judge this case, including the CPTPP, the U.S.-Mexico-Canada Agreement, and other relevant agreements on network data security?

The third issue is that the article is titled Public-Private Dichotomy, but I feel it is more about how companies respond to it. Speaking of response, the public-private conflict in the TikTok case is also very prominent, like this conflict between the state and the company that we talked about.

I also have a question about some of the measures your proposed, that is the multiple equity structure, by way of air cast companies or re-investment. In fact, non-benefit clause responds to this multiple shareholding structure of the company, and that this kind of investment protection through multiple shareholding structures is not feasible in reality. As a matter of domestic law, it is also not very feasible. Both China's Foreign Investment Law and the United States National Security Foreign Investment Review-related Security Act talk about control, not just equity structure. In terms of the visible shareholding structure, the real question is who the shareholders are. Control is actually a kind of penetrating regulation, no matter how many layers of sovereign structure there are, as long as in the end we can find the real control of the rights holder. The United States security clearance is under control from this perspective; so, there is no way to deal with it through multiple shareholding structures. Also, states are constantly improving the regulations. Whether in terms of international investment treaties under international law or domestic law, circumventing domestic security reviews through multiple shareholding structures is not a very feasible measure.

These are some of my comments on the three articles, and some of my personal concerns. Overall, I feel all three articles present very good research perspectives and

have strong potentials in the future writing and academic research process. But there is still a need to further refine the issues and make them valid and relevant to international law.

Okay, that's my commentary. Thank you.

Damages for Breach of Choice of Court Agreements: Foreign Experience and Domestic Approach

Hu Hailong[1]

Abstract: Application of damages remedy for breach of choice of court agreements safeguards the legitimate rights and interests of the parties as well as enhances the effectiveness of choice of court agreements, and thus makes up for the inadequacy of traditional remedies. The increase and evolution of judicial practice and trans-systemic expansion have demonstrated the practical value and universalization of this measure. Observations on foreign judicial practice indicate that parties' obligation not to sue before any non-chosen court is the legal basis for the application of damages remedy for breach of choice of court agreements. Choice of court agreements can thus be categorized as contracts of civil litigation rights. Domestic judicial practice on damages remedy for party's losses suffered from the other party's breach of contracts of civil litigation rights or tortious infringement on party's civil litigation rights shows that application of damages remedy regarding choice of court agreements is feasible under Chinese law. Based upon a judicial policy advocating strong support towards party autonomy and full protection of parties' legitimate rights and interests in international commercial scenario, China may consider adopting a carefully tailored damages remedy as a supplementary measure for the enforcement of choice of court agreements.

Keywords: Choice of Court Agreements; Obligation not to Sue; Damages; International Comity

1. Introduction

Due to the diversity of jurisdictions, choice of forum may have a greater impact on the outcome of dispute resolution in an international commercial setting than in a domestic one. In this regard, the existence of choice of court agreements,[2] based on and characterized by party autonomy, enhances legal certainty and predictability in international commercial activities,[3] and increases parties' willingness to conclude transactions. As a result, there appears an unmistakable trend in the international community to affirm and strengthen the effectiveness of choice of court agreements.[4] To achieve this goal, an effective enforcement or remedial mechanism is indispensable,[5] as

---

[1] Hu Hailong, Ph. D. Candidate in International Law at East China University of Political Science and Law. He is also a judge of Shanghai High People's Court.

[2] Choice of court agreements referred to here are all deemed as being exclusive.

[3] See Tanya J. Monestier, *When Forum Selection Clauses Meet Choice of Law Clauses*, 69(2) American University Law Review 325, 329-330 (2019).

[4] See Alex Mills, *Party Autonomy in Private International Law*, Cambridge University Press, p.92 (2018).

[5] See Daniel S. Tan, *Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation*, 40(3) Texas International Law Journal 623, 624 (2005).

parties are not always willing to comply with their commitments when disputes actually arise, due to a variety of legal or commercial considerations.[6] When one party breaches choice of court agreements by suing in a court other than the one agreed upon by the parties, the aggrieved party traditionally may resort to the non-chosen court applying for a dismissal of the action or stay of proceedings, or to a competent court applying for pre-emptive measures, such as an anti-suit injunction where available. But recently, with increasing emphasis on the principle of party autonomy and the practical need to compensate the aggrieved party for its economic losses incurred in enforcing choice of court agreements, damages as a remedy for breach of choice of court agreements has been gradually gaining attention in both judicial practice and academic circle.

An historical observation of judicial practice shows that awarding of damages for breach of arbitration agreements was not a particularly new phenomenon.[7] But the availability of this remedy to breach of choice of court agreements was more recently. In the United Kingdom, for example, in Union Discount Company Ltd. v. Robert Zoller & Others,[8] the seminal and leading case in this filed, the Court of Appeal upheld Union Discount Company Ltd.'s claim for the recovery of legal costs, mainly attorney's fees, incurred in New York striking out proceedings against an action instituted by Robert Zoller & Others notwithstanding choice of court agreements between them. The court held that choice of court agreements should be regarded just as any other commercial contracts and that the non-breaching party was therefore entitled to damages relief when choice of court agreements was breached. Subsequently, in Donohue v. Armco Inc. and Others,[9] the House of Lords further confirmed the applicability of this remedy at the highest judicial level in a broader context, that is to say, legal liabilities, beyond legal costs, awarded by a non-chosen court are also recoverable in damages. In the United States, the Seventh Circuit Court of Appeals, in Omron Healthcare Inc. v. MacLaren Exports Ltd.,[10] when affirming the decision of the district court declining its own jurisdiction, suggested the possibility of applying damages relief for breach of choice of court agreements. In Laboratory Corp. of America Inc. v. Upstate Testing Laboratory Inc.[11] and Allendale Mutual Insurance Co. v. Excess Insurance Co. Ltd.,[12] the courts held that the non-breaching party was entitled to recover damages for the other party's breach of choice of court agreements. In Commonwealth Bank of Australia v. White,[13] the Supreme Court of Victoria, Australia, also upheld the right of a non-breaching party to

---

[6] See Tanya J. Monestier, *Damages for Breach of a Forum Selection Clause*, 58(2) American Business Law Journal 271, 280-283 (2021).

[7] Damages for breach of an arbitration agreement was awarded in Ellerman Lines Ltd v. Read, [1928] 2 KB 144.

[8] See Union Discount Company Ltd. v. Robert Zoller & Others, [2001] EWCA Civ 1755.

[9] See Donohue v. Armco Inc and Others, [2001] UKHL 64.

[10] See Omron Healthcare Inc. v. MacLaren Exports Ltd., 28 F.3d 600, 604 (7th Cir. 1994).

[11] See Laboratory Corp. of America Inc. v. Upstate Testing Laboratory Inc., 967 F. Supp. 295 (N.D. III. 1997).

[12] See Allendale Mutual Insurance Co. v. Excess Insurance Co. Ltd., 992 F. Supp. 278 (S.D.N.Y. 1998).

[13] See Commonwealth Bank of Australia v. White (No. 2 of 2004), [2004] VSC 268.

bring a claim for damages based on choice of court agreements; in Pipeline Services WA Pty Ltd. v. Atco Gas Australia Pty Ltd.,[14] the court held that a breach of either arbitration agreements or choice of court agreements could entitle the non-breaching party to claim recovery for legal costs incurred in jurisdictional defenses while upholding a party's claim for damages based on an arbitration agreement.

Nevertheless, awards granting damages for breach of choice of court agreements had not been common occurrences.[15] For a long time in most jurisdictions, where a party sues in defiance of choice of court agreements, the only possible option for the other party seems to be to raise jurisdictional defenses in the non-chosen court expecting that the court will dismiss the other party's action or stay the proceedings after confirming the validity and effectiveness of choice of court agreements. Even for courts in common law jurisdictions, damages are generally viewed as an ineffective and useless remedy, and that an injunction is "the only effective remedy" for the defendant's breach of contract.[16]

However, since the decision of Court of Justice of the European Union (hereinafter referred to as CJEU) in Turner v. Grovit,[17] and especially CJEU's decision in the case of West Tankers Inc. v. Allianz SpA,[18] prohibiting the granting of anti-suit injunctions, even those with contractual basis,[19] involving courts of other Member States for the reason that they violated the European Union fundamental principle of mutual trust and the principle of effectiveness of European Union law,[20] the long being neglected remedy, damages for breach of choice of court agreements, has been given a chance to develop. Not only has the Common Law system begun to systematically grant this remedy to the non-breaching party of arbitration agreements or choice of court agreements,[21] even to affirm the availability of this remedy on a tort basis in a case where a German lawyer, as a third party, induced the breach of choice of court agreements,[22] but traditional civil law countries such as Spain and Germany have also applied this remedy at the highest judicial level respectively. In 2009, in Sogo USA Inc. v. Angel Jesus,[23] overturning the decisions

---

[14] See Pipeline Services WA Pty Ltd. v. Atco Gas Australia Pty Ltd., [2014] WASC 10.

[15] See Louise Merrett, *The Enforcement of Jurisdiction Agreements within the Brussels Regime*, 55(2) International and Comparative Law Quarterly 315, 315 (2006).

[16] See Continental bank NA v. Aeakos Compania Naviera S.A. and Others, [1994] 1 WLR 588, 598.

[17] See Turner v. Grovit (Case C-159/02), [2004] E.C.R. I-3565.

[18] See West Tankers Inc. v. Allianz SpA (Case C-185/07), [2009] E.C.R. I-00663.

[19] Those Anti-suit injunctions are often called contractual anti-suit injunctions and are generally granted to enforce arbitration agreements or choice of court agreements.

[20] Some scholars view it as "an extensive *effet utile* approach," thus unconvincing, see Geert van Calster, *European Private International Law (second edition)*, Hart Publishing, p.54 (2016).

[21] See e.g., A/S D/S Svendborg v. Akar, [2003] EWHC 797 (Comm); National Westminster Bank Plc v. Rabobank Nederland, [2007] EWHC 3163 (Comm); Starlight Shipping Co. v. Allianz Marine & Aviation Versicherungs AG, [2014] EWCA Civ 1010; Barclays Bank v. ENPAM, [2016] EWCA Civ 1261.

[22] See AMT Futures Ltd v. Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft Mbh, [2017] UKSC 13.

[23] See STS (Sala de lo Civil, Sección 1a), January 12, 2009, Repertorio de Jurisprudencia 2009/544; STS (Civil) 23 febrero 2007, Repertorio de Jurisprudencia 2007/2118, a case summary and analysis in English can be found in Sara SÁNCHEZ FERNÁNDEZ, *Choice-of-Court Agreements: Breach and Damages Within the Brussels Regime*, Yearbook of Private International Law, Vol. 12, 377, 383-385 (2010).

of lower courts, the Spanish Supreme Court stated that choice of court agreements is of not only procedural but also substantive nature, and that breach of choice of court clause, like the breach of any other contractual terms, entitles the non-breaching party to claim for damages, and that its procedural nature does not relieve the parties to comply completely with the agreement. The court also noted in particular that choice of court clause was one of the decisive factors for the conclusion of the main contract by the parties and that breach of choice of court clause by one party would therefore hinder the realization of the purpose of the main contract. In 2019, the Federal Court of Justice (BGH), citing the importance of choice of court agreements for the parties to achieve legal predictability and maintain legal risk calculability, overturned the decision of the second instance and confirmed the substantive effects of choice of court agreements that the non-breaching party has the right to claim damages for attorney's fees incurred in jurisdictional defenses in the courts of the United States.[24]

The increase and trans-systemic expansion of judicial practice on damages actions arising out of choice of court agreements proves parties' practical need and the universalization of this remedy. Building a new "Domestic-International Dual Circulation" development pattern and implementing a higher level of openness to the outside world require courts in Chinese Mainland to pursuit multilateralism and protect the legitimate rights and interests of international market players. So, it is indispensable to improve and perfect the foreign-related commercial dispute resolution mechanism, including those measures enhancing the effectiveness of choice of court agreements both procedurally and substantially. Damages for breach of choice of court agreements, with its distinct value and potential, compared with more controversial anti-suit injunctions, is worthy of special consideration. To this end, Chapter 2 will endeavor to clarify the legal basis of the remedy, explore its reasonable limits, and discuss some important practical issues concerning its application, based on foreign judicial practice and theoretical research up to date. Thereafter, Chapter 3 will conduct a preliminary discussion on the applicability of this remedy in Chinese Mainland, followed by a suggestion of China's possible approach in Chapter 4.

2. Theoretical Analyses Based upon Foreign Judicial Practice

2.1 Legal Basis of Damages Remedy for Breach of Choice of Court Agreements

Damages remedy is substantive. Therefore, the application of this remedy to breach of choice of court agreements presupposes legal recognition of the substantive nature and

[24] See BGH, Urteil vom 17.10.2019 – III ZR 42/19; an in-depth analysis of the case could be found in Wang Lei, *The Rule of Damages for Breach of Exclusive Jurisdiction Agreements in German Law: Main Applicable Conditions and Current Impacts*, 31(5) Journal of Fuyang Normal University (Social Science) 105, 106-111 (2022).

effect of choice of court agreements, i.e., choice of court agreements must inherently contain a right thereupon the parties may claim substantive remedies.[25]

The courts in Britain have not been particularly concerned with the legal basis issue of damages remedy for breach of choice of court agreements. They usually don't bother to elaborate on this issue in their decisions, holding the fact that choice of court agreements are contracts which is sufficiently enough to be a legal basis for a party to claim damages when suffered losses because of the other party's unlawful behavior.[26] However, such understanding is in fact based on the implicit recognition that choice of court agreements have both procedural and substantive nature and effects: procedurally, they are the basis for conferring jurisdiction on the chosen court (prorogating effect of choice of court agreements) and "removing" jurisdiction from non-chosen courts (derogating effect of choice of court agreements);[27] substantively, they create a positive obligation for the parties to resort only to the chosen court and a negative obligation not to bring proceedings before any non-chosen court. These two functions of choice of court agreements can be viewed separately and discretely.[28] The former being relevant when the court is dealing with jurisdictional disputes: it is the basis for the court to conduct a jurisdictional review and for the parties to commence proceedings in the chosen court or to mount jurisdictional defenses in a non-chosen court, while the latter allows the non-breaching party to seek injunctive or damages relief from a competent court in the event that the other party institutes proceedings in a non-chosen court in breach of choice of court agreements.[29] The Spanish and German courts share the same understanding on this issue and have thus similarly upheld the non-breaching party's claims for damages arising from the other party's breach of choice of court agreements.[30]

While the substantive nature of choice of court agreements is as objective as their procedural aspect and this view has increasingly become the mainstream doctrine theoretically,[31] whether it is contractually binding still depends on the understanding and judicial policy choice of particular jurisdictions. In the United States, for example, although judicial applications of damages remedy for breach of choice of court

---

[25] See Peter Hay, *Forum Selection Clauses-Procedural Tools or Contractual Obligations? Conceptualization and Remedies in American and German Law*, 35(1) Emory International Law Review 1, 3 (2021).

[26] See Adrian Briggs, *Civil Jurisdiction and Judgements (Seventh Edition)*, Routledge, p.654 (2021).

[27] Unlike in civil law countries, theoretically, parties' consent cannot oust courts' jurisdiction in common law countries, but can only affect courts' exercise of jurisdiction, see Tiong Min YEO, *The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements*, 17(1) Singapore Academy of Law Journal 306, 313 (2005); Peter Hay, *Forum Selection Clauses-Procedural Tools or Contractual Obligations? Conceptualization and Remedies in American and German Law*, 35(1) Emory International Law Review 1, 6-9 (2021)..

[28] See Nicholas S. Shantar, *Forum Selection Clauses: Damages in Lieu of Dismissal*, 82(6) Boston University Law Review 1063, 1078 (2002)

[29] See supra note 26, at 654-655.

[30] There are also scholars advocating tort, other than contract, as the legal basis for damages for breach of choice of court agreements, see e.g., Chee Ho Tham, *Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye*, 4(1) Lloyd's Maritime and Commercial Law Quarterly 46, 60-65 (2004).

[31] See e.g., supra note 4, at103.

agreements haven't been rare up until recently, they are not based on a uniform doctrine or methodology,[32] and "the case law is divided into two camps."[33] In Japan,[34] Australia[35] and Canada,[36] although there are scholars and judges who have addressed the legality of damages remedy in their respective domestic legal setting, there is no direct or actual judicial practice to support their theories or holdings. Interesting here is the attitude of France, as one of the representative countries of the civil law systems. Although there is no judicial practice on damages actions arising out of choice of court agreements, the French courts' inclination towards damages remedy may be inferred to some extent from their attitude towards contractual anti-suit injunctions, which share a common legal basis with damages remedy for breach of choice of court agreements, and the former is generally deemed a more drastic and thus controversial measure from the perspective of international comity. In October 2009, the highest court in French (Cour de cassation) in "InZone Brands,"[37] where the party applied for the recognition and enforcement of an anti-suit injunction issued by a court in the United States enforcing a choice of court agreement, held that the American court's anti-suit injunction was merely to enforce a pre-existing contractual obligation, thus its recognition and enforcement was not contrary to European Union or French public policy. In 2019, in IPCom v. Lenovo,[38] the Court of Appeal in Paris reiterated Cour de cassations's holding, that "anti-suit injunctions are against French *ordre public*, except where such injunctions are aimed at complying with arbitration or choice of jurisdiction contractual clauses…"[39] Combined with France's consistent position on the contractual nature of choice of court agreements,[40] flowing from their traditional support towards choice of court agreements,[41] it is reasonable to infer that claims for damages for breach of choice of court agreements would likely be equally upheld or recognized and enforced by the French courts.

---

[32] See supra note 6, at 286-290.
[33] Id., at 287.
[34] See Koji Takahashi, *Damages for Breach of A Choice-of-court Agreement*, Yearbook of Private International Law, Vol. 10, 57, 69 (2008).
[35] See Albert Dinelli, *The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law*, 38(3) Melbourne University Law Review 1023, 1025 (2015).
[36] See Richard Frimpong Oppong & Shannon Kathleen Clark Gibbs, *Damages for breach and interpretation of jurisdiction agreements in common law Canada*, 95(2) Canadian Bar Review 383, 388 (2017).
[37] See In Zone Brands Europe v. In Zone Brands Inc., [2009] Cass. 1e Civ.159.
[38] See IPCom v. Lenovo, Tribunal de Grande Instance de Paris, Case No RG 19/59311, November 8, 2019.
[39] See Enrico Bonadio & Luke McDonagh, *Paris Court Grants an SEP Anti-anti-suit Injunction in IPCom v Lenovo: A Worrying Decision in Uncertain Times?* 15(3) Journal of Intellectual Property Law & Practice 149, 149 (2020).
[40] See Jiao Yan, *On the Nature of Choice of Court Agreements and Related Issues*, 23(6) The Jurist 163, 166 (2011).
[41] See François Mailhé, *France: A Game of Asymmetries, Optional and Asymmetrical Choice of Court Agreements Under French Case Law*, in Mary Keyes(ed), *Optional Choice of Court Agreements in Private International Law*, Springer, pp.197-198 (2020).

The substantive nature and effects of choice of court agreements is therefore a sufficient rational basis for applying damages relief, but whether this will translate into a legal basis remains being dependent on the choice of particular jurisdictions.[42]

2.2 Reasonable Limits of Damages for Breach of Choice of Court Agreements

Unlike the substantive aspect, which in many instances is in a "natural state," the procedural effects of choice of court agreements, i.e., the legal effects of conferring or excluding the jurisdiction of a court or courts, is almost unanimously acknowledged by the international community. The worldwide acceptance of choice of court agreements has transformed the traditional public-public relationship between courts of different states under the international civil and commercial jurisdictional structure into a seemingly public-private relationship reflecting primarily the relationship between courts and private parties in specific cases.[43] However, when choice of court agreements are enforced by means of private damages remedy, the public-public relationship, which was previously potential behind the public-private relationship, becomes manifest once more, displaying a public-private-public relationship between the two or more states and the parties concerned. Though theoretically, breach of choice of court agreements can be performed merely by a party's bringing an action before a non-chosen court, the act of suing itself will usually only cause some minor disturbances to the other party but not enough to cause substantial damage to the non-breaching party. Damage such as attorney's fees may only occur when the breaching party's action is entertained by a non-chosen court and the non-breaching party is forced to raise jurisdictional defenses or seek other countermeasures such as anti-suit injunctions from competent courts where available. A decision granting damages relief to the non-breaching party is therefore likely to involve a negative evaluation of the exercise of jurisdiction by the non-chosen court. Under such circumstances, the impact of damages actions on international relations will need to be considered in order to achieve a balance between support of party autonomy and the maintenance of a stable order of international jurisdictional structure over cross border commercial disputes, which is "public" in essence.[44]

The discussion can be divided into two levels, based on whether there is a legally binding international jurisdiction framework between the court hearing the damages action and the non-chosen but seised court. The discussion on the compatibility of damages remedy for choice of court agreements within the Brussels I Regulation regime

---

[42] A state's attitude towards choice of court agreements is influenced by its policy objectives and interests, and is "culturally conditioned," see Horatia Muir Watt, *"Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance*, 6(1) European Review of Contract Law 250, 279-281 (2010).

[43] See supra note 4.

[44] See Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study*, Hart Publishing, p.263 (2017).

can be placed at the first level. For example, in "The Alexandros T,"[45] which involved proceedings in another member state of European Union, Greece, the court in Britain had to examine the applicability of damages remedy under the Brussels I framework before rendering its judgment in favor of the non-breaching party's claim for damages.[46] Study by scholars on the applicability of damages remedy for breach of choice of court agreements under the Hague Convention on Choice of Court Agreements regime can also be placed at this level.[47] The second level can be illustrated by the British, Spanish and German courts' considerations of respective foreign jurisdictional decisions before deciding on the lawfulness and reasonableness of non-breaching party's claim for damages.[48] As the discussion at the first level has not been the subject of much doctrinal attention，what focus here is at the second level. This concerns the relationship between the granting of damages remedy for breach of choice of court agreements and international comity.

Though as a concept have existed since the Middle Ages, there is no clear definition of international comity. The statement of the Supreme Court of the United States in Hilton v. Guyot is commonly cited to explain the usual meaning of international comity: "Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[49] International comity is reflected in a range of judicial doctrines, such as the extraterritorial effects of foreign laws and the recognition and enforcement of foreign judgments.[50] Comity does not require the courts of one state to show respect for other countries in every single case, as comity is not an "absolute obligation" and is not backed up by written or oral agreements between states, but on the other hand, comity requires courts to show respects towards courts of other states.

---

[45] See Starlight Shipping Co. v. Allianz Marine & Others, [2014] EWHC 3068 (Comm).

[46] Damages remedy is viewed by many scholars as incompatible with Brussels I Regulation regime based upon the principle of mutual trust. Still there are scholars argue that at least cases under the first category defined below can be justified, see e.g., Sara SÁNCHEZ FERNÁNDEZ, Choice-of-Court Agreements: Breach and Damages Within the Brussels Regime, Yearbook of Private International Law, Vol. 12, 377, 390 (2010).On June 25, the Greek Supreme Court has rendered a provisional judgment to request preliminary ruling of the CJEU on the question of the compatibility of damages for breach of choice of court agreements with the European *ordre public* (Case C-590/21).

[47] See e.g., Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study*, Hart Publishing, p.252 (2017); Adrian Briggs, *Agreements on Jurisdiction and Choice of Law*, Oxford University Press, pp.528-532 (2008), where the author concludes that the Convention lends support to the view that choice of court agreements are "contractual in nature and should be enforced because contracts should be enforced."

[48] See supra note 23; supra note 24; supra note 45.

[49] See Hilton v. Guyot, 159 U.S. 113, 163-164 (1895).

[50] See Emmanuel Gaillard, *Coordination or Chaos: Do the Principles of Comity, Lis Pendens, and Res Judicata Apply to International Arbitration?* 29(3) American Review of International Arbitration 205, 206 (2018).

Thus, international comity needs to be considered in conjunction with other factors and determined on a case-by-case basis. So, it is necessary here to first distinguish between two categories of damages actions for breach of choice of court agreements in practice generally.[51] According to the opinion of the non-chosen court towards the effectiveness of choice of court agreements and the progress of subsequent proceedings, damages actions concerning choice of court agreements can be divided into two categories. In the first category cases, the non-chosen court recognizes the validity and effectiveness of the agreement, accepts the jurisdictional defenses raised by the non-breaching party and dismisses the action of the breaching party, but its award of costs is not sufficient to cover the losses suffered by the non-breaching party, who therefore brings an action for damages in competent courts. Cases, such as those dealt with by the Spanish and German courts or Union Discount Company Ltd. v. Robert Zoller & Others,[52] mentioned above are all belong to this category. In the second category cases, the non-chosen court denies the validity or effectiveness of the choice of court agreement, does not adopt non-breaching party's jurisdictional defenses, but decides after hearing the cases on merits, and the non-breaching party accordingly filed a claim for damages, which not only includes relevant legal costs, but also may include legal liabilities awarded by the non-chosen court unfavorable to the non-breaching party. This is the scenario where English court made decisions to counteract the effects of judgments rendered,[53] or future judgments may be rendered, by several Chinese maritime courts on the disputes between Hin-Pro and CSAV,[54] and the aforementioned "*The Alexandros T*," where the British court's damages orders are aiming at preventing Greek proceedings,[55] though the latter is mainly discussed under Brussel I Regulation regime.

From the perspective of damages for breach of choice of court agreements, in cases of the first category, because the chosen court and the non-chosen but seised court agree on the validity and effectiveness of the choice of court agreements, comity considerations in the awarding of damages by competent court to the non-breaching party can be minimized, as the chosen court is not evaluating the jurisdiction of the non-chosen but seised court, but rather accepting the self-evaluation of its own jurisdiction by the non-chosen court. In cases of the second category, however, there is a material conflict between the chosen court and the non-chosen but seised court as to the exclusion or derogation effect of the choice of court agreements. Due to the objective existence of differences in legal systems, it is not unusual for jurisdictions to make different

---

[51] See Jonas Steinle & Evan Vasiliades, *The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy*, 6(3) Journal of Private International Law 565, 579 (2010).

[52] See supra note 8.

[53] See Hin-Pro International Logistics Ltd v. Compania Sud Americana De Vapores SA, [2015] EWCA Civ 401.

[54] See e.g., Wuhan Maritime Court, (2012) Wu Hai Fa Shang Zi No. 00972; Ningbo Maritime Court, (2013) Yong Hai Fa Shang Chu Zi No. 523; Shanghai Maritime Court, (2013) Hu Hai Fa Shang Chu Zi No. 1177; Guangzhou Maritime Court, (2013) Guang Hai Fa Chu Zhi No. 1116, etc.

[55] See supra note 45.

determinations as to the validity or effectiveness of the same choice of court agreements, and there shall be no judgement as to which one is superior or inferior. Normally, based on the doctrine of international comity, courts should respect each other's opinions and it is not advisable to undermine the international civil and commercial jurisdictional structure, which is part of global governance and essentially public in nature, by means of unilateral private ordering.[56] In such cases, therefore, it is usually inappropriate for the chosen court to substantially offset the judgment of the non-chosen court by granting relief in damages to the non-breaching party, unless there are strong reasons to justify that not granting damages relief to the non-breaching party would expose it to manifestly unfair consequences. In such cases, it usually would be more appropriate not to recognize and enforce the judgment rendered by the non-chosen but seised court. However, compared to other remedies, even contractual anti-suit injunctions based on the same legal basis which can only have an "all or nothing" rigid effect, one of the advantages of the damages remedy is the flexibility provided by the exercise of discretion in the quantification of damages. Some commentators have therefore argued that the impact on international comity can be mitigated by the careful adjustment of the scope of damages.[57]

In any event, international comity considerations arising from the procedural effects of choice of court agreements require that the application of damages remedy under choice of court agreements should be cautious and within reasonable limits.

2.3 Key Practical Issues

Following the general analysis on the legal basis and reasonable limits of damages remedy for breach of choice of court agreements, this part discusses certain important practical issues that may arise in the application of the damages remedy for choice of court agreements.

2.3.1 Appropriate forum

Arbitral tribunals are usually empowered by arbitration agreements to make final rulings as to the disputes over tribunal's own jurisdiction, however, there is no such international consensus that the chosen court has the sole competence to make decisions over disputes relating to the validity or effectiveness of choice of court agreements themselves, and the Hague Convention on Choice of Court Agreements actually acknowledges and stipulates the power of the non-chosen court to decide on the validity and effectiveness of choice of court agreements.[58] Thus, as to the jurisdiction of damages actions, any court, theoretically, could exercise jurisdiction thereupon, so long as it complies with its own applicable domestic jurisdictional rules. It would appear that the chosen court, the non-chosen court, and the court with personal jurisdiction over the

[56] See supra note 44.
[57] See supra note 36, at 392-393.
[58] See Article 6 of Hague Convention on Choice of Court Agreements.

parties are all competent courts that may exercise jurisdiction over claims for damages.[59] But further analysis may lead to a clearer judgement on which will be the more appropriate forum.

Firstly, it is difficult to imagine that the non-chosen court, which has denied the validity or effectiveness of choice of court agreements, would at the same time support a claim for damages brought by the non-breaching party, who is the defendant under the jurisdictional dispute.[60] And even if it were to accept the effectiveness of choice of court agreements, there would be either no need for the non-breaching party to bring an action for damages because the court's decision on the jurisdictional dispute has already dealt with the legal costs issue, or there would be no legal basis in the court's legal system for holding the losing party liable for the other party's legal costs in such cases, as in the case of the Spanish and German courts, American law does not support a party's claim for attorneys' fees against the other party. It is therefore unlikely that a non-chosen court would be the court to hear a claim for damages for breach of choice of court agreements.

Secondly, there seems no theoretical impediments for the non-breaching party to claim damages before a court with personal jurisdiction over the parties only. However, even if such a court were to allow relief in damages to a non-breaching party of choice of court agreements, the lack of enough connection to the choice of court agreement would likely lead it to decline to entertain a claim for damages based solely on personal jurisdiction due to international comity considerations. Because choice of court agreements are not ordinary commercial contracts, it is difficult to avoid the evaluation of the jurisdiction of the chosen and non-chosen courts in an action for damages. Just as being stated by High Court Judge Chu Hon-Tak (Singapore) in People's Insurance Co. Ltd. v. Akai Pty Ltd. case, where both the British and Australian courts have jurisdiction under their own jurisdiction rules, "the Singapore Court should not assume the role of an international busybody," and "where there are two courts having jurisdiction a third court with tenuous connection should not influence the course unless there are strong reasons to do so."[61] The delicate position of a third court in this situation is also illustrated by the hesitant attitude of the Court of Appeal of Hong Kong requested by the plaintiff of a damages action to take ancillary enforcement measures in respect of a damages award made by the British courts.[62] It can be seen that, as is often the case, due to international comity considerations, personal jurisdiction over the breaching party alone is not sufficient for a third state court to exercise jurisdiction over a claim for damages against the breaching party under a choice of court agreement.

---

[59] See supra note 47, at 207.

[60] Scholars discussed the possibility that a non-chosen but seised court may grant damages remedy to the non-breaching party while hearing the case on the merits, see e.g., Edwin Peel, *Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws*, 1998 Lloyd's Maritime and Commercial Law Quarterly 182, 224-226 (1998).

[61] See People's Insurance Co Ltd v. Akai Pty Ltd, [1998] 1 SLR 206.

[62] See Compania Sud Americana de Vapores S.A. v. Hin-Pro International Logistics Limited, CACV 243/2014.

In theory, therefore, it is more natural for the chosen court to deal with a claim for damages based on choice of court agreements, without mentioning the fact that the parties always tend to choose the court that will be most likely to support their claims. This can also be evidenced by the fact that in judicial practice up to date, most damages claims have been dealt with by the respective nominated courts.

2.3.2 Governing law

Similar to the appropriate forum issue, judicial practice has been consistent in the determination of the applicable law to damages claims. Except for the Spanish courts, where the parties directly referred to Spanish law without touching on the issue of conflict of laws, both the British[63] and German[64] courts have held that the law applicable to the main contract is also the governing law of damages claims.[65] However, this is not necessary the case. According to the principle of severability, choice of court agreements within or accompanying a contract and the main contract are theoretically independent with each other,[66] just as the Hague Convention on Choice of Court Agreements provides: "An exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract."[67]

The applicable law issue is controversial due to its historical relationship with the characterization of choice of court agreements.[68] Observations show that there are mainly three models: if choice of court agreements are characterized as being procedural, the law of the forum is generally applicable; if they are characterized as being purely contractual, the applicable law is determined by the conflict of laws rules the same as being applied to contracts; if they are characterized as being of a mixed procedural and substantive nature, different laws apply to different aspects of the agreement.[69]

With the general acceptance of the theory of procedural contracts and the development of the principle of party autonomy in international commercial disputes resolution, it is increasingly accepted that choice of court agreements have a mixed nature and that the applicable law should be determined respectively.[70] Both the Hague Convention on Choice of Court Agreements[71] and the Brussels Regulation I (recast) [72]

---

[63] See e.g., supra note 45.
[64] See supra note 24.
[65] There are scholars that strongly support this approach, see e.g., Kevin M. Clermont, *Reconciling Forum-Selection and Choice-of-Law Clauses*, 69(3) American University Law Review Forum 171, 171-181 (2020).
[66] See Mónica Herranz Ballesteros, *The Regime of Party Autonomy in the Brussels I Recast: The Solutions Adopted for Agreements on Jurisdiction*, 10(2) Journal of Private International Law 291, 297 (2014).
[67] See Article 3(d) of the Hague Convention on Choice of Court Agreements.
[68] See R. H. Graveson, *The Ninth Hague Conference of Private International Law*, 10(1) International and Comparative Law Quarterly 18, 28 (1961).
[69] See Felix Sparka, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis*, Springer, pp.81-87 (2010).
[70] See Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 Hastings Law Journal 643, 662 (2015).
[71] See Article 5(1) of the Hague Convention on Choice of Court Agreements.
[72] See Article 25(1) of the Brussel I Regulation (Recast).

refer the law determining the substantive validity of choice of court agreements to the law of the state of the chosen court and specifically state that it "includes the choice- of-laws rules of that state."[73] As the application of the conflict of laws rules presupposes the characterization of the subject matter, this indicates that both the Hague Convention on Choice of Court Agreements and the Brussels Regulation I recognize the different views held by member states on the nature of choice of court agreements and accept the reality that in some member states choice of court agreements are at least dual in nature.

From the perspective of damages claims, as it assumes legal confirmation of the substantive nature and effects of choice of court agreements, the determination of applicable law thereof should also follow the usual contractual conflict of laws rules: first follow the parties' choice, and in the absence of such an explicit consent, the law to be applied shall be determined by rules such as the principle of the closest connections. Parties to the choice of court agreements generally don't choose the applicable law of the agreement beforehand. Thus, if the chosen court is also the court to which the damages claim is brought, which is the most likely scenario as being analyzed above, the law of the state of the chosen court is still the most likely law applicable to the damages claims, taking into account the fact that procedural issues of choice of court agreements are also governed by *lex fori* and, perhaps, the fact that the law of the forum has also usually been chosen as the governing law of the main contract,[74] just as in the cases dealt with respectively by British and German courts. So, combined with the assumption that the designated court is normally the court hearing damages claims, it may be practical to suggest that in the absence of an explicit choice of law consent, substantive law of the designated forum could be deemed as the default applicable law to damages claims arising out of choice of court agreements.

2.3.3 Quantification of damages

Quantification of damages is one of the main issues that should be dealt with in contractual disputes. However, special notice should be paid to when it concerned with choice of court agreements. The solving of this issue in the context of choice of court agreements is never an easy task.[75] One of the main reasons damages remedies was not universally applied before CJEU' rulings prohibiting Intra-EU anti-suit injunctions, was that it was difficult to quantify damages.[76] Even after its solid establishment in some of the major legal systems as an available remedy for breach of choice of court agreements

---

[73] See Trevor Hartley & Masato Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Convention*, para.125 (2005).

[74] Recital 12 of Rome I Regulation specifies that "an agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated."

[75] See e.g., Stephen E. Sachs, *The Forum Selection Defense*, 10(1) Duke Journal of Constitutional Law & Public Policy 1, 34-35 (2015).

[76] See OT Africa Ltd v. Magic Sportswear Corp, [2005] EWCA 710.

recently, it is still a complex and sometimes controversial issue. This topic can still be discussed based on the previous categorization of damages actions.[77]

The quantification of damages under the first category cases is not so complex. It is usually sufficient to calculate the difference between the sum of the non-breaching party's costs and expenses, and the amount determined by the non-chosen but seised court's relevant costs order or award, if exists. The non-breaching party's costs and expenses under such circumstance usually include litigation costs, attorney's fees, travel expenses incurred for raising jurisdictional defenses before the non-chosen but seised court or for taking pre-emptive measures, such as applying for anti-suit injunctions before competent courts. This is the case in both the Spanish and German cases. However， in the second category cases where the non-chosen court has heard the case and decided on the merits, the quantification question may become problematic, even disregarding comity implications,[78] as the non-chosen but seised court and the chosen court may not reach the same conclusion due to various procedural and/or substantive law differences. If the non-chosen court does not uphold the defaulting party's claim after substantive hearings, the quantification issue may be relatively straightforward and will just like that under the first category cases. However, if the non-chosen but seised court has supported the breaching party's claim, the court hearing the damages claim will face a more complex situation. The court has to decide whether the judgment of the non-chosen court shall be considered in the quantification process and, if taking into consideration, how the specific amount should be calculated. Theoretically, the quantification of damages can only be achieved by contrasting the outcome of the hypothesized substantive proceedings in the chosen court with the judgment of the non-chosen court. The problem is further complicated where the trial of the main contractual dispute in the non-chosen court has not yet concluded, and the court hearing the damages claim has to assume the possible result of the trial.[79] British courts have avoided this problem by taking a "claw back" approach, that is to allow the non-breaching party to recover all substantive amount awarded or may be awarded against him by the non-chosen court.[80] Such an approach, completely nullifying the decision of the non-chosen court, though simple and straightforward, does not conform to usual definition of contractual damages, is logically unfounded and just as the Greek courts have said, merely turns the damages remedy into a "quasi-anti-suit injunction," and is a showing of judicial chauvinism.[81]

So, quantification of damages for breach of choice of court agreements shall be processed with appropriate limiting techniques.[82] As a matter of fact, quantification of

---

[77] See Chapter 2 Part 2.

[78] Quantification of damages and comity are correlated under this situation, see Chapter 2 Part 2, and e.g., Nik Yeo & Daniel Tan, *Damages for Breach of Exclusive Jurisdiction Clauses* in Sarah Worthington (ed), *Commercial Law and Commercial Practice*, Hart Publishing, p.419 (2003).

[79] See e.g., supra note 34, at 85.

[80] See e.g., supra note 45.

[81] See Piraeus Court of Appeal, Nr. 371/1.7.2019.

[82] See supra note 78, at 420.

damages should be made considering the purpose of choice of court agreements. The purpose of a choice of court agreement is to determine the hearing court for existing or potential disputes, and to secure the stability and predictability of procedures, but cannot be construed as having a direct and definite link with the substantive outcome of the proceedings. The substantive outcome of a case is not only affected by procedural law, but also by conflict of law rules, applicable substantive law, the litigation skills of the parties or lawyers, and various other factors. Therefore, the logic of linking the outcome of a case exclusively to the venue is untenable and beyond the parties' anticipation. The scope of damages for breach of choice of court agreements should therefore normally be limited to the losses incurred by the non-breaching party in taking steps to secure the validity and effectiveness of the agreement in order to achieve the purpose of the contract.[83] Such damages are usually the costs of attorney's fees, travel and communication expenses or the expenses for the preparation of evidence to bring jurisdictional challenges before the non-chosen but seised court, or in jurisdictions where anti-suit injunctions are available, may also include the costs of applying for an anti-suit injunction to prevent or stop the breach. Such treatment not only safeguards the legitimate rights and interests of the parties under choice of court agreements, but also avoids the tension between relevant courts caused by unreasonable expansion of the scope of damages.[84]

3. Applicability of Damages Remedy for Choice of Court Agreements under Chinese Law

3.1 The Nature of Choice of Court Agreements under Chinese Law and its Impact on the Damages Remedy

As in most jurisdictions, the legal nature of choice of court agreements is not statutorily defined in Chinese Mainland. Theoretical studies have likewise inferred the nature of choice of court agreements indirectly according to the courts' rulings on choice of law regarding choice of court agreements. In this regard, though the Supreme People's Court of the People's Republic of China (hereinafter referred to as SPC) had held in Sumitomo Bank Co. Ltd. v. Xinhua Real Estate Co. Ltd. that "the validity of the jurisdictional clause in the Loan Agreement between the parties shall comply with the governing law of the Loan Agreement as agreed by the parties,"[85] this *lex causae* of the main contract approach was soon discarded, and *lex fori,* i.e., Chinese law, as the governing law of choice of agreements has since become the consistent choice of SPC.

---

[83] See Daniel Tan & Nik Yeo, *Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?* 10(1) Lloyd's Maritime and Commercial Law Quarterly 435, 442-443 (2003).
[84] See Melis Avşar, *An Examination of the Liability for Compensation for the Breach of Choice of Court Agreements: In the Light of the German Federal Court Decision of 17.10.2019*, 80 (2) İstanbul Hukuk Mecmuası 357, 375-376 (2022).
[85] See SPC, (1999) Jing Zhong Zi No. 194.

For example, in Mares & Jamry v. Haier,[86] SPC held: "This case is a jurisdictional dispute with foreign elements and is a procedural issue. Whether the Qingdao Intermediate People's Court has jurisdiction over this dispute should be examined by applying the law of the forum, i.e., the Civil Procedure Law of the People's Republic of China. The applicants for retrial, Mares and Jamry, were wrong to argue that the law in British agreed in the Guarantee Letter should apply to the dispute. The law that the parties agreed to in their agreement refers only to substantive law and should not include procedural law and rules of conflict of laws." In Shandong Jufeng Network Co. v. Mgame Corp. and Tianjin Fengyun Network Technology Co. Ltd.,[87] SPC further clarified *lex fori* as the rule in determining the governing law of choice of court agreements by correcting the misuse of *lex causae* by the court of first instance: "The validity of the choice of jurisdiction clause should be judged according to the law of the forum; the first instance court's ruling that the jurisdiction clause must comply with the relevant legal rules of the country of the governing law of contract chosen by the parties was erroneous." The academic circle has thus generally inferred that, in Chinese Mainland, choice of court agreements should be procedural in nature.

However, it may not be sufficient to deny the substantial nature of choice of court agreements, or the applicability of damages remedy to choice of court agreements solely based on judicial practice in this field up to date. Firstly, as SPC has iterated more than once in the cases mentioned above or other jurisdictional disputes arising out of choice of court agreements, these are all "jurisdictional disputes with foreign elements," and "are procedural issues," i.e., they are disputes on the procedural effects of the choice of court agreements, while a damages action brought against the breaching party is based on the substantive effects of choice of court agreements. As discussed earlier, these two aspects of choice of court agreements are different and can be discrete with each other. Secondly, the application of the law of the forum does not mean that only the procedural law of the forum is to be applied. The law applicable to choice of court agreements goes beyond procedural rules such as the Civil Procedural Law of the People's Republic of China. In theory, many conditions, which can generally be grouped into three categories that is procedural, substantial, or formal,[88] should be satisfied before choice of court agreements being enforced by a given jurisdiction. Under Chinese law, however, except for rules concerning the procedural legality of choice of court agreements, such as subject matter limitations, substantial connection requirement etc., the Civil Procedural Law of the People's Republic of China does not contain any provision regarding the formal validity or substantive validity of choice of court agreements, and thus leaves these aspects of

---

[86] See SPC, (2009) Min Shen Zi No. 1095. And other similar cases, also see e.g., SPC, Shanghai Yanliu International Transportation Co., Ltd. V. Evergreen Marine Co., Ltd., (2011) Min Ti Zi No. 301; SPC, Xu Zhiming v. Zhang Yihua, (2015) Min Shen Zi No. 471.

[87] See SPC, [2009] Min San Zhong Zi No. 4.

[88] See Jason Webb Yackee, *Choice of Law Consideration in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?* 9(1) UCLA Journal of International Law and Foreign Affairs 43, 47 (2004).

choice of court agreements to substantive law.[89] For example, Article 3 of the 2022 Minutes of the National Working Conference on the Trial of Foreign-Related Commercial and Maritime Cases,[90] a SPC guideline on foreign-related commercial and maritime adjudication, stipulates that a consumer may, subject to the conditions prescribed by this article, claim that the jurisdictional clause in a cross-border consumer online purchase contract does not become part of the contract or is invalid according to Article 496 or Article 497 of the Civil Code of the People's Republic of China.[91] Thus, even if judicial review is carried out mainly aiming at the determination of the procedural enforceability of choice of court agreements, it cannot be performed appropriately without the though sometimes implicit application of substantive law. For this reason, it has been argued that the governing law of choice of court agreements should be determined respectively according to the substantive validity and procedural enforceability aspects of the choice of court agreements,[92] with *lex causae* (usually but not necessarily the same law applicable to the main contract) for the former and *lex fori* for the latter.[93] Finally, as mentioned in Chapter 2 Part 2, the Hague Convention on Choice of Court Agreements impliedly accepted the possible dual or substantive nature characterization of choice of court agreements by member states. Therefore, if China were to accede to the Convention, courts in Chinese Mainland, when being the non-chosen but seised court, will inevitably face with and be obliged to accept the characterization of choice of court agreements by other member states when decide on the validity of choice of court agreements.

The substantive or contractual nature of choice of court agreements is therefore objectively and inescapably present. To put it in other words, choice of court agreements are contracts within the purview of contract law, though concerned with matters of procedural flavor, such as courts' jurisdiction or parties' litigation right, thus involving simultaneously and distinctly the application of procedural law. Though both are substantive aspects of choice of court agreements, the applicability problem of damages remedy, focusing on the direct legal binding effect on the parties of choice of court agreements, like normal commercial contracts, is somewhat different from the substantive validity issue of choice of court agreements discussed above. While the latter is always being judicially explored explicitly or impliedly, the former, mainly a contract interpretation issue—choice of court agreements would be explained to have direct legal effects .on the parties entitling the non-breaching party to claim damages when the

[89] Thus, SPC's holding in Mares & Jamry v Haier, that "…should be examined by applying the law of the forum, i.e., the Civil Procedure Law of the People's Republic of China," is arguable.
[90] Titled "Effectiveness of Jurisdictional Agreements in Cross-border Consumer Online Purchase Contracts"
[91] These two articles of the Civil Code of the People's Republic of China are concerned with adhesion contracts.
[92] See Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78(4) Louisiana Law Review 1119, 1152 (2018).
[93] See Du Tao, *Certain Issues Concerning the Choice of Foreign Courts by Agreement of the Parties under the New Civil Procedure Law*, 61(1) People's Judicature 16, 18-20 (2017).

agreements are breached — is an unexplored, nevertheless not a forbidden area under judicial practice of Chinese Mainland, depending on the courts' future policy choices.[94]

3.2 Feasibility of Damages as a Remedy for Breach of Choice of Court Agreements under Chinese Law

As the principle of party autonomy in international commerce has long been cherished by SPC,[95] it is arguable that it's in conformity with the court's policy objective to adopt the damages remedy for breach of choice of agreements, as the remedy supports party autonomy in international commercial dispute resolution as well as safeguards international market players' legitimate rights and interests. What's more, as damages remedy for breach of choice of court agreements has not been adopted by all jurisdictions universally but is dependent on the domestic choice of given jurisdictions, availability of the remedy under Chinese law may attract international commercial participants to choose Chinese law as both the governing law of main contracts and accompanying choice of court agreements, thus promote the extraterritorial application of Chinese law, which also has been promoted with endeavor by SPC recently.

Nevertheless, there is still one more thing that should be considered on the adoption of damages remedy for breach of choice of court agreements under Chinese law. That is the feasibility of this remedy under the Chinese legal system. While there is no direct application of damages remedy for breach of jurisdiction agreements domestically, a more general survey on the courts' practice in protecting party's civil litigation rights through substantive law remedies may shed some light on this topic.

3.2.1 Judicial practice concerning the right not to be sued originating from contracts

Courts in Chinese Mainland have not had a chance to directly consider the question of whether damages may be recovered for breach of choice of court agreements or made any distinctive pronouncement on the availability of such a remedy. As mentioned above, at the substantive level, parties under a choice of court agreement are obliged not to commence proceedings before any non-chosen court. So, choice of court agreements are contracts with the parties' litigation right (not to be sued) and obligation (not to sue) as their contents, thus can be identified as "contracts of civil litigation rights" under legal theory and practice in Chinese Mainland, because "contracts of civil litigation rights," "refer to agreements concluded in advance by the parties to dispose of the litigation rights, including waivers of the right to sue, consents limiting the timing of the exercise of the right to sue, agreements on the conditions for the exercise of the right to sue, and so

---

[94] See Yeo Tiong Min, *Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005*, Law Reform Committee, Singapore Academy of Law, pp.14-15 (2013).

[95] See e.g., Circular of SPC on the Promulgation of the Several Opinions on Providing Judicial Protection to Improve the Business Environment, Fa Fa [2017] No.23, article 10(2017); Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, Fa Shi [2018] 11, Article 2(1) (2018); Minutes of the National Working Conference on the Trial of Foreign-Related Commercial and Maritime Cases, Articles 1-2,4 (2022).

forth."[96] Therefore, from the judicial practice on disputes arising out of contracts of civil litigation rights, we could infer the feasibility of the application of damages relief to choice of court agreements.

Though not uncommon in daily civil and commercial activities, judicial practice on contracts of civil litigation rights is not unified or consistent. Some judges deem them as general civil contracts and decide relevant disputes applying the Contract Law of the People's Republic of China or the Civil Code of the People's Republic of China, yet there are also others seeing such agreements as contradicting with mandatory provisions of the Civil Procedural Law of the People's Republic of China or even constitutional provisions ensuring parties' basic right of access to justice, thus fundamentally invalid. But a more detailed observation will show that even those deem them invalid are not so doctrinally rigid and actually adopting a more practical and reasonable approach. For example, a book compiling SPC's viewpoints on the adjudication of disputes concerning sales contracts posits that "the not-to-sue clause in the sales contract, a waiver of the right to sue by the parties, is invalid because it violates the mandatory provisions of the Civil Procedural Law of the People's Republic of China."[97] Nonetheless, the actual treatment is more subtle, as it continues, because "parties' litigation rights have both substantial and procedural significance," "the clause stipulating the abandonment of the right to sue by one party is often not independent and is usually accompanied by the other party's waiver of some substantive rights or interests, for example, one party's transferring of certain economic benefits in exchange for the other party's promise not to sue within three years. Under such circumstances, if the promised party still initiates the action, the court shall, after accepting the case, but facing challenges from the other party, review whether there are corresponding terms stipulating the other party's waiving of substantive rights in the contract; if the waiver of the substantive rights or promise to give up economic benefits exists, and does not in violation with the relevant provisions of the Civil Code of the People's Republic of China on the validity of contracts, the court shall either dismiss the action based on the principle of party autonomy or rule against the plaintiff, as the waiving of the right not to sue is not one-sided, but based upon fair conditions."[98] The above statements and the proposed treatment, "dismiss the action," i.e., procedural denial of the plaintiff's right to sue, is actually an implicit acknowledge of the legality of parties' waiving of the right to sue under satisfied conditions, and thus a legal recognition of party's autonomy to dispose of its civil litigation rights in the same way as those private rights originating from substantive law, because "parties' litigation rights have both

---

[96] See Chao Zhixiong, *Research on the Contract of Civil Right of Action: The Influences of Judicial Experience on the Development of Legal Theory*, 29(1) the Jurist 32, 33 (2017). The view that a choice of choice agreement is a type of waiver is echoed with some American scholars, see e.g., supra note 3, at 292, and supra note 75, at 5.

[97] See Zhong Li, *Rules for Adjudicating Disputes Over Sale and Purchase Contracts(I): Formation and Validity of Contracts*, Law Press, p.348 (2021).

[98] Ibid

substantial and procedural significance."[99] This view is consistent with scholars' survey of judicial practice on a broader scope.[100] The research finds that in most disputes arising out of contracts of civil litigation rights, judges apply the Contract Law of the People's Republic of China to decide on the cases just as other ordinary civil or commercial cases, only taking into account relevant mandatory provisions of the Civil Procedural Law of the People's Republic of China as one of the validity considerations.

SPC's ruling in Liupanshui Hengding Industrial Co. Ltd. v. Chongqing Qianniu Construction Engineering Co. Ltd.[101] is of special referential value from the perspective of awarding damages relief for breach of not to sue promise. In that case, the parties agreed that "neither party shall bring a lawsuit to the people's court during the performance of the agreement, otherwise the party bringing the lawsuit shall voluntarily and ultimately bear all the legal costs incurred by both parties, including but not limited to litigation costs, attorney's fees, preservation costs, enforcement costs, travel expenses, investigation expenses, etc." Subsequently, when a dispute arose between the parties and one party filed a lawsuit with a court, the defendant counterclaimed, requesting the court to order the plaintiff to pay its attorney's fees and bear all the litigation costs and expenses incurred on the grounds that the plaintiff had breached its promise not to sue. The court of first instance held that the clause "excluded the plaintiff's fundamental right of access to justice and should be invalid," thus did not uphold the defendant's counterclaim. SPC, in hearing the defendant's appeal, held that "the clause agreeing not to file a lawsuit within the agreed payment period did not exclude the party's fundamental right to sue; the clause only restricted the party's right to sue within a certain time period, delaying the time for the party to file a lawsuit, rather than denying and depriving the party of its right to sue completely. After the time period agreed by the parties, the party could still exercise its right to sue at any time," and consequently supported the defendant's counterclaim.

As indicated by the case above, even if a waiver of the right to sue may be invalid because of the mandatory provisions of the Civil Procedural Law of the People's Republic of China, which is not the case in practice, limitations put upon the right to sue under fair conditions, is capable of being recognized by the courts. Choice of court agreements do not exclude the party's right to sue, but only limit the parties' choice of forum to the chosen court. An analogy of the situation under choice of court agreements to the case mentioned above will arguably lead us to the conclusion that damages for breach of choice of court agreements is also capable of being supported by the courts, at least when parties draft and insert a guarantee, indemnity, or liquidated damages clause into a choice of court agreement beforehand, which is increasingly suggested by scholars[102] and adopted by merchants[103] in an international commercial dispute resolution

---

[99] Ibid.
[100] See e.g., supra note 96, at 33-34.
[101] See SPC, (2016) Zui Gao Fa Min Zhong No. 415.
[102] See e.g., Koji Takahashi, *Damages for breach of a choice-of-court agreement*, Yearbook of Private International Law, Vol. 10, 57, 87-88; Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court*

context.

3.2.2 Judicial practice concerning right not to be sued generally

Right not to be sued not only originates from mutual consent between the parties, but also stands on more general legal bases and can be protected by, such as tort law. Judicial practice in Chinese Mainland indicates that people who's not-to-be-sued right is infringed on can claim damages under certain circumstances.

Regulation of IP-related malicious litigations, brought usually by apparent junk patent or trademark owners, is one of the focuses of recent judicial practice on IP-related disputes. As the plaintiff of an IP-related malicious litigation "intends to use the litigation proceedings to achieve illegal purposes other than the litigation itself,"[104] so the plaintiff's behavior "belongs to the scope of abuse of litigation rights in a broader sense."[105] In other words, the conductor of an IP-related malicious litigation infringes on the other party's right not to be sued originating from a broader legal basis other than contracts. In August 2006, Nanjing Intermediate People's Court ruled on an IP-related malicious litigation case for the first time in Chinese Mainland, upholding the defendant's claim for damages, including attorney's fees.[106] After that, Beijing High People's Court and other courts on various levels also dealt with a number of similar cases.[107] In 2011, SPC formally listed "disputes over damages for IP-related malicious litigation" as one of the civil causes of action. In 2021, SPC clarified in a judicial interpretation that, "in an intellectual property infringement lawsuit, where the defendant submits evidence to prove that the plaintiff's lawsuit constituted an abuse of rights and harmed the legitimate rights and interests of the defendant under the law, and requests the plaintiff to compensate for the reasonable attorney fees, transportation expenses, board and lodging expenses, etc., paid by the defendant because of the lawsuit, the court in Chinese Mainland shall uphold such request according to law. The defendant may also file a lawsuit separately and request the plaintiff to compensate for the above-mentioned reasonable expenses."[108]

In addition to IP-related malicious litigation, courts' decisions upholding party's claims for recovery of damages due to malicious litigation on general civil and

---

Agreements: A Comparative Study, Hart Publishing, pp.175-176 (2017); Richard Fentiman, *International Commercial Litigation* (2nd Edition), Oxford University Press, pp.121-122 (2015).

[103] See e.g., Shanghai Maritime Court, [2020] Hu 72 Min Chu No.2620, where parties of a voyage charter party agreed upon a choice of English court clause accompanied by a promise of the charterer "to be responsible for all and any legal expenses and costs incurred by the Carrier in removing a suit wrongly filed or commenced in another forum."

[104] See Yao Zhijian & Ke Xuning, *Judicial Identification and Regulation of IP-related Malicious Litigations]*, 63(1) People's Judicature 48, 48 (2019).

[105] See Wang Jing &Zhang Suliu, *An Analysis on Key Issues Concerning IP-related Malicious Litigations*, 36(4) Journal of Law Application 101, 106 (2021).

[106] See Nanjing Intermediate People's Court, (2003) Ning Min San Chu Zi No. 188.

[107] See e.g., Beijing High People's Court, (2008) Gao Min Zhong Zi No. 163, and Beijing Second Intermediate People's Court, (2007) Er Zhong Min Chu Zi No.15445.

[108] See SPC, Reply on the Issue concerning the Defendant's Request for Compensation for Reasonable Expenses on the Grounds of the Plaintiff's Abuse of Rights in an Intellectual Property Rights Infringement Lawsuit, Fa Shi [2021] No.11 (2021).

commercial law grounds are also not uncommon recently.[109] What's more, SPC provides in a 2016 judicial interpretation,[110] that "…Where parties abuse their litigation rights…directly causing harm to their litigation counterpart or third parties, the courts may support legitimate requests by a party without fault, such as for compensation of reasonable lawyers' fees." This provision establishes, at a general level, the right of parties to bring claims for damages, including attorney's fees, when their not-to-be-sued right have been infringed upon. In the Chuangjin Huxin Fund Management Co. Ltd. and Shandong Shanshui Cement Group Co. Ltd. case,[111] in addition to the liquidated damages, the plaintiff also claimed that it had "paid unnecessary attorney's fees" as a result of the "defendant's breach of contract," and therefore "the unnecessary expenses should be borne by the defendant." Among the reasons given by the court in support of the plaintiff's claim, the defendant's intentional filing of jurisdictional objections and following appeals was found to be an abuse of litigation rights. By analogy, non-compliance with choice of court agreements and deliberately filing a lawsuit in a non-chosen court may also be described as an abusive litigation behavior, thereby entitling the grieved party to damages relief, just as the Spanish and German courts have both found in their respective case that the breaching party had been subjectively wrong for bringing an action before a non-chosen American court contravening a choice of court agreement.[112]

With the examination of relevant judicial practice or judicial opinions of SPC's above, it can be concluded that people can protect his or her right not to be sued, whether it is based upon contracts or on a more general legal basis, by applying to damages remedy provided by substantive law such as contract law or tort law. When this is established generally, there is no reason why people's rights not to be sued originating from a choice of court agreement, cannot be equally protected by the same substantive remedies. With the emphasis by SPC on the necessity of protection of legitimate rights and interests of market players in the international commercial context, it may be appropriate to argue that it is not only feasible but necessary to grant damages relief to parties who have suffered losses due to the other party's breach of choice of court agreements.

4. Conclusion

Choice of court agreements, when having the procedural prorogating or derogating effects upon courts' jurisdiction, also have the substantive effects upon the parties' rights

---

[109] See e.g., Xu Jun & Yu Xi, *Damages for Malicious Civil Litigations*, People's Court Daily, 2014-11-20, Seventh Column.

[110] See SPC, Several Opinions of the SPC on Further Promoting the Streaming of Complex and Simple Cases to Optimize the Allocation of Judicial Resources, [2016] Fa Fa No.21, Article 22 (2016).

[111] See Qianhai Cooperation Zone Primary People's Court, Shenzhen, Guangdong, (2016) Yue 0391 Min Chu No.903.

[112] Under Spanish or German Law alike, the party is liable only when he has failed intentionally or negligently to fulfil its contractual obligation.

and obligations, thereupon parties are bond not to sue before any non-chosen court. Therefore, when a party contravenes such an obligation causing damages to the other party, the non-breaching party could claim recovery of losses incurred. However, traditional preference, emanating from a narrow public law view on court's jurisdiction and party's litigation rights, for the procedural effects of choice of court agreements have kept this dimension of choice of court agreements outside of the attention of legal practice for a long time. The ever increasing and trans-systemic judicial practice recently has demonstrated the realistic value and universalization of this remedy.

Judicial practice in Chinese Mainland has proved that parties' right not to be sued, no matter arising out of parties' consent or more general legal bases, though traditionally defined as procedural in nature, while being infringed on, can be equally protected as any substantive rights by application of substantive law remedies. Therefore, there is no legal or practical obstacles to granting damages relief to the non-breaching party of choice of court agreements under Chinese law. At a time when the international community has reached a clear consensus on the core status of the principle of party autonomy in international private law,[113] it is important to fully understand and recognize the spirit of private law autonomy embodied in choice of court agreements.[114] Applying a carefully tailored damages remedy as a supplement to traditional, and somewhat rigid, remedies will make up for the lack of more flexible remedies for breach of choice of court agreements and meet parties' reasonable expectations. This is conducive to improve Chinese courts' attractiveness in international commercial dispute resolution network and promote to some extent the extraterritorial application of Chinese law.

So, it is suggested here that courts in Chinese Mainland could adopt damages as a remedy for breach of choice of court agreements. Firstly, it is necessary to accept the substantive nature and effects of choice of court agreements for the establishment of parties' obligation not to sue before any non-chosen court as the legal basis for the remedy. Secondly, it is appropriate for Chinese courts to accept normally only damages claims arising out of choice of court agreements nominating Chinese courts, so as not to implicate complex and sometimes troublesome comity issues due to lack of strong connections with the agreements. Thirdly, in the absence of explicit choice of law consent, Chinese courts may take Chinese law as the governing law for the unified application of law on both substantive and procedural aspects of choice of court agreements. Finally, the scope of damages normally should be limited to such an extent that will cover the parties' unredeemed costs and expenses incurred in bringing jurisdictional defenses or taking pre-emptive measures, so as to meet the reasonable expectations and reliance of the parties under choice of court agreements, while avoiding or mitigating conflicts with other jurisdictions.

---

[113] See supra note 4.

[114] See Arthur Lenhoff, *The Parties' Choice of a Forum: Prorogation Agreements*, 15(1) Rutgers Law Review 414, 414 (1961).

Criteria in Determining Indirect Expropriation in International Investment Arbitration: Doctrinal Investigation and New Developments

Zhang Yi[1]

Abstract: In recent years, the amount of investment between countries has been rapidly increased, and so as the disputes between them. The uncertainty of indirect expropriation criterion will not only increase the risk of China being sued to the arbitral tribunal, but also cause great damages to the interests of overseas investors in China. The criterion for indirect expropriation mainly includes the sole purpose doctrine, the sole effect doctrine and the combination of both of them. Through comparative analysis of different criteria, it can be concluded that the sole effect doctrine and the sole purpose doctrine are both too biased. The combination of effect and purpose doctrine is to some degree a better choice to balance the interests between the host government and investors. On this basis, the introduction of the principle of proportionality makes it clearer to balance the interests between them and is more operable in the arbitration practice. As China has a dual identity as both importing and exporting country, the risks have doubled as well, so it is important to look on both sides to safeguard the legitimate rights and interests of China and its overseas investors. Therefore, China may further perfect the provisions by incorporating the three-step inspection process of the "principle of proportionality," which includes "appropriateness," "necessity" and "narrow proportionality" criterion and set up a systematic identification standard in the light of China's national conditions.

Keywords: Indirect Expropriation; Arbitration Practice; the Principle of Proportionality; Balance of Interests

Since 1990s, with the development of economic globalization and the rapid flow of international capital, international investment, as one of the most active economic forms, has made a huge contribution to the development of various countries. The model of the international investment relationship has shifted from conservative one towards a liberal one. In the early stages, expropriation means that a country, in order to protect its public interests, implements relevant policies or laws to realize the legal occupation of the investors' private property.[2] However, direct expropriation may cause huge losses to investors' property. This will dampen investors' enthusiasm for overseas investment, which is unfavorable for the host country to attract foreign capital to develop its economy. In order to adapt to the changes in the international economic situation and better attract and utilize foreign capital, many countries have gradually turned from the practice of

[1] Zhang Yi, Ph.D. candidate in Law School at University of International Business and Economics.

[2] See Sebastián López Escarcena, *Indirect Expropriation in International Law*, Edward Elgar Publishing Ltd, p.23 (2014).

directly depriving foreign capital to adopting indirect expropriation as a more concealed form to achieve its economic sovereignty.

The economic sovereignty owned by a country is generally admitted by international law, but if a country adopts excessive regulations thus infringing the legitimate rights and interests of foreign investors, the act may still be regarded as indirect expropriation despite the need of public interests. However, the identification of indirect expropriation is ambiguous. Under what circumstances the intervention of the government's behavior will be identified as indirect expropriation still need to be clarified by further explanation. The question of whether the losses suffered by foreign investors should be compensated by the host country or paid by investors themselves is still uncertain.[3] The boundaries are blurred. In the arbitration practice and treaties signed by different countries, the attempt to clarify the standards for indirect expropriation has been going on for ages. The differences between various standards actually represent the competition between different political powers.[4]

The biggest difference between direct and indirect expropriation lies in the diversification of its forms. On one hand, the host country may take control of the company owned by foreign investors and sell their assets or equities forcibly; on the other hand, the host country may use its economic sovereignty to decide on tax rate, to impose restrictions on imports and exports prices, or to revoke its previous commitments or licenses, etc. Generally speaking, each country has the economic sovereignty to determine its own tax law without the interference of international law. However, if a country is overtaxed compared to other countries, their behaviors are very likely to be deemed as indirect expropriation against investors.[5] In addition, the host country government may also intervene the commercial activities of foreign investors through other means, such as forcibly expelling overseas investors out of their country or freezing their bank accounts, which may bring serious economic losses to their normal operations. These actions do not seem to deprive foreign investors of their property rights, but they definitely affect their normal use of properties. Due to the concealment and diversity of the forms of indirect expropriation, neither international treaties nor arbitration practices have formed a unified standard for indirect expropriation so far due to the different interests between capital importing and exporting states and the regulatory role of the state in cross-border investment activities.[6]

This paper tries to refine the criteria in determining indirect expropriation from the perspective of China. Part I to Part III lists the most representative three standards of indirect expropriation: sole effect standard, sole purpose standard and the standard of both

---

[3] See Yvette Anthony, *The Evolution of Indirect Expropriation Clauses: Lessons from Singapore's BITs/FTAs*, 7(2) Asian Journal of International Law 319, 319-320 (2017).
[4] See Maryam Malakotipour, *The Chilling Effect of Indirect Expropriation Clauses on Host States' Public Policies: A Call for a Legislative Response,* 22(2) International Community Law Review 235, 253 (2020).
[5] See Yu Jinsong, *International Investment Law*, Law Press, p.192 (2018).
[6] See Shen Wei, *Conceptuality or Textuality? Understanding the Notion of Expropriation in the Context of Tza Yap Shum v. The Republic of Peru*, 7(2) Journal of East Asia and International Law 379, 380 (2014).

effect and purpose. Each chapter demonstrates the meaning of the standard and analyzes the advantages and disadvantages through typical cases in international investment arbitration. Metalclad Corporation v. The United Mexican States was one of the most representative cases of the sole effect criterion, which exposed the shortcomings of ignoring the purpose of the host country government. Methanex Corporation v. United States of America was the representative case of the sole purpose criterion, in which the host country could easily use the public purpose as a defense. Later, Rudolf Dolzer put forward the standard of both effect and purpose in his article "Indirect Expropriation: New Development?,"denying the independent application of the effect standard or the purpose standard to identify indirect expropriation and believed that the standard for identifying indirect expropriation was an important issue that deserved further study.[7]

The introduction of the principle of proportionality is a further refinement and improvement of the three previous standards.[8] Alec Stone Sweet was one of the few scholars in the early stages who became aware of the importance of balancing the interests between the state and individuals. In his article "Investor-State Arbitration: Proportionality's New Frontier," he discussed the principle of proportionality in detail. He believed that grasping the ratio of interests between national economic sovereignty and foreign investors was particularly critical in the current historical stage.[9] On the contrary, Dani Mojtaba questioned the proportionality principle in the article "Rethinking the Use of Deference in Investment Arbitration: New Solutions Against the Perception of Bias," arguing that this guiding principle which was derived from administrative law was too general to be applied in practical arbitration because there was still a lack of detailed reference rules to implement.[10] The introduction of the proportionality principle will undoubtedly have a positive effect on the original identification standards, but foreign scholars still take a cautious approach to its application, because the introduction of it cannot solve the disputed identification problem once and for all. By summarizing the application of the principle of proportionality in different investment treaties and arbitration cases, the last part analyzes the advantages and limitations of this principle and introduces the test of appropriateness, necessity and the narrow proportion principle, which is a further refinement and improvement of the indirect expropriation identification standard. Under the background of economic globalization, China, as a main country with a two-way capital flow, is bound to keep up with the improvement of identification standards in international investment. China will make a choice on the issue of indirect expropriation standards and make more detailed rules for the application of it.

---

[7] See Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11(1) New York University Environmental Law Journal 64, 67 (2001).

[8] See Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, p.227 (2012).

[9] See Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4(1) Law & Ethics of Human Rights 48, 50 (2010).

[10] See Dani Mojtaba & Akhtar-Khavari Afshin, *Rethinking the Use of Deference in Investment Arbitration: New Solutions Against the Perception of Bias*, 22(1) UCLA Journal of International Law and Foreign Affairs 37, 37 (2018).

1. The Sole Effect Criterion in Indirect Expropriation

1.1 Meaning and Considerations of the Sole Effect Criterion

As an early theoretical criterion, the sole effect criterion only focuses on the impact of the government's actions on investment, without considering whether the action is for public purposes or social welfare. This standard holds that the "effect" of the measures is the only criterion to determine whether it can be deemed as indirect expropriation, that is, it produces an effect equivalent to nationalization or expropriation and has substantial impact on the intangible or tangible assets.[11] According to this standard, if the behavior of the host country government has the effect of depriving the property rights of foreign investors, it will inevitably be identified as indirect expropriation.[12] This standard reflects the strong demand of developed countries to protect their own overseas capital and the consideration of scholars who tend to balance the benefits between governments and investors. Compared with the purpose standard, this standard can prevent the host country from abusing public purposes and wantonly harming the rights and interests of investors, which is relatively more scientific.

The considerations for the sole effect standard in practice mainly include the severity of the measures and the reasonable expectations of investors. First of all, the severity of the measures includes at least two meanings: on one hand, the serious impact of the government's intervention on investment should reach the effect of direct expropriation; on the other hand, the duration of the intervention must be lasting and irreversible. Because the length of time directly reflects the severity of the control measures, under normal circumstances, if the government intervenes for a long time and causes irreversible harm which is equivalent to direct expropriation, it will be very likely to be identified as indirect expropriation because of the infringement on investors' property rights.[13]

Secondly, investors' reasonable expectations, as an important auxiliary factor, is an important reference for determining whether it constitutes indirect expropriation. The consideration of reasonable expectations is originated from the field of administrative law and then gradually penetrated into the field of international law. The protection of investors' reasonable expectations concerns the vital interests of overseas investors. Once the government makes a certain commitment or promulgates a decree, the administrative counterpart can make plans or take actions based on the trust in the governments' behavior and the resulting interests should be protected. When a prudent investor makes

---

[11] The sole effect criterion was first raised by the Justice of the United States Holmes in 1922. He believed: "If there are too many national laws and regulations, it is more likely to be identified as expropriation." However, the Holmes theory does not clearly define the scope of the so-called "too many regulations," which means that it can only be determined by the discretion of the arbitral tribunal or court.

[12] See Mostafa Ben, *The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law*, 15(1) Australian International Law Journal 267, 280-281 (2008).

[13] See Montserrat Corbella-Valea, *Indirect Expropriation and Resource Nationalism in Brazil's Mining Industry*, 46(1) The University of Miami Inter-American Law Review 61, 68 (2014).

an investment decision, he often conducts a detailed investigation of the host country's economic, political and policy environment, so as to weigh the pros and cons between the returns and risks, and then decide whether to invest overseas.[14] The investors' trust in various policies based on the government's commitments or licenses should be protected by law. If the government's actions violate the investors' reasonable expectations, investors can demand economic compensation on the grounds of indirect expropriation.[15] However, there are still different practices in the relevant arbitration cases on how to judge the degree of intervention that is reasonably expected.

1.2 Arbitration Practice for Sole Effect Criterion

The application of the sole effect criterion in international arbitration practice mainly involves three factors: first, the degree of impact on property rights (such as CME v. Czech case);[16] second, whether it constitutes a reasonable expectation (such as Ruckelshaus v. Monsanto Co.);[17] and third, the duration of influence (such as Wena Hotels v. Egypt case).[18] Metalclad Corporation v. The United Mexican States case involves all the above three considerations and is of great importance to the arbitration practice.

Metalclad Corporation is a waste disposal company of the United States that deals with hazardous materials. In the 1980s, the Mexican federal government authorized COTERIN Company to build a hazardous waste landfill in La Pedrera to dispose the toxic waste. On April 23, 1993, Metalclad signed a six-month optional agreement to acquire COTERIN Company and its licenses. On May 11, 1993, the San Luis Potosí government granted COTERIN the right to use the land for the construction of a hazardous waste disposal plant. Three months later, the National Institute of Ecology approved COTERIN to build a hazardous waste disposal plant, but the project must comply with local regulations. On September 10, 1993, Metalclad acquired COTERIN and purchased the relevant license to build the waste treatment plant. Metalclad claimed

---

[14] See Marina Azzimonti, *The Politics of FDI Expropriation*, 59(2) International Economic Review 479, 479-496 (2018).

[15] See Kristina Dierkes, *Compensation for Indirect Expropriation: Arnaboldi v Italy*, 8(4) European Human Rights Law Review 432, 435 (2019).

[16] See CME Czech Republic B. V. (The Netherlands) v. The Czech Republic, Final Award in UNCITRAL Arbitration Proceedings, March 14, 2003. The tribunal considered indirect expropriations to be those that "may not be evidently deprived in form, but actually have the effect of effectively depriving foreign investors of their property rights."

[17] See Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). In assessing whether Monsanto had any expectation of keeping this information confidential, Supreme Court of the United States held that "legitimate investment expectations are not simply some unilateral expectations or some abstract needs." The leak undermined Monsanto's justified investment expectations in the use and dissemination of these data.

[18] See ICSID Case No. ARB/98/4, Award, para.35 (December 8, 2000). In Wena Hotels v. Egypt, although the hotel management right was deprived by the government for just one year, the arbitral tribunal ruled that this short-term deprivation was sufficient to constitute indirect expropriation. On the whole, there is no uniform standard for the length of time for deprivation of property rights. The most fundamental judgment is to return to whether the actual impact of government measures on investors is permanent and irreversible.

that it would not have acquired COTERIN and started the construction of waste disposal plants without the approval of the Mexican federal and state governments. In the following year, Metalclad made a huge investment in the continuous construction. At this time, the state government questioned the legality of its construction behavior and ordered them to stop construction. Since then, Metalclad and the state government had been trying to solve the problem of normal operation of the hazardous waste disposal plant, but no consensus had been reached. The San Luis Potosí state government issued an ecological decree in September 1997 requiring the protection of cacti in this ecological area and ordered Metalclad's hazardous waste disposal plant to be permanently banned.

Metalclad believed that the ecological decree promulgated by the Mexican government directly interfered with its normal operation and therefore constituted expropriation and brought the claim to the ICSID Arbitration Tribunal on January 2, 1997. The arbitral tribunal first, based on the principle of "transparency" of Article 102(1) of North American Free Trade Agreement (hereinafter referred to as NAFTA) held that all legal requirements related to the purpose of originating, conducting and operating investments under the agreement should be announced to all the affected investors from the other contracting party and there was no room for doubt or uncertainty in these matters. Once the competent central government authorities of a contracting party became aware of their misunderstanding or confusion, it was their duty to ascertain the correct situation in a timely manner so that investors could confirm that their appropriate investment activities were in compliance with all relevant laws.[19] This principle covers the consideration of investors' reasonable expectations in the sole effect standard, that is, the measures taken by the host country government must comply with its domestic laws and relevant investment policies.

The arbitral tribunal also defined that expropriation in NAFTA included not only public, intentional and recognized expropriation, but also converted or unintentional interference with property, even if it did not expressly lead to the deprivation of all investor's property.[20] The arbitral tribunal held that, when determining the nature of the government's actions, it did not need to consider whether the government's decree was for a public purpose, nor did it need to determine whether the host country had benefited from the measure, but that Metalclad had made a huge investment based on reasonable trust. What's more, the waste disposal plant could not operate normally due to the government's actions, which had brought huge losses to its investment and inevitably constituted the deprivation of Metalclad's assets. So, the government's action was finally identified as indirect expropriation, although this measure did not directly occupy or deprive Metalclad Company of its properties. It caused serious interference in the operation of its property rights and interests, and had a huge impact on Metalclad Company's normal business operations, resulting in the same effect as expropriation.

---

[19] See Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, para.102 (2000).
[20] Id., at para.104.

Therefore, based on the impact of the government's action on the investor's economic interests and reasonable expectations, the arbitral tribunal identified the Mexican government's action as indirect expropriation.

1.3 Strengths and Weaknesses of Sole Effect Criterion

The sole effect standard focuses on the examination of the actual infringement of the investors' property rights and interests. When it comes to the burden of proof, investors only need to prove that their property rights have been deprived objectively. Compared with the subjective purpose of the behavior, it is more objective and less controversial in practice. In the Iran-U.S. Claims Tribunal, most cases are based on the sole effect standard, such as the Sea Co, Inc. v. Islamic Republic of Iran Case,[21] the Starrett Housing Corporation v. Islamic Republic of Iran Case, etc.[22] Besides the Iran-U.S. Claims Tribunal, the sole effect criterion is also widely used in Canada, Mexico and other North American countries (such as the Pope & Talbot, Inc. v. Government of Canada Case, the CME v. Czech Republic Case, Corn Products International v. Mexico Case, etc.).[23] The application of this standard greatly protects the interests of capital exporting countries and is more conducive to the development of investment activities by overseas investors in host countries.[24]

However, the standard of sole effect is not so perfect. Some scholars have suggested that "the 'effect-only' criterion of 'effect theory' tends to blur the line between effects caused by two different causes: the concretization of political risk (consequences that investors presume and therefore should bear) and the host country's unforeseen consequences not complied with due process of law (this was caused by the host country and therefore should be held accountable)."[25] It is difficult to calculate with a unified quantitative standard on the property damage caused by the control measures of the host country government to investors. In actual arbitration practice, the "effect" of the

---

[21] See Christopher R. Drahozal & Christopher S. Gibson, *The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State & International Arbitration*, Oxford University Press, p.211 (2007). See also Sea Co, Inc. v. Islamic Republic of Iran, Award No. 531-260-2, 28 Iran-U.S. Cl. Trib. Rep. 198, June 25, 1992. The tribunal stated that "the claimant in Sea Co could have prevailed upon its contention that the Government of Iran expropriated contract rights if it had succeeded in showing that its contract rights were breached and that the breach resulted from 'orders, directives, recommendations or instructions' of the Government of Iran."

[22] Id., at 205.

See also Starrett Housing Corporation v. Islamic Republic of Iran Award No. 314-24-1, 16 Iran-U.S. Cl. Trib. Rep. 112, August 14, 1987. The tribunal stated that "claims based on expropriation and other acts in breach of international obligations are directed exclusively against the Government of the Islamic Republic of Iran."

[23] See Pope & Talbot, Inc. v. Government of Canada, UNCITRAL, Interim Award, June 26, 2000; CME v. Czech Republic, UNCITRAL, Partial Award, September 3, 2001; Corn Products International v. Mexico, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008.

[24] See Shen Wei, *Expropriation in Transition: Evolving Chinese Investment Treaty Practices in Local and Global Contexts*, 28(3) Leiden Journal of International Law 579, 582 (2015).

[25] See Veijo Heiskanen, *The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8(2) The Journal of World Investment & Trade 215, 219 (2007).

government action needs to be judged by the arbitral tribunal based on the submitted evidence to determine whether it has reached the level of "serious." Due to the lack of relevant quantitative standards, subjective assumptions of the judges account for a large proportion of the adjudication results. Similar cases sometimes have different results, making the arbitration results lack impartiality. In addition, unilaterally relying on the effect criterion when determining whether it constitutes indirect expropriation is not conducive to the reasonable regulatory measures adopted by the host country in pursuit of public welfare, which may result in the expansion of the disputed indirect expropriation and further increases the risk of host countries being sued.[26]

1.4 The Preliminary Application of the Effect Standard in China

In the bilateral investment treaties (hereinafter referred to as BITs) signed by China before 2006, the concept and standard of indirectexpropriation were not clearly stipulated.[27] Most Chinese BITs use the expressions such as "nationalization," "other similar measures" in the expropriation clauses, which are too general and ambiguous.[28] For example, in the China-French BIT, it is described as "or any other measures that have the effect of expropriation directly or indirectly."[29] In the China-German BIT, it is described as "the direct or indirect expropriation, nationalization, or any other measures that have the effect of expropriation or nationalization,"[30] and it is stipulated in the China-Australia BIT as "expropriation, nationalization or other measures with the same effect."[31] These may have provided the broadest protection for the investments of foreign investors.[32]

When the above-mentioned foreign investment treaties were signed, China only gave a general description of expropriation, but didn't mention the distinction between direct and indirect expropriation. And the identification criterion is not specific enough. The expropriation clauses are reflected in most of the treaties China has signed with foreign countries, but in the early investment agreements, "measures equivalent to expropriation or nationalization" were mostly used to describe indirect expropriation

---

[26] See supra note 15, at 436.

[27] All the BITs cited herein are available at http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml (accessed on August 6, 2022).

[28] See supra note 6, at 381.

[29] See Article 5 of the China-French BIT.

[30] See Article 4 of the China-German BIT.

[31] See Article 8 of the China-Australia BIT.

[32] See supra note 24, at 582. Some Chinese BITs, such as the China-Germany BIT, touch upon indirect expropriation by stipulating that "investments by investors of either Contracting Party 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 Contracting Party." The China-Mexico BIT expressly refers to expropriation being made directly or "indirectly through measures tantamount to expropriation or nationalization." The term "tantamount to… expropriation" allows a number of tribunals to provide the broadest protection for the investments of foreign investors who may suffer harm by being deprived of their fundamental investment rights. For instance, in Eureko B.V. v. Republic of Poland, the tribunal concluded that "tantamount to deprivation" extends to the frustration of the benefits of an investor's contractual rights.

from the perspective of effect. The ambiguous concept of indirect expropriation is unconvincing in the arbitration practice, which may get both host states and arbitration tribunals into trouble.[33] A single determination based solely on the effect will undoubtedly make the fairness of the arbitral award questioned.[34]

By July 2022, there have been 11 cases involving the BITs signed by China,[35] one of which is the Tza Yap Shum v. The Republic of Peru case,[36] the first Chinese BIT arbitration case.[37] The applicant in this case, Tza Yap Shum (Tza), was born in Fujian, China, and later obtained permanent resident status in Hong Kong. On September 29, 2006, Tza submitted an application for arbitration before the International Centre for Settlement of Investment Disputes (hereinafter referred to as ICSID), claiming that the Superintendencia Nacional de Administracio´n Tributaria (SUNAT) implemented interim measures against the fishmeal company he indirectly owned in Peru, namely TSG Peru S.A.C. (TSG), which constituted indirect expropriation. SUNAT alleged that TSG owed taxes in the amount of 12 million Peruvian nuevos soles (S/.) and froze its bank accounts.[38] The ICSID secretariat registered the case on February 12, 2007, and established an arbitral tribunal in October in the same year. Instead of providing the arbitral tribunal with the specific regulations on indirect expropriation, the case the China-Peru BIT involved just gave out a general clause about it, stipulating that "Neither Contracting Party shall expropriate, nationalize or take similar measure against investments of investors of the other Contracting Party in its territory" and figuring out the exceptions that don't constitute expropriation when four conditions are satisfied.[39] When determining the effect of the measures, the arbitral tribunal took two factors into account: severity and duration. The tribunal held that these measures were implemented without prior notification to TSG. SUNAT knew or should have known how the company was financed and operated, and further understood that the bank's retention measures

---

[33] See supra note 24, at 582.

[34] See Prabhash Ranjan, *Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay*, 9(1) Asian Journal of International Law 98, 98-124 (2019).

[35] The above eleven cases are as follows: Beijing Shougang and others v. Mongolia, Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium, Sanum Investments Limited v. Lao People's Democratic Republic, Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, Señor Tza Yap Shum v. The Republic of Peru, Ansung Housing Co., Ltd. v. People's Republic of China, Zhongshan Fucheng v. Nigeria, Jinlong Dongli Minera International SA de CV v. United Mexican States, Alpene Ltd v. Republic of Malta, Sanum Investments Limited v. Lao People's Democratic Republic, Hela Schwarz GmbH v. The People's Republic of China.
All the cases cited herein are available at https://www.italaw.com/browse/international-investment-agreement-name?field_case_type_tid%5B%5D=1090&field_case_treaties_tid=1720 (accessed on August 7, 2022).

[36] See Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6.

[37] See supra note 24, at 583.

[38] See Shen Wei, *Bilateral Investment Treaties-Indirect Expropriation-Taxation-Interim Measures*, 108(2) The American Journal of International Law 315, 315 (2014).

[39] See Article 4 (1) of the China-Peru BIT. "Neither Contracting Party shall expropriate, …unless the following conditions are met: (a) for the public interest; (b) under domestic legal procedure; (c) without discrimination; (d) against compensation."

were bound to hit TSG's core operating capabilities.[40] In the analysis of the nature of SUNAT's measures, the tribunal had considered the arguments of the parties and the legal precedents which indicated that the effects of the measures on investment must be of a serious nature.[41] According to TSG's financial statements, even as the company itself sought protection from bankruptcy proceedings, the company's net sales fell drastically from its average because of the interim measures by SUNAT.[42] But the tribunal didn't give a quantity threshold to accurately measure the severity of the measures.[43] When it came to the duration of the measures, the tribunal also considered that the effects of the measures on investment must be permanent, or at least not temporary or ephemeral. It was important to highlight that the previous precautionary measures imposed by SUNAT on January 28, 2005, were ordered for an initial period of one year. The measures were extended for an additional two years when the tax debtor's claim was dismissed, and in practice it appeared that the extension was easily granted.[44] In conclusion, the tribunal considered that the previous precautionary measures resulted in the indirect expropriation of the claimant's investment and since the investor was not compensated, the expropriation was in violation of Article 4 of the China-Peru BIT.[45] It can be seen that "a taking does not have to be complete or full but must 'have the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefits of property even if not necessarily to the obvious benefit of the host State'."[46] Besides the effect of the measures, the tribunal also considered the "public interest" factor, the author will discuss it specifically in the second part of this article.

This is the first time that a Chinese BIT is applied by the ICSID tribunal. Unfortunately, the expropriation clauses therein have not been fully defined or arbitrated. With the continuous expansion of China's foreign investment, expropriation (especially the identification of indirect expropriation) has gradually become a key issue in the Chinese BITs.[47] The first time China made clear provisions on indirect expropriation was in the China-India BIT signed in 2006. Ad Article 5 of the protocol of the agreement made clear provisions on expropriation and further refined the classification of expropriation. Besides the obvious direct expropriation measures that directly deprive and transfer the ownership of the property, it also includes measures similar to nationalization or expropriation, such as the inability to obtain investment returns or investment income

[40] See Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, Award (July 7, 2011), para.158.
[41] Id., at para.159.
[42] Id., at para.161.
[43] See supra note 6, at 384.
[44] See supra note 40, paras.163-164.
[45] See supra note 40, para.170.
[46] See Metalclad Corporation v. Mexico, ICSID Case No. ARB (AF)/97/1, Award (August 30, 2000), para.103. (Quoting from Shen Wei, see supra note 24, at 586).
[47] See supra note 38, at 318.

for investors, namely indirect expropriation.[48] At the same time, the BIT takes into account "the economic impact of the measure or a series of measures."[49] In addition to "without discrimination;" and "for the public interest" mentioned in the China-Peru BIT, the China-India BIT also adds the consideration of "distinct, reasonable, investment-backed expectations."[50] This is a major progress in the formulation of identification rules, and it is also the general trend of the gradual refinement of the identification standards in international investment treaties. However, there is no further clear explanation for the scope of reasonable expectations, which may lead to the expanded interpretation of the concept and disputes in arbitration. In order to reduce disagreements, the China-Uzbekistan BIT pointed out that the reasonable expectations of investors are limited to the specific commitments of the host country government.[51] Later in Article 4 of Annex 13 in the China-New Zealand FTA, a non-exhaustive list of the form of the government's specific commitments is stipulated, including agreements, licenses or other binding legal documents.[52] It can be seen that if the specific commitment made by the host country government is a written agreement or license for the investor, the investor has reason to carry out investment activities based on the reasonable expectation on the government's behavior. But the investors cannot expect the laws of the host country to remain stable throughout. In addition, due to the general applicability of laws, the commitments which are too broad cannot become the basis for investors' reasonable expectations.

Another case which involves the interpretation and the application of the Chinese BIT is the Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium case.[53] From November 2007 to July 2008, China Ping An Life Insurance Co., Ltd. and China Ping An Insurance (Group) Co.,

---

[48] See the China-India BIT, Ad Article 5 of the "Protocol to the Agreement between the Republic of India and the People's Republic of China on Promotion and Protection of Investments."
On the signing of the China-India BIT, the undersigned representatives have agreed on the following provisions in the "Protocol to the Agreement between the Republic of India and the People's Republic of China on Promotion and Protection of Investments," which constitute an integral part of the China-India BIT.

[49] Ibid.

[50] Ibid.

[51] See real-time data from Ministry of Commerce on List of BITs Signed by China with Foreign Countries, http://tfs.mofcom.gov.cn/article/h/au/201111/20111107819511.shtml (accessed on July 27, 2022). Article 6 of the "Agreement between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments" stipulated that "the extent to which the measure or the series of measures cause damage to reasonable investment expectation of investors of the other Contracting Party: such expectation arises from the specific commitments made by one Contracting Party to the investors of the other Contracting Party."

[52] See real-time data from Ministry of Commerce on Regional and Subregional Economic Cooperation, http://gjs.mofcom.gov.cn/aarticle/af/ak/200804/20080405464190.html (accessed on July 27, 2022). Also see Article 4 (b) of Annex 13 of the China-New Zealand FTA stipulated that "a deprivation of property shall be particularly likely to constitute indirect expropriation where it is either: in breach of the state's prior binding written commitment to the investor, whether by contract, license, or other legal document."

[53] See Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium, ICSID Case No. ARB/12/29.

Ltd. (Ping An) acquired the shares of Fortis SA/NV (Fortis) and the shareholding ratio reached 4.18%. However, within less than a year after Ping An invested in Fortis, the financial crisis swept the world, causing Ping An's assets to shrink substantially. In order to save Fortis, the Belgian government implemented a series of measures without the approval of the general meeting of shareholders. And the scope of the later compensation plan was limited to EU countries. Ping An, as the largest shareholder, was excluded.[54] On September 7, 2012, Ping An filed an arbitration before ICSID with the China-Belgium BIT (1986 BIT) as the substantive basis and with the China-Belgium BIT (2009 BIT) as the procedural basis,[55] claiming that although the splitting measures taken by the Belgian government did not change the proportion of Ping An's shares in Fortis, the actual value of its equity interests was substantially impaired, which had the equivalent effect to indirect expropriation.[56] At the same time, as the largest shareholder, Ping An was not compensated without discrimination, thus breaching the terms of the 1986 BIT.[57] The tribunal held that the essential difference between the 1986 BIT and the 2009 BIT was that a much wider range of disputes (not limited to the amount of compensation for expropriation and analogous measures) might be submitted to ICSID arbitration under 2009 BIT.[58] The effect of Article 10(2) of the 2009 BIT is that any dispute or claim concerning an investment which is already under judicial or arbitral process before December 1, 2009 is to be settled according to the 1986 BIT, which means that such claims in international arbitration would continue to be limited to disputes relating to the amount of compensation for expropriation, etc. Thus, on April 30, 2015, the ICSID tribunal finally ruled that it did not have jurisdiction over this case. The arbitral tribunal did not respond to whether the Belgian government's actions constituted indirect expropriation, leaving this issue under considerable controversy. But this is one of the few cases that an overseas investor in mainland China seeks dispute resolution in ICSID invoking the Chinese BIT, and to a certain extent, the effect standard is applied by the claimant to clarify whether it constitutes indirect expropriation.

2. The Sole Purpose Criterion in Indirect Expropriation

2.1 Meaning and Considerations of Sole Purpose Criterion

The introduction of the police powers reflects the position under general international law.[59] If the measures are taken to realize the public interest, there is no need to compensate the investors.[60] As early as the 1960s, Professor Christie had mentioned in his published paper that if the control measures implemented by the host country

[54] See Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium, ICSID Case No. ARB/12/29, Award (April 30, 2015), paras. 51-65.
[55] Id., at para.131.
[56] Id., at para.62.
[57] Id., at paras.79-85.
[58] Id., at para.204.
[59] See supra note 34, at 110.
[60] See supra note 34, at 110.

government were for public purposes and were in compliance with legal norms, the purpose could be used as a defense for the government to implement excessive control measures.[61]

From the practice of the arbitral tribunals, the sole purpose standard mainly includes the following considerations when determining the "purpose." Professor Yves and Professor Stephen first summed it up as follows: the duration of the control measures and the discriminatory acts.[62] First, the duration of the host country government's control measures. Temporary control measures are generally not recognized as indirect expropriation. For example, in the CMS v. Argentina case, the most controversial issue was the duration of the government's actions. The complainant believed that the government's actions had lasted for a long time and had seriously interfered with its normal business activities, while the respondent believed that this measure was a temporary action and did not have the effect of expropriation.[63] In the end, the arbitral tribunal held that the measure had been in place for five years, which exceeded a reasonable period required to respond to the crisis and was therefore considered as a permanent measure, constituting indirect expropriation.

Second, whether the government has committed discriminatory acts. If the government acts against a specific investor, it is likely to be sued for indirect expropriation. For example, in Sea-Land Service Company case, the tribunal held that: "If it is to be deemed as expropriation, it must at least meet the following requirements: the implementation of the government's regulatory measures is targeted and intentional, and the purpose is to make Sea-Land lose the ownership and right of its investment."[64] The tribunal held that there was no evidence that the conduct was deliberately targeted at Sea-Land and maliciously obstructed its operations. So, it could not be deemed as indirect expropriation. It can be seen that even under the guise of "public interest purpose," the government's discriminatory behavior may still be identified as indirect expropriation.

In addition, the commitment behavior of the host country government is also an important auxiliary factor to review its purpose. If the government makes a specific commitment and the investors conduct activities based on the principle of trust, then the host country government has the responsibilities and obligations to fulfill their commitments, such as licenses, approvals, etc. Once violated, it is likely to be identified as expropriation. Public purposes generally include the following items due to international law: environmental protection, human health, public order, and taxation. It is easier to reach consensus on these types of public interests in academia or in arbitration

---

[61] See George C. Christie, *What Constitutes a Taking of Property under International Law*, 38(1) British Yearbook of International Law 307, 307 (1962).

[62] See L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 13(1) ICSID Review 79, 86 (2005).

[63] See CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision, para.101 (2007).

[64] See Max Gutbrod & Steffen Hindelang et al., *Protection against Indirect Expropriation under National and International Legal Systems*, 1(2) Göttingen Journal of International Law 16, 16 (2009).

practice, but the purpose of government actions is diverse and subjective, so the standard is still controversial in practice.

2.2 Arbitration Practice for Sole Purpose Criterion

The first application of the sole purpose criterion was in the case Methanex Corporation v. United States of America.[65] It is the first and the most representative case in which the arbitral tribunal used the purpose standard to judge whether the conduct of the host country constituted indirect expropriation. NAFTA tribunal's first application of the sole purpose criterion in the Methanex Case has had an important impact on the later arbitration practice. In the case Feldman v. Mexico in 2012, the ICSID tribunal also adopted the same standard in determining whether the Mexican government's refusal to refund the excise tax on cigarettes constituted indirect expropriation.[66]

As a Canadian investor, Methanex was mainly engaged in methanol production and supplied methanol to MTBE (methyl tertiary butyl ether) producers in the United States (methanol was one of the main raw materials for the production of MTBE). But later, the California government issued a ban on gasoline containing MTBE, and only ethanol could be used as gasoline additive, which was almost entirely sourced from the United States. Methanex believed that the actions of the government of the United States were in fact local economic protectionism, claiming that its actions violated the provisions of Article 1110 of NAFTA on expropriation, and sued the government of the United States for compensation in 1999.[67] Methanex claimed that the executive order issued by the state of California had substantially deprived it of its investment in California. The decree to transfer its market share in California to the domestic ethanol industry was not for public purposes, instead, it should be deemed as indirect expropriation.[68]

The tribunal held that the control measures imposed by the host government should not be considered as expropriation if it was for public purpose. In this case, Methanex cited Article 1139 of NAFTA to demonstrate the definition of investment, which covered any forms of business profit, both tangible and intangible, such as Methanex's California

---

[65] See NAFTA Chapter Eleven Arbitral Tribunal 44 I.L.M. 1345 (2005), http://1.next.westlaw.com/Document/12da0c6c54f3611dca51ccfdfa1ed2cd3/View/FullText.html (accessed on July 27, 2022).

[66] See ICSID Additional Facility Case No. ARB(AF)/99/1, https://1nextwestlaw.com/Document/110b717d4f0a763f0c0440003ba0d6c6d/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Search)&userEnteredCitation=2003+CarswellOnt+4929 (accessed on July 28, 2022).

[67] See First Partial Award in a NAFTA Arbitration under the UNCITRAL Arbitration Rules, https://1.next.westlaw.com/Document/I7B3A952CD0E5405FBCAA51BC64DE5D9A/View/FullText.html (accessed on July 28, 2022).

As to Article 1110 of NAFTA, Methanex alleged that the measures conducted by the United States would end the business of Methanex-US in selling methanol for use in MTBE in California, would contribute to the extended closure of the Fortier plant, and would therefore constitute a substantial taking of the Methanex-US and Methanex-Fortier business and of Methanex's investment in those companies (Para.35 of the Original Statement of Claim).

[68] Id., at paras.22-34.

market share and goodwill.[69] Methanex claimed that such arbitrary and discriminatory "encroaching expropriation" was actually equivalent to indirect expropriation. However, the arbitral tribunal held the view that if the act was carried out by the state through due process for public purposes and it was applicable to unspecified majorities, which meant it was not discriminatory, then the government should not be responsible for the compensation of the damages that the investors had suffered. If the government had made a specific commitment, it was obliged to comply. But in this case, the government of the United States didn't make any specific commitment to Methanex. The government's actions of carrying out the orders to stop the use of MTBE was solely out of the concern for environmental hygiene and human health. The decree was generally applicable, it was not a discriminatory act against Methanex and Methanex also admitted that the decree had been made through local due process, so the arbitral tribunal finally made a ruling in favor of the government of the United States and did not identify the act as indirect expropriation.[70]

It can be seen that, in this case, the arbitral tribunal made a judgment on the case based on the sole purpose standard and did not consider the damage caused by the government's regulatory measures to investors as a factor to expropriation. It is obvious that the right to protect public interests has higher value, so the purpose of the behavior is an important criterion for judging whether it constitutes indirect expropriation.[71]

2.3 Strengths and Weaknesses of Sole Purpose Criterion

The sole purpose standard is the product of coordinating the right between the host country's economic sovereignty and the overseas investors, and it is also the product of the long-term game between developing countries and developed countries. This standard attempts to seek a better balance between them. Professor Weston believed that when determining an indirect expropriation, the original purpose of the government's implementation of the measure should be taken into consideration.[72] It can be seen that the sole purpose standard has been partially applied in arbitration practice.[73] The arbitral tribunal has gradually taken into account the protection of a country's economic

---

[69] Id., at para.87. "As to the former provision, it is contended that Methanex has failed to identify an 'investment' that could be expropriated; and a customer base or goodwill cannot qualify as an investment under Article 1139(g)&(h) NAFTA; an expectation of future profits from methanol sales cannot constitute an investment; and expectations are not property rights capable of expropriation."

[70] See Final Award on Jurisdiction and Merits in a NAFTA Arbitration under the UNCITRAL Arbitration Rules, https://1.next.westlaw.com/Document/IA7D712391CE74AEEA266389E6AD8C96E/View/FullText.html (accessed on July 28, 2022).

[71] See Max Gutbrod & Steffen Hindelang, *Externalization of Effective Legal Protection against Indirect Expropriation*, 7(1) The Journal of World Investment & Trade 59, 59-78 (2006).

[72] See Burns H. Weston, *"Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation"*, 16(1) Virginia Journal of International Law 103, 115-117 (1975).

[73] After the criterion had been applied in the Methanex case, it was adopted by the arbitral tribunal in some later cases, such as Compañia del Desarrollo de Santa Elena S. A. v. Republic of Costa Rica, Saluka Investment B.V. v. The Czech Republic.

sovereignty and public interests, and supports the country's appropriate exercise of "police power" to achieve its own economic and social interests. But there are still some cases in which the arbitral tribunal doesn't take the governments' purpose as the necessary factor.[74]

Although the sole purpose standard recognizes the insufficiency of the effect standard and tries to balance the interests between the states and investors, but the sole purpose standard may be subjective, and it is difficult to form a relatively certain determination method in practice, thus making it very difficult for the arbitral tribunal to determine the true nature of the government's actions.[75] In addition, there are also inconsistencies in the application of this standard. When determining whether a country's expropriation is legal, the public purpose factor has been taken into account. If the expropriation is legal, it must meet the public purpose. In this way, all indirect expropriations can meet this standard, which is logically self-contradictory.[76] When determining whether the measures comply with public purposes, different decisions are made due to different situations in different countries. When investors analyze the situation based on the information obtained from the state, they are comparatively a vulnerable group. It is difficult for investors to use fragmented information to estimate the purpose of the host government's behavior, and the government is very likely to arbitrarily damage the rights and interests of investors by its dominant position.[77] It can be seen that the application of this standard can easily lead the host country government to arbitrarily implement regulatory measures with the public purpose as a defense, thereby harming the interests of overseas investors and lacking impartiality.

Since the judgment of the "purpose" in the sole purpose standard is very subjective, the arbitral tribunal is prone to make different judgments due to its own value orientation, so the application of the purpose standard in the agreement is appropriately limited, and the effect criterion is re-referenced. The two items together become the factors to consider for the determination of indirect expropriation and thus the standard of both effect and purpose has been developed.

2.4 The Preliminary Application of the Purpose Standard in China

Although the sole purpose standard has many of the above limitations, its introduction reflects the host country's efforts to protect national sovereignty and China

---

[74] In some other cases, such as Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana, Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, the arbitral tribunal held that, "Although government intention is weighed in determining whether a government measure is an expropriation, state intention is not a necessary requirement."

[75] See Omar Chehade, *The Evolution of the Law of Indirect Expropriation and its Application to Oil and Gas Investments*, 9(1) Journal of World Energy Law & Business 64, 69-71 (2016).

[76] See supra note 6, at 379.

[77] See Xu Chongli, *Balance of Interests and Recognition and Compensation for Indirect Expropriation of Foreign Capital*, 30(6) Universal Law Review 28, 32 (2008). Xu believes that the standard overemphasizes the priority of social and public interests, which may condone the abuse of foreign investment management rights by the host country government and cause injustice to foreign investors.

has gradually adopted the "purpose of government action" as an important factor when signing the outbound investment agreements with foreign investors. For example, in the China-New Zealand BIT signed in 1988, the expropriation is required to meet the "purpose authorized by law."[78] Most of the Chinese BITs stipulate it as "the public interest(s)," such as the China-Hungary BIT (1991),[79] the China-Tunis BIT (2004),[80] the China-Finland BIT (2004),[81] etc. There are also a few Chinese BITs which use the expression of "public purpose," like the China-Denmark BIT (1985)[82] and the China-Canada BIT (2012).[83] It also appears in some other different expressions such as "security and public interest" in the China-Pakistan BIT (1989),[84] "public or national interest" in the China-Chile BIT (1994),[85] "social and public interest(s)" in the China-Mongolia BIT (1991)[86] and the China-Albania BIT (1995).[87] These provisions are relatively broad, giving the arbitral tribunal a wide range of discretion. Later in 2006, Article 5 of the China-India BIT Protocol further stipulates the factors that should be comprehensively considered when determining the nature of the measure, including the economic impact of the measure, whether it is discriminatory to foreign investors and whether it obviously exceeds the investors' reasonable expectations.[88] It also takes into account the public purpose pursued by the government in its actions, which means that if the host country government's regulatory behavior is the exercise of state regulatory power in accordance with the law and is based on legitimate public purpose, even if improper consequences are caused, it may not constitute expropriation.

As an important identification factor in indirect expropriation, public interest is also the most controversial one. Public interest is often used as a defense against unlawful expropriation, and it is one of the four well-recognized elements to justify the expropriation measures by the state.[89] During the process of identification, it is very necessary to examine the legitimacy and purposefulness of the government's actions. This

---

[78] See Article 6 (1) of the China-New Zealand BIT.
[79] See Article 4 (1) of the China-Hungary BIT.
[80] See Article 4 (1) of the China-Tunis BIT.
[81] See Article 4 (1) of the China-Finland BIT.
[82] See Article 4 (1) of the China-Denmark BIT.
[83] See Article 10 (1) of the China-Canada BIT.
[84] See Article 4 (1) of the China-Pakistan BIT.
[85] See Article 4 (1) of the China-Chile BIT.
[86] See Article 4 (1) of the China-Mongolia BIT.
[87] See Article 4 (1) of the China-Albania BIT.
[88] See supra note 48. Also see Article 5 of the China-India BIT: "Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation." The consideration of the "purpose" of the indirect expropriation that the regulatory actions implemented by the host country must be expressly or implicitly aimed at foreign investors. The duration is also considered to be one of the components of the "purpose" of the government's action.
[89] See supra note 24, at 587. Under customary international law, the well-recognized conditions include four elements, namely, the expropriation must be (i) for the public interests, (ii) pursuant to domestic legal procedure, (iii) non-discriminatory, and (iv) with compensation. These four elements consistently appear in almost all Chinese BITs except a few BITs such as the China-UK BIT and the China-Italy BIT.

can also become an important confrontation point for the government against expropriation. At present, neither China's domestic laws nor foreign investment treaties have defined what public interest means, which will bring many restrictions on the exercise of host countries' economic sovereignty.[90]

In the first Chinese BIT arbitration case: Tza Yap Shum v. The Republic of Peru, the respondent argued that the administration and collection of taxes was part of the power of the tax authorities.[91] Thus, SUNAT's measures were legitimate regulatory activities of the state and therefore did not give rise to its international liability.[92] The argument made by SUNAT was quite a restrictive and narrow method that required Tza to prove an expropriation purpose. This is a typical purpose-oriented approach emphasizing on the host state's intention or motivation to expropriate.[93] When determining the nature of the host state's measures, besides the "the public interest" mentioned in the China-Peru BIT, the tribunal further adopted the FTA between the Government of the People's Republic of China and the Government of the Republic of Peru (China-Peru FTA) to clarify its meanings, which includes "public health, safety and the environment,"[94] that is, a state's regulatory powers may be reasonably justified in the protection of the public welfare mentioned above.[95] When determining whether the public purpose of the government's regulatory measures was sufficient to constitute a defense to the determination of indirect expropriation, the tribunal cited an author's explanation: "Non-arbitrary commitments facilitate the acceptance of the inevitable sacrifice of private interests in pursuit of public goals,"[96] and further examined whether the government's measures were non-discriminatory and consistent with due process.[97] Although the public purpose is often cited by states as the defense against unlawful expropriation, only by assessing the purpose of states is definitely not enough for the tribunal's final decisions.[98] There are no definitive rules that provide full certainty to states as to when a measure will be a regulatory taking or not. The case-by-case approach which currently subsists will continue as the way to identify what is an indirect expropriation.[99] It can be seen that no matter in Chinese BIT treaties or related BIT arbitration cases, the mere "public purpose" expression cannot provide valuable guidance for arbitration practice.

---

[90] See Zhang Guang, *Legislative Design of Public Interest Protection Clauses in Sino-foreign BITs*, 30(3) International Economic and Trade Exploration 85, 85-87 (2014).
[91] See Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6.
[92] See supra note 40, para.172.
[93] See supra note 6, at 388.
[94] See Article 6 of Annex 9 in the China-Peru FTA, http://fta.mofcom.gov.cn/bilu/annex/bilu_fujian9_en.pdf (accessed on August 9, 2022).
[95] See supra note 40, para.178.
[96] See supra note 40, para.181.
[97] See supra note 40, para.95.
[98] See supra note 4, at 261.
[99] See Courtenay Barklem & Enrique Alberto Prieto-Ríos, *The Concept of "Indirect Expropriation," its Appearance in the International System and its Effects in the Regulatory Activity of Governments*, 11(21) Civilizar 90, 90 (2011).

The definition of public interest is roughly divided into two categories in the international society. One is the generalized form represented by the United States. For example, the United States stipulates in Annex (B) of its Model BIT that, unless under special circumstances, a contracting party's non-discriminatory measures taken for public interest purposes such as environmental protection and human health shall not be considered as indirect expropriation.[100] The other is a detailed enumeration form represented by Thailand, Japan, Korea, etc.[101] For example, Article 37 of the Thai Constitution first stipulates that citizens have the freedom of speech, and then lists some exceptions to restrict the freedom, that is, for the protection of the public interest, such as maintaining national public safety, protecting the honor of the country and other people, maintaining the peaceful life of the citizens, and protecting the physical and mental health of the people.

Although different countries differ in the definition of public interests due to their own political, economic and cultural backgrounds, the representative ones that are recognized by most countries can promote consensus among countries and reduce unnecessary dispute. For example, the natural environment on which a country depends is undoubtedly the foundation of a country's existence. If the environment is severely damaged, it will directly endanger the lives of citizens and cause irreparable huge losses to a country. Therefore, environmental protection, as a public interest, can be recognized by most countries. In addition, public health, as the basis of the existence of human rights in international law, is the minimum protection for people, and it is also the most important embodiment of a country's humanity. Therefore, the life and health of citizens is undoubtedly an indispensable category of public interests. However, when it comes to national security and political security, there is considerable controversy. Due to the hidden characteristics of a country's politics, many countries often refuse to provide relevant evidence in arbitration on the grounds of protecting their state secrets, which is unfavorable for the protection of the rights of investors.[102]

3. The Combination of Effect and Purpose Doctrine in Indirect Expropriation

3.1 Meaning and Consideration Factors of Adopting Both Effect and Purpose Doctrines

The management power of the host country refers to the power owned by a country to manage its domestic affairs and its scope is generally limited to economic affairs

[100] See Article 4 (b) of Annex (B) in 2012 U.S. Model BIT.

[101] Article 3 of the Land Acquisition Law in Japan enumerates the scope of public interests in detail, mainly including the construction of road education facilities, hospitals, social welfare facilities and natural resource protection, a total of 35 items. Article 2 of the Korean Land Acquisition Act lists matters involving public interests as follows: (1) related to national defense and military undertakings; (2) construction projects such as railways and highways; (3) office spaces established by the state or local common groups, etc.

[102] See supra note 77, at 32-34.

within its own country.[103] A host country has the right to control its capital market and capital flow by setting the qualifications for natural persons and enterprises participating in commercial activities.

Driven by the wave of economic globalization at the end of the 20th Century, transnational investment activities began to enter a stage of high-speed development, correspondingly promoting the rapid development of international investment liberalization.[104] At this time, the United States adopted a more open foreign investment policy to expand its economic power and develop foreign investment. This also represented the common practice of most developed countries during this period. But at the same time, they also required developing countries to open their doors. In order to adapt to the liberalization policies implemented in the investment market and attract more investment from developed countries, developing countries had begun to loosen its national controls. International Investment Agreements (hereinafter referred to as the IIAs) concluded between countries gave investors a wide range of rights but ignored the interests of the host country.[105] This inequality goes against the balance of interests between the host country and the investors. The excessive unilateral liberalization of foreign investment legislation and policies by capital exporting countries to maintain their own overseas investment is likely to threaten the economic sovereignty and economic security of the host country.

In this regard, scholars have gradually realized that the principle of sustainable development must be adhered to the determination of indirect expropriation and the one-sided pursuit of economic value while ignoring the protection of the environment and social welfare will inevitably bring about economic recession.[106] On one hand, overseas investors must abide by the regulations on sustainable development when they conduct business activities to obtain benefits. On the other hand, the international investment dispute settlement mechanism should also obey the rules of sustainable development and make reasonable judgments between the interests of overseas investors to promote the harmonious and sustainable development of the international investment environment.[107]

Dolzer points out the weakness of the "sole effect doctrine," stating that "the proponents of the 'sole effect doctrine' would have to explain why international law

---

[103] See Sukma Dwi Andrina, *Towards a Future Investment Treaty: Lessons from Indirect Expropriation Cases due to Measures to Protect the Environmental and Public Health*, 28(2) European Business Law Review 245, 252-253 (2017).

[104] See Wissem Belhadj & Mohamed Adel Dhif et al., *Effects of Openness in Services Sectors on Tunisian Economy under the DCFTA with the EU: Border Liberalisation and Investment Liberalisation*, 14(6) International Journal of Trade and Global Markets 525, 527-529 (2021).

[105] 2004 Canada Model BIT and 2012 U.S. Model BIT both propose that regulatory actions cannot target at certain investor and when the expropriation is implemented, the relevant investors who have been infringed should be compensated.

[106] See Michael G. Parisi, *Moving Towards Transparency? An Examination of Regulatory Taking*, 19(1) International Law Review 383, 418-419 (2005).

[107] See Maite Cubas-Diaz & Miguel Angel Martinez Sedano, *Measures for Sustainable Investment Decisions and Business Strategy – A Triple Bottom Line Approach*, 27(1) Business Strategy and the Environment 16, 17 (2018).

protecting aliens should require a higher standard of protection than the major domestic legal orders."[108] The combination of both effect and purpose standards is a reasonable fusion of the two standards. It draws on the advantages of both elements, which better balances the interests between the host state and investors, reduces conflicts and disputes in international investment and thus has a high degree of acceptance.[109] So it is gradually applied in various arbitrations in the court.[110]

According to the standard of both effect and purpose, the formation of indirect expropriation requires not only the substantial damages caused by the host country government's behaviors, but also the unjustified purpose of the government's behaviors. The European Convention on Human Rights takes into account the factors of both effect and purpose when defining indirect expropriation. Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms clearly confirms the ownership of each person's private property and defines the legal circumstances of the state's deprivation of private property, which must be in the public interest and abide by the law and the principles of international law.[111] If the behavior of a government has not yet caused investors to lose complete control over their property and only causes a slight interference effect, the behavior is a reasonable activity by the host government to exercise the country's economic sovereignty; on the contrary, even if the behavior achieves the above effect, if it is not based on public interest or purpose, it is necessary to further seek a balance between the national public interest and private property rights, and thus lead to the introduction of the principle of proportionality.[112]

The application of both effect and purpose standard in practice is mainly due to the following considerations. Firstly, it is important to analyze the severity of the effect. It is

---

[108] See supra note 7, at 91.

[109] See supra note 77, at 37. Xu mentioned that: "At present, there are still differences in international arbitration practice: in the new century, some international arbitral tribunals continue to adhere to the 'single effect standard', such as the Metalclad v. Mexico case and the Santa v. Costa Rica case in 2000 through ICSID additional facilitation program, and the Vivendi v. Argentina case in 2007; there are also a few international arbitral tribunals adopting the 'single nature standard', such as the Methanex v. The United States case awarded by the ICSID tribunal in 2005 and the Saluka v. Czech case awarded in 2006; at the same time, there are more and more international investment arbitration awards claiming that when determining indirect expropriation, it should adopt both the effect and nature standards, such as the Tecmed v. Mexico case and the LG&E v. Argentina case."

[110] In international investment practice, the "effect and purpose standard" has been applied in more and more arbitration cases, such as the LG&E v. Argentina case (the arbitral tribunal held that when examining whether Argentina's actions constituted indirect expropriation, it should not only examine whether it had the effect of indirect expropriation, but also whether it had the subjective purpose of depriving investors of the right to control), the Fredin v. Sweden case, the Tecmed v. Mexico case and so on.

[111] See Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[112] In the case Continental Casualty v. Argentina, the arbitral tribunal held that the defendant's measures did not affect the plaintiff's normal business activities in terms of effect, nor did it nationalize its business, and its purpose was also in the public interest, and there was no imbalance between the purpose and the measures, but it was beneficial to promote economic recovery. Therefore, the arbitral tribunal held that the defendant did not violate the provisions of the Argentina-US BIT and did not constitute indirect expropriation.

necessary to deeply examine whether the control measures implemented by the host country government have deprived overseas investors of their property ownership, and the duration of it, to judge the actual effect of the control measures comprehensively. Secondly, it is necessary to further examine the nature and purpose of the government's actions. If the government's actions are for the protection of public interests, it may not be deemed as indirect expropriation and thus be exempted from compensation.[113] Finally, it can be seen that in the application of this standard, the "effect" factor is the preliminary determination rule and the "purpose" factor is the exclusion one. The standard is actually a reasonable combination of the preliminary determination rule and the exclusion rule.

3.2 Arbitration Practice of Adopting Both Effect and Purpose Standards

From the perspective of international investment legal practice, the European Court of Human Rights (hereinafter referred to as the ECtHR) has always supported the "combination of both effect and purpose standards" in the determination of indirect expropriation,[114] based on the provisions of Article 1 of the First Protocol of the European Convention on Human Rights.[115] Although ICSID arbitral tribunals also began to gradually introduce the same standard in the early 2000s, such as the LG&E v. Argentina case,[116] the Waste Management Inc. v. United Mexican States case,[117] it was first adopted in Pinnacle Meat Processors v. United Kingdom case in 1998 by the ECtHR.[118] Pinnacle Meat Processors v. United Kingdom is a representative case in the determination of indirect expropriation. Pinnacle was a meat processing plant just built in the UK, mainly engaged in beef head deboning and meat processing activities. Although it was small in scale, it had a high degree of specialization and had provided its beef skull meat to sellers for processing and manufacturing for a long time. The deboned beef would be transferred to all parts of the world by international suppliers. Therefore, Pinnacle had invested a large amount of money in obtaining relevant licenses for the meat processing activities and the construction of specialized plants. However, the British government issued a ban on March 29, 1996, which stipulated that for the sake of preventing the occurrence and

---

[113] See supra note 77, at 37. Xu believes that the issues involved should not be contradicted. First, it can be determined that the public purpose is closely related to the identification and compensation standards of indirect expropriation. Second, different conclusions will be drawn when viewing public interests from different perspectives. None determines whether indirect expropriation is legal or not, and the size of public interest determines the determination of indirect expropriation and the choice of compensation standards.

[114] See supra note 77, at 33.

[115] See Article 1 of the First Protocol of the European Convention on Human Rights: "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[116] See LG&E Energy Corporation, LG&E Capital Corporation. & LG&E International Inc. v. The Argentine Republic, ICSID Case No. ARB/02/1, Decision on liability of October 3, 2006.

[117] See Waste Management Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3. Final Award of April 30, 2004.

[118] See Pinnacle Meat Processors Co. v. the United Kingdom, Eur. Court H.R., No. 33298/96, Decision, First Section (1998).

spread of mad cow disease and protecting human health, the production and sale of this kind of meat was prohibited. Pinnacle believed that the promulgation of the ban directly made its entire cattle deboning activity illegal, which seriously interfered with its normal business operations and harmed its economic interests. Pinnacle claimed that the British government's ban constituted indirect expropriation and sued the British government to the ECtHR for the compensation of the losses for transferring the beef outside the stockpile.

The European Commission of Human Rights believed that the actions of the British government did not constitute indirect expropriation. According to the European Convention on Human Rights and Fundamental Freedoms, in some special circumstances, even if there is no direct deprivation of property, it may constitute indirect expropriation. In this case, although the British government's ban directly made Pinnacle's continued processing and production illegal, it did not directly deprive or control the use of its specific beef materials. The measures were only used to avoid the spread of disease and was not discriminatory. The ban only stipulated that the production and sale of this type of beef was prohibited, but the factories and various specialized equipment invested by Pinnacle could still be used, that was, Pinnacle had not lost the occupation of its major properties and could still restore these assets. They could still be put into use and were commercially profitable, and in April 1996, Pinnacle's stock of qualified beef had been awarded for more than £400,000 in compensation, so there was no huge losses or additional burden.

In addition, the value pursued by Article 1 of the First Protocol in European Convention on Human Rights and Fundamental Freedoms is to achieve a balance of the general interests between the human community and the fundamental rights of individuals. It is obvious that compared to Pinnacle's commercial benefits, the health of all human beings is undoubtedly of higher value and need to be prioritized.[119] In this case, the purpose of the British government's promulgation of the Act is open and transparent. For the protection of "public objection to an unknown proportion of potential diseases," the public interest of the society takes precedence over the protection of private property. It is reasonable to eliminate the risk of transmission of deadly diseases and protect the life and health of all human beings at the expense of the closure of similar processing plants.[120]

It can be seen that, in this case, the ECtHR adopted the standard of both effect and purpose, which comprehensively considered the impact of the host country government's actions on the investor's property and the protection of public interests involved in the government's actions.[121] After weighing the overall interests of human beings and the private property rights of the processing plant, the arbitral tribunal finally found the

[119] See supra note 14, at 501.
[120] See supra note 34, at 121.
[121] See supra note 34, at 121.

balance and drew a scientific and reasonable arbitration determination, which was highly accepted by the society.

3.3 Advantages and Disadvantages of Adopting Both Effect and Purpose Standards

In the early stages of capital expansion, the western countries used the sole effect doctrine as the basis for identification. This doctrine tends to protect the interests of investors, but it may do harm to the national public interest, which is unreasonable.[122] The sole purpose doctrine take "public interest" as the protection defense for the host country government. But it is too difficult for investors to prove their losses. Both the above standards are too extreme to be applied in practice.[123] The introduction of the new standard attempts to balance the interests between the state and overseas investors. It is more acceptable and operable.[124]

However, there are certain disputes and defects in the application of this standard. It is hard to assign the proportion of effect and purpose when determining whether a behavior constitutes indirect expropriation.[125] These factors have not fundamentally resolved the identification of indirect expropriation. From this point of view, it is impossible to adopt the combination of both effect and purpose standard once and for all, and there is still the problem of proportional division between the two standards. Later, the principle of proportionality is introduced and applied in the treaty rules and arbitration practice.[126]

In short, whichever the sole effect standard or the sole purpose standard, its essence is to seek a balance between the interests of host country and overseas investors.[127] The sole effect standard focus on the damages suffered by investors, which is not conducive to

---

[122] See Rudolf Dolzer & Felix Bloch, *Indirect Expropriation: Conceptual Realignments?*, 5(3) International Law Forum 155, 163-165 (2003).

[123] Rudolf Dolzer explicitly criticized the application of the effect standard on the grounds of legal certainty or safety and advocated that the effect standard should be understood from the perspective of protecting the rights and interests of foreign investors. Dolzer believed that the seriousness of the impact of a specific control measure on the legal status of the property and the actual impact of the property owner's ability to use and enjoy the property were the core factors in determining whether the control measure constituted an expropriation.

[124] See supra note 75, at 78.

[125] In a certain number of cases such as Siemens A.G. v. The Argentine Republic, S. D. Myers v. Canada, Azurix Corp. v. The Argentine Republic, although the arbitral tribunals recognized that the actual impact on investment properties and the purpose of government actions should be comprehensively considered and believed that there was a possibility of balancing the purpose of investment property protection and government regulation, they still did not reach a consensus for dividing the ratio between the two factors.

[126] See supra note 14, at 489. After the introduction of the proportionality principle, the "effect and purpose standard" has become more specific and standardized, including "property," "necessity" and "proportionality in a narrow sense."

[127] See supra note 77, at 33. "Existing international law does not clarify the demarcation between the specific application of 'public security right' and indirect expropriation, thus forming the so-called 'expropriation-management dilemma' in recent international investment. In essence, this dilemma reflects the eternal tension between the promotion of social public interests and the protection of private property rights, and it is necessary to make a careful balance between them."

protecting the host country government. However, the sole purpose standard is too partial to the national interest, which hinders the investment enthusiasm of investors. Compared with the above two standards, the combination of them is more suitable for today's investment environment. The development of economic globalization has made more and more countries become two-way capital flow entities. They have to fully consider the state interests and the overseas interests when investing abroad. These have largely promoted the widespread application of the standard of both effect and purpose.[128]

3.4 Application and Perfection of the Standard of Adopting Both Effect and Purpose in China

Adopting both the effect and purpose standard has made up for the limitations of applying each standard alone and has taken an important step in the attempt to balance the interests between the host country and overseas investors.

Most Chinese BITs include both the effect and purpose clauses in the expropriation chapter, except a few such as the China-Italy BIT, the China-Poland BIT, the China-Bulgaria BIT, which do not involve the purpose criterion.[129] However, among the BITs which include both the effect and purpose criteria, a large proportion of them cannot provide a valuable guidance for the arbitral practice due to their ambiguity. For example, the China-Spain BIT, the China-Greece BIT, the China-Ukraine BIT, the China-Croatia BIT and the China-Estonia BIT take "other similar measures having equivalent effect to nationalization or expropriation" as the effect factor and "public interest/purpose" as the purpose factor, combined with legal procedure, non-discrimination, compensation to define whether it constitutes indirect expropriation.[130] These are relatively general rules which leave the arbitral tribunal a wide range of discretionary.[131] The treaties fail to "offer an exhaustive list of key components of indirect expropriation."[132] On April 7, 2008, China and New Zealand signed the China-New Zealand FTA.[133] Compared with the China-India BIT, the FTA signed between China and New Zealand not only expands its foreign cooperation partners from developing countries to developed countries, but also further refines the provisions on indirect expropriation. The China-New Zealand FTA points out that the host country's discriminatory acts against foreign investors should be outright or indefinite, which seriously deprive their property rights and are inconsistent with public purposes. The host country should bear the responsibility of compensation

---

[128] See supra note 4, at 252.

[129] See Article 4 of the China-Italy BIT, Article 4 of the China-Poland BIT and Article 4 of the China-Bulgaria BIT.

[130] See Article 4 of the China-Spain BIT, Article 4 of the China-Greece BIT and Article 4 of the China-Ukraine BIT.

[131] See Federico Ortino, *Defining Indirect Expropriation: The Transatlantic Trade and Investment Partnership and the (Elusive) Search for Greater Certainty*, 43(4) Legal Issues of Economic Integration 351, 361 (2016).

[132] See supra note 38, at 319.

[133] See real-time data from Ministry of Commerce on the China-New Zealand FTA, http://gjs.mofcom.gov.cn/aarticle/af/ak/200804/20080405464190.html (accessed on July 29, 2022).

once it violates the commitments. On one hand, it puts more emphasis on the severity and duration of the control measure. On the other hand, it pays more attention to the balance between means and ends.[134] In addition, Article 145 clearly points out that investors have reasons to rely on the specific commitments of the government, thereby limiting investors' reasonable expectations to a certain range and distinguishing them from normal business risks. Later in the year 2011, China and Uzbekistan signed a new BIT, which narrowed the connotation of investment expectations and provided specific guidelines for legitimate public welfare. After that, the China-Cuba BIT in 2007, the China-Switzerland BIT in 2009, the China-Uzbekistan BIT in 2011, and the China-Canada BIT in 2012 generally reflected the consideration of the balance of interests between the host country and investors.[135] Compared with German BITs and 2012 U.S. Model BIT, there are still some flaws in the investment agreements signed by China at this stage.[136] In terms of identification standards, the weight analysis between effect and purpose lacks operability. In addition, the traditional four elements lack specific application explanation.[137] In terms of exceptions, the expression of "public interest" is inconsistent in different treaties and there is a lack of clear regulations on the scope of the state's regulatory power.[138]

In order to make up for the deficiencies in the application of this standard, China should further refine the relevant identification standards in future legislation and investment treaties. It is reasonable to classify and enumerate the circumstances that constitute indirect expropriation based on China's national conditions.[139]

On one hand, as for the effect determination of the state's measures, the degree of "serious damage" should be accurately defined.[140] China should adopt substantive standards in effect determination. This substantial impact mainly refers to whether the foreign investor loses its substantial right to control the property.[141] And there should be a causal link between the measures of expropriation and subsequent damages. The decrease in the investment's capacity to maintain its activities or a loss of profit margins is not sufficient especially when the investment remains operational.[142] It is also critical to further identify the effects in the investment agreement through definitions and

---

[134] See Article 3 of Annex 13 of the China-New Zealand FTA.
[135] Ibid.
[136] For example, the BIT signed by Germany, Bosnia and Herzegovina in 2001 expanded the arbitral tribunal's discretion.
[137] The traditional four elements are as follows: for public purposes; non-discrimination; due process of law and appropriate compensation.
[138] See supra note 34, at 111.
[139] See He Zhipeng, *Safeguarding National Interests: The Power of International Law*, Law Press, p.236 (2018).
[140] See Laura-Cristiana Spătaru-Negură, *Special Considerations Regarding Indirect Expropriation in International Economic Law*, 7(2) Juridical Tribune 124, 124-128 (2017).
[141] In the case Pope & Talbo v. Canada, the arbitral tribunal considered a number of factors in determining whether it constituted an act of expropriation. For example, whether the investors lost control of their investment property, whether they were still free to make the company's strategies, whether the profits were accessible to the shareholders, etc. Ultimately, the tribunal held that the Canadian government's measures were not substantial enough to constitute expropriation.
[142] See supra note 6, at 383.

enumerations, such as the duration of the host country's measures and the actual losses of investors. The deprivation needs to be permanent or for a substantial period of time. That is, the lawful measures of expropriation should be ephemeral, not irreversible and non-temporary.[143] "Non-temporary" includes the following situations: there is no reasonable expectation that the control over the property will be returned; there is no reasonable expectation that the loss will be compensated; the fact that the property right has been substantially deprived has continued for a considerable period of time.[144] Besides, the BITs should take restrictive interpretation of investors' reasonable expectations. The scope can be limited to the written agreement signed in advance with the government of the foreign investors' country, the contract or the written document issued in advance by the host country's government, etc.[145]

On the other hand, the BITs should clarify the scope of the public purpose and take the host country's motivation into consideration, whether the action is for public purpose and whether it is taken by the host country to encroach investors' legal property. Malicious regulation should be banned and the host country should bear the burden of proof on the level of intervention that investors reasonably expect. "Non-arbitrary commitments facilitate the acceptance of the inevitable sacrifice of private interests in pursuit of public goals,"[146] so it is important to further examine whether the government's measures are non-discriminatory and consistent with due process.[147] When it comes to the public interests in China, the BITs can firstly define the concept of it in a general way as "unless under special circumstances, a contracting party's non-discriminatory measures taken for public interest purposes shall not be considered as indirect expropriation" and then refine the concept by non-exhaustive enumeration based on China's national conditions.[148] China has the history of nationalizing foreign investment soon after the founding of the People's Republic of China and the "creeping renationalization" of grabbing state land from privately owned coal mines.[149] Since the public purpose can justify the expropriation under certain circumstances, adopting some typical "public

---

[143] See Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6. Award (April 12, 2002), para.107.

[144] See supra note 103, at 261.

[145] See supra note 7, at 78. In his research, Professor Dolzer has proposed a series of factors that he believes should be used as a basis when examining whether there are reasonable expectations for foreign investors. For example, the legal system and environment of the host country, the evolution of values and social priorities, etc.

[146] See supra note 40, para.181.

[147] See supra note 40, para.95.

[148] See Article 4 (b) of Annex (B) in 2012 U.S. Model BIT.

[149] Quoting from Shen Wei, *Bilateral Investment Treaties-Indirect Expropriation-Taxation-Interim Measures.* (Laurie A. Pinard, Comment, United States Policy Regarding Nationalization of American Investments: The People's Republic of China's Nationalization Decree of 1950, 14 CAL. W. INT'L L.J. 148 (1984); Jamil Anderlini & Geoff Dyer, Beijing Accused of Launching Attack on Private Enterprise, FIN. TIMES, November 26, 2009, at 7 (London ed.); see also Geoff Dyer, Mine Crackdown Ignites Concern over Land Grab, id.; Chuin-Wei Yap, Beijing Aims to Enlarge Role of State-Owned Coal Giants, WALL ST. J., November 29, 2013, at A12; Bob Davis, China's State-Owned Sector Gets a New Boost, WALL ST. J., February 24, 2014, at A2.)

interest" with Chinese characteristics in Chinese BIT treaties, such as economic development, national defense, may be a reasonable approach.[150] And it is necessary to refer to the "public interest" in international practice, such as environmental protection, public health, so as to better safeguard China's economic sovereignty in foreign investment and reduce the risk of being sued.

4. New Development of Indirect Expropriation Recognition Standards

4.1 Introduction of the Principle of Proportionality

4.1.1 The concept and emergence of the principle of proportionality

The principle of proportionality is explained in the dictionary as a method "to test whether a legal act is proportional to the goal or effect it intends to achieve, or whether it exceeds the necessary method to achieve the goal."[151] The principle of proportionality in the field of law was first originated in Germany as a judicial technique or analytical structure. It was used to adjudicate disputes involving measures that deprived the rights or interests but pursued public or common goals. At the beginning of the 20th Century, the German scholar Heck proposed that the aim of law was to balance the interests between individual and society, and then realize the combination of egoism and altruism.[152] The purpose of the existence of the law is to measure interests in a case, settle disputes, weigh and compare various interests, and find an appropriate balance point, so as to reasonably resolve conflicts. The principle of proportionality, as a concept in administrative law, requires the government to pay attention to the necessity and rationality of the results of the behavior when implementing administrative acts. It is now used by many international tribunals in a variety of situations and may become a general principle of international law. The application of the proportionality principle in the field of administrative law has to a certain extent reduced the abuse of the government's public power and is of great significance for protecting the personal interests of the administrative counterpart.[153]

The principle of proportionality has three meanings in the German Federal Constitution, namely the principle of appropriateness, necessity and the narrow sense of proportionality. First of all, the principle of appropriateness requires that the implementation of government actions must be for a legitimate purpose and the exercise of its administrative power must be able to achieve the purpose or at least help to achieve the purpose. The main consideration is whether the method is legal and appropriate, and

---

[150] See Bjoern Hoops & Hanri Mostert et al., *Expropriation and the Endurance of Public Purpose*, 4(2) European Property Law Journal 115, 120 (2015).
[151] See *Longman Law Dictionary*, Law Press, p.56 (2007).
[152] See Philipp Heck, *Begriffsbildung und interessenjurisprudenz*, Tübingen: Mohr, p.131 (1932).
[153] See Caroline Foster, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy*, 13(1) New Zealand Yearbook of International Law 347, 349-353 (2015).

whether there is a causal link between the purpose and the effect. For example, in order to relieve the pressure of traffic, vehicles that do not meet the annual inspection standards are prohibited from the road. Obviously, the implementation of this behavior will only reduce environmental pollution but cannot achieve the purpose of alleviating travel pressure at all, which does not conform to the principle of appropriateness. Secondly, the necessity principle requires that the implementation of the government's act must be irreplaceable. When there are multiple choices to promote the realization of the purpose, the one with the least damage should be selected among them. The damage must be minimal, and once there are other less harmful measures, there will be a certain risk of violating the principle of necessity.[154] Finally, the narrow proportionality principle requires that the value of social and public interests pursued by the government to implement regulatory actions cannot exceed its damage caused to the value of investors' private property. The host country should take into account the severity of the damage that may be caused by its actions, as well as the length of the duration and the urgency of protecting the public interests.

In a word, the principle of proportionality is to firstly consider the legitimacy and necessity of the means under the premise that the behavior is constitutional, and secondly select the one with the least damage to the rights and interests of private property to realize its public interest. It can be seen that the application of the principle of proportionality will better balance the conflicts between different interests.

4.1.2 Treaty embodiment of the principle of proportionality

With the gradual emergence of the rationality of the proportionality principle, more and more international legal documents have introduced this principle to make up for the shortcomings of the previous standards in determining of indirect expropriation. The regulations on the determination criteria of indirect expropriation are mostly found in BITs, regional investment agreements and multilateral investment agreements.

Proportionality analysis is a discursive judicial technique for adjudicating disputes concerning measures intruding on protected rights or interests but pursuing a public objective or communal aim.[155]The principle of proportionality was first reflected at the international level in the European Convention on Human Rights in 1954. Later some international arbitral tribunals began to gradually introduce this principle when judging cases.[156] For example, in the case Continental Casualty v. Argentina in 2008, the applicant argued that Argentina had violated its investment treaty obligations by imposing

---

[154] See Diane A. Desierto, *The Outer Limits of Adequate Reparations for Breaches of Non-Expropriation Investment Treaty Provisions: Choice and Proportionality in ChorzÓw*, 55(2) The Columbia Journal of Transnational Law, 395 (2017).

[155] See Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15(1) Journal of International Economic Law 223, 226 (2012).

[156] In Tecmed v. Mexico case in 2003 and LG&E v. Argentina case in 2006, the ICSID tribunal applied the "principle of proportionality" upheld by the ECtHR.

restrictions on withdrawals and transfers from its bank accounts. The respondent, Argentina, believed that these measures were implemented in response to a severe financial crisis and were "necessary for the maintenance of public order." This case is an example of how the principle of proportionality can be effectively transplanted from one international legal regime to another (from WTO law to international investment arbitration).[157] In recent years, the proportionality principle in the BITs and FTAs signed by developed countries represented by the United States and Canada has become more and more widely used and has gradually played a leading role in determining indirect expropriation. For example, the Canada-Korea FTA, which entered into force on January 1, 2015, detailed the determination of government actions in its annex: "The consideration of the nature of the action should include whether the loss to a particular investment or investor caused by the regulatory measures imposed by the government exceeds the scope of losses that overseas investors should bear for the sake of public interest." This clause balances the interests of public and the cost of investors. The US-Korea FTA that came into effect on March 15, 2012, not only introduced the principle of proportionality to determine the nature of government actions, but also further elaborated on the reasonable expectations of investors. The nature and extent of policies and regulations are compared with their appropriateness and necessity, and it is pointed out in the annex that "except in rare cases, such as when a government's act or series of acts are seriously disproportionate to the purpose or effect," holding the view that both effect and purpose should be taken into consideration when determining indirect expropriation.[158] The revised version of the US-Korea FTA signed on September 24, 2018 still retained the above provisions.[159]

It can be seen that indirect expropriation, as an important issue in investment, has aroused great attention of more and more countries under the background of investment liberalization. And the gradual refinement of its identification standards is also reflected in various agreements signed between countries. The application of the proportionality principle as a trend can better balance international investment relations and create a mutually beneficial and win-win international investment environment.

4.2 Feasibility Analysis of the Principle of Proportionality

4.2.1 Arbitration practice of proportionality principle

The pioneering application of the proportionality principle is in the case of Tecmed v. Mexico.[160] The arbitral tribunal firstly analyzed whether the government's action caused

---

[157] See Stephan W. Schill (ed), *International Investment Law and Comparative Public Law*, Oxford University Press, p.84 (2010).

[158] See real-time data from Office of the United States Trade Representative on the US-Korea FTA, https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (accessed on July 29, 2022). Also see Article 3 (b) of Annex 11-B: Expropriation in Chapter 11.

[159] Ibid.

[160] See Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF) /00/2, May 29, 2003.

substantial damage to the investor's property, and secondly analyzed whether the implementation of the action was for the purpose of protecting the public interest. Different from the standard of both effect and purpose, the analysis of the purpose of the government's actions was not aimed to exclude the possibility of being identified as indirect expropriation, but to determine whether the relationship between the government's actions and the public purpose conformed to the principle of proportionality.[161] The measures should be necessary to achieve its public purpose and cause the least damage to the investors' rights among all the alternative choices. In this case, the Mexican government gave up the option of other less harmful measures and created an additional burden for the foreign investors. Thus, its behavior should be deemed as indirect expropriation. This is the first time that an award was made based on the principle of proportionality and it also opened a new era for international arbitration.

As in the recent Philip Morris v. Uruguay case, the arbitral tribunal had introduced the principle of proportionality when balancing the interests between the two parties. On July 8, 2016, the ICSID arbitral tribunal issued an arbitral award, rejecting all the arbitration claims of Philip Morris.[162]

As a large multinational company, Philip Morris (hereinafter referred to as PM) sold more than 160 brands of cigarettes, among which "Marlboro" was the largest brand in the international tobacco market. However, the Uruguayan government had increased its control over tobacco in recent years, which had caused a huge blow to PM's business development and operations in Uruguay. Subsequently, PM Company and its wholly owned subsidiary Abel, together as the complainants, filed an arbitration request in ICSID, arguing that the "single appearance requirement"[163] and "80/80 rule"[164] issued by the Uruguayan government constituted indirect expropriation to their property.

First, the arbitral tribunal held that although the Uruguayan government did not impose expropriation or similar nationalization measures on PM's cigarette products, its "single-appearance requirement" and "80/80 rule" had deprived PM of its sub-brands markets. In the market, the excessive requirements for the outer packaging of its products directly interfered with the normal business operations of PM Company, thereby weakening the competitiveness of its products in the tobacco market. As a bridge between consumers and producers, trademark was an invisible property protected by law. In this case, the Uruguayan government made a restrictive measure of "single-appearance requirement," which degraded the business reputation and trademark value of the company. However, after the implementation of the accused control measures, PM company still obtained considerable investment benefits from the Uruguayan tobacco

---

[161] Id., at paras.122-128.

[162] See Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para.506 (2016).

[163] Each brand of cigarettes produced and sold in Uruguay could only have one appearance, while the Marlboro owned by PM Company also sold Marlboro-Gold, Marlboro-fresh mint the two sub-brands.

[164] The warning area on the outer packaging of cigarette products must take up at least 80% of the main display area.

market. In return, although the complainant claimed that its potential operating profits were affected, many past international investment arbitration cases had shown that "the potential loss of investment profits caused by the assumption that there is no alleged regulatory measure cannot make the defendant sued for expropriation."[165] In addition, the damage to interests caused by indirect expropriation should be significant. Although the increase in the area of the warning graphic from 50% to 80% in this case would have a certain impact on consumers' purchases, it had not yet reached a serious level. Consumers could still identify the uniqueness of the cigarette products they bought, so it could not meet the levy standard in terms of effect. This control measure conformed to the suitability and necessity requirements of the principle of proportionality.

Secondly, the arbitral tribunal believed that the implementation of tobacco control measures by the state would inevitably have a certain degree of impact on the commercial operation and market share of tobacco companies, but the measures introduced by the Uruguayan government in this case were for the public purpose of protecting human life and health, and the cigarette products themselves were not good for health. As a harmful product, it should not be widely publicized or promoted. For the health and well-being of most people, the state had the responsibility and the right to regulate relating products. Such behavior was necessary and feasible, and the measures of Uruguayan government did not cause excessive property damage to PM Company beyond necessary limits, which was conformed to the "narrow sense proportionality" requirement, so it could not be regarded as indirect expropriation. Obviously, the arbitral tribunal introduced the principle of proportionality (including three factors: "suitability," "necessity" and "narrow sense proportionality") when determining the facts of this case to achieve a balance between the interests of both parties, which was more conducive to achieve a win-win situation for the interests between the host country and investors.

4.2.2 Insufficiency and perfection of the principle of proportionality

The introduction of the proportionality principle breaks through the limitations of the sole effect standard and the sole purpose standard, providing a more transparent analytical structure for public and private interests, and establishing a relatively fair relationship between the host country and overseas investors. It is precisely because of the rationality of this principle that the determination of indirect expropriation has gradually become clear, but as a principle introduced into international law from administrative law, its own problems should not be underestimated. The use of this doctrine has drawn sharp criticism by scholars in legal philosophy and human rights, including excessive scrutiny measures, subjective decision-making and the impact to judicial (or arbitration) legislation.[166]

---

[165] See supra note 162, paras.411-420.

[166] See Stephan W. Schill, *Investor Rights - NAFTA Chapter 11-Indirect Expropriation/Regulatory Taking-Fair and Equitable Treatment-Mining Rights-Protection of Native American Sacred Sites-International Minimum Standard-Burden of Proof*, 104(2) American Journal of International Law 253, 254-257 (2010).

First of all, when it comes to the question of determining the size of the "proportion," there is still no final verdict. Whether the government's regulatory measures are reasonable, whether they are necessary to achieve public purposes, and whether all the measures taken to pursue public purposes are within the scope of consideration are too subjective to determine. Among all the control measures, the one with the least damage to the interests of investors is difficult to figure out. When determining indirect expropriation, the judges should precisely draw the conclusion that the realization of the public purpose excessively exceeds the property sacrifice suffered by the investors, but the quantity threshold is still uncertain, leading to the subjective decisions in arbitration practice. In addition, due to the differences in the complexity of different cases, each arbitral tribunal may make totally different decisions on the appropriateness and necessity of the nature of government actions, especially when exercising their discretion due to various value orientations.[167]

Secondly, the existence of the three sub-principles of the proportionality principle also increases the uncertainty of the decisions by the arbitral tribunal in applying the standard. As for the principle of appropriateness, the arbitral tribunals often have different understandings on whether the government's actions really contribute to the realization of its public purpose. Sometimes they may even ignore the application of this principle and make it difficult for the protection of the rights and interests of investors.[168] It is even more difficult to analyze the necessity of the government's actions. This principle requires the arbitral tribunal to identify the one that is least harmful to investors and is the most necessary among all available control measures. But how to precisely select the most necessary one among so many measures is extremely strict for the arbitral tribunal.[169] Finally, the narrow sense proportionality principle put forward a higher requirement to clearly assess the public interest when judging whether the behavior and the purpose are proportional. Macroscopic concepts like human health, public environment and social welfare are difficult to be quantified and thus cannot be accurately weighed with commercial interests of investors.[170]

---

[167] Ibid.

[168] In the Continental Casualty Company v. Argentina case, whether the arbitral tribunal determined that it was for a major security interest was raised by the defendant in its defense in accordance with relevant treaty, it was difficult to explain the clear attitude of the arbitral tribunal to the public purpose and the arbitral tribunal did not discuss much about it.

[169] The arbitral tribunal in the Azurix Corp. v. The Argentine Republic case clearly stated that the impact of government-related measures must reach an effect equivalent to the expropriation measure before applying the proportionality analysis method, but when it came to the "necessity" analysis, the tribunal didn't give a detailed reason.

[170] See Cai Congyan, *The Dispute Between the Effect Criterion and the Purpose Criterion: The New Development of Indirect Expropriation Recognition*, 8(6) Journal of Southwest University of Political Science and Law 85, 88 (2006). "When invoking the principle of proportionality, the arbitral tribunal particularly emphasized that 'the severity of the impact on investors plays a key role in confirming proportionality'. This shows that the arbitral tribunal pays more attention to the principle of necessity and ignores the principle of appropriateness based on realizing the purpose of legislation, thus showing the basic characteristics of understanding the principle of proportionality with private property as the logical starting point."

The principle of proportionality has not reached a unified standards as the guidelines for arbitration practice. It is necessary to form a standardized system through continuous accumulation of experience to break the limitations in arbitration practice.

First is to evaluate the public purpose pursued by the government's actions based on the appropriateness analysis. As different countries lie in different political, economic, cultural and other backgrounds, the arbitral tribunal should sufficiently assess the requisite balance between public and private interests.[171] On the basis of the initial determination that the behavior is legal, further evaluation on the nature of the behavior should be made, that is, whether the behavior is of good faith or whether it is a malicious behavior. The unilateral legal statement of the host country's purpose cannot be used as the only evidence adopted by the arbitral tribunal. For example, Canada has added a requirement of good faith to the "exception of police power" in its arbitration practice, while the EU has added the requirement of "good faith." The arbitral tribunal can determine the nature of its behavior by investigating whether the government's behavior is carried out in accordance with its predetermined plan. More attention should be paid to analyze the environmental background of the implementation of the measures and comprehensively consider whether the government's behavior is obviously malicious, so as to determine whether the behavior is legal and reasonable to achieve its purpose.[172]

Second, in the analysis of necessity, it is necessary to flexibly adjust the severity of the standard according to the specific circumstances of different cases. The principle of necessity requires that the government's selected actions should have the least impact on investors. But the identification of the minimum damage caused by the control measures is relative, which means, the implementation of the project has undergone in-depth research by the host country government on various feasible measures that can achieve its public purposes.[173] The control measures have been comprehensively considered among multiple factors after careful comparison, which can be accepted by most people.[174] In addition, multi-level necessity review can be carried out on its behavior. For example, as for the purpose of public interest involving the basic rights in international law, it needs to be strictly reviewed in accordance with the norms of international law. But when it comes to the protection of its domestic environment and social welfare, it is better to respect the local conditions in the host country.[175] The government's assessment can be adjusted

---

[171] See supra note 155, at 229.

[172] See supra note 38, at 315.

[173] See supra note 157, at 81. "First, the measures taken must be well-designed to achieve their respective objectives; they must not be arbitrary, unfair or based on unreasonable considerations. In short, the measures must have a reasonable link to the target. Second, even if these measures are reasonably related to the objectives in the preceding sentence, they should impair the freedom or right referred to in 'as little as possible'. Third, there must be proportionality or balance between the impact of the measure (responsible for limiting Charter rights or freedoms) and the objective deemed 'of considerable importance'."

[174] See supra note 166, at 253.

[175] See Katharina A. Byrne, *Regulatory Expropriation and State Intent*, 38(1) Canadian Yearbook of International Law 89, 89 (2001). Katharina believes that if it is for the protection of major public interests, the proportionality between the two factors determines the nature of the government's actions, that is, whether it constitutes an indirect expropriation or a regulatory measure. The principle of proportionality

flexibly for different cases to avoid injustice caused by one-size-fits-all standards.

Finally, in the judgment of the narrow proportionality principle, due to the interference of various factors such as the value orientation and practical experience of different members in the arbitral tribunal, the court is required to weigh the two competing interests and decide whether the measure is consistent with the public policy.[176] It is recommended to take the evidence provided by the host country government as the main object of review, and analyze whether the actions obviously exceed the necessary limits and cause serious damage to the rights and interests of investors based on the materials provided by the host country. In the context of political economy, it is necessary to carefully consider whether the government's behavior is fully scrutinized when it is conducted and whether the consequences of the behavior are proportional to the realization of its policy goals.[177]

As a guiding principle in the field of administrative law, the principle of proportionality still has a long way to go in its application in international law. Since it is still immature in practice, it is necessary to accumulate more experience through various arbitration cases and form an applicable method for arbitration practice.

4.3 Application and Prospect of Proportionality Principle in China

4.3.1 The Application of the Proportionality Principle in China

A wide range of countries in the world have introduced the principle of proportionality into their BITs due to the rationality and scientificalness of it, and more and more arbitral tribunals have adopted the principle of proportionality in practice to accurately identify the behavior in different cases. The principle of proportionality has also been gradually introduced to the BITs and FTAs signed by China in recent years.

On April 7, 2008, China and New Zealand signed the China-New Zealand FTA. Article 3 of Annex 13 of the China-New Zealand FTA requires both "severe effect" and "disproportionate to the public purpose" of the government's behavior, which is the first time that China has introduced the principle of proportionality into an investment

---

also determines the extent to which the host country's regulatory power is superior to the investor's private property rights when it comes to public interests such as environmental protection, public health, and labor protection.

[176] See Andreas Kulick, *Global Public Interest in International Investment Law*, Cambridge University Press, pp.168-173 (2014). Kulick held the view that the process did not follow a reliable pattern but was rather arbitrary based on the political preferences of the judges. A judge can easily reverse a decision toward a preferred outcome, by choosing a higher or lower level of scrutiny, or by determining from the outset that one interest is more important than another.

[177] In the case Feldman v. Mexico, the tribunal held that in the past, confiscatory taxes and the imposition of unreasonable regulatory regimes would be considered as expropriation, but the government should have some freedom if the taxation is appropriate in order to serve the wider public interest. If any adversely affected industry associations seek compensation at this time, such appropriate and reasonable government regulations cannot be implemented normally.

agreement.[178] A year later in 2009, the China-Peru FTA also invoked the principle of proportionality and used the same expression as the clauses in the China-New Zealand FTA when determining the indirect expropriation.[179] The China-Uzbekistan BIT re-signed in 2011 adopted the principle of proportionality and gave a more detailed list of considerations when defining the occurrence of expropriation. As to the effect of the measures, the BIT clause emphasizes the economic factors in it and stipulates that "a measure or a series of measures of the Contracting Party has an adverse effect on the economic value of investments, standing alone, does not establish that an indirect expropriation has occurred." To determine whether a measure or a series of measures of the states constitute indirect expropriation, there are still other factors that must be taken into consideration: whether it is discriminatory or not, reasonable investment expectation of investors, the purpose of public interest in good faith. The most valuable aspect of the treaty is the introduction of the principle of proportionality to assess the relationship between purpose and effect, stating that the measures severely exceeding the necessity of the public welfare cannot be the public-interest defense[180] against unlawful expropriation.[181]

The principle of proportionality was applied in the first Chinese BIT arbitration case, Tza Yap Shum v. The Republic of Peru.[182] When it came to the controversy over whether the public interest can relieve the state of the responsibility for exercising tax authorities, the tribunal first invoked the regulations from the international law stipulating that the state's regulatory activities (including taxing powers) must be exercised under certain conditions. A state is not responsible for loss of property value or other economic disadvantages resulting from the imposition of general taxes, regulations, or other acts generally accepted as part of state police powers in good faith. The tribunal must assess, among other factors, the proportionality of SUNAT's actions and whether it is in compliance with due process.[183] Additionally, the General Administrative Procedure Law states that, by virtue of the Principle of Reasonableness, "The decisions of the administrative authority involving creating obligations, qualifying infractions, imposing sanctions, or establishing restrictions on the companies, must be adapted within the limits of the power attributed and maintaining the due proportion between the means to be used and the public purposes that must be protected."[184] It is clear that the tribunal invoked the

---

[178] See Article 3 of Annex 13 of the China-New Zealand FTA: "In order to constitute indirect expropriation, the state's deprivation of the investor's property must be: (a) either severe or for an indefinite period; and (b) disproportionate to the public purpose."

[179] See Article 3 of Annex 9 of the China-Peru FTA, http://fta.mofcom.gov.cn/bilu/annex/bilu_fujian9_en.pdf (accessed on August 10, 2022).
"In order to constitute indirect expropriation, the action or series of actions must be: (a) either severe or for an indefinite period; and (b) disproportionate to the public interest."

[180] See supra note 38, at 319.

[181] See Article 2 (d) of the China-Uzbekistan BIT.

[182] See Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6.

[183] See supra note 40, paras.173-174.

[184] See supra note 40, para.177.

principle of proportionality from the administrative law to solve the problems in international investment dispute. This is also confirmed in the China-Peru FTA stipulating that the action or series of actions must be disproportionate to the public interest in order to constitute indirect expropriation.[185] The analyses in the case Tza Yap Shum v. The Republic of Peru have reflected the tendency of the arbitral tribunal to apply the principle of proportionality when making an award. It is also the first time that the expropriation treaties in a Chinese FTA are substantially applied. Though the tribunal did not provide a specific quantity threshold guidance when judging the proportion between the effect and the purpose, but the application of the principle has provided a valuable reference for determining indirect expropriation for the future investment arbitration cases. The formula should be consequently viewed as a useful tool in judicial analysis by international investment tribunals.[186]

Most provisions on indirect expropriation in Chinese BITs have been gradually refined to balance the interests of a given country in its capacity as a (capital-importing) host country with its interests in its capacity of a (capital-exporting) home country.[187] However, there are still many defects in the treaties. At present, most treaties in China have been signed for a long time and the expressions are very vague.[188] Most treaties do not specify the obligations of the state and are unlikely to provide specific guidance on how to balance the interests of the state and the investor when determining liability.[189] Besides, the provisions on legal procedures are too broad and fail to clearly identify whether it is a domestic or an international legal procedure, increasing the possibility of being expanded.[190] And the treaties vary in the compensation for foreign investors.[191] Such as "appropriate compensation" in the China-Austria BIT, "fair and reasonable compensation" in the China-Israel BIT, "compensation based on actual value" in the China-Kyrgyzstan BIT, "fair market value" in the China-Malta BIT, etc. Under the background of the "go global" strategy, China is placing more and more emphasis on signing new BITs with developing countries and updating old BITs with developed countries to better protect the investors abroad, which reflects that "China's stance in BIT

---

[185] See Article 3 (b) of Annex 9 of the China-Peru FTA.

[186] See David A. Collins & Philip Thomas, *Measuring Gross Disproportion in Environmental Precaution to Establish Regulatory Expropriation and Quantum of Compensation in International Investment Arbitration*, 41(3) European Journal of Law and Economics 621, 627-628 (2014).

[187] See Karl P. Sauvant & Chen Huiping, *A China-US Bilateral Investment Treaty: A Template for a Multilateral Framework for Investment?*, 5(1) Transnational Corporations Review 1, 2 (2013).

[188] Among all the 104 BITs signed by China, only 8 BITs have been re-signed.
Real-time data from Ministry of Commerce on List of BITs Signed by China with Foreign Countries, http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml (accessed on July 30, 2022).

[189] For example, in the BITs signed by China with Finland, Austria, Japan, there are often vague expressions such as "unless there are exceptional circumstances" and "unless there are special circumstances" in the expropriation part. Such expressions have a range of possible meanings when they are specifically interpreted and there is uncertainty about their application when it comes to treaty interpretation.

[190] For example, in the BITs signed by China with Korea, Sri Lanka, Mauritius, it is generally expressed as "due legal process," "due legal process," "applicable laws and regulations," etc.

[191] See supra note 6, at 379.

practice was evolving from a restrictive to a balanced or even liberal stance."[192] In order to cope with the increasingly fierce international investment environment, China should take precautions and include more detailed provisions to provide stronger protection for investors under the promotion of overseas expansion.

4.3.2 Prospects and perfection for the development of the proportionality principle in China

According to the 2022 World Investment Report, China ranked second in attracting foreign investment in 2020 and 2021,[193] second only to the United States in attracting foreign investment and ranked fourth in outbound investment in 2020 and 2021.[194] As a country with two-way capital flow, China and other developing countries and emerging economies have more and more interest demands in international investment. Overseas investment from emerging economies has risen sharply, resulting in the increasing policy demands for better protection of domestic overseas investment. The interests of developed countries have gradually converged and the willingness to oppose the conclusion of multilateral investment agreements has decreased. The BITs seek to promote and protect in and outbound foreign investments by providing substantive protection standards such as relating to the protection against illegal expropriations.[195] As for the standards involving expropriation in the Chinese BITs, the background of globalization and increasing development in the investment in China as both capital importing and exporting country, has fundamentally lifted China's foreign investment standards up to international standards.[196] Since China and Sweden signed the first BIT in 1982, looking back over the past 30 years of development, the Chinese BITs have gone through two stages.[197] The first stage was from 1982 to 1998, China had signed BITs with nearly 90 countries, most of which were developing countries out of political purpose and a few were developed countries exporting capital. Although China signed a large number of BITs during this period, the overall attitude towards protecting foreign capital was relatively conservative and cautious.[198] Most BITs limit the scope of submission to arbitration to the "disputes involving the amount of compensation for expropriation."[199] Because of the relatively weak overall economic strength, China placed great emphasis

---

[192] See supra note 24, at 603.
[193] See World Investment Report 2022, Figure 1.7. FDI inflows, top 20 host economies, 2020 and 2021, https://unctad.org/system/files/official-document/wir2022_ch01_en.pdf (accessed on August 12, 2022).
[194] Id., at Figure 1.14. FDI outflows, top 20 home economies, 2020 and 2021.
[195] See Bajar Scharaw, *The (Provisional) End of Debates on Narrow Dispute Settlement Clauses in PRC First-generation BITs? —China Heilongjiang et al v Mongolia*, 34(2) Arbitration International 293, 293 (2018).
[196] See Shen Wei, *Evolution of Non-Discriminatory Standards in China's BITs in the Context of EU-China BIT Negotiations*, 17(3) Chinese Journal of International Law (Boulder, Colo.) 799, 799 (2018).
[197] See Qi Tong & Nie Jingjing, *The Model Change of Chinese Bilateral Investment Treaties*, 16(1) Wuhan University International Law Review 222, 223 (2013).
[198] Id., at 226.
[199] See Article 8 of the China-Denmark BIT, Article 10 of the China-Poland BIT, Article 10 of the China-Hungary BIT, etc.

on the sovereign power of the host country to regulate foreign investment at this period. The second stage is from 1998 till now, China has turned to more liberalized investment treaties. Since more disputes arise from indirect expropriation, China has expanded the disputes that can be submitted to arbitration from the previous "disputes over the expropriation of compensation" to "any disputes over investment."[200] Recent BITs concluded by the United States and Canada have included more detailed provisions, and China appears to take on this trend in BIT jurisprudence and practice.[201] China has attempted to seek a balance of interests between investors and host states through the reform of treaties (mainly by invoking the principle of proportionality and taking more detailed factors into considerations).[202]

Under such circumstances, further consideration should be given to formulate targeted BIT models and set up systematic identification standards in the light of China's national conditions. Specifically, the systematic standards include the following aspects:

First of all, China should clarify the definition of indirect expropriation in its domestic law and BITs. The definition of expropriation should be distinguished by renegotiating with other countries.[203] As for the specific identification criterion, it can be listed in the appendix in detail. To remain competitive in the global market, China still needs to cope with the international investment trend by refining the expropriation clauses.[204] Four traditional elements could be introduced when defining it: for public purposes; non-discrimination; due process of law and appropriate compensation. For example, the acts that do not directly transfer or deprive overseas investors of their property, but substantially render their ownership or cause serious interference without legal process should be deemed as indirect expropriation. But the malicious acts which are extremely severe, or disproportionate to the public purpose, or constituted the violation of specific commitments should be excluded from the defense against illegal expropriation.[205]

Second, China should further clarify the "effect" and "purpose" factors in its BITs. As to the "effect," it should be a major and substantial interference in the economic interests of investors, which involves the following considerations: firstly, the serious impact should reach the effect of direct expropriation ("can no longer control or directly lead the operations of the investment" or "make these rights useless...even though the

---

[200] See supra note 197, at 227.
[201] See supra note 24, at 603.
[202] See supra note 197, at 228.
[203] See Timothy Meyer & Tae Jung Park, *Renegotiating International Investment Law*, 21(3) Journal of International Economic Law 655, 655-667 (2018).
[204] See Courtenay Barklem & Enrique Alberto Prieto Ríos, *The Concept of "Indirect Expropriation," its Appearance in the International System and its Effects in the Regulatory Activity of Governments*, 11(21) Journal of Globalization and Development 77, 79 (2010).
[205] See Rachel D. Edsall, *Indirect Expropriation under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulation*, 86(4) Boston University Law Review 931, 950 (2006).

ownership of the property remains with the original owner").[206] And there should be a causal link between the measures of expropriation and subsequent damages. The decrease in the investment's capacity to maintain its activities or a loss of profit margins is not sufficient especially when the investment remains operational. Secondly, the duration of the intervention must be lasting, irreversible and non-temporary. "Non-temporary" includes the following situations: there is no reasonable expectation that the control over the property will be returned; there is no reasonable expectation that the loss will be compensated; the fact that the property right that has been substantially deprived has continued for a considerable period of time. Thirdly, the scope of investors' reasonable expectations should be clearly defined and it can be limited to specific licenses, agreements made by the host government, or targeted laws or policies issued to attract foreign investment, so as to limit the arbitral tribunal's discretion power. As to the "purpose," China can firstly define the concept of it in a general way as "unless under special circumstances, a contracting party's non-discriminatory measures taken for public interest purposes shall not be considered as indirect expropriation." And then China can refine the concept by non-exhaustive enumeration based on China's national conditions. It is important to further invoke the factors on whether the government's measures are non-discriminatory and consistent with due process.

Finally, the three-step process should be adopted in the application of the proportionality principle in Chinese BITs. The principle of proportionality should be more comprehensively specified, including a three-step process of "principle of appropriateness," "principle of necessity" and "principle of narrow proportion," trying to make this abstract guiding principle become more practical. It is necessary to measure whether the government's behavior exceeds the necessary level and causes serious damage to the interests of investors according to the triple test standard. First of all, the principle of appropriateness includes the assessment of the legitimacy of the government's actions. On the basis of the preliminary deduction that the actions are legal, the nature of the actions should be further assessed by considering whether they are carried out according to its predetermined plan. Besides, the government's actions should be comprehensively considered under the political background of the states.[207] Secondly, the minimum damage in the principle of necessity should be relative, and the damage should be relatively small and acceptable to the majority among all the control measures that contribute to the realization of the public purpose, and it should be suitable for different cases. In addition, multi-level necessity review should be carried out on its behavior. For example, as for the purpose of public interest involving the basic rights in international law, it needs to be strictly reviewed in accordance with the norms of

---

[206] See LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc. v. The Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, para.188; Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc. v. The Government of the Islamic Republic of Iran, Final Award, August 14, 1987, para.154.

[207] See Nicholas Tsagourias, *Transnational Constitutionalism: International and European Perspectives*, Cambridge University Press, pp.107-121 (2007).

international law. But when it comes to the protection of its domestic environment and social welfare, it is better to respect the local conditions in the host country. The government's assessment can be adjusted flexibly for different cases to avoid injustice caused by one-size-fits-all standards.[208] Finally, through the application of the narrow principle of proportionality in arbitration cases, it is always affected by the value orientation of different members of the arbitral tribunal and has a strong subjectivity. Therefore, it is necessary to carefully consider whether the government's behavior is fully scrutinized when it is conducted, and whether the consequences of the behavior are proportional to the realization of its policy goals.[209]

The certainty and consistency of the arbitral awards can be better enhanced by clarifying and unifying the concept of indirect expropriation and comprehensively adopting the principle of proportionality, which may help maintain a more equitable and harmonious international investment environment.

5. Conclusion

The rapid development of the liberalization in international investment has accelerated the capital flow in the global market and international investment has shifted from a one-way flow from developed countries to developing countries to a two-way flow between them.

The criterion of indirect expropriation has also been continuously developed with the changes of different political backgrounds. In the initial period when foreign investment frequently occurred in developed countries, the sole effect criterion was mainly adopted to protect the interests of their own domestic investors overseas. Later, developing countries caught on and tried to find a balance between the interests of the host country and overseas investors to strengthen their own economic sovereignty. The subsequent criterion is a better refinement compared with the former one by summarizing the advantages and disadvantages of its application in arbitration practice.[210] The introduction of the proportionality principle is further supplemented and improved by its three-step assessment.

This article discusses three traditional criteria in international investment with relevant arbitration cases and Chinese BITs. The sole effect criterion focuses on the protection of investors' interests, emphasizing that the effect of government's actions should be valuated as the main impact factor. The sole purpose standard focuses on the protection of the host country's public interests, as well as the public purpose pursued by the implementation of the regulatory measures. While the combination of effect and purpose standard strives to find a balance between the interests of the host country and

---

[208] See Gebhard Bucheler, *Proportionality in Investor-State Arbitration*, Oxford University Press, pp.253-263 (2015).
[209] See supra note 207, at 122-141.
[210] See Mark Kantor, *Indirect Expropriation and Political Risk Insurance for Energy Projects*, 8(2) Journal of World Energy Law & Business 173, 176 (2015).

the foreign investors. Due to the limitations of applying each criterion alone, the introduction of the principle of proportionality has provided a guidance in determining indirect expropriation, which is widely accepted by the arbitration tribunals.

China is in its important period of economic transformation. In recent years, China has ranked top in foreign investment in the world and is playing an increasingly important role in international economic activities. As a major country with a two-way capital flow, China has placed more emphasis on using BITs as legal instruments for the protection of Chinese investments overseas.[211] However, the standards for the determination of indirect expropriation in China's domestic legislation and relevant investment treaties still need to be perfected. In view of China's dual status in international capital flows, it is important to set up the systematic identification standards in the light of China's national conditions, which is consistent with the development in related international investment law, as well as coping with China's "go global" strategy.

[211] See supra note 24, at 603.

China's Stance and Participation in the ISDS Reform

Zhu Zihan[1]

Abstract: In recent years, China's economy has been developing rapidly, and its influence on global politics and international investment activities has also increased. Therefore, how China chooses and develops in the reform of the ISDS mechanism has attracted much attention. This paper mainly discusses China's position and response in the context of the multi-path, multi-mode and multi-form ISDS mechanism reform. Firstly, it reviews China's ISDS practice, and analyzes China's position and role in the international investment legal system, as well as the existing problems. Through the review, this paper analyzes the necessity of China's participation in the ISDS reform and finds out a suitable ISDS reform path for China. Secondly, China's position, preferences, and advantages in ISDS reform are discussed. Finally, this paper puts forward some recommendations on how China can participate in and respond to ISDS reform. This paper believes that under the background of the reform of international investment law and the Belt and Road Initiative, China, as a major investment country with dual identities, should actively participate in the reform of the ISDS mechanism, enhance its voice in the global investment field, and become the leader of the rule-makers to respond to the world's concerns and expectations for China.

Keywords: ISDS Reform; International Investment Law; The Belt and Road Initiative; China's Stance

1. China's Practices in ISDS

In terms of the conclusion of investment treaties, International Investment Agreements (hereinafter referred to as IIAs) that China is currently participating in include three types: Bilateral Investment Treaties (hereinafter referred to as BITs), Treaties with Investment Provisions (hereinafter referred to as TIPs), Investment Related Instruments (hereinafter referred to as IRIs). Since China signed the first BIT (the China-Sweden BIT) in 1983, as of August 31, 2021, China has signed a total of 145 BITs (including those that have not yet entered into force and those that have been abolished). The total number is slightly less than that of Germany, ranking second in the world. In addition, China has signed 24 TIPs (including those that have not yet come into force) and signed 21 IRIs.[2]

In terms of the investment dispute settlement, China applied to join the ICSID Convention in 1993. Over the past three decades, China has accumulated certain

---

[1] Zhu Zihan, Ph.D., Assistant Professor of Jiangsu Provincial Academy of Social Sciences.

[2] TIPs generally refer to FTAs that contain investment terms. IRIs mainly refer to the ICSID Convention, the New York Convention, the Multilateral Investment Guarantee Agency Convention, Agreement on Trade-Related Aspects of Intellectual Property Rights, Agreement on Trade-Related Investment Measures, etc.

theoretical and practical experience in the Investor-State Dispute Settlement (hereinafter referred to as ISDS) mechanism. According to the United Nations Conference on Trade and Development (hereinafter referred to as UNCTAD) statistics, a total of 1,104 ISDS cases have been announced. As of December 31, 2020, 14 ISDS cases concerning China have been filed based on the treaty. Among them, there are 6 cases in which China is the host country, and there are 8 cases in which China is the applicant's home country.[3]

1.1 The Change of China's Attitude Towards ISDS Terms from Restriction to Acceptance

China's contracting practice on the ISDS mechanism is based on the IIAs signed and negotiated by China, the most important of which are the BITs signed with various countries. By comparing and analyzing the content and changes of the specific clauses in the IIAs signed and negotiated by China, it can be found that in the contracting practice, China's attitude towards the ISDS mechanism has changed from negative to positive one. In terms of which investment disputes can be submitted to international arbitration, China has roughly gone through three stages: strict restrictions, limited consent, and full liberalization.

1.1.1 Strict restriction of the application of ISDS in the early stage

China's first BIT (the China-Sweden BIT) was signed in the 1980s. In this BIT, China did not accept the ISDS mechanism and only agreed to handle disputes through inter-state dispute settlement. The China-France BIT in 1984 was the first time that China added an ISDS clause to the signing of a BIT,[4] but it imposed strict restrictions on the scope of investment disputes submitted to international arbitration and was limited to submitting disputes over the amount of expropriation and compensation to arbitration. Furthermore, there were similar provisions in the China-Japan BIT in 1988 and the China-Korea BIT in 1992. In addition, the China-Japan BIT also requires that the investment arbitration must be based on the special consent of the host country.

1.1.2 Gradual expansion of the scope of disputes that can be submitted to arbitration

On January 7, 1993, China submitted an instrument of ratification for its accession to the ICSID Convention, officially becoming a contracting party to the ICSID Convention. Moreover, it is limited to disputes over the amount of expropriation compensation. In the contracting practice, China began to gradually liberalize the scope of disputes that can be submitted to investment arbitration, such as the China-Iceland BIT (1988) and the China-Korea BIT (1992). During this period, China adopted restricted consent to the ISDS mechanism, allowing three main types of disputes to be submitted to

[3] See UNCTAD, Cases as Respondent States, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china (accessed on October 2, 2022). Other agencies, such as the ICSID, have also conducted statistics on ISDS cases, and the number of statistics varies due to the different statistical standards. This will be discussed further below.

[4] See Article 8 of the China-France BIT.

international arbitration: (1) disputes over the amount of compensation arising from expropriation and nationalization; (2) other disputes agreed by both parties; (3) disputes other than those in which China declares reservations or non-submission of ICSID.[5] Before China's entry into the World Trade Organization (hereinafter referred to as WTO), the old BITs signed with other countries included such restrictive investment dispute settlement clauses.[6]

1.1.3 Acceptance of comprehensive ISDS terms after accession to the WTO

China has been acting proactively on its BIT program with "user-friendly" clauses after its accession to the WTO.[7] After 1998, China has completely liberalized its attitude towards the ISDS mechanism, allowing investors to submit any disputes arising from investment to arbitration. Since then, almost all of the BITs signed or updated by China contain such comprehensive ISDS clauses, such as the China-Netherlands BIT and the China-Canada BIT. In these BITs, China allows investors to apply the ICSID or the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL) arbitration rules.[8]

1.2 China's Transition from Bystander to Participant in ISDS Arbitration Practice

According to the UNCTAD statistics, the overall number of ISDS cases involved in China is currently relatively small, but it has presented an upward trend over the past two years. Cases are mainly divided into two categories. One is the case in which China is the host country and is brought to arbitration by foreign investors. The other is the case in which China is the home country of the investor, and the investor initiates arbitration with the governments of other countries, including Chinese Mainland, residents and companies in Chinese Hong Kong and Chinese Macau.

1.2.1 Chinese government as the host country in ISDS cases

As of September 5, 2021, according to the UNCTAD statistics, among the ISDS cases that have been announced so far, there are 7 ISDS cases involving China as the host country.[9] According to the ICSID statistics, there are 5 ISDS cases with China as the host country.[10] According to the information published on the official websites of UNCTAD, ICSID and Permanent Court of Arbitration (hereinafter referred to as PCA), it can be

---

[5] See Norah Gallagher & Shan Wenhua, *Chinese Investment Treaties: Policies and Practice*, Oxford University Press, p.299 (2009).
[6] See Shen Wei, *Evolution of Non-Discriminatory Standards in China's BITs in the Context of EU-China BIT Negotiations*, 17(3) Chinese Journal of International Law 799, 821 (2018).
[7] Id., at 800.
[8] See supra note 5, at 300.
[9] See UNCTAD, Cases as Respondent States, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china (accessed on October 2, 2022).
[10] See ICSID, Cases, https://icsid.worldbank.org/cases/case-database (accessed on October 2, 2022).

observed that there are 7 ISDS cases in which China is the host country, all of which are arbitration cases based on the investment treaties.

Table : Chinese government as the host country in ISDS cases[11]

No.	Date Registered	Case Name	Case No.	Instrument(s) Invoked	Applicable Rules	Arbitration Institution	Status of Proceeding	Claimant(s)	Respondents(s)
1	2011	Ekran v. China	ICSID Case No. ARB/11/15	BIT China - Israel 1995, BIT Malaysia - China 1988	ICSID Convention - Arbitration Rules	ICSID	Concluded	Ekran Berhad (Malaysian)	China
2	2014	Ansung Housing v. China	ICSID Case No. ARB/14/25	BIT China - Korea, Republic of 2007	ICSID Convention - Arbitration Rules	ICSID	Concluded	Ansung Housing Co., Ltd. (Korean)	China
3	2017	Hela Schwarz v. China	ICSID Case No. ARB/17/19	BIT China - Germany 2003	ICSID Convention - Arbitration Rules	ICSID	Pending	Hela Schwarz GmbH (German)	China
4	2019	Jason Yu Song (UK) v. China	PCA Case No. 2019-39	BIT United Kingdom - China	UNCITRAL	PCA	Pending	Jason Yu Song (Private entity)	China
5	2020	Macro Trading v. China	ICSID Case No. ARB/20/22	BIT China - Japan 1988	ICSID Convention - Arbitration Rules	ICSID	Concluded	Macro Trading Co., Ltd. (Japanese)	China
6	2020	Goh v. China	ICSID Case No. ARB/20/34	BIT Singapore - China 1985	ICSID Convention - Arbitration Rules	ICSID	Concluded	Mr. Goh Chin Soon (Singaporean)	China
7	2020	AsiaPhos v. China	/	BIT Singapore - China 1985	UNCITRAL	/	Pending	AsiaPhos Co., Ltd. (Singaporean)	China

(1) Ekran Berhad v. China, ICSID Case No. ARB/11/15

[11] According to the data of UNCTAD, ICSID, PCA and other official websites.

This case is not only the first ISDS case brought by a foreign investor against the Chinese government based on the treaty, but also the first case that China has been sued in ICSID. The case involves land development, and the plaintiff is Ekran Berhad in Malaysia.[12] In 2011, Ekran Berhad's Chinese subsidiary invested in Hainan Province, but failed to develop land in accordance with local laws and regulations. The local government took back the land leased by Ekran Berhad. Ekran Berhad initiated investment arbitration with the Chinese government in accordance with the investment agreement between China, Malaysia and Israel, submitted to the ICSID Secretariat and applied the ICSID Arbitration Rules. Finally, the disputed parties in the case reached a settlement and submitted a termination application on May 16, 2013.[13]

(2) Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25

The case was filed under the China-Korea BIT (2007), which involved the real estate development. Ansung Housing Co., Ltd., the applicant, believed that its investment in the development of golf courses in Sheyang County, Jiangsu Province was affected by the measures taken by the Jiangsu Provincial Government, and thereby filed a claim for arbitration. Finally, the arbitral tribunal made an award in favor of the host country on the grounds that the Korean company's initiation of arbitration had expired, and the arbitral tribunal lacked jurisdiction.

(3) Hela Schwarz GmbH v. People's Republic of China, ICSID Case No. ARB/17/19

The case was brought by a German company under the China-Germany BIT (2003). The case is due to an investment arbitration triggered by the demolition of the local government. The detailed information has not been released online, and the case has not yet been decided.

(4) Jason Yu Song v. People's Republic of China, PCA Case No. 2019-39

The case is a lawsuit brought by a British national against the Chinese government, and it is an investment arbitration case managed by the Permanent Court of Arbitration. Details are not published online.

(5) Macro Trading Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/20/22

This case was filed in accordance with the China-Japan BIT (1988) on June 29, 2020. The subject of dispute in the case was a real estate project. As of September 10, 2021, the Tribunal issued an order confirming the termination of proceedings pursuant to the ICSID Administrative and Financial Regulations,[14] declaring the case closed.

(6) Mr. Goh Chin Soon v. People's Republic of China, PCA Case No. 2021-30

On September 16, 2020, a Singapore national filed an arbitration application with ICSID pursuant to the China-Singapore BIT (1985) for the development of a real estate

---

[12] See Qi Tong, *How Exactly Does China Consent to Investor-State Arbitration: On the First ICSID Case against China*, 5(2) Contemporary Asia Arbitration Journal 265, 286 (2012).
[13] Id., at 267.
[14] See Article 14(3)(d) of ICSID Administrative and Financial Regulation.

project. The claimant claimed that the government was suspected of illegally detaining and infringing upon its assets and rights and interests in the real estate development project in Qingdao and filed an arbitration with the Chinese government. On August 25, 2021, the arbitral tribunal issued a statement on the termination of the procedure, and the case is currently in a closed state.

(7) China. AsiaPhos Limited v. People's Republic of China, ICSID Case No. ADM/21/1

This case is an arbitration application filed by a Singapore company under the China-Singapore BIT (1985). The applicant claimed that the environmental protection measures in Mianzhu City, Sichuan Province constituted illegal expropriation of its mining investment in Sichuan Province, and the government not only ordered the termination of mining and the evacuation of two of the phosphate mines, but also rejected the renewal application for the mining right of the other phosphate mine. The case is currently pending.

1.2.2 Chinese investors as the applicants in ISDS cases

As of September 5, 2021, according to the UNCTAD statistics, among the ISDS cases that have been announced so far, there are a total of 8 ISDS cases involving Chinese investors as applicants.[15] According to the ICSID statistics, there are a total of 9 ISDS cases submitted to ICSID by Chinese investors as applicants.[16] According to the information published on the official websites of UNCTAD, ICSID and PCA, it can be observed that there are 14 ISDS cases brought by Chinese investors against other countries. Among them, the two cases (Standard Chartered Bank (Chinese Hong Kong) Limited v. Tanzania Electric Supply Company Limited (ICSID Case No. ARB/10/20); Standard Chartered Bank v. United Republic Of Tanzania (ICSID Case No. ARB/10/12) were brought under investment contracts and investment arbitration, and other cases are arbitrations based on investment treaties.

Table 2: Chinese investors as the applicants in ISDS cases [17]

No.	Date Registered	Case Name	Case No.	Instrument(s) Invoked	Applicable Rules	Arbitration Institution	Status of Proceeding	Claimant(s)	Respondents(s)

[15] See supra note 9.
[16] See supra note 10.
[17] According to the data of UNCTAD, ICSID, PCA and other official websites.

1	2007	Tza Yap Shum v. Peru	ICSID Case No. ARB/07/6	BIT Peru - China 1994	ICSID Convention - Arbitration Rules	ICSID	Concluded	Tza Yap Shum	Peru
2	2010	Beijing Shougang and others v. Mongolia	PCA Case No. 2010-20	China - Mongolia BIT	UNCITRAL Arbitration Rules (1976)	UNCITRAL	Concluded	Beijing Shougang and others	Mongolia
3	2010	Standard Chartered Bank (Hong Kong) v. Tanzania Electric Supply Company	ICSID Case No. ARB/10/20	Contract	ICSID Convention - Arbitration Rules	ICSID	Concluded	Standard Chartered Bank (Hong Kong)	Tanzania
4	2011	Philip Morris v. Australia	PCA Case No. 2012-12	Australia - Hong Kong BIT	UNCITRAL (2010)	PCA	Concluded	Philip Morris Asia Ltd.	Australia
5	2012	Ping An v. Belgium	ICSID Case No. ARB/12/29	BIT China - Belgium-Luxembou-rg 1984, BIT China - Belgium-Luxembou-rg 2005	ICSID Convention - Arbitration Rules	ICSID	Concluded	Ping An Insurance Company, Ping An Life Insurance Company	Belgium
6	2012	Sanum Investmen-ts v. Laos (I)	PCA Case No. 2013-13	China-Laos BIT	UNCITRAL Arbitration Rules (2010)	PCA	Concluded	Sanum Investments Ltd.	Laos

7	2014	Beijing Urban Construc-tion v. Yemen	ICSID Case No. ARB/14/30	BIT China – Yemen (1998)	ICSID Convention - Arbitration Rules	ICSID	Settled	Beijing Urban Construc-tion Group	Yemen
8	2015	Standard Chartered Bank (Hong Kong) v. Tanzania	ICSID Case No. ARB/15/41	Contract	ICSID Convention - Arbitration Rules	ICSID	Conclu-ded	Standard Chartered Bank (Hong Kong)	Tanzania
9	2017	Sanum Investmen-ts v. Laos (II)	ICSID Case No. ADHOC/17/1	BIT Lao People's Democratic Republic - China 1993	ICSID Ad Hoc	ICSID	Pending	Sanum Investments Ltd.	Laos
10	2019	Jetion and T-Hertz v. Greece	/	BIT Greece – China 1992	UNCITRAL	/	Withdr-awn	Jetion and T-Hertz	Greece
11	2020	Wang and others v. Ukraine	/	BIT Ukraine – China 1992	/	/	Pending	Wang and others	Ukraine
12	2020	Min v. Korea	ICSID Case No. ARB/20/26	BIT China - Korea, Republic of 2007	ICSID Convention - Arbitration Rules	ICSID	Pending	Fengzhen Min	Korea
13	2021	Alpene Ltd v. Malta	ICSID Case No. ARB/21/36	BIT Malta - China 2009	ICSID Convention - Arbitration Rules	ICSID	Pending	Alpene Ltd.	Malta

14	2021	Qiong Ye and Jianping Yang v. Cambod-ia	ICSID Case No. ARB/21/42	ASEAN - China Investment Agreement 2009	ICSID Convention - Arbitration Rules	ICSID	Pending	Qiong Ye and Jianping Yang	Cambodia

(1) Tza Yap Shum v. Republic of Peru, ICSID Case NO. ARB/07/6

A Chinese Hong Kong resident applied to ICSID for arbitration under the China-Peru BIT (1994). Tza Yap Shum, a Chinese Hong Kong resident, had tax debts, and the Peruvian tax authorities took measures such as seizure of its company's bank account. Tza Yap Shum believed that these actions had caused substantial deprivation of its investment, and initiated arbitration accordingly. The arbitral tribunal ruled in favor of the investor.

(2) Beijing Shougang and others v. Mongolia, PCA Case No. 2010-20

The Chinese company, Beijing Shougang initiated an arbitration against Mongolia under the China-Mongolia BIT (1991), claiming that the license it held in the Tumurtei iron ore mine in the host country was cancelled in 2012, and the claimant filed an arbitration claim. The first-instance arbitral tribunal held that it did not have jurisdiction and dismissed the request. Besides, the claimant applied for the second-instance procedure to revoke the award. Finally, the second-instance appellate court refused to review the arbitrability of the case from scratch, upheld the first-instance arbitral tribunal's ruling, and upheld the ruling in favor of the host country.

(3) Standard Chartered Bank (Chinese Hong Kong) Limited v. Tanzania Electric Supply Company Limited, ICSID Case No. ARB/10/20

This case is an arbitration case initiated by an investor based on an investment contract, and the arbitral tribunal finally made a ruling in favor of the investor.

(4) Philip Morris Asia Limited (Chinese Hong Kong) v. The Commonwealth of Australia, PCA Case No. 2012-12

In 2011, tobacco businessman Philip Morris Asia Limited filed a multi-billion-dollar compensation application against Australia through his company in Chinese Hong Kong, in order to make use of the Australia-Hong Kong BIT to obtain investment protection, arguing that Australia's simple packaging legislation based on public health made its intellectual property rights infringed. The case involved the issue of treaty selection, and the arbitral tribunal ultimately dismissed the investor's claim on the grounds of lack of jurisdiction, finding that Philip Morris Asia Limited was not a bona fide investor under treaty requirements.

(5) Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium, ICSID Case No. ARB/12/29

The applicant believes that due to a series of measures taken by the Belgian government after the financial crisis, its investment in Belgium has suffered serious damage. After the negotiation between the two parties failed, Ping An Insurance (Group)

Company of China initiated arbitration against the Belgian government. Eventually, the case did not enter the substantive stage and was dismissed due to jurisdictional issues. This result is more favorable to the host country.

(6) Sanum Investments Limited v. Lao People's Democratic Republic, ICSID Case No. ADHOC/17/1

In 2012, the claimant-initiated arbitration under the China-Laos BIT (1993), arguing that its investment in opening casinos and operating hotels in Laos government was violated. Laos government believes that the arbitral tribunal has no jurisdiction and maintains that the Chinese Mainland BIT cannot be applied in Chinese Macau. The first-instance arbitral tribunal retained jurisdiction on the grounds that the BIT signed by Chinese Mainland was applicable to Chinese Macau, and the Singapore Court of Appeal also agreed with this view.

(7) Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30

Beijing Urban Construction Group Co. Ltd. filed an arbitration application with the Yemeni government in accordance with the China-Yemen BIT (1998) in 2014, arguing that the Yemeni government had forcibly deprived its property and violated its rights in the Sana'a Airport Terminal Construction Project Contract. The court made a jurisdictional decision in favor of the applicant. After the case entered the substantive trial stage, the two parties reached a settlement.

(8) Standard Chartered Bank v. United Republic of Tanzania, ICSID Case No. ARB/10/12

The legal basis of this case is the investment contract between the two parties, and the court has made a ruling in favor of the investor.

(9) Sanum Investments Limited v. Lao People's Democratic Republic (II)

Sanum Investments Limited in Chinese Macau argued that the Lao government's actions violated the settlement agreement in 2014, and thereby initiated arbitration. The case is currently in an undivided phase on jurisdictional and substantive issues.

(10) Jetion Solar Co. Ltd and Wuxi T-Hertz Co. Ltd. v. Hellenic Republic

On May 27, 2019, two Chinese companies, Jetion Solar Co. Ltd and Wuxi T-Hertz Co. Ltd, submitted an arbitration request to the Greek government in accordance with the China-Greece BIT (1992), arguing that the Greek government's freezing of domestic energy subsidy contracts constituted an expropriation of investment. The case is currently on hold.

(11) Wang Jing et al. v. Ukraine

In 2020, Chinese investors Wang et al. believed that the measures taken by the Ukrainian authorities had resulted in the freezing of their airline acquisition projects, so that they filed for arbitration according to the China-Ukraine BIT (1992). The case is still in the trial stage.

(12) Fengzhen Min v. Republic of Korea, ICSID Case No. ARB/20/26

South Korea's Woori Bank forced the sale of Chinese investor Min's stake in a local real estate company. Fengzhen Min sued that the South Korean bank was controlled by the government and filed for arbitration under the China-Korea BIT (2007). The arbitrator appointed by the Korean government has also been appointed by it in the previous cases, and the presiding judge has also been appointed as an arbitrator by the Korean government to participate in other cases.

(13) Alpene Ltd. v. Republic of Malta, ICSID Case No. ARB/21/36

In July 2021, Chinese Hong Kong investor Aplene Ltd. sued Malta to ICSID pursuant to the China-Malta BIT (2009).

(14) Qiong Ye and Jianping Yang v. Kingdom of Cambodia, ICSID Case No. ARB/21/42

The Chinese investor's telecommunications operating service license in Cambodia was revoked and did not have to be renewed. In September 2021, Chinese investors Qiong Ye and Jianping Yang filed arbitration against the Cambodian government under the ASEAN-China Investment Agreement (2009), which is the Chinese investor, for the first time, an investor initiated an arbitration case under the ASEAN-China Investment Agreement.

The above are the 21 Chinese ISDS-related cases announced so far. Due to the different calculation standards of the case information management agencies, the procedures and degrees of disclosure of statistics and information about the cases are also different. Therefore, different counts may be generated.

1.3 Analysis of China's ISDS Arbitration Practices

The current ISDS arbitration cases in China can not only bring valuable experience in investment dispute settlement to China, but also provide reference for related activities in China in the future.

1.3.1 Litigation in China facing increasing risks

By sorting out and analyzing the above-mentioned cases involving ISDS in China, it can be observed that the overall number of cases involved in China is not many at present, but in terms of the number of cases, there has been a trend of rapid growth in recent years. Especially after the COVID-19 pandemic, it has presented obvious characteristics of large number and rapid growth. Whether Chinese investors seek protection for overseas investments based on the ISDS mechanism, or foreign investors use the ISDS mechanism to initiate arbitration against the Chinese government, the number of litigation cases in China has increased significantly since 2020, and this situation needs to be given enough attention. Since this continuous growth trend will make the Chinese government face more investment arbitration cases, it is essential to be vigilant and prepare to respond.

1.3.2 More than half of the investment arbitration cases based on the older generation of BITs

Due to the broad wording in the older generation of BITs in China, although the use of the ISDS mechanism is strictly controlled, the vague language requires the arbitral tribunal to carry out further interpretation when interpreting the treaty. Such a behavior is prone to inconsistency and damages the authority of investment arbitration.

1.3.3 Most of the case trials revolving around the determination of jurisdiction

Most of cases stop at the jurisdiction determination stage. For example, Beijing Urban Construction Group Co. Ltd. is the first case in which a Chinese Mainland investor

wins the jurisdiction determination stage, and then enters the substantive trial stage. Meanwhile, it is a model case of investment arbitration in China. The case was registered with ICSID in 2014, until the arbitral tribunal determined that it had jurisdiction in 2017, and then entered the substantive trial stage until the procedure was terminated in 2018. The lengthy case processing period caused the disputing parties to bear huge time and financial costs.

1.3.4 ICSID-based institutions and rules

In terms of the institution selection, nearly 70% of the cases involving litigation in China are managed by ICSID, and the remaining cases are presided over by PCA. With regard to the arbitration rule selection, both the ICSID and UNCITRAL rules are highly utilized, with only one Sanum Investments v. Laos (II) case being conducted under the ICSID Additional Facility Rules. On the one hand, ICSID manages the vast majority of investment arbitration cases in the world. On the other hand, it may be attributed to the trust and understanding of the Chinese government and investors in these institutions and arbitration rules.

1.3.5 Use of alternative dispute resolution

In the arbitration process, whether suing or being sued, China's dual investment status has used ADR to reach settlements, such as Beijing Urban Construction Group Co. Ltd. (Chinese as the investor) and Ekran v. China (China as the respondent). This alternative dispute resolution approach not only reflects Chinese people's excellent traditional legal and cultural concept of "harmony being most precious," but also shows Chinese government and Chinese investors' pursuit of long-term and stable development of cooperative relations.

1.3.6 Application of Chinese Mainland BITs in Chinese Hong Kong and Chinese Macau

There are two important cases in the above arrangement, which are closely related to the protection of Chinese Hong Kong and Chinese Macao investors. Specifically, these are Sanum Investments Limited v. Lao People's Democratic Republic and Tza Yap Shum v. Republic of Peru.[18] In these two cases, the BIT signed by Chinese Mainland was applied to the residents of the special administrative region. Both arbitral tribunals believed that it could be applied, which caused huge domestic disputes in China. Since China has not yet formed a consistent practice and model for the application of IIAs, the arbitral tribunal's decision to apply international law over domestic law is also an important reason for the debate.[19] Based on this phenomenon, Chinese government

[18] See Christina Binder, *Sanum Investments Limited v the Government of the Lao People's Democratic Republic*, 17(1) Journal of World Investment & Trade 280, 281 (2016).

[19] See Odysseas G. Repousis, *On Territoriality and International Investment Law: Applying China's Investment Treaties to Hong Kong and Macao*, 37(1) Michigan Journal of International Law 113, 157 (2015).

should take a clear position and express it clearly in the practice of participating in IIAs and ISDS.

Based on the above analysis, China's valuable experience in participating in ISDS practice will provide reference and guidance for China to form a position and choose a path in ISDS reform.

2. China's Position on ISDS Mechanism Reform

At present, there are multiple paths for the reform of the ISDS mechanism, which can be classified into three paths: incremental reform, systemic reform and paradigmatic reform.[20] The countries supporting incremental reforms are mainly led by the United States. They believe that the current ISDS mechanism is still the best option for resolving investment disputes, and its full value cannot be denied because of some of the criticisms it has incurred. Besides, incremental reform is to make appropriate corrections to the existing ISDS mechanism on the basis of retaining the existing ISDS mechanism, such as increasing the transparency of investment arbitration, optimizing the way arbitrators are selected, and establishing an appeal mechanism. The advocates of systemic reform are represented by the European Union, and they believe that investors' direct right of action against the state should be preserved at the level of international law. However, the current ISDS mechanism has serious and irreparable problems, and it should be reformed systematically, such as constructing the Multilateral Investment Court and its appellate mechanism to completely replace the current ISDS. The main proponents of the paradigm reform are Brazil, South Africa and other countries. Having completely rejected the current ISDS mechanism, they believe that it is unnecessary to exist, and strongly oppose the right of investors to directly initiate lawsuits against the country at any level.[21] In addition, paradigm reform proponents hope to handle investor-state disputes through various alternative dispute resolution mechanisms, such as host-state court remedies, ombudsman systems, and inter-state arbitration.

In the process of ISDS reform, multi-path and multi-mode programs and options have been formed. For these programs and options, China should choose its own reform path according to its own situation and needs.

2.1 Necessity for China to Participate in ISDS Reform

The necessity of China's participation in the ISDS reform can be analyzed from three aspects: identity needs, law-making needs, and usage needs.

2.1.1 China as a major country with dual roles

Throughout the evolution and development of international investment law, China,

[20] See Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112(3) American Journal of international Law 410, 410 (2018).

[21] See Feng Shuo & Shen Wei, *Calvo Is Back! Changing Sovereignty and Evolutionary Investment Law in a Leaving and Return of the State Paradigm*, 13(2) Journal of East Asia and International Law 307, 309 (2020).

as an emerging developing country, has undergone earth-shaking changes in its status in international investment activities and in the international investment landscape. During this process, China has been upgraded from a one-way importing country of capital to a two-way importing and exporting country, with dual investment status, and is currently the second largest economy in the world.[22] In 2020, the inflow of *foreign direct investment* (hereinafter referred to as *FDI*) in Chinese Mainland was US$149 billion, ranking second in the world. Besides, the outflow of FDI was US$133 billion, ranking first in the world.[23]

After China implemented the strategy of "going out," it began to actively use foreign capital to develop its own economy. With the proposal of sustainable development goals and the Belt and Road Initiative, in the international investment activities, China, as a host country, should provide strong investment protection and a high-quality investment environment for foreign investors on the premise of safeguarding national sovereignty. As the home country of investors, it should also actively seek international legal protection for Chinese investors.

Therefore, China's participation in ISDS reform is necessary, because China has dual investment status.

2.1.2 China as a major player in IIAs reform and international law development

Actively participating in the discussion and formulation of international investment rules is an act of law-making at the international level. Furthermore, negotiating IIAs is the process of negotiating and reaching agreement on the international investment rules. In 2020, the Regional Comprehensive Economic Partnership (hereinafter referred to as the RCEP) was officially signed. The economies of member states including China are huge, accounting for about one-third of the world's total. The world's largest free trade zone has been established, which reflects the major advancement of East Asian economic integration. However, this giant IIA did not adopt the ISDS clause, and the contracting parties agreed to complete the relevant discussions within two years after the entry into force of the RCEP.[24]

On December 30, 2020, China and the European Union reached an agreement on the Agreement in principle for the China-EU Comprehensive Agreement on Investment, which replaces the ISDS mechanism provided in traditional BITs with an inter-state dispute settlement mechanism.[25] On September 16, 2021, China officially submitted its application to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter referred to as the CPTPP).[26]

---

[22] See UNCTAD/WIR/2020, p.12.
[23] See UNCTAD/WIR/2021, p.5 & 7.
[24] See UNCTAD/WIR/2021, p.126.
[25] See UNCTAD/WIR/2021, p.125.
[26] See Zoey Zhang, *Joining CPTPP: What China Needs to Do and Comparison with the RCEP*, https://www.china-briefing.com/news/chinas-bid-to-join-the-cptpp-challenges-comparison-with-rcep/ (accessed on September 30, 2022).

Countries along the Belt and Road Initiative lack a sound legal system and have high investment risks. At the same time, China's extensive and in-depth participation in international law-making will also bring practical protection and benefits to domestic investors, and problems can be identified and resolved early in the process. At present, the United States is renewing global economic and trade rules in its own way.[27] Against the backdrop of the reform of IIAs, China should also seize the opportunity to actively participate in and formulate new rules for international investment, so as to have the right to speak and strive for dominance and contribute views and play roles in shaping new international investment rules.

Therefore, China should participate in the reform of ISDS, and it is based on the need for law-making to deeply participate in the legalization of international investment.

2.1.3 Preparing well in advance to face multiple arbitration cases

As mentioned above, China may face a large number of ISDS cases in the future. One of these cases is the case against which China is the host country, and the other is the rights protection case of Chinese investors to protect overseas investment. Therefore, the preparation work should also start from this and expand in two aspects. The legal framework of the investment dispute settlement mechanism is mainly based on a fragmented investment legal network, and it actively participates in the international law-making to make the international investment legal rules more reasonable, so that they can be handier when using these rules.

On the one hand, China, as a host country, strengthens its ability to respond to lawsuits and adapts to cases, and uses rules to protect the regulatory power of sovereign countries. On the other hand, Chinese investors should actively use the rules to prepare for overseas rights protection. Given the current serious spread of the epidemic around the world and the large-scale "shutdown" of international exchange activities, the relevant measures taken by the state in response to the epidemic may profoundly affect the international investment activities and international investment structure.[28] Besides, a large backlog of investment events, arbitration cases, etc. may usher in a turbulent future for international investment law.

Therefore, China needs to participate in the reform of ISDS, and it will have a large demand for use when facing a lot of investment arbitration cases.

2.2 Supporting Multilateral Reform of the Current ISDS Mechanism

China's position and attitude in the reform of ISDS is demonstrated in the document submitted to the United Nations. China should choose the path of incremental reform, adopt a targeted approach to the ISDS mechanism in the contracting practice, and make

---

[27] See Che Pizhao, *Can International Laws Serve as Country-Governing Laws*, Guangming Daily, May 23, 2015.

[28] See Ning Hongling & Qi Tong, *Multilateral Investment Court: The Gap Between the EU and China*, 4(2) the Chinese Journal of Global Governance 154, 164 (2018).

comprehensive use of dispute settlement methods in the context of multi-path and multi-modal ISDS reform.

2.2.1 Carrying out reform of ISDS based on the maintenance of the current ISDS mechanism

On July 18, 2019, China submitted a letter of opinion on the reform of ISDS (hereinafter referred to as "Opinion Paper").[29] The content of the Opinion Paper is divided into four parts, including the background of the reform of the ISDS mechanism, the main problems existing, China's consideration based on the goals and plans of the reform, and suggestions for the work process of the third working group.

When discussing the background of the reform, the Chinese government first affirmed the positive role of the current ISDS mechanism in promoting global economic development, boosting cross-border capital flows, and protecting the rights and interests of foreign investors, and provided a depoliticized dispute resolution solution that is generally worth maintaining. The Chinese government said that it agreed to reform the ISDS mechanism in accordance with the Global Investment Guiding Principles.

The Chinese government believes that, in practice, the basic function of the ISDS mechanism is to interpret and apply IIAs, and to determine state responsibility, and claims that the mechanism is a public law remedy. Regarding the problems existing in the current ISDS mechanism, the Chinese government thinks that it should pay attention from five aspects: First, the current ISDS mechanism lacks an institutionalized and reasonable error correction mechanism. Existing revocation mechanisms strictly limit the grounds for revocation to procedural issues, which thus cannot correct substantive errors arising from the award. Second, the current ISDS mechanism lacks predictability and stability. In the past practice of investment arbitration, the arbitral tribunal has occasionally made inconsistent awards with different judgments in the same case, and the unpredictability of the award results has seriously affected the trust of the parties in the ISDS mechanism. Third, there are systemic flaws in the selection of arbitrators. Since the current ISDS mechanism is derived from the practical experience of commercial arbitration, the reality of handling public disputes by private courts has arisen, and the independence and professionalism of arbitrators cannot be guaranteed, which in turn will exert irreversible effects on the entire process and outcome of investment arbitration. Fourth, there is an imbalance of rights caused by the third-party funding. The potential abuse of third-party funding and the negative impact on the legitimacy of the ISDS mechanism requires great attention. Fifth, it is expensive in terms of time and expense. According to the latest data, the trial of ISDS cases generally takes about 3 to 4 years. If there is a procedural error in the arbitration, it will take an average of nearly two years to carry out the revocation procedure. In addition to the long referee cycle, the cost of the parties is also very staggering. According to statistics, the average service fee for a case is

[29] See A/CN.9/WG.III/WP.177.

even far more than US$10 million.[30]

Based on the current background and the existing problems, the Chinese government proposes that the reform should focus on improving the current ISDS mechanism, balancing the legitimate supervision rights of the host country and the protection of foreign investors' rights and interests and enhancing the confidence of all parties in the ISDS mechanism. With regard to other possible reform options, the Chinese government indicates that it is also open to these options and has put forward its own views under other reform options.

Finally, Opinion Paper stated that the Chinese government has always firmly pursued multilateralism, upheld the global economic outlook and global governance outlook, and believed that the multilateral development of the ISDS mechanism reform is inseparable from the joint efforts of all member states.

2.2.2 Conducting incremental reforms on the ISDS mechanism

China should pay close attention to the dynamics of the reform of the ISDS mechanism, actively participate in the reform process, and cautiously deal with some proposals and suggestions in the reform. Through the above analysis, China has gradually accepted the ISDS mechanism, which also reflects the changes in China's intrinsic value pursuit and external practical needs in the field of international investment. In recent years, China's participation in investment arbitration practice has been increasing, and some preliminary experience has been accumulated for this mechanism in terms of the contracting technology and the use of rules. At present, China should carefully study all the current reform paths and possible solutions, select a reform path suitable for China's national conditions, and formulate a balanced and reasonable investment dispute settlement solution with Chinese characteristics.

At present, the international community presents the characteristics of multiple models and multiple paths for the reform of the ISDS mechanism. The specific models for the reform of the ISDS mechanism currently mainly include the following five types: partial and limited improvement of the existing ISDS, construction of an appellate body based on the existing ISDS mechanism, establishment of a permanent investment court system, a permanent investment court plus an appellate body, host country local relief plus SSDS mechanism.[31] By summarizing these five modes, it can be classified into three mainstream ISDS mechanism reform paths: the commercialized reform path (incremental reform), the judicial reform path (systematic reform), and the politicized reform path and rejection path (paradigm reform).[32] While discussing how China should choose the

---

[30] See A/CN.9/WG.III.WP.177, p.3.

[31] See Wang Yanzhi, *The Plural Models in International Investment Dispute Settlement Reform and China's Options*, 25(4) Journal of Central-South University (Social Science) 73, 76 (2019).

[32] See Anthea Roberts, *Investment Treaties: The Reform Matrix*, 112(1) American Journal of International Law Unbound 191, 191 (2018). Incremental reform: retains the commercial character of the existing ISDS mechanism, improves on this basis, and adds new elements to the existing mechanism, such as the

reform path of the existing ISDS mechanism, this paper believes that the following three aspects need to be considered.

(1) Being wary of a radical return of Calvinism in paradigm reform

South Africa and some Latin American countries believe that a politicized rejection path should be adopted in reform,[33] and China should be vigilant and think critically about this. At present, some developing countries have adopted the method of returning to the host country to resolve investment disputes and advocated that the current ISDS mechanism needs to be replaced by the dispute prevention mechanism and the inter-state arbitration mechanism, such as Brazil's 2015 investment model- the Cooperation and Facilitation Investment Agreement.[34] Countries that support paradigm reform see current ISDS mechanisms to be irreparably flawed. Under this path, investors lose the initiative to initiate arbitration to the host country, and the relief they may get is dependent on the cultural tradition and the level of the rule of law in the host country. This approach has moved from the previous investment arbitration bias to investor protection to the other extreme. It makes the host country completely take back its control over the investment dispute settlement, which goes against the investor's original intention of "depoliticizing" the investment dispute settlement. As for the recovery of the Volunteerism, this kind of dispute settlement method that completely returns to the host country cannot achieve a fair and efficient settlement of investment disputes. The Latin American countries that have adopted the paradigm reform encounter problems such as the small number of supporters, the small influence on the international investment environment, the status of absolute capital importing countries, and the low level of domestic rule of law. This approach cannot satisfy China's dual investment identity needs, so that China should not take this approach. Overall, China should pay close attention to countries that take this path, and fully consider the protection of overseas investment by Chinese nationals when upgrading treaties or negotiating new treaties with these countries.

(2) Firmly maintaining and improving the existing ISDS mechanism in the short term

Countries represented by the United States have proposed an improved path for commercialization. China should pay close attention and participate in a timely manner to form a set of practical plans with Chinese characteristics. This path adheres to moderate incremental reforms, maintains the current investor-led concept of the ISDS mechanism, and adopts practices that limit or improve the ISDS mechanism, such as the CPTPP and the United States-Mexico-Canada Agreement (hereinafter referred to as the USMCA).

---

construction of an appellate body. Systematic reform: retain the investor's right to sue the host country and establish a judicial secondary investment court.

[33] See Liang Yong & Zhao Daiwei, *The Developments of ISDS Mechanism Initiated by the EU Investment Court System and Chinas Choice*, 11(1) Indian Journal of International Economic Law 127, 133 (2019). Countries such as Ecuador had mitigated the adverse effects by withdrawing from the ICSID Convention. Brazil, for example, has never accepted the mechanism.

[34] See Akshat Agarwal, *Rethinking the Regulation of International Foreign Investment: Recent Developments in Brazil, South Africa and India*, 10(1) Indian Journal of International Economic Law 1, 6 (2019).

Both the CPTPP and the USMCA impose strict restrictions on the scope of arbitration that can be submitted[35], restrict the application of the ISDS mechanism, and obtain the consent of the host government.[36] In terms of improvement methods, the main approaches under this path include conducting transparency reform, improving the arbitrator selection system, strengthening the state's control over the interpretation of treaties, and enhancing procedural efficiency. It is hoped that these approaches will improve the legitimacy of the current investment arbitration mechanism. This path also includes the establishment of a possible appeal mechanism, as a supplement to the current ISDS mechanism, which does not change the essence of the original investment arbitration but will break the current feature of "one-arbitration and finality" in investment arbitration, which is also a form of the current ISDS mechanism change. Apart from that, China expresses an open attitude towards the establishment of an appeal mechanism in Opinion Paper. The incremental reform approach, as the most feasible reform path at present, is more likely to be accepted by most countries.

(3) Proactively exploring possible multilateral reforms in the future

The multilateral reform under the systematic reform of ISDS is dominated by the European Union. The European Union's permanent secondary investment court is the most thorough reform of the ISDS mechanism among all the current reform options. Countries that support the systemic reform path mainly include the European Union and Canada, which are initially reflected in the investment chapter of the Transatlantic Trade and Investment Partnership, which proposes to fully replace the *ad hoc* arbitral tribunal system based on party autonomy with secondary ICS.[37] Apart from institutionalizing the dispute settlement mechanism, this systemic reform will also improve the independence and impartiality of adjudicators (led by the contracting states), strengthen the consistency of rulings (set up an appeal mechanism), and ensure the host country's regulatory space (in the text of the treaty). Significant breakthroughs have been made in such aspects as explicitly protecting the host country's regulatory rights) and setting up pre-arbitration procedures to improve efficiency (such as negotiation). On the one hand, it seems that this multilateral reform plan may have many problems at present.[38] Undeniably, this system has responded most thoroughly to the crisis of the legitimacy of the ISDS mechanism and can solve most of the problems raised by the ISDS mechanism. Moreover, if the goal of multilateral cooperation can be achieved, it will be helpful to ensure the legitimacy of the system and bring more consistency. On the other hand, the system can also provide a useful reference for China to build the Belt and Road Initiative dispute settlement mechanism and draw lessons from it. Therefore, China should also actively

[35] The ISDS mechanism in the USMCA applies only between Mexico and the United States.

[36] In CPTPP, New Zealand, Peru, etc. renounced the application of investment arbitration mechanisms between the two countries. New Zealand, Brunei, Malaysia and other countries have agreed that the consent of the host government must be obtained before the arbitration is filed.

[37] There are also relevant regulations in the EU-Canada Trade Agreement, the European Structured Investment Products Association and the EU-Viet Nam Free Trade Agreement.

[38] See supra note 28, at 158 (2018).

participate in the discussion of multilateral system reform, keep abreast of the latest progress of the plan, and use the discussion forum to express China's voice and promote the Chinese plan.

2.3 Playing an Advantageous Role in International Investment Law Reform

Since the policy of going out was implemented, Chinese investors have been active in the arena of overseas investment. In the early days, China, as a major capital importing country, mainly focused on domestic foreign investment supervision. After the Belt and Road Initiative, China, as a major capital exporter, has attracted more attention from the world.

2.3.1 More say of China with dual investment status in the investment field

In recent years, China has attracted much attention in the field of global investment. Under the sluggish environment, China has achieved positive growth despite adversity and become the backbone of the global capital market.[39] In the rich investment practice, the attributes of China's dual investment status have been further coordinated and strengthened.

In view of China's dual identity, China should focus on safeguarding the host country's regulatory rights and protecting investors in practice. First of all, China is a superpower with dual investment status, and its economic strength determines that China will have more say in international economic and investment activities. Second, China's ISDS practice has brought more voice to China. No matter what kind of investment status it is, China has certain practical experience. Thus, China has the ability to speak in the discussion of the application of the ISDS mechanism and its shortcomings, and this practice-based reform proposal will be more convincing.

2.3.2 Attaching importance to China's influence in the investment field

China actively promotes and facilitates the negotiation of the RCEP. Firstly, China has played a huge role in forging consensus. As the world's largest FTA, the RECP can be negotiated in the context of de-globalization and the difficult recovery of the world economy after the COVID-19 pandemic. Second, China shares important practical experience in the negotiation of the RCEP. Most of the participants in the RCEP are Asian countries, and China has actively and deeply participated in the negotiation. The investment chapter of the RCEP also reflects obvious Asian characteristics, including the condensed and sublimated practice and experience of China's IIAs.[40]

2.3.3 Strong leadership of China in the camp of the developing countries under the Belt and Road Initiative

---

[39] See UNCTAD/WIR/2021, p.20.

[40] See He Ping & Shen Chen, *RCEP and China's Asia-Pacific FTA Strategy*, 40(1) China International Studies 138, 146 (2013).

China, as a loyal representative of the developing countries, is at the core of the developing country camp, and has established leadership in the developing country camp through practical actions and efforts. After World War II, China has always been the representative of developing countries in the world. China will adhere to this position in the past, present and future, and speak out for the interests of the developing countries. The Belt and Road Initiative advocated by President Xi Jinping is a Chinese path for economic integration as well as a Chinese innovation for regional cooperation. Although the strategy has strong geopolitical significance, it cannot be simply defined as a regional strategy.[41] The initiative embodies the essence of traditional Chinese culture of "harmony and coexistence,"[42] and provides an excellent opportunity and platform for the elimination of Western central ideas in the field of international law. The Belt and Road Initiative has received positive responses and participation from countries along the route.[43]

Therefore, China needs to actively participate in the reform of the international investment legal system, continuously improve its voice and influence, and boost the development of the rule of law in international investment through its leadership in the developing countries. For the reform of the ISDS mechanism at this stage, China should choose the path of incremental reform as a whole. However, on the basis of maintaining and upgrading the existing ISDS mechanism, China should also take a long-term perspective, actively explore the path of multilateral reform of the ISDS mechanism, and establish the Belt and Road Initiative dispute settlement mechanism.

3. China's Response

In the view of the ISDS reform on a global scale, China should adhere to the idea of "procedure being also substance," deeply participate in the upgrading and formulation of the international investment legal system and improve and upgrade relevant domestic legal systems and policies to establish a linking and supporting mechanism between domestic law and international law.

3.1 Adherence to the Idea of "Procedure Being also Substance"

"Procedure before substance" was the best solution at the beginning of the international investment dispute settlement mechanism. In the early days, the North and South countries had obvious characteristics of investment status, and the two sides had serious differences on the substantive standards of investment protection. Therefore, it was difficult to reach a multilateral agreement on the substantive rules. For this reason, rule-makers could not take both substantive and procedural rules into account

[41] See Zeng Lingliang, *Conceptual Analysis of China's Belt and Road Initiative: A Road towards a Regional Community of Common Destiny*, 15(3) Chinese Journal of International Law 517, 540 (2016).
[42] See Peter K. Yu, *Building Intellectual Property Infrastructure along China's Belt and Road*, 14(3) University of Pennsylvania Asian Law Review 275, 297 (2019).
[43] See Wang Guiguo, *Legal Challenges to the Belt and Road Initiative*, 4(2) Journal of International and Comparative Law 309, 309-312 (2017).

simultaneously. In order to deal with the protection of overseas investors, the field of international investment law followed the logic of "procedures before substantives," and only reached multilateral rules on procedural issues.

However, the logic of "procedure before substance" is difficult to achieve the coherent and predictable goals pursued by investment arbitration, which is the root cause of the legitimacy crisis. First, the confidentiality feature of commercial arbitration procedures ignores the public law nature of investment arbitration cases and cannot meet the public's requirements for transparency. Second, rigid and vague substantive rules cannot meet the dynamic development requirements of customary international law. In recent years, the number of cases has increased, but there is a lack of uniform substantive protection standard in the field of international investment, and no precedent system is established. The broad wording in IIAs has also led to different interpretations by the arbitral tribunal in the judgment,[44] resulting in different judgment results in similar cases.

The reform of IIAs is a necessary part of the reform of ISDS, and the idea of "procedure being also substance" should be adopted when formulating international investment laws and regulations. At present, the international community's focus on ISDS reform is on procedural reform, and the logic of "procedure first and then entity" is still used as a whole. However, the legal framework on which investment dispute settlement is based does not have a consistent basis, and this approach still cannot fundamentally solve the consistency problem of the ISDS mechanism. Therefore, effective ISDS reform must involve the reform of IIA substantive rules, and only multilateral IIA reform can form a relatively consistent legal framework, and ISDS reform can have a relatively consistent legal basis.

"Procedure being also substance" is feasible, and the time for reform of IIAs is mature. UNCTAD started the IIA reform plan in 2012. Up to now, UNCTAD has formulated reform proposals for key substantive clauses.[45] Through the reform, the international investment rules in IIAs will have more similarities and even consistency, which will inevitably lead to disputes. Resolution brings more consistency, improves predictability in the field of international investment law, and brings more legitimacy to the ISDS mechanism.

Therefore, China must adhere to the idea of "procedure being also substance" in the reform of ISDS and get rid of the outdated concept of "procedure before substance."

3.2 Acceleration of IIA Reform

---

[44] See Susan D. Franck & Anne van Aaken et al., *Inside the Arbitrator's Mind*, 66(6) Emory Journal Law 1115 (2017). The article explores how arbitrators decide cases through original experimental research, concluding that arbitrators often rely on intuition rather than the law to make decisions. Individual tribunals consider cases to a large extent depending on the arguments of the parties to the dispute because they lack treaty guidance or any other procedure that can provide guidance on interpretation, in which case the arbitral tribunal assigns different weights to the rules that can be relied upon according to the parties' arguments, resulting in different decisions in similar cases, which further exacerbates inconsistencies in the investment arbitration system.

[45] See UNCTAD/WIR/2021, p.131.

The reform of IIAs in China is mainly considered from two aspects. First, in terms of content, China should improve the investment rules in IIAs and design its own BIT model to guide the practice of IIAs contracting. Second, from a system perspective, China needs to improve its own IIAs network.

3.2.1 Improvement of Chinese IIAs content

In order to improve the content of China's IIAs, it should be considered from the two dimensions of formulating rules and upgrading rules. On the one hand, China should formulate and reform the investment rules in IIAs and form its own BIT model. International investment rules are developing towards legalization and refinement. According to UNCTAD's reform proposals for key clauses in IIAs, the idea of balancing interests between investors and host countries should be adhered to in the setting of rules,[46] and the following three points should be taken into account. First, it is essential to clearly define "investors" and "investments" so as to prevent investors from abusing their powers (e.g., selecting treaties), and avoid the arbitral tribunal's extended interpretation to reserve jurisdiction. The second is to protect the host country's regulation right and to clarify the reservation of the host country's regulatory space through exception clauses. The third is to refine the physical protection rules and clarify the scope of protection, such as clarifying the criteria for determining indirect expropriation, to prevent the abuse of the host country's rights. China's control over treaties can be enhanced through the use of closed lists and joint statements of interpretation.[47]

China should form its own BIT model. Having accumulated rich experience in contracting through a large number of contracting activities, China should form its own BIT model as soon as possible. The template will serve as a model and guide for China's contracting practice and should basically reflect the current international investment policy and China's position on investment activities. The development of the template is conductive to improving the consistency of the content of the participating IIAs.[48] In the face of different contracting objects, differentiated contracting strategies should be adopted, model rules should be formulated in a targeted manner, China's dual investment status needs to be considered, and it is also essential to resolve concerns about "identity confusion" in China's participation in the investment activities.[49]

Apart from that, China should speed up the modification, replacement and upgrade

---

[46] See UNCTAD/DIAE/PCB/INF/2020/8.

[47] For example, the CETA Investment Chapter enumerates violations of the fair and equitable treatment clause by the host country and provides for five situations in which the clause applies. In previous investment arbitration practices, investors in most cases have claimed that the host country has violated the clause based on IIAs, and there is serious uncertainty and unpredictability in the interpretation and application of the clause by the arbitral tribunal, resulting in restrictions on the regulatory power of the host country. See UNCTAD, IIA Issue Note, No. 3, 2017.

[48] See Zeng Huaqun, Balance, *Sustainable Development, and Integration: Innovative Path for BIT Practice*, 17(2) Journal of International Economic Law 299, 330 (2014).

[49] See Sophia Sepulveda Harms, *Toward a Green New Treaty Deal: Reforms to ISDS amid Environmental Crisis*, 58(2) Houston Law Review 479, 488 (2020).

of the old version of IIAs. First, semantic ambiguity in older versions of IIAs is one of the root causes of the crisis in the legitimacy of the ISDS mechanism. The language and content defects of IIAs directly cause the arbitral tribunal to have too much room for discretion in the process of interpretation and application. This institutional arrangement can no longer meet the development requirements of today's international investment law. The main focus of this work is the reform of key provisions (including substantive and procedural rules) in the old version of IIAs. Secondly, attention should also be paid to the connection between the old and new treaties. It is important to clarify the ISDS clauses in the IIAs concluded by China and make clear provisions on the application between the old and new treaties or the transition period for terminating the old treaties, so as to avoid conflicts and contradictions between the old and new treaties when the law is applied.[50]

3.2.2 Improvement of China's IIAs system

At the same time, China's IIAs should cover all investment and cooperation countries. China can check and fill omissions in countries that have concluded IIAs, complete the screening of countries that have not concluded IIAs, select countries that have investment relations with China, and start IIA conclusion activities with these countries as soon as possible, so as to realize full capital export and import. The covered IIAs system could escort the investment activities. By the end of 2020, Chinese investors' overseas investment has flowed to nearly 200 countries (regions) around the world.[51] According to the statistics of Ministry of Commerce of the People's Republic of China, China has signed a total of 104 BITs,[52] which are mainly to countries such as Venezuela and Brazil. Nonetheless, no BIT has been signed with China, and BITs with countries such as Iran have not yet come into effect.[53] In this case, if Chinese investors have disputes with them, they cannot defend their rights overseas through the investment arbitration mechanism.

3.3 Active Promotion of the Reform of ISDS Multilateralization

First, China should join the ISDS reform on the premise of the IIAs reform. Indeed, actively participating in the formulation of international rules will help China strengthen its voice and influence in the field of international investment law. In the upgrading and formulation of international investment rules, China should conduct in-depth research on the reform path and model of the international investment dispute settlement mechanism, analyze its advantages, disadvantages and feasibility, and form its own position and

---

[50] See Tania Singla, *A Multilateral Framework for Investment Protection: The Missing Piece in the Puzzle of ISDS Reform?*, 2(1) NLUD Journal of Legal Studies 131, 162 (2020).

[51] See Ministry of Commerce of the People's Republic of China and National Bureau of Statistics of China et al., *2020 Statistical Bulletin of China's Outward Foreign Direct Investment*, http://images.mofcom.gov.cn/www/202109/20210929084957284.pdf (accessed on September 30, 2022).

[52] See Ministry of Commerce of the People's Republic of China, *Bilateral Investment Treaty*, http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml (accessed on September 30, 2022).

[53] See supra note 33, at 129.

plan.[54]

Second, China should reform the ISDS mechanism on the basis of retaining it. First, China should take differentiated considerations and use a flexible approach to the adoption of ISDS clauses in IIAs contracting practice. As the home country of investors, especially in the face of importing countries along the route with imperfect legal systems and lack of remedies, China should try its best to adhere to the current ISDS mechanism so as to protect the overseas interests of Chinese investors. In the face of countries with a higher level of rule of law and capital importing countries than China, it is possible to consider restricting the application of the ISDS mechanism. Second, China should increase the flexibility of ISDS procedures, such as setting up pre-procedures and using alternative dispute settlement solutions (e.g., consultation, mediation), ensure the effect, and provide the disputing parties with as many other peaceful dispute settlement methods as possible. Third, China should consider establishing an appeal mechanism on the current ISDS mechanism, but within a multilateral framework. As a supplementary mechanism to the ISDS mechanism, the appeal mechanism will build a permanent appellate court through clear rules to manage the appeal process and stricter selection methods to select adjudicators. It will be helpful to ensure the correctness and predictability of the ruling and improve the legitimacy of the current ISDS mechanism.

Finally, China should promote the reform of ISDS multilateralization. The current system reform plan needs to be established within a multilateral framework, in order to achieve the goal of correcting the defects of the current ISDS mechanism (e.g., the inconsistency of rulings, and the lack of error correction mechanism), and obtain the desired effect. In order to realize a China-led investment dispute settlement mechanism, this multilateral exploration will enrich China's practical experience and help construct the Belt and Road Initiative regional dispute settlement mechanism.

3.4 Construction of the Belt and Road Initiative Regional Dispute Settlement Mechanism

More and more countries support and join the Belt and Road Initiative. At the beginning of 2021, China signed more than 200 cooperation documents with over 170 countries and international organizations.[55] Based on this, the scale of China's capital output has grown rapidly, and the establishment of the Belt and Road Initiative dispute settlement mechanism will be a huge opportunity and challenge for China, as well as a key step in the legal process of the Belt and Road Initiative.

3.4.1 The necessity of constructing a dispute settlement mechanism for the Belt and

[54] See Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112(3) American Journal of International Law 361, 367 (2018).

[55] See Ministry of Commerce of the People's Republic of China, *China Has Signed 205 Cooperation Documents on the Joint Construction of the Belt and Road Initiative*, http://fec.mofcom.gov.cn/article/fwydyl/zgzx/202102/20210203040640.shtml (accessed on September 30, 2022).

Road Initiative

First, the currently available dispute settlement approaches are flawed. First, based on the previous discussion, the current ISDS mechanism is flawed. ISDS faces problems such as private courts dealing with public disputes, frivolous-claims, violation of the host country's regulatory rights, imbalance of rights and obligations between investors and host countries, lack of error correction mechanisms, lack of independence and impartiality of arbitrators, time-consuming and costly litigation. Other possible remedies should be explored in the context of its legitimacy issues that have not been effectively resolved. Secondly, the rule of law in most countries along the Belt and Road Initiative is relatively weak and cannot provide investors with effective domestic remedies in the host country. Beyond that, courts in these countries may not have the expertise to resolve these kinds of disputes if investors rely on their domestic courts for relief. From a political perspective, the courts of these countries may have a situation of "territorial protection" out of a sense of loyalty to their own countries. From a procedural perspective, this method of dispute settlement is not flexible and does not meet the needs of diversification. Finally, the cooperating countries are unstable in political and economic development and cannot provide the expected relief. According to the statistics, less than 30% of the countries along the Belt and Road Initiative accept ICSID jurisdiction over investment disputes, and Chinese investors may not be able to effectively protect their rights overseas when faced with disputes in these countries. Therefore, establishing an independent investment dispute settlement mechanism for the Belt and Road Initiative is a realistic need to deal with investment disputes in the region.

Second, a special dispute settlement mechanism is conducive to improving the efficiency and fairness of dispute settlement. With the deepening of cooperation, the number of disputes between China and countries along the route has increased. Meanwhile, the special dispute settlement mechanism will maximize the cultural, legal and value needs of countries along the route, guide the construction of a new mechanism through reflection on the existing ISDS mechanism, and ensure the efficiency and fairness of dispute settlement as much as possible.

Third, the Belt and Road Initiative is an excellent innovation platform for China to carry out the reform of the ISDS mechanism. With absolute right to speak and influence in it, China has made leaps in cooperation and is praised. Taking this opportunity, the establishment of an independent investment dispute settlement mechanism will help strengthen China's practical experience in ISDS reform. If successful, China can extend this experience to the current ISDS reform in the international community. The voice and influence in this field will promote the multilateral reform of ISDS.

Therefore, establishing an independent the Belt and Road Initiative dispute settlement mechanism will help protect the safety of inter-regional overseas investment and reduce risks. China can also take this opportunity and platform to innovate the ISDS reform and promote the legalization of international investment rules. The most effective

dispute settlement mechanism will further promote the implementation and development of the initiative.

3.4.2 Suggestions on building a dispute settlement mechanism for the Belt and Road Initiative

In the preparation and construction, it should take the existing dispute settlement mechanism and alternative dispute settlement scheme as the basis, combine with the domestic judicial mechanism, and consider China's dual investment status, especially the identity of the investor's home country, to formulate rules. In addition to the coping ideas and solutions mentioned above, China can also consider the following three points.

(1) Establishment of a diversified dispute resolution center

With reference to the European Union multilateral investment court system, a permanent, independent and diversified dispute resolution center (hereinafter referred to as the "Center") with an appeal mechanism can be established. First, in the selection and appointment of personnel, it is important to formulate selection standards that meet the needs of regional dispute settlement to ensure their professionalism, formulate strict codes of conduct for the Center personnel to ensure their independence and impartiality, and establish an accountability system for the center personnel to ensure that their responsibility can be questioned. Second, in terms of the procedures, clear and explicit rules should be formulated to ensure the diversity of dispute resolution methods and the flexibility of dispute procedures. Third, in the use of alternative dispute resolution mechanisms, it is possible to consider adding mandatory consultation procedures, and make good use of the "Oriental Treasures" mediation procedure to reduce the confrontational nature of dispute resolution. Fourth, the initial trial may follow the investment arbitration model based on party autonomy and establish a roster of arbitrators to provide disputing parties with a list of persons competent for dispute resolution. Fifth, an appeal mechanism should be established to strengthen the correctness of dispute resolution at the Center and ensure a fair resolution of disputes without seriously affecting efficiency. It is also possible to consider relying on existing platforms, such as setting up a special dispute resolution mechanism under the AIIB.[56]

(2) Proactive use of investment dispute prevention mechanisms

Indeed, the investment dispute prevention mechanism promoted by Brazil is an alternative dispute settlement method, which is aimed to reduce the possibility of disagreements turning into disputes and entering into a strong adversarial settlement procedure. This mechanism for preventing the actual occurrence of disputes has the characteristics of focusing on prevention in advance, preventing differences from turning into disputes, having a wide range of applications, and helping to maintain the cooperative relationship between the parties. It can achieve the effect of benefiting both parties at the same time, with an emphasis on dispute prevention mechanisms for

[56] See Yang Lu, *The Establishment of Belt and Road International Investment Disputes Settlement Institution*, 37(1) Journal of Law & Commerce 1, 18 (2018).

non-zero-sum games. This non-zero-sum game method of prevention in advance is also in line with the concept of "harmony being the most important" of the Belt and Road Initiative and is conducive to the stable and healthy development of investment cooperation in the region.

The establishment of a dispute prevention mechanism should consider the integrity and comprehensiveness, which can be implemented from the following aspects. First, countries along the route should set up or designate dispute prevention management departments, including treaty guidance (clarification of treaty obligations), information interconnection (information collection and exchange), prevention management (issue of risk warnings) and other functions. Second, the establishment of an inter-regional international dispute prevention mechanism and the strengthening of inter-state dialogue and cooperation are favorable to timely respond to problems encountered by investors. Third, the home country needs to instruct investors in advance so that they can learn to protect themselves.[57]

(3) Improvement of the relevant systems for the recognition and enforcement of international investment arbitration awards in the region

On the one hand, China needs to deeply study the provisions and application experience of the New York Convention and solve the interpretation and application of existing arbitration agreements or arbitration clauses with countries along the route. On the other hand, for countries that are not parties to the New York Convention, China can promote the mutual recognition and enforcement of awards by establishing "reciprocal relations." However, at present, the application of the principle of reciprocity in Chinese academia and practice still needs further research.[58] It is necessary to actively and boldly explore the application of the principle of reciprocity according to China's current experience in participating in ISDS practice and the background of changing needs. From China's long-term practice of "factual reciprocity" to "legal reciprocity," it may be considered that the court should bear the burden of proving the relationship of reciprocity. In addition, the relevant provisions in the Trans-Pacific Partnership Agreement (hereinafter referred to as the TPP) can also be referred to link the enforcement of international investment arbitration awards with the national dispute settlement mechanism.[59] When the respondent fails to perform or comply with the award, the applicant provides relief.

3.5 Providing Domestic Support for ISDS Reform

[57] See Sienho Yee, *Dispute Settlement on the Belt and Road: Ideas on System, Spirit and Style*, 17(3) Chinese Journal of International Law 907, 908 (2018).
[58] See Article 3 of the New York Convention.
[59] See Article 9.28 of TPP. If the respondent fails to perform or comply with the investment arbitral award, the claimant's home country may request the establishment of a panel pursuant to Article 28.7 to rule on the respondent's breach of compliance with the award obligations in the TPP and to urge the respondent to perform or comply with the award.

China's active participation in ISDS reform internationally cannot be separated from the formulation of relevant domestic laws, regulations and policies. In the international level, China should also properly handle the interaction between the domestic rule of law and the international rule of law.

3.5.1 Improvement of relevant Chinese laws, regulations and policies

In terms of the Belt and Road Initiative construction, in 2015, the Supreme People's Court of China issued the Several Opinions on Providing Judicial Services and Guarantee for the Belt and Road Initiative Construction, which stipulates general requirements for the application of laws to international treaties and practices and provides a basis for the Belt and Road Initiative. Dispute resolution and recognition and enforcement issues under the initiative provide judicial safeguards. In 2017, the Supreme People's Court of China issued the Typical Cases Involving the Belt and Road Initiative Construction (the second batch) to recognize and enforce the commercial rulings of Singapore courts, enriching the practice of reciprocal legal relations.

In terms of the upgrading of China's arbitration regulations, the Arbitration Law of the People's Republic of China was adopted in 1994 and has been implemented since 1995. The provisions on arbitrable matters are based on the domestic law of "commercial relations," requiring that arbitration must take place between equal subjects. Investment arbitration between investors and host countries, which is an unequal subject, is excluded, and its content is seriously out of line with the actual needs of China's social development and participation in international economic and trade activities. In July 2021, Ministry of Justice of the People's Republic of China released the draft law for comments. This draft expands the scope of arbitral matters, leaves room for investment arbitration, and provides a clear legislative basis for Chinese arbitration institutions to participate in the management of investment arbitration cases.

In terms of the investment protection and supervision at home and abroad, China's latest Foreign Investment Law bade farewell to the era of "Three Foreign Investment Laws,"[60] ushered in the era of the Foreign Investment Law of the People's Republic of China and provided an institutional basis for China's participation in the ISDS reform. Compared with the previous "Three Foreign Investment Laws," the Foreign Investment Law of the People's Republic of China has changed its concept from supervision to investor protection, and further determined the specific content such as the principle of national treatment through legal form, covering all stages of foreign investment.

Obviously, China has made some progress in improving relevant domestic laws, regulations and policies. In the future, it is essential to accelerate the promulgation of

[60] Including the Law on Sino-Foreign Equity Joint Ventures of the People's Republic of China, the Law on Foreign-Funded Enterprises of the People's Republic of China and the Law on Sino-Foreign Cooperative Joint Ventures of the People's Republic of China adopted between 1979 and 1988. In the practice of China's reform and opening up, these three laws have been unable to meet the actual needs, have conflicts with the new law, and cannot meet the needs of society, which is seriously divorced from the current international economic situation.

supporting regulations and documents, improve the relevant legal system in China comprehensively, promote the reform of domestic law through the reform of international law, form a positive interaction between international law and domestic law, and handle legal coordination at different levels well.

3.5.2 Chinese institutions accepting international investment arbitration cases

With the increase of China-related cases, Chinese arbitration institutions have begun to develop related businesses.[61] In 2016, China's Shenzhen Court of International Arbitration (SCIA) amended the arbitration rules to include investment disputes in the scope of arbitral cases for the first time in mainland China.[62] In 2017, the China International Economic and Trade Arbitration Commission formulated Chinese first arbitration rules for international investment disputes, which provided guarantees for Chinese enterprises to protect their rights overseas.[63] In 2019, the Beijing Arbitration Commission adopted the International Investment Arbitration Rules. With the promulgation of the Draft Amendment to the Arbitration Law of the People's Republic of China, Chinese arbitration institutions also have a clear legal basis for accepting international investment arbitration cases. So far, no cases have been referred to Chinese institutions. In the subsequent practice of ISDS, China should focus on incorporating Chinese arbitration institutions into dispute settlement clauses in the practice of IIAs and strive to improve the influence and competitiveness of Chinese arbitration institutions in international investment activities. In addition, the connection work should be done well to further clarify matters such as enforcement in the arbitration rules of various institutions, so as to improve the usability of the relevant systems.

3.5.3 Acceleration of the training of professional teams for international investment dispute settlement

During China's participation in ISDS reform, it is of great necessity to build a team of international investment law talents, especially international investment dispute settlement talents. All reform plans require talents with relevant professional backgrounds to implement and develop. China must accelerate the establishment of a professional team for international investment dispute resolution, which will be a decisive factor affecting the future development direction of China's investment dispute resolution. With the in-depth development of ISDS reform on a global scale, there are higher requirements for the selection criteria of adjudicators. At present, the problems of "revolving door" and "overlapping identities" in international investment arbitration mainly occur in the developed countries in Europe and America. As the main promoter of the mechanism, it not only has rich experience in international investment dispute settlement and a large

---

[61] See Chi Manjiao, *The ISDS Adventure of Chinese Arbitration Institutions: Towards a Dead End or a Bright Future?*, 28(2) Asia Pacific Law Review 279, 279 (2020).
[62] See Article 2.2 of SCIA Arbitration Rules.
[63] See China International Economic and Trade Arbitration Commission (CIETAC) International Investment Arbitration Rules (For Trial Implementation).

number of professionals in related fields to choose from, but also has a strong professional team as technical support when encountering cases. In this regard, China must speed up its team building. The main force of China's participation in international investment dispute settlement is mainly from experts, scholars and lawyers from all walks of life. Through their influence, they can attract more talents and form a professional international investment team. The dispute settlement team is one of the important work contents of China's participation in the ISDS reform. It has very important practical significance for the construction of the Belt and Road Initiative dispute settlement mechanism. These experts are conducive to China's participation in the ISDS reform. The formation of such a team can be comprehensively considered in terms of background screening, training, code of conduct, assessment, management, and communication. The trustworthy high-level professional team will also be helpful to improve China's judicial credibility in this field and promote the rule of law and professional development of international investment dispute settlement.

4. Conclusion

China's attitude towards the ISDS mechanism has shifted from restriction to acceptance. The BITs signed by China after its accession to the WTO basically contain comprehensive ISDS clauses, and China's ISDS practice is gradually enriched. As of September 2021, according to incomplete statistics, there are currently a total of 21 ISDS cases involving litigation in China, most of which are based on the old BITs signed by China in the early stage. The number of investment cases involving China has increased significantly over the past two years, and China needs to be vigilant.

China has the dual status of a capital importing country and a capital exporting country. It should actively participate in the ISDS reform and lead the formulation of international investment rules, so as to build a more balanced institutional framework for the growth of investment dispute cases in China. In the reform of ISDS, an incremental path needs to be taken. In the system reform plan, China can consider establishing a multilateral and independent permanent appeal mechanism on the basis of retaining the current ISDS mechanism. During the reform, China should give full play to its advantages in the international investment activities, which is also a process of further strengthening China's voice, influence and leadership in the field of international investment.

In response to the reform of the ISDS system, China should adopt the idea of "procedure being also substance," accelerate the reform of IIAs, and actively promote the multilateral reform of ISDS. Internationally, China should actively use the Belt and Road Initiative platform for innovation, promote the establishment of the Belt and Road Initiative regional dispute settlement mechanism, and pay special attention to the dispute settlement needs of the investor's home country in the context of the Belt and Road Initiative. In China, domestic law reform can be forced through international law, and simultaneous support for China's participation in ISDS reform can be provided.

Regarding the protection of foreign investors, the Foreign Investment Law of the People's Republic of China and the Arbitration Law of the People's Republic of China as well as their supporting laws and regulations in China can be upgraded and properly utilized, so as to give full play to their positive effects on China's economic development, and to prevent their possible negative impact on China's economy. While attracting foreign investment to provide necessary legal protection and preferential treatment, it maintains the country's national regulatory power based on the principle of sovereignty.

The Foundation for Law and International Affairs Review
Now Accepting Submissions

"The Foundation for Law and International Affairs Review (FLIA Review)" (ISSN: 2576- 6619) is a journal published quarterly by the Foundation for Law and International Affairs. The purpose of this quarterly journal is to provide members of the legal profession and the general public with peer-reviewed articles, essays, and book reviews by individual authors or co-authors and reports and surveys by scholars and professionals at the intersection of law and international affairs. It seeks to create a new, transnational model for the production and dissemination of scholarship at the intersection of law and international affairs.

Submission of Articles

The latest dates for the submission of articles for publication are September 1 for the Winter issue, December 1 for the Spring issue, March 1 for the Summer issue, and June 1 for the Fall issue.

FLIA Review will accept submissions via email to fliareview@flia.org using the subject line "FLIA Review Submission."

Prospective authors should submit:

1. a manuscript (in accord with the specifications below);
2. resume;
3. separate cover sheet which includes a brief abstract and contact information (name, telephone number, e-mail address, and mailing address).

Manuscripts should follow the specifications below:

1. Microsoft Word or Word-compatible software program.
2. Double-spaced.
3. There is no page limit for submissions for publication. However, please consider that a majority of articles published by FLIA Review range from 7,000 to 15,000 words.
4. The working language of the FLIA Review is English. But articles that are written in other languages are welcome too.
5. Footnotes.
6. Text and citations should conform to The Bluebook: A Uniform System of Citation (20th ed. 2015) or the style convention commonly used in the discipline. Authors can also refer to www.flia.org/flia-review for specific instructions on citation style.

Review Process

Authors will receive acknowledgement of their submissions by email from FLIA Review's Editor-in-Chief or Managing Editor of Articles. For unsolicited manuscripts, FLIA Review will conduct an initial review to assess the article's relevance for its readership. Manuscripts

that pass the initial review are forwarded to two (anonymous) peer reviewers. Authors may expect to receive the results of the peer review from the managing editor within 60 days following the initial review.

If you would like to request an expedited review of your article, please send an email request with your name, your article title, your deadline, and your contact information to fliareview@flia.org. The journal will attempt to honor each request but cannot guarantee review in the time provided.

Issues of Focus

- Global Governance and Constitutionalism of Global Norms
- Transnational Law, Transnational Institutions, and Societal Development
- Human Rights and Global Civics
- Comparative Law and Culture
- Judicial Cooperation in Criminal Matters and Civil Matters
- International Courts and Tribunals
- Global Economics, World Trade and Investment Rules
- International Relations and Multilateral Diplomacy
- International Economic and Business Law

CONTENTS

Email: fliareview@flia.org

Web: flia.org/flia-review/

ISSN: 2576-6619